IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL TRICARICHI, Appellant, v. PRICEWATERHOUSECOOPERS, LLP, Respondent.	Electronically Filed Apr 08 2024 10:34 PM Elizabeth A. Brown Clerk of Supreme Court Supreme Court No: 86317 87375 87835

Appeal from the District Court of Clark County, Nevada

District Court Case No. A-16-735910-B

APPELLANT'S APPENDIX TO OPENING BRIEF

VOLUME 4 of 8

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CERTIFICATE OF SERVICE

I hereby certify pursuant to NRAP 25(c), that on this 8th day of April, 2024, I caused service of a true and correct copy of the above and APPELLANT'S APPENDIX TO OPENING BRIEF pursuant to the Supreme Court Electronic Filing System to the following:

ALL COUNSEL ON SERVICE LIST

/s/ Kaylee Conradi
An employee of Hutchison & Steffen PLLC

RSM McGladrey

Addressing Taxpayers' Errors and Omissions

RSM McGladrey

Agenda

- Discovery of Errors and Omissions
- Circular 230 §10.21
- Consequences of Errors and Omissions
- Issues Involving the Recalcitrant Client
- Documenting Compliance

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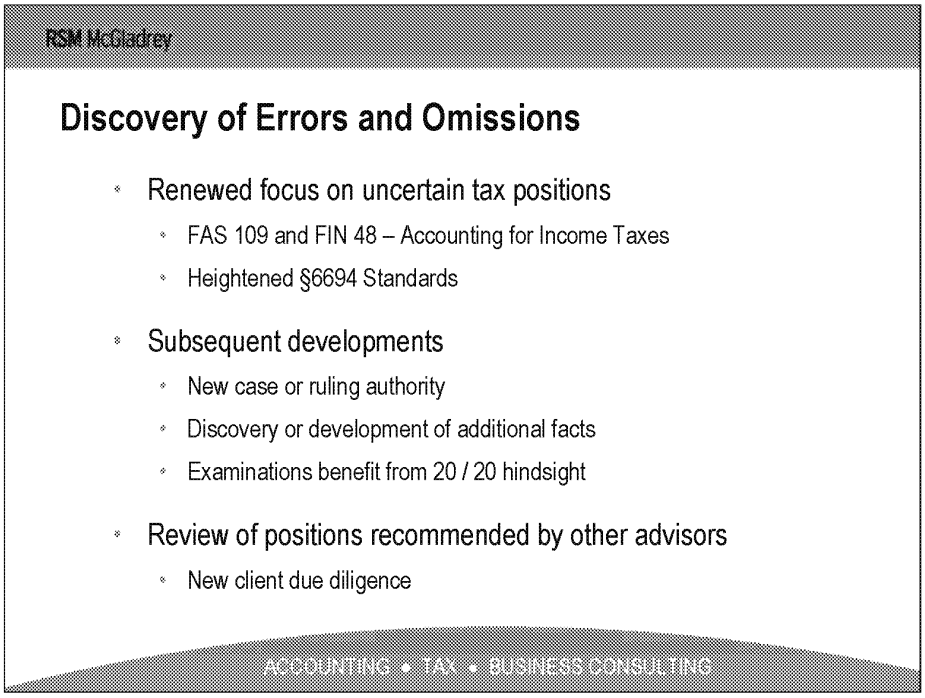
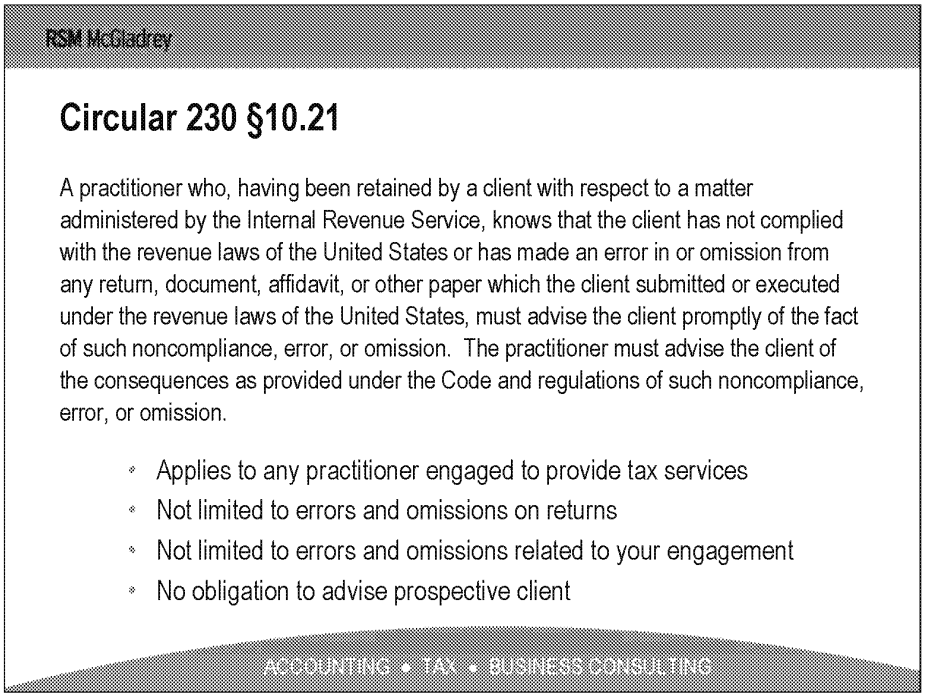


FIN 48 has resulted in a review of a company's entire tax provision, including the portion relating to prior year return positions. The §6694 changes have also resulted in a more in depth review of return positions, including recurring positions, which can result in identification of potential errors or omissions on prior year returns.

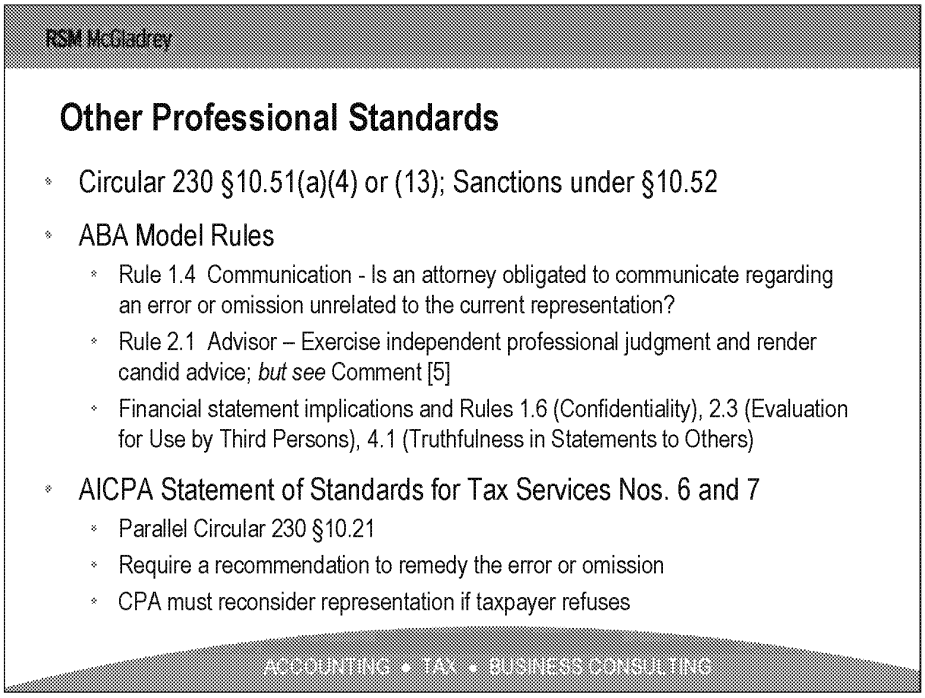
Positions that appeared reasonable when reported may be viewed as questionable in light of subsequent developments, such as new case or ruling authority or the development/discovery of new facts. How do these subsequent developments affect the determination whether a prior year return position was an error? For example, does **Knight v. Commissioner** (the 2% AGI rule for trusts case) mean that a prior year return that took a contrary position is in error? Does it matter if the taxpayer is in the Sixth Circuit, which had held that the 2% rule did not apply?

It's always easier to point out other advisors' mistakes, such as when the practitioner reviews the prior year positions taken by a new client that were recommended by another firm. But even these situations can be difficult, especially when the correct position is less advantageous to the client.



It's important to emphasize that once a practitioner is engaged to provide **any** tax services, §10.21 applies to **any** error or omission discovered regardless of the cause of the error.

While Circular 230 §10.21 does not apply to prospective clients, attorneys need to consider Model Rule 1.18, Duties to a Prospective Client. Suppose longstanding Client A has been an investor in Partnership Z for several years, and the attorney is asked to propose on a tax consulting engagement with Z. During the proposal process, the attorney learns of a prior year error that exposes A to liability for taxes, interest, and penalties. The attorney cannot discuss the issue with A unless Z consents. What if the error has a continuing impact on returns (*e.g.*, a bad accounting method)? Can the attorney advise Client A concerning current year returns, knowing that they contain an error?

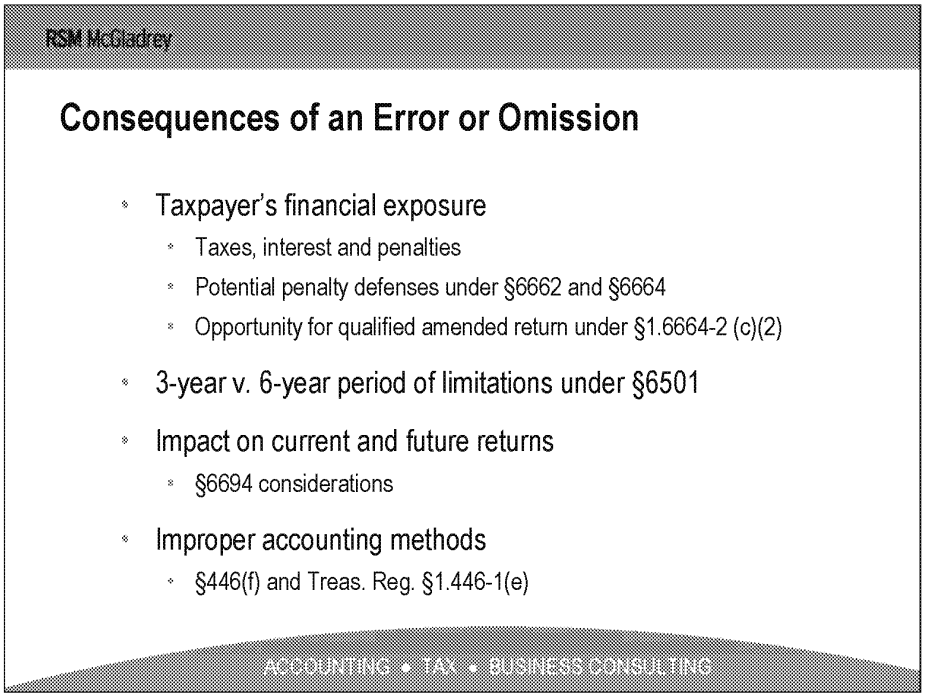


Depending on the cause of the prior year error and whether the error has an impact on current year returns, other Circular 230 provisions may also apply.

Comment [5] to Model Rule 2.1 states that "when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation." A client that will continue to use an erroneous position or that refuses to file a qualified amended return could be subject to "adverse legal consequences," such as penalties.

If the error has financial statement implications, then how should the attorney address the issue in the context of the letter to the company's auditors? The potential for a tax penalty represents a contingent liability. See the ABA **Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information (1976)**.

The AICPA goes further than Circular 230 by requiring that the CPA recommend that the client correct the error and consider withdrawal if the client refuses.



Refer to the April 2008 Tax Adviser article, which provides a methodical approach to addressing prior year errors and omissions.

RSM McGladrey

Issues Involving the Recalcitrant Client

- What if the client refuses to amend a prior year return to correct the error or omission?
- Conflicts of interest
- Confidentiality considerations
- Financial statement implications
  - FIN 48, ¶6 – MLTN standard for recognizing tax position
  - FIN 48, ¶16 – Reserves for penalties not meeting MLTN
  - Attorneys' Letters to Auditors

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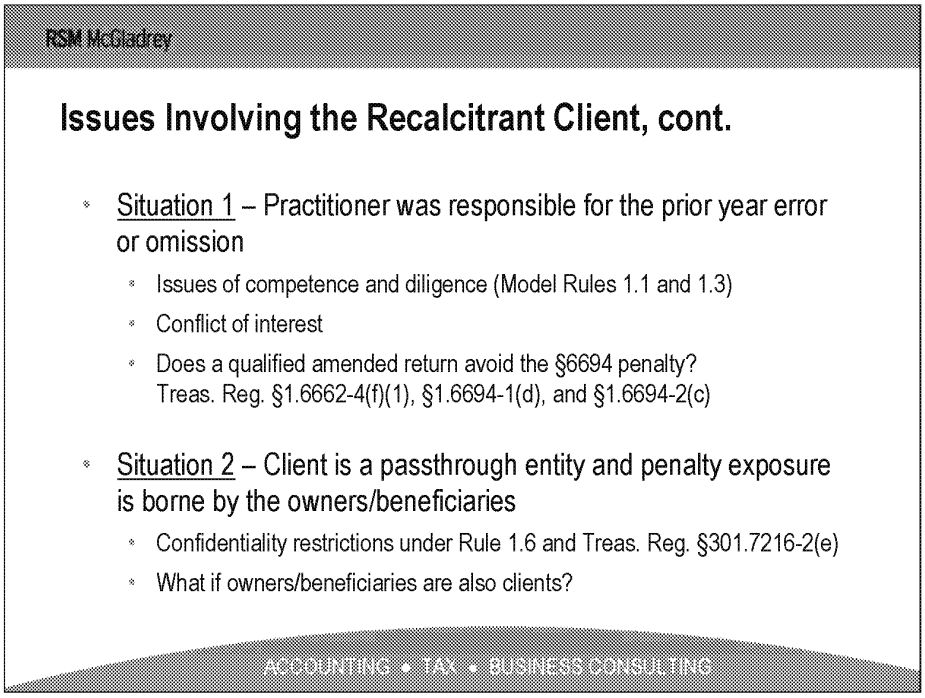
Discuss reasons why clients would refuse to amend. For example, the limitations period may have expired. Consider tiered entities where the error may be large on the lowest tier partnership return, but the impact is divided among a thousand taxpayers via tiered entities. As a result, the error may not have a material impact on the tax liability of any individual taxpayer. An error on the lowest tier partnership return could trigger amended returns for all these taxpayers.

Once a client refuses to correct an error, the practitioner will have to consider the impact of other professional standards under both Circular 230 and the Model Rules.

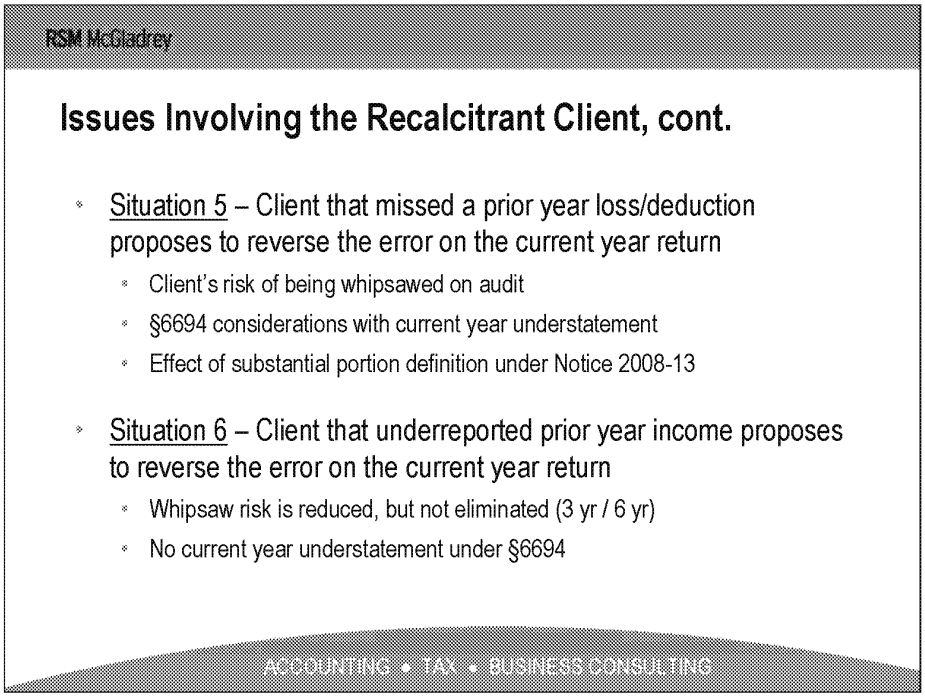


If the practitioner was responsible for the error, the practitioner may have §6694 penalty exposure. The filing of a qualified amended return would appear to eliminate this exposure (by eliminating the understatement), but Circular 230 exposure may remain if the original advice resulted from practitioner's gross incompetence. (See §10.51(a)(13))

Question – Does §7216 apply to a practitioner giving tax advice regarding a reporting position (*i.e.*, a nonsigning preparer under §6694)? Treas. Reg. §301.7216-1(b)(2)(C) includes in the definition of tax return preparer a person who is paid to assist in the preparation of an income tax return and Treas. Reg. §301.7216-1(b)(3) defines "tax return information" to include any information "which is furnished in any form or manner by a taxpayer for, or in connection with, the preparation of a tax return of such taxpayer."

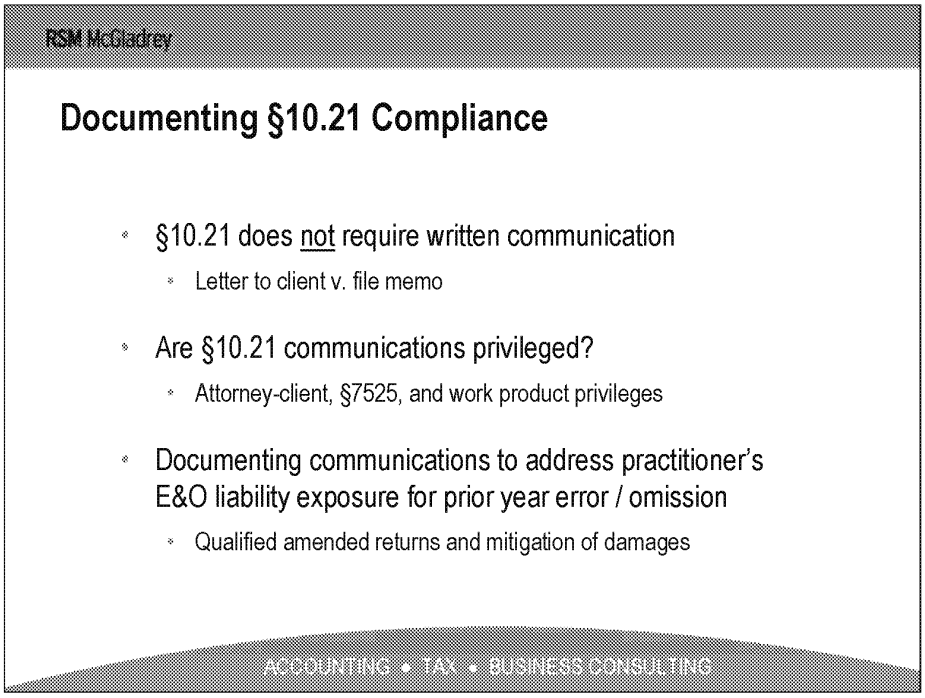
Issues Involving the Recalcitrant Client, cont.

- Situation 3 – Client is a passthrough entity, and owners in the year of the error are former clients
  - Rule 1.9 – Duties to Former Clients
  - Can the attorney continue to represent the entity?
- Situation 4 – Client should recognize back taxes and penalty exposure under FIN 48
  - Advising the client under *Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information*
  - What if recognizing the taxes/penalties would result in a covenant default?
  - What if the client is currently seeking financing? - Rules 1.6(b)(2) and 4.1(b)



In Situation 5, the "substantial portion" rule may mitigate the nonsigning preparer's exposure, but the "substantial portion" rule does not help the signing preparer.

In Situation 6, note that §6694 requires an understatement, so an incorrect return position that does not result in an understatement cannot result in §6694 exposure. However, Circular 230 §10.34 is not dependent upon an understatement.



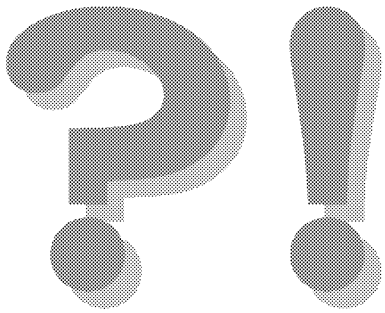
The issue of documenting §10.21 compliance raises potential conflicts. The practitioner will be well served by having contemporaneous written evidence of compliance, but the client may prefer that no "paper trail" exist.

Is advice regarding a prior year error advice in contemplation of litigation? Is the answer different if the error will have a current year impact, *i.e.*, does that make it advice relating to tax return preparation? Note that the §7525 privilege does not apply to advice regarding "tax shelters" as defined in §6662(d).

If a qualified amended return would avoid taxpayer penalties, doesn't the concept of mitigation of damages prevent the client from later seeking reimbursement of penalties after the client refuses to file a QAR? Written documentation may reduce the practitioner's E&O liability risk.

RSM McGladrey

Questions
Comments



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PRACTICE & PROCEDURES

CPA Obligations for Addressing Errors and Omissions

The implementation of Financial Accounting Standards Board Interpretations No. 48 (FIN 48), *Accounting for Uncertainty in Income Taxes*, and the change in the tax return preparer penalty standards under Sec. 6694 have resulted in increased scrutiny of tax return positions taken by taxpayers and tax practitioners alike. This heightened scrutiny may result in the discovery of errors or omissions on prior-year tax returns. Both Circular 230, *Regulations Governing the Practice of Attorneys, Certified Public Accountants, Enrolled Agents, Enrolled Actuaries, and Appraisers Before the Internal Revenue Service*, and AICPA professional standards impose obligations on CPAs who encounter these errors or omissions.

Circular 230 §10.21 provides that a CPA, attorney, enrolled agent, or enrolled actuary retained to provide federal tax services who discovers an error or omission with respect to any federal tax (not just income taxes) must promptly advise the client of the error or omission and the consequences under the Code and regulations of the error or omission. The §10.21 obligations are not limited to practitioners preparing returns, so the discovery of an error or omission in the course of a tax consulting or advisory engagement will also trigger its requirements.

In addition to Circular 230, CPAs must consider the requirements of AICPA Statement on Standards for Tax Services No. 6, *Knowledge of Error: Return Preparation* (SSTS 6). Like Circular 230 §10.21, SSTS 6 requires advising the client of the existence of an error or omission. SSTS 6 goes beyond §10.21 by requiring that the CPA recommend corrective measures. If the client refuses to take corrective action with respect to a prior-year return, SSTS 6 requires a CPA retained to prepare the current-year return to consider withdrawal from the representation.

While these two professional standards appear straightforward, a CPA must evaluate a number of issues to be able to advise a client of the consequences of a prior year's error or omission. A methodical approach to evaluating and addressing these issues helps to ensure that the CPA fulfills these obligations.

- First, confirm that an error or omission in fact exists. While this would seem self-evident, it is not uncommon for practitioners to begin evaluating the matters described below before confirming the relevant facts. What may appear to be an error may simply be a misunderstanding caused by incomplete workpapers.
- Quantify the impact on the amount of taxes due for any prior-year return affected by the error or omission. A client's ability to comprehend the consequences of an error and of a failure to remedy it depends in part on an understanding of the financial exposure for any tax understatement. Depending on the complexity of the issue, it may be appropriate at the outset to estimate the amount of any understatement. If estimates are used, it is important that the client understand that the final determination of the understatement amount may be different.
- Quantify the amount of interest and potential penalties that could result from any prior-year understatement. Consider the client's penalty exposure both from accuracy-related penalties calculated as a percentage of any understatement and from other penalties that apply without regard to the amount of any understatement (e.g., the Sec. 6707A penalty for failure to disclose a reportable transaction). Of course, if the understatement amount has been estimated, the amount of any interest or accuracy-related penalty will also be an estimate.
- Evaluate penalty defenses, such as the reasonable cause defense under Sec. 6664 or the existence of substantial authority for a nontax-shelter position at the time the return was filed. While the Sec. 6664 reasonable cause defense normally takes into consideration all facts and circumstances, the regulations do establish requirements for certain positions. For example, the failure to file Form 8886, Reportable Transaction Disclosure Statement, for a reportable transaction or Form 8275-R, Regulation Disclosure Statement, in reliance on an opinion that a regulation was invalid will negate the reasonable cause defense.
- Evaluate whether penalties may be avoided or reduced by filing a "qualified amended return." Amounts paid with a qualified amended return reduce the amount of the income tax understatement to which the accuracy-related penalties can apply (Regs. Sec. 1.6664-2(c)). For an amended return to be a qualified amended return, it must be filed before the taxpayer is contacted by the IRS regarding an examination of the return. There are special rules for undisclosed listed transactions (including those retroactively listed) under which the Service's contacting a promoter or material adviser for the undisclosed transaction may cut off the opportunity to file a qualified amended return. For undisclosed listed transactions, it may be necessary to contact promoters and material advisers to determine whether a qualified amended return is a viable option.
- Consider the impact of the statute of limitation on the client's exposure to an assessment for additional taxes, interest, or penalties. Generally, the limitation period under Sec. 6501 is three years from the filing of the return. This period is extended to six years if the return omits from gross income items in excess of 25% of the gross income on the return (Sec. 6501(e)). Since application of the six-year statute of limitation opens the *entire* return to examination and assessment, the CPA should consider whether there are other positions on the return unrelated to the error or omission that could trigger the longer period. The limitations period can be extended beyond six years in the case of undisclosed listed transactions (Sec. 6501(c)(10)).

- Consider the potential impact of the prior-year error or omission on current or future tax returns. If the prior-year error could result in an understatement on the current or a future return, it may require a return disclosure or even prevent the CPA from preparing the current/future return under Sec. 6694 and Circular 230 §10.34. Notice 2008-13 provides interim guidance concerning the application of the Sec. 6694 preparer penalty to returns filed on or before December 31, 2008.
- Determine the cause of the error or omission. Errors may result from weak accounting systems or lax internal controls, miscommunication, or good-faith mistakes by the client or the CPA. Understanding the cause will help to avoid repeating the mistake by strengthening systems and controls or improving communication. Not only should a CPA preparing the current-year return take reasonable steps to avoid repeating the mistake under SSTS 6; the existence of adequate processes for avoiding repetition of errors is a component of the reasonable cause defense in Regs. Sec. 1.6694-2(d). Understanding the cause of any error will also help the CPA appropriately address client relationship management issues.
- Evaluate other potential consequences of errors or omissions. A client issuing GAAP financial statements may be required to accrue the tax liability attributable to the error or omission, as well as a reserve for any penalties likely to apply. An exempt organization's status under Sec. 501 could be adversely affected, and publicly traded companies should consider mandated disclosures for certain penalties.

Caution: It is not possible to list here all the potential ancillary consequences of a prior-year error or omission, so the CPA must consider the specifics of each client's situation.

After evaluating the matters outlined above, the CPA must advise the client of the existence of the error, the potential consequences, and the CPA's recommendations for corrective action.

Practice tip: Neither Circular 230 §10.21 nor SSTS 6 requires that this advice be in writing, and it is generally preferable to discuss the issues with the client before sending any written communication so as to allow the client the opportunity to ask questions and consider the merits and risks of various remedial actions. Once the client decides on a course of action, the CPA should document the advice to the client in writing by either a letter to the client or a file memorandum summarizing the advice. A client letter can help avoid any client misunderstandings regarding potential consequences.

If the client elects not to correct a prior-year error or omission, SSTS 6 states that the CPA should consider whether to continue the representation. If the client's decision may predict future behavior that could result in a conflict between the client's desires and the CPA's professional obligations, withdrawal is appropriate. Even if the CPA concludes that he or she can continue to represent the client, the CPA should evaluate and document any procedures to avoid repetition of the error on future returns.

The application of the individual steps described above to a particular error or omission will depend on the specific facts, but this methodical approach will help the CPA to fulfill the ethical obligations under Circular 230 §10.21 and SSTS 6.

FROM PETER S. WILSON, J.D., CPA, RALEIGH, NC **TTA**

EXHIBIT 22

Message

From: elaine.church@us.pwc.com [elaine.church@us.pwc.com]
Sent: 5/8/2008 7:13:02 PM
To: tax core qrm; John Monaco ["cn=john monaco/ou=us/ou=tls/o=pwc@americas-us"]; John Petrella ["cn=john petrella/ou=us/ou=tls/o=pwc@americas-us"]; Corina M Trainer ["cn=corina m trainer/ou=us/ou=tls/o=pwc@americas-us"]; Daniel J Wiles ["cn=daniel j wiles/ou=us/ou=tls/o=pwc@americas-us"]; Rochelle L Hodes ["cn=rochelle l hodes/ou=us/ou=tls/o=pwc"]
CC: Dick Ruge ["cn=dick ruge/ou=us/ou=tls/o=pwc"]
Subject: Fw: ABA materials May 2008 Standards of Tax Practice
Attachments: _.png; _.png

Materials to be presented by the Standards Committee at this week's ABA Tax section meeting are too voluminous to send them all by e-mail. Attached please find some updates re: practitioner standards. These materials (and the remaining documents dealing with ethical standards applicable to IRS practitioners) will also be posted to DMS: Non Client: Special Projects Q&RM: ABA Meetings May 2008: Standards of Tax Practice


CPA Obligations_pdf.zip


Addressing Taxpayers' Errors and Omissions_pdf.zip

PRACTICE & PROCEDURES

CPA Obligations for Addressing Errors and Omissions

The implementation of Financial Accounting Standards Board Interpretations No. 48 (FIN 48), *Accounting for Uncertainty in Income Taxes*, and the change in the tax return preparer penalty standards under Sec. 6694 have resulted in increased scrutiny of tax return positions taken by taxpayers and tax practitioners alike. This heightened scrutiny may result in the discovery of errors or omissions on prior-year tax returns. Both Circular 230, *Regulations Governing the Practice of Attorneys, Certified Public Accountants, Enrolled Agents, Enrolled Actuaries, and Appraisers Before the Internal Revenue Service*, and AICPA professional standards impose obligations on CPAs who encounter these errors or omissions.

Circular 230 §10.21 provides that a CPA, attorney, enrolled agent, or enrolled actuary retained to provide federal tax services who discovers an error or omission with respect to any federal tax (not just income taxes) must promptly advise the client of the error or omission and the consequences under the Code and regulations of the error or omission. The §10.21 obligations are not limited to practitioners preparing returns, so the discovery of an error or omission in the course of a tax consulting or advisory engagement will also trigger its requirements.

In addition to Circular 230, CPAs must consider the requirements of AICPA Statement on Standards for Tax Services No. 6, *Knowledge of Error: Return Preparation* (SSTS 6). Like Circular 230 §10.21, SSTS 6 requires advising the client of the existence of an error or omission. SSTS 6 goes beyond §10.21 by requiring that the CPA recommend corrective measures. If the client refuses to take corrective action with respect to a prior-year return, SSTS 6 requires a CPA retained to prepare the current-year return to consider withdrawal from the representation.

While these two professional standards appear straightforward, a CPA must evaluate a number of issues to be able to advise a client of the consequences of a prior year's error or omission. A methodical approach to evaluating and addressing these issues helps to ensure that the CPA fulfills these obligations.

- First, confirm that an error or omission in fact exists. While this would seem self-evident, it is not uncommon for practitioners to begin evaluating the matters described below before confirming the relevant facts. What may appear to be an error may simply be a misunderstanding caused by incomplete workpapers.
- Quantify the impact on the amount of taxes due for any prior-year return affected by the error or omission. A client's ability to comprehend the consequences of an error and of a failure to remedy it depends in part on an understanding of the financial exposure for any tax understatement. Depending on the complexity of the issue, it may be appropriate at the outset to estimate the amount of any understatement. If estimates are used, it is important that the client understand that the final determination of the understatement amount may be different.
- Quantify the amount of interest and potential penalties that could result from any prior-year understatement. Consider the client's penalty exposure both from accuracy-related penalties calculated as a percentage of any understatement and from other penalties that apply without regard to the amount of any understatement (e.g., the Sec. 6707A penalty for failure to disclose a reportable transaction). Of course, if the understatement amount has been estimated, the amount of any interest or accuracy-related penalty will also be an estimate.
- Evaluate penalty defenses, such as the reasonable cause defense under Sec. 6664 or the existence of substantial authority for a nontax-shelter position at the time the return was filed. While the Sec. 6664 reasonable cause defense normally takes into consideration all facts and circumstances, the regulations do establish requirements for certain positions. For example, the failure to file Form 8886, Reportable Transaction Disclosure Statement, for a reportable transaction or Form 8275-R, Regulation Disclosure Statement, in reliance on an opinion that a regulation was invalid will negate the reasonable cause defense.
- Evaluate whether penalties may be avoided or reduced by filing a "qualified amended return." Amounts paid with a qualified amended return reduce the amount of the income tax understatement to which the accuracy-related penalties can apply (Regs. Sec. 1.6664-2(c)). For an amended return to be a qualified amended return, it must be filed before the taxpayer is contacted by the IRS regarding an examination of the return. There are special rules for undisclosed listed transactions (including those retroactively listed) under which the Service's contacting a promoter or material adviser for the undisclosed transaction may cut off the opportunity to file a qualified amended return. For undisclosed listed transactions, it may be necessary to contact promoters and material advisers to determine whether a qualified amended return is a viable option.
- Consider the impact of the statute of limitation on the client's exposure to an assessment for additional taxes, interest, or penalties. Generally, the limitation period under Sec. 6501 is three years from the filing of the return. This period is extended to six years if the return omits from gross income items in excess of 25% of the gross income on the return (Sec. 6501(e)). Since application of the six-year statute of limitation opens the *entire* return to examination and assessment, the CPA should consider whether there are other positions on the return unrelated to the error or omission that could trigger the longer period. The limitations period can be extended beyond six years in the case of undisclosed listed transactions (Sec. 6501(c)(10)).

- Consider the potential impact of the prior-year error or omission on current or future tax returns. If the prior-year error could result in an understatement on the current or a future return, it may require a return disclosure or even prevent the CPA from preparing the current/future return under Sec. 6694 and Circular 230 §10.34. Notice 2008-13 provides interim guidance concerning the application of the Sec. 6694 preparer penalty to returns filed on or before December 31, 2008.
- Determine the cause of the error or omission. Errors may result from weak accounting systems or lax internal controls, miscommunication, or good-faith mistakes by the client or the CPA. Understanding the cause will help to avoid repeating the mistake by strengthening systems and controls or improving communication. Not only should a CPA preparing the current-year return take reasonable steps to avoid repeating the mistake under SSTS 6; the existence of adequate processes for avoiding repetition of errors is a component of the reasonable cause defense in Regs. Sec. 1.6694-2(d). Understanding the cause of any error will also help the CPA appropriately address client relationship management issues.
- Evaluate other potential consequences of errors or omissions. A client issuing GAAP financial statements may be required to accrue the tax liability attributable to the error or omission, as well as a reserve for any penalties likely to apply. An exempt organization's status under Sec. 501 could be adversely affected, and publicly traded companies should consider mandated disclosures for certain penalties.

Caution: It is not possible to list here all the potential ancillary consequences of a prior-year error or omission, so the CPA must consider the specifics of each client's situation.

After evaluating the matters outlined above, the CPA must advise the client of the existence of the error, the potential consequences, and the CPA's recommendations for corrective action.

Practice tip: Neither Circular 230 §10.21 nor SSTS 6 requires that this advice be in writing, and it is generally preferable to discuss the issues with the client before sending any written communication so as to allow the client the opportunity to ask questions and consider the merits and risks of various remedial actions. Once the client decides on a course of action, the CPA should document the advice to the client in writing by either a letter to the client or a file memorandum summarizing the advice. A client letter can help avoid any client misunderstandings regarding potential consequences.

If the client elects not to correct a prior-year error or omission, SSTS 6 states that the CPA should consider whether to continue the representation. If the client's decision may predict future behavior that could result in a conflict between the client's desires and the CPA's professional obligations, withdrawal is appropriate. Even if the CPA concludes that he or she can continue to represent the client, the CPA should evaluate and document any procedures to avoid repetition of the error on future returns.

The application of the individual steps described above to a particular error or omission will depend on the specific facts, but this methodical approach will help the CPA to fulfill the ethical obligations under Circular 230 §10.21 and SSTS 6.

FROM PETER S. WILSON, J.D., CPA, RALEIGH, NC **TTA**

RSM McGladrey

Addressing Taxpayers' Errors and Omissions

Agenda

- Discovery of Errors and Omissions
- Circular 230 §10.21
- Consequences of Errors and Omissions
- Issues Involving the Recalcitrant Client
- Documenting Compliance

Discovery of Errors and Omissions

- Renewed focus on uncertain tax positions
  - FAS 109 and FIN 48 – Accounting for Income Taxes
  - Heightened §6694 Standards
- Subsequent developments
  - New case or ruling authority
  - Discovery or development of additional facts
  - Examinations benefit from 20 / 20 hindsight
- Review of positions recommended by other advisors
  - New client due diligence

Circular 230 §10.21

A practitioner who, having been retained by a client with respect to a matter administered by the Internal Revenue Service, knows that the client has not complied with the revenue laws of the United States or has made an error in or omission from any return, document, affidavit, or other paper which the client submitted or executed under the revenue laws of the United States, must advise the client promptly of the fact of such noncompliance, error, or omission. The practitioner must advise the client of the consequences as provided under the Code and regulations of such noncompliance, error, or omission.

- Applies to any practitioner engaged to provide tax services
- Not limited to errors and omissions on returns
- Not limited to errors and omissions related to your engagement
- No obligation to advise prospective client

Other Professional Standards

- Circular 230 §10.51(a)(4) or (13); Sanctions under §10.52
- ABA Model Rules
  - Rule 1.4 Communication - Is an attorney obligated to communicate regarding an error or omission unrelated to the current representation?
  - Rule 2.1 Advisor – Exercise independent professional judgment and render candid advice; *but see* Comment [5]
  - Financial statement implications and Rules 1.6 (Confidentiality), 2.3 (Evaluation for Use by Third Persons), 4.1 (Truthfulness in Statements to Others)
- AICPA Statement of Standards for Tax Services Nos. 6 and 7
  - Parallel Circular 230 §10.21
  - Require a recommendation to remedy the error or omission
  - CPA must reconsider representation if taxpayer refuses

Consequences of an Error or Omission

- Taxpayer's financial exposure
  - Taxes, interest and penalties
  - Potential penalty defenses under §6662 and §6664
  - Opportunity for qualified amended return under §1.6664-2 (c)(2)
- 3-year v. 6-year period of limitations under §6501
- Impact on current and future returns
  - §6694 considerations
- Improper accounting methods
  - §446(f) and Treas. Reg. §1.446-1(e)

Issues Involving the Recalcitrant Client

- What if the client refuses to amend a prior year return to correct the error or omission?
- Conflicts of interest
- Confidentiality considerations
- Financial statement implications
  - FIN 48, ¶6 – MLTN standard for recognizing tax position
  - FIN 48, ¶16 – Reserves for penalties not meeting MLTN
  - Attorneys' Letters to Auditors

Issues Involving the Recalcitrant Client, cont.

- Situation 1 – Practitioner was responsible for the prior year error or omission
  - Issues of competence and diligence (Model Rules 1.1 and 1.3)
  - Conflict of interest
  - Does a qualified amended return avoid the §6694 penalty? Treas. Reg. §1.6662-4(f)(1), §1.6694-1(d), and §1.6694-2(c)
- Situation 2 – Client is a passthrough entity and penalty exposure is borne by the owners/beneficiaries
  - Confidentiality restrictions under Rule 1.6 and Treas. Reg. §301.7216-2(e)
  - What if owners/beneficiaries are also clients?

Issues Involving the Recalcitrant Client, cont.

- Situation 3 – Client is a passthrough entity, and owners in the year of the error are former clients
  - Rule 1.9 – Duties to Former Clients
  - Can the attorney continue to represent the entity?
- Situation 4 – Client should recognize back taxes and penalty exposure under FIN 48
  - Advising the client under *Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information*
  - What if recognizing the taxes/penalties would result in a covenant default?
  - What if the client is currently seeking financing? - Rules 1.6(b)(2) and 4.1(b)

Issues Involving the Recalcitrant Client, cont.

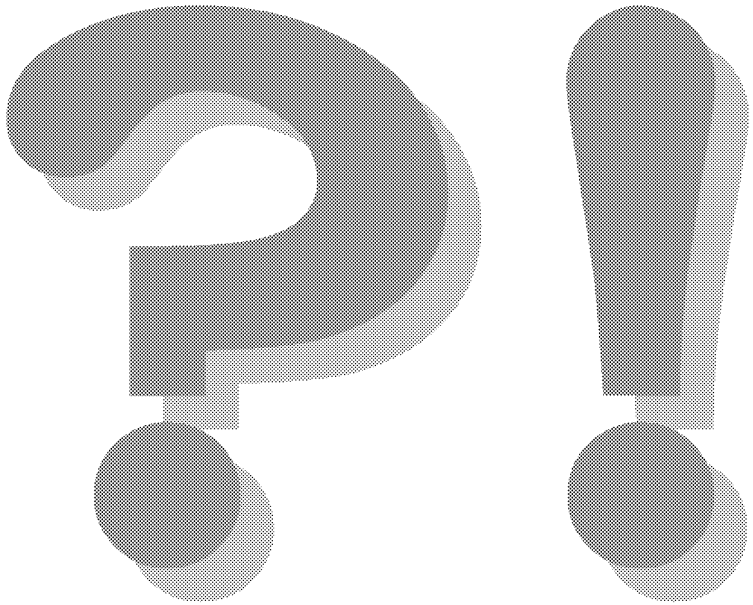
- Situation 5 – Client that missed a prior year loss/deduction proposes to reverse the error on the current year return
  - Client's risk of being whipsawed on audit
  - §6694 considerations with current year understatement
  - Effect of substantial portion definition under Notice 2008-13
- Situation 6 – Client that underreported prior year income proposes to reverse the error on the current year return
  - Whipsaw risk is reduced, but not eliminated (3 yr / 6 yr)
  - No current year understatement under §6694

Documenting §10.21 Compliance

- §10.21 does not require written communication
  - Letter to client v. file memo
- Are §10.21 communications privileged?
  - Attorney-client, §7525, and work product privileges
- Documenting communications to address practitioner's E&O liability exposure for prior year error / omission
  - Qualified amended returns and mitigation of damages

RSM McGladrey

Questions
Comments



ACCOUNTING • TAX • BUSINESS CONSULTING

AA 000780

PwC-007642

EXHIBIT 23

Richard J. DeMarco, Jr.
Office of the General Counsel

October 23, 2015

Joel Levin, Esq.
Levin & Associates Co., L.P.A.
The Tower at ErieView, Suite 1100
1301 East 9th Street
Cleveland, OH 44114

Re: Tolling Agreement between PricewaterhouseCoopers LLP, Richard P. Stovsky, Michael Tricarichi and Barbara Tricarichi

Dear Mr. Levin:

This letter agreement is made in order to confirm the entire and exclusive understanding concerning its subject matter between PricewaterhouseCoopers LLP and Richard P. Stovsky (collectively "PwC") on the one hand and Michael Tricarichi and Barbara Tricarichi (collectively "Tricarichi") on the other.

An issue has arisen in connection with professional services provided by PwC to Tricarichi relating to the sale of West Side Cellular to Fortrend International LLC in or around September 2003. In order to permit discussion of matters at issue between the parties to this Agreement, PwC and Tricarichi have agreed that as of January 19, 2011, any statutes of limitations that would expire during the period of time from January 19, 2011 through May 1, 2016, or any other defense that would have been available based on the passage of time during such period pertaining to any claim or defense that Tricarichi may have available to them arising from the services performed by PwC for Tricarichi relating to the sale of West Side Cellular, or pertaining to any claim or defense that PwC may have available to it arising from the services performed by PwC for Tricarichi relating to the sale, is tolled and waived. Any such statutes that would have expired during such period shall expire, and any such other defenses shall be available, only upon the expiration of this letter agreement in accordance with its terms. This agreement is non-assignable and non-transferable, and any attempt to transfer or assign this agreement shall immediately render it null and void.

This letter agreement shall expire at 11:59 P.M. on May 1, 2016, unless renewed by a written instrument signed by authorized representatives of PwC and Tricarichi prior to that date and time. Upon the expiration of this letter agreement, all provisions of said agreement shall become null and void, and all statutes of limitations shall be deemed to have never been tolled, unless a lawsuit relating to the above subject matter is filed and served by a party to this letter agreement before the expiration of this

PricewaterhouseCoopers LLP, 300 Madison Avenue, New York, NY 10017
T: (646) 471 1126, F: (813) 282 6298, richard.j.demarco@us.pwc.com

agreement. PwC and Tricarichi agree to provide notice in writing no less than fifteen (15) days prior to the commencement of a lawsuit relating to the above subject matter, but such requirement is waived within 15 days of expiration of this letter agreement. Nothing in this letter shall be taken as an admission by any of the parties as to the applicability, running, expiration or non-expiration of any statute of limitations or similar rule of law or equity prior to the date of this letter.

This letter agreement shall be construed in accordance with the laws of New York. Tricarichi and PwC will not disclose the existence or terms of this agreement to any third party without the written consent of the other party, provided that no such consent will be required in connection with any disclosure (i) that is required by law or regulation, so long as the other party is given adequate prior notice and an opportunity to object to the disclosure, (ii) to a party's counsel or insurer, or (iii) as necessary to enforce the terms of this agreement. Nothing contained in this letter agreement shall be taken to suggest or imply that any party has agreed to the jurisdiction of any court.

Nothing contained in this letter will prevent any party from asserting any claim prior to or after the expiration date set forth above. Nothing contained in this letter will prevent any party from seeking to obtain discovery in accordance with applicable law, and nothing contained in this letter shall limit any party from exercising all its rights to object thereto.

Neither this Agreement nor any action taken pursuant to this Agreement shall be offered or received into evidence in any action or proceeding as an admission of liability or wrongdoing by any party.

If this letter agreement is acceptable to Tricarichi, please acknowledge acceptance of its terms by signing the enclosed counterpart of this letter agreement and returning it to me. Your signature below will constitute a representation that you have been duly authorized to do the same on behalf of Tricarichi.

Very truly yours,

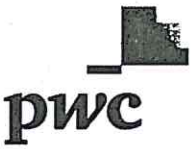
By: Richard J. DeMarco, Jr., Esq. on behalf of PricewaterhouseCoopers LLP and Richard P. Stovsky

Agreed:

Michael Tricarichi and Barbara Tricarichi

Date: 10/24/15

By: _____
Joel Levin, Esq.



Richard J. DeMarco, Jr.
Office of the General Counsel

September 16, 2014

Joel Levin, Esq.
Levin & Associates Co., L.P.A.
The Tower at ErieView, Suite 1100
1301 East 9th Street
Cleveland, OH 44114

Re: Tolling Agreement between PricewaterhouseCoopers LLP, Richard P. Stovsky, Michael Tricarichi and Barbara Tricarichi

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pwc

Joel Levin, Esq. September 16, 2014

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Very truly yours,

By: Richard J. DeMarco, Jr., Esq. on behalf of PricewaterhouseCoopers LLP and Richard P. Stovsky

Agreed:

Michael Tricarichi and Barbara Tricarichi

Date: 9/16/14

By: Joel Levin, Counsel for Tricarichis
Joel Levin, Esq.

Richard J. DeMarco, Jr.
Office of the General Counsel

January 20, 2014

Joel Levin, Esq.
Levin & Associates Co., L.P.A.
The Tower at ErieView, Suite 1100
1301 East 9th Street
Cleveland, OH 44114

Re: Tolling Agreement between PricewaterhouseCoopers LLP, Richard P. Stovsky, Michael Tricarichi and Barbara Tricarichi

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Very truly yours,

By: Richard J. DeMarco, Jr., Esq. on behalf of PricewaterhouseCoopers LLP and Richard P. Stovsky

Agreed:

Michael Tricarichi and Barbara Tricarichi

Date: 1/21/14

By: _____
Joel Levin, Esq.

Margaret M. Enloe
Associate General Counsel

October 11, 2012

Joel Levin, Esq.
Levin & Associates Co., L.P.A.
The Tower at ErieView, Suite 1100
1301 East 9th Street
Cleveland, OH 44114

March 1, 2014
J.L.L.

Re: Tolling Agreement between PricewaterhouseCoopers LLP, Richard P. Stovsky, Michael Tricarichi and Barbara Tricarichi

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PricewaterhouseCoopers LLP, 300 Madison Avenue, New York, NY 10017
T: (646) 471 1123 F: (813) 637-7747, margaret.m.enloe@us.pwc.com

pwc

March 1, 2014

This letter agreement shall expire at 11:59 P.M. on ~~May 1, 2013~~, unless renewed by a written instrument signed by authorized representatives of PwC and Tricarichi prior to that date and time. Upon the expiration of this letter agreement, all provisions of said agreement shall become null and void, and all statutes of limitations shall be deemed to have never been tolled, unless a lawsuit relating to the above subject matter is filed and served by a party to this letter agreement before the expiration of this agreement. PwC and Tricarichi agree to provide notice in writing no less than fifteen (15) days prior to the commencement of a lawsuit relating to the above subject matter, but such requirement is waived within 15 days of expiration of this letter agreement. Nothing in this letter shall be taken as an admission by any of the parties as to the applicability, running, expiration or non-expiration of any statute of limitations or similar rule of law or equity prior to the date of this letter.

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pwc

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Very truly yours,

Margaret M. Enloe

By: Margaret M. Enloe, Esq. on behalf of PricewaterhouseCoopers LLP and Richard P. Stovsky

Agreed:

Michael Tricarichi and Barbara Tricarichi

Date: 10/4/12

By: Joel Levin

Joel Levin, Esq.

Margaret M. Enloe
Associate General Counsel

October 11, 2012

Joel Levin, Esq.
Levin & Associates Co., L.P.A.
The Tower at ErieView, Suite 1100
1301 East 9th Street
Cleveland, OH 44114

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Dear Mr. Levin:

This letter agreement is made in order to confirm the entire and exclusive understanding concerning its subject matter between PricewaterhouseCoopers LLP and Richard P. Stovsky (collectively "PwC") on the one hand and Michael Tricarichi and Barbara Tricarichi (collectively "Tricarichi") on the other.

An issue has arisen in connection with professional services provided by PwC to Tricarichi relating to the sale of West Side Cellular to Fortrend International LLC in or around September 2003. In order to permit discussion of matters at issue between the parties to this Agreement, PwC and Tricarichi have agreed that as of January 19, 2011, any statutes of limitations that would expire during the period of time from January 19, 2011 through May 1, 2013, or any other defense that would have been available based on the passage of time during such period pertaining to any claim or defense that Tricarichi may have available to them arising from the services performed by PwC for Tricarichi relating to the sale of West Side Cellular, or pertaining to any claim or defense that PwC may have available to it arising from the services performed by PwC for Tricarichi relating to the sale, is tolled and waived. Any such statutes that would have expired during such period shall expire, and any such other defenses shall be available, only upon the expiration of this letter agreement in accordance with its terms. This agreement is non-assignable and non-transferable, and any attempt to transfer or assign this agreement shall immediately render it null and void.

PricewaterhouseCoopers LLP, 300 Madison Avenue, New York, NY 10017
T: (646) 471 1123 F: (813) 637-7747, margaret.m.enloe@us.pwc.com

pwc

This letter agreement shall expire at 11:59 P.M. on May 1, 2013, unless renewed by a written instrument signed by authorized representatives of PwC and Tricarichi prior to that date and time. Upon the expiration of this letter agreement, all provisions of said agreement shall become null and void, and all statutes of limitations shall be deemed to have never been tolled, unless a lawsuit relating to the above subject matter is filed and served by a party to this letter agreement before the expiration of this agreement. PwC and Tricarichi agree to provide notice in writing no less than fifteen (15) days prior to the commencement of a lawsuit relating to the above subject matter, but such requirement is waived within 15 days of expiration of this letter agreement. Nothing in this letter shall be taken as an admission by any of the parties as to the applicability, running, expiration or non-expiration of any statute of limitations or similar rule of law or equity prior to the date of this letter.

This letter agreement shall be construed in accordance with the laws of New York. Tricarichi and PwC will not disclose the existence or terms of this agreement to any third party without the written consent of the other party, provided that no such consent will be required in connection with any disclosure (i) that is required by law or regulation, so long as the other party is given adequate prior notice and an opportunity to object to the disclosure, (ii) to a party's counsel or insurer, or (iii) as necessary to enforce the terms of this agreement. Nothing contained in this letter agreement shall be taken to suggest or imply that any party has agreed to the jurisdiction of any court.

Nothing contained in this letter will prevent any party from asserting any claim prior to or after the expiration date set forth above. Nothing contained in this letter will prevent any party from seeking to obtain discovery in accordance with applicable law, and nothing contained in this letter shall limit any party from exercising all its rights to object thereto.

Neither this Agreement nor any action taken pursuant to this Agreement shall be offered or received into evidence in any action or proceeding as an admission of liability or wrongdoing by any party.

pwc

If this letter agreement is acceptable to Tricarichi, please acknowledge acceptance of its terms by signing the enclosed counterpart of this letter agreement and returning it to me. Your signature below will constitute a representation that you have been duly authorized to do the same on behalf of Tricarichi.

Very truly yours,

Margaret M. Enloe

By: Margaret M. Enloe, Esq. on behalf of PricewaterhouseCoopers LLP and Richard P. Stovsky

Agreed:

Michael Tricarichi and Barbara Tricarichi

Date: 10/14/12

By: Joel Levin

Joel Levin, Esq.

EXHIBIT 24

AFFT
Mark A. Hutchison (4639)
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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI, Plaintiff, v. PRICEWATERHOUSE COOPERS, LLP, COÖPERATIEVE RABOBANK U.A., UTRECHT-AMERICA FINANCE CO., SEYFARTH SHAW LLP and GRAHAM R. TAYLOR, Defendants.	CASE NO. A-16-735910-B DEPT NO. XV **AFFIDAVIT OF MICHAEL A. TRICARICHI IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT PRICEWATERHOUSE COOPERS LLP'S MOTION FOR SUMMARY JUDGMENT** JURY TRIAL DEMANDED

I, Michael A. Tricarichi, having first been duly sworn upon oath, hereby depose and state as follows:

1. I am over 18 years of age, and otherwise am fully competent to execute this affidavit. I have personal knowledge of all of the facts stated herein.

2. I am the Plaintiff in the above-captioned case.

3. In April 2003, when I was considering a proposed transaction by Fortrend to purchase my shares in Westside Cellular, I asked Pricewaterhouse Coopers LLP ("PwC"), the defendant in this case, to give me advice regarding the proposed transaction. In connection with this request, PwC sent me an engagement letter and asked me to sign it. A copy of the engagement letter is included in Exhibit 2 to PwC's Motion for Summary Judgment filed March 6, 2017 ("PwC's Motion"). (The second page of that exhibit contains some handwritten notes that are not mine.) There were no other drafts of the engagement letter, or of the rider attached to the letter, exchanged with me.

4. PwC's Motion refers to a choice-of-law provision on page 2 of the rider to the engagement letter. There were no negotiations or discussions between me and anyone at PwC regarding the choice-of-law provision. In fact, that provision was not even called to my attention. I had no understanding that New York statutes of limitations might apply to any claims that I might need to bring against PwC, particularly to claims such as those I have filed in this case for PwC's gross negligence. PwC's Motion (at page 9) says that I "affirmed [my] understanding and agreement that the choice-of-law clause governed the relationship between the Parties." I did not do so, and did not understand that, by signing the engagement letter, I was agreeing to have the choice-of-law provision, which had not even been discussed or called to my attention, govern as PwC now says.

5. In addition to federal tax advice regarding the Fortrend transaction, I also sought advice from PwC regarding changing my residence to Nevada. My brother, James Tricarichi,

initially reached out to PwC about these topics on my behalf. PwC did, in fact, give me advice about changing my residence to Nevada, in addition to giving me other advice about the proposed Fortrend transaction. Exhibit G in the Appendix of Exhibits in Support of Plaintiff's Opposition to Defendant Pricewaterhouse Coopers LLP's Motion for Summary Judgment (the "Appendix") is a copy of documents reflecting that such advice was sought and provided. I understand that the PwC personnel providing the advice, including Mr. Stovsky and Mr. Lohnes, were located in PwC's Cleveland and Washington, D.C. offices. I had no dealings with any PwC personnel from a PwC New York office, and understand that PwC personnel from New York did not participate in advising me. PwC's work and advice to me about proceeding with the Fortrend transaction extended into August 2003, after (as PwC knew) I had moved to Nevada in May 2003.

6. In addition to the foregoing points, I understand that other facts justifying my opposition to PwC's motion are unavailable to me without being able to proceed with discovery in this case. These include PwC documents and testimony regarding the origin and intent of the choice-of-law provision in the PwC rider, and possible admissions from PwC (via testimony, documents or both) that (i) there were no negotiations or discussions with me about the choice-of-law provision, (ii) there were no drafts reflecting such negotiations or discussions, and (iii) PwC's New York office had no involvement in advising me.

7. Starting in October 2012, after the IRS sent me a notice of transferee liability in June 2012, PwC entered into a series of retroactive tolling agreements with me. Exhibit I in the Appendix consists of copies of those tolling agreements.

8. After the Tax Court issued its ruling in my case in October 2015, I learned that, in late 1999, PwC had advocated that a similar transaction structure be used in the purchase of the Bishop Group Ltd. ("Bishop") by PwC's client Midcoast Energy Resources, Inc.; that PwC approached Fortrend to serve as an intermediary in the transaction; and that a Fortrend

affiliate in fact served as an intermediary, purchasing the Bishop stock in a "Midco" transaction that PwC helped negotiate. Exhibit J in the Appendix is a copy of the decision in *Enbridge Energy Co., Inc. v. U.S.*, which makes note of these facts. That decision also notes that, as was the case with my Fortrend transaction, Rabobank facilitated the Bishop transaction by loaning Fortrend the purchase price and serving as the conduit through which funds changed hands at closing, in return for a substantial fee. PwC disclosed none of these facts to me in 2003 or at any point thereafter. Had PwC disclosed these facts to me, I would have proceeded differently with respect to the proposed Fortrend transaction. I now also understand that the Bishop transaction was audited by the IRS starting in late 2003 (but before I had reported the Westside stock sale on any tax returns), and found deficient by the IRS in 2004. PwC did not tell me about this, either.

9. Similarly, PwC did not tell me that, before it gave me contrary advice about the Fortrend transaction, PwC had advised at least one other client *not* to proceed with a similar transaction. I only learned in December 2016 that, in March 2003, before it advised me regarding the proposed Fortrend transaction, PwC had advised another taxpayer, John Marshall, to steer clear of such a transaction. Exhibit K in the Appendix is a copy of the decision in *Estate of Marshall v. Commissioner of Internal Revenue*, which makes note of PwC's conflicting advice. Again, had PwC disclosed these facts to me, I would have proceeded differently with respect to the proposed Fortrend transaction, and not gone ahead with it.

10. I further understand that there are various facts regarding the foregoing points that are also unavailable to me without discovery in this case. These include PwC documents and testimony regarding the Bishop transaction; the Marshall transaction; PwC's review, promotion or advocacy of, or other advice regarding transactions similar to these and to my own transaction; and the reasons why PwC did not make me aware of same – not to mention information regarding what PwC knew or reasonably should have known about the transaction

(but never disclosed to me) and when PwC knew it; and regarding PwC's review of, advice regarding, and involvement in my transaction with Fortrend.

11. It was my understanding when I sought and received PwC's advice about the Fortrend transaction that PwC would continue to be available to assist me should there be subsequent inquiries from the IRS in connection with the transaction. In fact, when I received a notice from the IRS in 2009 that it was looking into the matter, I did reach out and contact PwC.

Further affiant sayeth not.

Michael A. Tricarichi

Subscribed and sworn to before me

this 7th day of April, 2017.

Kevin J. Brennan, Esq. (Ohio S.C.#0075699)

My commission has no expiration date.

O.R.C. §147.03

EXHIBIT 25

553 F.Supp.2d 716
United States District Court,
S.D. Texas,
Houston Division.

ENBRIDGE ENERGY COMPANY, INC. and Enbridge Midcoast Energy, L.P. f/k/a Enbridge Midcoast Energy, Inc. f/k/a Midcoast Energy Resources, Inc., Plaintiffs
v.
UNITED STATES of America, Defendant.

Civil Action No. H–06–657.
|
March 31, 2008.

Synopsis

Background: Corporate taxpayer that acquired assets of pipeline business through sale of stock to third party brought action against United States seeking refund for taxes and penalty paid for acquisition. Cross-motions for summary judgment were filed.

Holdings: The District Court, Melinda Harmon, J., held that:

[1] transaction was sale of stock, rather than sale of assets;

[2] corporate taxpayer was not entitled to ordinary loss for partnership losses or capital or ordinary loss for termination of partnership;

[3] imposition of penalty for substantial understatement of income was warranted; and

[4] corporate taxpayer could not avail itself of reasonable cause/good faith exception to fraud penalties.

Plaintiffs' motion denied; Defendant's motion granted.

West Headnotes (11)

[1] **Internal Revenue**
Presumptions and Burden of Proof

In a refund suit, the taxpayer has the burden of proving that the Internal Revenue Service's (IRS) determination is incorrect.

Cases that cite this headnote

[2] **Internal Revenue**
Substance or Form of Transaction

A key principle in tax law is that the incidence of taxation depends upon the substance of a transaction rather than its form.

Cases that cite this headnote

[3] **Internal Revenue**
Substance or Form of Transaction

In the conduit theory of the substance over form doctrine of taxation, the court may disregard an entity if it is a mere conduit for the real transaction at issue.

4 Cases that cite this headnote

[4] **Internal Revenue**
Substance or Form of Transaction

Under the conduit theory of the substance over form doctrine of taxation, the tax consequences which arise from gains from a sale of property are not finally to be determined solely by the means employed to transfer legal title; rather, the transaction must be viewed as a whole, and each step, from the commencement of negotiations to the consummation of the sale, is relevant.

2 Cases that cite this headnote

[5] **Internal Revenue**
Grantors

Under the conduit theory of the substance over form doctrine of taxation, a sale by one person cannot be transformed for tax purposes into a sale by another by using the latter as a conduit through which to pass title; to permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies of Congress.

2 Cases that cite this headnote

[6] **Internal Revenue**
Grantors

Court would not consider role of third party company that acquired stock in pipeline business from business owner and sold assets to corporate taxpayer, for purposes of determining tax implications of transaction for corporate taxpayer; third party company that acquired stock was conduit for real transaction at issue, corporate taxpayer's tax advisors helped structure transaction, and all communications regarding transaction involved corporate taxpayer.

Cases that cite this headnote

[7] **Internal Revenue**
Sale or Exchange of Property

Transaction during which corporate taxpayer acquired pipeline business was sale of stock, rather than sale of assets, and thus government's recharacterization as stock sale was appropriate for tax purposes, although corporate taxpayer purchased assets from third party buyer of stock; third party was conduit for transaction, seller of business would not agree to direct asset sale and corporate taxpayer negotiated extensively to obtain assets through stock purchase and liquidation. 26 U.S.C.A. § 338.

Cases that cite this headnote

[8] **Internal Revenue**
Creation and Existence

Third party company that acquired stock in pipeline business and corporate taxpayer entered into partnership for purpose of tax avoidance, and thus corporate taxpayer was not entitled to ordinary loss for partnership losses or capital or ordinary loss for termination of partnership; partnership was part of preconceived plan to provide "good facts" to third party company's participation in transaction involving transfer of pipeline business assets and disguise true nature of transaction. 26 U.S.C.A. §§ 162, 165.

Cases that cite this headnote

[9] **Internal Revenue**
Substance or Form of Transaction

Where there is a genuine multiple-party transaction with economic substance which is compelled or encouraged by business or regulatory realities, is imbued with tax independent considerations, and is not shaped solely by tax-avoidance features that have meaningless labels attached, the Government should honor the allocation.

Cases that cite this headnote

[10] **Internal Revenue**
Grounds and Amount

Imposition of penalty for substantial understatement of income on corporate taxpayer that acquired assets to pipeline business through transaction involving conduit that purchased stock from business owner and sold assets to corporate taxpayer was warranted, even if

transaction was not a tax shelter, absent substantial authority to support deductions or adequate disclosure of relevant facts relating to deductions and a reasonable basis for tax treatment claimed. 26 U.S.C.A. § 6662.

Cases that cite this headnote

[11] **Internal Revenue**
Reasonable Cause

Corporate taxpayer knowingly participated in a scheme to obfuscate real transaction at issue in transfer of assets of pipeline business, during which transaction third party company purchased stock from business owner and sold assets to corporate taxpayer, and taxpayer's reliance on tax advisors who orchestrated plan was unreasonable, and thus corporate taxpayer could not avail itself of reasonable cause/good faith exception to fraud penalties under Tax Code. 26 U.S.C.A. § 6664.

Cases that cite this headnote

Attorneys and Law Firms

***717** Karl Scherrak Stern, Vinson & Elkins, Houston, TX, for Plaintiffs.

David B. Coffin, Dept of Justice, Tax Division, Dallas, TX, for Defendant.

OPINION AND ORDER

MELINDA HARMON, District Judge.

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

***718 I. Background and Relevant Facts**

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

A. *The Challenged Transaction(s)*

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

One potential buyer was Midcoast, a publically-traded company engaged in the business of constructing and operating natural gas pipelines. Midcoast was interested in owning the Bishop Assets, which included an interstate natural gas pipeline system located in Kansas, Oklahoma, and Missouri, because the assets "provided a stable cash flow from long-term transportation contracts and would

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

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

In early September 1999, Fortrend began negotiating with Langley about acquiring the Bishop Stock. Langley provided Fortrend with the same auction material that he had given to other potential bidders. Although they had not participated in the negotiations between Langley and the other bidders, Midcoast and PWC participated in the negotiations between Langley and Fortrend. For example, Langley's representative faxed to Fortrend and PWC a draft Mutual Confidentiality Agreement and a draft letter of intent (Gov't Exs. 35 and 36, Doc. 23), and Langley's representatives emailed to PWC a draft Stock Purchase Agreement between Fortrend and Langley, which was a red-lined version of the agreement that had been drafted between Midcoast and Langley, with Fortrend substituted for Midcoast (Gov't Ex. 37, Doc. 23). On September 30, 1999, K–Pipe Holdings Partners, L.P., affiliated with Fortrend and the holding company of K–Pipe Merger Corporation, submitted a nonbinding letter of intent, offering to purchase the Bishop Stock for approximately $188 million. (Gov't Ex. 65, Doc. 23). The letter of intent also indicated that "other agreements" would be negotiated. (*Id.*).

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

The parties negotiated numerous issues in the lead up to the financing and execution of the final stock and asset purchase agreements (hereafter "Stock Purchase Agreement" and "Asset Purchase Agreement"). In general, Midcoast continued discussions with Langley regarding certain issues affecting the Bishop Assets. These issues included a PDA that Langley was causing Kansas Pipeline Company ("KPC"), a partnership included in the Bishop Assets, to enter with a Langley affiliate. (Kaitson Aff. ¶ 9, Doc. 26). Midcoast claims it became so concerned about a continuing relationship with Langley through the PDA that it indicated it would not buy the Bishop Assets unless there was a provision for terminating the PDA relationship. Langley, therefore, put in place an agreement giving KPC the option to terminate the PDA upon the payment of $10.75 million. K–Pipe agreed to pay Langley $3 million more for the Bishop Stock, and Midcoast agreed to pay K–Pipe ***720** a corresponding amount for the Bishop Assets.

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

With respect to the Asset Purchase Agreement, Midcoast

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

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

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

On November 4, 1999, but dated "as of November 8, 1999," K–Pipe executed a Promissory Note to pay Rabobank up to $195 million on November 28, 1999, plus interest, as well as a Security and Assignment Agreement. (Gov't Exs. 148 and 149, Doc. 23). The $195 million, to be deposited into K–Pipe's account at Rabobank on November 8, 1999, was conditioned on, *inter alia*, (i) K–Pipe executing and delivering the Security and Assignment ***721** Agreement; (ii) K–Pipe, Langley, Midcoast, and Rabobank entering into an escrow agreement (the "Escrow Agreement");[4] (iii) Rabobank, as escrow agent, receiving the escrow amount equal to at least the principal ($195 million) plus all interest to be due on the advance through maturity, plus $1 million (the "Escrow Amount"); (iv) Rabobank receiving an upfront fee of $750,000; and (v) K–Pipe using the proceeds to purchase the Bishop Stock. (Gov't Ex. 148, Doc. 23). Under the Security and Assignment Agreement, K–Pipe pledged as collateral (i) the Escrow Agreement and the Escrow Amount; (ii) all of its accounts with Rabobank; (iii) all other accounts; (iv) all personal property; and (v) any proceeds of any of the collateral. (Gov't Ex. 149, Doc. 23). The Escrow Agreement was entered into by K–Pipe, as the seller, Midcoast, as the buyer, Rabobank, as the escrow agent, and Bank of America, as the lender. (Gov't Ex. 1–6, Doc. 23). Under the Escrow Agreement, Bank of America agreed to fund $198.1 million into an escrow account set up with Rabobank ("Rabobank Escrow Account # 18359"). (*Id.*). Thus, the $198.1 million loan acted as security for K–Pipe's loan from Rabobank for the purchase of the Bishop Stock.

On November 8, 1999, the stock purchase transaction closed. As noted above, Bishop changed its name to K–Pipe Group, Inc. and merged with K–Pipe Merger, with K–Pipe Group, Inc. as the surviving entity. K–Pipe Group requested, in writing, a drawdown of $123,345,000 under the Promissory Note to be credited into its Rabobank account ("K–Pipe Group Rabobank # 18313") and authorized Rabobank to debit its up-front fee of $750,000 from the account. (Stern Aff. Ex. 35 at 1160, Doc. 25). K–Pipe Group then authorized the wire transfer of $122,594,852 to Langley under the Stock Purchase Agreement. (Gov't Ex. 1–5 at ENB 317, Doc. 23).

On November 9, 1999, the asset purchase transaction closed. As contemplated by the Escrow Agreement, the following amounts were wired from Rabobank Escrow Account # 18359: (i) $112,695,895 to K–Pipe Group Rabobank # 18313 in consideration for the Bishop Assets; (ii) approximately $79 million directly to Bishop's creditors; and (iii) $6.1 million to Bank of America "for the benefit of Butcher Interest Partnership." (*See* Gov't Exs. 1–6 and 117, Doc. 23). As noted above, the Butcher Interest was a royalty interest in which Bishop had both an obligation to pay and a right to receive payment. Nevertheless, in exchange for a partnership interest and a distribution of $6.225 million, K–Pipe Group transferred the Butcher Interest to a partnership, The Butcher Interest Partnership, owned 55% by K–Pipe Group and 45% by Midcoast. (Kaitson Aff. ¶ 12, Doc. 26). Midcoast retained the option to purchase K–Pipe Group's interest, and K–Pipe Group retained the option to sell its interest. (*Id.*). On November 9, Midcoast, on behalf of the Butcher Interest Partnership, transferred $6.225 to K–Pipe Group Rabobank # 18313. Finally, K–Pipe Group received approximately $10 million from a cash reserve account held by a Bishop partnership that was released once

Midcoast paid the related Bishop debt. In total, K–Pipe Group received $128,960,431 for the sale of the Bishop Assets. (*See* Gov't Ex. 116, Doc. 23). From these funds, K–Pipe Group repaid the Rabobank loan and approximately $2 million in fees to advisors involved in the transactions, including $299,750 to LeBoeuf, Lamb, Greene & MacRae, which ***722** allegedly acted as K–Pipe's counsel on the negotiations. (*See id.*). The price differential between the stock purchased and the assets sold totaled $6,364,579, which the Government contends was K–Pipe's "fee" for the transaction.

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

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

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

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

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

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

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

> These transactions generally involve four parties: seller (X) who desires to sell stock of a corporation (T), an intermediary corporation (M), and buyer (Y) who desires to purchase the assets (and not the stock) of T. Pursuant to a plan, the parties undertake the following steps. X purports to sell the stock of T to M. T then purports to sell some or all of its assets to Y. Y claims a basis in the T assets equal to Y's purchase price. Under one version of this transaction, T is included as a member of the affiliated group that includes M, which files a consolidated return, and the group reports losses (or credits) to offset the gain (or tax) resulting from T's sale of assets. In another form of the transaction, M may be an entity that is not subject to tax, and M liquidates T (in a transaction that is not covered by § 337(b)(2) of the Internal Revenue Code or ***723** § 1.337(d)–4 of the Income Tax Regulations), resulting in no reported gain on M's sale of T's assets.
>
> Depending on the facts of the particular case, the Service may challenge the purported tax results of these transactions on several grounds, including but not limited to one of the following: (1) M is an agent for X, and consequently for tax purposes T has sold assets while T is still owned by X, (2) M is an agent for Y, and consequently for tax purposes Y has purchased the stock of T from X, or (3) the transaction is otherwise properly recharacterized (e.g., to treat X as having sold assets or to treat T as having sold assets while T is still owned by X). Alternatively, the Service may examine M's consolidated group to determine whether it may properly offset losses (or credits) against the gain (or tax) from the sale of assets.

(*See* Notice 2001–16, 2001–1 C.B. 730). PWC brought the notice to Midcoast's attention, but advised that disclosure of the Bishop transaction was unnecessary because it was not the "same or substantially similar" to the transaction described in Notice 2001–16. (*See* Robert Aff. ¶ 3, Doc. 28). According to Midcoast, the IRS subsequently broadened the meaning of "substantially similar" such that it found it found it prudent to disclose the Bishop transaction. (*See* Jordan Aff. ¶ 2, Doc. 27). Enbridge, as the successor in interest to Midcoast, finally

disclosed the transaction to the Office of Tax Shelter Analysis of the Internal Revenue Service on January 3, 2003. (*See* Disclosure Statement, Gov't Ex. 62, Doc. 23).

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

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

Midcoast paid the amounts set forth in the Notice of Deficiency under protest. (Stern Aff. Ex. 73, Doc. 25). Midcoast also paid under protest the interest associated with these amounts, $911,641. (Jordan Aff. ¶ 7, Doc. 27). Midcoast then filed a tax refund claim with the IRS. Midcoast claimed that, because it acquired assets, not stock, it was entitled to take total depreciation, alternative minimum tax ("AMT") depreciation, and amortization deductions in the amounts of $23,816,420, $22,686,331, and $1,749414, respectively, for the 2000 tax year. (*Id.* ¶ 5). Midcoast also claimed it was entitled to take total depreciation and amortization deductions on the assets in the amounts of $7,228,853 and $745,973, respectively, for the 2001 tax year. (*Id.* ¶ 8). Additionally, for the 2000 tax year, Midcoast claimed that it was entitled to a $10.75 million deduction for the cancelled PDA and a $182,138 deduction for losses from the Butcher Interest Partnership. (*Id.* ¶ 5). Finally, Midcoast stated in its refund claim that it was entitled ***724** to deduct the loss associated with the termination of the Butcher Interest Partnership in the amount of $5,775,416 for the 2001 tax year. (*Id.* ¶ 8).

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

C. *The Current Case*

On February 28, 2006, Midcoast[6] filed the current suit against the Government, seeking a refund of the total amount paid, plus interest. It claims that it purchased the Bishop Assets, not the Bishop Stock, and that the Government's characterization otherwise is erroneous.

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

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

II. Summary Judgment Standard

A party moving for summary judgment must inform the court of the basis for the motion and identify those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, that show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The substantive law governing the suit identifies the essential elements of the claims at issue and therefore indicates which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The initial burden falls on the movant to identify areas essential to the nonmovant's claim in which there is an "absence of a genuine issue of material fact." *Lincoln Gen. Ins. Co. v. Reyna*, 401 F.3d 347, 349 (5th Cir.2005). If the moving party fails to meet its initial burden, the motion must be denied, regardless of the adequacy of any response. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir.1994) (en banc). Moreover, if the party moving for summary judgment bears the burden of proof on an issue, either as a plaintiff or as a defendant asserting an affirmative defense, then that party must establish that no dispute of material fact exists regarding all of the essential elements of the claim or defense to warrant judgment in his favor.

Fontenot v. Upjohn, 780 F.2d 1190, 1194 (5th Cir.1986) (the movant with the burden of proof "must establish beyond peradventure all of the essential elements of the claim or defense to warrant judgment in his favor") (emphasis in original).

Once the movant meets its burden, the nonmovant must direct the court's attention to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial. ***725** *Celotex*, 477 U.S. at 323–24, 106 S.Ct. 2548. The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indust. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962)). Instead, the non-moving party must produce evidence upon which a jury could reasonably base a verdict in its favor. *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505; *see also DIRECTV Inc. v. Robson*, 420 F.3d 532, 536 (5th Cir.2005). To do so, the nonmovant must "go beyond the pleadings and by [its] own affidavits or by depositions, answers to interrogatories and admissions on file, designate specific facts that show there is a genuine issue for trial." *Webb v. Cardiothoracic Surgery Assoc. of North Texas, P.A.*, 139 F.3d 532, 536 (5th Cir.1998). Unsubstantiated and subjective beliefs and conclusory allegations and opinions of fact are not competent summary judgment evidence. *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir.1998); *Grimes v. Texas Dept. of Mental Health and Mental Retardation*, 102 F.3d 137, 139–40 (5th Cir.1996); *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir.1994), *cert. denied*, 513 U.S. 871, 115 S.Ct. 195, 130 L.Ed.2d 127 (1994); *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir.1992), *cert. denied*, 506 U.S. 825, 113 S.Ct. 82, 121 L.Ed.2d 46 (1992). Nor are pleadings summary judgment evidence. *Wallace v. Tex. Tech Univ.*, 80 F.3d 1042, 1046 (5th Cir.1996) (citing *Little*, 37 F.3d at 1075). The non-movant cannot discharge his burden by offering vague allegations and legal conclusions. *Salas v. Carpenter*, 980 F.2d 299, 305 (5th Cir.1992); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 889, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990). Nor is the court required by Rule 56 to sift through the record in search of evidence to support a party's opposition to summary judgment. *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir.1998) (citing *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915–16 & n.7 (5th Cir.1992)).

Nevertheless, all reasonable inferences must be drawn in favor of the non-moving party. *Matsushita*, 475 U.S. at 587–88, 106 S.Ct. 1348; *see also Reaves Brokerage Co. v. Sunbelt Fruit & Vegetable Co.*, 336 F.3d 410, 412 (5th Cir.2003). Furthermore, the party opposing a motion for summary judgment does not need to present additional evidence, but may identify genuine issues of fact extant in the summary judgment evidence produced by the moving party. *Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 198–200 (5th Cir.1988). The non-moving party may also identify evidentiary documents already in the record that establish specific facts showing the existence of a genuine issue. *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 178 (5th Cir.1990). In reviewing evidence favorable to the party opposing a motion for summary judgment, a court should be more lenient in allowing evidence that is admissible, though it may not be in admissible form. *See Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc.*, 831 F.2d 77, 80 (5th Cir.1987).

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

III. Analysis

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

It is undisputed that Midcoast wanted to own the Bishop Assets. The Government contends that there were two "direct" routes in which Midcoast could have purchased the Bishop Assets: (1) a direct asset sale, or (2) a stock sale, followed by a ***726** liquidation of Bishop. In a direct asset sale, the purchaser (Midcoast) gets a cost basis in the assets, the corporation (Bishop) is liable for the tax on the gain, and the shareholders (Langley), who receive the asset proceeds, are liable for a gain on their shares. *See* I.R.C. §§ 1001, 331, and 1012. In the stock sale/liquidation scenario, the selling shareholders (Langley) are liable for the tax on any gain in their shares, and, while the liquidation of the target (Bishop) into its acquiring parent corporation (Midcoast) will be tax free, the assets will take their historic or "carryover" basis. *See* I.R.C. §§ 1001, 332, and 334. For situations in which a buyer cannot directly purchase the assets, like where a seller mandates a stock sale, the Code authorizes certain purchasers to elect to treat the price they paid for the stock as the asset basis. *See* I.R.C. § 338. However, the election effects a deemed sale of the assets, and the corporate level tax on the deemed sale must be paid by the newly acquired target corporation. A section 338 election would, therefore, have provided less value to Midcoast had it chosen that route. Thus, there were definite tax benefits to all the parties involved in using an intermediary to purchase the stock and sell the assets. In particular, Midcoast enjoyed a substantial step up in basis

on the Bishop Assets.

[2] A key principle in tax law is that the incidence of taxation depends upon the substance of a transaction rather than its form. *See Gregory v. Helvering*, 293 U.S. 465, 469, 55 S.Ct. 266, 79 L.Ed. 596 (1935); *see also Freytag v. Comm'r*, 904 F.2d 1011, 1015 (5th Cir.1990) ("The fundamental premise underlying the Internal Revenue Code is that taxation is based upon a transaction's substance rather than its form. Thus sham transactions are not recognized for tax purposes ..."). There are numerous iterations of the substance over form doctrine, which include, in relevant part, (1) the conduit theory; (2) the step transaction doctrine, and (3) the economic substance doctrine. Here, the Government contends that under any one of the substance over form doctrines, the participation of K–Pipe should be disregarded, and Midcoast should be deemed to have purchased the Bishop Stock and to have liquidated Bishop. The court finds that the conduit theory is the most analogous to the facts in this case and applies this substance over form doctrine to affirm the Government's recharacterization of the transaction as one of stock rather than assets.

[3] [4] [5] In the conduit theory of the substance over form doctrine, the court may disregard an entity if it is a mere conduit for the real transaction at issue. As the Supreme Court stated in *Comm'r v. Court Holding Co.*, 324 U.S. 331, 65 S.Ct. 707, 89 L.Ed. 981 (1945),

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

Id. at 334, 65 S.Ct. 707 (internal citations omitted). The contours of the conduit theory are not well defined. Nevertheless, a close scrutiny of the precedent discussing conduits provides the court with guidance on when and how to apply this theory.

In *Court Holding*, an apartment house was the sole asset of a corporation. ***727** *Id.* at 332, 65 S.Ct. 707. The corporation wanted to sell this asset and had reached an oral agreement with a third party purchaser. *Id.* at 333, 65 S.Ct. 707. Before the agreement for the asset sale could be reduced to writing, the corporation's attorney informed the purchaser that the sale could not be consummated because it would result in a sizable income tax on the corporation. *Id.* Rather than consummate the sale, the corporation transferred the apartment house in the form of a liquidating dividend to the corporation's two shareholders. *Id.* The two shareholders, in turn, formally conveyed the asset to a purchaser who had originally negotiated for the purchase of the asset from the corporation. *Id.* The Supreme Court affirmed the Tax Court's conclusion that, under these facts of the entire transaction, the role of the intermediary should be disregarded and the corporation should be deemed as having sold the asset. *Id.* at 334, 65 S.Ct. 707.

The Supreme Court faced a similar situation in *United States v. Cumberland Pub. Serv. Co.*, 338 U.S. 451, 70 S.Ct. 280, 94 L.Ed. 251 (1950). In that case, the shareholders of a closely-held corporation offered to sell all the corporate stock to a local cooperative. *Id.* at 452, 70 S.Ct. 280. The cooperative refused to buy the stock, but countered with an offer to buy certain assets from the corporation. *Id.* The corporation refused, not wanting to pay the heavy capital gains tax from the asset sale transaction. *Id.* The shareholders agreed to acquire the assets as a liquidated dividend and then sell them to the cooperative. *Id.* at 452–53, 70 S.Ct. 280. The cooperative accepted, and the assets were transferred in this manner. *Id.* at 453, 70 S.Ct. 280. The corporations remaining assets were sold, and the corporation dissolved. *Id.* The Tax Court found that the sale was made by the shareholders and not the corporation, concluding that the liquidation and dissolution were genuine transactions and that at no time did the corporation plan to make the sale itself. *Id.* The Supreme Court accepted the Tax Court's finding of fact that the sale was made by the stockholders rather than the corporation. *Id.* at 455. As the Court noted, "[t]he Government's argument that the shareholders acted as a mere 'conduit' for a sale by respondent corporation must fall before this finding." *Id.*

These Supreme Court cases form the backdrop of the conduit analysis, but neither *Court Holding Co.* nor *Cumberland* deal with the same factual scenario as in this case, i.e., when a corporation sells its stock to an entity,

which turns around and sells the assets to a third party. The parties have directed the court's attention to three 5th Circuit cases addressing more analogous factual scenarios: *Davant v. Comm'r,* 366 F.2d 874 (5th Cir.1966); *Blueberry Land Co. v. Comm'r,* 361 F.2d 93 (5th Cir.1966); and *Reef Corp. v. Comm'r,* 368 F.2d 125 (5th Cir.1966). The court addresses each in turn.

In *Davant,* two corporations, Warehouse and Water, were owned by common owners, who wanted to sell the assets of Warehouse to Water and liquidate Warehouse. 366 F.2d at 877–88. The corporations' attorney, Bruce Sr., advised against the direct sale of assets because he believed that the IRS would take the position that the stockholders had received a dividend taxable at ordinary rather than capital rate. *Id.* at 878. Therefore, Bruce Sr. suggested that the stockholders make a sale of their stock to an unrelated third-party, who could, in turn, sell Warehouse's operating assets to Water and liquidate Warehouse without compromising the original stockholders' capital gain treatment. *Id.* The attorney's son, Bruce Jr., who was himself an attorney, agreed to purchase the stock and sell the assets. *Id.* Bruce Sr. contacted the bank holding the corporations' ***728** accounts and secured a loan for Bruce Jr. to purchase Warehouse. *Id.* The stock of Warehouse was the collateral for the loan, and it was understood that Water would then buy the assets Warehouse. *Id.* This money, plus part of the money that Warehouse had in its bank account, would then be used to repay the loan. *Id.* Bruce Jr. received $15,583.30 for his part in the transaction, and the Bank received one day's interest on the loan. *Id.* Bruce Jr. played almost no role in negotiating the transactions or the loan. *See id.* The taxpayers reported capital gain from the sale of the Warehouse stock; the Commissioner disregarded sale of stock to Bruce Jr., arguing that the substance of the transaction was a corporate reorganization with the taxpayers receiving dividends taxable as ordinary income to the extent of earnings and profits. *Id.* at 879. The Tax Court agreed with the Commissioner's characterization, and the Fifth Circuit affirmed. The Fifth Circuit examined and viewed the relevant portions of the Tax Code "as a functional whole" to determine that "[d]istributions of corporate funds to stockholders made with respect their stockholdings must be included in their gross income to the extent that those distributions are made out of the corporation's earnings and profits." *Id.* The 5th Circuit concluded that all the steps by the taxpayer were for the sole purpose of turning what otherwise would be a dividend taxed at the ordinary income rate into a capital gain. *Id.* at 880. It disregarded Bruce Jr.'s participation because "his presence served no legitimate nontaxavoidance business purpose." *Id.* at 881. He was, in the Tax Court's factual determination, "not a purchaser of the stock in any real sense but merely a conduct through which funds passed from Water to Warehouse and from Warehouse to [the stockholder petitioners]." *Id.* at 880.

In *Blueberry Land Co.,* the corporate taxpayers, involved in the real estate development business, owned certain mortgages and unpaid installment obligations (collectively, "Mortgages"), which they wanted to sell. 361 F.2d at 94–95. A prospective buyer for the assets was First Federal, and the parties began negotiating an asset purchase agreement. *Id.* at 95. First Federal and the taxpayers entered into such an agreement, but the agreement was later rescinded when the taxpayers' attorney advised against a direct asset sale due to the tax consequences. *Id.* at 96. Another attorney, familiar with the nature of the proposed transaction, came forward with an offer to purchase the taxpayer corporations' stock, liquidate the corporations, and sell the assets to First Federal. *Id.* at 97. The attorney formed a shell corporation, Pemrich, to complete the transaction. *Id.* According to plan, Pemrich purchased the stock, dissolved the corporations, and sold the Mortgages to First Federal. *Id.* Pemrich retained as an apparent profit $1,931.71 on the deal. *Id.* at 98. The taxpayer corporations and their stockholders "were not divorced from the transaction," as the stockholders were required to open certain savings accounts at First Federal as collateral for the transferred Mortgages. *Id.* These savings accounts represented 15% of the original sales price of the mortgaged properties. *Id.* In upholding the Tax Court's determination that Pemrich had been a mere conduit for the real obligation flowing between the taxpayer corporations and First Federal, the Fifth Circuit found that Pemrich was entirely dependent on the pre-existing negotiations between the taxpayers and First Federal and that the substance of the transaction was a sale by the taxpayers of their Mortgages, i.e., their assets. *Id.* 101–102. The Court was careful to note, however, that its opinion should not be construed as preventing or discouraging "a real and bona fide sale of stock by stockholders of one corporation to a second ***729** corporation, and liquidation of the first by the acquiring corporation to obtain its assets." *Id.* at 102. The key is the transaction must be substantively real and bona fide. The tension between legitimate and sham transactions is reflected in the Fifth Circuit's following comments in the case:

> We have said many times, and we here reiterate, that one may not only lawfully yearn for tax savings, but he may utilize and exploit every available legitimate means of arranging his affairs to achieve this end. Thus Taxpayers and their stockholders were entitled to avail themselves of the sale of stock method of disposing of

> Taxpayers if they so chose. But the stumbling block here is that First Federal, which throughout this transaction was the only party actually interested in obtaining Taxpayers' mortgages, could not—and hence would not—itself purchase Taxpayers' stock from the stockholders, because of restrictions on the types of investments open to it. This made necessary the use of an intermediary, which would purchase all of Taxpayers' stock, liquidate Taxpayers into it and thereby obtain their assets (principally the mortgages), and then sell the mortgages to First Federal.
>
> This plan certainly presents a legitimate method whereby the stockholders of one corporation can dispose of their stock to a second corporation, which in turn liquidates, and sells the assets of, the acquired corporation. If this actually takes place, a transaction conducted in this way would be upheld and given effect for Federal income tax purposes. But the question here is not whether a plan of this type is valid or invalid. The question rather is whether under the circumstances of this case, the plan was really what it purported to be. Stated another way, the issue is whether in substance the transaction was as formally cast by the parties; and if not, whether the form, or the substance, should control for tax purposes.
>
> We must take guard against oversimplification, for a glib generalization that substance rather than form is determinative of tax consequences not only would be of little assistance in deciding troublesome tax cases, but also would be incorrect. The fact—at least the tax world fact—is that in numerous situations the form by which a transaction is effected does influence and may indeed decisively control the tax consequences. This generalization does, however, reflect the fact that courts will, and do, look beyond the superficial formalities of a transaction to determine the proper tax treatment.

Id. at 100–101.

Finally, in *Reef Corp.*, one of the issues to be determined was whether the taxpayer was entitled to a stepped-up basis in assets acquired in a transaction involving an intermediary. *See* 368 F.2d at 127–30. There, two shareholder groups owned the taxpayer corporation, Reef Fields Gasoline Corporation ("Reef Fields"). *Id.* at 128. One group, the Butler group, decided to buy out the other, the Favrot group. *Id.* One plan that was formulated involved the liquidation of Reef Fields, which would sell its operating assets to a new corporation to be formed in exchange for cash and notes. *Id.* The Favrot group would receive cash and notes while the Butler group would receive only notes. *Id.* The Butler group rejected this plan after learning it would have to pay taxes on the gain and would not be receiving the cash to pay the taxes. *Id.* Thus, the parties agreed to and executed a new plan. *Id.* The Butler group formed another corporation, Reef Corporation ("New Reef"), and received all of the common stock of New Reef in exchange for a portion of their stock in Reef Fields. *Id.* On the same day, Reef Fields contracted ***730** to sell its properties to New Reef, but before the sale of the properties, and in accordance with a pre-arranged plan, all of the stock of Reef Fields was sold to an intermediary, who was to carry out the sale of the assets of Reef Fields to New Reef with New Reef giving promissory notes to Reef Fields as consideration. *Id.* Reef Fields distributed the promissory notes to the intermediary, an attorney named George Strong ("Strong") with a business connection to the Favrot group, and Strong pledged the notes to Butler group, Favrot group, and New Reef for the stock they sold to him. *Id.* In affirming the Tax Court's decision to disregard the sale of Reef Fields to Strong, the Fifth Circuit stated as follows:

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

Id. at 130.

[6] All of these cases turn on the trial court's particular findings of fact, which requires examining the transaction as a whole to determine whether it is bona fide. Several facts stand out as particularly relevant and include (1) whether there was an agreement between the principals to do a transaction before the intermediary participated; (2) whether the intermediary was an independent actor; (3) whether the intermediary assumed any risk; (4) whether the intermediary was brought into the transaction at the

behest of the taxpayer; and (5) whether there was a nontax-avoidance business purpose to the intermediary's participation. Many of these facts are present in this case and weigh in favor of declaring K–Pipe a mere conduit in the transaction.

Although there was not a formal agreement between Langley and Midcoast regarding the stock sale, the evidence reflects that K–Pipe was able to facilitate that agreement by acting as an intermediary. Midcoast goes to great lengths to distance itself from Fortrend and K–Pipe in order to infuse legitimacy into the intermediary transaction. However, the undisputed facts reveal that it was Midcoast's tax advisors, PWC, who brought Fortrend into the picture and helped to structure the Midco transaction. Ultimately, Fortrend's participation was far less fortuitous than Midcoast intimates. Moreover, there is no objective evidence in the record that K–Pipe negotiated the stock sale at all. All of the communications involved Midcoast, and it was at the insistence of Midcoast's tax advisors that certain actions be undertaken, such as the agreement not to liquidate Bishop for two years and the formation of the Butcher Interest Partnership to add "good facts" to the transaction. Additionally, K–Pipe's obligations were almost entirely indemnified by Midcoast through various side agreements and under the Stock and Asset Purchase Agreements. It was Midcoast's loan that acted as security for the $195 million, which K–Pipe borrowed. K–Pipe, having been created for the purposes of this transaction, could not have provided any assets as security. After the transaction, K–Pipe engaged in virtually no business activity and was, in substance, a mere shell. Finally, K–Pipe's sole purpose in participating in the transaction was to allow Midcoast to step up the basis of the Bishop Assets. Under the facts of this case, the court ***731** finds that K–Pipe's role in the transaction should be disregarded.

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

B. *The Butcher Interest*

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

[9] To determine whether the Butcher Interest Partnership was a sham, the court must examine whether entering into the partnership had economic substance. *See Merryman v. Comm'r*, 873 F.2d 879, 881 (5th Cir.1989) ("transactions which have no economic purpose or substance other than the creation of income tax losses or credits are to be disregarded for tax purposes"). The court must examine the objective realities of the transaction in resolving whether economic substance is present. *See id.* "Where ... there is a genuine multiple-party transaction with economic substance which is compelled or encouraged by business or regulatory realities, is imbued with tax independent considerations, and is not shaped solely by tax-avoidance features that have meaningless labels attached, the Government should honor the allocation." *Id.* (quoting *Frank Lyon Co. v. United States*, 435 U.S. 561, 583–84, 98 S.Ct. 1291, 55 L.Ed.2d 550 (1978)). Here, the court finds that K–Pipe and Midcoast entered the Butcher Interest Partnership solely for the purpose of tax avoidance. The Butcher Interest Partnership was a part of a preconceived plan to provide "good facts" to K–Pipe's participation and disguise the true nature of the Midco transaction. The court is not persuaded that the Bishop Interest had any inherent value to Midcoast other than as a means to bolster its tax position. The court finds, therefore, that the Butcher Interest Partnership was a sham and that Midcoast is not entitled to any deductions relating thereto.

C. *The PDA*

Midcoast is claiming that it is entitled to deduct the entire $10.75 million relating to the terminated Project Development Agreement as an ordinary and necessary business expense under I.R.C § 162. The Government contends that the $10.75 million was, like the $3 million, additional consideration paid for the Bishop stock. The

court finds that the facts support the Government's position and holds that Midcoast is not entitled to an additional deduction for this amount.

***732** D. *The I.R.C. § 6662 Penalty*

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

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

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

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

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

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

immunize Midcoast from the 20 percent penalty assessed by the Government.

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

IV. Conclusion

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

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

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

All Citations

553 F.Supp.2d 716, 101 A.F.T.R.2d 2008-1733, 2008-1 USTC P 50,266, 171 Oil & Gas Rep. 537

Footnotes

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

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

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

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

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

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

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

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

EXHIBIT 26

T.C. Memo. 2016-119
United States Tax Court.

Estate of Richard L. Marshall, Deceased, Patsy L. Marshall, Personal Representative, and Patsy L. Marshall, Transferees, et al.,[1] Petitioners
v.
Commissioner of Internal Revenue, Respondent

Docket Nos. 27241-11
|
28661-11
|
28782-11
|
Filed June 20, 2016.

1 Cases of the following petitioners are consolidated herewith: Marshall Associated, LLC, Transferee, docket No. 28661-11; and John M. Marshall and Karen M. Marshall, Transferees, docket No. 28782-11.

Synopsis
Background: Related taxpayers who formerly owned C corporation, and their limited liability company (LLC), petitioned for review of IRS determination that taxpayers and LLC were liable as transferees for corporation's income-tax liability.

Holdings: The Tax Court, Goeke, J., held that:

[1] taxpayers had constructive knowledge of transfers that left their former C corporation unable to pay taxes;

[2] C corporation's transfer of over $33.7 million in exchange for taxpayers' stock was fraudulent as to IRS under Oregon Uniform Fraudulent Transfer Act (OUFTA);

[3] C corporation's fraudulent transfer had no economic effects other than the creation of a loss for corporation.

Decision for IRS.

Attorneys and Law Firms

Robert J. Chicoine, Christopher R. Chicoine, and David B. Bukey, for petitioners.

Melanie E. Senick, William D. Richard, Patsy A. Clarke, and Gregory Michael Hahn, for respondent.

[*2] MEMORANDUM FINDINGS OF FACT AND OPINION

GOEKE, Judge:

***1** In these three consolidated transferee liability cases the Government seeks to collect from petitioners, as transferees, Federal income tax of $15,482,046 and a penalty of $6,192,818 assessed against First Associated Contractors, Inc., formerly known as Marshall Associated Contractors, Inc. (MAC), for its fiscal year ending (FYE) March 31, 2003.[2] On March 7, 2003, MAC entered into a complex set of agreements which resulted in all or substantially all of its assets' being transferred to Richard Marshall (Richard), Patsy Marshall (Patsy), John Marshall (John), and Karen Marshall (Karen) (collectively Marshalls) and Marshall Associated, LLC (MA LLC), an Oregon limited liability company wholly owned by the Marshalls (MAC transaction).

2 All dollar amounts are rounded to the nearest dollar.

The issue for decision is whether petitioners are liable as transferees under section 6901 for MAC's unpaid Federal income tax liability, penalty, and interest.[3] For the reasons stated herein, we find that petitioners are liable.

3 Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the year in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

[*3] FINDINGS OF FACT

The Marshalls were residents of Oregon at the time they filed petitions, and MA LLC's principal place of business was in Oregon at all relevant times. Richard, Patsy, John, and Karen each owned 25% of MAC. MAC was

incorporated in 1965 under the laws of the State of Oregon as a C corporation, where it also had its principal place of business. John and Richard were brothers. Richard and Patsy were married, as were John and Karen, for all relevant periods. Richard Marshall died on October 29, 2013.

Beginning in 1965 MAC operated as a construction contractor specializing in heavy construction, including sewer and water pipe installation. Richard was responsible for MAC's business operations. His duties included managing MAC's finances and doing most of MAC's bidding on construction projects. John was responsible for MAC's field operations. His duties included assembling crews for MAC's construction projects and overseeing the construction worksites.

U.S. Bureau of Reclamation Work and Subsequent Litigation

In 1982 MAC entered into a contract with the U.S. Bureau of Reclamation (US BOR) to supply approximately 1,061,400 cubic yards of sand and coarse aggregate for the construction of the Upper Stillwater Dam in central Utah (Stillwater project), which MAC completed. Construction of the dam was to begin [*4] in 1983. In or about 1983 MAC entered into a contract with the US BOR to build a two-lane road in the mountains near Thistle, Utah (Sheep Creek project). In 1984 Union Bank of California (UBOC) lent $2 million to MAC for the Stillwater project. Richard and John personally guaranteed the UBOC loan to MAC.

A contract dispute arose regarding the Stillwater project and the contract was terminated. MAC filed a claim for equitable adjustment, which was denied, and subsequently appealed in 1984 (Stillwater appeal). Another contract dispute arose regarding the Sheep Creek project, and MAC subsequently filed a claim for additional compensation in 1984 following completion of the project. This claim was also denied, and MAC appealed (Sheep Creek appeal). The Marshalls and US BOR agreed to resolve the Stillwater appeal before addressing the Sheep Creek appeal.

***2** In 1999 Richard suffered a stroke that left him with hemiparalysis, difficulty moving one side of his body; and expressive aphasia, difficulty expressing himself using spoken language. After his stroke Richard was unable to speak, but "his memory and understanding [were] good." Dr. Ellen Mayock, Richard's treating physician, does not know what Richard understood or did not understand because he was unable to tell her what he could understand. Richard relied on his family [*5] and on his legal advisers with respect to the MAC transaction. Richard's answer to the question of whether he wanted to sell his MAC stock would reflect his intention to sell. John represented to third parties that after the stroke Richard "could not communicate very well but could understand what was going on."

After Richard's stroke, John took over Richard's responsibilities at MAC, including maintenance of MAC's books and records. MAC wound down its contracting business and had not contracted on any construction jobs since 2000. MAC shifted its primary focus to the pursuit of the Stillwater appeal. MAC's only business activity after 2000 was the rental of its heavy equipment and its land.

On March 22, 2002, the Department of the Interior Board of Contract Appeals ruled in favor of MAC in the Stillwater appeal. On May 16, 2002, MAC received a $40,033,130 litigation award from US BOR, which represented contract damages and interest for the Stillwater appeal (Stillwater litigation award). On August 2 and October 9, 2002, MAC received additional interest payments on the Stillwater litigation award of $265,743 and $556,005, respectively. The total amount of MAC's Stillwater litigation award, with interest, was $40,854,878, all of which MAC received during its FYE March 31, 2003.

[*6] Following receipt of the Stillwater litigation award, MAC made estimated tax payments of $889,990 to the State of Oregon and $3,825,000 to the Internal Revenue Service (IRS) for its FYE March 31, 2003.

MAC and the Marshalls' Search for a Solution to the Tax Problem

In anticipation of MAC's receipt of the Stillwater litigation award, John sought help from John Dempsey and Michael Weber at PricewaterhouseCoopers (PwC). Mr. Dempsey was a senior manager at PwC in Portland, Oregon, and Mr. Weber was one of the partners that oversaw Mr. Dempsey.

Mr. Dempsey and Mr. Weber oversaw the preparation of the Marshalls' personal income tax returns, including those for taxable year 2003, and Mr. Weber signed them as the preparer. In anticipation of the Stillwater litigation award, John asked PwC to find out what liability MAC and the Marshalls would incur and whether there were any strategies that could help the Marshalls shelter some of the gain from the Stillwater litigation award.

Through consultations with PwC, the Marshalls

considered a liquidation of MAC, an S corporation election for MAC, refreshing MAC's expired net operating losses (NOLs), and a sale of their MAC stock in 2002. The Marshalls decided not to pursue any of the tax planning options that Mr. Dempsey and Mr. [*7] Weber recommended because John Marshall was uncomfortable with PwC's recommendations.

Peachtree Financial

John's insurance agent, Kenneth Evanson, introduced the Marshalls to Peachtree Financial. Peachtree Financial proposed to purchase the Marshalls' MAC stock in an installment sale. The Marshalls evaluated and rejected Peachtree Financial's proposal to purchase their MAC stock because they would lose control over their money.

Through Peachtree Financial, John was introduced to Fortrend International, Inc. (Fortrend). Peachtree Financial received a $306,000 referral fee for introducing John to Fortrend. Initially, John communicated and negotiated directly with representatives of Fortrend and represented the other MAC shareholders in his communications with Fortrend.

Fortrend

***3** In a letter to John dated October 15, 2002, Steve Irgang of Fortrend represented that Fortrend "specializes in structuring transactions to solve specific corporate tax problems." A Fortrend promotional brochure that Mr. Irgang transmitted to John represented that "[c]lients of Fortrend have benefitted from our ability to structure transactions that minimize shareholder and corporate [*8] liabilities." On October 22, 2002, John had a telephone conference with Mr. Irgang, Jeffrey Furman of Fortrend, Howard Kramer of Fortrend, Michael Bittner, a return preparer for Fortrend, Charles Klink, a lawyer representing Fortrend, and Mr. Dempsey.

On October 28, 2002, Alice Dill of Fortrend sent John, as representative of the MAC shareholders, a letter of intent to purchase the Marshalls' MAC stock. The letter of intent was from Essex Solutions, Inc. (Essex), signed by its president, Richard Leslie. On January 31, 2003, the shareholders of Essex were Willow Investment Trust (Willow) and MidCoast Credit Corp. (MidCoast). As of April 10, 2003, Essex was wholly owned by Willow. The Essex letter of intent reflected that $4,700,000 of the purchase price would consist of a promissory note "secured by tax refunds".

John reviewed and marked up the Essex letter of intent. On November 8, 2002, Randy Bae of Fortrend sent an email to John regarding "acquisition of Marshall Associated Contractors, Inc." with an attachment "illustrating the buyer's calculation of the stock purchase price." As proposed, the stock purchase price would be determined by taking the net value of the company after taxes and adding 50% of MAC's tax liability, resulting in an amount greater than the net asset value of the company. John himself calculated a "scenario sale" purchase [*9] price and the split of MAC's tax liability between the Marshalls and Essex. John mulled over the Essex letter of intent for several weeks before deciding that he wanted the Marshalls to sell their MAC stock.

The Marshalls' Search for Advice

The Marshalls engaged PwC and the law firm of Schwabe Williamson & Wyatt (Schwabe) to advise them in connection with the Essex letter of intent. John interacted with Schwabe and PwC on behalf of Richard, Patsy, and Karen.

In late October 2002 John brought the Essex letter of intent to Mr. Dempsey and Mr. Weber of PwC. Both Mr. Dempsey and Mr. Weber had significant tax experience. Mr. Dempsey prepared a spreadsheet comparing the net cash after taxes that the Marshalls would receive in a liquidation of MAC versus a stock sale pursuant to the terms of the Essex letter of intent. Mr. Dempsey concluded that the Marshalls would receive approximately $6,800,000 more in net proceeds if they sold their MAC stock than if they liquidated MAC.

At the time that the Marshalls received the Essex letter of intent, MAC's assets consisted of: (i) an office and construction shop on 11 acres of land and heavy machinery and equipment, with a combined value of $2,776,500; (ii) an interest in Pearl Condo, LLC, valued at $4 million; (iii) $34,500,000 in cash; (iv) the Stillwater Equal Access to Justice claim for attorney's fees (Stillwater EAJA [*10] claim) and the Sheep Creek appeal with projected future proceeds of $2,897,500; (v) $3,825,000 in prepaid Federal tax; and (vi) $889,990 in prepaid Oregon State taxes. MAC's liabilities consisted of: (i) $4,433,866 to UBOC (UBOC liability); (ii) $500,000 to Mr. Jochim (Jochim liability); and (iii) Federal and State taxes for its FYE March 31, 2003, due on the Stillwater litigation award.

Schwabe

In late November 2002 John took the Essex letter of intent to Schwabe. Schwabe had been the Marshalls' long-time

legal advisers. They represented the Marshalls in the MAC transaction in their capacity as shareholders but did not represent MAC in the MAC transaction. The Marshalls relied on Schwabe to advise and represent them in the MAC transaction. Mitchell Hornecker was a business lawyer and the lead attorney at Schwabe representing the Marshalls with respect to the MAC transaction. Also involved in the MAC transaction for Schwabe were Kevin Kerstiens, Craig Russillo, Alan Pasternack, and Deric Luoto. John met with Mr. Hornecker on November 20, 2002, to discuss the Essex letter of intent. At the November 20, 2002, meeting, John told Mr. Hornecker that the purchase price was the value of the stock plus half of MAC's tax liability and that Essex was splitting the tax benefit with the Marshalls.

***4** [*11] John was planning on developing MAC's 11 acres of land. He also intended to stay in the construction business and was considering starting a new construction company. John informed Mr. Hornecker that the Marshalls wanted to keep MAC's 11 acres of land, MAC's interest in Pearl Condo, LLC, MAC's heavy machinery and equipment, and control over the remaining US BOR litigation.

Essex proposed to use the cash in MAC's bank account to pay the purchase price for the MAC stock to the Marshalls. This caused Schwabe some concern. Mr. Hornecker was concerned that MAC could be pulled into bankruptcy if Essex used MAC's cash to pay the purchase price to the Marshalls. Mr. Russillo stated to Mr. Hornecker and Mr. Kerstiens on November 24, 2002, that "there is the possibility that the proposed stock sale can be attacked by the [bankruptcy] trustee as a fraudulent transaction under 11 USC 548" and concluded that "[i]f Essex is paying FMV for the stock, and has no intent to defraud any of its creditors, I think we're ok."

Mr. Kramer of Fortrend provided two references to Mr. Hornecker. The "nuts and bolts" of Schwabe's due diligence was done by Schwabe associates and Mr. Luoto, so Mr. Hornecker did not contact the references. Schwabe only conducted database and Internet research on Essex and Fortrend. Despite the "sketchy information" that Schwabe uncovered about related Fortrend entities' tax [*12] noncompliance, Schwabe did not inquire about Fortrend's past deals. They also researched transferee liability and communicated to the Marshalls that if Essex took steps to render MAC unable to pay its tax liability, the IRS could pursue transferee liability against the Marshalls.

Schwabe had concerns regarding whether the buyer was going to defraud creditors and carefully structured the transaction to try to avoid any potential problems with that. Because of Schwabe's concern about transferee liability, Mr. Pasternack was asked to research the issue and prepare a memorandum. After extensive research, Mr. Pasternack concluded in his "Transferee Liability" memorandum that "the selling Marshall shareholders would likely be considered transferees of * * * [MAC's] property" with respect to the partial redemption and that "if Essex took steps that rendered * * * [MAC] unable to pay tax liabilities existing at the time of the redemption and the stock sale, there could be a basis for the IRS to seek to impose transferee liability on the selling shareholders" with respect to the stock sale. Mr. Hornecker discussed the risk of transferee liability with the Marshalls after Mr. Hornecker reviewed Mr. Pasternack's "Transferee Liability" memorandum and before the MAC transaction closed.

The Marshalls decided to sell their MAC stock in the MAC transaction under the negotiated terms despite being advised of the risks of the MAC [*13] transaction by Schwabe. Mr. Hornecker provided the Marshalls with a followup letter dated April 24, 2003, which was after the MAC transaction closed. It did not contain any legal analysis and was intended "to remind [the Marshalls] of a few of the more significant issues arising from these transactions."

PricewaterhouseCoopers

After gathering information and conducting an analysis of the stock sale proposed by the Essex letter of intent, Mr. Dempsey became concerned about Fortrend's plan to offset MAC's income with its losses because it was similar to a listed transaction. Mr. Dempsey discussed his concerns about the proposed stock sale with Mr. Weber, who expressed similar concerns. Mr. Weber thought the MAC transaction seemed inconsistent with other transactions in which he had been involved. Mr. Weber was concerned because Fortrend had used transactions like the proposed stock sale in the past to shelter income and avoid taxes. Mr. Weber and Mr. Dempsey contacted PwC's national office to obtain advice.

***5** Dan Mendelson was a national partner in PwC's tax quality and risk management (QRM) group in 2002 and 2003. He assessed transactions that other PwC personnel were uncomfortable with or were concerned could be listed transactions to determine whether PwC could remain involved. PwC's QRM group assessed PwC's compliance with IRS regulations to reduce the risk of [*14] noncompliance and penalties' being imposed on PwC and PwC employees, among other things. Mr. Mendelson advised Mr. Dempsey and Mr. Weber that

PwC should not consult or advise on the proposed stock sale. PwC concluded that the stock sale proposed by Essex was similar to a listed transaction and that it could not consult or advise on the proposed stock sale any further.

When Mr. Weber and Mr. Dempsey spoke with John about their concerns regarding the proposed stock sale, they were "trying to convey absolute concern over the transaction and the chances that it could be challenged by the IRS" to John. Mr. Dempsey and Mr. Weber told John before March 7, 2003, that the proposed stock sale was similar to a listed transaction, explained to John what a listed transaction was, and tried to discourage John from entering into the proposed stock sale. After advising John not to do the proposed stock sale, Mr. Weber thought that John understood the risks, including the risks associated with losing control over MAC. John's response to Mr. Weber's and Mr. Dempsey's warnings about the proposed stock sale was silence. After the MAC transaction closed on March 7, 2003, but before the Marshalls' personal returns were filed in October 2004, Mr. Weber and Mr. Dempsey informed John that the MAC transaction was similar to a listed transaction and would need to be disclosed on petitioners' returns.

[*15] Mr. Dempsey informed John in person that PwC could not consult or advise on the proposed stock sale, which meant PwC could not be involved in discussions or negotiations with Fortrend regarding it. MAC did not remain a client of PwC although the Marshalls did remain clients. PwC provided services with respect to the preparation of the Marshalls' Forms 1040, U.S. Individual Income Tax Return. PwC still needed to determine the net cash that the Marshalls would receive from the MAC transaction so that PwC could compute their estimated tax and prepare their Forms 1040.

After PwC warned John about the proposed stock sale, Fortrend learned of PwC's concerns that the stock sale proposed by the Essex letter of intent was similar to a listed transaction. Fortrend's Mr. Kramer and Mr. Bernstein of Midcoast telephoned Mr. Dempsey to try to persuade him that it was not similar to a listed transaction. The telephone call from Mr. Kramer and Mr. Bernstein did not alleviate Mr. Dempsey's concerns about the proposed stock sale. In January 2003, MidCoast sent the Marshalls, PwC, and Schwabe letters and promotional materials that represented that their tax strategy was "not the same as, or substantially similar to, the tax strategy contained in Notice 2001-16."

[*16] Carrying Out the Transaction

Utrecht-America Finance Co. (UAFC) was a Delaware company and subsidiary of Utrecht-America Holdings, which was a U.S. subsidiary of Rabobank Nederland (Rabobank). Rabobank provided financing to Fortrend to purchase corporations in transactions similar to the MAC transaction. Before Rabobank would fund a loan to Fortrend, it required security interest agreements in place securing the loan with the corporation's assets to allow Fortrend's use of the loan proceeds to acquire the corporation's stock. Once Fortrend had title to the corporation, the corporation's cash would be used to pay off the Rabobank loan. Rabobank typically analyzed audited financials during its credit check process. Rabobank did not conduct a credit analysis if the corporation had sufficient cash to repay Rabobank's loan to the buyer.

***6** On or about January 28, 2003, John executed a revised Essex letter of intent as the director of MAC (final Essex letter of intent). On January 30, 2003, Cruz Alderete executed the final Essex letter of intent as the president of Essex.[4] The final Essex letter of intent reflected that the purchase price for the Marshalls' MAC stock was to be calculated as follows:

> [*17] An amount equal to (i) four million three hundred thousand dollars ($4,300,000) plus (ii) (A) one hundred percent (100%) of the Company's cash at Closing minus (B) forty percent (40%) of the tax liability of the Company as of the Closing based on the balance sheet of the Company, dated October 21, 2002, as amended.

[4] It is unclear when or why Mr. Alderete replaced Mr. Leslie as president of Essex.

The $4,300,000 amount in the final Essex letter of intent represented a discounted value for MAC's prepaid Federal and State taxes, which equaled $4,714,990. Initially, Essex proposed to pay the Marshalls 50% of MAC's tax liability as a premium over MAC's net asset value. Mr. Hornecker was able to negotiate the percentage of MAC's tax liability that would be paid as a premium to the Marshalls up to 60%. The purchase price for the Marshalls' MAC stock was calculated as follows:

Total tax liabilities	$15,896,215 ($2,670,273 + $13,225,942)
40% of total taxes	$6,358,486 (premium)
Cash at Rabobank	$19,912,952 ($26,271,438 - 6,358,486)
Credit for prepaid tax	$4,300,000
Purchase price	$24,212,952

The MAC redemption and stock sale were effected by the closing of both the partial redemption agreement and the stock purchase agreement, which were integrated agreements. Under the partial redemption agreement the shareholders of MAC would receive assets worth $6,766,500, constituting all of MAC's assets other than MAC's cash, the future litigation proceeds, and its prepaid income tax, for approximately 18% of MAC shares.

[*18] The stock purchase agreement required MAC to "not [be] engaged in any material business or material business activity" and to have as its "sole assets" $26,271,438 in cash and the remaining US BOR litigation. On or about January 30, 2003, the Marshalls formed MA LLC, an Oregon limited liability company, taxable as a partnership. MA LLC had four equal members: John, Richard, Karen, and Patsy, with John and Richard as the managers. MA LLC was formed to put MAC's land and equipment and the Pearl Gateway Condo into an entity. Once MAC's land, equipment, and other noncash assets were held by MA LLC on March 7, 2003, MAC's only assets were the $26,271,438 in its Rabobank account No. 1345, its estimated tax payments, and the remaining US BOR litigation claim.

The stock purchase agreement required MAC to establish an account at Rabobank and deposit $26,271,438 in cash into this Rabobank account as a condition to closing. On February 18, 2003, Ms. Dill transmitted forms for a new Rabobank account for MAC to Mr. Hornecker, which John executed on February 20, 2003.

At the insistence of Fortrend, MAC opened Rabobank account No. 1345 on February 20, 2003. On March 3, 2003, MAC wired $80,259 and $25,982,847 into its new Rabobank account No. 1345. On March 4, 2003, MAC wired $208,332 into its Rabobank account No. 1345. As of March 4, 2003, the balance in MAC's [*19] Rabobank account No. 1345 was $26,271,438. As of March 4, 2003, all of MAC's cash was on deposit in its new Rabobank account No. 1345. On February 20, 2003, Essex opened Rabobank account No. 1336. On March 6, 2003, Mr. Alderete executed Rabobank account forms for MAC's Rabobank account No. 1345 as the president of MAC.

***7** Rabobank did not require Essex or MAC to submit audited financials because MAC's cash on deposit at Rabobank would be sufficient to pay off Essex's loan. The loan to Essex was short term because MAC had sufficient cash to pay Essex's loan, MAC's Rabobank account No. 1345 was pledged to repay Essex's loan, and Rabobank would have a security interest in MAC's Rabobank account No. 1345. In a Rabobank "Credit Report dated February 7, 2003," Chris Kortlandt, the vice president of Rabobank's Structured Finance Department in 2003, stated that the stock sale was referred to Rabobank by Fortrend and that there would be a

> [p]ledge of the accounts (at Rabobank) of our borrower, Essex Solutions, and its newly acquired subsidiary, Marshall [MAC]. Marshall [MAC] will hold cash balances of $31mm [million] in an account at Rabobank (pledged to us).
>
> At closing, Marshall [MAC] guarantees Essex Solutions obligations under the loan, which guarantee will be secured by Marshall [MAC] cash accounts held

at Rabobank.

[*20] The credit report also stated that: (1) even though the loan was to be provided up to 30 days, "it is expected to be repaid within 2 business days"; (2) "[w]e will receive irrevocable payment instructions to transfer the total cash balance ($31mm) from the * * * [MAC account] to * * * [Essex's account] held at Rabobank, which funds will be used as repayment for our loan"; and (3) "the loan will be cash collateralized."

Rabobank's loan to Essex was low risk for nonrepayment because it was cash collateralized by MAC's cash in Rabobank account No. 1345, MAC guaranteed the loan, and Rabobank had a security interest in MAC's Rabobank account No. 1345 and Essex's Rabobank account No. 1336.

Mr. Alderete, as president of Essex, executed a promissory note in the amount of $30 million payable to UAFC dated as of March 6, 2003 (promissory note). The promissory note was explicit in stating that the advanced funds were to be used to acquire the MAC stock and that Essex's loan would not be funded until Essex and MAC had on deposit in their respective Rabobank accounts the principal amount of the loan plus $1 million. The balances in MAC's Rabobank account No. 1345 and Essex's Rabobank account No. 1336 would at all times exceed the outstanding balance of Essex's loan and the interest and fees due on the loan.

[*21] A control agreement among Essex as the grantor, UAFC, and Rabobank dated as of March 6, 2003, was executed by Mr. Alderete, as president of Essex (Essex control agreement). The Essex control agreement gave UAFC control over all cash, instruments, and financial assets, Essex's Rabobank account No. 1336, and all security entitlements.

A guaranty by MAC, the guarantor, in favor of UAFC dated as of March 6, 2003, was executed by Mr. Alderete as president of MAC (MAC guaranty). Pursuant to the MAC guaranty, MAC unconditionally guaranteed the punctual payment of all of Essex's obligations and liabilities to UAFC and granted UAFC the right to offset MAC's Rabobank account No. 1345 to satisfy Essex's obligations and liabilities. Essex's loan from Rabobank was conditional upon the MAC guaranty. A security and assignment agreement by MAC as the guarantor in favor of UAFC dated as of March 6, 2003, was executed by Mr. Alderete as president of MAC (MAC security agreement). Pursuant to the terms of the MAC security agreement, MAC granted UAFC a first priority security interest in MAC's Rabobank account No. 1345 to secure the obligations of MAC, under the MAC guaranty, to UAFC.

A control agreement among MAC as the grantor, UAFC, and Rabobank dated as of March 6, 2003, was executed by Mr. Alderete as president of MAC [*22] (MAC control agreement). The MAC control agreement gave UAFC control over MAC's Rabobank account No. 1345, all cash, instruments, and financial assets contained, and all security entitlements. Rabobank and UAFC required the MAC guaranty, the MAC security agreement, and the MAC control agreement to be executed before Essex's loan would be funded. The MAC guaranty, the MAC security agreement, and the MAC control agreement became effective simultaneously with the closing of the stock sale.

Transaction

***8** On March 7, 2003, pursuant to the partial redemption agreement, MAC redeemed 180 shares of capital stock from each of the Marshalls in exchange for $1,691,625 worth of MAC's noncash tangible assets, for a total of $6,766,500. MAC's noncash tangible assets consisted of heavy equipment, shop equipment and tools, office electronics, machinery, vehicles, trailers, leases, the 11 acres of land where MAC maintained its office, and MAC's interest in Pearl Condo, LLC. In connection with the partial redemption, MAC conveyed its noncash tangible assets to MA LLC on March 7, 2003, at the direction of the MAC shareholders.

On March 7, 2003, pursuant to the future litigation proceeds agreement entered into by petitioners and Essex, MAC transferred its rights to 80.35% of the Sheep Creek appeal proceeds and 100% of the Stillwater EAJA claim proceeds [*23] with a combined value of $2,544,480 to the Marshalls. The Marshalls purportedly sold their remaining MAC stock to Essex. On the same day, the stock sale closed and, pursuant to the stock purchase agreement, the Marshalls assumed MAC's nontax liabilities, which consisted of the $4,433,866 UBOC liability and the $500,000 Jochim liability.

On March 7, 2003, Essex's account No. 1336 at Rabobank was credited with $30 million, which represented a draw under the loan agreement with UAFC. Immediately before the stock sale, Essex's sole asset was the $30 million in UAFC loan proceeds and its sole liability was the $30 million UAFC loan payable. Pursuant to the stock purchase agreement, Essex wired $24,410,000 from its Rabobank account No. 1336 to MA LLC's USBanCorp Piper Jaffray account No. 5091 at the direction of the Marshalls and wired $200,000 to Schwabe's trust account. Pursuant to the stock purchase agreement, the Marshalls conveyed their outstanding

shares of MAC to Essex.

On March 7, 2003, funds of $25 million were transferred from MAC's Rabobank account No. 1345 to Essex's Rabobank account No. 1336. Essex paid MAC a $150,000 guaranty fee. At the end of the day on March 7, 2003, after taking into account MAC's transfer of $25 million from its Rabobank account No. 1345 to Essex's Rabobank account No. 1336 and MAC's receipt of the $150,000 [*24] guaranty fee from Essex, the balance in MAC's Rabobank account No. 1345 was $1,421,438.01. On March 7, 2003, Essex's Rabobank account No. 1336 was debited in the amount of $30 million to repay the $30 million loan due to UAFC. Essex's loan was drawn down and repaid on the same day. Essex paid a $100,000 upfront fee to UAFC.

At the end of the day on March 7, 2003, after taking into account Essex's repayment of its loan, payment of the $150,000 guaranty fee to MAC, and payment of the $100,000 upfront fee to UAFC, the balance in Essex's Rabobank account No. 1336 was $139,600. On March 7, 2003, Schwabe received notification from UAFC that the Essex loan had been repaid and Schwabe returned the $200,000 to Essex on March 7, 2003. On March 13, 2003, MA LLC transferred funds of $10,705,173 from its USBanCorp Piper Jaffray account No. 5091 to Richard and Patsy's joint USBanCorp Piper Jaffray account No. 7198. MA LLC also transferred funds of $10,705,173 from its USBanCorp Piper Jaffray account No. 5091 to John and Karen's joint USBanCorp Piper Jaffray account No. 5089.

Before the MAC transaction, MAC had $40,650,877 in assets and $20,830,081 in liabilities and the net asset value of the MAC stock was $19,820,796. At the time the Marshalls assumed the UBOC liability and the [*25] Jochim liability, MAC's remaining liabilities consisted of Federal and State income tax liabilities totaling $15,896,215 for its FYE March 31, 2003. The Marshalls received $24,410,400 as the purchase price for their MAC stock.

Postclosing Activities

***9** Pursuant to the stock purchase agreement, Essex was required to change the name of MAC. The Marshalls retained the name of MAC because John intended to stay in the construction business. MAC made the following payments on March 10, 2003: $50,000 to Baguette Holdings, LCC; $50,000 to Bittner & Co., LLP; and $37,500 to Joseph Valentino. On March 13, 2003, Essex merged into MAC with MAC surviving and changing its name to First Associated Contractor, Inc.

On April 13, 2003, MAC filed its Form 1120, U.S. Corporation Income Tax Return, for its FYE March 31, 2003. MAC claimed a bad debt deduction of $39,772,396 on the 2003 return to offset its taxable income from the Stillwater litigation award. The bad debt loss deduction claimed by MAC was based upon U.S. Treasury bills. On March 13, 2003, Willow purportedly contributed 140,000 U.S. Treasury bills with a face value of $140,000 and $100,000 cash to MAC in a section 351 transaction. Willow claimed that it had a $53,333,288 tax basis in the U.S. Treasury bills.

[*26] MAC's 2003 return reflected a refund due of $3,825,000. MAC received a refund of $3,825,000 for its FYE March 31, 2003, from the IRS on May 29, 2003. MAC used the $3,825,000 Federal tax refund to make the following payments: $840,000 to Fortrend; $510,000 to Willow; $306,000 to Peachtree; $241,000 to Irgang & Co.; $200,000 to Manatt, Phelps, Phillips; $110,743 to Jeffer, Mangels, Butler & Marmaro; $100,000 to Susan Smith; $30,000 to Oceanus Solutions, LLC; and $7,846 to TC Capital Management, LLC.

MAC administratively dissolved on June 6, 2003, pursuant to Or. Rev. Stat. sec. 63.647, was reinstated on September 12, 2003, and then was administratively dissolved on March 20, 2009. MAC is no longer in existence under Oregon law.

The Marshalls' Protective Disclosure

On October 15, 2004, Richard and Patsy filed their Form 1040 for taxable year 2003, which included Form 8886, Reportable Transaction Disclosure Statement, for the MAC transaction. On October 15, 2004, John and Karen filed their Form 1040 for taxable year 2003, which included Form 8886 for the MAC transaction. The MAC transaction was registered with the IRS as a tax shelter. Richard and Patsy attached Form 8271, Investor Reporting of Tax Shelter Registration Number, for the MAC transaction to their Form 1040 for taxable year 2004.

[*27] Notice of Deficiency to MAC

The IRS disallowed MAC's claimed bad debt deduction of $39,772,396 because MAC could not support or substantiate its basis in the purported bad debt, among other reasons. On February 19, 2009, respondent timely mailed a notice of deficiency to MAC for FYE March 31, 2003, 2004, and 2005. In the notice, the IRS determined a gross valuation misstatement penalty against MAC under

section 6662(h), or alternatively a substantial understatement penalty under section 6662(a) and (b)(2), for FYE March 31, 2003.

Neither MAC nor anyone acting on its behalf filed a petition in this Court. On June 24, 2009, the IRS made assessments against MAC for FYE March 31, 2003, for income tax of $15,482,046, accuracy-related penalties of $6,192,818, and interest of $9,592,446.

On October 31, 2009, collection of MAC's liability was assigned to a field revenue officer. Respondent's revenue agent conducted database searches for MAC's assets in Oregon, Nevada, and California, filed notices of Federal tax liens on MAC's assets in Nevada, and issued levies to three banks where MAC maintained accounts.

[*28] Notices of Transferee Liability to Petitioners

***10** On August 26, 2011, after determining that MAC had no assets from which respondent could collect, respondent sent a notice of liability to Richard in which it was determined that he was liable as a transferee for $13,896,825 of the tax liability of MAC for its FYE March 31, 2003, plus interest. On October 26, 2011, respondent sent notices of liability to John, Karen, and Patsy, respectively, in which it was determined that each was liable as a transferee for $13,896,825 of the tax liability of MAC for its FYE March 31, 2003, plus interest. On October 26, 2011, respondent sent a notice of liability to MA LLC, in which it was determined that MA LLC was liable as a transferee and as a transferee of a transferee for $6,776,500 of the tax liability of MAC for its FYE March 31, 2003, plus interest. In response to the notices, Richard and Patsy filed a timely petition on November 28, 2011, MA LLC filed a timely petition on December 15, 2011, and John and Karen filed a timely petition on December 16, 2011.

OPINION

I. Legal Standard

[1]Section 6901(a)(1) is a procedural statute authorizing the assessment of transferee liability in the same manner and subject to the same provisions and limitations as in the case of the tax with respect to which the transferee liability [*29] was incurred. Section 6901(a) does not create or define a substantive liability but merely provides the Commissioner a remedy for enforcing and collecting from the transferee of property the transferor's existing liability. Coca-Cola Bottling Co. v. Commissioner, 334 F.2d 875, 877 (9th Cir. 1964), aff'g 37 T.C. 1006 (1962); Mysse v. Commissioner, 57 T.C. 680, 700-701 (1972).

[2]Once the transferor's own tax liability is established, the Commissioner may assess that liability against a transferee under section 6901 only if two distinct requirements are met. First, the transferee must be subject to liability under applicable State law, which includes State equity principles. Second, under principles of Federal tax law, that person must be a "transferee" within the meaning of section 6901. See Salus Mundi Found. v. Commissioner, 776 F.3d 1010, 1017-1019 (9th Cir. 2014), rev'g and remanding T.C. Memo. 2012-61; Diebold Found., Inc. v. Commissioner, 736 F.3d 172, 183-184 (2d Cir. 2013), vacating and remanding Salus Mundi Found. v. Commissioner, T.C. Memo. 2012-61; Starnes v. Commissioner, 680 F.3d 417, 427 (4th Cir. 2012), aff'g T.C. Memo. 2011-63; Swords Trust v. Commissioner, 142 T.C. 317, 336 (2014).

The Commissioner bears the burden of proving that a person is liable as a transferee. Sec. 6902(a); Rule 142(d). The Commissioner does not have the burden, however, "to show that the taxpayer was liable for the tax." Sec. 6902(a).

[3][*30] Therefore, petitioners have the burden of proving that MAC is not liable for $21,674,864 of tax and penalty. See Rule 142(a)(1), (d); Welch v. Helvering, 290 U.S. 111, 115 (1933); see also United States v. Williams, 514 U.S. 527, 539 (1995) (noting that "the Code treats the transferee as the taxpayer" for this purpose); L.V. Castle Inv. Grp., Inc. v. Commissioner, 465 F.3d 1243, 1248 (11th Cir. 2006).

We must determine whether respondent has shown that petitioners are liable as transferees.

II. Petitioners' Transferee Status Under Oregon Uniform Fraudulent Transfer Act

***11** [4] We apply Oregon State law to determine whether petitioners are liable, as transferees, for the unpaid tax of MAC since the transaction took place in Oregon. See Commissioner v. Stern, 357 U.S. 39, 45 (1958). Oregon has adopted the Uniform Fraudulent Transfer Act (UFTA), codified at chapter 95 of the Oregon Statutes. See Or. Rev. Stat. secs. 95.200 to 95.310 (2015). The Oregon Uniform Fraudulent Transfer Act (OUFTA) broadly defines "transfer" as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes a payment of money, a release, a lease

and the creation of a lien or other encumbrance." Id. sec. 95.200(12). Where a debtor transfers property to a transferee and thereby avoids [*31] creditor claims, OUFTA provides creditors with certain remedies against the transferee. See id. sec. 95.260.

[5]Under Oregon common law, the creditor must prove a fraudulent transfer by a preponderance of the evidence under the OUFTA. Norris v. R&T Mfg., LLC, 338 P.3d 150 (Or. Ct. App. 2014).

A. Constructive Fraud

Respondent's arguments under OUFTA are predicated on the assumption that the series of transfers among MAC, Essex, and Fortrend should be collapsed and treated as if MAC had sold its assets and then made liquidating distributions to the shareholders. If the transfers are collapsed accordingly, then MAC will have transferred substantially all of its assets to petitioners and received less than reasonably equivalent value. If the preceding is found, it follows that petitioners will be liable as transferees of MAC's assets under Or. Rev. Stat. sec. 95.240(1) as further explained below. Alternatively, respondent argues that MA LLC is liable as a transferee of the assets transferred in the partial redemption under OUFTA's constructive fraud provisions.

1. Collapsing the Transaction

[6]Respondent contends that the transfers among MAC, Essex, and petitioners should be collapsed and recharacterized under Oregon law as a redemption of the [*32] Marshalls' MAC shares, with the Marshalls receiving a $31,339,897 liquidating distribution in exchange for their shares. Oregon courts have not addressed this type of transaction; however, courts in jurisdictions with fraudulent transfer provisions similar to Oregon's have "collapsed" transactions if the ultimate transferee had constructive knowledge that the debtor's debts would not be paid. See Salus Mundi Found. v. Commissioner, 776 F.3d 1010; Diebold Found., Inc. v. Commissioner, 736 F.3d 172; Starnes v. Commissioner, 680 F.3d 417.

In Salus Mundi Found. the Court of Appeals for the Ninth Circuit addressed the application of New York's fraudulent transfer provisions to a transaction similar to the transaction in these cases. It concluded that if constructive knowledge of the fraudulent scheme could be shown from the conduct of the final transferees, multiple transfers could be collapsed under State law. Salus Mundi Found. v. Commissioner, 776 F.3d at 1020. In Diebold Found., Inc. v. Commissioner, 736 F.3d at 186, the Court of Appeals for the Second Circuit addressed the application of the New York UFTA to the same transaction at issue in Salus Mundi Found. and held that multiparty transactions can be collapsed where the debtor's property is "reconveyed * * * for less than fair consideration" and the ultimate transferee had "constructive knowledge of the entire scheme."

[*33] In Starnes, the Court of Appeals for the Fourth Circuit addressed the application of North Carolina's fraudulent transfer provisions to another transaction similar to the transaction at issue in these cases and ruled that multiple transfers could be collapsed if the ultimate transferee had constructive knowledge that the debtor's tax liabilities would not be paid. If the ultimate transferees "were on inquiry notice * * * and failed to make reasonably diligent inquiry, they are charged with the knowledge they would have acquired had they undertaken the reasonably diligent inquiry required by the known circumstances." Starnes v. Commissioner, 680 F.3d at 434.

***12** In Tricarichi v. Commissioner, T.C. Memo. 2015-201, we noted that the Ohio Supreme Court did not have a case addressing this precise issue. We relied on the previously discussed cases when applying Ohio's UFTA because we concluded that the Ohio Supreme Court would find them persuasive as Ohio's UFTA tracks the uniform law almost verbatim and the fraudulent transfer provisions at issue in these cases also mirrored the uniform law or were materially similar to it. Id. at *37-*38. We conclude that the Oregon Supreme Court would also find the previously cited cases persuasive and would follow these decisions if faced with this type of transaction as Oregon's UFTA closely resembles Ohio's UFTA. If petitioners had constructive knowledge that MAC's tax liability would [*34] not be paid, the transfers at issue may be collapsed. Finding that a person had constructive knowledge does not require finding that he had actual knowledge of the plan's minute details. It is sufficient if, under the totality of the surrounding circumstances, he "should have known" about the tax-avoidance scheme. HBE Leasing Corp. v. Frank, 48 F.3d 623, 636 (2d Cir. 1995).

Constructive knowledge also includes "inquiry knowledge." Constructive knowledge may be found where the initial transferee became aware of circumstances that should have led to further inquiry into the circumstances of the transaction, but no inquiry was made. Id. Some cases define constructive knowledge as

the knowledge that ordinary diligence would have elicited, while others require more active avoidance of the truth. Diebold Found., Inc. v. Commissioner, 736 F.3d at 187. We need not decide which of these formulations is appropriate because petitioners had "constructive knowledge" under either standard.

Our analysis focuses on what John knew because John assumed the responsibility of representing the Marshalls. In determining what the transferees knew, we have to focus on what they were advised and what they themselves appreciated. See id. at 188-189. The Marshalls, Schwabe, and PwC had constructive knowledge of the entire scheme. John knew that Essex was interested [*35] in buying MAC only for its tax liability; that Essex intended to use high-basis low-value assets to offset MAC's income; that Essex intended to obtain a refund of MAC's prepaid taxes, a plan he was leery about; and that Essex was splitting MAC's avoided taxes with the Marshalls.

PwC and Schwabe had a sophisticated understanding of the entire scheme. Notably, before the MAC transaction closed, each of the Marshalls was warned by Schwabe of the risks of transferee liability and John was warned by PwC that the stock sale was similar to a listed transaction and was advised by PwC not to engage in the stock sale. Petitioners knew that the Stillwater litigation award would be considered income to MAC and be subject to corporate income tax for 2003. This knowledge motivated petitioners to enter into a transaction to mitigate this tax liability.

Further, MidCoast and Fortrend promotional material referenced Notice 2001-16, 2001-1 C.B. 730.[5] PwC told John that the proposed stock sale was [*36] similar to a listed transaction.[6] Given this reference by Fortrend and Midcoast and especially PwC's warning to John, the Marshalls and their Schwabe advisers were or should have been on heightened alert for other red flags. That the Marshalls were aware of Notice 2001-16, supra, is evidenced by the protective disclosure attached to their Forms 1040 that referenced Notice 2001-16, supra, and their signatures on their Forms 1040.

5 Notice 2001-16, 2001-1 C.B. 730, indicated that the IRS may challenge transactions in which the assets of a corporation are sold following the purported sale of the corporation's stock to an intermediary and that these and substantially similar transactions are designated "listed transactions" for purposes of sec. 1.6011-4T(b)(2), Temporary Income Tax Regs., 65 Fed. Reg. 11207 (Mar. 2, 2000), and sec. 301.6111-2T, Temporary Proced. & Admin. Regs., 65 Fed. Reg. 11218 (Mar. 2, 2002).

6 John disputes what PwC actually told him. However, it was clear from the record that PwC and John discussed this.

***13** The Marshalls recognized the large tax liability arising from the Stillwater litigation award and entered into a series of transfers to minimize the liability. John and the Marshalls' advisers are analogous to the advisers in Diebold Found., Inc. and Richard, Patsy, and Karen are akin to the shareholders in that case. The Court of Appeals for the Second Circuit in Diebold Found., Inc. found that if the advisers knew or should have known then the transferee is deemed to have had the same knowledge and had a duty to inquire. See Salus Mundi Found. v. Commissioner, 776 F.3d at 1019-1020; Diebold Found., Inc. v. Commissioner, 736 F.3d at 188-190. The Marshalls had a duty to inquire, and they were advised that there was a significant risk of transferee liability. Cf. Slone v. Commissioner, T.C. Memo. 2016-115, at *14-*17 (distinguishable on factual grounds) [*37] ("Petitioners and their advisers had no reason to believe that Fortrend's strategies were other than legitimate tax planning methods."). Accordingly, petitioners are transferees of MAC, as MAC sold its assets and MA LLC received noncash assets and the Marshalls received liquidating distributions in exchange for their shares.

B. Petitioners' Liability as Transferees Under Oregon Law

[7]Or. Rev. Stat. sec. 95.240(1) establishes that a transfer is fraudulent with respect to a creditor where: (1) the creditor's claim arose before the transfer; (2) the transferor did not receive "a reasonably equivalent value in exchange for the transfer"; and (3) the transferor was insolvent at the time of the transfer or became insolvent as a result of the transfer. Petitioners repeatedly argue that they cannot be found liable as transferees because they acted in good faith. An intent requirement is absent from Or. Rev. Stat. sec. 95.240, and the Or. Rev. Stat. sec. 95.270(1) good faith defense does not apply to Or. Rev. Stat. sec. 95.240. Nor can petitioners claim the good-faith defense to reduce the amount of the liability under Or. Rev. Stat. sec. 95.270(5) as we have found the Marshalls to have had at least constructive knowledge. Further, we find that the three elements of Or. Rev. Stat. sec. 95.240(1) are met and that petitioners are liable as transferees of MAC under Oregon law.

[*38] 1. Claim

[8] [9]"Claim" is defined expansively as a "right to payment." Id. sec. 95.200(3). A right to payment constitutes a claim regardless of whether it is "reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." Id. A "creditor" is any person who has a "claim". Id. sec. 95.200(4). Given this broad definition, transfers are fraudulent as to creditors whose claims have not been finally determined, and even as to creditors whose claims are not yet due. See Zahra Spiritual Tr. v. United States, 910 F.2d 240, 248 (5th Cir.1990). Because "unmatured tax liabilities are taken into account in determining a debtor's solvency, they are 'claims' and should be treated as such under the expansive definition of the term 'claim' " in the UFTA. Stuart v. Commissioner, 144 T.C. 235, 258-259 (2015).

Petitioners do not dispute that there was a claim. MAC received the Stillwater litigation award in May 2002 and additional interest payments in August and October of the same year, generating a Federal tax liability. The transfer of MAC's assets to petitioners occurred on March 7, 2003. Accordingly, respondent had a claim against MAC before the transfer occurred.

[*39] 2. Reasonably Equivalent Value

[10]The second factor of Or. Rev. Stat. sec. 95.240(1) is whether the transferor received reasonably equivalent value in exchange for the transfer, which is a question of fact. See Shockley v. Commissioner, T.C. Memo. 2015-113. Once the transaction is collapsed, the timing of the transfers is irrelevant and we must determine whether MAC's transfers of assets to petitioners were for reasonably equivalent value.

Petitioners received over $33.7 million[7] in exchange for their stock and the assumption of the UBOC liability and the Jochim liability, worth a total of $4.9 million. Before the partial redemption and sale of the MAC stock, the net asset value of petitioners' stock was about $19.8 million[8] and petitioners received approximately $28.8 million[9] in exchange for their shares. Petitioners received approximately $9 million in consideration in excess of the value of their MAC [*40] stock. Thus, MAC did not receive reasonably equivalent value in exchange for the proceeds from the sale of its assets.

7 Cash of $24,410,400, noncash assets of $6,776,500, and future litigation proceeds rights worth $2,544,480

8 Assets of $40.6 million less $20.8 million in the UBOC and Jochim liabilities and taxes.

9 The total of $33.7 million received less the liabilities of $4.9 million assumed.

3. Insolvency

***14** The third factor of Or. Rev. Stat. sec. 95.240(1) is whether the transferor was insolvent or became insolvent as a result of the transfer. A debtor is insolvent under OUFTA "if, at a fair valuation, the sum of * * * [its] debts is greater than all of * * * [its] assets." Id. sec. 95.210(1). Solvency is measured at the time of the transfer. Id. sec. 95.240(1).

Petitioners' argument that MAC was solvent at the time of the partial redemption because it still had over $26 million cash in its bank account is unpersuasive. The precise timing of the transfers is immaterial since we collapsed the transaction under OUFTA and solvency must be judged as MAC transferred assets to petitioners.

After MAC's transfer of $25 million to petitioners via Essex, MAC was left with over $15 million in State and Federal tax liabilities and $6.8 million in assets, consisting mostly of estimated tax deposits. Thus, MAC became insolvent as a result of the MAC transaction.

[*41] C. Petitioners' Liability for Penalties Under Oregon Law

Petitioners argue that they are not liable for accuracy-related penalties because the penalty was not a "current liability" under OUFTA when the MAC stock was sold to Essex but was incurred by the new owners of MAC after the stock sale. Petitioners reliance on Stanko v. Commissioner, 209 F.3d 1082 (8th Cir. 2000), rev'g T.C. Memo. 1996-530, for the proposition that penalties for negligent or intentional misconduct that occurred months after the transfer are not existing at the time of the transfer is misplaced.

In Tricarichi v. Commissioner, T.C. Memo. 2015-201, we

found an argument similar to this unpersuasive. In that case we held that the UFTA's expansive definition of "claim" encompasses this type of penalty regardless of whether the penalty existed at the time of the transfer. Id. at *62. Further, we found the UFTA applies to future and present creditors if the transfer was not for reasonably equivalent value and the debtor "intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due" and the IRS was a future creditor. Id. at *62-*63 (quoting Ohio Rev. Code sec. 1336.04(A)(2)(b)); see Or. Rev. Stat. sec. 95.230(1)(b)(B).

[*42] Oregon's and Ohio's statutes are materially similar. Accordingly, for the reasons we stated in Tricarichi, we find that petitioners are liable under Oregon law for the penalties.

III. Federal Transferee Liability

For purposes of section 6901 the term "transferee" includes, inter alia, donee, heir, legatee, devisee, distributee, and shareholder of a dissolved corporation. See sec. 6901(h); sec. 301.6901-1(b), Proced. & Admin. Regs. As stated previously, recent authority has treated the inquiry as two separate prongs. See Slone v. Commissioner, 810 F.3d 599 (9th Cir. 2015), vacating and remanding T.C. Memo. 2012-57; Salus Mundi, Found. v. Commissioner, 776 F.3d at 1018-1019. Having found petitioners liable under State law, we must now determine whether they are liable under Federal law.

[11]The Court of Appeals for the Ninth Circuit recently held that a court must consider whether to disregard the form of a transaction by which the transfer occurred when determining transferee status for Federal law purposes. See Slone v. Commissioner, 810 F.3d at 605-606. In performing the inquiry, the court must focus "holistically on whether the transaction had any practical economic effects other than the creation of income tax losses." Id. at 606 (quoting Reddam v. Commissioner, 755 F.3d 1051, 1060 (9th Cir. 2014), aff'g T.C. Memo. 2012-106).

***15** [12][*43] The MAC transaction had no economic effects other than the creation of a loss for MAC. The Marshalls recognized the income tax liability from the litigation awards and entered into a series of transfers solely to evade their tax liability. For this reason and the reasons discussed above, we disregard the form of the MAC transaction and find that petitioners are transferees within the meaning of section 6901.

IV. Transferor Liability for Unpaid Tax

In arguing whether MAC actually owed the tax liability, petitioners rely on the form of the MAC transaction's being respected. Petitioners bear the burden of proof on this matter and offer no alternative arguments as to MAC's tax liability. See sec. 6902(a); Rule 142(d). Petitioners point to nothing in the record that shows that respondent incorrectly determined or improperly assessed MAC's tax liability for its FYE March 31, 2003. As the MAC transaction was collapsed and treated as a de facto liquidation to petitioners, we conclude that MAC was liable for the unpaid tax for its FYE March 31, 2003.

V. Collection Efforts Against MAC

Petitioners argue that respondent must show that he exhausted all reasonable efforts to collect the tax liability from the transferor before proceeding against the transferees.

[13][*44] We must look to Oregon law to determine whether respondent has an obligation to pursue all reasonable collection efforts against a transferor before proceeding against a transferee. See Hagaman v. Commissioner, 100 T.C. 180, 183-184, (1993); Jefferies v. Commissioner, T.C. Memo. 2010-172; Upchurch v. Commissioner, T.C. Memo. 2010-169. Where "the transferor is hopelessly insolvent, the creditor is not required to take useless steps to collect from the transferor." Zadorkin v. Commissioner, T.C. Memo. 1985-137, 49 T.C.M. (CCH) 1022, 1028 (1985).

[14]We think respondent did pursue all reasonably necessary collection efforts, and petitioners have not shown that respondent's efforts to collect against MAC were not reasonably exhausted. MAC was left insolvent after the MAC transaction and was administratively dissolved in March 2009. Respondent's revenue agent conducted database searches for MAC's assets in Oregon, Nevada, and California, filed notices of Federal tax lien on MAC's assets in Nevada, and issued levies to three banks where MAC maintained accounts. Nothing in the record states that MAC still exists, but the record instead suggests that MAC was not a viable entity.

If for the sake of argument, we presume that respondent did not take reasonable steps, the OUFTA does not require a creditor to pursue all reasonable [*45] collection efforts against the transferor. See Or. Rev. Stat. secs. 95.200-95.310. Therefore, respondent was not required to exhaust collection efforts against MAC, and petitioners may be held liable.

Accordingly, we conclude that (1) petitioners are liable

under Oregon law for the full amount of MAC's 2003 tax deficiency and penalty and (2) the IRS may collect this liability from petitioners as "transferees" pursuant to section 6901.

To reflect the foregoing,

Decisions will be entered under Rule 155.

All Citations

T.C. Memo. 2016-119, 2016 WL 3460226, 111 T.C.M. (CCH) 1579, T.C.M. (RIA) 2016-119, 2016 RIA TC Memo 2016-119

EXHIBIT 27

PISANELLI BICE
3883 HOWARD HUGHES PARKWAY, SUITE 800
LAS VEGAS, NEVADA 89169

CLARK COUNTY, NEVADA

CANTOR G&W (NEVADA) HOLDINGS, L.P., a Delaware limited partnership, CANTOR G&W (NEVADA), L.P., a Nevada limited partnership, CF NOTES, LLC, a Delaware limited liability company, and CANTOR FITZGERALD, L.P., a Delaware limited partnership,

Plaintiffs,

vs.

JOSEPH M. ASHER, an Individual, and BRANDYWINE BOOKMAKING LLC, a Delaware limited liability company; DOES 1 through 5; and ROE BUSINESS ENTITIES 6 through 10,

Defendants.

JOSEPH M. ASHER, an Individual,

Counterclaimant

vs.

CANTOR G&W (NEVADA) HOLDINGS, L.P., a Delaware limited partnership, CANTOR G&W (NEVADA), L.P., a Nevada limited partnership, CF NOTES, LLC, a Delaware limited liability company, and CANTOR FITZGERALD, L.P., a Delaware limited partnership, DOES I- X; and ROE ENTITIES I-X, inclusive,

Counterdefendants.

Case No.:
Dept. No.:

ORDER:

DENYING I
COUNTERC
PARTIAL S
REGARDIN
FOR (1) BR
(2) BREACH
(3) UNJUST
(4) AIDING
OF FIDUCI

GRANTING
COUNTERI
COUNTERI
JUDGMEN
LIMITATIO
DEFENSE

Date of Hear

Time of Hea

PISANELLI BICE
3883 HOWARD HUGHES PARKWAY, SUITE 800
LAS VEGAS, NEVADA 89169

("CF Notes"), and Cantor Fitzgerald, L.P. ("Cantor Fitzgera
Nicholas J. Santoro, Esq. and Oliver Pancheri, Esq. of the
appeared on behalf of Defendants/Counterclaimants Joseph M
Bookmaking, LLC ("Brandywine") (collectively, "Asher").

Good cause appearing, the Court denies Asher'
Countermotion for the following reasons:

1. Asher was a limited partner in Cantor Fitzger
Limited Partnership of Cantor Fitzgerald, amended and re
"CFLP Agreement").

2. Subsequently, Asher also became a limited par
the Agreement of Limited Partnership of CGW Holdings,
("CGW Holdings Agreement").

3. Asher's Motion focuses on the choice of law pr
of the CGW Holdings Agreement. This provision states:

> **Applicable Law. THIS AGREEMENT AND T
> PARTIES HEREUNDER SHALL BE GO
> INTERPRETED IN ACCORDANCE WITH THE
> OF DELAWARE, WITHOUT REGARD T
> CONFLICTS OF LAWS.**

PISANELLI BICE
3883 HOWARD HUGHES PARKWAY, SUITE 800
LAS VEGAS, NEVADA 89169

breach of contract for failure to pay on promissory notes, are
limitations.

7. Whether Nevada or Delaware's statute of limitat
Asher's Motion and Cantor's Countermotion. The parties
limitations applies, Asher's Motion fails.

8. Pursuant to NRCP 56, summary judgment "shal
is no "genuine issue as to any material fact . . . and the movi
matter of law."

9. The defense that a claim is barred by the sta
matter governed by the law of the forum. *Seely v. Illinois-Ca*
1307, 1309 (D. Nev. 1982); *see also Tipton v. Heeren*, 109 Ne
n.3 (1993) (where there is a valid choice of law agreemer
substantive issues, but Nevada law governs the procedural issu

10. Although Asher claims that the parties' ch
Delaware's statute of limitations, Section 20.07 applies to '
RIGHTS OF THE PARTIES HEREUNDER . . . ." In *Wil*
(1869), the Nevada Supreme Court held that "the Statute of Li
and not to a right or obligation."

11. Moreover, even under Delaware law, a choice o
the statute of limitations of the chosen jurisdiction if their incl

PISANELLI BICE
3883 HOWARD HUGHES PARKWAY, SUITE 800
LAS VEGAS, NEVADA 89169

DATED: November 26, 2013

THE HONORABL
EIGHTH JUDICI

Respectfully submitted:

PISANELLI BICE PLLC

By: _____

Todd L. Bice, Esq., Bar No. 4534
Jarrod L. Rickard, Esq., Bar No. 10203
3883 Howard Hughes Parkway, Suite 800
Las Vegas, Nevada 89169

Attorneys for Plaintiffs/Counterdefendants

EXHIBIT 28

IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE MARK R. DENTON, DISTRICT JUDGE,
Respondents,
and
CANTOR G&W (NEVADA) HOLDINGS, L.P., A DELAWARE LIMITED PARTNERSHIP; CANTOR G&W (NEVADA) HOLDINGS, L.P., A NEVADA LIMITED PARTNERSHIP; CF NOTES, LLC, A DELAWARE LIMITED LIABILITY COMPANY; AND CANTOR FITZGERALD, L.P., A DELAWARE LIMITED PARTNERSHIP,
Real Parties in Interest.

ORDER DENYING PETITI

This is a petition for a writ of alternative, prohibition, directing the district co statute of limitations on contract disputes to choice-of-law provision favoring Delaware law. Court, Clark County; Mark R. Denton, Judge.

Cherry

Gibbons

cc: Hon. Mark R. Denton, District Judge
Lewis Roca Rothgerber Christie LLP/Las Ve
Santoro Whitmire
Pisanelli Bice, PLLC
Eighth District Court Clerk

EXHIBIT 29

CLARK; AND THE HONORABLE MARK R. DENTON, DISTRICT JUDGE,
Respondents,
and
CANTOR G&W (NEVADA) HOLDINGS, L.P., A DELAWARE LIMITED PARTNERSHIP; CANTOR G&W (NEVADA) HOLDINGS, L.P., A NEVADA LIMITED PARTNERSHIP; CF NOTES, LLC, A DELAWARE LIMITED LIABILITY COMPANY; AND CANTOR FITZGERALD, L.P., A DELAWARE LIMITED PARTNERSHIP,
Real Parties in Interest.

ORDER DENYING REHEAR

Rehearing denied. NRAP 40(c).

It is so ORDERED.

Cherry

Douglas

Gibbons

EXHIBIT 30

vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE MARK R. DENTON, DISTRICT JUDGE,
Respondents,
and
CANTOR G&W (NEVADA) HOLDINGS, L.P., A DELAWARE LIMITED PARTNERSHIP; CANTOR G&W (NEVADA) HOLDINGS, L.P., A NEVADA LIMITED PARTNERSHIP; CF NOTES, LLC, A DELAWARE LIMITED LIABILITY COMPANY; AND CANTOR FITZGERALD, L.P., A DELAWARE LIMITED PARTNERSHIP,
Real Parties in Interest.

ORDER DENYING EN BANC RECONS

Having considered the petition on

Hardesty, J.

Douglas

Cherry, J.

Gibbons

Pickering

cc: Hon. Mark R. Denton, District Judge
Lewis Roca Rothgerber Christie LLP/Las Ve
Santoro Whitmire
Pisanelli Bice, PLLC
Eighth District Court Clerk

EXHIBIT 31

Scott F. Hessell
Thomas D. Brooks
Pro Hac Vice
SPERLING & SLATER, P.C.
55 West Monroe, Suite 3200
Chicago, IL 60603
Tel: (312) 641-3200
Fax: (312) 641-6492
Email: shessell@sperling-law.com
tbrooks@sperling-law.com

Attorneys for Plaintiff

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 DEPT **AFFI** **TRIC** **(1) PI** **TO D** **AND** **DISM** **MOT** **JURI** JURY

Avenue in Las Vegas in May 2003. Exhibit A in the Appendix

Plaintiff's Opposition to Defendants Rabobank and Utrecht's M

"Appendix") are records from the Clark County Assessor's Offi

5. In June 2003 I obtained a Nevada driver's license

a receipt, dated June 24, 2003, reflecting this.

6. In June 2003 I registered to vote in Nevada. Exhi

of my voter registration application dated June 24, 2003.

7. I changed the insurance on my vehicle to reflect n

2003. Exhibit D in the Appendix is a Nevada motor vehicle insu

July 14, 2003. I also changed the registration on my vehicle to re

August 2003. Exhibit E in the Appendix is a receipt reflecting th

8. In addition to doing these things upon moving to

example, changed my mailing address to my Nevada address and

accounts in Nevada.

9. Since moving to Nevada in May 2003, including

September 2003, I have spent most of my time physically presen

10. Exhibit F in the Appendix is a copy of the letter

Nob Hill Holdings, Inc. ("Nob Hill") sent to me in Las Vegas,

12. Exhibit I in the Appendix is a copy of an amendm

Nob Hill sent to me in Las Vegas, Nevada on or about August 2

13. During the stock-purchase negotiations, I had as

the closing, transfer the purchase price for my stock to my acc

Hill did not object to this request.

14. As the closing approached, however, Rabobank

loaning most of the purchase price to Nob Hill, said that it wo

transaction if the purchase price was going to be transferred di

Rabobank said that, in order for the purchase funds to be relea

sure that I resigned as a director and officer of Westside. Rab

resign so that I would not have control over the Westside acco

I was reluctant to resign, however, without first knowing that

price.

15. Rabobank then told me that Rabobank needed n

my name, at Rabobank. Rabobank said that the purchase price

would be placed into this account by Nob Hill while I submitt

Westside director and officer into escrow; and that Rabobank

purchase funds in the account to me per my instructions.

contains a copy of a letter and resignation I sent to Rabobank.

18. At this time, I also sent instructions to Rabobank f from my Rabobank account to my account at Pershing. Exhibit (copy of those instructions.

19. The stock purchase closed on September 9, 2003. copy of the Stock Purchase Agreement between Nob Hill, as buy as of September 9, 2003

20. Rabobank released the purchase price to my Persh instructions, and my resignation from Westside became effective

Further affiant sayeth not.

Michael A.

Subscribed and sworn to before me

this 6th day of December, 2016.

Kevin J. Brennan, Esq

My commission has r

EXHIBIT 32

"Jim Tricarichi" <jtricarichi@softflexinc.com>
04/08/2003 01:33 PM

To: Richard P Stovsky/US/TLS/PwC@Americas-US
cc: "Anthony J. Tricarichi \(E-mail\)" <atricarichijr@kpmg.com>
Subject: Tax issues

Please respond to jtricarichi

1 attachment

Tax Issues for Cellnet and Mike Tricarichi.doc

Rich,

Attached are the tax issues we need to have you help us with. I will call you at 4:30 pm Today.

Thanks,

Jim Tricarichi
SoftFlex, Inc.
Cell: 216-978-9008
Office: 216-514-4900
Fax: 216-765-0885
www.softflexinc.com

Tax Issues for Cellnet and Mike Tricarichi

1. Engage PWC to advise on the possible sale of Mike Tricarichi's stock in Cellnet to one of two companies. The companies are Mid Coast and Fortrend. We want to set up conference calls on Thursday, April 10. The purpose of the call is so PWC can understand the transaction and advise us on the potential tax issues and the associated risks to Mike Tricarichi.
2. If the stock is sold, the issue of change of residence to Nevada becomes on issue. Advise on what the requirements the State of Ohio would look at once they realize no taxes would be paid to Ohio. Examples of issues: how long does Mike need to live in Nevada. Does he need to show permanent intent to live in Nevada? Would he have to sell his home in Chesterland? Please provide a list of items the State of Ohio would scrutinize.
3. Compensation to key employees and if there are issues for excess compensation regarding deductions for wages at the corporate level. See table below.

Title	Annual Wages	Propsed Bonus
Operations Mgr.	81,000	2,500,000
Controller	80,000	2,000,000
Credit mgr./Attorney	76,000	1,500,000

4. If the stock is not sold and the C Corp. continues to operate, what can be done to mitigate the tax liability.

David L Cook
05/19/2003 01:08 PM
216-875-3027
Cleveland
US

To: Ray Turk/US/TLS/PwC@Americas-US
cc:
Subject: Re: Tricarichi Memo

Ray,

You were right. I checked up on the Nevada homestead exemption and it appears that they don't have one like Florida does. I did verify previously that they do have a "statement of domicile" of all things, but should have also checked the property exemption. Sorry for the slip. I have removed the line item from the checklist, which is re-attached below along with the CCH discussion on the lack of the property exemption.

I'll keep an eye out for your suggested revisions.

Dave

NV residency conversion checklist.d No NV Homestead Exemption

----- Forwarded by David L Cook/US/TLS/PwC on 05/19/2003 01:05 PM -----

Ray Turk
05/19/2003 07:26 AM
216-875-3074
Cleveland, Ohio
US

To: David L Cook/US/TLS/PwC@Americas-US
cc:
Subject: Re: Tricarichi Memo

Dave
I looked at the memo over the weekend and will pass along a version to you and Rich with some suggested changes later today. Nothing major, as usual you did a great job with it. One small question on the attachement. Does Nevada have a homestead exemption? I did not think all states did. If you could just double check that. Thanks
<Removed files: Ohio Taxation of Gain.doc, NV residency conversion checklist.doc>

David L Cook

David L Cook
05/16/2003 11:37 AM
216-875-3027
Cleveland
US

To: Richard P Stovsky/US/TLS/PwC@Americas-US, Ray Turk/US/TLS/PwC@Americas-US
cc:
Subject: Tricarichi Memo

Rich and Ray,

Attached for your review is the my final version of the memo. I have NOT yet sent this to Jim, as I assumed that you would prefer to see if first, especially with respect to the installment sale issue.

Please contact me with any questions.

Dave

EXHIBIT 11-J

PWC-WS 0035

David L Cook
05/20/2003 09:11 AM
216-875-3027
Cleveland
US

To: Richard P Stovsky/US/TLS/PwC@Americas-US
cc: Ray Turk/US/TLS/PwC@Americas-US
Subject: Tricarichi Memo

Rich,

Attached are the final versions of the memo and the residency conversion checklist. Ray has reviewed, revised, and approved of the memo, so it should be complete unless you have any changes of your own. Are you comfortable with our conclusion that the installment sale doesn't really create any state benefit for us?

Dave


Tricarichi Ohio Taxation of Gain (final).c


NV residency conversion checklist.dc

EXHIBIT 12-J

PWC-WS 0038

PRICEWATERHOUSECOOPERS

Memo

To: / Location: Taxpayer File / Cleveland BP Tower

From: / Location: Cleveland SALT Group / Cleveland BP Tower

Date: May 16, 2003

Subject: Ohio Taxation of Capital Gain from the Sale of Stock

FACTS

The Taxpayer is a 100% owner of a C corporation that has operations primarily in Ohio. The Taxpayer will be selling the stock of the C corporation, which will result in a significant gain of approximately $50,000,000. The sales contract will most likely be signed on or about July 1, 2003. The sale of stock may be made on an installment sale basis with a small portion of the gain being recognized in 2003 and the remainder of the gain being recognized in 2004.

The Taxpayer is currently an Ohio resident, and owns a home in Ohio where he lives with his wife and two children. The Taxpayer recently purchased a house in Nevada and plans to move his family into that house at some future date in 2003. The Taxpayer will not sell the Ohio house, but will maintain it as a second or vacation home.

The Taxpayer also owns other S corporations with business operations in Ohio. Additionally, the Taxpayer may start a new real estate investment business, with operations likely to be in Ohio, with some of the proceeds from the sale.

ISSUE

I. What is the Ohio tax treatment of capital gain income for Ohio residents and non-residents?

II. What steps does the Taxpayer need to take to change residency and assure that the gain will not be taxable in the State of Ohio?

III. If a portion of the federal gain is recharacterized as ordinary income related to services performed, what is the Ohio taxation impact?

CONCLUSION

I. Ohio residents are subjected to taxation on all items of income, including capital gain income. Non-residents are taxable only on items of income that are

EXHIBIT 13-J

PWC-WS 0039

considered earned or received in Ohio, determined by a set of explicit allocation and sourcing rules. For a non-resident taxpayer, capital gain income attributable to the sale of intangible property is allocated to Ohio if the taxpayer was domiciled in Ohio at the time of the sale.

II. In order to have any viable position that the Taxpayer's change in residency has occurred and to assure that the gain will not be taxable by the State of Ohio, the Taxpayer needs to complete the following steps: (1) Take ownership of the new Nevada home prior to the stock sale; (2) Physically move into the new Nevada home prior to the stock sale; and (3) have fewer than 120 contact periods in Ohio during the 2004 calendar year. In addition, if the Taxpayer's family could also physically move with him to the new Nevada home prior to the stock sale, it would significantly strengthen his position. Finally, a number of additional steps, identified on Attachment 1, would be helpful in building evidential support for the position. Completion of as many of these steps as possible is highly recommended.

III. If the federal gain is recharacterized as ordinary income related to services performed, then the gain would be taxable to Ohio if the services were performed in Ohio. If the services were performed outside Ohio after residency conversion, then the gain would not be taxable in Ohio. Since the C corporation's business is based in Ohio and it is likely that the ordinary income is for prior services performed in Ohio, it is most likely that the ordinary income- would be taxable for Ohio purposes.

ANALYSIS

I. Taxation of Capital Gains

Ohio residents are subjected to taxation on all of their income, regardless of where it is earned or what the income is related to (with the exception of specifically exempted items such as federal interest income, etc.). To the extent that a resident's income is subjected to taxation in another state, the resident will receive a credit against the Ohio tax liability computed on the same income.

Non-residents are essentially subjected to taxation on only income that is earned or received in Ohio. As part of the non-resident credit computation, a non-resident allocates his total income between Ohio-sourced income, which is ultimately taxable, and non-Ohio sourced income, which is not subjected to taxation. In determining how capital gains are sourced, the Ohio statutes provide guidance. Capital gains are considered non-business income, pursuant to Ohio Revised Code (ORC) §5747.01(c), which states:

> ""Nonbusiness income" means all income other than business income and may include, but is not limited to, compensation, rents and royalties from real or tangible personal property, capital gains, interest, dividends and distributions, patent or copyright royalties, or lottery winnings, prizes, and awards." (Emphasis added).

Non-business income items are subject to explicit allocation rules, and ORC §5747.20(B)(2)(c) states that "capital gains or losses from the sale or other transfer or intangible personal property are allocable to this state if the taxpayer's domicile was in this state at the time of such sale or other transfer." (Emphasis added). Accordingly, if the Taxpayer is domiciled in Ohio at the time of the sale that generated the capital gain, the gain will be allocated or sourced to Ohio and subjected to taxation. However, if the Taxpayer is not domiciled in Ohio at the time of the sale, which is generally the case for non-residents, the gain will not be allocated to Ohio and will not be subjected to tax. There are some special rules for taxation of capital gains from the sale of an interest in a pass through entity that are discussed below, but those rules are not applicable here with the sale of C corporation stock.

II. Steps to Change Residency

In the vast majority of cases, it is very clear when a person has changed his or her residence: They purchase a new house, sell the old one, pack up and move their belongings to the new home. In these situations, there is little doubt that the person has changed their domicile, and almost nothing for the former state of residence to challenge. Furthermore, the timing of the change is generally clear as well, based upon the date when the individual moved into the new home.

But what about a situation where the individual maintains a significant number of ties back to the old state of residence, including maintaining the original home? And what if there is a significant difference in the tax liability of the individual if he or she is determined to still be a resident of the old state? In these cases, the facts become less clear, and there is a significant motivation for the former state of residency to argue that the individual is still a resident and subject to taxation. It is exactly this "vague" situation that we must address in order to determine what steps the Taxpayer should take to minimize the likelihood of Ohio being able to subject the gain to taxation.

Ohio Bright Line Test

In 1993, Ohio enacted ORC §§ 5747.24 and 5737.25, commonly referred to as the "Bright-Line" Test. These statutes were meant to address the residency status of a growing number of "snow-birds," former Ohio resident individuals that spend the summers in Ohio and the winters in Florida. The statutes provide a clear numerical standard to determine an individual's residency status in a given year:

1. A person in Ohio for less than 120 contact periods[1] is presumed to be a non-resident.
2. A person in Ohio between 120 and 183 contact periods is presumed to be a resident, but this position may be rebutted with a "preponderance of evidence" to the contrary.
3. A person in Ohio for 183 or more contact periods is presumed to be a resident, but this position may be rebutted with "clear and convincing evidence" to the contrary.

Unfortunately, the Bright Line Test is not applicable in the year of a change in residency, because an individual will be both a resident and a non-resident for some portion of the year. Therefore, while the Bright Line Test will be relevant to the Taxpayer for 2004 and future tax years, it does not help us determine exactly when a change in residency occurs in the year of transition. Furthermore, even the non-resident presumption associated with fewer than 120 contact periods is based upon the ability of the individual to claim that he or she was not "domiciled" in Ohio at any time during the year[2].

Determination of Domicile

ORC §5747.01(I)(1) defines a "resident" of the state as "an individual who is domiciled in this state." However, the critical term "domicile" is never statutorily defined, leaving it open to interpretation. Case law in Ohio and other states, as well as statutes in other states, have tended to define "domicile" as the "the place to which an individual intends to return." Therefore, an evaluation of a person's intentions is effectively drawn into the analysis, which, because intentions are difficult if not impossible to prove, is generally based upon the facts and circumstances of each specific case.

One of the most basic tenets in residency case law is that in order to complete a change in residency, a new domicile must be established before the old domicile can be abandoned[3].

---

[1] Pursuant to ORC §5747.24(A)(1)(a) and (b), an individual has "one contact period in Ohio" if the individual is away overnight from her/his abode located outside this state and while away overnight from that abode spends at least some portion, however minimal, of each of two consecutive days in this state.

[2] Pursuant to ORC 5747.24(B) the Tax Commissioner may require the Taxpayer submit an affidavit under penalties of perjury stating that during the entire taxable year, the Taxpayer (1) was not domiciled in Ohio and (2) had at least one abode outside the state.

[3] In fact, there are a number of cases where an individual on an extended assignment in a foreign country has sold their home and placed all their property in storage, subsequently claiming that they are no longer a resident of the state. However, because they had never established a new domicile in a different state or country and did not

Clearly, a new domicile must be established in order to have a new residence to move to, but how absolutely must the old domicile be "abandoned" in order to convince the former state of residence that domicile has truly changed? If the former residence is retained as a vacation home or second residence, does it essentially become impossible to change the state of domicile?

Obviously, keeping the original home is a hurdle that must be overcome, but it is not impossible to effectuate a domicile change in this situation. Again, the case law indicates that each situation is based upon the facts and circumstances. It is important to remember that the Taxpayer is essentially building a position, and that each favorable fact or circumstance supporting a change to Nevada domicile will strengthen the argument. However, the converse is also true. Therefore, it is critical to amass as much favorable evidence as possible, especially when there are unfavorable facts and circumstances (such as the retention of the original home or ties back to the original domicile) that must be overcome.

It is also important to note that, based upon the normal audit cycle, the State of Ohio is not likely to complete a review or audit of the Taxpayer's return and filing position for several years. It would not be unusual for the 2003 return, which is generally filed in calendar year 2004 and open under the statute of limitations through 2008, to not be reviewed until 2006 or 2007. Therefore, the Taxpayer should be aware that actions in future years may very well have an impact upon the residency determinations for 2003 and 2004. Specifically, if the Taxpayer relocates back to the original home in Ohio in 2005, after a two-year absence, this fact will be considered in the residency determination for 2003. Remember that an individual's intentions are a critical component in a determination of domicile, and the state would have a strong argument that the Taxpayer never truly intended to abandon the Ohio domicile, but merely was temporarily absent during a period of years when, coincidentally, his income was very high.

Accordingly, based upon the above discussion and a review of the relevant case law, the following steps should be completed by the Taxpayer to put himself in the best possible position. Again, it should be noted that completion of the following steps prior to the sale in 2003 does not guarantee a favorable result for 2003, and that all of the facts and circumstances, including actions in the future, will impact the ultimate determination.

Required Steps

At a minimum, the following steps must be taken in order to meet the basic requirements to change the Taxpayer's domicile from Ohio to Nevada. Failure to complete these steps will result in the Taxpayer clearly being considered an Ohio resident and subject to taxation on the gain. For simplicity, all of the steps have assumed that the stock sale contract is signed on July 1, 2003.

---

intend to reside permanently in the country to which they were temporarily assigned, the courts held that they were still a resident and subject to taxation.

1. Taxpayer must acquire a new Nevada residence (home) before July 1, 2003.
2. Taxpayer must physically move from Ohio to the new Nevada residence before July 1, 2003.
3. Taxpayer must have less than 120 contact periods with Ohio during 2004. This will prevent the Taxpayer from being presumed to be an Ohio resident during 2004 as a result of greater than 120 contact periods.

Beneficial Steps

The following steps will help the Taxpayer build additional "facts and circumstances" evidence to support the position that his domicile has changed to Nevada prior to the stock sale in 2003. No one step is critical or required, but all are beneficial.

1. Taxpayer's family should physically move from Ohio to the new Nevada residence before July 1, 2003. If not possible by July 1, 2003, the family should move as soon as possible after that date (but no later than December 31, 2003), and a reasonable argument constructed for why it was important for the Taxpayer to move to Nevada ahead of his family.
2. Any legal documents associated with the stock sale transaction should refer to the Taxpayer as a Nevada resident and provide the Nevada address and phone number as his place of residence.
3. Assure that the Nevada residence is more expensive and elaborately decorated than the Ohio residence to support the position that the Ohio home is not the primary residence. Keep all-important furnishings (such as family heirlooms, etc.) in the Nevada residence.
4. Establish as many ties to Nevada and sever as many Ohio ties as possible (bank accounts, voter registration, driver's license, club memberships, etc.). Please refer to the attached Residency Conversion Checklist for a complete listing and description of additional steps to support the Nevada domicile change.

Timing of the Move

As indicated above, it is absolutely critical that the Taxpayer at a minimum has physically moved to Nevada prior to the sales contract is signed. In addition, it is beneficial, but not critical, if the Taxpayer's family also physically moves into the Nevada residence prior to the sale date. The timing is critical for the Taxpayer since the Ohio statutes indicate that capital gains are allocated to the domicile of the Taxpayer at the time of the sale. Therefore, the Taxpayer needs to assure that he has changed his domicile prior to signing the sales contract.

It should be relatively obvious that the optics of the residency conversion will improve to the extent that more time elapses between the move to Nevada and the sale of the stock. If the Taxpayer completes the physical move on June 30, 2003 and signs the sales contract on July 1, 2003, the residency conversion date obviously appears somewhat contrived. Although the residency determination will ultimately depend upon all of the facts and circumstances, it is important to build as strong of a position as possible around the date of the move. Therefore,

it would be recommended that the Taxpayer and his family physically move to Nevada as far in advance of the sale date as possible. This will allow for more time to elapse and more Nevada ties to be established, making it that much more difficult for Ohio to question the change in domicile or its timing.

Installment Sale Considerations

As the above analysis indicates, the Ohio taxation of the gain is entirely dependent upon the domicile of the Taxpayer on the date of the sale. The discussion addresses all of the issues associated with how the Taxpayer's domicile is determined, as well as the steps he needs to take to effectuate a change in his domicile. However, the manner in which the stock sale is completed has no bearing upon the domicile determination, and hence does not have any impact upon its ultimate taxability by Ohio, other than the timing of the liability.

At first, it might appear under the installment sale method that the recognition of a smaller gain in the year of residency conversion would appear less obvious to the State of Ohio, and that the 2004 portion of the gain would not be visible because the Taxpayer is no longer filing a resident return. However, it should be noted that the Taxpayer is still likely to have other Ohio source income (from his other S corporations and/or other investments), and may therefore still be required to file a non-resident return. Furthermore, as indicated, it is likely that the state will not review the Taxpayer's returns for several years, and in the event the returns are reviewed, it is likely that the State will audit a period of several years rather than just 2003. On the other hand, electing the installment sale method does complicate the transaction, as it defers the receipt of the sale proceeds, creates a federal interest cost, and creates additional legal complexities and risks. Accordingly, it should be understood that the state tax optics are only marginally improved by using the installment sales method.

Non- Resident Taxation Considerations

As noted, the Taxpayer owns additional S corporations with business operations in the State of Ohio. It is important to note that any income generated by flow through entities doing business in Ohio will be treated as Ohio business income and subjected to Ohio taxation, even though the Taxpayer is no longer an Ohio resident. Additionally, flow through entities are also subject to the withholding and filing requirements associated with the Ohio Pass-Through Entity Tax rules, and may be required to withhold and remit taxes on the income generated. Finally, it should also be noted that the Ohio statutes require that any capital gains on the sale of a pass-through entity interest be apportioned to Ohio (using the entity's historical factors) to the extent that the owner owns more than 20% of the pass-through entity, rather than allocating the gains to the owner's state of domicile. A more detailed explanation of these topics is beyond the scope of this memorandum.

III. Ohio Impact of Federal Recharacterization of Gain

Again, all of the income of a resident is subjected to taxation. Assuming that the Taxpayer can complete his change in domicile prior to the sale, he will be a non-resident. ORC §

5747.20(B)(1) states that "all items of compensation paid to an individual for personal services performed in this state who was a non-resident at the time of payment and all items of deduction directly allocated thereto shall be allocated to this state." Accordingly, non-residents are subjected to tax on income paid for services rendered to the extent those services were performed in Ohio.

The Ohio taxability of the services is therefore highly dependent upon the actual facts and circumstances. Because the business is based in Ohio, there would likely be a strong presumption that any services performed were most likely to have occurred in Ohio.

kept with the individual's other important documents).

2. Register to vote in Nevada and actually vote whenever possible, including by absentee ballot if you are outside the state.

3. File federal income tax returns with the Internal Revenue Service Center in Fresno, and file any federal estimated payment vouchers with the Internal Revenue Service Center in Fresno.

4. Consider executing new estate planning documents, which recite the new domicile.

5. Change the title and registration of automobiles to Nevada.

6. Obtain a Nevada driver's license.

7. Use the Nevada address on all documents and records, such as Social Security records, hotel registration, credit card applications, etc. File a change in address form at the old post office. Register the new address with the Federal Social Security Office.

8. Change principal bank accounts to Nevada. Maintaining a convenience account in Ohio for use during periods in Ohio should not present a problem.

9. Become a member of, and be active in clubs, religious or social organizations in Nevada.

10. Generate the maximum possible amount of business activity from the Nevada residence.

11. Furnish the Nevada residence more substantially than the Ohio residence and keep objects of sentimental value or family interest (e.g. photographs, family heirlooms, etc.) in the Nevada residence.

12. Transfer contents of any safe deposit boxes to safe deposit boxes located in Nevada.

13. Use stationery printed with the Nevada address whenever possible for business and social occasions.

EXHIBIT 14-J

PWC-WS 0047

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

MICHAEL TRICARICHI Plaintiff vs. PRICEWATERHOUSECOOPERS LLP. et al. Defendant	.	CASE NO. A-16-735910-B DEPT. NO. XI **Transcript of Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

FURTHER HEARING ON MOTION FOR SUMMARY JUDGMENT

MONDAY, SEPTEMBER 24, 2018

APPEARANCES:

FOR THE PLAINTIFF:	MARK A. HUTCHISON, ESQ. SCOTT F. HESSELL, ESQ.
FOR THE DEFENDANTS:	PATRICK G. BYRNE, ESQ. PETER B. MORRISON, ESQ.
COURT RECORDER:	TRANSCRIPTION BY:
JILL HAWKINS District Court	FLORENCE HOYT Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

LAS VEGAS, NEVADA, MONDAY, SEPTEMBER 24, 2018, 9:15 A.M.

(Court was called to order)

THE COURT: Can I get appearances, please.

MR. HUTCHISON: Good morning, Your Honor. Mark Hutchison on behalf of Mr. Tricarichi.

MR. HESSELL: Scott Hessell for the plaintiff.

MR. BYRNE: Good morning, Your Honor. Pat Byrne on behalf of the defendant, PricewaterhouseCoopers. With me today is Peter Morrison, my co-counsel, from Skadden Arps --

MR. MORRISON: Good morning, Your Honor.

MR. BYRNE: -- and Jeff Fagan from Skadden Arps. Also somewhere in the courtroom is Geoff Ezgar from the Office of General Counsel for Pricewaterhouse.

THE COURT: Okay. It's your motion.

MR. BYRNE: Yes, Your Honor.

THE COURT: Somebody told you you get 10 minutes, not to exceed; right?

MR. BYRNE: You're looking at the wrong person, Judge.

THE COURT: Oh.

MR. BYRNE: Your Honor, before we start the clock --

THE COURT: I don't have any doubt you can make the 10 minutes.

MR. BYRNE: You know how fast I can talk, Your Honor.

THE COURT: Yes, I do.

MR. BYRNE: I'm wearing my UK tie this morning, Your Honor --

THE COURT: I know.

MR. BYRNE: -- because I haven't been in your court since --

THE COURT: Thanks for rubbing it in.

MR. BYRNE: -- Kentucky did break the streak. So --

THE COURT: Thirty years.

MR. BYRNE: -- I've just got to wait another 30 years, Your Honor.

THE COURT: Thirty years.

MR. BYRNE: Yes, I know. Futility at a new level.

Your Honor, this case involves a dispute over tax advice that was given 15 years ago. Plaintiff's claims have been time barred for nearly a decade. Now, we moved for summary judgement in front Judge Hardy last March based on plaintiff's own complaint, where he alleges the services ended in August of 2003. Now, the engagement letter had a general choice of law provisions for New York, and there's a big fight over which law governs. Under Nevada law the four-year provision from the time the services are rendered the claims would be barred as of August 2007. Under New York law it's three years, and it would be barred as of 2006.

THE COURT: Unless we use that Saragosa-Brown

discovery issue, and then it might have started at the time of the IRS investigation, whenever that was, at the latest.

MR. BYRNE: Your Honor, I want to get to that, because that was something we didn't get to argue in front of Judge Hardy.

THE COURT: That's why we're talking about it today.

MR. BYRNE: And I believe he would have granted summary judgement had we had that document.

THE COURT: It doesn't matter what he would have done. It matters what I'm going to do.

MR. BYRNE: I know. But I only bring out that point because we did not have that document. Because that's the other argument under Nevada law. Judge Hardy, though, did find, Your Honor, that -- he was prepared to grant summary judgement. He granted discovery on a very narrow issue, fraudulent concealment. Now, I'm going to -- a lot of briefing is spent on stuff that's already been briefed before in the prior briefing. I think it was implicitly rejected by Judge Hardy, and I'm going to skip over it. I'll point it out and skip over it, unless, Your Honor, you think I should address it.

THE COURT: No. I told you the one thing that I think you should address.

MR. BYRNE: Well, Your Honor, and I'm going to get to that --

THE COURT: And you could get there eventually.

MR. BYRNE: I'm going to get there quickly. Let's start with Nevada law, because if we win under Nevada law, we're certainly going to win under New York law. The only point I want to make is having New York law control is important for Pricewaterhouse. Enforcing this provision is important, because they have these -- they have disputes all across the country, and as Ernst-Engel decision in the Supreme Court says, having uniformity in these types of situations is legitimate and appropriate. So I want to make that point.

But let me dive into Nevada law, because we win under Nevada law. Under Nevada law I've already addressed subsection 11.2075(1)(b). You mentioned 1(a), which was not briefed before. It's the earlier of the two dates, Your Honor. And 1(a) is at the time you knew or should have known of the malpractice, you have two years. Well, Your Honor, here -- and look at Exhibit 4. Exhibit 4 to our motion is the letter from Mr. Tricarichi's lawyer to the IRS addressing their inquiry as to his transferee liability, Your Honor.

There is no doubt as of the date of the response, probably early, it's the date the actual request was made, but at least as of the date of the response he knows he's in --

THE COURT: And that's February 21st --

MR. BYRNE: -- the cross-hairs.

THE COURT: -- February 21, 2008.

MR. BYRNE: '08. He knows he's in the cross-hairs, Your Honor, there's no doubt. We cite the cases that stand for that proposition that that puts him on notice. Your Honor, at that point the two-year statute starts to run.

So why are we arguing this now? Well, we didn't have the document. And why would we argue it if the earlier statute brings it back all the way to 2007? The reason we argue it, Your Honor, is we don't have to deal with fraudulent concealment.

If in fact the plaintiff knows, then there can't be any concealment, and that's the reason why we addressed it in the new brief. Now, plaintiff makes four arguments essentially why he should not lose under Nevada statutes of limitation. Let's start with fraudulent -- you know what, Your Honor, I'm going to go out of order. I'm going to start -- well, let me start with fraudulent concealment.

The statute that is -- our statute includes a fraudulent concealment provision, which is subsection (2). The Supreme Court has not specifically addressed it, Your Honor, but the Nevada Supreme Court has addressed an identical statute, word for word identical in the medical malpractice context, and that was the Libbey versus State and the Wynn-Sunrise Estate. And they have read that clause very narrowly, Your Honor, requiring affirmative conduct, intentional conduct. And they also require the showing that it would

objectively hinder the plaintiff.

Here, Your Honor, there's no evidence that they can show that there was an intentional act. The internal email that they point to that they say triggers their new claim in 2008, the Pricewaterhouse partners conclude that, quote, "it should not change any of our prior analysis." And ultimately what does the plaintiff argue here? The plaintiff doesn't argue the tolling cases, the plaintiff argues fiduciary duty cases. Your Honor, there is no breach of fiduciary duty claim here. It's a different standard in those cases.

The second argument the plaintiff makes is he points to the representation of the other clients that the partners involved here were not involved in. Your Honor, Judge Hardy dealt with that. That was in the prior papers. There's no new discovery that changes the facts, and so I won't deal with it.

Your Honor, there is nothing to support a fraudulent concealment claim in this case. But even if the Court thinks there is, Your Honor has nailed the second issue, and that was not briefed before, and that's under 2075(1)(a). The clock started two years after he received this notice. And what is plaintiff's response to that, Your Honor? He argues that he did not have definitive knowledge until the IRS completed its investigation in June of 2012.

Your Honor, he provides no support for that

position, nor does he attempt to distinguish the cases that we cite that stand for the proposition that you're on notice for purposes of the statute at the time the IRS put you on notice that it's investigating.

Your Honor, whether it's fraudulent concealment or whether it's the fallback to February of 2008, this statute expired before the parties tolled the statute in January of 2011. So what does the plaintiff do to resurrect it? Because this is something that wasn't previously briefed. He tries to argue a new theory of liability. He argues that Pricewaterhouse committed malpractice again in 2008, when it wrongly concluded that the IRS notice of the revision to the Midco notice in 2001, they wrongly concluded that it doesn't change their analysis.

Well, Your Honor, that's wrong for at least four reasons. First, it's not been pled, Your Honor, and you can't amend your pleadings in an opposition. And that's the Ramney case that we cite.

Second, Your Honor, the plaintiff's original claim we think is barred in 2007. So there's nothing that can resurrect that claim in 2008. And then, Your Honor, we would also argue it does not state a claim even if the Court were going to allow them to assert it.

The internal analysis concludes, rightly or wrongly, that it shouldn't change any of our prior analysis. The cited

professional standards that they rely on to show negligence say that the accountant has an obligation "only when the tax professional has knowledge of the mistake." Plaintiff does not dispute Pricewaterhouse did not have actual knowledge. Instead, he just says they got it wrong. But that, Your Honor, doesn't violate the standards. In addition, Your Honor, he can't show that the error in 2008 caused him damage. By 2008, Your Honor, the cake is baked. The tax returns had been filed, the positions had been taken all the way back in 2003 and '04, and it's too late to go back and change that.

Your Honor, the other argument that plaintiffs make, and this has been previously briefed with respect to Nevada law, the last one I will address, is that you have to read damages into the statute. Judge Hardy rejected it, Your Honor, because otherwise there'd be no reason to have 56(f) discovery. And you should reject it, too. Because it would contradict the expressed terms of the statute, Your Honor, which was amended to remove damages. And so we have the Supreme Court's case that says when you remove the language you have to read into that that that's what the legislature intended to do.

And so, ultimately, Your Honor, under Nevada law summary judgement has to be granted. Whether it's August 2007 or it's February of 2010, it predates the tolling agreement. Now, Your Honor, under New York law the issue is even easier,

and I'm not going to go through the choice of law analysis, because, frankly, I don't have time. But we think it's clear that applying the Restatement -- which, Your Honor, Judge Denton did not do it in the Cantor case, but if you apply a Restatement conflict of laws, you go to Section 187 in every case that has addressed the issue in the context of statute of limitations has concluded a general choice of law incorporates in addition to the substantive law the statute of limitations. And they cite no cases other than Judge Denton's decision to beat -- and by the way, Your Honor, we cite six cases in the Federal District Court that address this very issue, and they all ruled consistently, New York law applies. Now, the only way to get around New York law, because there's no fraudulent concealment, Your Honor, is plaintiff argues continuous representation. His problem is -- we'll start with the obvious -- he admits in his affidavit that it terminated in August 2003. In addition, Your Honor, the standard is continuous representation, not mere possibility, not sporadic. And here all we can point to is the March internal discussion in 2008. That's his only evidence, and, Your Honor, that wasn't shared, it wasn't requested, and my client didn't charge for it. He does not meet New York's continuous representation exception. Unless --

THE COURT: Thank you, Mr. Byrne.

MR. BYRNE: -- the Court has any questions -- and I

need some water because I've been talking so fast -- I'll rest.

THE COURT: Okay. Thank you.

Gentlemen?

MR. HESSELL: Good morning, Your Honor.

THE COURT: Good morning.

MR. HESSELL: Scott Hessell for plaintiffs. I did want to address, hopefully it won't be on my 10 minutes, the sealing issue, the sealing of the brief, which was pursuant to a confidentiality stipulation that the parties entered into.

THE COURT: Not so much. I read it.

MR. HESSELL: I know. Well, in all events I think we've avoided the issue, because the defendants have advised us that they have no objection to us filing it not under seal.

THE COURT: Okay.

MR. HESSELL: So we will do that by the end of the day today.

THE COURT: Great.

MR. BYRNE: And that's correct, Your Honor.

THE COURT: Awesome.

MR. HESSELL: So I wanted to just start with -- stepping back back for a moment, which is that Mr. Tricarichi, who's in court here today, in this case is not an instance where plaintiffs sat on their rights for a dozen years. Even though the original advice was back in 2003 --

THE COURT: So why didn't they get the tolling agreement when the IRS first came knocking?

MR. HESSELL: Right. So that's --

THE COURT: No, I'm serious. Why didn't they do that?

MR. HESSELL: No, I know. I know. And here's -- and my answer is he did.

THE COURT: He got a tolling agreement --

MR. HESSELL: As soon --

THE COURT: -- in 2008?

MR. HESSELL: -- as the notice of -- as soon as the notice of transferee liability was issued by --

THE COURT: Oh. Okay.

MR. HESSELL: -- the IRS in 2012, which was the first time the IRS proposed any adjustments to his personal tax returns that he may be subject to the transferee liability that's directly at issue in this case. PwC in 2003 told him, you do not have to worry about what Westside, the company who you're selling all your shares in, does in terms of tax transactions, because there's no transferee liability. That fact wasn't disproven until the IRS took a contrary position.

The document that the defendants cite to is a 2008 document request from the IRS, which seeks information from Mr. Tricarichi, but it pertains to the ongoing audit that was occurring as to Westside. They were establishing and needed

to establish liability against Westside before they ever came to Mr. Tricarichi, because as far as the IRS knew at that time, Westside was the one who was going to be on the hook. The only reason why they turned to Mr. Tricarichi later is because they learned, after issuing a notice of proposed adjustments to Westside, there's no money there.

And it was not until 2012 when the IRS issued the notice of transferee liability that Mr. Tricarichi ever thought that he was going to be on the hook. In all events, let's accept the defendant's argument, we are on a motion for summary judgement. All the inferences from the evidence at this juncture must be interpreted in favor of the nonmovant. They say, oh, well there's a document request. And they are asking you to find as a matter of law without the benefit of the witness's testimony about how he reacted to that document request, that he must have known that PwC screwed up. But let's assume that the IRS never issues a proposed adjustment to Mr. Tricarichi, all they do is seek documents from him. We're never here and this case never exists.

The only point in time where he knows that PwC's advice is bunk is in 2012, when the IRS formally asserts liability against him. That dispute then goes on for six or seven years, that is the dispute between --

THE COURT: In the tax court?

MR. HESSELL: Yes.

THE COURT: Right.

MR. HESSELL: And only in 2015 does the tax court rule against him. All during that period of time we have a tolling agreement in place, and by all accounts, both sides, both the plaintiff and PwC were waiting to see what the outcome of that tax dispute was to know whether or not these claims needed to go forward.

So taking all of that, where does that lead us with the statute of limitations analysis? Our argument here and before has been that Nevada law is pretty clear, and there are a bunch of cases -- and in particular I would direct you to the Nuvoric [phonetic] case, which where Nevada has established the proposition that until you have damages, until you have a right claim your statute can't run, because in the Nuvoric case it was a legal malpractice case where they said we have a litigation tolling rule. We don't want to force plaintiffs to bring premature lawsuits. Had Mr. Tricarichi brought his case four years after the services were provided PwC you know full well would be up here saying, your claims aren't ripe, they should be dismissed because you have no damages yet, how do you know that our advice is even bad. The fact of the matter is no benefit is gained by forcing plaintiffs in his situation to file a premature lawsuit then come into court and say stay it until my seven-year litigation with the IRS is concluded. What we want as a matter of

judicial administration is exactly what he did, go get a tolling agreement and see whether or not you have any claims.

The statute 11.2075 starts out by saying, "An action against an accountant or accounting firm to recover damages for malpractice must be commenced within the periods that then follow." They want to say that that language, "to recover damages," means nothing, that you don't actually have to have damages, and the statute's going to apply either way. We've set forth a caselaw on that point, and I won't belabor it.

I'd like to just turn to the question that you brought up, which is, well, what about sub (2) of 2075, which is what we got the 56(f) discovery from Judge Hardy concerning. The language, and I know -- I'm sure we've all read it, but I think it bears repeating, that says that "The time of limitations in subsection (1) is tolled for any period during which the accountant or accounting firm conceals the act, error, or omission upon which the action is founded and which is known, or through the use of reasonable diligence should have been known, to the accounting firm or accountant." The reason why I'm reading that is because it is not a fraudulent concealment common-law provision that requires us to demonstrate the intent of the parties who were advising us. It says that if the defendant, the accounting firm, knew or should have known that it screwed up in the past and conceals that fact from the plaintiff, during that entire period of

time where it occurred, you get tolling.

And before I even dive into the facts, everything that you've heard from defense counsel is arguing from the evidence that we've adduced, and at this juncture that's not appropriate. We've put forward evidence that shows that PwC as an institution less than a year after they advised the client on the transaction started expressing concern about the dubiousness of the transaction, whether they should go out and market themselves to those who participated in the transaction in order to earn additional fees. And when the 2008 decision came out about a transaction in which PwC had previously advised, they were specifically concerned about the possibility that their clients would come and sue them. With that evidence in mind it doesn't matter whether Stosky [phonetic] and Lowes themselves, on their own, decided they didn't need to come back to Mr. Tricarichi. We haven't sued Stotsky and Lowes, we have sued PwC. PwC as an institution knew two critical facts at the time they advised him and concealed those facts at a later date, as well. The two key facts that we allege in the complaint, that they've never disclosed, is the conflict of interest, because they had brought Fortran and earned a million-dollar fee in this Bishop transaction which we refer to, and, secondly, at the very same time Lowes and Stosky are telling Mr. Tricarichi, no problem with the transaction, it's not a listed transaction, you can

go forward, PwC is advising one of my other clients, the Marshalls, the exact opposite. And those facts were never learned until discovery in the tax court case. Those facts were concealed from day one of the representation all the way through the point in time where he learns about it in tax court.

That evidence read in our favor or interpreted in our favor with the reasonable inferences from it presents a question of fact for the jury to have to decide, when did Mr. Tricarichi learn of the possibility that he was going to be subject to damages and when did they learn that their previous advice was bad. Those are issues which can be presented in jury instructions in which the jury should have the benefit of the witnesses in the box to decide whether Mr. Stosky and Lowes's self-serving email to each other that they don't think they did anything wrong needs to be credited, or whether it simply reflects that they were not wanting to go back to a client who they knew might sue them.

And the rest of the issues, and there are a lot of them, are I think addressed in the briefs, and I'm not going to go further on them.

THE COURT: Thank you. I appreciate that. Thank you.

Mr. Byrne, you may have two minutes to answer my question. That is, assume for a minute that I find that there

is receipt of the February 21, 2008, letter, because it's a response to the IRS and arguably would be notice. Why would there not be factual issues as to the extent of the notice, whether it is notice of a problem with the company he sold, Westside Cellular, as opposed to a problem with himself as an individual?

MR. BYRNE: Your Honor, I would say first off this is as good as it gets, because they've had 56(f) discovery on this issue, and it's closed. Exhibit 4 answers your question for you.

THE COURT: I'm reading it.

MR. BYRNE: This is not a narrow, we want to hear about Westside. Westside wasn't transferee liability. It says, with respect to, quote, "transferee liability," then it proceeds to ask questions that are relating to what plaintiff received and what plaintiff did. Your Honor, if this didn't put him on notice and that he needed the final decision, then why in January of 2011 are they asking for a tolling agreement. They don't get the final decision for another year later. That's because, Your Honor, they were on notice. They were on notice the minute the IRS inquired and started asking questions about his side of the transaction about Mr. Tricarichi's receipt of the proceeds.

So this idea that they can somehow close their eyes and you need more discovery, the caselaw is clear, this type

of notice puts him on notice for statute of limitations purposes. And if he needed the final determination he would have came to us in January of 2012, and not January of 2011, asking for the tolling agreement. And the tolling agreement is Exhibit 13 to our reply, Your Honor.

THE COURT: Thank you. All right. Thanks.

Regardless of what law applies, even under Nevada law, given the IRS investigation and the statutory interpretation of the NRS 11.2075-1, the period is two years after discovery under the best-case scenario for the plaintiffs, which would be, before whenever the receipt of the information document request was, which is before the response to the information document request is dated February 21st, 2008. Therefore. the statute of limitations expired prior to the January 2011 tolling agreement being executed.

However, if you believe that you have a subsequent retention that may have different statute of limitations, I will give you the opportunity to amend. I will not do it based upon your opposition that's been filed. However, based upon the facts that are currently before the Court it appears under the discovery rule that the two years expired prior to the execution of the tolling agreement.

MR. BYRNE: Your Honor, I'll prepare the order and submit it by counsel.

THE COURT: Yes. But they may be filing a motion to

amend.

MR. BYRNE: I understand, Your Honor.

THE COURT: All right. Have a nice day. 'Bye.

THE PROCEEDINGS CONCLUDED AT 9:39 A.M,

* * * * *

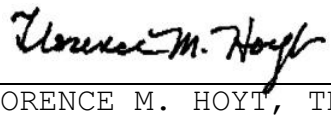
CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
Las Vegas, Nevada 89146



FLORENCE M. HOYT, TRANSCRIBER

9/25/18

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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**

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TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL:

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

Dated: October 24, 2018

SNELL & WILMER L.L.P.

By: /s/ *Bradley Austin*
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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:

☐	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).
☐	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.
☐	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.
☐	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.
☒	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.
☐	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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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

ORDER GRANTING SUMMARY JUDGMENT

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

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

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

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

3. Plaintiff completed the Transaction in September 2003.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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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:

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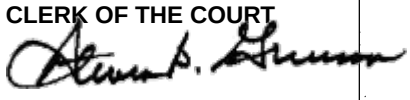

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DISTRICT COURT

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. 11 **NOTICE OF ENTRY OF ORDER GRANTING MOTION FOR LEAVE TO FILE AMENDED COMPLAINT**

TO: ALL INTERESTED PARTIES

NOTICE IS HEREBY GIVEN that an Order Granting Motion for Leave to File Amended Complaint was entered in the above-entitled action on March 26, 2019, a copy of which is attached hereto.

DATED this 27th day of March, 2019.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Hutchison & Steffen, PLLC and that on this 27th day of March, 2019, I caused the document entitled **NOTICE OF ENTRY OF ORDER GRANTING MOTION FOR LEAVE TO FILE AMENDED COMPLAINT** to be served on the following by Electronic Service to:

ALL PARTIES ON THE E-SERVICE LIST

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

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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI, Plaintiff, v. 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 **ORDER GRANTING MOTION FOR LEAVE TO FILE AMENDED COMPLAINT**

Plaintiff Michael A. Tricarichi's Motion for Leave to File Amended Complaint came on for hearing before this Court on March 18, 2019. Thomas D. Brooks and Michael K. Wall appeared on behalf of Plaintiff Michael A. Tricarichi. Patrick G. Byrne, Peter B. Morrison and Zachary Faigen appeared on behalf of Defendant PricewaterhouseCoopers LLP. THE COURT, having reviewed the papers on file herein and having heard argument from the parties and good cause appearing,

HEREBY ORDERS that Plaintiff Michael A. Tricarichi's Motion for Leave to File Amended Complaint is GRANTED. Plaintiff may file the Amended Complaint within five days. Pursuant to the parties' agreement, Defendant PricewaterhouseCoopers LLP shall have until April 29, 2019 to answer or otherwise respond to the Amended Complaint. Since Defendant intends to file a motion with respect to the Amended Complaint on such date, pursuant to the parties' agreement the following schedule, subject to possible revision after actual filing of the motion and review by Plaintiff, is hereby set: Plaintiff's Opposition to be filed by May 29, 2019; Defendant's Reply to be filed by June 17, 2019; hearing on the motion to be held July 8, 2019 at 9:00 a.m.

DATED: 3/26/19

DISTRICT COURT JUDGE

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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 CASE[1]

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.

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

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

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

6. Defendants Seyfarth Shaw LLP ("Seyfarth") and Graham R. Taylor – a law firm and a now-disbarred lawyer who was a Seyfarth partner at the time – unbeknownst to Plaintiff until years later, further facilitated the transaction by providing Fortrend with a legal opinion blessing steps that Fortrend would take but that Seyfarth and Taylor actually knew to be 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,

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

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

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

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

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

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

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

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

JURISDICTION AND VENUE

21. This Court has subject matter jurisdiction over this matter pursuant to Art. 6, Sec. 6 of the Nevada Constitution.

22. This Court has personal jurisdiction over Defendants by virtue of their ongoing contacts with the state of Nevada, and/or because they purposefully availed themselves of, or directed their activities toward, the forum state of Nevada by participating in, substantially assisting and/or conspiring with Fortrend and other parties to advance the transaction that was promoted to and targeted Plaintiff, a Nevada resident, with Plaintiff's injuries arising in Nevada as a result, as set forth below.

23. Venue is proper before this Court because the Defendants, or one of them, reside in this District, and because the claims at issue arose in substantial part in this District.

24. This matter is properly brought as a business matter in business court pursuant to EDCR 1.61(a)(ii)-(iii).

FACTUAL BACKGROUND

Midco Transactions Generally

25. "Midco" transactions, a type of abusive tax shelter, were widely promoted during the late 1990s and early 2000s. The IRS has listed Midco transactions as "reportable transactions" for federal income tax purposes, meaning that the IRS considers them, and substantially similar transactions, to be improper tax-avoidance mechanisms. Fortrend and Midcoast were leading promoters of Midco-type transactions, with both companies being involved in numerous such transactions that were, years later, accordingly rejected by the tax courts.

26. Midco-type transactions were generally promoted to shareholders of closely held C corporations that had incurred large taxable gains. Promoters of Midco transactions targeted such shareholders and offered a purported solution to "double taxation," that is, the

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

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

The Midco Transaction Into Which Plaintiff Was Drawn

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

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

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

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

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

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

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

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

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

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

36. Because Plaintiff thought Midcoast and Fortrend were competitors, he began negotiating with both in the hope of stirring up a bidding war. Rather than continue to compete, though, Midcoast and Fortrend secretly agreed that Midcoast would step away from the

transaction in exchange for a kickback of $1,180,000. As a result of this bid-rigging, Midcoast's final offer was intentionally unattractive, and Plaintiff chose to proceed with Fortrend.

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

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

39. Unbeknownst to Plaintiff, PwC had on at least one prior occasion brought Fortrend to the table to facilitate a Midco transaction that PwC itself had advocated. In particular, in late 1999, PwC advocated that a Midco transaction be used in the purchase of the Bishop Group Ltd. ("Bishop") by PwC's client Midcoast Energy Resources, Inc.; PwC approached Fortrend to serve as an intermediary; and a Fortrend affiliate in fact served as an intermediary, purchasing the Bishop stock in a Midco transaction that PwC helped negotiate. As it did in Mr. Tricarichi's case, Rabobank also facilitated the Bishop transaction by loaning Fortrend the purchase price and serving as the conduit through which funds changed hands at closing, all in return for a substantial fee. PwC disclosed none of this to Plaintiff. The Bishop

Midco transaction was audited by the IRS starting in late 2003 (but before Plaintiff had reported the Westside stock sale on any tax returns), found deficient by the IRS in 2004, and confirmed by the courts in 2008 and 2009 to be an illegal tax shelter.

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

41. During the period April-August 2003, a team of PwC tax professionals, including Rich Stovsky, Timothy Lohnes and Don Rocen, set out to examine and advise Plaintiff regarding the transactions proposed by Fortrend and Midcoast. PwC personnel put between 150 and 200 hours into this effort, for which PwC charged approximately $48,000 in fees. PwC participated in various calls with the parties and/or their representatives, reviewed transaction documentation, and undertook research. PwC understood, among other things, that Fortrend would borrow a substantial sum from Rabobank in order to finance the transaction; that Fortrend intended to employ Westside's tax liability to offset

gains and deductions associated with high basis / low value assets; and that Plaintiff was relying on Fortrend to satisfy Westside's tax obligations.

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

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

44. Fortrend would use its affiliate Nob Hill, Inc. ("Nob Hill"), of which McNabola was the president, as the intermediary company to purchase the Westside stock. Nob Hill's sole shareholder was Millennium Recovery Fund, LLC, a Fortrend affiliate formed in the Cayman Islands. In the stock purchase agreement, which McNabola signed, Nob Hill represented that Westside would remain in existence for at least five years after the closing and "at all times be engaged in an active trade or business." Nob Hill also provided purported tax warranties. The agreement represented that Nob Hill would "cause … [Westside] to satisfy fully all United States … taxes, penalties and interest required to be paid by … [Westside] attributable to income earned during the [2003] tax year." Nob Hill agreed to indemnify Plaintiff in the event of liability arising from breach of its representation to satisfy Westside's 2003 tax liability, and represented that it had sufficient assets to cover this indemnification obligation. Nob Hill

further warranted that it had no intention of causing Westside to engage in an IRS reportable transaction.

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

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

47. On information and belief, from 1996 to 2003, Fortrend promoted almost one hundred Midco transactions, and worked closely with Rabobank to obtain financing for many of those transactions. In Plaintiff's case, of the $34.6 million agreed purchase price for Westside's stock, $29.9 million would come from Rabobank, via Utrecht. (The remainder was loaned to Nob Hill by another Fortrend affiliate, Moffat.) The loan and the closing were

structured in such a way that Defendants Rabobank and Utrecht considered that they really bore no risk of non-payment.

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

49. Among the financing documents subsequently executed by Nob Hill (the Fortrend affiliate) were a promissory note for $29.9 million, a security agreement, and a pledge agreement dated as of September 9, 2003. McNabola signed all these documents as Nob Hill's president. Pursuant to the security agreement, the Tax Court subsequently found, Nob Hill granted Rabobank a first priority security interest in a Rabobank account that Plaintiff would open for Westside in connection with the transaction, in order to secure Nob Hill's repayment obligation. Pursuant to the pledge agreement, the Tax Court also found, Nob Hill granted Rabobank a first-priority security interest in the Westside stock and the stock sale proceeds as collateral securing Nob Hill's repayment obligation. Among the financing documents to be executed by Westside were security and guaranty agreements in favor of Rabobank, and a control agreement. McNabola also signed these documents. Via the security and guaranty agreements, the Tax Court further found, Westside unconditionally guaranteed payment of Nob Hill's obligations to Rabobank, and granted Rabobank a first priority security interest in

Westside's Rabobank account. The control agreement further gave Rabobank control over Westside's account – including all cash, instruments, and other financial assets contained therein from time to time, and all security entitlements with respect thereto – in order to ensure that Westside did not default on its commitments, the Tax Court determined, further concluding that these agreements effectively gave Rabobank a "springing lien" on Westside's cash at the moment it funded the loan. For all practical purposes, therefore, the Tax Court found, the Rabobank loan was fully collateralized with the cash in Westside's Rabobank account, consistent with the R-1 risk rating that Rabobank assigned to that loan.

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

51. Rabobank and Utrecht proceeded with the transaction and the loan to Fortrend (Nob Hill) despite knowing that the Fortrend transaction in this case was a Midco deal that constituted a reportable transaction considered by the IRS to be an improper tax-avoidance mechanism. During the years 1998 – 2002, Rabobank (via, on information and belief, subsidiaries including Utrecht) had financed a total of 88 Midco transactions, at the pace of about 18 transactions per year. Rabobank earned considerable and attractive fees via the loans, which ranged in amount between $6 million and $260 million, and were mostly for terms of only one to three days. At the time, Rabobank was experiencing difficulty in other areas of its

business, and opportunistically looked at the Midco financing transactions as "easy money" – short term loans with high yield and no credit risk.

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

a. Bishop Group: In or about October 1999, Rabobank facilitated the purchase of Bishop stock by loaning another special-purpose Fortrend affiliate (K-Pipe Merger Corp.) approximately $200 million short-term for the purchase price, and by serving as the conduit through which funds changed hands at closing, in return for a substantial fee. Like Nob Hill in this case, K-Pipe was a shell company with no assets and conducted virtually no business after the purchase. A federal court in Texas subsequently found that the Bishop transaction was a sham and constituted an improper Midco tax shelter, and that determination was affirmed by the U.S. Court of Appeals for the Fifth Circuit.

b. Town Taxi and Checker Taxi: In or about October 2000, Rabobank loaned Three Wood LLC, a newly formed Fortrend special-purpose affiliate, $30 million short-term to purchase the stock of Town Taxi Inc. and Checker Taxi Inc. from the Frank Sawyer Trust after those companies had sold all their assets. Rabobank again served as the conduit through which funds changed hands at closing, on information and belief in return for a substantial fee. On information and belief, in order to induce the Trust into the transaction, Fortrend falsely represented to the Trust that Fortrend had a strategy to legitimately offset the taxes due as a result of the taxi companies' asset sales. Within about two months of the closing, Fortrend stripped Town Taxi and Checker Taxi of their remaining funds, totaling millions of dollars, moving that money to other Fortrend affiliates. Late in 2000, Fortrend contributed to Town Taxi and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

66. As the Tax Court noted, Seyfarth "gained notoriety for issuing bogus tax-shelter opinions," and the opinion issued to Fortrend in Plaintiff's case "seems par for the course." Rogers conceived of and created a DAD shelter in early 2003, shortly before he became a Seyfarth partner in July 2003, and Seyfarth, Rogers and Taylor subsequently promoted, facilitated and participated in numerous DAD and other illegal tax shelters thereafter with

Fortrend and others. Upon information and belief, numerous clients of Seyfarth, Taylor and Rogers were – like Fortrend – themselves tax shelter promoters who used the purported losses from DAD and similar schemes as part of abusive Midco transactions.

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

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

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

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

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

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

b. As the Tax Court found, Westside conducted no meaningful business operations after September 10, 2003; it reported no gross receipts, income, or business expenses relating to its supposed "debt collection" business; and it undertook no efforts to collect the Aoyama Loans or contract with a third party to do so. During this period, Conn Vu served Fortrend as Westside's president, secretary and treasurer, signing Westside's tax returns and nominally presiding over the company's "business" until Fortrend drained it of its last assets.

c. On its tax return for 2003, Westside (under Fortrend's control) reported total income of $66,116,708 and total deductions of $67,840,521. The deductions included purported bad debt losses of $42,480,622 based on the Aoyama Loans. Westside did not pay any amount of taxes.

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

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

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

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

PwC Monitored and Sought to Benefit from Midco Developments

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

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

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

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

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

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

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

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

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

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

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

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

a. As Stovsky testified in Tax Court, PwC concluded when it originally advised Tricarichi that Fortrend's plan "for the write-off of … high basis/low valued property that was to be contributed to Westside … was not Mr. Tricarichi's concern." (Trial 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

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

b. But, under the newly-issued Notice 2008-111, Fortrend's plan *was* Tricarichi's concern. As Notice 2008-111 indicates, Fortrend's plan was pertinent to the question of whether Fortrend and/or Tricarichi were engaging in the transaction "pursuant to" a "Plan," *i.e.*, "under circumstances where the person or persons primarily liable for any Federal income tax obligation with respect to the disposition of the Built-In Gain Assets will not pay that tax." Since PwC had been aware of Fortrend's plan to write off the distressed assets it would contribute to Westside in order to reduce Westside's (*i.e.*, Fortrend's) tax liability post-closing, under recently-issued Notice 2008-111 PwC knew, or at least had reason to know, that the Fortrend transaction was structured to effectuate a Plan as defined in the notice.

c. Since PwC had been Tricarichi's advisor with respect to the Fortrend transaction, Tricarichi could thus now be deemed, under Notice 2008-111, to have engaged in the transaction pursuant to a Plan, and the transaction thus deemed to be a Midco transaction.

d. Accordingly, PwC's conclusion that the Fortrend transaction was not a reportable or listed transaction (*see, e.g.*, Trial Tr. 653:19-25 [Stovsky]) was incorrect or at the very least questionable, as PwC knew or should have known by December 2008.

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

a. Notice 2008-111 itself states: "The Service and the Treasury Department recognize that some taxpayers may have filed tax returns taking the position that they were entitled to the purported tax benefits of the types of transactions described in Notice 2001-16. These taxpayers should consult with a tax advisor to ensure that their transactions are disclosed properly and to take appropriate corrective action."

b. As PwC has itself noted, Association of International Certified Professional Accountants ("AICPA") Statement on Standards for Tax Services ("SSTS") No. 6 (Knowledge of Error: Return Preparation and Administrative Proceedings) "sets forth the applicable standards for a member who becomes aware of (a) an error in a taxpayer's previously filed tax return [or] (b) an error in a return that is the subject of an administrative proceeding, such as an examination by a taxing authority...." Under this AICPA provision, "The term error ... includes a position taken on a prior year's return that no longer meets these standards due to legislation, judicial decisions, or administrative pronouncements having retroactive effect.... SSTS No. 6 applies whether or not the member prepared or signed the return that contains the error."

c. Given its retroactive effective date of January 19, 2001, Notice 2008-111 is an administrative pronouncement having retroactive effect. As alleged above, PwC knew or had reason to know by December 1, 2008, that Notice 2008-111, and its

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

d. SSTS No. 6 further provides that, "If a member becomes aware of an error in a previously filed return, the member should promptly advise the taxpayer of the error, the potential consequences, and recommend the measures to be taken.... If the member is not engaged to perform tax return preparation, the member is only responsible for informing the taxpayer of the error and recommend[ing] that the taxpayer discuss the error with the taxpayer's tax return preparer."

e. Similarly, Section 10.21 of U.S. Treasury Department Circular No. 230, as summarized by the IRS, requires that: "If you know that a client has not complied with the U.S. revenue laws or has made an error in, or omission from, any return, affidavit, or other document which the client submitted or executed under U.S. revenue laws, you must promptly inform the client of that noncompliance, error, or omission and advise the client regarding the consequences under the Code and regulations of that noncompliance, error, or omission. Depending on the particular facts and circumstances, the consequences of an error or omission could include (among other things) additional tax liability, civil penalties, interest, criminal penalties, and an extension of the statute of limitations.")

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

86. PwC had numerous opportunities to inform Plaintiff of the foregoing points, but 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

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

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

Defendants and Their Co-Conspirators Fraudulently Concealed Their Acts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COUNT I
GROSS NEGLIGENCE AS TO PwC

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

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

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

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

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

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

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.

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

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

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

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

113. The said false and otherwise inaccurate statements made by PwC caused Plaintiff to incur damages 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, and 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.

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

COUNT III
NEGLIGENCE AS TO PwC

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

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

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

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

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

120. As a direct and proximate result of the negligence or 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 penalties and interest by the IRS in sums far greater than Plaintiff would otherwise have had to pay, and other losses.

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

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

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

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

127. 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.

128. 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 V
CIVIL CONSPIRACY
AS TO RABOBANK, UTRECHT, SEYFARTH AND TAYLOR

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COUNT IX
UNJUST ENRICHMENT
AS TO RABOBANK AND UTRECHT

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

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

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

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

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

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

D. Costs of investigation and litigation reasonably incurred;

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

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

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

JURY DEMAND

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

DATED this 10th day of December, 2018.

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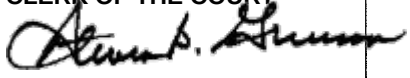

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DISTRICT COURT

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. 11 **NOTICE OF ENTRY OF ORDER DENYING PRICEWATERHOUSECOOPERS LLP'S MOTION TO DISMISS AMENDED COMPLAINT**

TO: ALL INTERESTED PARTIES

NOTICE IS HEREBY GIVEN that an Order Denying PricewaterhouseCoopers LLP's Motion to Dismiss Amended Complaint was entered in the above-entitled action on July 30, 2019, a copy of which is attached hereto.

DATED this 31st day of July, 2019.

HUTCHISON & STEFFEN, PLLC

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Attorneys for Plaintiff Michael A. Tricarichi

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Hutchison & Steffen, PLLC and that on this 31st day of July, 2019, I caused the document entitled **NOTICE OF ENTRY OF ORDER DENYING PRICEWATERHOUSECOOPERS LLP'S MOTION TO DISMISS AMENDED COMPLAINT** to be served on the following by Electronic Service to:

ALL PARTIES ON THE E-SERVICE LIST

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

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Attorneys for Plaintiff

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 **ORDER DENYING PRICEWATERHOUSECOOPERS LLP'S MOTION TO DISMISS AMENDED COMPLAINT**

Defendant PricewaterhouseCoopers LLP's (PwC's) Motion to Dismiss Amended Complaint came on for hearing before this Court on July 8, 2019. Scott F. Hessell and Michael K. Wall appeared on behalf of Plaintiff Michael A. Tricarichi. Patrick G. Byrne, Peter B. Morrison and Zachary Faigen appeared on behalf of Defendant Pricewaterhouse Coopers, LLP. The Court, having considered the papers submitted by counsel and their arguments, and GOOD CAUSE APPEARING;

IT IS HEREBY ORDERED that Defendant Pricewaterhouse Coopers LLP's Motion to Dismiss Amended Complaint is denied for the reasons stated on the record.

Defendant Pricewaterhouse Coopers, LLP shall answer the Amended Complaint on or before August 12, 2019.

DATED this 29 day of July, 2019.

DISTRICT COURT JUDGE

Approved as to form and content:

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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 **PRICEWATERHOUSECOOPERS LLP'S ANSWER TO AMENDED COMPLAINT**

Defendant PricewaterhouseCoopers LLP ("PwC") submits its Answer to the Amended Complaint filed by Plaintiff Michael A. Tricarichi as follows:

ANSWER

NATURE OF THE CASE

1. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 1. To the extent a response is required, PwC denies the allegations.

2. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 2. To the extent a response is required, PwC denies the allegations.

3. The allegations in paragraph 3 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC refers to its website, www.pwc.com, for a description of PwC's professional services and its qualifications to provide such services. PwC admits that Plaintiff retained PwC from April 2003 to August 2003 to provide certain advice regarding Plaintiff's transaction with Fortrend International, LLC (the "Fortrend Transaction"). PwC denies the remaining allegations in paragraph 3.

4. PwC denies the allegations in paragraph 4.

5. The allegations in paragraph 5 are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 5. To the extent the allegations in paragraph 5 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

6. The allegations in paragraph 6 are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff

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states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 6. To the extent the allegations in paragraph 6 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

7. The allegations in paragraph 7 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 7 as to PwC. To the extent the allegations in paragraph 7 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

8. The allegations in paragraph 8 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 8 as to PwC. PwC refers to the Tax Court Opinion for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the Tax Court Opinion and any factual inferences or legal conclusions made by Plaintiff based on the Tax Court Opinion. To the extent the allegations in paragraph 8 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

9. The allegations in paragraph 9 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 9 as to PwC. To the extent

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the allegations in paragraph 9 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

PARTIES

10. PwC is without information sufficient to form a belief as to the truth of the allegations in the first two sentences of paragraph 10. PwC otherwise denies the allegations contained in paragraph 10.

11. Regarding the allegations contained in paragraph 11:

    a. In response to Plaintiff's characterization of PwC's services, PwC refers to its website, www.pwc.com, for a description of PwC's professional services and its qualifications to provide such services.

    b. PwC admits that it is a limited liability partnership organized and existing under the laws of Delaware.

    c. PwC admits that it is registered with the Nevada Secretary of State to do business in the State of Nevada.

    d. PwC admits that it maintains a Nevada CPA License (PART-0663).

    e. PwC admits that it has one office in, and does business in, the City of Las Vegas.

    f. PwC admits that certain PwC partners reside in the State of Nevada.

    g. PwC otherwise denies the allegations contained in paragraph 11.

12. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 12. To the extent the allegations in paragraph 12 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

13. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 13. To the extent the allegations in paragraph 13 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

14. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 14. To the extent the allegations in paragraph 14 are addressed to other

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defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

15. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 15. To the extent the allegations in paragraph 14 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

THIRD PARTIES

16. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 16. To the extent a response is required, PwC denies the allegations.

17. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 17. To the extent a response is required, PwC denies the allegations.

18. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 18. To the extent a response is required, PwC denies the allegations.

19. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 19. To the extent a response is required, PwC denies the allegations.

20. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 20. To the extent a response is required, PwC denies the allegations.

JURISDICTION AND VENUE

21. Paragraph 21 states a legal conclusion to which no response is required.

22. Paragraph 22 states a legal conclusion to which no response is required.

23. Paragraph 23 states a legal conclusion to which no response is required.

24. Paragraph 24 states a legal conclusion to which no response is required.

FACTUAL BACKGROUND

25. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 25. Paragraph 25 states a legal conclusion to which no response is required. To the extent a response is required, PwC denies the allegations.

26. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 26. To the extent a response is required, PwC denies the allegations.

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27. The allegations in paragraph 27 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 27 as to PwC. To the extent the allegations in paragraph 27 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

28. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 28. To the extent a response is required, PwC denies the allegations.

29. PwC refers to the referenced legal proceedings and decisions for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the legal decisions and any factual inferences or legal conclusions made by Plaintiff based on the referenced decisions. PwC is otherwise without information sufficient to form a belief as to the truth of the allegations in paragraph 29. To the extent a response is required, PwC denies the allegations.

30. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 30. To the extent a response is required, PwC denies the allegations.

31. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 31. To the extent a response is required, PwC denies the allegations.

32. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 32. To the extent a response is required, PwC denies the allegations.

33. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 33. To the extent a response is required, PwC denies the allegations.

34. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 34. To the extent a response is required, PwC denies the allegations.

35. The allegations in paragraph 35 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original

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claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 35 as to PwC. To the extent the allegations in paragraph 35 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

36. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 36. To the extent a response is required, PwC denies the allegations.

37. The allegations in paragraph 37 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC states that, in response to Plaintiff's characterization of PwC's services, PwC refers to its website, www.pwc.com, for a description of PwC's professional services and its qualifications to provide such services. PwC admits that Plaintiff retained PwC from April 2003 to August 2003 to provide certain advice regarding the Fortrend Transaction. PwC denies the remaining allegations in paragraph 37 as to PwC. PwC is otherwise without information sufficient to form a belief as to the truth of the allegations in paragraph 37. To the extent a response is required, PwC denies the allegations.

38. The allegations in paragraph 38 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC admits that on or about April 25, 2003, Plaintiff and PwC entered into an Engagement Agreement ("Engagement Agreement"). PwC refers to the Engagement Agreement for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the Engagement Agreement and any factual inferences or legal conclusions made by Plaintiff based on the Engagement Agreement. PwC otherwise denies the allegations in paragraph 38.

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39. The allegations in paragraph 39 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC refers to the referenced court proceedings and opinions for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the referenced court proceedings and opinions and any factual inferences or legal conclusions made by Plaintiff based on the court proceedings and opinions. PwC otherwise denies the allegations in paragraph 39.

40. The allegations in paragraph 40 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC refers to the referenced court proceedings and opinions for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the referenced court proceedings and opinions and any factual inferences or legal conclusions made by Plaintiff based on the court proceedings and opinions. PwC otherwise denies the allegations in paragraph 40.

41. The allegations in paragraph 41 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC admits that PwC was retained by Plaintiff from April 2003 to August 2003 to provide certain advice pursuant to the Engagement Agreement. PwC further admits that the PwC professionals working on the Engagement included Rich Stovsky, Timothy Lohnes and Don Rocen. PwC admits that PwC professionals worked over 150 hours on the engagement with Plaintiff and that Plaintiff paid approximately $48,000 in fees. PwC otherwise denies the allegations in paragraph 41.

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42. The allegations in paragraph 42 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 42.

43. The allegations in paragraph 43 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC admits it reviewed certain terms of drafts of the stock purchase agreement. PwC refers to the Engagement Agreement for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the Engagement Agreement and any factual inferences or legal conclusions made by Plaintiff based on the Engagement Agreement. PwC is otherwise without information sufficient to form a belief as to the truth of the remaining allegations in paragraph 43. To the extent a response is required, PwC denies the allegations.

44. PwC refers to the stock purchase agreement for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the stock purchase agreement and any factual inferences or legal conclusions made by Plaintiff based on the stock purchase agreement. PwC otherwise denies the allegations in paragraph 44.

45. The allegations in paragraph 45 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC refers to the stock purchase agreement for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the stock purchase agreement and any factual inferences or legal conclusions made by Plaintiff based on the stock purchase agreement. PwC denies the remaining allegations in paragraph

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45 as to PwC. PwC otherwise is without information sufficient to form a belief as to the truth of the allegations in paragraph 45.

46. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 46. To the extent the allegations in paragraph 46 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

47. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 47. To the extent the allegations in paragraph 47 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

48. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 48. To the extent the allegations in paragraph 48 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

49. PwC refers to the Tax Court Opinion for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the Tax Court Opinion and any factual inferences or legal conclusions made by Plaintiff based on the Tax Court Opinion. PwC is otherwise without information sufficient to form a belief as to the truth of the allegations in paragraph 49. To the extent the allegations in paragraph 49 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

50. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 50. To the extent the allegations in paragraph 50 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

51. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 51. To the extent the allegations in paragraph 51 are addressed to other

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defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

52. PwC refers to the relevant court decisions, referenced in paragraph 52, for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the court decisions and any factual inferences or legal conclusions made by Plaintiff based on the referenced court decisions. PwC is otherwise without information sufficient to form a belief as to the truth of the allegations in paragraph 52. To the extent the allegations in paragraph 52 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

53. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 53. To the extent the allegations in paragraph 53 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

54. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 54. To the extent the allegations in paragraph 54 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

55. The allegations in paragraph 55 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC admits that Plaintiff retained PwC from April 2003 to August 2003 to provide certain advice regarding the Fortrend Transaction. PwC denies the remaining allegations in paragraph 55.

56. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 56. To the extent the allegations in paragraph 56 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

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57. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 57. To the extent the allegations in paragraph 57 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

58. The allegations in paragraph 58 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC refers to IRS Notice 2001-16 for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of IRS Notice 2001-16 and any factual inferences or legal conclusions made by Plaintiff based on IRS Notice 2001-16. PwC denies the remaining allegations in paragraph 58 as to PwC. To the extent the allegations in paragraph 58 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

59. The allegations in paragraph 59 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 59 as to PwC. To the extent the allegations in paragraph 59 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

60. The allegations in paragraph 60 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 60 as to PwC. To the extent the allegations in paragraph 60 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

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61. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 61. To the extent a response is required, PwC denies the allegations.

62. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 62. To the extent a response is required, PwC denies the allegations.

63. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 63. To the extent a response is required, PwC denies the allegations.

64. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 64. To the extent a response is required, PwC denies the allegations.

65. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 65. To the extent a response is required, PwC denies the allegations.

66. PwC refers to the Tax Court Opinion for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the Tax Court Opinion and any factual inferences or legal conclusions made by Plaintiff based on the Tax Court Opinion. To the extent the allegations in paragraph 66 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

67. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 67. To the extent the allegations in paragraph 65 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

68. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 68. To the extent the allegations in paragraph 68 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

69. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 69. PwC refers to the American Jobs Creation Act of 2004, P.L. 108-357, for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the American Jobs Creation Act of 2004 and any factual inferences or

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legal conclusions made by Plaintiff based on the American Jobs Creation Act of 2004. To the extent the allegations in paragraph 69 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

70. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 70. To the extent the allegations in paragraph 70 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

71. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 71. PwC refers to the Tax Court proceeding and Tax Court Opinion for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the Tax Court Opinion and any factual inferences or legal conclusions made by Plaintiff based on the Tax Court Opinion. To the extent the allegations in paragraph 71 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

72. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 72. To the extent the allegations in paragraph 72 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

73. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 73. To the extent the allegations in paragraph 73 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

74. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 74. To the extent the allegations in paragraph 74 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

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75. The allegations in paragraph 75 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC refers to the documents from which the paragraph purports to be quoting for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the documents and any factual inferences or legal conclusions made by Plaintiff based on the documents. PwC otherwise denies the allegations in paragraph 75.

76. The allegations in paragraph 76 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC refers to IRS Notice 2003-76 and the documents from which the paragraph purports to be quoting for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of IRS Notice 2003-76 or the documents and any factual inferences or legal conclusions made by Plaintiff based on IRS Notice 2003-76 or the documents. PwC otherwise denies the allegations in paragraph 76.

77. The allegations in paragraph 77 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC refers to the documents from which the paragraph purports to be quoting for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the documents and any factual inferences or legal conclusions made by Plaintiff based on the documents. PwC otherwise denies the allegations in paragraph 77.

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78. PwC admits that it responded to a summons from the IRS in or around February 2008. PwC otherwise denies the allegations in paragraph 78.

79. PwC refers to IRS Notice 2008-34 and the documents from which the paragraph purports to be quoting for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of IRS Notice 2008-34 or the documents and any factual inferences or legal conclusions made by Plaintiff based on IRS Notice 2008-34 or the documents. PwC otherwise denies the allegations in paragraph 79.

80. PwC refers to the referenced court decision and the documents from which the paragraph purports to be quoting for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the court decision or the documents and any factual inferences or legal conclusions made by Plaintiff based on the court decision or the documents. PwC otherwise denies the allegations in paragraph 80.

81. PwC refers to IRS Notices 2008-111, 2001-16, and 2008-20, and the documents from which the paragraph purports to be quoting, for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of IRS Notices 2008-111, 2001-16, and 2008-20, or the documents and any factual inferences or legal conclusions made by Plaintiff based on IRS Notices 2008-111, 2001-16, and 2008-20, or the documents. PwC otherwise denies the allegations in paragraph 81.

82. PwC refers to IRS Notice 2008-111 for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of IRS Notice 2008-111 and any factual inferences or legal conclusions made by Plaintiff based on IRS Notice 2008-111. PwC otherwise denies the allegations in paragraph 82.

83. PwC refers to IRS Notice 2008-111, the Tax Court transcript, and the documents from which the paragraph purports to be quoting for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of IRS Notice 2008-111, the Tax Court transcript, or the documents and any factual inferences or legal conclusions made by Plaintiff based on IRS Notice 2008-111, the Tax Court transcript, or the documents. PwC admits that the PwC professionals working on the Engagement included

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Rich Stovsky, Timothy Lohnes and Don Rocen. PwC otherwise denies the allegations in paragraph 83.

84. PwC refers to IRS Notice 2008-111, SSTS No. 6, U.S. Treasury Department Circular No. 230, and the documents from which the paragraph purports to be quoting for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of IRS Notice 2008-111, SSTS No. 6, U.S. Treasury Department Circular No. 230, or the documents and any factual inferences or legal conclusions made by Plaintiff based on IRS Notice 2008-111, SSTS No. 6, U.S. Treasury Department Circular No. 230, or the documents. PwC otherwise denies the allegations in paragraph 84.

85. PwC refers to IRS Notice 2008-111, SSTS No. 6, U.S. Treasury Department Circular No. 230, and the documents from which the paragraph purports to be quoting for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of IRS Notice 2008-111, SSTS No. 6, U.S. Treasury Department Circular No. 230, or the documents and any factual inferences or legal conclusions made by Plaintiff based on IRS Notice 2008-111, SSTS No. 6, U.S. Treasury Department Circular No. 230, or the documents. PwC otherwise denies the allegations in paragraph 85.

86. PwC refers to IRS Notice 2008-111, SSTS No. 6, and U.S. Treasury Department Circular No. 230 for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of IRS Notice 2008-111, SSTS No. 6, or U.S. Treasury Department Circular No. 230, and any factual inferences or legal conclusions made by Plaintiff based on IRS Notice 2008-111, SSTS No. 6, or U.S. Treasury Department Circular No. 230. PwC admits that certain PwC employees have had contact with Plaintiff or Plaintiff's representatives since 2008. PwC otherwise denies the allegations in paragraph 86.

87. PwC denies the allegations in paragraph 87.

88. The allegations in paragraph 88 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original

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claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 88 as to PwC. To the extent the allegations in paragraph 88 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

89. The allegations in paragraph 89 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 89 as to PwC. To the extent the allegations in paragraph 89 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

90. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 90. To the extent a response is required, PwC denies the allegations.

91. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 91. To the extent a response is required, PwC denies the allegations.

92. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 92. Paragraph 92 also states a legal conclusion to which no response is required. To the extent a response is required, PwC denies the allegations.

93. PwC denies the allegations in paragraph 93 as to PwC. PwC otherwise is without information sufficient to form a belief as to the truth of the allegations in paragraph 93. To the extent a response is required, PwC denies the allegations.

94. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 94. To the extent a response is required, PwC denies the allegations.

95. The allegations in paragraph 95 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 95 as to PwC. PwC refers to

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the Tax Court proceeding and Tax Court Opinion for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the Tax Court Opinion and any factual inferences or legal conclusions made by Plaintiff based on the Tax Court Opinion.

96. PwC refers to the referenced Ninth Circuit decision for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the Ninth Circuit decision and any factual inferences or legal conclusions made by Plaintiff based on the Ninth Circuit decision. PwC otherwise denies the allegations in paragraph 96.

97. The allegations in paragraph 97 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 97 as to PwC. To the extent the allegations in paragraph 97 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

98. PwC denies the allegations in paragraph 98.

COUNT I
GROSS NEGLIGENCE AS TO PwC

99. Paragraph 99 is a characterization of the Complaint to which no response is required. To the extent a response is required, PwC denies the allegations. Furthermore, PwC refers to its answers to paragraphs 1 through 98, inclusive, and incorporates those answers herein by this reference.

100. The allegations in paragraph 100 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 100.

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101. The allegations in paragraph 101 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 101.

102. The allegations in paragraph 102 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 102.

103. The allegations in paragraph 103 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 103.

104. The allegations in paragraph 104 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 104.

COUNT II
NEGLIGENT MISREPRESENTATION AS TO PwC

105. Paragraph 105 is a characterization of the Complaint to which no response is required. To the extent a response is required, PwC denies the allegations. Furthermore, PwC refers to its answers to paragraphs 1 through 104, inclusive, and incorporates those answers herein by this reference.

106. The allegations in paragraph 106 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary

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Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 106.

107. The allegations in paragraph 107 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 107.

108. The allegations in paragraph 108 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 108.

109. The allegations in paragraph 109 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 109.

110. The allegations in paragraph 110 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 110.

111. The allegations in paragraph 111 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 111.

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112. The allegations in paragraph 112 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 112.

113. The allegations in paragraph 113 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 113.

114. The allegations in paragraph 114 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 114.

COUNT III
NEGLIGENCE AS TO PwC

115. Paragraph 115 is a characterization of the Complaint to which no response is required. To the extent a response is required, PwC denies the allegations. Furthermore, PwC refers to its answers to paragraphs 1 through 114, inclusive, and incorporates those answers herein by this reference.

116. PwC denies the allegations in paragraph 116.

117. PwC denies the allegations in paragraph 117.

118. PwC denies the allegations in paragraph 118.

119. PwC denies the allegations in paragraph 119.

120. PwC denies the allegations in paragraph 120.

121. PwC denies the allegations in paragraph 121.

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

122. Paragraph 122 is a characterization of the Complaint to which no response is required. To the extent a response is required, PwC denies the allegations. Furthermore, PwC refers to its answers to paragraphs 1 through 121, inclusive, and incorporates those answers herein by this reference.

123. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 123. Moreover, the allegations in paragraph 123 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

124. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 124. Moreover, the allegations in paragraph 124 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

125. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 125. Moreover, the allegations in paragraph 125 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

126. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 126. Moreover, the allegations in paragraph 126 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

127. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 127. Moreover, the allegations in paragraph 127 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

128. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 128. Moreover, the allegations in paragraph 128 are addressed to other

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defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

COUNT V
CIVIL CONSPIRACY
AS TO RABOBANK, UTRECHT, SEYFARTH AND TAYLOR

129. Paragraph 129 is a characterization of the Complaint to which no response is required. To the extent a response is required, PwC denies the allegations. Furthermore, PwC refers to its answers to paragraphs 1 through 128, inclusive, and incorporates those answers herein by this reference.

130. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 130. Moreover, the allegations in paragraph 130 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

131. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 131. Moreover, the allegations in paragraph 131 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

132. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 132. Moreover, the allegations in paragraph 132 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

133. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 133. Moreover, the allegations in paragraph 133 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

134. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 134. Moreover, the allegations in paragraph 134 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

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

135. Paragraph 135 is a characterization of the Complaint to which no response is required. To the extent a response is required, PwC denies the allegations. Furthermore, PwC refers to its answers to paragraphs 1 through 134, inclusive, and incorporates those answers herein by this reference.

136. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 136. Moreover, the allegations in paragraph 136 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

137. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 137. Moreover, the allegations in paragraph 137 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

138. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 138. Moreover, the allegations in paragraph 138 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

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

139. Paragraph 139 is a characterization of the Complaint to which no response is required. To the extent a response is required, PwC denies the allegations. Furthermore, PwC refers to its answers to paragraphs 1 through 138, inclusive, and incorporates those answers herein by this reference.

140. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 140. Moreover, the allegations in paragraph 140 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

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141. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 141. Moreover, the allegations in paragraph 141 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

142. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 142. Moreover, the allegations in paragraph 142 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

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

143. Paragraph 143 is a characterization of the Complaint to which no response is required. To the extent a response is required, PwC denies the allegations. Furthermore, PwC refers to its answers to paragraphs 1 through 142, inclusive, and incorporates those answers herein by this reference.

144. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 144. Moreover, the allegations in paragraph 144 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

145. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 145. Moreover, the allegations in paragraph 145 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

146. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 146. Moreover, the allegations in paragraph 146 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

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///

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COUNT IX
UNJUST ENRICHMENT
AS TO RABOBANK AND UTRECHT

147. Paragraph 147 is a characterization of the Complaint to which no response is required. To the extent a response is required, PwC denies the allegations. Furthermore, PwC refers to its answers to paragraphs 1 through 146, inclusive, and incorporates those answers herein by this reference.

148. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 148. Moreover, the allegations in paragraph 148 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

A. PwC denies that Plaintiff is entitled to the requested relief in paragraph A.

B. PwC denies that Plaintiff is entitled to the requested relief in paragraph B.

C. PwC denies that Plaintiff is entitled to the requested relief in paragraph C.

D. PwC denies that Plaintiff is entitled to the requested relief in paragraph D.

E. PwC denies that Plaintiff is entitled to the requested relief in paragraph E.

F. PwC denies that Plaintiff is entitled to the requested relief in paragraph F.

G. PwC denies that Plaintiff is entitled to the requested relief in paragraph G.

JURY DEMAND

PwC avers that Plaintiff waived his right to jury trial on his claims against PwC pursuant to the Engagement Agreement.

GENERAL DENIAL AND RESERVATION OF RIGHTS

PwC generally denies any allegation not expressly admitted above. When PwC responded that no response was required, it did so in good faith. If there is any dispute over whether a response should have been provided in such circumstances, then PwC hereby denies the allegations. PwC reserves the right to supplement or amend this answer based on the information revealed in discovery. PwC's responses are all subject to the Affirmative Defenses stated below.

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AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Plaintiff's Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the applicable statutes of limitations and repose.

THIRD AFFIRMATIVE DEFENSE

Plaintiff's claims are barred under the doctrine of laches.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred under the doctrine of waiver.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred under the doctrine of estoppel.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred under the doctrine of unclean hands.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred under the doctrine of *in pari delicto*.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred under the doctrines of collateral estoppel, res judicata, and/or law of the case.

NINTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the doctrine of comparative negligence/fault.

TENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the intervening and superseding negligence or intentional actions of third parties.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by Plaintiff's breach of the Engagement Agreement.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred because Plaintiff would be unjustly enriched if he were permitted to obtain any recovery in this action.

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THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by Plaintiff's failure to join necessary parties.

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiff's damages, if any claims succeed, should be reduced due to Plaintiff's failure to mitigate his own damages.

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiff's damages, if any claims succeed, should be reduced by the doctrines of offset and/or contribution.

SIXTEENTH AFFIRMATIVE DEFENSE

Plaintiff's damages, if any claims succeed, should be limited to the limitation of liability clause in the Engagement Agreement.

RESERVATION OF RIGHT TO ADD AFFIRMATIVE DEFENSES

By alleging the matters set forth above as "Affirmative Defenses," PwC does not thereby allege or admit that it has the burden of proof or the burden of persuasion with respect to any of those matters. PwC presently has insufficient knowledge or information on which to form a belief as to whether it may have additional, as yet unstated, defenses available. Accordingly, PwC hereby gives notice that it intends to rely upon such other and further defenses as may become available or apparent during discovery or pre-trial proceedings in this case and hereby reserves its rights to assert such defenses. PwC further reserves the right to amend its Answer and affirmative defenses accordingly and to delete affirmative defenses that PwC determines are not applicable during the course of this litigation.

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WHEREFORE, Defendant PwC prays for relief as follows:

1. Plaintiff takes nothing by way of his Complaint;
2. That the Complaint be dismissed with prejudice;
3. That PwC be awarded its attorneys' fees and costs; and
4. For such other and further relief as the Court may deem just and proper.

Dated: August 12, 2019.

SNELL & WILMER L.L.P.

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 August 12, 2019, I caused to be served a true and correct copy of the foregoing **PRICEWATERHOUSECOOPERS LLP'S ANSWER TO AMENDED COMPLAINT** upon the following by the method indicated:

☐ **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).

☐ **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 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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DATED: August 12, 2019

4839-7201-4751

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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 REGARDING MOTIONS IN LIMINE**

PLEASE TAKE NOTICE that the attached Order Regarding Motions in Limine was entered in the above-entitled action on December 30, 2020.

Dated: December 20, 2020. SNELL & WILMER L.L.P.

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 December 30, 2020, I caused to be served a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER REGARDING MOTIONS IN LIMINE** 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.

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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 **ORDER REGARDING MOTIONS IN LIMINE**

Motions in limine filed by Plaintiff Michael Tricarichi ("Mr. Tricarichi") and Defendant PricewaterhouseCoopers LLP ("PwC") came before the Court on December 21, 2020. The Court, having considered the Parties' motions and all supporting papers, hereby orders as follows:

PwC's Motion in Limine No. 1 to Exclude Certain Opinions of Plaintiff's Expert Craig Greene is **DENIED** for the reasons stated in Mr. Tricarichi's opposition briefing, including, among other reasons, the issues raised in the motion go to the weight to be given Mr. Greene's testimony by the fact finder.

PwC's Motion in Limine No. 2 to Exclude Testimony Related to PwC's 2003 Advice is **DENIED** for the reasons stated in Mr. Tricarichi's opposition briefing, including, among other reasons, PwC's original advice is relevant to determining Mr. Tricarichi's remaining claims.

PwC's Motion in Limine No. 3 to Exclude Testimony Regarding PwC's Alleged Conflict of Interest is **DENIED** for the reasons stated in Mr. Tricarichi's opposition briefing, including, among other reasons, PwC's receipt of the alleged referral fee from Fortrend is relevant to Mr. Tricarichi's remaining claims.

PwC's Motion in Limine No. 4 to Exclude Testimony Related to PwC's Advice to Other Clients is **DENIED** for the reasons stated in Mr. Tricarichi's opposition briefing, including, among other reasons, the advice given by PwC in the Marshall and MidCoast Energy matters is relevant and unlikely to confuse the jury.

Mr. Tricarichi's Motion in Limine No. 1 to Bar References to the Prior Convictions of James Tricarichi is **GRANTED IN PART**. The DUI conviction is excluded because it is a misdemeanor. The Motion is otherwise **DENIED** for the reasons stated in PwC's opposition briefing. The other convictions may be used for impeachment during cross-examination of the witness James Tricarichi only.

Mr. Tricarichi's Motion in Limine No. 2 to Exclude the Opinions of Kenneth Harris is **DENIED** for the reasons stated in PwC's opposition briefing, including, among other reasons, the issues raised in the motion go to the weight to be given Mr. Harris's testimony by the fact finder.

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Mr. Tricarichi's Motion in Limine No. 3 to Bar Purported Mitigation Evidence is **DENIED** for the reasons stated in PwC's opposition briefing, including, among other reasons, the issues raised in the motion go to the weight to be given to PwC's expert Joe Leauanae's testimony by the fact finder.

IT IS SO ORDERED.

DATED this December 30, 2020 ~~of January, 2021.~~

THE HONORABLE ELIZABETH GONZALEZ
DISTRICT COURT JUDGE

Submitted by:

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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 DENYING PRICEWATERHOUSECOOPERS LLP'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO STRIKE JURY DEMAND

PLEASE TAKE NOTICE that the attached Order Denying Defendant PricewaterhouseCoopers LLP's Motion for Summary Judgment and Motion to Strike Jury Demand was entered in the above-entitled action on January 5, 2021.

Dated: January 20, 2021.

SNELL & WILMER L.L.P.

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 January 20, 2021, I caused to be served a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER DENYING PRICEWATERHOUSECOOPERS LLP'S MOTION FOR SUMMARY JUDGMENT AND 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.

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4836-8774-2936

Electronically Filed
1/5/2021 10:48 AM
Steven D. Grierson
CLERK OF THE COURT

ORDR

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

ORDER DENYING DEFENDANT PRICEWATERHOUSECOOPERS LLP'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO STRIKE JURY DEMAND

PricewaterhouseCoopers LLP ("PwC") filed a Motion for Summary Judgment and Motion to Strike Jury Demand (the "Motions") that were set for hearing before the Court for December 21, 2020. Having reviewed and carefully considered the Parties' briefings, the Court denies PwC's Motions. With respect to the causation issues the briefing establishes genuine issues of material fact. With respect to PwC's motion for partial summary judgment and to strike Mr. Tricarichi's jury demand there is no rider that is signed or initialed by Plaintiff waiving the jury trial or agreeing to the limitation of damages.

Accordingly, PwC's Motion for Summary Judgment and Motion to Strike Jury Demand is denied.

DATED this 5th of January, 2021.

ELIZABETH GONZALEZ
DISTRICT COURT JUDGE

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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.: XXXI **NOTICE OF ENTRY OF ORDER DENYING DEFENDANT PRICEWATERHOUSECOOPERS LLP'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO LIMIT DAMAGES**

PLEASE TAKE NOTICE that the attached *Order Denying Defendant PricewaterhouseCoopers LLP's Motion for Summary Judgment and Motion to Limit Damages* was entered in the above-entitled action on April 14th, 2022.

Dated: April 14, 2022.

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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 14, 2022, I caused to be served a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER DENYING DEFENDANT PRICEWATERHOUSECOOPERS LLP'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO LIMIT DAMAGES** 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.

☐ **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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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI, Plaintiff, vs. PRICEWATERHOUSECOOPERS LLP, Defendant.	CASE NO.: A-16-735910-B DEPT. NO.: XXXI **ORDER DENYING DEFENDANT PRICEWATERHOUSECOOPERS LLP'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO LIMIT DAMAGES**

Pursuant to the Supreme Court's Writ of Mandamus, dated September 30, 2021, the Court was instructed to vacate its prior order denying PwC's motion to strike the jury demand. The prior order, dated January 5, 2021, denying Defendant PricewaterhouseCoopers LLP ("PwC")'s Motion for Summary Judgment and Motion to Strike Jury Demand ("Prior Order") was a combined order denying both motions.

As instructed by the Supreme Court's Writ of Mandamus, the Prior Order is hereby vacated. The Court held an evidentiary hearing on PwC's motion to strike the jury demand on March 30, 2022, and will address it by separate order. As to PwC's motion for summary judgment, the Prior Order is reentered *nunc pro tunc*[1] to the original date of issuance (January 5, 2021) with respect to the grounds other than PwC's motion for partial summary judgment based on the limitation of damages provision.

With respect to PwC's motion for partial summary judgment based on the limitation of liability provision in the Terms of Engagement, the reasoning for denial in the Prior Order has been overruled by the Supreme Court. The Prior Order denied both the motion to strike the jury demand based on the jury waiver and the motion for partial summary judgment based on the limitation of liability provision on the ground that "there is no rider that is signed or initialed by Plaintiff [ ] agreeing to the limitation of damages." The Supreme Court ruled that Nevada law "does not require that a party sign each page of a contract" and that "Tricarichi signed the contract, so the incorporated terms bound him regardless of whether he separately signed them." (Sept. 30, 2021 Order Granting Writ of Mandamus at 2, 3) As a result, the ruling in the Prior Order on the motion for partial summary judgment based on the limitation of liability provision is no longer good law, and PwC's motion for partial summary judgment based on the limitation of liability

[1] This order is being issued *nunc pro tunc* at the Court's direction (March 31, 2022 Hr'g Tr. at 134:13-17) and inherent authority, and not pursuant to the inadvertence standard set forth in EDCR 7.22. *See McClintock v. McClintock*, 122 Nev. 842, 845, 138 P.3d 513, 515 (2006) ("We have stated that the district court may amend a judgment nunc pro tunc if 'the change will make the record speak the truth as to what was actually determined or done or *intended to be determined or done* by the court.'") (quoting *Finley v. Finley*, 65 Nev. 113, 119, 189 P.2d 334, 337 (1948), *overruled on other grounds by Day v. Day*, 80 Nev. 386, 395 P.2d 321 (1964)) (emphasis in original).

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provision is denied without prejudice to PwC to refile or renew such motion in light of the Supreme Court ruling within 14 days of this order.

Accordingly, **IT IS ORDERED** that the Prior Order is vacated; and

IT IS FURTHER ORDERED NUNC PRO TUNC to January 5, 2021, that PwC's Motion for Summary Judgment other than the portion based on the limitation of liability provision is **DENIED**; and

IT IS FURTHER ORDERED that PwC's motion for partial summary judgment is denied without prejudice to PwC to refile or renew such motion in light of the Supreme Court ruling within 14 days of this order.

Dated this 14th day of April, 2022

Joanna S Kishner

099 3EF 5E06 09EE
Joanna S. Kishner
District Court Judge

Submitted by:

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Circulated, Submitting Competing Order

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From: Mark Levine <mark.levine@bartlitbeck.com>
Sent: Tuesday, April 5, 2022 2:33 PM
To: Scott F. Hessell; Chris Landgraff; Daniel Taylor; Byrne, Pat
Cc: Blake Sercye; Ariel C. Johnson; Austin, Bradley; Daniel Taylor; Kate Roin
Subject: RE: Tricarichi v PWC Proposed Summary Judgment Order
Attachments: April 5, 2022 draft PwC edits Proposed Order re Motion for Summary Judgment.docx

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Scott,

Here are PwC's edits to your draft.

Mark

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From: Scott F. Hessell <shessell@sperling-law.com>
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Subject: Tricarichi v PWC Proposed Summary Judgment Order

EXTERNAL EMAIL: Caution with Links and Attachments

Gents

Attached is a proposed order vacating the motion to strike jury demand pursuant to the Supreme Court writ and reentering the remainder of the order nunc pro tunc to January 5, 2021.

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