

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL TRICARICHI,

Appellant,

v.

PRICEWATERHOUSECOOPERS,
LLP,

Respondent.

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Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court No: 86317
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Appeal from the District Court of Clark County, Nevada

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

APPELLANT'S APPENDIX TO OPENING BRIEF

VOLUME 7 of 8

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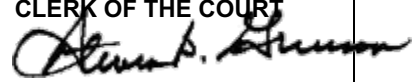
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CERTIFICATE OF SERVICE

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:

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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

**PRICEWATERHOUSECOOPERS LLP'S
OPPOSITION TO PLAINTIFF'S NRCP
60(b) MOTION FOR RECONSIDERATION**

AA 001524

1 Defendant PricewaterhouseCoopers LLP (“PwC”), by and through its counsel of record,
2 files its Opposition to Plaintiff’s NRCP 60(b) Motion for Reconsideration. This Opposition is
3 based on the referenced pleadings and papers on file, the following Memorandum of Points and
4 Authorities, and any argument the Court may entertain on behalf of PwC.

5 Dated: September 19, 2023

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MEMORANDUM OF POINTS AND AUTHORITIES

After more than six years of litigation and a nine-day bench trial, the Court issued Findings of Fact and Conclusions of Law that spanned 161 paragraphs and found in favor of PwC and against Plaintiff Michael Tricarichi on multiple, independent grounds. Based on these findings and conclusions, the Court entered judgment for PwC.

Tricarichi now asks the Court to undo all the time and effort it has invested in this case and set aside the judgment under NRCP 60(b). Tricarichi's sole justification for this extraordinary request are two documents PwC produced in another case in Oregon state court involving an entirely different transaction, *Marshall v. PwC*. PwC was not required to produce either of the documents in its limited Rule 56(f) discovery in this case in 2017 and 2018. The so-called Wow! email—a February 2003 email thread regarding the Marshall transaction that has nothing to do with the Tricarichi transaction—was not in the files of any agreed-on custodians and so was not collected from them. PwC had no obligation beyond the scope of the parties' agreement. The second document, a 2002 booklet titled "US Tax Quality & Risk Management," has no relevance to Tricarichi's claim and did not fall within what PwC's counsel agreed to produce as part of Rule 56(f) discovery in 2017 and 2018. Tricarichi's Rule 60(b) motion fails for multiple reasons.

First, the motion is untimely. PwC produced the two documents in the *Marshall* case more than seven months ago, before the Court issued its Findings of Fact and Conclusions of Law in this case. Mr. Tricarichi's lead attorney, Scott Hessell, also represents the Marshalls and was aware of the two documents well before the deadline for seeking a new trial under Rule 59. Mr. Hessell took no steps to attempt to secure permission to present the documents in support of a Rule 59 motion—he did not ask PwC, nor did he move the Oregon court. This lack of diligence means the two documents do not constitute newly discovered evidence and do not provide a basis for relief under Rule 60(b)(2). *See* NRCP 60(b)(2) (only evidence that "could not have been discovered in time to move for a new trial under Rule 59(b)" qualifies as "newly discovered evidence").

Second, PwC did not commit any discovery violations with respect to these two documents. The Marshall Wow! email was not in the custodial files of any of the custodians PwC agreed to search as part of Rule 56(f) discovery; was not in any other custodian's file; and was not

1 collected, reviewed, and put on a privilege log in the Marshall litigation until 2019. Although two
2 of the agreed-on custodians were recipients of the email, it is unsurprising that those custodians
3 no longer had a copy of a 2003 email more than seven years later when they were put on a litigation
4 hold. Further, the Q&RM Booklet is not a PwC policy regarding ongoing communication with a
5 client after an engagement has ended. PwC's prior counsel's representations regarding the scope
6 of PwC's document production were not misleading or false.

7 *Finally and most importantly*, the two documents come nowhere near justifying setting
8 aside the judgment because they would not have made any difference to the outcome of the case.
9 The Marshall Wow! email is solely about the Marshall transaction—which this Court found was
10 “substantially distinct” from Tricarichi's Westside transaction. Dkt. 416, Findings of Fact and
11 Conclusions of Law (“FOFCOL”) ¶ 135. Neither the Marshall Wow! email nor the Q&RM
12 Booklet would have altered the Court's 2018 order entering summary judgment for PwC on
13 Tricarichi's claims regarding PwC's 2003 advice, nor would they have affected any of the
14 numerous grounds on which the Court ruled for PwC on Tricarichi's 2008 claim following the
15 bench trial.

16 Tricarichi's Rule 60(b) motion should be denied.

17 **FACTUAL BACKGROUND**

18 **A. Rule 56(f) Discovery in This Case**

19 In 2017, PwC moved for summary judgment on Tricarichi's original claims regarding
20 PwC's 2003 advice on the ground that they were barred under the applicable statute of limitations.
21 Tricarichi submitted an affidavit as part of his opposition to PwC's motion. The affidavit referred
22 to and attached a copy of the Tax Court's opinion in *Estate of Marshall v. Commissioner of Internal*
23 *Revenue*, which, as Tricarichi stated in his affidavit, “makes note of PwC's conflicting advice,” and
24 further stated that “had PwC disclosed these facts to me, I would have proceeded differently with
25 respect to the proposed Fortrend transaction, and not gone ahead with it.” The affidavit also set out
26 various topics on which Tricarichi said he wanted discovery, including “PwC documents and
27 testimony regarding the Bishop transaction; the Marshall transaction; PwC's review, promotion or
28

1 advocacy of, or other advice regarding transactions similar to these and to my own transaction; and
2 the reasons why PwC did not make me aware of the same.” Dkt. 88, Tricarichi Aff. at ¶¶ 9–10.

3 On May 31, 2017, the Court granted Tricarichi’s request for Rule 56(f) discovery and
4 ordered the limited discovery Tricarichi requested in paragraph 10 of his affidavit, including “PwC
5 documents and testimony regarding the Bishop and Marshall transactions; PwC’s review,
6 promotion or advocacy of, or other advice regarding transactions similar to Mr. Tricarichi’s
7 transaction with Fortrend, and the reasons why PwC did not make Mr. Tricarichi aware of those
8 transactions.” Dkt. 100, Order.

9 The parties then engaged in several conferrals before PwC made its initial Rule 56(f)
10 document production on August 24, 2017 based on certain agreed parameters. PwC’s transmittal
11 email set out various categories of documents produced, including “documents related to any
12 internal policies or guidelines regarding on-going communication with a client after PwC’s
13 services/advice has been rendered concerning the client’s engagement” and “documents collected
14 from a custodial search” with search parameters agreed to by the parties: a date range of 1/1/1999
15 through 12/31/2012; a list of custodians, including Gary Cesnik and Michael Weber; and a list of
16 search terms, including “Fortrend.” Hessell Decl. Ex. 4 at 30. PwC produced 2,158 documents
17 (totaling 30,648 pages) based on these parameters. Ex. 1 at 2. (Jan. 17, 2018 Ltr. from Hsaio to
18 Brooks).

19 On December 21, 2017, PwC informed Tricarichi that it intended to renew its motion for
20 summary judgment and considered Rule 56(f) discovery closed, as approximately four months had
21 passed since PwC’s production and “Plaintiff ha[d] not requested any further discovery.” Ex. 2.
22 When Tricarichi followed up with a request for additional documents relating to the Marshall
23 transaction, PwC replied in a January 17, 2018 letter that PwC had “produced documents from an
24 agreed-upon list of custodians, which includes an individual who worked on the Marshall
25 Transaction” and that PwC “expect[ed] Plaintiff to abide by his prior agreement.” PwC also noted
26 that Tricarichi’s counsel, Mr. Hessell, stated during a meet and confer that “in respect to the
27 Marshall Transaction, [his] firm is now counsel for the Marshalls and therefore *do not need*
28 *documents from PwC concerning the Marshall Transaction* and corresponding Tax Court

proceeding.” Ex. 1 at pp. 2–3 (emphasis added). In any event, the Wow! email was not in the universe of documents collected for the Tricarichi litigation. PwC did not collect it, review it, and make a privilege determination regarding the contents of the email thread until over a year later, and that was only in the context of the Marshall litigation (which is unsurprising since the Wow! email relates exclusively to the Marshall transaction).

The parties subsequently reached an agreement on six additional custodians (Corina Trainer; Gary Wilcox; Patricia Pellervo; Bob Whitten; Dennis McErlean; and Thomas Palmisano) and PwC produced additional documents on March 31, 2018, which “conclude[d] PwC’s Rule 56(f) production.” Ex. 3 (Mar. 31, 2018 email from Hsiao to Brooks); Dkt. 220, PwC’s Opp’n to Pl.’s Mot. Compel, Perry Decl. at ¶ 4 (setting out custodial searches performed between May 30, 2017 and May 15, 2018 with complete list of agreed-to custodians).

PwC renewed its motion for summary judgment on June 14, 2018. *See* Dkt. 107, PwC’s Renewed Mot. Summ. J. Tricarichi filed a fulsome response in opposition with 32 exhibits, many of which were documents produced as part of PwC’s Rule 56(f) efforts. Even without the Marshall Wow! email, Tricarichi was well aware of the issue to which it relates—that PwC advised the Marshalls that the transaction they were contemplating was similar to a listed Notice 2001-16 transaction and not to go forward with the deal. Tricarichi’s response emphasized this point: that PwC failed to disclose the Marshall transaction to him in 2003. Tricarichi argued that he “was entitled to know [at the time of the transaction] 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,” and that PwC’s failure to disclose to him its conclusion on the Marshall transaction amounted to fraudulent concealment that tolled the statute of limitations. Dkt. 113, Pl.’s Resp. Opp’n at 20, 30.

This Court rejected Tricarichi’s fraudulent concealment argument and held that “regardless of whether New York’s or Nevada’s statute of limitations applies, Plaintiff’s claims are time-barred” because “[i]n the best-case scenario for Plaintiff . . . 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 [Information Document Request] from the IRS*” on February 21, 2008. Dkt. 119, Order at ¶¶ 17–

18 (emphasis added). In other words, the IRS put Tricarichi on notice of his negligence claim—he was not relying on PwC to do so. As a result, the Court held that Tricarichi’s negligence claim arising from PwC’s 2003 services were time-barred no later than February 21, 2010—“nearly a year before the parties entered into a tolling agreement in January 2011.” *Id.* at ¶ 19. The Court therefore entered summary judgment “in favor of PwC regarding any and all claims arising from the services PwC provided Plaintiff in 2003.” *Id.* at 3.

Tricarichi now says that PwC should have produced the Marshall Wow! email and the Q&RM Booklet as part of its Rule 56(f) production back in 2017. Tricarichi is incorrect, and a description of each document shows why.

B. Michael Weber’s February 14, 2003 Email

The primary document that Tricarichi relies on in support of his Rule 60(b)(2) motion is a February 14, 2003 email thread regarding the Marshall transaction. Hessel Decl. Ex. 2. The email thread is between the engagement team in PwC’s Portland office and members of PwC’s Washington National Office and Quality & Risk Management (Q&RM) group. None of the individuals on the email thread ever worked on Tricarichi’s matter. The Portland engagement team consulted with the Washington National Office and Q&RM, which concluded—based on the specific provisions in the proposed stock purchase agreement—that the Marshalls’ deal was substantially similar to a Notice 2001-16 listed intermediary transaction. As a result, PwC’s Q&RM group determined that the firm should not play any advisory role in the transaction. The National Office informed the Portland engagement team that the transaction would need to be disclosed on the Marshalls’ tax returns if they went through with the deal. *See generally Estate of Marshall v. Comm’r of Internal Revenue*, T.C. Memo. 2016-119, 2016 WL 3460226, at *4–6 (T.C. June 20, 2016).

The February 14, 2003 email thread reflects this Marshall-specific advice. Mr. Dempsey’s initial email indicated that he had highlighted certain provisions, including confidentiality and disclosure provisions, that he thought would make the transaction reportable to the IRS. Hessel Decl. Ex. 2, at 5. Dan Mendelson responded that they were “very uncomfortable taking any advisory role” in the deal—and observed that the “57 page stock purchase agreement alone suggests

1 that this is way too difficult.” *Id.* at 4. Mr. Mendelson also set out a course of action for PwC to
2 take as tax return preparers in the event that the Marshalls’ law firm continued to advise the
3 taxpayers to go forward with the sale. *Id.* at 4–5. Mr. Dempsey looped in Michael Weber, the
4 engagement partner for the Marshall matter in Portland, that same day, and Mr. Weber responded
5 with an off-the-cuff reaction to the emails earlier in the thread. *Id.* at 4.

6 Tricarichi blatantly mischaracterizes the Marshall Wow! email. Tricarichi contends the
7 email shows that **PwC as a whole** concluded that *any* transaction involving Fortrend was risky and
8 “probably” would blow up at the IRS, and that “*any* client participating in such a transaction may
9 get ‘sued for aiding and abetting a transaction the sole purpose of which was to evade income tax.’”
10 *See* Mot. at 2 (emphasis added). In context, however, it is clear that the February 14, 2003 email is
11 a knee-jerk reaction from **one PwC partner in Portland**—a non-lawyer with no experience in listed
12 transactions or transferee liability—to feedback from PwC’s Washington National Office and
13 Q&RM about the specific 57-page stock purchase agreement in the Marshalls’ transaction.
14 Tricarichi’s statement that PwC knew that his transaction “could get Tricarichi sued for aiding and
15 abetting Fortrend’s fraud” (Mot. at 10) is a false statement of fact to this Court.

16 None of the PwC professionals on the Marshall February 14, 2003 email thread worked on
17 Tricarichi’s transaction, which involved an engagement team in Cleveland, Ohio and different
18 practitioners in the Washington National Office. And PwC’s conclusions that the Marshall deal was
19 substantially similar to a Notice 2001-16 intermediary transaction and that, as a result, the
20 engagement team should not be involved in advising on the transaction have no bearing on the
21 soundness of the “more-likely-than-not” opinion that PwC delivered to Tricarichi regarding the
22 Westside Cellular transaction. As this Court found in its February 2023 Findings of Fact and
23 Conclusions of Law, there are “numerous differences between the Marshall matter and the instant
24 case” and, given those differences, PwC was not liable to Tricarichi for “failing to disclose or take
25 into account the advice given in [the Marshall] transaction” when forming its opinion on
26 Tricarichi’s subsequent stock sale. Dkt. 416, FOFCOL ¶ 39. Even more, the Court concluded as a
27 matter of law that “there is no reason to believe that PwC’s work in [the Marshall and Enbridge]
28 matters rendered [its] advice to Tricarichi any more or less correct.” *Id.* at ¶ 135.

1 In sum, an email between a completely different team of PwC professionals about a
2 materially different transaction does not suggest—let alone “clearly show[]—that “before
3 Tricarichi even engaged PwC, PwC knew the transaction was risky, would blow up at the IRS and
4 could get *Tricarichi* sued for aiding and abetting Fortrend’s tax fraud.” Mot. at 10 (emphasis
5 added); *see also id.* at 6. To the contrary. PwC closely analyzed the Westside Cellular transaction
6 as a potential Notice 2001-16 transaction; concluded at a more likely than not level of confidence
7 that the transaction did not need to be reported to the IRS as such; and *internally stood by that*
8 *opinion* five years later after the IRS issued Notice 2008-111, which clarified the bounds of the
9 “intermediary” transaction described in Notice 2001-16. Trial Ex. 45 (Lohnes’s December 2, 2008
10 email to Stovsky that he “read through the Notice” and “agree[d] with [Stovsky’s] assessment that
11 it shouldn’t change any of our prior analysis”).

12 Tricarichi has known for many years that PwC reached a different conclusion on the facts
13 presented in the Marshall transaction; the Tax Court expressly found as much in its 2016 opinion
14 holding the Marshalls liable as transferees. *See Estate of Marshall*, 2016 WL 3460226, at *5 (“PwC
15 concluded that the stock sale proposed by Essex [the Fortrend entity] was similar to a listed
16 transaction and that it could not consult or advise on the proposed stock sale any further.”).
17 Tricarichi’s negligence theory incorporated PwC’s involvement in the Marshall matter in two
18 different (but related) ways: (1) that PwC’s contrary advice to the Marshalls “demonstrated that it
19 knew or had reason to know that the advice it provided to Tricarichi was inaccurate or inconsistent”;
20 and (2) that PwC’s failure to disclose its advice to the Marshalls to him in either 2003 or 2008 was
21 itself a negligent omission. *See, e.g.*, Dkt. 416, FOFCOL ¶¶ 32, 38, 133. The Wow! email thread,
22 which does nothing more than provide a paper trail corroborating the Tax Court’s findings about
23 PwC’s advice to the Marshalls, changes nothing about the Court’s assessments of the timeliness
24 and merits of Tricarichi’s claims.

25 C. PwC’s 2003 Q&RM Booklet

26 Tricarichi’s motion also relies on a 2003 booklet published by PwC’s Q&RM group. Hessel
27 Decl. Ex. 3. The booklet is not itself a policy document. Instead, the booklet serves as a risk
28 management educational tool to “highlight[] some of the key policies comprising standards of

1 conduct” for practitioners in PwC’s tax practice. *Id.* at 10. As the booklet makes clear, the policies
2 themselves “reside in ARMOR”—a PwC database that is the “principal repository for quality and
3 risk management policies, procedures and practice aids.” *Id.* at 10–11.

4 The portion of the booklet that Tricarichi argues is relevant here summarizes detailed
5 guidance available to PwC tax practitioners in ARMOR in a policy called “US Policy & Guidance
6 – Claims against PwC.” On page 17, the Q&RM Booklet defines “Troublesome Practice Matters”
7 and provides both general examples (such as formal, informal, or threatened claims by clients
8 against PwC “for damages, costs, or compensation”) and tax-specific examples, including
9 rendering a final opinion that differs from an opinion “upon which the client based its decision to
10 implement a transaction” or detecting a “technical error in services provided to a client.” *Id.* at 26.

11 The Troublesome Practice Matter page includes several do’s and don’t’s. In the “do”
12 column, Q&RM encourages practitioners to “get assistance early” and “report” potential issues
13 “promptly.” In the “don’t” column, Q&RM warns tax professionals against “try[ing] to keep the
14 problem to yourself”; “offer[ing] a settlement or commit[ing] the Firm”; or unilaterally “admit[ting]
15 liability, shortcomings, or defects in [the firm’s] services” before appropriate consultation with
16 Q&RM and the Office of General Counsel, if necessary. *Id.*

17 Tricarichi makes the unsupported accusation that PwC “concealed the Wow! email
18 conclusions *from Tricarichi*” because of the Q&RM Booklet, which explains that practitioners
19 should not unilaterally “admit liability, shortcomings, or defects in our services” to a client
20 contemplating a claim against PwC before consulting with the appropriate Q&RM or OGC
21 employees. Mot. at 2 (emphasis added). That argument is wholly unsupported by the record. As the
22 Court found in its February 2023 Findings of Fact and Conclusions of Law, the evidence at the
23 parties’ bench trial on Tricarichi’s 2008 negligence claim “showed that PwC would not have been
24 able to disclose the specific details of [the Enbridge and Marshall] engagements with Tricarichi
25 because of its confidentiality obligations.” Dkt. 416, FOFCOL ¶ 136 (citing the testimony of Tim
26 Lohnes, Ken Harris, and Tricarichi’s expert, Craig Greene). That prohibition would certainly extend
27 to sharing emails regarding the specifics of one client’s proposed transaction with an entirely
28 different client contemplating a different transaction. Casting an inapplicable Q&RM policy as the

1 rationale for not sharing client-specific emails across engagements is nothing more than a last ditch
2 attempt to upend the finality of this Court's judgment.

3 **D. Production of Documents in *Marshall* Litigation**

4 PwC produced both of these documents early this year in the Marshall case in Multnomah
5 County, Oregon. The Marshall plaintiffs are represented by Mr. Hessell, Tricarichi's counsel in this
6 case.

7 The bulk of the parties' discovery in the Marshall litigation took place in 2019. At that time,
8 PwC's prior counsel collected Bill Galanis's electronic files, reviewed the Wow! email thread, and
9 determined it was protected by attorney-client privilege—an understandable call in light of the fact
10 that a PwC in-house attorney, Alan Fox, is a receipt of two of the emails in the thread and the
11 email subject line reads "Privileged and Confidential." PwC put the entire Wow! email thread on a
12 privilege log that was served to the Marshalls' counsel, including Mr. Hessell, in June 2019. The
13 Oregon trial court entered summary judgment for PwC shortly thereafter, and the Marshalls
14 appealed.

15 The Oregon Court of Appeals reversed the trial court's entry of summary judgment and
16 remanded the case for further proceedings in late December 2021. When discovery resumed in
17 December 2022 (nearly a year after the case was remanded), the Marshalls' counsel asked PwC's
18 new counsel to revisit a number of prior counsel's privilege determinations from its 2019 privilege
19 logs. PwC's new counsel did so and also reviewed for the first time other withheld documents that
20 the Marshalls did not challenge, including the Wow! email. PwC's new counsel concluded that the
21 Wow! email should be produced in redacted form and promptly did so on February 3, 2023. *See*
22 Hessell Decl. ¶ 4. On the Marshalls' motion to compel, and after *in camera* review, the Oregon trial
23 court upheld PwC's attorney-client privilege redaction on the top email (to in-house attorney Alan
24 Fox) in the string that caused the document to be on the privilege log. Ex. 4 (July 12, 2023 Order
25 Denying Pls.' Mot. to Compel).

26 Around the same time (December 2022), the Marshalls' counsel also requested that PwC
27 produce documents regarding when the Firm's advice or tax opinions should be rendered in writing.
28 That request led to the collection and production of the Q&RM Booklet in January 2023, because

1 page 15 of the Q&RM Booklet references PwC’s policy on documenting conclusions reached on
2 an engagement. *See* Hessel Decl. ¶ 5, Ex. 3 at 24.

3 LEGAL STANDARD

4 Tricarichi filed his motion under Nevada Rule of Civil Procedure 60(b)(2), which provides
5 that “[o]n motion and just terms, the court may relieve a party or its legal representative from a
6 final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence
7 that, with reasonable diligence, could not have been discovered in time to move for a new trial
8 under Rule 59(b).” NRCP 60(b)(2).

9 While there is relatively little Nevada caselaw interpreting NRCP 60(b)(2), Nevada courts
10 look to how federal courts interpret FRCP 60(b)(2), which is nearly identical. *See Foster v.*
11 *Dingwall*, 126 Nev. 49, 54, 228 P.3d 453 (2010) (explaining that “federal decisions involving the
12 Federal Rules of Civil Procedure provide persuasive authority when this court examines its rules,”
13 and in particular following federal decisions regarding FRCP 60(b) because “NRCP 60(b) largely
14 replicates Fed. R. Civ. P. 60(b)”) (citation omitted); *see also* NRCP 60, Adv. Cmte. Notes to 2019
15 Amendment (explaining that the “amendments generally conform Rule 60 to FRCP 60”); *Bonnell*
16 *v. Lawrence*, 128 Nev. 394, 398 282 P.3d 712, 714 (2012) (“Rule 60(b) of the Nevada Rules of
17 Civil Procedure is modeled on Rule 60(b) of the Federal Rules of Civil Procedure”).

18 To obtain relief under FRCP 60(b)(2), the Ninth Circuit requires that “(1) the moving party
19 [] show that the evidence relied on in fact constitutes ‘newly discovered evidence’ within the
20 meaning of Rule 60(b); (2) the moving party exercised due diligence to discover this evidence;
21 and (3) the new evidence must be ‘of such magnitude that it would have been likely to change the
22 disposition of the case.’” *Feature Realty, Inc. v. City of Spokane*, 331 F.3d 1082, 1093 (9th Cir.
23 2003) (citation omitted). The moving party is required to satisfy all three elements. *See id.*
24 Tricarichi cannot satisfy any of the three required elements; accordingly, his claim fails.

25 ARGUMENT

26 **I. The Motion Is Untimely**

27 The two documents on which Tricarichi bases his motion—the Marshall Wow! email and
28 the Q&RM Booklet—are not newly discovered evidence within the requirements of NRCP

1 60(b)(2). That rule applies to “newly discovered evidence that, with reasonable diligence, could
2 not have been discovered in time to move for a new trial under Rule 59(b).” NRCP 60(b)(2). Rule
3 59(b), in turn, says that a “motion for a new trial must be filed no later than 28 days after service
4 of written notice of entry of judgment.” NRCP 59(b).

5 In this case, PwC served written notice of entry of the Court’s Findings of Fact and
6 Conclusions of Law and Judgment on February 22, 2023. Dkt. 420. Accordingly, Tricarichi had
7 until March 22, 2023 (28 days later) to move for a new trial under Rule 59. Tricarichi’s counsel
8 had both the Marshall Wow! email and the Q&RM Booklet in his possession well in advance of
9 that deadline. According to the Hessell declaration, the Q&RM Booklet was produced in the
10 Marshall case on or about January 20, 2023, and the Marshall Wow! email was produced in the
11 Marshall case on February 3, 2023. Hessell Decl. ¶¶ 4–5. Tricarichi’s lead counsel in this case,
12 Scott Hessell, was also counsel for the plaintiffs in the Marshall case. Mr. Hessell knew about both
13 the Marshall Wow! email and the Q&RM Booklet at the time they were produced in the Marshall
14 case and used them in numerous depositions and in briefing in the Marshall litigation from that
15 point onward. *See Feature Realty*, 331 F.3d at 1093 (holding that evidence was not newly
16 discovered where party’s attorney knew about it because attorney’s “knowledge is properly
17 attributable to” client under agency principles).

18 Both documents were stamped with a “Confidential” designation when they were
19 produced in the Marshall case, and the Protective Order in the Marshall case restricts how
20 documents with that designation can be used. *See* Ex. 5, Marshall Protective Order. However, Rule
21 60(b)(2) requires “reasonable diligence,” and Mr. Hessell could have taken any number of
22 different steps to attempt to secure the ability to present the Marshall Wow! email and the Q&RM
23 Booklet in support of a motion for new trial under Rule 59 before the March 22, 2023 deadline.
24 Mr. Hessell could have simply asked PwC for permission to use the documents in support of a
25 Rule 59 motion in this case. He did not. Mr. Hessell could have challenged the confidentiality
26 designation applied to one or both of the documents under paragraph 9 of the Marshall protective
27 order. He did not. Mr. Hessell could have petitioned the Marshall court under paragraph 12 of the
28 Marshall protective order for the ability to present the documents in support of a Rule 59 motion

1 in this case. *See id.*, ¶ 12 (allows a party to “ask the Court . . . to modify or grant relief from any
2 provision of this Stipulated Protective Order”). He did not. He could have filed a motion with this
3 Court seeking to extend the Rule 59(b) deadline until the confidentiality issue was resolved. He
4 did not.

5 Instead, Mr. Hessell waited until after he used the documents as exhibits in open court
6 during the Marshall trial in August 2023,¹ and then filed his Rule 60(b) motion on the day before
7 the six-month deadline in NRCP 60(c)(1) lapsed. That simply does not amount to “reasonable
8 diligence.” *See, e.g., Stoecklein v. Johnson Elec., Inc.*, 109 Nev. 268, 272, 849 P.2d 305, 308
9 (1993) (explaining the “sixth-month period represents the extreme limit of reasonableness”)
10 (citation omitted); *Helfstein v. Eighth Jud. Dist. Ct.*, 131 Nev. 909, 914, 362 P.3d 91, 95 (2015)
11 (same).

12 **II. PwC Did Not Improperly Conceal the Two Documents At Issue**

13 Tricarichi’s Rule 60(b) motion is premised on the argument that PwC should have
14 produced the Marshall Wow! email and the Q&RM Booklet as part of Rule 56(f) discovery in this
15 case. *See* Mot. at 7, 9 (arguing that PwC “faile[d] to produce the Wow! email and Risk
16 Management Policy in this case despite an express agreement and obligation to do so”). PwC had
17 no such obligation. As part of the limited Rule 56(f) discovery ordered by the Court, the parties
18 reached an agreement regarding the various categories of documents that would be produced and
19 the different custodians whose documents would be searched for responsive documents. Neither
20 the February 2003 Wow! email nor the PwC Q&RM Booklet fell within the agreed-on scope of
21 that discovery. Moreover, even if Tricarichi can establish that PwC committed a discovery
22

23 ¹ On June 20, 2023, the Marshalls moved the Oregon trial court to continue the parties’ July 31,
24 2023 trial date until the Oregon Supreme Court rendered a decision in a related pending appeal by
25 the Marshalls’ law firm. *See* Ex. 6. The plaintiffs acknowledged that this could result in a months-
26 long delay. *Id.* If the plaintiffs had successfully continued the trial date, the Wow! email and
27 Q&RM Booklet would not have been used publicly at trial before the six-month deadline
28 applicable here under NRCP 60(c)(1). Tricarichi’s ability to seek Rule 60(b) relief cannot turn on
the timing of a trial in different litigation. Mr. Hessell had an obligation to take reasonable steps to
pursue Tricarichi’s Rule 60(b) motion in a timely manner, including asking the Oregon court for
relief from the protective order if necessary, and waiting until the eleventh hour to file a Rule 60(b)
motion when the “newly discovered” evidence was available before the judgment was entered was
not reasonable.

1 violation, he cannot establish by clear and convincing evidence that PwC perpetrated a fraud on
2 the court warranting relief under NRCP 60(b)(3).

3 **A. None of the Agreed Custodians Had the 2003 Wow! Email in Their Custodial**
4 **Files**

5 First, PwC's non-production of the email during Rule 56(f) discovery in 2017 and 2018 is
6 not attributable to PwC withholding a responsive, non-privileged document collected in the
7 Tricarichi litigation. PwC's custodial search of Michael Weber's and Gary Cesnik's files for the
8 range January 1, 1999 through December 31, 2012 as part of the limited Rule 56(f) discovery *did*
9 *not* return the Wow! email. Neither custodian—nor any other custodian collected as part of the
10 Tricarichi litigation—had a copy of the email in their files. PwC's counsel was not aware of the
11 Wow! email thread until it was collected from Bill Galanis's files, reviewed, and placed on a
12 privilege log in the Marshall litigation in 2019—and Bill Galanis was not one of the custodians
13 whose records were collected in this case, because Mr. Galanis did not work on Tricarichi's
14 transaction. *See* Ex. 11, Genord Decl. ¶¶ 15–18.

15 That neither Mr. Cesnik nor Mr. Weber had a copy of this email in their electronic files
16 when they were placed on litigation hold nearly eight years *after* the email was sent is
17 unsurprising. *See* Ex. 11, Genord Decl. ¶¶ 19–20. Gary Cesnik, a member of PwC's national
18 Q&RM team, had no other involvement in the Marshall transaction, and Michael Weber's
19 testimony in the Marshall litigation was that he routinely deleted emails from his inbox on the
20 same day if they did not contain an outstanding action item requiring his attention. Ex. 7 at Tr.
21 946–48. This practice was consistent with PwC's 2003 document retention policy, which
22 instructed its tax professionals to retain only those documents that “record, support or otherwise
23 form the basis of the Firm's professional work product or administrative functions.” Ex. 8. The
24 policy explained that “documents such as electronic mail, correspondence or draft documents that
25 are not necessary to record or support the Firm's work should not be retained beyond the end of
26 the engagement to which they relate.” *Id.* at 2. Neither Mr. Cesnik nor Mr. Weber were under any
27 duty to preserve the email in their electronic records in February 2003—and certainly not under a
28 duty to preserve an email that related solely to the Marshall transaction based on the possibility

1 that Tricarichi (who they did not know at all) would sue PwC for negligent work on a transaction
2 on which PwC had not yet been engaged and which did not close until months after the email in
3 question was sent. *See, e.g., Bass-Davis v. Davis*, 122 Nev. 442, 450, 134 P.3d 103, 108 (2006)
4 (“[T]he prelitigation duty to preserve evidence is imposed once a party is on ‘notice’ of of a
5 potential legal claim.”); *see also Kerr v. Bd. of Psychologist Examiners*, 304 Or. App. 95, 111–12,
6 467 P.3d 754, 765 (Or. Ct. App. 2020) (describing a litigation hold as a “matter of prudent *practice*,
7 not a mandate expressed in law like a statute, administrative rule, or Oregon court rule”);
8 *Markstrom v. Guard Publishing Co.*, 315 Or. App. 309, 315, 501 P.3d 71, 74–75 (Or. Ct. App.
9 2021) (Oregon Rule of Civil Procedure 46 D did not authorize sanctions for party’s prelitigation
10 failure to preserve evidence).

11 PwC carried out its Rule 56(f) discovery efforts based on the parties’ agreement regarding
12 cutodians, date range, and search terms exactly as PwC’s prior counsel represented to opposing
13 counsel and to the Court. None of the custodians had a copy of the February 2003 email thread,
14 and it was not otherwise collected in the Tricarichi litigation. PwC was not obligated to go beyond
15 the parties’ agreement to track down documents from every conceivable custodian at the Firm—
16 particularly where, based on the parties’ January 2018 discovery correspondence, Mr. Hessell
17 represented to PwC’s counsel that his “firm is now counsel for the Marshalls and therefore d[id]
18 not need documents from PwC concerning the Marshall Transaction and corresponding Tax Court
19 proceeding.” Ex. 1 at 3.

20 **B. The Q&RM Booklet Is Not An “Internal Polic[y] or Guideline Regarding On-**
21 **Going Communication With A Client” After PwC’s Services Are Complete**

22 The limited scope of PwC’s Rule 56(f) production obligation did not include the Q&RM
23 Booklet either. When the Court ordered limited Rule 56(f) discovery in May 2017, it instructed
24 that Tricarichi was entitled to the “limited discovery necessary to oppose PwC’s motion for
25 summary judgment as set forth in Paragraph 10 of Mr. Tricarichi’s affidavit,” including “PwC
26 documents and testimony regarding the Bishop and Marshall transactions . . . and the reasons why
27 PwC did not make Mr. Tricarichi aware of those transactions.” Dkt. 100, Order. But Tricarichi’s
28 discovery requests promulgated as part of the Rule 56(f) discovery process swept far broader than

1 what he set out in paragraph 10 of his affidavit. In the months that followed, Tricarichi designed
2 interrogatories and document requests that he thought would lend support to his alternative
3 argument that the statute of limitations on his 2003 negligence claim was tolled because PwC
4 provided continuing representation beyond the closing of the Westside Cellular transaction in fall
5 2003.

6 Tricarichi's affidavit, interrogatories, and document requests add helpful color and context
7 to what PwC agreed to produce as part of the Rule 56(f) discovery. In paragraph 11 of his affidavit,
8 for example, Tricarichi expressed his "understanding" that when he "sought and received PwC's
9 advice about the Fortrend transaction," "PwC would continue to be available to assist me should
10 there be subsequent inquiries from the IRS in connection with the transaction." Dkt. 88, Tricarichi
11 Aff. at ¶ 11. One of the interrogatories Tricarichi propounded asked whether PwC had "complied
12 with AICPA Statement on Standards for Tax Services No. 6, with respect to the Fortrend
13 Transaction," identifying the SSTS that sets out the standard of conduct for CPAs who discover
14 an error on a client's tax return, and one of Tricarichi's requests for production served nearly
15 simultaneously with the Court's order granting Rule 56(f) discovery included "[a]ll documents
16 relating to AICPA Statement on Standards for Tax Services No. 6." *See* Ex. 9 (Interrogatory No.
17 10); Ex. 10 (Request For Production No. 5). Similarly, the agreed-on custodial searches included
18 the search terms ["10.21" w/10 "230"] (for Circular 230) and ["AICPA Statement on Standards"
19 w/10 "6"]. Hessel Decl. Ex. 4.

20 As with the custodial search described above, the parties met and conferred with respect
21 to Tricarichi's requests for production and interrogatories issued as part of the limited Rule 56(f)
22 discovery. Mr. Tricarichi argues that the booklet falls within the first category of documents that
23 PwC's counsel represented PwC produced in August 2017: "documents related to any internal
24 policies or guidelines regarding on-going communication with a client after PwC's services/advice
25 has been rendered concerning the client's engagement." But against the relevant backdrop of Mr.
26 Tricarichi's earlier statute of limitations arguments and own discovery requests, this category was
27 designed to identify documents that could bolster Mr. Tricarichi's continuing representation
28 argument—not his far-fetched allegations that PwC began to "fraudulently conceal" its supposed

1 negligence on the Tricarichi transaction before PwC had even reached a final opinion on the
2 reportability of the transaction and the deal closed. *See* Mot. at 6 (alleging that “PwC knew its
3 advice to Tricarichi was wrong before they were even engaged”).

4 The Q&RM Booklet produced in Marshall cannot be shoehorned into this wholly distinct
5 category of documents that Tricarichi sought on a different statute of limitations theory than that
6 set out in the Rule 60(b) motion. As stated above, the Q&RM Booklet is not itself a policy, but
7 instead a risk management tool that pointed PwC practitioners to ARMOR, the Firm’s policy
8 repository, and specifically to a policy called “US Policy & Guidance – Claims against PwC” for
9 “detailed guidance on TPMs” (or “troublesome practice matters”). The Q&RM Booklet provides
10 practitioners with a high-level overview of the steps they should follow if a client brings (or
11 threatens) a claim against the Firm for deficiencies in its services. Even if the booklet were itself
12 a policy (which it is not), it does *not* speak to the agreed-upon category for production: the scope
13 of PwC’s obligations to, or expected communications with, a former client after an engagement
14 has concluded (issues that would be relevant to whether PwC’s representation could be considered
15 “ongoing” even after its engagement as described in an engagement letter had formally ended).

16 In sum, by stripping PwC’s production communications of their context, Tricarichi
17 misrepresents the type of documents he was seeking and that PwC agreed to search for and
18 produce: Firm policies and guidance relating to ongoing obligations to a client after an
19 engagement has concluded, whether under AICPA SSTS 6 or as contemplated by the parties’
20 engagement letter, which stated PwC would be available to work with Tricarichi, if requested, in
21 the event of an IRS investigation. Tricarichi in fact used several of those policy and guidance
22 documents in his opposition to PwC’s renewed summary judgment motion on his 2003 claim. *See*,
23 *e.g.*, Dkt. 112.17, Ex. 17 to Tricarichi’s Resp. Opp’n (PwC Q&RM “tip” on AICPA SSTS 6); Dkt.
24 112.18, Ex. 18 to Tricarichi’s Resp. Opp’n (PwC TaxSource document on SSTS 6); Dkt. 112.19,
25 Ex. 19 to Tricarichi’s Resp. Opp’n (PwC document “Guidance to Practitioners Regarding
26 Professional Obligations Under Treasury Circular No. 230,” which covers advising a client of an
27 error discovered in a tax return). The Q&RM Booklet, which provides a high-level summary of a
28 policy dealing with claims brought or threatened against PwC, does not fall into that category, and

PwC did not breach an obligation to the Court or its agreement with Tricarichi's counsel by not producing it as part of the Rule 56(f) discovery in 2017 and 2018.

C. PwC's Non-Production of These Two Documents Is Not "Fraud on the Court"

Tricarichi suggests in his motion that PwC's failure to produce the two documents described above during Rule 56(f) discovery amounts to "fraud on the court" and justifies relief under Rule 60(b)(3). Mot. at 9. Even if this Court concludes that one or both of the documents at issue should have been collected and produced as part of PwC's limited Rule 56(f) discovery, an inadvertent discovery violation does not come close to fraud on the court under Rule 60(b)(3). To grant relief under Rule 60(b)(3), the court must find that fraud has been established by clear and convincing evidence. *NC-DSH, Inc. v. Garner*, 125 Nev. 647, 657, 218 P.3d 853, 860–61 (2009) ("A party seeking to vacate a final judgment based on fraud upon the court bears a heavy burden.").

Courts set a high threshold for fraud under NRCP 60(b)(3). "[F]raud upon the court" goes beyond mere "conduct of a party or lawyer of which the court disapproves"—instead, NRCP 60(b)(3) "embraces only that species of fraud which does, or attempts to, subvert the integrity of the court itself" or makes it such that "the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases." *Id.* at 654 (quoting *Demjanjuk v. Petrovsky*, 10 F.3d 338, 352 (6th Cir. 1994)). The Nevada Supreme Court has further explained that "true fraud on the court is rare and requires 'egregious misconduct.'" *Id.* at 650 (quoting *Occhiuto v. Occhiuto*, 97 Nev. 143, 146 n.2, 629 P.2d 568, 570 n.2 (1981)). *See also* *Appling v. State Farm Mut. Auto. Ins. Co.*, 340 F.3d 769, 780 (9th Cir. 2003) ("Non-disclosure, or perjury by a party or witness, does not, by itself, amount to fraud on the court."). *Cf. Nuri v. Jarso*, 529 P.3d 168, 2023 WL 3440457, at *1 (Nev. May 12, 2023) (plaintiff committed fraud on the court warranting Rule 60(b)(3) relief where plaintiff failed to serve defendant with the complaint and resulting divorce decree, knew that the defendant was outside of the state and when she would return, but nonetheless "represented to the district court that he did not know where [defendant] could be found" to secure an order allowing service by publication) (unpublished disposition).

Nothing in Tricarichi's motion would support a finding, by clear and convincing evidence, that PwC's counsel perpetrated a fraud on the court, such that PwC "subvert[ed] the integrity of

the court itself” or prevented the judicial machinery from performing in its usual manner. *NC-DSH, Inc.*, 125 Nev. at 654; *see also Trendsetta USA, Inc. v Swisher Int’l, Inc.*, 31 F.4th 1124, 1132–33 (9th Cir. 2022) (“Under the high standard for a Rule 60(d)(3) motion, a mere discovery violation or non-disclosure does not rise to the level of fraud on the court.”) (quotation marks and citation omitted); *Aulmann v. Aulmann*, 25 F. App’x 555, 557 (9th Cir. 2001) (generally “a witness’ perjury or failure to disclose a material fact is not fraud on the court” regardless of “whether the perjury or non-disclosure occurs during discovery or at trial”). The relief Tricarichi seeks is therefore not warranted under Rule 60(b)(3).

III. The Two Documents Do Not Meet the High Bar Required for Rule 60(b)(2) Relief

Finally, even if the Court reaches the merits of Tricarichi’s motion—which it should not because the motion is untimely and PwC did nothing wrong during discovery—the two documents would have made no difference in this Court’s decisions, which dismissed Tricarichi’s claims on multiple independent grounds.

Tricarichi’s motion does not come close to meeting the high bar required for relief under Rule 60(b)(2). In order to justify setting aside the judgment in this case and undoing the significant amount of time, energy, and resources the Court and the parties have invested in reaching final resolution, the newly discovered evidence “must be of such magnitude that production of it earlier would have been likely to *change the disposition of the case.*” *Feature Realty*, 331 F.3d at 1093 (quotation marks and citation omitted) (emphasis added);² *see also Renteria v. Canepa*, No. 3:11-CV-00534-RCJ, 2013 WL 837127, at *3 (D. Nev. Mar. 5, 2013) (denying Rule 60(b)(2) motion because “[t]he allegedly new evidence does not support a finding that the Court would have decided otherwise had that evidence been before the Court prior to the judgment”); *Abet Just., L.L.C. v. Am. First Credit Union*, No. 2:13-CV-02082-MMD-PAL, 2015 WL 4110800, at *2 (D. Nev. July 7, 2015) (stating that “the Court would still deny Plaintiffs’ [Rule 60(b)(2)] Motion even

² In the Motion, Tricarichi cites a 43-year-old case from the Seventh Circuit for the standard for granting relief under Rule 60(b)(2). Motion 10–11 (citing *United States v. Walus*, 616 F.2d 283, 287–88 (7th Cir. 1980)). Although the more recent *Featury Royalty* standard from the Ninth Circuit should be more persuasive, in reality there does not appear to be much daylight between the two since *Walus* requires that the newly discovered evidence be “such that a new trial would probably produce a new result.” *Walus*, 616 F.2d at 288.

1 if it were timely because the newly discovered evidence would not have changed the outcome of
2 the case”)(citation omitted).

3 Tricarichi’s motion fails to show that either the Marhsall Wow! email or the Q&RM
4 Booklet would likely have changed the summary judgment on the 2003 claim, the Court’s decision
5 on the 2008 claim, or anything else about this case.

6 **A. The Documents Would Not Have Changed the Court’s Holding That**
7 **Tricarichi’s 2003 Claim is Time-Barred**

8 Tricarichi’s primary argument is that the Marshall Wow! email and the Q&RM Booklet
9 would have enabled him to defeat the Court’s 2018 grant of summary judgment to PwC on
10 Tricarichi’s claims regarding PwC’s 2003 advice based on the statute of limitations. Tricarichi is
11 indisputably wrong. The Court found that the IRS itself put Tricarichi on notice of his potential
12 claims—not PwC. Yet Tricarichi argues that these two documents “call[] into doubt the Court’s
13 2018 dismissal of Tricarichi’s 2003-based malpractice claims because these documents, at least,
14 create questions of fact regarding when Tricarichi knew or should have known of his claim.” Mot.
15 at 2. Specifically, Tricarichi argues that these two documents would have allowed him “to establish
16 PwC’s fraudulent concealment,” and thereby defeat the grant of summary judgment. *Id.* at 3. This
17 argument does not withstand basic scrutiny.

18 On October 22, 2018, the Court entered its order granting PwC summary judgment
19 “regarding any and all claims arising from the services PwC provided [Tricarichi] in 2003.” Dkt.
20 119 at 3. The Court’s reasoning was straightforward: The Court held that Tricarichi should have
21 discovered PwC’s alleged negligence regarding its 2003 advice no later than when Tricarichi
22 received and responded to an IDR from the IRS regarding potential transferee liability arising out
23 of the Westside transaction. *Id.* ¶¶ 6, 18. Tricarichi responded to the IDR by producing documents
24 on February 21, 2008. *Id.* ¶ 19. Applying the most generous statute of limitations that could
25 apply—the two-year statute set forth in Nev. Rev. Stat. § 11.2075(1)(a)³—the Court held that

26
27 ³ The Court recognized that there was a dispute over which statute of limitations applied—
28 Nevada’s, or a shorter New York statute. However, the Court did not decide which limitations
period governed because it held that Tricarichi’s claims were time-barred even assuming the longer
Nevada limitations period applied. Dkt. 119 ¶ 17.

1 Tricarichi's claims became time-barred "no later than February 21, 2010," which was "nearly a
2 year before the parties entered into a tolling agreement in January 2011." *Id.* ¶¶ 18–19.

3 Simply put, the Marshall Wow! email and the Q&RM Booklet have *nothing* to do with
4 the key facts that formed the basis for the Court's 2018 summary judgment order. The Court
5 entered summary judgment for PwC regarding its 2003 advice because communications Tricarichi
6 received directly from the IRS in 2008 should have led him to discover any alleged problems with
7 PwC's advice. Even if PwC had produced the Wow! email and the Q&RM Booklet in 2017 (when
8 Triciarchi says they should have been produced), those documents (and Tricarichi's argument
9 about PwC's concealment of a potential negligence claim from 2003 on) have no bearing
10 whatsoever on what Tricarichi knew or should have known in 2008 when he received the IDR
11 from the IRS asking for documents related to potential transferee liability.

12 Recognizing that the two documents have nothing to do with the grounds for the Court's
13 summary judgment decision, Tricarichi pivots and argues that "PwC's failure to produce" the
14 documents "deprived the Court and Plaintiff of the ability to argue that they create questions of
15 fact about whether PwC fraudulent [sic] concealed its negligence." Mot. at 11. But Tricarichi made
16 an extensive fraudulent-concealment argument in the briefing on PwC's renewed motion for
17 summary judgment back in 2018. *See* Dkt. 113, Pl.'s Resp. Opp'n. at 18–20, 30. Indeed, one of
18 the items Tricarichi argued PwC fraudulently concealed from him was the fact that PwC told the
19 Marshalls not to do their proposed deal with Fortrend. *See id.* at 20 ("PwC never said a word to
20 Mr. Tricarichi about this contradictory advice to another taxpayer . . ."). That argument did not
21 sway the Court in 2018. There is zero chance that producing a single email from the Marshall
22 transaction, which was consistent with the Tax Court's 2016 finding that PwC discouraged the
23 Marshalls from engaging in the transaction, would have made any difference in the Court's
24 evaluation of Tricarichi's fraudulent-concealment argument.

25 The Q&RM Booklet likewise would not have advanced Tricarichi's fraudulent
26 concealment argument. Tricarichi tries to put a nefarious spin on the Q&RM Booklet's
27 commonsense admonition that PwC practioners should not unilaterally "admit liability,
28 shortcomings, or defects in [their] services" but rather should consult with other PwC departments,

1 including Q&RM and the Office of General Counsel, about “Troublesome Practice Matters.”
2 Hessel Decl. Ex. 3, at 26. This practice reminder is commonsense: whether for accountants,
3 lawyers, or any other professional service provider. Professionals should consult with neutral
4 colleagues before admitting fault. But more fundamentally, there is no evidence that anyone at
5 PwC considered the advice PwC gave to Tricarichi in 2003 to have been incorrect, either in 2003
6 or in 2008. As this Court found in its Findings of Fact and Conclusions of Law: “it is undisputed
7 that PwC was not aware of any error on a previously filed tax return as a result of Notice 2008-
8 111.” Dkt. 416, FOFCOL ¶ 118. Thus, the Q&RM Booklet could not have led anyone at PwC to
9 conceal any defect in the 2003 Tricarichi advice because there was no evidence that anyone at
10 PwC believed such a defect existed.

11 **B. The Documents Would Not Have Changed the Court’s Disposition of**
12 **Tricarichi’s 2008 Claim and Entry of Final Judgment in Favor of PwC**

13 The Marshall Wow! email and the Q&RM Booklet would not have changed the outcome
14 of the bench trial on Tricarichi’s 2008 claim, either, because Tricarichi’s claim failed on multiple
15 independent grounds completely unrelated to these documents.

16 The Court specifically ruled, more than two years before trial, that documents related to
17 the Marshall transaction were not relevant to Tricarichi’s 2008 claim. In April 2020, Tricarichi
18 moved to compel PwC to produce documents regarding other alleged midco transactions for which
19 PwC advised, including the Marshall transaction. *See* Dkt. 213, 4/29/20 Tricarichi’s Mot. to
20 Compel at 6–7. The Court denied the motion to compel, holding that “the additional client-specific
21 documents Tricarichi seeks are *not relevant* or proportional to Tricarichi’s remaining claim in this
22 case, which focuses on PwC’s alleged failure to disclose IRS Notice 2008-111 to him.” Dkt. 234,
23 6/16/20 Order Denying Mot. to Compel at 4 (emphasis added). The Court specifically mentioned
24 the Marshall transaction in its ruling, explaining that the “Marshall transaction . . . took place in
25 March 2003, before PwC’s engagement with Tricarichi,” and therefore “[a]ny claim related to the
26 Marshall transaction would be barred by the Court’s October 22, 2018 Summary Judgment Order.”

27 *Id.*
28

1 The Court held a nine-day bench trial on Tricarichi's 2008 claim from October 31 to
2 November 10, 2022. The Court heard testimony from 14 different witnesses, and received 112
3 exhibits into evidence. Following trial, the Court issued extensive findings of fact and conclusions
4 of law that rejected Tricarichi's claim on multiple, independent grounds. *See* Dkt. 416, FOFCOL.
5 Tricarichi has not identified any reason to believe that the Marshall Wow! email and the Q&RM
6 Booklet, if they had been added to the evidence pile, would have changed a single aspect of the
7 Court's findings of fact and conclusions of law, much less that those two documents would have
8 led to an entirely different bottom-line ruling in Tricarichi's favor.

9 The Court held that Tricarichi failed to meet his burden of proof on critical elements of his
10 negligence claim. *Id.* ¶¶ 102–103. First, the Court held that PwC did not owe any duty to Tricarichi
11 to update its advice in 2008 since Tricarichi ceased being a client in 2003. *Id.* ¶ 104. The Marshall
12 Wow! email and the Q&RM Booklet could not have altered this finding. Second, the Court held
13 that PwC did not breach any duty by failing to disclose Notice 2008-111 to Tricarichi because,
14 among other reasons, the Notice did not render PwC's prior advice to Tricarichi erroneous. *Id.*
15 ¶¶ 117–130. The Marshall Wow! email and the Q&RM Booklet could not have altered this finding.
16 Third, the Court held that Tricarichi did not prove causation for multiple "independent reasons,"
17 including that Tricarichi and his tax lawyers were already aware of Notice 2008-111; advising
18 Tricarichi of the Notice could not have prevented the IRS audit and ultimate liability
19 determination; and Tricarichi did not prove that he would have settled with the IRS in December
20 2008 if he had been told about Notice 2008-111. *Id.* ¶¶ 140–149. The Marshall Wow! email and
21 the Q&RM Booklet could not have altered any of these findings.

22 Beyond his failure to prove the central elements of his claim, the Court also found that
23 Tricarichi's claim was time-barred. *Id.* ¶¶ 152–161. The Court held that Tricarichi's claim was
24 untimely under both New York and Nevada law because the limitations period expired in January
25 2013 at the latest, and Tricarichi did not file his lawsuit until April 2016. *Id.* ¶¶ 155–158. The
26 Court also held that Tricarichi could not claim the benefit of any tolling agreement because he
27 decided not to introduce the tolling agreement into evidence. *Id.* ¶¶ 159–160. Again, the Marshall
28 Wow! email and the Q&RM Booklet could not have altered this finding.

Tricarichi argues that, by not producing the Marshall Wow! email and the Q&RM Booklet, PwC “deprived Plaintiff of the ability to argue at the bench trial in this matter that PwC, as an institution, knew well before 2003 and certainly by 2008 that this transaction was dangerous and Tricarichi should get away as soon as possible, none of which it did.” Mot. at 11–12. But of course Tricarichi did make an argument at trial based on the Marshall transaction, and the Court rejected that argument based on the “numerous differences” the Court found “between the Marshall matter and the instant case.” Dkt. 416, FOFCOL ¶ 39. As the Court explained, “[t]he Marshalls undertook an integrated transaction with significant non-cash built-in gain assets (as opposed to none in the Westside Transaction), and the nature of this transaction presented greater risks of transferee liability than the Westside Transaction.” *Id.* “Given the differences in the matters,” the Court found that “Tricarichi did not meet his burden to show that PwC has liability to him for failing to disclose or take into account the advice given in [the Marshall] transaction.” *Id.*; *see also id.* ¶ 135 (“[B]oth the Enbridge and Marshall transactions were substantially distinct from the Westside Transaction, and there is no reason to believe that PwC’s work in those two matters rendered their advice to Tricarichi any more or less correct.”). One additional email about the Marshall case that simply gave more color about why PwC recommended against that deal would not have altered the Court’s conclusion.

///

///

///

CONCLUSION

For the foregoing reasons, PwC respectfully requests that the Court deny Tricarichi's Rule 60(b) Motion.

DATED this 19th day of September, 2023.

SNELL & WILMER L.L.P.

By: /s/ Bradley Austin

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Attorneys for Defendant

PricewaterhouseCoopers LLP

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 September 19, 2023, I caused to be served a true and correct copy of the foregoing **PRICEWATERHOUSECOOPERS LLP'S OPPOSITION TO PLAINTIFF'S NRCP 60(B) MOTION FOR RECONSIDERATION** 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 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 service upon the Court's Service List for the above-referenced case.

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Attorneys for Plaintiff

/s/ Lyndsey Luxford
An Employee of Snell & Wilmer L.L.P.

EXHIBIT 1

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January 17, 2018

VIA EMAIL

Thomas D. Brooks, Esq.
Sperling & Slater
55 West Monroe Street, Suite 3200
Chicago, IL 60603
tdbrooks@sperling-law.com

RE: *Tricarichi v. PricewaterhouseCoopers LLP, et al.*,
A-16-735910-B

Tom:

I write in response to your letter dated December 22, 2017 (the "December 22 Letter").

As an initial matter, we are compelled to respond to Plaintiff's complaint that "PwC's initial document production and interrogatory responses were not provided until about three months after such discovery commenced." (*See* December 22 Letter at 1.) As you know, Plaintiff served PwC with document requests and interrogatories on May 30, 2017. PwC served written responses and objections to Plaintiff's requests on July 3, 2017, in compliance with the Nevada Rules of Civil Procedure. Plaintiff's discovery requests were patently overbroad; therefore, we met and conferred on an agreeable scope of production and interrogatory responses. PwC subsequently provided amended interrogatory responses and produced documents on August 23, 2017. Plaintiff was then silent for the next *four months* with *zero* activity in the case. Accordingly, PwC presumed Plaintiff had received the discovery necessary in connection with his 56(f) motion and stated this position in our December 21, 2017 letter. Only after receiving our letter did Plaintiff belatedly contend for the first time that our production was incomplete and that you intend to pursue further discovery.

Moreover, many of Plaintiff's objections and demands in your December 22 Letter are not well-taken, particularly those objections and demands that are inconsistent with the agreement the parties previously reached concerning PwC's production of materials, as reflected in the attached **Exhibit 1**. Our prior agreement stated that the scope of the production would be

AA 001552

Thomas D. Brooks, Esq.
January 17, 2018
Page 2
as follows:

- Documents related to any internal policies or guidelines regarding on-going communication with a client after PwC's services had been rendered concerning the client's engagement;
- Documents related to any internal policies or guidelines regarding the enforcement of AICPA Statement on Standards for Tax Services No. 6 or Section 10.21 of Treasury Circular No. 230;
- Correspondence with and submissions to the IRS concerning Midco transactions; and
- Documents responsive to the Request for Documents collected from a custodial search using the following parameters:
 - Date Range: 1/1/1999 through 12/31/2012
 - Custodians: (1) Elaine Church; (2) Marissa Nelson; (3) Mark Boyer; (4) Richard Stovsky; (5) Tim Lohnes; (6) Rochelle Hodes; (7) Stephen Anderson; (8) Gary Cesnik; (9) Michael Weber.
 - Search Terms: (1) Tricarichi; (2) Fortrend; (3) Midco; (4) Midcoast; (5) Notice 2001-16; (6) Notice 2008-20; (7) Notice 2008-111; (8) "10.21" /10 "230"; (9) "AICPA Statement on Standards" w/10 "6"; and (10) Intermediary transaction.

PwC produced 2,158 documents totaling 30,648 pages, pursuant to these agreed-upon parameters. We are concerned that Plaintiff now seeks to renege on the agreement to seek discovery from new custodians simply because the 30,000-plus pages do not provide any support for Plaintiff's fraudulent concealment theory. We expect Plaintiff to abide by the agreement previously reached in connection with the scope of 56(f) discovery.

PwC further responds to the specific objections and requests ("Bullet Point") articulated in your December 22 Letter, as follows:

- With regard to **Bullet Point 1**, Plaintiff seeks documents from additional custodians, including PwC individuals who worked on the Bishop and Marshall Transactions. PwC produced documents from an agreed-upon list of custodians, which includes an individual who worked on the Marshall Transaction. PwC expects Plaintiff to abide by his prior agreement.
- With regard to **Bullet Points 2 and 3**, Plaintiff's Requests for Production Nos. 1, 2 and 14 seek documents concerning the Bishop and Marshall Transactions, and corresponding court proceedings. As we have discussed during the meet and confer process, such documents contain confidential client information that PwC

cannot produce absent client authorization. In response, your colleague, Mr. Hessell, stated: (1) in respect to the Marshall Transaction, your firm is now counsel for the Marshalls and therefore do not need documents from PwC concerning the Marshall Transaction and corresponding Tax Court proceeding; and (2) in respect to the Bishop Transaction, he was attempting to obtain authorization from the appropriate individuals or entities. However, neither you nor Mr. Hessell ever informed PwC whether you obtained authorization regarding the Bishop Transaction, or even provided an update on your efforts to obtain such authorization.

- With regard to **Bullet Point 4**, pursuant to the parties' agreed-upon search parameters, PwC has produced all non-privileged and non-client confidential documents responsive to Request for Production No. 12.
- With regard to **Bullet Point 5**, PwC believes its amended responses to Interrogatories No. 10 and 11 are sufficient under Nevada law.
- With regard to **Bullet Point 6**, PwC states that after a reasonable and diligent search, PwC has not located any documents responsive to Request for Production No. 4.
- With regard to **Bullet Point 7**, pursuant to the parties' agreed-upon search parameters, PwC has produced all non-privileged and non-client confidential documents responsive to Request for Production Nos. 15 and 16.
- With regard to **Bullet Point 8**, as stated above, PwC collected, searched, and produced documents pursuant to agreed-upon parameters. PwC expects Plaintiff to honor the parties' agreement.
- With regard to **Bullet Point 9**, PwC will provide a privilege log at a mutually agreeable time.

PwC is willing to meet and confer on the issues discussed above, as well as any proposed amendments to the case schedule.

Sincerely,



Winston P. Hsiao

CC: Scott F. Hessell, Esq.
Todd L. Moody, Esq.
Patrick G. Byrne, Esq.
Peter B. Morrison, Esq.

EXHIBIT 1

From: Heian, Winston P (I AC)
Sent: Wednesday, August 23, 2017 6:40 PM
To: 'Scott F. Hessel'
Cc: Todd Prall (TPrall@hutchlegal.com); Tom Brooks
Subject: RE: [Ext] Re: Tricarichi v PwC: Discovery Responses
Attachments: PwC - Amended Responses to Interrogatories.pdf

Scott,
I hope this finds you well. Please find attached PwC's amended interrogatory responses.

Please also find an FTP link to PwC's second document production.

Link: <https://secureftp.skadden.com>

Username: sk1214271

Log-in password: JpB9fNZJ (this is case sensitive)

File Encryption password: 3*U#NBT@(Ts (this is case sensitive)

As we have discussed before, the document production contains:

- (1) documents related to any internal policies or guidelines regarding on-going communication with a client after PwC's services/advice has been rendered concerning the client's engagement
- (2) documents related to any internal policies or guidelines regarding the enforcement of AICPA Statement on Standards for Tax Services No. 6 or Section 10.21 of Treasury Circular No. 230.
- (3) correspondence with and submissions to the IRS concerning Midco transactions
- (4) documents collected from a custodial search with the following agreed upon search parameters:

- Date Range: 1/1/1999 through 12/31/2012
- Custodians:
 - Elaine Church
 - Marissa Nelson
 - Mark Boyer
 - Richard Stovsky
 - Tim Lohnes
 - Rochelle Hodes
 - Stephen Anderson
 - Gary Cesnik
 - Michael Weber
- Search Terms:
 - Tricarichi
 - Fortrend
 - Midco
 - Midcoast
 - Notice 2001-16
 - Notice 2008-20
 - Notice 2008-111
 - "10.21" w/10 "230"
 - "AICPA Statement on Standards" w/10 "6"
 - "intermediary transaction"

Thanks.

Winston P. Hsiao

Skadden, Arps, Slate, Meagher & Flom LLP
300 South Grand Avenue | Los Angeles | California | 90071-3144
T: 213.687.5219 | F: 213.621.5219
winston.hsiao@skadden.com



Please consider the environment before printing this email.

From: Scott F. Hessell [mailto:SHessell@sperling-law.com]
Sent: Monday, August 14, 2017 12:54 PM
To: Hsiao, Winston P (LAC)
Cc: Todd Prall (TPrall@hutchlegal.com); Tom Brooks
Subject: Re: [Ext] Re: Tricarichi v PwC: Discovery Responses

Winston

What is the status of production of documents in the above matter?

Scott

Scott F. Hessell

Sperling & Slater, P.C.

55 West Monroe, Suite 3200

Chicago, IL 60603

T: (312) 641-4882

F: (312) 641-6492

www.sperling-law.com

From: Scott Hessell <shessell@sperling-law.com>
Date: Thursday, July 13, 2017 at 7:11 PM
To: "Hsiao, Winston P" <Winston.Hsiao@skadden.com>
Cc: "Todd Prall (TPrall@hutchlegal.com)" <TPrall@hutchlegal.com>, Thomas Brooks <tdbrooks@sperling-law.com>
Subject: Re: [Ext] Re: Tricarichi v PwC: Discovery Responses

Sure.

On Jul 13, 2017, at 7:09 PM, Hsiao, Winston P <Winston.Hsiao@skadden.com> wrote:

How about 2 pm et tomorrow? I'll give you a call. Thanks.

From: Scott F. Hessell [mailto:SHessell@sperling-law.com]
Sent: Thursday, July 13, 2017 12:00 PM

To: Hsiao, Winston P (LAC); Todd Prall (TPrall@hutchlegal.com); Tom Brooks
Subject: Re: [Ext] Re: Tricarichi v PwC: Discovery Responses

That's fine. Let me know.

Scott F. Hessel

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From: "Hsiao, Winston P" <Winston.Hsiao@skadden.com>

Date: Thursday, July 13, 2017 at 1:51 PM

To: Scott Hessel <shessel@sperling-law.com>, "Todd Prall (TPrall@hutchlegal.com)" <TPrall@hutchlegal.com>, Thomas Brooks <tdbrooks@sperling-law.com>

Subject: Re: [Ext] Re: Tricarichi v PwC: Discovery Responses

Hi Scott,

I was actually going to email you later today. I am trying to get hold of my client to talk about things with her one more time before I reached out. I can do Friday afternoon PT time if I can speak with her before then or first thing Monday morning if I cannot in time. Does that work? Can I let you know later today?

Thanks
Winston

Sent from my BlackBerry 10 smartphone.

From: Scott F. Hessel

Sent: Thursday, July 13, 2017 11:45 AM

To: Hsiao, Winston P (LAC); Todd Prall (TPrall@hutchlegal.com); Tom Brooks

Subject: Re: [Ext] Re: Tricarichi v PwC: Discovery Responses

Winston

Are you available for a call re below tomorrow any time?

Scott

Scott F. Hessel

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From: "Hsiao, Winston P" <Winston.Hsiao@skadden.com>

Date: Friday, July 7, 2017 at 7:26 PM

To: Scott Hessel <shessel@sperling-law.com>, "Todd Prall (TPrall@hutchlegal.com)" <TPrall@hutchlegal.com>, Thomas Brooks <tdbrooks@sperling-law.com>

Subject: RE: [Ext] Re: Tricarichi v PwC: Discovery Responses

Scott,

We have been cooperative throughout this process. We continue to think the requested discovery is overly broad and unnecessary for responding to our motion for summary judgment. That being said, we remain open to a compromise over the appropriate areas and amount of discovery. We are working on our end and hope to be in a position to discuss by the end of next week.

Have a good weekend.

Winston

Winston P. Hsiao

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winston.hsiao@skadden.com



Please consider the environment before printing this email.

From: Scott F. Hessel [<mailto:SHessel@sperling-law.com>]

Sent: Thursday, July 06, 2017 9:03 AM

To: Hsiao, Winston P (LAC); Todd Prall (TPrall@hutchlegal.com); Tom Brooks

Subject: [Ext] Re: Tricarichi v PwC: Discovery Responses

Winston

After 30 days and a lengthy meet and confer call, I am disappointed by PWC's "responses" even if they are not PWC's "final decision." I do not believe these responses are in good faith.

The parties are at issue with respect to all Rqs and RFP Nos. 4-16, 18-20, 22, & 25, where PWC objects in whole. With respect to the remainder of the RFPs where PWC refuses to produce documents unless we revise the requests are not adequate under Nevada rules. Please amend and set forth what documents PWC will agree to produce and we'll decide whether those meet the requests. Otherwise, we regard the requests as PWC standing on its objections.

Scott

Scott F. Hessel

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From: "Hsiao, Winston P" <Winston.Hsiao@skadden.com>

Date: Monday, July 3, 2017 at 7:17 PM

To: Scott Hessel <shessel@sperling-law.com>, "Todd Prall (TPrall@hutchlegal.com)" <TPrall@hutchlegal.com>, Thomas Brooks <tdbrooks@sperling-law.com>

Subject: Tricarichi v PwC: Discovery Responses

Counsel,

Attached are PwC's formal responses and objections to Plaintiff's document requests and interrogatories. Please note that these responses do not represent our final position on your requests, and on the categories of documents Scott and I discussed recently. We are still gathering internal information before we can make our decisions. It has been a lengthy and involved task so far but we will let you know as soon as we can. In the meantime, we wanted to serve these written responses to preserve our objections.

Let me know if you would like to discuss. Thanks and Happy Fourth.

Winston P. Hsiao

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Further information about the firm, a list of the Partners and their professional qualifications will be provided upon request.

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Further information about the firm, a list of the Partners and their professional qualifications will be provided upon request.

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Further information about the firm, a list of the Partners and their professional qualifications will be provided upon request.

EXHIBIT 2

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
300 SOUTH GRAND AVENUE
LOS ANGELES, CALIFORNIA 90071-3144

TEL: (213) 687-5000
FAX: (213) 687-5600
www.skadden.com

DIRECT DIAL
(213) 687-5304
DIRECT FAX
(213) 621-5304
EMAIL ADDRESS
PETER.MORRISON@SKADDEN.COM

FIRM/AFFILIATE OFFICES
BOSTON
CHICAGO
HOUSTON
NEW YORK
PALO ALTO
WASHINGTON, D.C.
WILMINGTON

BEIJING
BRUSSELS
FRANKFURT
HONG KONG
LONDON
MOSCOW
MUNICH
PARIS
SAO PAULO
SEOUL
SHANGHAI
SINGAPORE
TOKYO
TORONTO

December 21, 2017

VIA EMAIL

Scott F. Hessell, Esq.
Sperling & Slater
55 West Monroe Street, Suite 3200
Chicago, IL 60603
shessell@sperling-law.com

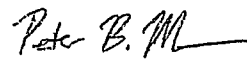
RE: *Tricarichi v. PricewaterhouseCoopers LLP, et al.*,
A-16-735910-B

Scott:

I write on behalf of Defendant PricewaterhouseCoopers LLP ("PwC") in regards to the above-captioned action. As you know, on May 30, 2017, pursuant to Nevada Rule of Civil Procedure 56(f), the Court granted Plaintiff Michael. A. Tricarichi limited discovery as set forth in Paragraph 10 of Plaintiff's April 10, 2017 affidavit in opposition to PwC's motion for summary judgment (the "Order"). On August 23, 2017, after several meet and confers with you, PwC served discovery responses and produced documents in compliance with the Court's order.

Roughly four months have now passed and Plaintiff has not requested any further discovery. Accordingly, given the passage of time and Plaintiff's inactivity, PwC intends to renew its motion for summary judgment and considers Rule 56(f) discovery closed. PwC will move the Court for a Rule 16 status conference in connection with these matters. Please provide Plaintiff's position, if any, by Friday, January 5, 2018.

Sincerely,

 /wpm
Peter Morrison

CC: Thomas D. Brooks, Esq.
Todd L. Moody, Esq.
Patrick G. Byrne, Esq.

AA 001563

EXHIBIT 3

From: [Hsiao, Winston P \(LAC\)](#)
To: ["Tom Brooks"](#)
Bcc: [Berglund, Nandi L \(LAC\)](#); [Faigen, Zachary \(LAC\)](#); ["Austin, Bradley"](#); [Lee, Ki \(LAC\)](#)
Subject: Tricarichi v PwC
Date: Friday, March 30, 2018 9:24:22 PM
Attachments: [Tricarich v PwC - March 30 2018 Amended Interrogatories.pdf](#)

Tom,

Pursuant to the parties' agreement on the scope of additional Rule 56(f) discovery, please find the following:

- Amended responses and objections to Interrogatories 10 and 11.
- Responsive, non-privileged documents pursuant to the agreed-upon search terms (the original set of terms plus the additional term "conceal!") from the agreed-upon additional custodians from whom we were able to collect documents. To clarify, we also ran the search "conceal!" across the original list of custodians, and the production contains any responsive non privileged documents yielded from that search if any. The production is on the below FTP site:

Site: <https://secureftp.skadden.com>

Username: sk1323356

Site Password: vT3BX99e (this is case sensitive)

File Password: ~Rx6+#M@Hx&(s&m;

Pursuant to the parties' agreement, this concludes PwC's Rule 56(f) production.

Have a good weekend,

Winston

Winston P. Hsiao

Skadden, Arps, Slate, Meagher & Flom LLP
300 South Grand Avenue | Los Angeles | California | 90071-3144
T: 213.687.5219 | F: 213.621.5219
winston.hsiao@skadden.com

Skadden



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EXHIBIT 4

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR MULTNOMAH COUNTY

JOHN M. MARSHALL and KAREN M.	)	
MARSHALL, individuals; PATSY L.	)	
MARSHALL, an individual; PATSY L.	)	Case No. 17CV11907
MARSHALL, as personal representative	)	
of the ESTATE OF RICHARD L.	)	ORDER DENYING PLAINTIFFS' MOTION
MARSHALL, deceased; and MARSHALL	)	TO COMPEL PRODUCTION OF
ASSOCIATED, LLC, an Oregon limited	)	DOCUMENTS WITHHELD BY PWC ON
liability corporation,	)	PRIVILEGE GROUNDS, OR IN THE
	)	ALTERNATIVE, FOR <i>IN CAMERA</i>
Plaintiffs,	)	REVIEW
	)	
vs.	)	
	)	
PRICEWATERHOUSECOOPERS, LLP,	)	
a limited liability partnership,	)	
	)	
Defendant.	)	

Plaintiffs' Motion to Compel Production of Documents Withheld by PwC on Privilege Grounds was heard on Friday, June 30, 2023. At that hearing, Plaintiffs were represented by Scott Hessel and Jeff Pitzer; Defendant was represented by Christopher Landgraff and Katharine Roin. Rather than proceed to the contested hearing, the parties agreed that Defendant would submit the documents at issue in the privilege log to the Court for *in camera* review.

The Court finds that the disputed documents have indeed been properly withheld by Defendant for reasons of attorney-client privilege or work product, or both. After reviewing the documents and considering the written memoranda of the parties outlining their respective

positions, Plaintiffs' Motion to Compel Production of Documents Withheld by PwC on Privilege Grounds is DENIED.

IT IS SO ORDERED.

DATED this 12th day of July, 2023.


Katharine von Ter Stegge
Multnomah County Circuit Court Judge

Original: Court File

cc: Jeff Pitzer and Peter Grabiell, Counsel for Plaintiffs
Bruce Cahn, Christopher Landgraff, and Katharine Roin, Counsel for
Defendant PricewaterhouseCoopers

EXHIBIT 5

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

JOHN M. MARSHALL and KAREN M. MARSHALL, individuals; PATSY L. MARSHALL, an individual; PATSY L. MARSHALL, as personal representative of the ESTATE OF RICHARD L. MARSHALL, deceased; and MARSHALL ASSOCIATED, LLC, an Oregon limited liability corporation,	)	
	)	
	)	Case No. 17CV11907
	)	STIPULATED PROTECTIVE ORDER
	)	HON. JERRY B. HODSON
Plaintiffs,	)	
	)	
vs.	)	
	)	
PRICEWATERHOUSE COOPERS, LLP, a limited liability partnership; and SCHWABE WILLIAMSON & WYATT, P.C., an Oregon professional corporation,	)	
	)	
Defendants.	)	

Pursuant to the stipulation of Plaintiffs John M. Marshall, Karen M. Marshall, Patsy L. Marshall, the Estate of Richard L. Marshall, and Marshall Associated, LLC, through attorneys Pitzer Law, and Defendant PricewaterhouseCoopers LLP ("PwC"), through attorneys Lane Powell PC, (collectively, the "Parties"), IT IS HEREBY ORDERED as follows:

1. In this Protective Order, the words set forth below shall have the following meanings:

- a. "Court" means the Hon. Jerry B. Hodson, or any other judge to which this Proceeding may be assigned, including Court staff participating in such proceedings.

- 1 b. "Disclose" or "Disclosed" or "Disclosure" means to reveal, divulge, give,
2 or make available documents, testimony, or information.
- 3 c. "Documents" means any "electronically stored information, writings,
4 drawings, graphs, charts, photographs, sound recordings, images, and
5 other data or data compilations from which information can be obtained
6 and translated, if necessary, . . . through detection devices or software into
7 a reasonably usable form," ORS § 40.550, whether prepared by you or
8 another person that is in your possession, custody, or control.
- 9 d. "Testimony" means all depositions, declarations, or other testimony taken
10 or used in this proceeding.
- 11 e. "Information" means the content of Documents or Testimony.
- 12 f. "Proceeding" means the above-captioned action: Marshall, et al. v.
13 PricewaterhouseCoopers, LLP, at al., Case No. 17CV11907.
- 14 g. "Marking Party" means the producing party or non-party making a
15 "CONFIDENTIAL" designation.
- 16 h. "Confidential Materials" means any Documents, Testimony, or
17 Information designated as "CONFIDENTIAL," as defined below,
18 pursuant to the provisions of this Stipulated Protective Order.

19 2. This Protective Order governs the discovery and use of Documents, Testimony,
20 and Information provided, produced, or obtained, whether formally or informally, in the course
21 of discovery in this action, including, without limitation, Information provided, produced or
22 obtained as required under Oregon Rules of Civil Procedure, or pursuant to any deposition,
23 subpoena, response to a request for admission, or request for production.

24 3. Any party or non-party providing Information in the course of discovery in this
25 action shall have the right to designate as "CONFIDENTIAL" any Documents, Information or
26 Testimony that the producing party or non-party in good faith believes contains proprietary

1 Information, sensitive financial Information, a trade secret, business procedures and/or policies
2 that the Parties desire to remain confidential, or other confidential research, development, or
3 commercial Information within the meaning of ORCP 36(C), or which could be considered
4 confidential under other applicable law. Confidential Information includes, without limitation,
5 the names, addresses, telephone numbers, social security numbers and other personal identifying
6 Information of persons who are not named parties in this action.

7 4. The Marking Party shall have the right to designate a Document as
8 “CONFIDENTIAL” before it is Disclosed or produced by clearly marking each page of the
9 Document containing confidential Information with the words “CONFIDENTIAL” or
10 “CONFIDENTIAL—SUBJECT TO PROTECTIVE ORDER.” The Marking Party shall make
11 such designation without obscuring any text or interfering with the legibility of the Information.

12 5. With respect to electronically stored Information (“ESI”), if the ESI is produced
13 in whole or in part in the form of an image file (such as TIFF or PDF), then the Marking Party
14 shall designate the ESI as “CONFIDENTIAL” before it is Disclosed or produced by clearly
15 marking each page of the image file containing confidential Information with the words
16 “CONFIDENTIAL” or “CONFIDENTIAL—SUBJECT TO PROTECTIVE ORDER.” Such
17 designation shall apply to any underlying native file as well as the image file. For any ESI
18 produced only in native format, the Marking Party shall designate the ESI as
19 “CONFIDENTIAL” by including the word “CONFIDENTIAL” in the electronic file name. The
20 Marking Party shall make such designation without obscuring any text or interfering with the
21 legibility of the Information.

22 6. A Marking Party shall have the right to designate deposition Testimony as
23 “CONFIDENTIAL” by any of the following methods:

- 24 a. identifying on the record, before the close of the deposition, all
25 “CONFIDENTIAL” Testimony, by specifying all portions of the
26 Testimony that qualify as “CONFIDENTIAL”;

1 b. provisionally designating the entirety of the Testimony at the deposition
2 as “CONFIDENTIAL” (before the deposition is concluded), provided that
3 the provisional designation will expire 21 days after receipt of the final
4 deposition transcript and the Marking Party, within 21 days of receiving
5 the final deposition transcript, must identify in writing, by page and line
6 number, the portions of the deposition transcript containing confidential
7 Information. The court reporter shall thereafter mark each page of the
8 transcript containing the designated portions with the words
9 “CONFIDENTIAL” or “CONFIDENTIAL—SUBJECT TO
10 PROTECTIVE ORDER.”

11 In circumstances where portions of the deposition Testimony are designated for protection, the
12 transcript pages containing “CONFIDENTIAL” Information may be separately bound by the
13 court reporter, who must affix to the top of each page the words “CONFIDENTIAL” or
14 “CONFIDENTIAL—SUBJECT TO PROTECTIVE ORDER” as instructed by the Marking
15 Party.

16 7. For Information produced in some form other than Documents, and for any other
17 tangible items, including, without limitation, compact discs or DVDs, the Marking Party must
18 affix in a prominent place on the exterior of the container or containers in which the Information
19 or item is stored with the words “CONFIDENTIAL” or “CONFIDENTIAL—SUBJECT TO
20 PROTECTIVE ORDER.” If only portions of the Information or item warrant protection, the
21 Marking Party, to the extent practicable, shall identify the “CONFIDENTIAL” portions.

22 8. An inadvertent failure to designate Information as “CONFIDENTIAL” shall be
23 without prejudice to any claim that such item is “CONFIDENTIAL”, and such party shall not be
24 held to have waived any rights by such inadvertent production. If a party or non-party producing
25 Information in this action inadvertently produces confidential Information without marking or
26 otherwise designating it as such in accordance with the provisions of this Protective Order, such

1 party or non-party may give written notice (the “Inadvertent Production Notice”) within twenty
2 (20) days of discovery of the inadvertent production, to the receiving parties that the Information
3 is deemed “CONFIDENTIAL” and should be treated as such in accordance with the provisions
4 of this Protective Order. The receiving parties must treat such Information as
5 “CONFIDENTIAL” from the date the Inadvertent Production Notice is received. Disclosure
6 prior to the receipt of the Inadvertent Production Notice to persons not authorized to receive
7 “CONFIDENTIAL” Information shall not be deemed a violation of this Protective Order. This
8 provision is not intended to apply to any inadvertent production of any Information protected by
9 attorney-client or work product privileges. In the event that this provision conflicts with any
10 applicable law regarding waiver of confidentiality through the inadvertent production of
11 Documents, Testimony or Information, such law shall govern.

12 9. A receiving party shall not be obligated to challenge the propriety of any
13 “CONFIDENTIAL” designation at the time it is made, and the failure to do so shall not preclude
14 a subsequent challenge. If a receiving party challenges such a designation, it shall send or give
15 written notice to the Marking Party of such challenge and clearly state the specific Documents,
16 Testimony, or Information to which each objection pertains, and the specific reasons and support
17 for such objections. The parties shall thereafter meet and confer in good faith to resolve the
18 dispute within seven (7) days of the request. If the challenge cannot be resolved within seven (7)
19 days following the meet and confer, the objecting party has the right to immediately move the
20 Court for an order that the Information at issue is not to be considered and treated as
21 “CONFIDENTIAL” within the meaning of this Order. In the event that the objecting party fails
22 to timely make such motion, such Documents, Testimony, or Information shall remain
23 “CONFIDENTIAL”. The Documents, Testimony or Information at issue shall continue to be
24 treated as “CONFIDENTIAL” pursuant to the terms of this Protective Order until the challenge
25 has been resolved by an agreement of the Parties or Court order. The Marking Party shall have
26

1 the burden on any such motion of establishing the applicability of its “CONFIDENTIAL”
2 designation.

3 10. A receiving party may use Information designated “CONFIDENTIAL” only for
4 purposes of this litigation, and may Disclose such Information only to the following persons:

5 a. the Parties and those officers, directors, partners, members, employees,
6 and agents of all non-Marking Party, on whose behalf an attorney of
7 record in this proceeding has signed this Stipulated Protective Order
8 deems necessary to aid counsel in the prosecution and defense of this
9 Proceeding;

10 b. both outside counsel and in-house counsel for the Parties to this action,
11 including paralegals, clerical staff, secretarial staff, and other support staff
12 at their respective law firms and organizations as well as third-party
13 vendors hired for litigation support services (e.g., copying services or e-
14 discovery vendors). Each non-lawyer given access to Confidential
15 Materials shall be advised that such materials are being Disclosed pursuant
16 to, and are subject to, the terms of this Stipulated Protective Order and
17 may not be Disclosed other than pursuant to its terms;

18 c. any outside consultant or expert (testifying or non-testifying) and their
19 secretarial, technical and clerical employees (including but not limited to
20 photocopy service personnel and document management vendors) retained
21 by the Parties for purposes of this litigation and to whom it is necessary to
22 Disclose the “CONFIDENTIAL” Information, provided that prior to
23 Disclosure, counsel for the non-Marking Party making the Disclosure
24 delivers a copy of this Stipulated Protective Order to such person, explains
25 its terms to such person, and secures the signature of such person on a
26 statement in the form attached hereto as Exhibit A. It shall be the

1 obligation of the non-Marking Party, upon learning of any breach or
2 threatened breach of this Stipulated Protective Order by any expert or
3 expert consultant, to promptly notify counsel for the Marking Party of
4 such breach or threatened breach;

5 d. any actual deposition or trial witnesses or witnesses whose Testimony is
6 (in the good faith belief of a party's counsel) reasonably likely to be taken
7 in the case, provided that such witness is advised that such materials are
8 being Disclosed pursuant to, and are subject to, the terms of this Stipulated
9 Protective Order, that they may not be Disclosed other than pursuant to its
10 terms, and that they sign a certification in the form attached hereto as
11 Exhibit A;

12 e. the Court and any members of its staff to whom it is necessary to Disclose
13 the Information for the purpose of assisting the Court in this proceeding;

14 f. any stenographers or court reporters in this Proceeding (whether at
15 depositions, hearings, or any other proceeding); and

16 g. any person indicated on the face of a Document or accompanying
17 covering letter, email, or other communication to be the author, addressee,
18 or an actual or intended recipient of a Document designated as
19 "CONFIDENTIAL" prior to the entry of this order, provided that such
20 witness is advised that such materials are being Disclosed pursuant to, and
21 are subject to, the terms of this Stipulated Protective Order, that they may
22 not be Disclosed other than pursuant to its terms, and that they sign a
23 certification in the form attached hereto as Exhibit A.

24 h. mock jury participants, provided that counsel for the party making the
25 Disclosure advise such mock jury participants that such materials are
26 being Disclosed pursuant to, and are subject to, the terms of this Stipulated

1 Protective Order, that they may not be Disclosed other than pursuant to its
2 terms, and that they sign a certification in the form attached hereto as
3 Exhibit A.

- 4 i. any mediator or arbitrator that may be used in this Proceeding; and
5 j. any other person that the Marking Party agrees to in writing or by
6 statement on the record, or any other person upon order of the Court
7 entered upon notice to the Parties.

8 11. "CONFIDENTIAL" materials shall be used by the persons receiving them only
9 for the purposes of preparing for, conducting, participating in the conduct of, and/or prosecuting
10 and/or defending the Proceeding, and not for any business or other purpose whatsoever.

11 12. Any of the Parties (or other person subject to the terms of this Stipulated
12 Protective Order) may ask the Court, after appropriate notice to the other Parties, to modify or
13 grant relief from any provision of this Stipulated Protective Order.

14 13. Entering into, agreeing to, and/or complying with the terms of this Stipulated
15 Protective Order shall not:

- 16 a. operate as an admission by any person that any particular Document,
17 Testimony, or Information marked "CONFIDENTIAL" contains or
18 reflects trade secrets, proprietary, confidential, or competitively sensitive
19 business, commercial, financial, or personal Information; or
20 b. prejudice in any way the right of any party to the Proceeding (or any other
21 person subject to the terms of this Stipulated Protective Order):
22 i. to seek a determination by the Court of whether any particular
23 Confidential material should be subject to protection as
24 "CONFIDENTIAL" under the terms of this Stipulated Protective
25 Order; or
26

1 ii. to seek relief from the Court on appropriate notice to all other
2 parties to the Proceeding from any provision(s) of this Stipulated
3 Protective Order, either generally or as to any particular
4 Document, Material, or Information.

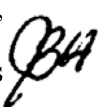
5 14. Any party to the Proceeding who has not executed this Stipulated Protective
6 Order as of the time it is presented to the Court for signature may thereafter become a signatory
7 party to this Order by the party or its counsel signing and dating a copy thereof and filing the
8 same with the Court, and serving copies of such signed and dated copy upon the other Parties to
9 this Stipulated Protective Order.

10 15. Any Information that may be produced during discovery by a non-party to the
11 Proceeding, pursuant to subpoena or otherwise, may be designated by such non-party as
12 "CONFIDENTIAL" under the terms of this Stipulated Protective Order, and any such
13 designation by a non-party shall have the same force and effect, and create the same duties and
14 obligations, as if made by one of the Parties. Any such designation shall also function as a
15 consent by such producing party to the authority of the Court in the Proceeding to resolve and
16 conclusively determine any motion or other application made by any person or party with respect
17 to such designation, or any other matter otherwise arising under this Stipulated Protective Order.
18 Additionally, consistent with paragraph 3, one of the Parties may designate as
19 "CONFIDENTIAL" any Information or discovery materials produced by another one of the
20 Parties, another party to the Proceeding or a non-party to the Proceeding by providing written
21 notice to all parties of the relevant document numbers or other identification within thirty (30)
22 days after receiving such Documents or discovery materials. Until such thirty (30) days has
23 expired, all non-party discovery materials shall be treated as confidential. Nothing in this Order
24 shall restrict in any way a party's or non-party's use or disclosure of its own confidential
25 Information.

1 16. If any person subject to this Stipulated Protective Order who has custody of any
2 “CONFIDENTIAL” materials receives a subpoena, demand, or other legal process in another
3 proceeding seeking Information designated “CONFIDENTIAL,” the receiving party shall give
4 prompt notice thereof by electronic mail transmission, followed by either express mail or
5 overnight delivery to counsel of record for the Marking Party (including a copy of the subpoena,
6 demand, or legal process) to the Marking Party in order to permit the Marking Party to seek
7 appropriate relief in the other proceeding. Absent such relief, however, this Stipulated Protective
8 Order does not prohibit a receiving party from complying with any legal obligation to produce
9 Information in any other proceeding. The person receiving the discovery request or subpoena
10 shall in the interim take all necessary steps to protect the potentially confidential Information and
11 shall not produce any Documents, Testimony, or Information pursuant to the Subpoena prior to
12 the date specified for production on the Subpoena.

13 17. A receiving party intending to file with the Court any Information designated
14 “CONFIDENTIAL” by another person shall provide the Marking Party with at least three
15 judicial days’ notice before doing so, identifying with a reasonable description (e.g., by Bates
16 number or deposition transcript page and line number) the designated Information to be included
17 in the filing. The filing party may ask the Marking Party if it would remove the
18 CONFIDENTIAL designation and permit a public filing of the documents. If the Marking Party
19 does not respond to the request within three judicial days, the filing party may file the documents
20 publicly. If the Marking Party declines to remove the CONFIDENTIAL designation, the filing
21 party will proceed to file the documents under seal pursuant to state and local procedural rules,
22 **and SLR 5.165** including UTCR 5.160./ If the Court grants the motion to seal, the receiving party shall make its
23 filing under seal in accordance with the Court’s order and applicable court procedures.

Signed: 1/8/2019 11:33 AM



24 18. Nothing in this Stipulated Protective Order shall be construed to preclude any of
25 the Parties from asserting in good faith that certain Confidential Materials require additional
26 protection (e.g., that certain Confidential Materials should be limited to disclosure to Parties’

1 “Attorneys’ Eyes Only”). The Parties shall meet and confer to agree upon the terms of such
2 additional protection.

3 19. After execution of this Stipulated Protective Order, any of the Parties, or non-
4 Parties properly in possession of Confidential Materials pursuant to the terms of this Stipulated
5 Protective Order, who discloses Confidential Materials to persons other than those authorized to
6 receive Confidential Materials under this Stipulated Protective Order, including the filing or use
7 of any Confidential Materials in another legal proceeding, shall report such Disclosure to the
8 Marking Party. In that event, the non-Marking Party responsible for the unauthorized Disclosure
9 shall make all reasonable efforts to retrieve the Confidential Materials or to obtain the agreement
10 of persons to whom inadvertent Disclosure was made to destroy the improperly Disclosed
11 Confidential Materials and all copies thereof.

12 20. The parties to the Proceedings shall meet and confer regarding the procedures for
13 use of Confidential Materials at a hearing or trial and shall move the Court for entry of an
14 appropriate order.

15 21. Nothing in this Stipulated Protective Order shall affect the admissibility into
16 evidence of Confidential Materials, or abridge the rights of any person to seek judicial review or
17 to pursue other appropriate judicial action with respect to any ruling made by the Court
18 concerning the issue of the status of Protected Material.

19 22. Within sixty (60) days after the conclusion of this action (including any appeals),
20 and unless otherwise agreed to in writing by counsel, each receiving party shall either return the
21 original and all copies of “CONFIDENTIAL” Information to the Marking Party, or agree with
22 counsel for the Marking Party upon appropriate methods and certification of destruction or other
23 disposition of such Confidential Materials and certify in writing that the original and all copies of
24 the “CONFIDENTIAL” Information have been destroyed. Notwithstanding the foregoing, the
25 attorneys of record for each party may retain in their files one copy of all Documents and ESI
26 produced and testimonial transcripts made in this action that reflect “CONFIDENTIAL”

1 Information, as well as one copy of each pleading, brief, memorandum, motion, communication,
2 and other Documents containing their work product that refer to or incorporate
3 “CONFIDENTIAL” Information provided counsel continues to be bound by the terms of this
4 Protective Order with respect to all such retained Information, or as to any Documents,
5 Testimony, or other Information not otherwise addressed by the above, file a motion seeking a
6 Court order regarding proper preservation of such Materials.

7 23. The entry of this Stipulated Protective Order does not alter, waive, modify, or
8 abridge any right, privilege, or protection otherwise available to the Parties with respect to the
9 discovery of matters, including, but not limited to, any of the Parties’ rights to assert the
10 attorney-client privilege, the attorney work product doctrine, , or other privileges, or any of the
11 Parties’ rights to contest any such assertion.

12 24. The inadvertent production of Information protected from Disclosure by the
13 attorney-client privilege, the work product doctrine, and/or any other applicable privilege or
14 immunity (“Privileged Information”) is not a waiver of the privilege or protection from
15 discovery in this case and shall not render discoverable Information that was previously immune
16 from discovery or Disclosure. If any party receives Information that it has reason to believe was
17 produced or Disclosed inadvertently, the receiving party shall promptly notify the producing
18 party of the inadvertent Disclosure. At the request of the producing party, the receiving party
19 shall not further read or review the inadvertently produced Information, and shall make a
20 reasonable effort to return to the producing party or destroy or delete any copies of the
21 inadvertently Disclosed Information. Nothing in this paragraph shall preclude the receiving
22 party from contesting the receiving party’s claim that the inadvertently Disclosed Information
23 constitutes Privileged Information or shall limit the right of any party to request that the Court
24 conduct an *in camera* review of the allegedly Privileged Information.

25 25. The terms of this Stipulated Protective Order shall continue to be binding after the
26 termination of this action and all subsequent proceedings arising from this Proceeding, except

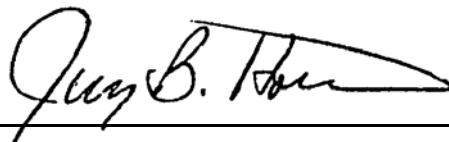
1 that a party may seek the written permission of the Marking Party or may move the Court for
2 relief from the provisions of this Stipulated Protective Order. To the extent permitted by law, the
3 Court shall retain jurisdiction to enforce, modify, or reconsider this Stipulated Protective Order,
4 even after the Proceeding is terminated.

5 26. After this Stipulated Protective Order has been signed by counsel for the Parties,
6 it shall be presented to the Court for entry. Counsel agree to be bound by the terms set forth
7 herein with regard to any Confidential Materials that have been produced before the Court signs
8 this Stipulated Protective Order.

9 27. The Parties and all signatories to the Certification, attached hereto as Exhibit A,
10 agree to be bound by this Stipulated Protective Order pending its approval and entry by the
11 Court. In the event that the Court modifies this Stipulated Protective Order, or in the event that
12 the Court enters a different Protective Order, the Parties agree to be bound by this Stipulated
13 Protective Order until such time as the Court may enter such a different Order. It is the Parties'
14 intent to be bound by the terms of this Stipulated Protective Order pending its entry so as to
15 allow for immediate production of Confidential Materials under the terms herein.

16 **IT IS SO ORDERED.**

Signed: 1/8/2019 11:33 AM

17
18
19 

Circuit Court Judge Jerry B. Hodson

20 **IT IS SO STIPULATED:**

21 LANE POWELL PC

PITZER LAW

22 By /s/ Milo Petranovich
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Attorneys for Plaintiffs

Attorneys for Defendant
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PAGE 13 - STIPULATED PROTECTIVE ORDER

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2 FLOM LLP

SPERLING & SLATER, PC

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Attorneys for Plaintiffs

7 Attorneys for PricewaterhouseCoopers LLP

8
9 Submitted by:
10 Peter D. Hawkes, OSB No. 071986
Lane Powell PC
11 Attorneys for Defendant PricewaterhouseCoopers LLP

EXHIBIT A – CONFIDENTIALITY ACKNOWLEDGMENT

1. I have read and understand the attached Stipulated Protective Order that has been entered in *Marshall, et al. v. PricewaterhouseCoopers, LLP, et al.*, Case No. 17CV11907 in the Circuit Court for the State of Oregon for the County of Multnomah.

2. I understand that I may be given access to confidential information, and in consideration of that access, I agree that I shall be bound by all the terms of the Stipulated Protective Order.

3. I understand that I am subject to the jurisdiction of the Multnomah County Circuit Court for any proceedings involving my alleged improper use or disclosure of the confidential information.

4. I understand that I am to retain all originals and copies of the confidential information in my possession in a secure manner and that all copies shall be destroyed or returned to the party producing such documents when the action is concluded.

Signature: _____
Name: _____
Business Address: _____
Position: _____
Date: _____

CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2019, I caused to be served a copy of the foregoing
STIPULATED PROTECTIVE ORDER on the following person(s) in the manner indicated below
at the following address(es):

Jeff S. Pitzer, Esq.
Pitzer Law
101 SW Main St., Suite 805
Portland, OR 97204
E-Mail: jpitzer@pitzerlaw.net

Scott Hessell, Esq.
Sperling & Slater, PC
55 West Monroe Street, Suite 3200
Chicago, IL 60603
E-Mail: shessell@sperling-law.com

Attorneys for Plaintiffs

- ☒ by CM/ECF
- ☐ by Electronic Mail (courtesy copy)
- ☒ by Electronic Mail (e-mail agreement in place)
- ☐ by Facsimile Transmission
- ☐ by First Class Mail
- ☐ by Hand Delivery
- ☐ by Overnight Delivery

s/ Peter D. Hawkes
Peter D. Hawkes

CERTIFICATE OF SERVICE

CERTIFICATE OF READINESS
(UTCR 5.100)

This proposed order or judgment is ready for judicial signature because:

- ☐ Each opposing party affected by this order or judgment has stipulated to the order or judgment, as shown by each opposing party's signature on the document being submitted.
- ☒ Each opposing party affected by this order or judgment has approved the order or judgment, as shown by signature on the document being submitted or by written confirmation of approval sent to me.
- ☐ I have served a copy of this order or judgment on all parties entitled to service, and:
 - ☐ No objection has been served on me.
 - ☐ I received objections that I could not resolve with the opposing party despite reasonable efforts to do so. I have filed a copy of the objections I received and indicated which objections remain unresolved.
 - ☐ After conferring about objections, [role and name of opposing party] agreed to independently file any remaining objection.
- ☐ The relief sought is against an opposing party who has been found in default.
- ☐ An order of default is being requested with this proposed judgment.
- ☐ Service is not required pursuant to subsection (3) of this rule, or by statute, rule, or otherwise.
- ☐ This is a proposed judgment that includes an award of punitive damages and notice has been served on the Director of the Crime Victims' Assistance Section as required by subsection (4) of this rule.

DATED: January 7, 2019

s/Peter D. Hawkes
Peter D. Hawkes

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH
1021 SW Fourth Avenue Portland Oregon 97204
503-988-3022, option 3 <http://courts.oregon.gov/multnomah>

January 10, 2019

PETER HAWKES
LANE POWELL PC
601 SW 2ND AVE STE 2100
PORTLAND OR 97204

Re: Karen M. Marshall, Patsy L. Marshall, Estate of Richard L. Marshall, Marshall Associated, LLC, John M Marshall vs PricewaterhouseCoopers, LLP, Schwabe Williamson & Wyatt, PC
Case #: 17CV11907 Tort - General

NOTICE OF SIGNED DOCUMENT

A case event that includes a signed document has been added to the Register of Actions for this case.

For further information, log into the Oregon eCourt Case Information (OECI) system or go to a public access kiosk at the courthouse.

Note: Documents may not be attached to events depending on local court business processes.

Hunt, Christine A.

From: Court_Notification@ojd.state.or.us
Sent: Thursday, January 10, 2019 1:52 PM
To: Hawkes, Peter
Subject: Court Notification

You have received a court notification regarding:

Karen M. Marshall, Patsy L. Marshall, Estate of Richard L. Marshall, Marshall Associated, LLC, John M Marshall vs PricewaterhouseCoopers, LLP, Schwabe Williamson & Wyatt, PC, Case #: 17CV11907

Click the link below to view the notification.

<https://publicaccess.courts.oregon.gov/Notifications/d738e194810e430dacb47f7faa246466>

NOTE: **This email is NOT monitored.** DO NOT reply to this email. If you need to contact the court, use the contact information provided on the enclosed notification.

EXHIBIT 6

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6 IN THE CIRCUIT COURT OF THE STATE OF OREGON
7 FOR THE COUNTY OF MULTNOMAH

8 JOHN M. MARSHALL and KAREN M.)
9 MARSHALL, individuals; PATSY L.) Case No. 17CV11907
10 MARSHALL, an individual; PATSY L.)
11 MARSHALL, as personal representative of the)
12 ESTATE OF RICHARD L. MARSHALL,) **PLAINTIFFS' UTCR 6.030 MOTION**
13 deceased; and MARSHALL ASSOCIATED,) **TO CONTINUE TRIAL DATE**
14 LLC, an Oregon limited liability corporation,) **PENDING SUPREME COURT**
15) **DECISION ON SCHWABE APPEAL**
16 Plaintiffs,)
17 v.) **Expedited Consideration Requested**
18)
19 PRICEWATERHOUSECOOPERS, LLP, a)
20 limited liability partnership,)
21)
22 Defendant.)
23 _____)

18 **UTCR 5.010 CERTIFICATION**

19 Pursuant to UTCR 5.010, counsel for the Marshalls conferred in good faith
20 with counsel for PwC regarding the subject matter of this motion. PwC objects to the relief
21 sought by this motion, and also does not agree to expedited consideration.
22

23 Page 1 – **PLAINTIFFS' UTCR 6.030 MOTION TO
CONTINUE TRIAL DATE PENDING
SUPREME COURT DECISION ON SCHWABE
APPEAL**

**Pitzer Law
210 SW Morrison St., Ste. 600
Portland, OR 97204
(503) 227-1477**

AA 001590

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UTCR 6.030 MOTION TO POSTPONE TRIAL DATE

Defendant PricewaterhouseCoopers, LLP (“PwC”) sought leave to file an amended affirmative defense seeking to allocate fault for Plaintiffs’ injuries to former co-defendant Schwabe, Williamson & Wyatt, P.C. (“Schwabe”). Plaintiffs opposed the motion, citing, *inter alia*, O.R.S. 31.600’s explicit bar that “there shall be no comparison of fault with any person . . . [w]ho is not subject to action because the claim is barred by a statute of limitation or statute of ultimate repose.” ORS § 31.600(2)(c).

In fact, over the course of the last three months, the parties have taken and/or defended approximately 18 depositions, many involving significant travel to

1 places like New York, Arizona, Washington D.C., Houston, Texas and Palm Springs,
2 California. The parties have also exchanged exhibit lists, deposition designations, and
3 have conferred on motions *in limine*. Neither side has been sitting on its hands. To the
4 contrary, we have been working hard while hoping that by now a ruling would have
5 come down from the Supreme Court.

6 Unfortunately, as of the date of this filing, the Oregon Supreme Court has
7 not yet issued an opinion in the Schwabe appeal. The oral argument in the Schwabe case
8 took place on November 29, 2022. The Supreme Court also has not issued an opinion in
9 any of the three other cases argued on the same day.¹ There are at least six additional
10 cases awaiting opinions from the Supreme Court that were argued before November 29,
11 2022, including at least one argued on June 8, 2022 (*State v. John Olaf Halvorson*,
12 S069142).² The two most recent Supreme Court opinions were in cases that were argued
13 in May 2022 (*State v. Turay*, S068894) and September 2022 (*State v. A.R.H.*, S069077).
14 It is thus difficult to predict when an opinion might issue, but the pace of decisions
15 suggests that it could be several more months. Because we are now nearly 30 days from
16 the start of the trial, and firm commitments on lodging, travel, experts and other expenses
17

18 ¹ The other cases argued on November 29, 2022 were: *Trebelhorn v. Prime Wimbeldon SPE*,
19 *LLC*, S069417, *Susan Clark v Eddie Bauer, LLC*, S069438, and *Walton v. Neskowin Regional*
Sanitary Authority, S069004.

20 ² The five other cases awaiting decisions from earlier oral argument sessions are *State v.*
21 *Brian G. Hubbell*, S069092 (argued 9/23/2022), *Haas v. Carter*, S069255 (argued 9/30/2022),
22 *Ingle v. Matteucci*, S069222 (argued 9/30/2022), *Moody v. Oregon Community Credit Union*,
S069409 (argued 11/17/2022), and *PNW Metal Recycling Inc. v. Oregon Dep't of Env'tl*
Quality, S09412 (argued 11/17/2022).

1 are imminent, Plaintiffs respectfully request that the Court continue the existing trial date
2 until after the Supreme Court issues its decision in the Schwabe appeal.

3 To proceed to trial on the current schedule, the Court would need to rule on
4 PwC's motion without the Supreme Court's conclusive resolution of Schwabe's status as
5 a party to this case and, in doing so, introduce a potential appeal issue regardless of how
6 the Court rules.

7 Further, pretrial issues, such as motions *in limine*, the scope of expert
8 testimony, jury instructions, and the verdict form, will be substantially impacted by
9 whether Schwabe is part of the trial. The Court's adjudication of those issues between
10 now and trial could be wasted effort by the parties and the Court until the status of
11 Schwabe as a party is known. If the Supreme Court ultimately revives Plaintiffs' claims
12 against Schwabe, there's no question that a single trial on all claims against both
13 defendants is best for the Court, the parties and the witnesses. A single trial would also
14 avoid potentially inconsistent results. In addition, the undersigned have particular
15 concern about the potential burden of two trials given that both Karen and Patsy Marshall
16 are widows in their 80's, and if we go forward on July 31 against PwC, there is a
17 possibility we could have to try the case a second time against Schwabe. This would
18 impose a significant and unnecessary hardship on the Plaintiffs.

19 CONCLUSION

20 For the reasons set forth above, which establish good cause shown,
21 Plaintiffs move that the Court vacate the existing July 31, 2023 trial date and set the case
22 for a status/scheduling conference 30 days after the Supreme Court issues a decision in

1 the Schwabe appeal. The trial date was postponed previously on one occasion from April
2 10, 2023 to the existing date of July 31, 2023.

3 **UTCR 6.030(2) CERTIFICATION**

4 By signing below, pursuant to UTCR 6.030(2) the undersigned certify that
5 they have consulted with and advised their clients on the postponement sought by this
6 motion and Plaintiffs support this request.

7 DATED this 20th day of June, 2023.

8
9 Respectfully submitted,

10 **PITZER LAW**

11 /s/ Jeff S. Pitzer

12 Jeff S. Pitzer, OSB No. 020846
jpitzer@pitzerlaw.net
13 Peter M. Grabel, OSB No. 171964
pgrabel@pitzerlaw.net
210 SW Morrison St., Suite 600
14 Portland, OR 97204
Phone: (503) 227-1477

15 Attorneys for Plaintiffs

16 **SPERLING & SLATER, LLC**

17 /s/ Scott Hessel

18 Scott Hessel, IL Bar No. 6275119
shessel@sperling-law.com
55 West Monroe Street
Chicago, IL 60603
19 Phone: (312) 641-4882
Fax: (312) 641-6492

20 Attorney for Plaintiffs (Admitted *Pro*
21 *Hac Vice*)

CERTIFICATE OF SERVICE

Jeff S. Pitzer, an attorney, hereby certifies that on June 20, 2023, he caused a copy of the foregoing **PLAINTIFFS' UTCR 6.030 MOTION TO CONTINUE TRIAL DATE PENDING SUPREME COURT DECISION ON SCHWABE APPEAL** to be served on the following parties via email pursuant to an email service agreement:

Bruce H. Cahn Mohammed Workicho Kamille Simons Mary Perry LANE POWELL PC 601 SW 2nd Ave. Ste. 2100 Portland, OR 97204 Phone: 503-778-2114 Email: cahn@lanepowell.com Email: WorkichoM@LanePowell.com Email: SimonsK@LanePowell.com Email: PerryM@LanePowell.com Attorneys for Defendant PricewaterhouseCoopers LLP	Christopher Landgraff Daniel C. Taylor Jameson Jones Katharine A. Roin Mark L. Levine Alexandra Genord BARTLIT BECK Courthouse Place 54 West Hubbard Street Chicago, IL 60654 Phone: 312-494-4400 Email: chris.landgraff@bartlitbeck.com Email: daniel.taylor@bartlitbeck.com Email: jameson.jones@bartlitbeck.com Email: kate.roin@bartlitbeck.com Email: mark.levine@bartlitbeck.com Email: alexandra.genord@bartlitbeck.com Attorneys for Defendant PricewaterhouseCoopers LLP
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/s/ Jeff Pitzer
Jeff Pitzer, OSB No. 020846

EXHIBIT 7

Page 699										Page 701																													
1	IN THE CIRCUIT COURT OF THE STATE OF OREGON																			1	APPEARANCES CONTINUED:																		
2	FOR THE COUNTY OF MULTNOMAH																			2																			
3																				3	BARTLIT BECK LLP																		
4	JOHN M. MARSHALL and KAREN M.																			4	Mr. Mark Levine																		
5	MARSHALL, individuals; PATSY L.																			5	Mr. Christopher Landgraff																		
6	MARSHALL, an individual; PATSY L.																			6	Ms. Katharine Roin																		
7	MARSHALL, as personal																			7	Ms. Alexandra Genord																		
8	representative of the ESTATE OF																			8	54 West Hubbard Street, Suite 300																		
9	RICHARD L. MARSHALL, deceased;																			9	Chicago, Illinois, 60754																		
10	and MARSHALL ASSOCIATED, LLC,																			10	Counsel for Defendant																		
11	an Oregon limited liability																			11	PricewaterhouseCoopers																		
12	corporation,																			12	and																		
13	Plaintiffs,																			13	LANE POWELL PC																		
14	v. Case No. 17CV11907																			14	Mr. Bruce Cahn																		
15	PRICEWATERHOUSECOOPERS, LLP,																			15	601 SW Second Avenue																		
16	a limited liability partnership;																			16	Portland, Oregon 97204																		
17	and SCHWABE WILLIAMSON & WYATT,																			17	Counsel for Defendant																		
18	P.C., an Oregon professional																			18	PricewaterhouseCoopers																		
19	corporation,																			19																			
20	Defendants.																			20																			
21																				21																			
22	TRANSCRIPT OF PROCEEDINGS																			22																			
23	VOLUME 4																			23																			
24	August 3, 2023																			24																			
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Page 700																				Page 702																			
1	BE IT REMEMBERED THAT the above-entitled Court and																			1	INDEX																		
2	Cause came regularly on for trial before the																			2																			
3	Honorable Katharine von Ter Stegge, said trial was																			3	WITNESS D X ReD ReX																		
4	reported by Julie A. Walter, Certified Shorthand																			4	DAN MENDELSON 699 787																		
5	Reporter and Registered Professional Reporter, on																			5	MICHAEL WEBER 804 961																		
6	August 3, 2023, commencing at the hour of 8:39 a.m.,																			6																			
7	the proceedings held at the Multnomah County																			7																			
8	Courthouse, 1200 SW First Avenue, Portland, Oregon																			8	PLAINTIFF EXHIBITS Offered Received																		
9	* * *																			9	E 35 Fax from Marshall to 961 961																		
10	APPEARANCES																			10	Dempsey																		
11	PITZER LAW																			11	E 163 Timesheet for Bowler 876 877																		
12	Mr. Jeff Pitzer																			12	for Period 2/15/2003																		
13	Mr. Peter Gabriel																			13	E 177 IRS Summons 949 949																		
14	210 SW Morrison, Suite 600																			14	E 228 Global TLS Risk Management 923 923																		
15	Portland, Oregon 97204																			15	Policy & Guidance 14.5.1																		
16	and																			16	E 281 IRS Service Bulletin No. 882 883																		
17	SPERLING & SLATER, PC																			17	2000-36																		
18	Mr. Scott Hessel																			18																			
19	Mr. Matthew Rice																			19	DEFENSE EXHIBITS																		
20	Mr. Robert Cheifetz																			20	E 512 Letter to Kramer from 981 981																		
21	55 West Monroe Street, 32nd Floor																			21	Hornecker																		
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23	Counsel for the Plaintiffs																			23	from Hornecker																		
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25																				25	The Database																		

Page 703 1 THURSDAY, AUGUST 3, 2023 2 3 THE COURT: So we are here for day four of trial 4 in Marshall, et al., versus PricewaterhouseCoopers 5 LLC, 17CV11907. We have all of the same lawyers 6 present except for Jeff Pitzer. Are we missing 7 anybody else. 8 MR. HESSELL: No. Oh, yeah, his partner, 9 Mr. Grabiell. 10 THE COURT: Okay. So is it Pete Grabiell? 11 MR. HESSELL: Pete, yes. 12 THE COURT: Other than that, we've got 13 everybody. Are we ready to go with the jury? 14 MR. HESSELL: Yes, we're ready to go. 15 MR. LEVINE: I think there will be some issues 16 with Mr. Weber when he is called live after the 17 video, but Mr. Pitzer is not here, so evidently, we 18 will have to argue it after the break. 19 THE COURT: How long is the video? 20 MR. HESSELL: Two and a half hours. 21 MR. CHEIFETZ: But it's tax stuff. That's 22 great. 23 THE COURT: Who is the witness? 24 MR. HESSELL: Mendelson. 25 (Pause in proceedings)	Page 705 1 "QUESTION: And you received a JD and LLM 2 at Georgetown? 3 "ANSWER: Correct. 4 "QUESTION: Right. Fair enough. The LLM 5 you received was an advanced legal degree specific 6 to taxation. Correct? 7 "ANSWER: Correct. 8 "QUESTION: You have also been an adjunct 9 professor at Georgetown University Law School for 10 nearly 20 years. Correct? 11 "ANSWER: That's correct. 12 "QUESTION: You taught at Georgetown law 13 school tax lawyering and professional 14 responsibilities in federal tax practice. Correct? 15 "ANSWER: That's correct. 16 "QUESTION: But you taught that class for 17 20 years at Georgetown law school. Correct? 18 "ANSWER: 19 years. 19 "QUESTION: In connection with your job 20 as national director for tax professional 21 responsibility at Deloitte, you developed and 22 communicated guidance to accountants on the 23 standards under applicable laws and regulations. 24 Correct? 25 "ANSWER: That's accurate.
Page 704 1 (The following proceedings were held in the 2 presence of the jury.) 3 THE COURT: Welcome back. So we will begin with 4 prerecorded testimony by video. This one is two and 5 a half hours long. We will take a break around 6 10:00. 7 MR. HESSELL: Plaintiffs call Dan Mendelson. 8 DAN MENDELSON 9 was thereupon produced as a witness and, after 10 having been duly sworn on oath, was examined and 11 testified as via videotape: 12 (Video played) 13 DIRECT EXAMINATION 14 BY MR. HESSELL: 15 "QUESTION: You are a lawyer and CPA. 16 Correct? 17 "ANSWER: Yes, I am. 18 "QUESTION: And you are currently active 19 as both a lawyer and CPA? 20 "ANSWER: No. I am inactive with the 21 bar, with the D.C. bar. I am a licensed CPA in 22 Maryland. 23 "QUESTION: You went to Georgetown law 24 school. Correct? 25 "ANSWER: I did.	Page 706 1 "QUESTION: And you continued in those 2 sorts of responsibilities when you moved from 3 Deloitte to PwC. Correct? 4 "ANSWER: Correct. 5 "QUESTION: You were a national partner 6 at PwC in PwC's tax quality and risk management 7 group for six years. Correct? 8 "ANSWER: Yes. 9 "QUESTION: And you worked at PwC from 10 1995 -- 1999 through 2005 all in its quality and 11 risk management group. Correct? 12 "ANSWER: That's right. 13 "QUESTION: And that group is sometimes 14 referred to as tax QRM at PwC. Correct? 15 "ANSWER: Correct. 16 "QUESTION: What was the purpose of the 17 tax QRM group at PwC? 18 "ANSWER: To provide advice and 19 assistance to our partners, managers and staff as 20 needed, primarily in the area of compliance with 21 professional standards. We would also provide 22 practice aides and tools for their practice. We 23 performed practice reviews. We maintained databases 24 and guidance as well as policies. 25 "QUESTION: Continuing with the subject

Page 943 1 the situation, but what I want to refer to is where 2 it got forwarded in the top part of the document. 3 And it got forwarded to a group of people, Bill 4 Galanis, and you know who he is? 5 A. I do, sure. 6 Q. He is a high-level guy in the Washington office. 7 And then you see Alan Fox's name? 8 A. I do. 9 Q. And he's in the office of general counsel? Do you 10 see that? 11 A. It says OGC, yes. 12 Q. And do you ever have any -- and I don't want to ask 13 anything about any discussions you had with him or 14 communications, but did you -- did you know who he 15 was? Had you ever had any contact with him in the 16 past on prior deals? 17 A. Oh, I talked to the OGC before. I knew who Alan Fox 18 was. 19 Q. Okay. Now, your "Wow" email gets forwarded to Alan 20 Fox the same day. Correct? 21 A. It appears so. 22 Q. And are you aware of any other correspondence 23 relating to your "Wow" email and the explosive 24 topics that you brought up in that email -- that, 25 you know, subsequent to February 14? Was there any	Page 945 1 A. Oh, we've been over that. Yeah, I did if it was no 2 longer relevant. 3 Q. You would just delete emails? 4 A. If it was no longer relevant. I lived by my emails. 5 MR. PITZER: Let's play Clip 34, if we could, 6 Marco. 7 (Video played). 8 "QUESTION: The question is do you know 9 whether there were further email communications that 10 followed your "Wow" email? 11 "ANSWER: Well, that "Wow" email, if you 12 will, was kind of the end of it for me and D.C. I 13 think they were trying to communicate the urgency 14 and seriousness of this matter, which they did, and 15 I think my email says I get it. That was not in our 16 Portland office stack of work papers that talk about 17 this transaction. However, I think other things in 18 our stack of work papers indicate the same thing, 19 largely because of listed transaction. The term 20 listed transaction would have been as concerning to 21 a tax professional as my email was. 22 "QUESTION: What happened to this email? 23 "ANSWER: Well, I deleted all my emails. 24 I think you know that. 25 "QUESTION: No, I don't. I didn't know
Page 944 1 follow up on it at all to your knowledge? 2 A. No. 3 Q. It just sort of -- because we haven't seen a single 4 document, a single email, a single anything. It's 5 like it just fell off the face of the earth. You 6 don't remember -- you're not aware of any further 7 communications? 8 A. Correct. 9 Q. And you never spoke to anybody again about it. Is 10 that your testimony? 11 A. Well, other than Galanis on a technical aspect. I 12 don't remember ever talking to -- I mean, we talked 13 to Mendelson a lot regarding the disclosure, okay, 14 but I don't remember ever talking to Alan Fox on 15 this client, no. 16 Q. Did you -- did you maintain your own, I mean, 17 records on the Marshall transaction back in your 18 office in Portland on your computer system? 19 A. No. 20 Q. Why not? 21 A. Because everything up -- that I have seen up until 22 now was Dempsey's handwritten notes and the actual 23 hard file. 24 Q. I mean, for example, did you have a policy of just 25 deleting emails?	Page 946 1 that. 2 "ANSWER: My practice -- I had a very 3 busy practice with over 100 clients. And my -- I 4 worked 12 hours a day. I couldn't keep everything 5 straight in my mind. So my emails became a to-do 6 list for me. So I did not delete them if there was 7 something more for me to do. It's as simple as 8 that. That's how I ran my practice my entire 9 career. 10 "QUESTION: And otherwise you did delete 11 them if they -- 12 "ANSWER: If it wasn't a to-do item, yes. 13 "QUESTION: And so it could be, you know, 14 file someone's tax return, and once that was filed, 15 you would delete that email? 16 "ANSWER: That's how I operated. 17 "QUESTION: And how is that consistent 18 with this policy that we marked as Weber 37?" 19 MR. LEVINE: Objection, Your Honor. 20 THE COURT: What's the basis of the objection? 21 MR. PITZER: If you can maybe pause it. 22 MR. LEVINE: For one thing, the document is in, 23 the other is -- can we have sidebar? 24 THE COURT: Yes. 25 (Sidebar not reported.)

Page 947 1 (Video played.) 2 "QUESTION: A clear and detailed record 3 of facts on which verbal advice was given and all of 4 that. How is that consistent when you're deleting 5 every email? 6 "ANSWER: It would have been normal for 7 me, if I thought my specific email was critical to a 8 position we took with a client, to have put that in 9 the hard copy in the office. That would have been 10 critical. So if you could have looked at all my 11 client files back then, you would have seen my 12 emails that I made the decision was critical or 13 somebody else on my staff thought was critical and 14 they would have hard-copied that into the paper 15 file. 16 "QUESTION: Did you also have a practice 17 of deleting sent emails? 18 "ANSWER: Oh, all emails. 19 "QUESTION: So you would go in your 20 inbox; if something wasn't of use any longer, you 21 would delete that? 22 "ANSWER: Um-hum (affirmative response). 23 "QUESTION: You would go into your sent 24 email box and delete stuff there as well on a 25 regular basis?	Page 949 1 A. Yes. 2 Q. And when did you do that? 3 A. I have no recollection. 4 Q. And do you recall that -- you were still working at 5 Pricewaterhouse in 2007, right? 6 A. I was. 7 Q. And do you recall that you received, I guess it came 8 to you, but it was directed to Pricewaterhouse, a 9 summons from the IRS, seeking documents about the 10 MAC, you know, the Marshall MAC transaction? 11 A. I do, I do. 12 MR. PITZER: And why don't we look at 177. 13 Let's not put it up yet. You have no objection. 14 MR. LEVINE: No objection. 15 MR. PITZER: No objection. We will move for the 16 admission of 177, Plaintiffs' 177. 17 THE COURT: 177 is admitted. 18 MR. PITZER: If you can sort of zoom in Marco on 19 the top address. 20 Q. BY MR. PITZER: So this is directed at 21 Pricewaterhouse in care of John Weber. I assume 22 that's -- obviously that's a typo unless your first 23 name is actually John. It's not John? 24 A. It is not. 25 Q. Okay. Maybe they mixed up you and John Dempsey
Page 948 1 "ANSWER: To be honest, my recollection 2 is we didn't have a sent folder back then like your 3 Apple iPhone does today. We had one repository. It 4 was emails. They went out as sent or they came to 5 you as received. There was one place. 6 "QUESTION: And did you talk to anybody 7 inside Pricewaterhouse about the propriety of that 8 personal practice of your own, of deleting emails on 9 a regular basis? 10 "ANSWER: Not that I can think of, Jeff. 11 I know there was no policy inside PwC to not delete 12 emails. There was not that policy. There was this 13 policy to keep things to support what we did, which 14 I think our file does. 15 "QUESTION: But maybe the most critical 16 email at least that survives that we have seen, 17 which is your "Wow" email, you apparently deleted 18 that one? 19 "ANSWER: I agree. Apparently I did." 20 (End of video) 21 Q. BY MR. PITZER: I think I heard that last answer. I 22 was saying something to Mr. Grabiell, but the "Wow" 23 email we've been talking about that you deleted from 24 your system, is that right? 25 That's a yes?	Page 950 1 but -- so this comes from the -- if you go up to the 2 top legend, it comes from the Department of Treasury 3 Internal Revenue Service, Large and Mid-Size 4 Business Division. Is that correct? 5 A. Yes. 6 Q. And it's directed to Pricewaterhouse, and it comes 7 to -- obviously that's you that it's referring to. 8 John Dempsey, I think, no longer worked there at 9 that time? 10 A. I don't recall. 11 Q. And it's attaching a summons regarding First 12 Associated Contractors. Correct? 13 A. Correct. 14 Q. For the period April 1 of '02 through March 31 15 of '03, right? 16 A. Correct. 17 Q. And that's the precise sort of span of time during 18 which you and Mr. Dempsey and Pricewaterhouse were 19 advising the Marshalls on the ultimate sale of their 20 company MAC to Fortrend. Is that correct? 21 A. Agreed. 22 Q. And then attached to this letter from the IRS is a 23 summons from the IRS. And do you see that at the 24 top, and it says in the matter of First Associated 25 Contractors, formerly known as Marshall Associated

THE COURT: So I said no to 12 through 20.

MR. LANDGRAFF: Correct.

THE COURT: But 3 through 11 was not resolved.

MR. LANDGRAFF: Okay.

THE COURT: I mean, I don't think -- I don't think the findings in the opinion touched this.

MR. LANDGRAFF: We will confirm that and confer with counsel.

THE COURT: Okay. But otherwise it can be played unless you find something persuasive.

MR. RICE: Thank you, Your Honor.

THE COURT: Did we talk about everything?

MR. RICE: Thank you very much for staying.

MR. LANDGRAFF: Thank you, Julie.

THE COURT: Thank you, Julie. Thank you, Andrew.

(Proceedings adjourned at 5:22)

C E R T I F I C A T E

I, Julie A. Walter, CSR No. 90-0173, do hereby certify that, the hearing before Judge von Ter Stegge, was reported by me at the time and place mentioned in the caption herein; that said hearing, was taken down by me in stenotype and thereafter reduced to typewriting; and, that the foregoing transcript, Pages 699 to 995, both inclusive, constitutes a full, true and accurate record of said hearing, and of all other proceedings had during the taking of said hearing, and of the whole thereof, to the best of my ability.

Witness my hand at Portland, Oregon, this 3rd day of August, 2023.

Julie A. Walter
CSR No. 90-0173

EXHIBIT 8

PricewaterhouseCoopers LLP Policy for Retention of Firm Documents

1. *Policy.* All documents (including those kept in an electronic medium) created, sent or received by the Firm that are necessary or appropriate to record, support or otherwise form the basis of the Firm's professional work product or administrative functions (hereinafter "Professional and Administrative Records") and other documents required to be retained in accordance with the particular guidance set forth below shall be retained during the assigned period for retention ("Retention Period") for such records. Documents not required to be retained under this policy should be retained only for so long as they are necessary. Except as otherwise specifically stated below or as set forth in guidance applicable to particular lines of service, the Retention Period for all Professional Records is the Current Period (as defined below) plus seven years. The Retention Period for Administrative Records shall be as described in Section 3 of this policy. After the expiration of the Retention Period, Professional and Administrative Records shall not be retained. Business Unit Leaders and Office Managing Partners are responsible for overseeing compliance with this Policy.

Notwithstanding the general policy statement described above and the specific rules, definitions and examples set forth below and in LOS-specific guidance, the firm must retain all documents (not just working papers) relating to work that is the subject of a pending or threatened lawsuit, government investigation or subpoena, or is reasonably anticipated to become the subject of a lawsuit, investigation or subpoena. In such situations, all documents (including notes, drafts and e-mails) that relate to the subject matter of the proceeding/anticipated proceeding that were in existence at the time the firm became aware of the proceeding and/or reasonably anticipated such a proceeding, should be preserved unaltered (and thus, in the case of electronic audit files, not wrapped up or otherwise altered) until such time as OGC instructs otherwise. **It is the responsibility of each individual at the firm to preserve his or her documents in such situations until OGC instructs otherwise.** Firm personnel should consult OGC prior to revising and/or discarding any documents where there is any question about whether the documents in question should be preserved. Firm personnel should also consult OGC as to what document retention procedures should be followed with respect to documents created after the firm becomes aware of a lawsuit, government investigation or subpoena or after the firm reasonably anticipates such proceedings. OGC will notify the appropriate Records Center and Risk Management of any files that must be retained beyond their assigned retention date due to pending litigation or other reasons. At that time, the files will be retained indefinitely, and discarding will require specific approval of OGC.

The following are examples of the types of circumstances that may give rise to the suspension of normal document retention procedures, the need to preserve documents unaltered, and the suspension of normal wrapping up policies and procedures (to the extent applicable) until OGC instructs otherwise:

- A significant question arises as to the appropriateness or accuracy of prior completed work, such as a question as to whether the accounting for a particular significant item or transaction was correct arising after an audit report is issued, or a question as to whether certain significant tax planning advice previously given was appropriate.
- A restatement of an audit client's financial statements.
- Knowledge of an informal government-directed inquiry of a client where the firm's work relates to the subject of the investigation.
- Knowledge of a subpoena directed to an audit client relating to the client's financial reporting or accounting, or knowledge of a subpoena directed to any client where the subpoenaed records relate to work that the firm performed for the client.
- Informal government-directed inquiry of the firm.
- Subpoena directed to the firm in connection with client litigation and/or a government investigation of the client or

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with respect to the firm.

- Threatened litigation against the firm.
- Subpoena and/or claim/litigation directed at the firm regarding the firm's work or regarding the firm.

This policy applies to all lines of service of PricewaterhouseCoopers LLP and all internal firm services matters.

2. *Definitions/Examples.*

(a) *Current Period.*

- (i) Definition. "Current Period" means, in most cases, the calendar year during which the document was created, revised or received. In some cases, Current Period means the effective life of the document. Examples of documents falling into the latter category are office leases, personnel files, contracts to which the Firm is a party, engagement letters relating to continuing client engagements, tax planning files and the "permanent file" of a continuing client.

As a general rule, choice of the appropriate Current Period and corresponding date of record retention termination should be made by the person who created or received the document in question, and not by the Records Center. Questions arising in connection with the choice of an appropriate Current Period should be directed to the appropriate Unit, Line of Business or Office Managing Partner, or the Office of General Counsel.

Note that in some situations, the Retention Period will have to be extended on a year-to-year basis, as when the IRS has not closed a particular tax year of a client within the Retention Period.

(ii) *Examples of Measurement of the Retention Period:*

- Audit files relating to the Firm's report, dated March 13, 1997, on the financial statements of Universal Widgets as of December 31, 1996: Terminate retention after December 31, 2004.
- Lease dated November 1, 1993 covering a lease term of February 1, 1994 through January 31, 1995: Terminate retention after December 31, 2002.
- Letter dated August 19, 1996: Terminate retention after December 31, 2003.
- Permanent files deemed superseded on September 30, 1998: Terminate retention after December 31, 2005.
- Tax planning or project file created July 1995 covering a transaction that will affect the tax return for 1995: Terminate retention after the calendar year that is seven years after the year in which the period for tax assessment expires for the 1995 tax return.

(b) "Record, support or otherwise form the basis of the Firm's professional work product or administrative functions."

- (i) What it means for documents "to record, support or otherwise form the basis of":
- Records "recording, supporting or otherwise forming the basis" of the firm's professional work product and administrative functions are records that are retained in sufficient detail to support the conclusions reached by the firm in its professional work and administrative functions. Not all documents record, support, or otherwise form the basis of the firm's professional work product or administrative functions. Documents such as electronic mail and correspondence, if the communication is necessary to record or support PricewaterhouseCoopers' work, should be included in the engagement files, either electronically or in paper form. By contrast, documents such as electronic mail, correspondence or draft documents that are not necessary to record or support the Firm's work should not be retained beyond the end of the engagement to which they relate unless there is a specific LOS requirement for the retention of such

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additional materials. There are specific LOS policies that do require the retention of certain such documents under certain circumstances. All personnel therefore must consult their LOS specific policies to determine the particular retention requirements applicable to their LOS.

- For specific guidance and additional requirements as to the retention of audit and review documents and records, see PwC Audit US Section 9400 “Retention of Assurance Engagement Documents.”
- For specific guidance as to the retention of tax documents and records, see Tax Policy 14.5.5 – “Methodologies – Record Retention – Retention of firm documents and files”
- For specific guidance as to the retention of records relating to the Financial Advisory Services practice, see FAS DA&I Document Retention Policy.

- (ii) What it means to “record, support, or otherwise form the basis of administrative functions”: A record “records or supports administrative functions” under the meaning of paragraph 1 of this policy if it constitutes substantive communication with a third person on a significant issue in a firm business matter, constitutes an agreement between the firm and third parties (including firm personnel) regarding procurement of services for the firm or other administrative matters, records personnel or Human Resources information, or records or supports other firm business administrative information (such as financial information, office administration information, etc.).

3. Retention Period For Administrative Records:

- (a) Documents pertaining to Firm governance and regulatory matters: permanent*.
- (b) Final negotiated agreements and related documents pertaining to mergers or acquisitions by the Firm, as designated by OGC: permanent*.
- (c) Minutes of meetings of the Firm’s Board of Partners and Principals and the Board’s Committees, as well as other Firm Committees designated by the Firm’s Senior Partner: (permanent*).
- (d) Certain legal or historical files designated by the General Counsel: discretion of OGC.
- (e) Firm Policy Releases: until superseded. The partner or director leading the group issuing the policy should ensure that one full historical set of the Releases or Statements issued by it is retained permanently.
- (f) Financial records, including tax returns, of the Firm: permanent*.
- (g) Quality review documents and PwC Feedback Program documents, including reports, correspondence, questionnaires, and supporting work papers that identify or relate to findings or evaluations of specified offices or individuals: 12 months from date of creation for non-ECLIPSE documents, 24 months from month of creation for ECLIPSE documents, except where such documents relate specifically to work that is the subject of a pending, threatened or reasonably anticipated lawsuit, government investigation or subpoena, in which case such documents must be preserved until such time as OGC instructs otherwise. Quality review documents that do not relate

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specifically to work that is the subject of a pending, threatened or reasonably anticipated lawsuit, government investigation or subpoena may be retained for a shorter period than the period described above when it is determined by the Lead Partner or Director of Quality for the respective Line of Service that they have served their intended purpose.

- (h) Personnel records of former employees: Current Period plus ten years.
- (i) Internal administrative documents, such as office financial information or LOS specific administrative reports: discretion of appropriate Unit Leader, Line of Business Leader or Office Managing Partner. Administrative Assurance Management Reports should be retained for a period determined at the discretion of the U.S. Assurance Risk Management Leader or U.S. Assurance Operations Leader.
- (j) All other Administrative Records: Current Period plus seven years.
- (k) Exceptions to the Current period plus seven years retention period for other Administrative Records: Any person who creates or receives a document or class of documents that he or she believes should be the subject of an exception should refer the matter to OGC.

4. *Exceptions to the Current + seven years policy for Professional Records:*

There are exceptions to the current plus seven years retention period for Professional Records described above. The following retention periods apply for the following types of records:

- (a) Exceptions to the current period plus seven year retention period for engagement related files:

<u>Assurance Files</u> Permanent/Carry-Forward – “No date” until superseded, Current + seven years from the “superseded date.”	<u>Tax Files</u> - Permanent/Carry Forward – “No date” until superseded, Current + seven years from the “superseded date.” - Planning/Project – “No date” while active or until superseded. Current + seven years from the “superseded date” or date on which it becomes no longer active. - Tax Return and related work papers – 15 years - Tax IAS – 15 years (Tax Return and related workpapers)
<u>FAS Files</u> As indicated in U.S. FAS DA&I document retention policy	

- (b) Other Exceptions to the Current period plus seven years retention period for Professional Records: Any

* For permanent retention, consider microfilming or other less bulky storage systems.

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person who creates or receives a document or class of documents that he or she believes should be the subject of an exception should refer the matter to OGC.

5. Organization and Timing of Discarding:

Persons responsible for maintenance of Firm files should conduct a review of all files during each December to identify those files that should be discarded promptly after December 31 of that year. Thereafter, during January of the following year, such documents should be discarded only upon formal authorization from the designated partner.

6. Other Related Policies

Other firm policies contain document retention requirements. Specifically, as of the date of the release of this policy, the following are the firm's policies addressing document retention:

- PwC Audit US Section 9400 - RETENTION OF ASSURANCE ENGAGEMENT DOCUMENTS
- PwC Audit US Section 6900 - ARCHIVING AND UNARCHIVING AUDIT FILES
- PwC Audit US Section 2400 - DOCUMENTATION OF AUDIT WORK
- Policies implementing state regulations. As of the date of this release, such policies relate solely to document retention requirements in the state of New York.
- TAX Policy 14.5.5 Methodologies – Record Retention – Retention of firm documents and files
- FAS US – DA&I Record Retention Policy
- Guidelines for Maintenance of Personnel Records
- PwC Feedback Program Policy

EXHIBIT 9

1 **INTG**

2 Mark A. Hutchison (4639)
3 Todd L. Moody (5430)
4 Todd W. Prall (9154)
5 HUTCHISON & STEFFEN, LLC
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7 Las Vegas, NV 89145
8 Tel: (702) 385-2500
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12 tprall@hutchlegal.com

13 Scott F. Hessel
14 Thomas D. Brooks
15 (*Pro Hac Vice*)
16 SPERLING & SLATER, P.C.
17 55 West Monroe, Suite 3200
18 Chicago, IL 60603
19 Tel: (312) 641-3200
20 Fax: (312) 641-6492
21 Email: shessel@sperling-law.com
22 tdbrooks@sperling-law.com

23 *Attorneys for Plaintiff*

24 DISTRICT COURT

25 CLARK COUNTY, NEVADA

26 MICHAEL A. TRICARICHI,
27
28 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

)
) **PLAINTIFF'S FIRST SET OF**
) **INTERROGATORIES TO**
) **DEFENDANT**
) **PRICEWATERHOUSE**
) **COOPERS LLP**

) JURY TRIAL DEMANDED

1
2 Pursuant to the Nevada Rules of Civil Procedure, Plaintiff Michael A. Tricarichi hereby
3 requests that you respond under oath within 30 days to each of the interrogatories set forth
4 below in accordance with the Nevada rules and the Definitions and Instructions also set forth
5 below.
6

7 DEFINITIONS

8 A. "You," "Your," or "PwC" means Pricewaterhouse Coopers LLP and each
9 of its current and former employees, owners, and any predecessors, successors, or affiliates,
10 and any other persons or attorneys acting on its, his, her or their behalf, including Richard
11 Stovsky and Timothy Lohnes.

12 B. "Plaintiff" means Michael A. Tricarichi and each of his current and former
13 employees, owners, and any predecessors, successors, or affiliates, and any other persons or
14 attorneys acting on its, his, her or their behalf.
15

16 C. "Seyfarth Shaw" means Seyfarth Shaw LLP and each of its current and
17 former employees, owners, and any predecessors, successors, or affiliates, and any other
18 persons or attorneys acting on its, his, her or their behalf, including Graham R. Taylor and
19 John E. Rogers.

20 D. "Rabobank" means Coöperatieve Rabobank U.A. and each of its current
21 and former employees, owners, and any predecessors, successors, or affiliates, and any
22 other persons or attorneys acting on its, his, her or their behalf.
23

24 E. "Utrecht" means Utrecht-America Finance Co. and each of its current and
25 former employees, owners, and any predecessors, successors, or affiliates, and any other
26 persons or attorneys acting on its, his, her or their behalf.
27
28

1 F. "Taylor" means Graham R. Taylor and each of his current and former
2 employees, owners, and any predecessors, successors, or affiliates, and any other persons or
3 attorneys acting on its, his, her or their behalf.

4 G. "Fortrend" means Fortrend International LLC and each of its current and
5 former employees, owners, and any predecessors, successors, or affiliates, and any other
6 persons or attorneys acting on its, his, her or their behalf, including John P. McNabola and
7 Timothy H. Vu (f/k/a Timothy H. Conn, a/k/a Timothy Conn Vu) ("Conn Vu").
8

9 H. "Midcoast" means Midcoast Credit Corp. and each of its current and former
10 employees, owners, and any predecessors, successors, or affiliates, and any other persons or
11 attorneys acting on its, his, her or their behalf.

12 I. "Communication" means any exchange, transfer, or dissemination of facts
13 or information, regardless of the means by which it is accomplished.
14

15 H. "Document" means any written, recorded, or graphic material, whether
16 prepared by you or by another person that is in your possession, custody, or control. The
17 term includes memoranda; reports; letters; telegrams; electronic correspondence; electronic
18 mail (*i.e., e-mail*); any communications recorded in any form or medium; notes; minutes;
19 and transcripts of conferences, meetings, and telephone or other communications; contracts
20 and other agreements, statements, ledgers, and other records of financial matters or
21 commercial transactions; notebooks, calendars, and diaries; diagrams, graphs, charts,
22 blueprints, and other drawings; plans and specifications; publications and published or
23 unpublished speeches or articles; photographs, photocopies, microfilm, microfiche, and
24 other copies or reproductions; tape, disk, and other electronic recordings; and computer
25 printouts. The term "document" also includes electronically-stored data from which
26 information can be obtained either directly or by translation through detection devices or
27 readers; any such document is to be produced in a reasonably legible and usable form. The
28

1 term "document" includes the original document (or a copy thereof if the original is not
2 available), all drafts, whether or not they resulted in a final document, and all copies which
3 differ in any respect from the original, including any notation, underlining, marking, or
4 information not on the original.

5 I. "Identify" means:

- 6
- 7 1. with respect to a person, to state, as applicable, that person's full
8 name, home and business address, phone number, occupation, job
9 title or job description, and present or last-known employer; and
 - 10 2. with respect to a document or tangible item, to state its type, its
11 name or title, its author, its date of creation, its recipients, its
12 current format or location, its custodian, and to describe with
13 particularity its subject matter.

14 J. "Describe" means to state with particularity, including but not limited to
15 stating each date, fact, event, occurrence, and identify (pursuant to the term identify) each
16 document, and to identify each individual who can testify as to the alleged dates, facts,
17 events, and occurrences.

18 K. "Relate to" or "relating to" or their forms mean discuss, describe, refer to,
19 forecast, reflect, contain, analyze, study, report on, comment on, evidence, constitute, set
20 forth, consider, recommend, concern, or pertain to, in whole or in part.

21 L. "IRS Notice 2001-16" means the notice issued by the IRS on January 18,
22 2001.

23 M. "IRS Notice 2008-20" means the notice issued by the IRS on February 11,
24 2008.

25 N. "IRS Notice 2008-111" means the notice issued by the IRS on December 2,
26 2008.
27
28

1 O. "IRS Announcement 2002-2" means the announcement issued by the IRS
2 on January 14, 2002.

3 P. "Midco" means the concept, strategy, or use of an intermediary entity to
4 facilitate a business transaction and/or to reduce the tax implications of the transaction to the
5 buyer and/or seller, by which an intermediary entity acquires stock from the selling party
6 and subsequently transfers assets to the buying party.
7

8 O. "Midco Transaction" means a transaction employing or consistent with the
9 Midco concept or strategy, or consistent with or substantially similar to the transaction(s)
10 described in IRS Notice 2001-16, IRS Notice 2008-20 or IRS Notice 2008-111.
11

12 P. "Fortrend Transaction" means a Midco Transaction or the transaction in
13 which the Plaintiff participated, as described in Plaintiff's Complaint, which was found to
14 be a Midco Transaction.
15

16 J. A "Listed Transaction" is a transaction that is the same as or substantially
17 similar to one of the types of transactions previously or subsequently determined by the IRS
18 to be a tax avoidance transaction by being identified as such by notice, regulation, or other
19 form of published guidance.
20

21 K. To "State the Basis" means to provide the complete factual summary of each
22 element of the claim, contention, allegation or denial. The summary should chronologically
23 describe each and every fact, action and/or occurrence that relates to the particular claim,
24 contention, allegation or denial. In describing each such fact, action and/or occurrence, (i) do
25 so in accordance with these definitions and instructions; (ii) identify each individual and entity
26 claimed to be involved therein; and (iii) in each instance, identify the source from which the
27 information set forth in your response was obtained.
28

INSTRUCTIONS

A. Respond separately and completely to each request.

B. If you cannot respond fully to any request, please respond to the fullest extent possible and explain the reasons for your inability to respond fully, the efforts you have made to obtain the information or documents requested, and the source from which all responsive information and documents may be obtained to the best of your knowledge or belief.

C. Please construe all singular terms as including the plural, and all plural terms as including the singular.

D. Please construe the connectives "and" and "or" either disjunctively or conjunctively as necessary to bring within the scope of the request all material that might otherwise be construed to be outside its scope.

E. Please construe the terms "all," "any," and "each" as "all, any, and each."

F. Unless otherwise indicated, these requests seek responsive documents and information for the period January 1, 1999 to the present.

INTERROGATORIES

1. For the period between September 9, 2003, and the present, identify and describe all communications You have had with or regarding Plaintiff, or regarding the Fortrend Transaction, including communications with the IRS.

2. Identify and describe any Midco Transaction regarding which you provided advice or otherwise participated, with respect to which a taxpayer was later determined, by the IRS or Tax Court, to have transferee or other tax liability. Please include in Your response the date(s) of the transaction(s) and of the determination(s) of liability; a description of Your role in the transaction(s); and the identity of the other participants in the transaction(s).

1 3. Identify and describe any Midco Transaction regarding which you provided
2 advice or otherwise participated, with respect to which a taxpayer was later investigated or
3 audited by the IRS. Please include in Your response the date of the transaction(s) and of the
4 investigation or audit; a description of Your role in the transaction(s); and the identity of the
5 other participants in the transaction(s).

6
7 4. Identify all PwC personnel who performed any work in connection with any
8 Midco strategy or Midco Transaction identified in response to interrogatory no. 2 or no. 3 above,
9 or in connection with the Bishop Midco Transaction or the Marshall Midco Transaction, and
10 provide a brief description of their role(s) in connection with such transaction(s), when their
11 work took place, and what transaction(s) their work was in connection with.

12 5. Identify all current or former employees of PwC who have been interviewed or
13 deposed or testified at trial, in a hearing, or before a grand jury, in which the Midco strategy or a
14 Midco Transaction was mentioned, referred to, described, or inquired about. Please include the
15 name of each witness, each date they testified, and the nature of each proceeding.

16
17 6. Identify all employees of PwC who personally participated in a Midco
18 Transaction and who attempted to or in fact participated in an Internal Revenue Service amnesty
19 program, such as that described in IRS Announcement 2002-2, or amended their returns to
20 abandon the tax implications of the Midco Transaction on those returns.

21
22 7. Identify all persons or entities (including governmental entities) to whom You
23 have produced documents concerning the Midco concept or strategy, Midco Transaction(s) or
24 the Fortrend Transaction, or to whom You otherwise responded to requests for information,
25 summons, subpoenas, or regulatory inquiries concerning same.

26 8. Identify and describe any governmental investigation or inquiries of any kind
27 into Your use of, promotion of, advice regarding, or role in any Midco Transaction.
28

1 9. Identify and describe any communications with the IRS or any other agency
2 relating to Your use of, promotion of, advice regarding, or role in any Midco Transaction.

3 10. Have You complied with AICPA Statement on Standards for Tax Services No. 6,
4 with respect to the Fortrend Transaction? State the basis for Your answer.

5 11. Have You complied with Section 10.21 of Treasury Circular No. 230, with
6 respect to the Fortrend Transaction? State the basis for Your answer.
7

8
9 Dated: May 30, 2017

SPERLING & SLATER, P.C.

10
11 

12 Scott F. Hessel
13 Thomas D. Brooks
14 (*Pro Hac Vice*)
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16 Chicago, IL 60603

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21 10080 West Alta Drive, Suite 200
22 Las Vegas, NV 89145

23
24 *Attorneys for Plaintiff Michael A. Tricarichi*
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of May, 2017, I caused to be emailed and mailed to the counsel of record listed below a copy of the foregoing Plaintiff's First Set of Interrogatories to Defendant Pricewaterhouse Coopers LLP.



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Attorneys for Plaintiff

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EXHIBIT 10

1 **REQT**

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21 Email: shessel@sperling-law.com
22 tdbrooks@sperling-law.com

23 *Attorneys for Plaintiff*

24 DISTRICT COURT

25 CLARK COUNTY, NEVADA

26 MICHAEL A. TRICARICHI,
27
28 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

) **PLAINTIFF'S AMENDED FIRST**
) **SET OF REQUESTS FOR**
) **PRODUCTION OF DOCUMENTS**
) **TO DEFENDANT**
) **PRICEWATERHOUSE**
) **COOPERS LLP**

) JURY TRIAL DEMANDED

1
2 Pursuant to the Nevada Rules of Civil Procedure, Plaintiff Michael A. Tricarichi hereby
3 requests that, by June 12, 2017, you respond to the requests set forth below in accordance with
4 the Nevada rules and the Definitions and Instructions also set forth below.

5 6 **DEFINITIONS**

7 A. "You," "Your," or "PwC" means Pricewaterhouse Coopers LLP and each
8 of its current and former employees, owners, and any predecessors, successors, or affiliates,
9 and any other persons or attorneys acting on its, his, her or their behalf, including Richard
10 Stovsky and Timothy Lohnes.

11 B. "Plaintiff" means Michael A. Tricarichi and each of his current and former
12 employees, owners, and any predecessors, successors, or affiliates, and any other persons or
13 attorneys acting on its, his, her or their behalf.

14 C. "Seyfarth Shaw" means Seyfarth Shaw LLP and each of its current and
15 former employees, owners, and any predecessors, successors, or affiliates, and any other
16 persons or attorneys acting on its, his, her or their behalf, including Graham R. Taylor and
17 John E. Rogers.

18 D. "Rabobank" means Coöperatieve Rabobank U.A. and each of its current
19 and former employees, owners, and any predecessors, successors, or affiliates, and any
20 other persons or attorneys acting on its, his, her or their behalf.

21 E. "Utrecht" means Utrecht-America Finance Co. and each of its current and
22 former employees, owners, and any predecessors, successors, or affiliates, and any other
23 persons or attorneys acting on its, his, her or their behalf.

24 F. "Taylor" means Graham R. Taylor and each of his current and former
25 employees, owners, and any predecessors, successors, or affiliates, and any other persons or
26 attorneys acting on its, his, her or their behalf.
27
28

1 G. “Fortrend” means Fortrend International LLC and each of its current and
2 former employees, owners, and any predecessors, successors, or affiliates, and any other
3 persons or attorneys acting on its, his, her or their behalf, including John P. McNabola and
4 Timothy H. Vu (f/k/a Timothy H. Conn, a/k/a Timothy Conn Vu) (“Conn Vu”).

5 H. “Midcoast” means Midcoast Credit Corp. and each of its current and former
6 employees, owners, and any predecessors, successors, or affiliates, and any other persons or
7 attorneys acting on its, his, her or their behalf.

8 I. “Communication” means any exchange, transfer, or dissemination of facts
9 or information, regardless of the means by which it is accomplished.

10 H. “Document” means any written, recorded, or graphic material, whether
11 prepared by you or by another person that is in your possession, custody, or control. The
12 term includes memoranda; reports; letters; telegrams; electronic correspondence; electronic
13 mail (*i.e., e-mail*); any communications recorded in any form or medium; notes; minutes;
14 and transcripts of conferences, meetings, and telephone or other communications; contracts
15 and other agreements, statements, ledgers, and other records of financial matters or
16 commercial transactions; notebooks, calendars, and diaries; diagrams, graphs, charts,
17 blueprints, and other drawings; plans and specifications; publications and published or
18 unpublished speeches or articles; photographs, photocopies, microfilm, microfiche, and
19 other copies or reproductions; tape, disk, and other electronic recordings; and computer
20 printouts. The term “document” also includes electronically-stored data from which
21 information can be obtained either directly or by translation through detection devices or
22 readers; any such document is to be produced in a reasonably legible and usable form. The
23 term “document” includes the original document (or a copy thereof if the original is not
24 available), all drafts, whether or not they resulted in a final document, and all copies which
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1 differ in any respect from the original, including any notation, underlining, marking, or
2 information not on the original.

3 I. "Identify" means:

- 4 1. with respect to a person, to state, as applicable, that person's full
5 name, home and business address, phone number, occupation, job
6 title or job description, and present or last-known employer; and
7 2. with respect to a document or tangible item, to state its type, its
8 name or title, its author, its date of creation, its recipients, its
9 current format or location, its custodian, and to describe with
10 particularity its subject matter.

11 J. "Describe" means to state with particularity, including but not limited to
12 stating each date, fact, event, occurrence, and identify (pursuant to the term identify) each
13 document, and to identify each individual who can testify as to the alleged dates, facts,
14 events, and occurrences.

15 K. "Relate to" or "relating to" or their forms mean discuss, describe, refer to,
16 forecast, reflect, contain, analyze, study, report on, comment on, evidence, constitute, set
17 forth, consider, recommend, concern, or pertain to, in whole or in part.

18 L. "IRS Notice 2001-16" means the notice issued by the IRS on January 18,
19 2001.

20 M. "IRS Announcement 2002-2" means the announcement issued by the IRS
21 on January 14, 2002.

22 N. "IRS Notice 2008-20" means the notice issued by the IRS on February 11,
23 2008.

24 O. "IRS Notice 2008-111" means the notice issued by the IRS on December 2,
25 2008.

1 P. "Midco" means the concept, strategy, or use of an intermediary entity to
2 facilitate a business transaction and/or to reduce the tax implications of the transaction to the
3 buyer and/or seller, by which an intermediary entity acquires stock from the selling party
4 and subsequently transfers assets to the buying party.
5

6 O. "Midco Transaction" means a transaction employing or consistent with the
7 Midco concept or strategy, or consistent with or substantially similar to the transaction(s)
8 described in IRS Notice 2001-16, IRS Notice 2008-20 or IRS Notice 2008-111.
9

10 P. "Fortrend Transaction" means a Midco Transaction or the transaction in
11 which the Plaintiff participated, as described in Plaintiff's Complaint, which was found to
12 be a Midco Transaction.

13 J. A "Listed Transaction" is a transaction that is the same as or substantially
14 similar to one of the types of transactions previously or subsequently determined by the IRS
15 to be a tax avoidance transaction by being identified as such by notice, regulation, or other
16 form of published guidance.
17

18 INSTRUCTIONS

19 A. Respond separately and completely to each request.

20 B. If you cannot respond fully to any request, please respond to the fullest
21 extent possible and explain the reasons for your inability to respond fully, the efforts you
22 have made to obtain the information or documents requested, and the source from which all
23 responsive information and documents may be obtained to the best of your knowledge or
24 belief.
25

26 C. If any document or tangible thing for which production is requested was
27 formerly in existence or in your possession but no longer exists, or no longer is within your
28

1 possession, custody, or control, your response should include, for each such document or
2 thing:

- 3 1. an identification of the document or thing, and if a document, its
4 author and addressee;
- 5 2. the date and circumstances of such loss or destruction; and
- 6 3. the reason or justification for such loss or destruction.

7 D. These document requests seek documents in your possession, custody, or control,
8 even if in the actual possession of a third party, and include documents of your agents,
9 representatives, and your attorneys.

10 E. If any portion of any document is responsive to a document request, then
11 the entire document must be produced (with appropriate redactions only as authorized by law).

12 F. Documents produced pursuant to these document requests shall be produced in
13 the order in which they appear in your files and shall not be shuffled or otherwise rearranged
14 without the agreement of the parties serving these requests.

15 G. Please construe all singular terms as including the plural, and all plural
16 terms as including the singular.

17 H. Please construe the connectives "and" and "or" either disjunctively or
18 conjunctively as necessary to bring within the scope of the request all material that might
19 otherwise be construed to be outside its scope.

20 I. Please construe the terms "all," "any," and "each" as "all, any, and each."

21 J. Unless otherwise indicated, these requests seek responsive documents and
22 information for the period January 1, 1999 to the present.

DOCUMENT REQUESTS

REQUEST NO. 1 All documents concerning, referring or relating to the Bishop Midco Transaction in which PwC participated, which is discussed in *Enbridge Energy Co., Inc. v. U.S.*, 553 F.Supp.2d 716 (S.D.Tex. 2008).

REQUEST NO. 2 All documents concerning, referring or relating to the Marshall Midco Transaction in which PwC participated, which is discussed in *Estate of Marshall v. Commissioner of Internal Revenue*, T.C. Memo 2016-119 (2016).

REQUEST NO. 3 Any policies, procedures, internal guidance, and/or directives in effect on or after September 9, 2003, with respect to communications with clients who previously participated in a Midco Transaction or other Listed Transaction.

REQUEST NO. 4 Documents which contend, conclude or allege that You concealed, hid, or covered up Your involvement in the design, marketing, and implementation of the Midco strategy or Midco Transactions, including the Fortrend Transaction.

REQUEST NO. 5 All documents relating to AICPA Statement on Standards for Tax Services No. 6, with respect to Midco Transaction(s).

REQUEST NO. 6 All documents relating to Section 10.21 of Treasury Circular No. 230, with respect to Midco Transaction(s).

REQUEST NO. 7 All documents relating to any aspect of any IRS amnesty offered in connection with Midco strategies or Midco Transactions, or documents relating to the filing of amended tax returns in connection with a Midco strategy or Midco Transaction, including but not limited to the filing of amended returns by PwC clients or PwC personnel.

REQUEST NO. 8 All court or arbitral rulings, awards, findings of fact, opinions, or decisions relating to Midco strategies or Midco Transactions involving You.

REQUEST NO. 9 All documents You have produced in any other litigation involving Midco strategies or Midco Transactions.

1 **REQUEST NO. 10** For the period on or after April 1, 2003, documents relating to the
2 applicability of any part of the Internal Revenue Code, published court decisions, IRS
3 pronouncements, notices, rules, statements, regulations or other tax laws as they relate to the
4 Fortrend Transaction, including but not limited to Notice 2008-20 or Notice 2008-111.

5 **REQUEST NO. 11** For the period April 1, 2003, to the present, documents
6 concerning, referring or relating to the Fortrend Transaction.
7

8 **REQUEST NO. 12** Documents produced by You to the Internal Revenue Service or to
9 any other governmental committee, government agency, federal or state prosecutor, or private
10 litigant, relating or referring to the Fortrend Transaction.

11 **REQUEST NO. 13** Transcripts or recordings of, or documents otherwise referring to
12 or reflecting, any testimony, statement or interview given by You referring or relating to the
13 Fortrend Transaction, and any exhibits used during same or referenced in the transcripts.
14

15 **REQUEST NO. 14** Transcripts or recordings of, or documents otherwise referring to
16 or reflecting, any testimony, statement or interview given by Mr. Stovsky, Mr. Lohnes or any
17 other PwC personnel relating to any Midco Transaction(s), and any exhibits used during that
18 testimony or referenced in the transcripts.

19 **REQUEST NO. 15** Communications with the Internal Revenue Service or any other
20 governmental committee, government agency, or federal or state prosecutor, referring or
21 relating to the Fortrend Transaction, including closing agreements and communications
22 referring or relating to a promoter penalty audit or investigation.
23

24 **REQUEST NO. 16** Any presentations to or by PwC to or by the Internal Revenue
25 Service, U.S. Department of Justice or other governmental or investigative agency referring or
26 relating to the Fortrend Transaction.
27
28

1 **REQUEST NO. 17** Documents constituting, referring or relating to any internal PwC
2 communications regarding, or internal investigation or audit by You relating to the Fortrend
3 Transaction, including any internal audit report.

4 **REQUEST NO. 18** For the period April 1, 2003, to the present, communications
5 between PwC and any third party (including Fortrend, Midcoast, Seyfarth, Taylor, Rabobank
6 and Utrecht) referring or relating to the Fortrend Transaction.

7 **REQUEST NO. 19** For the period April 1, 2003, to the present, documents referring or
8 relating to IRS Notice 2001-16, IRS Notice 2008-20 or IRS Notice 2008-111.

9 **REQUEST NO. 20** For the period April 1, 2003, to the present, documents referring or
10 relating to the compliance, or lack thereof, of the Fortrend Transaction with the Internal Revenue
11 Code, IRS regulations or other IRS pronouncements or notices.

12 **REQUEST NO. 21** For the period April 1, 2003, to the present, documents containing
13 or concerning any written or oral communications where any PwC employee, including Stovsky
14 or Lohnes, ever told, or considered telling, Plaintiff (a) that the tax opinion(s) provided by PwC
15 with respect to the Fortrend Transaction were erroneous; (b) that the conduct of any Defendant
16 in this case with respect to the Fortrend Transaction was unlawful, illegal, or criminal; or (c)
17 that Plaintiff should participate in any IRS disclosure or settlement initiative or otherwise settle
18 with the IRS.

19 **REQUEST NO. 22** For the period April 1, 2003, to the present, documents referring
20 to, relating to or concerning the possibility that the Fortrend Transaction might lead to:

- 21
- 22
- 23
- 24 a. An IRS audit of one of Your clients;
- 25 b. An IRS assertion of transferee liability against one of Your clients;
- 26 c. An IRS assertion that the transaction should be recharacterized for tax purposes;
- 27 d. An IRS notice of deficiency or notice of liability being sent to one of Your clients;
- 28 e. An IRS assertion that You may be subject to promoter penalties;

1 f. Any other liability for one of Your clients; or

2 g. Any other liability for You.

3 **REQUEST NO. 23** Documents that support, contradict or concern Your answer to
4 paragraphs 73 and 74 of the Complaint.

5 **REQUEST NO. 24** Documents that support, contradict or concern Your Second
6 Affirmative Defense to the Complaint.

7 **REQUEST NO. 25** For the period April 1, 2003, to the present, documents regarding,
8 referring to or reflecting any minutes, reports, or notes of meetings of Your Board of Directors (or
9 similar governing body) and/or any sub-committees or sections thereof, concerning the Midco
10 concept or strategy or Midco Transaction(s).
11

12
13 Dated: May 30, 2017

SPERLING & SLATER, P.C.

14
15 

16 Scott F. Hessel
17 Thomas D. Brooks
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21 Mark A. Hutchison
22 Todd L. Moody
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24 *Attorneys for Plaintiff Michael A. Tricarichi*
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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of May, 2017, I caused to be emailed and mailed to the counsel of record listed below a copy of the foregoing Plaintiff's Amended First Set of Requests for Production of Documents to Defendant Pricewaterhouse Coopers LLP.



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EXHIBIT 11

DECL

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Attorneys for Defendant
PricewaterhouseCoopers LLP

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI,

Plaintiff,

vs.

PRICEWATERHOUSECOOPERS LLP,

Defendant.

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

**DECLARATION OF ALEXANDRA
GENORD, ESQ. IN SUPPORT OF
PRICEWATERHOUSECOOPERS LLP'S
OPPOSITION TO MICHAEL
TRICARICHI'S NRCP 60(B) MOTION FOR
RECONSIDERATION**

**DECLARATION OF ALEXANDRA GENORD, ESQ. IN SUPPORT OF
PRICEWATERHOUSECOOPERS LLP'S OPPOSITION TO MICHAEL TRICARICHI'S
NRCP 60(B) MOTION FOR RECONSIDERATION**

STATE OF ILLINOIS)
) ss.
COOK COUNTY)

Alexandra Genord, Esq., the declarant, deposes and says as follows:

1. I am an attorney with the law firm Bartlit Beck LLP, counsel for PwC in this lawsuit. I have personal knowledge of all the matters stated below and would competently be able to testify to them if required to do so.

2. I make this declaration in support of PwC's Opposition to Michael Tricarichi's NRCP 60(b) Motion for Reconsideration.

3. This Opposition is made in good faith.

4. Attached as **Exhibit 1** to the Opposition is a true and correct copy of a January 17, 2018 letter regarding discovery in this case from Winston Hsiao, prior counsel for PwC, to Thomas Brooks, counsel for Michael Tricarichi.

5. Attached as **Exhibit 2** to the Opposition is a true and correct copy of a December 21, 2017 letter regarding discovery in this case from Peter Morrison, prior counsel for PwC, to Scott Hessel, counsel for Michael Tricarichi.

6. Attached as **Exhibit 3** to the Opposition is a true and correct copy of a March 31, 2018 production email from Winston Hsiao, prior counsel for PwC, to Thomas Brooks, counsel for Michael Tricarichi.

7. Attached as **Exhibit 4** to the Opposition is a true and correct copy of the July 12, 2023 Order Denying Plaintiffs' Motion to Compel Production of Documents Withheld by PwC on Privilege Grounds, Or In the Alternative, For *In Camera* Review, in *Marshall v. PricewaterhouseCoopers LLP*, Case No. 17CV11907, in Multnomah County Circuit Court.

8. Attached as **Exhibit 5** to the Opposition is a true and correct copy of the January 8, 2019 Stipulated Protective Order in *Marshall v. PricewaterhouseCoopers LLP*, Case No. 17CV11907, in Multnomah County Circuit Court.

1 9. Attached as **Exhibit 6** to the Opposition is a true and correct copy of the Plaintiffs'
2 June 20, 2023 UTCR 6.030 Motion to Continue Trial Date Pending Supreme Court Decision on
3 Schwabe Appeal in *Marshall v. PricewaterhouseCoopers LLP*, Case No. 17CV11907, in
4 Multnomah County Circuit Court.

5 10. Attached as **Exhibit 7** to the Opposition is an excerpt of Michael Weber's August
6 3, 2023 trial testimony in *Marshall v. PricewaterhouseCoopers LLP*, Case No. 17CV11907, in
7 Multnomah County Circuit Court.

8 11. Attached as **Exhibit 8** to the Opposition is a true and correct copy of
9 PricewaterhouseCoopers LLP Policy for Retention of Firm Documents effective December 2003.

10 12. Attached as **Exhibit 9** to the Opposition is a true and correct copy of the Plaintiff's
11 First Set of Interrogatories to Defendant PricewaterhouseCoopers LLP, served in this case on May
12 30, 2017.

13 13. Attached as **Exhibit 10** to the Opposition is a true and correct copy of the Plaintiff's
14 Amended First Set of Requests For Production of Documents to Defendant
15 PricewaterhouseCoopers LLP, served in this case on May 30, 2017.

16 14. After plaintiff Michael Tricarichi filed the instant Rule 60(b) motion, PwC brought
17 its Relativity database back online.

18 15. I reviewed the Relativity database and determined that PwC collected a total of
19 248,567 documents from Michael Weber and Gary Cesnik, collectively, for purposes of this
20 litigation. I searched those files by date and with certain search terms and phrases that appear in
21 the Wow! email thread. Neither custodian had a copy of the Wow! email in their files.

22 16. As such, PwC's search based on the parties' agreed-on custodial search parameters
23 (described in Winston Hsiao's August 23, 2017 production transmittal email) could not have
24 located a copy of the document to be reviewed for production.

25 17. Additionally, I confirmed through various searches that the February 14, 2003
26 Wow! email thread was not collected from any of the other Tricarichi custodians in the Relativity
27 database.
28

1 18. In the Marshall litigation, the February 14, 2003 Wow! email thread was collected
2 from Bill Galanis's files. It was first processed in the Marshall litigation in March 2019, coded
3 and placed on PwC's privilege log in June 2019, and produced by PwC's current counsel in
4 redacted form on February 3, 2023.

5 19. PwC put a litigation hold in place on February 1, 2011, for documents relating to
6 Michael Tricarichi's 2003 sale of Westside Cellular.

7 20. PwC put a litigation hold in place on December 22, 2010 for documents relating to
8 the Marshalls' 2003 sale of Marshall Associated Contractors, Inc. Gary Cesnik and Michael
9 Weber were subject to the litigation hold relating to the Marshalls' MAC stock sale.

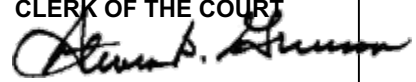
10
11 Pursuant to N.R.S. 53.045, I declare under penalty of perjury under the law of the State
12 of Nevada that the foregoing is true and correct.

13
14 Executed on September 19, 2023

15 In Cook County, Illinois

16
17
18 /s/Alexandra Genord

19 Alexandra Genord
20
21
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1 **NOAS**

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13 Email: shessel@sperling-law.com

11 *Attorneys for Plaintiff Michael Tricarichi*

12
13 DISTRICT COURT
14 CLARK COUNTY, NEVADA

15 MICHAEL A. TRICARICHI,	)	CASE NO. A-16-735910-B
	)	DEPT NO. XXXI
16 Plaintiff,	)	
	)	PLAINTIFF'S NOTICE OF
17 v.	)	APPEAL
	)	
18 PRICEWATERHOUSECOOPERS LLP,	)	
	)	
19 Defendant.	)	
	)	
20 _____	)	

21 Notice is hereby given that Plaintiff Michael Tricarichi hereby appeals to the Supreme
22 Court of Nevada from the special order after final judgment, awarding attorney's fees and costs,
23 entered in this action on August 25, 2023, and all other orders rendered appealable by the
24 foregoing.

25 Dated: September 26, 2023

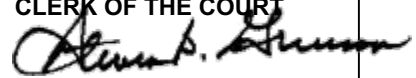
HUTCHISON & STEFFEN, PLLC

27 By: /s/ Ariel C. Johnson
Ariel C. Johnson (13357)
28 *Attorneys for Plaintiff Michael A. Tricarichi*

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ALL PARTIES ON THE E-SERVICE LIST

AA 001636



RPLY

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DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI,	)	CASE NO. A-16-735910-B
	)	DEPT NO. XXXI
Plaintiff,	)	
	)	PLAINTIFF'S REPLY IN
v.	)	SUPPORT OF HIS MOTION TO
	)	RECONSIDER PURSUANT TO
PRICEWATERHOUSECOOPERS LLP,	)	NRCP 60(b) BASED ON NEWLY
	)	DISCOVERED EVIDENCE
Defendant.	)	
	)	HEARING REQUESTED

The previously undiscovered and improperly withheld “Wow! email” and Risk Management Policy are “smoking gun” documents in every sense. It is shocking to anyone who reads them that a preeminent global accounting firm let its clients get anywhere near Midco transactions, or that it would have an explicit policy to never admit mistakes. Because PwC knew how incriminating the documents would be, it concealed them for years—including by (i) allowing deletion of the Wow! email in violation of PwC’s document-retention policies; (ii)

1 failing to produce the documents despite summonses from the IRS, discovery obligations, and
2 court orders; and (iii) in the *Marshall* litigation, hiding the Wow! email on PwC's privilege log
3 and, after being compelled to produce it, firing Skadden and leaving it to Bartlit Beck earlier this
4 year to produce the email and Risk Management Policy just five months before the *Marshall* trial.
5 Those two documents played a central role in the *Marshall* trial, which resulted in a jury verdict
6 for the Marshalls and judgment against PwC for more than \$60 million. Thus, while Tricarichi
7 acknowledges the heavy burden for Rule 60(b) relief, it is necessary here because of PwC's
8 improper (but long-successful) efforts to conceal highly incriminating evidence. Otherwise PwC
9 will be rewarded for its discovery evasions with a \$2 million-plus judgment.

11 Six years ago, the Court denied PwC's motion for summary judgment on Tricarichi's
12 2003-based negligence claims expressly because Tricarichi was entitled to NRCP 56(f) discovery
13 regarding "PwC's review, promotion or advocacy of, or other advice regarding transactions
14 similar to Mr. Tricarichi's transaction with Fortrend, and the reasons why PwC did not make
15 Mr. Tricarichi aware of those transactions." (Dkt. 100, 5/31/2017 MSJ Order, at 1.) Pursuant to
16 that discovery, PwC should have produced the Wow! email and PwC's Risk Management Policy,
17 both of which fall squarely within the scope of the Court's order and Tricarichi's document
18 requests. But PwC did not produce those documents, and at the hearing on PwC's renewed motion
19 for summary judgment, PwC capitalized on their absence. When the Court asked "[w]hy would
20 there not be factual issues as to the extent of the notice" provided by the IRS document requests
21 to Tricarichi, counsel for PwC responded: "Your Honor, I would say first off this is as good as it
22 gets, because they've had 56(f) discovery on this issue, and it's closed." (Dkt. 116, 9/24/2018
23 MSJ Tr. at 18:2-9.)

26 That assertion was false. PwC failed to produce the Wow! email and Risk Management
27 Policy, and those documents go to the heart of the ordered 56(f) discovery. The Wow! email
28 shows that, even before Tricarichi hired PwC to advise on the Midco transaction with Fortrend,

1 PwC knew the “basic” Midco transaction was so “risky” that it “probably” would “blow[] up at
2 the IRS” and expose clients engaging in such transactions to substantial liability for Fortrend’s
3 “tax evasion.” (Mot. Ex. 2.) PwC concealed that knowledge from Tricarichi and advised—
4 contrary to what it knew—that the proposed transaction would be respected for tax purposes and
5 that Tricarichi would not be subject to personal liability for Westside’s taxes. (Ex. 1, Hessel
6 Reply Decl. ¶ 3.)

7 PwC obstructed the discovery process and deprived Tricarichi—and every level of the
8 Nevada courts—of critical evidence of what PwC’s national office knew but concealed. At
9 minimum, the evidence was sufficient to raise material questions of fact precluding summary
10 judgment on Tricarichi’s 2003 claims. It also would have allowed Tricarichi to refute the jury
11 waiver/damage limitation clause as fraudulently induced. It goes to the core of PwC’s “we did not
12 know our advice was wrong” defense to Tricarichi’s 2008 claims. And it destroys any basis for
13 PwC to argue, with respect to its request for attorney’s fees and costs, that it was acting in “good
14 faith,” because its \$50,000 offer of judgment was made while PwC continued to conceal highly
15 relevant evidence.
16

17 PwC seeks to minimize the Wow! email as an off-the-cuff communication about a
18 different Midco transaction. (PwC Br. at 7.) And PwC argues that it “did not commit any
19 discovery violations with respect to these two documents” and that the documents would not have
20 affected the Court’s ruling. (*Id.* at 2–3, 13–24.) Alternatively, PwC argues that the Court should
21 ignore the wrongfully withheld documents on the ground that Tricarichi’s Rule 60(b) motion is
22 untimely. (*Id.* at 2, 11–13.)
23

24 None of PwC’s arguments has merit. The unfiltered nature of the Wow! email makes the
25 email *more reliable*, not less, and another court already found that PwC committed discovery
26 violations with respect to the two documents PwC wrongly withheld—sanctioning PwC at trial
27 by instructing the jury that the Wow! email’s author, Michael Weber, violated PwC’s retention
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1 policies by regularly and improperly deleting his sent and received emails. In this case, PwC
2 represents to the Court that it performed agreed searches on the files of Weber and a recipient of
3 the Wow! email. (PwC's Br. at 2–5, 13–15.) Yet even now, neither PwC nor its current counsel
4 verifies that reasonable searches would not have located or recovered the Wow! email or other
5 related communications. Those documents (which should have been produced in this case in
6 2017) at least raise questions of fact that could not have been resolved at summary judgment. Nor
7 can PwC avoid Tricarichi's request for relief under Rule 60(b) by arguing that Tricarichi should
8 have filed his motion sooner. Notably, PwC did not produce the documents even in the *Marshall*
9 case until three months after the bench trial and the week before this Court issued its findings of
10 fact. Tricarichi's motion—filed two weeks after the documents were finally made available to
11 him—is timely.

13 Tricarichi respectfully asks the Court to grant his motion for relief under Rule 60(b).

14 **I. Relief under NRCP 60(b)(2) is warranted because the two PwC documents show**
15 **what PwC knew and concealed from Tricarichi.**

16 PwC argues that the two documents it failed to produce are not as damning as they seem.
17 (PwC's Br. at 6–10, 19–24.) But on summary judgment the Court would not have accepted PwC's
18 nothing-to-see-here characterization of the documents. Rather, the Court would have drawn all
19 reasonable inferences in Tricarichi's favor. *See Price v. Blaine Kern Artista, Inc.*, 111 Nev. 515,
20 518 (1995) (explaining that record is viewed “in a light most favorable to the nonmoving party”).
21 And PwC's characterization is objectively baseless in any event, particularly in the face of the
22 Marshalls' \$60 million jury verdict against PwC in a case that centered on the two very same
23 documents that PwC improperly withheld here. While PwC dismisses the Wow! email as an
24 irrelevant “off-the-cuff reaction” about a different transaction (PwC's Br. at 7), a straightforward
25 reading of the Wow! email strongly supports a contrary inference—i.e., the email not only is
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1 relevant, but its “off-the-cuff,” panicked quality from a senior, buttoned-down PwC partner makes
2 it especially reliable evidence of what PwC knew about Midco transactions.

3 The Wow! email was written by Michael Weber, who was the co-head of PwC’s Portland
4 office that advised on the *Marshall* Midco transaction in late 2002 and early 2003. As the email
5 makes clear, Weber and his Portland colleague were not experts with respect to Midco
6 transactions, but they had been advising the Marshalls based on the premise that PwC did Midco
7 transactions “all the time” and that the basic transaction was not risky to transferee taxpayers.
8 (Mot. Ex. 2.) As the *Marshall* transaction approached closing in March 2003, Weber’s Portland
9 colleague belatedly sought feedback from PwC’s National Office. **Eleven minutes** after PwC’s
10 National Office received the draft 57-page stock-purchase agreement, National Risk Management
11 lead partner Dan Mendelson, after conferring with his National Office colleagues, balked at the
12 Midco transaction itself and made clear that PwC should not advise on such transactions because
13 “the basic transaction was risky.” (Mot. Ex. 2.) And after receiving Weber’s unfiltered response,
14 Mendelson realized that PwC’s Office of General Counsel needed to be involved and forwarded
15 the email chain to the senior tax attorney in PwC’s Office of General Counsel. (*Id.*)
16

17
18 After the Wow! email chain was forwarded, there is not a single written communication
19 pertaining to the issues addressed in the email chain (or, at least, none was ever produced). The
20 National Office apparently attempted to be discreet about what they put into writing because, as
21 we now know from the Risk Management Policy that PwC also improperly withheld, PwC had a
22 policy that flatly prohibited “admit[ting] liability, shortcomings, or defects in [its] services.” (Mot.
23 Ex. 3.) But Weber’s panicked, unfiltered “Wow!” response put into writing what PwC actually
24 knew: the basic Midco transaction posed a substantial risk to PwC’s clients. (Mot. Ex. 2.) This
25 evidence is more than sufficient to raise a question of fact that would have precluded summary
26 judgment.
27
28

1 PwC cannot get around this factual question by arguing that the Court already accounted
2 for PwC giving different advice to Tricarichi than it gave to the Marshalls. (PwC’s Br. at 21.) The
3 Court *did not know* PwC concealed (from Tricarichi and from the Marshalls) that the basic Midco
4 transaction was not just reportable but would be, practically speaking, financially ruinous.
5 Without the benefit of that concealed evidence, the Court concluded that there were enough
6 differences between the particular Midco transactions to potentially permit different advice from
7 PwC with respect to those transactions. (Dkt. 416, 2/9/2023 Findings of Fact and Conclusions of
8 Law and Judgment, ¶ 39.) But the Wow! email cuts through any differences between the Midco
9 transactions and shows that PwC’s National Office experts knew, just eleven minutes after
10 receiving the draft stock-purchase agreement, that the “basic transaction” posed substantial risk
11 to its transferee clients—so much so that Weber immediately documented his concerns.

13 PwC can no longer argue, as it did at summary judgment, that the IRS document requests
14 in 2008 put Tricarichi on notice about PwC’s malpractice. (PwC’s Br. at 20–21.) Again, the
15 documents improperly withheld by PwC provide critical context that previously was unknown to
16 Tricarichi and the Court. At summary judgment, when the Court questioned “[w]hy would there
17 not be factual issues as to the extent of the notice” provided by the IRS document requests, PwC’s
18 first response was to emphasize that Tricarichi already “had 56(f) discovery on this issue, and it’s
19 closed.” (Dkt. 116, at 18:2–9.) But we now know what PwC concealed. PwC knew from the
20 beginning that the basic transaction was risky, that it probably would blow up at the IRS, and that
21 Fortrend would engage in “tax evasion” rendering Tricarichi liable for Westside’s unpaid taxes.
22 PwC concealed that knowledge from Tricarichi—both by failing to tell him what it knew and by
23 advising him, contrary to what it knew, that he should do the transaction. (Ex. 2, Hessel Reply
24 Decl. ¶ 4, at 9.)

27 Thus, when Tricarichi received document requests from the IRS in 2008, those requests
28 did not reasonably notify him that PwC’s advice was wrong. The IRS investigation and audit of

1 Westside was consistent with how PwC advised Tricarichi—i.e., while the Westside transaction
2 entailed “some risk,” Tricarichi ultimately “should have no successor/transferee liability for any
3 corporate level tax” and the downside is “still better than not doing deal.” (Ex. 1 at 3.) In other
4 words, Tricarichi did not need to worry if the IRS investigated the transaction, because any issues
5 would not be Tricarichi’s problem (but Fortrend’s) and PwC “would still do the transaction 10
6 times out of 10.” (Ex. 2 at 9.) The bottom line is that Tricarichi had no idea PwC concealed its
7 knowledge about the transaction’s risk and provided advice that PwC knew was wrong. Nothing
8 in the IRS document requests reasonably suggested that PwC had done so.

9
10 PwC argues that the firm “as a whole” did not know the Westside transaction was risky
11 because that transaction involved “a completely different team of PwC professionals” who
12 “closely analyzed” the transaction and “concluded at a more likely than not level of confidence
13 that the transaction did not need to be reported to the IRS.” (PwC’s Br. at 8.) But PwC cannot
14 dodge liability on grounds that the professionals it assigned to Westside were ignorant about what
15 PwC’s National Office knew. It was PwC’s responsibility to ensure that its Westside team had
16 the knowledge necessary to competently advise Tricarichi, and at summary judgment, PwC
17 maintained that its Westside team had the requisite knowledge. Indeed, the Court credited PwC’s
18 assertion that one of the Westside team members, Timothy Lohnes, had the same expertise as the
19 subject matter experts in the national office. (Dkt. 416 ¶ 126.)

21 Not only did Lohnes purportedly have the requisite expertise, but he was in the same office
22 (just down the hall from) the members of the National Office who received the Wow! email—
23 including Dan Mendelson (the risk management partner who triggered the Wow! email when he
24 balked at the *Marshall* transaction) and Bill Galanis (a partner with whom Mendelson consulted
25 before balking at the *Marshall* transaction). Although Mendelson was the partner specifically
26 designated within PwC to handle questions regarding listed transactions, nothing in the files PwC
27 produced suggests that he was ever consulted about the Westside transaction. Likewise, while it
28

1 appears that Bill Galanis was consulted (Ex. 2 at 7), PwC did not produce any records reflecting
2 the substance of work (if any) that Galanis performed.

3 **II. PwC cannot foreclose relief under NRCP 60(b) by arguing that it did not commit any**
4 **discovery violations.**

5 PwC asserts that it “did not commit any discovery violations with respect to these two
6 documents.” (PwC’s Br. at 2.) But that assertion is both irrelevant and false, and none of PwC’s
7 attempts to excuse its misconduct has merit.

8 **A. Relief under NRCP 60(b) is warranted regardless of PwC’s denial that it**
9 **committed any misconduct.**

10 PwC did not produce the Wow! email or the Risk Management Policy, even though both
11 documents were clearly encompassed by Tricarichi’s discovery requests. Tricarichi obtained
12 those documents in August of this year when they were made public in the *Marshall* trial against
13 PwC, and he promptly moved for relief under NRCP 60(b) two weeks later. PwC’s assertion that
14 it did not commit any discovery violations does not affect Tricarichi’s entitlement to relief.

15 **B. PwC’s denial of any misconduct is demonstrably false and already has led a**
16 **court to sanction PwC.**

17 There is no question PwC committed discovery violations. As the court in the *Marshall*
18 litigation explained with respect to the Wow! email, “these key emails ... were in fact being
19 improperly withheld” and the Marshalls “didn’t have those [emails] at critical procedural points
20 in this litigation.” (Mot. Ex. 5 at 2584:16–21.) The court found that “the failure to produce [the
21 Wow! email and related email chain] was in fact **a violation** of [the court’s] order to compel from
22 April of 2019.” (*Id.* at 2584:24–2585:1 (emphasis added).) Because of PwC’s violation, the Court
23 sanctioned PwC by instructing the jury about PwC’s discovery misconduct.

24 PwC cannot pretend the *Marshall* court’s finding and sanction never happened,
25 particularly since PwC’s conduct in this case is intertwined with its violations in the *Marshall*
26 litigation (and its lawyers managing the discovery process in both cases were the same). Although
27
28

1 Weber wrote down what PwC knew—and candidly admitted that PwC may have given its clients
2 the wrong advice—no further communications on the subject were ever produced by PwC. Nor
3 was the Wow! email or its substance ever communicated to the Marshalls or the Marshalls’
4 attorneys at the time of the transaction, even though Weber himself wrote that PwC needed to
5 convey the National Office’s advice to the Marshalls’ attorneys. (Mot. Ex. 2.)

6 Rather than conveying the substance of Wow! email to its clients or its clients’ lawyers,
7 PwC concealed it and took steps to prevent the Wow! email from ever being discovered. Most
8 copies of Wow! email were apparently deleted from PwC’s servers, including from the files of
9 Weber himself and of several other key recipients. That spoliation violated PwC’s own document-
10 retention policies, which in the ordinary course required preserving the Wow! email until at least
11 2010. (PwC Br. Ex. 8 ¶ 1 (specifying that general retention period for “all Professional Records
12 is the Current Period ... plus seven years”).) And because PwC knew the transaction would
13 “probably” blow up at the IRS, PwC’s retention policies required a litigation hold to preserve the
14 Wow! email indefinitely. (*Id.*)

15
16 As for the one copy of the Wow! email that we know survived, PwC failed to produce it
17 until February 2023, when it finally was produced under the *Marshall* protective order. PwC’s
18 failure to produce the email violated PwC’s discovery obligations in at least four cases:

19
20 1. In 2007, the IRS sent a summons to PwC for, among other things, “[a]ll documents
21 that discuss, describe, effectuate or otherwise relate to” the *Marshall* transaction. (Ex. 3, Hessel
22 Reply Decl. ¶ 5, Request 1.) The IRS explicitly directed that, to the extent PwC did not produce
23 a responsive document on account of spoliation or privilege, PwC was obligated to identify the
24 document not produced. (Ex. 3, Instructions.) But PwC neither produced the Wow! email nor
25 complied with the directive to identify unproduced documents or put it on a privilege log. Instead,
26 on the eve of the Marshalls’ first tax trial, PwC submitted a false (or at least deceptive) declaration,
27
28

1 under penalty of perjury, that all of the Marshalls' files had been produced. (Ex. 4, Hessell Reply
2 Decl. ¶ 6.)

3 2. In 2008, as part of the Westside audit, the IRS sent a summons to PwC for, among
4 other things, “[a]ll documents and communications by, among, or pertaining to the Relevant
5 Parties, that plan, debate, analyze, discuss, describe, effectuate or otherwise relate to [defined]
6 transactions and/or activities.” (Ex. 5, Hessell Reply Decl. ¶ 7, Request 4.) The IRS defined
7 “Relevant Parties” to include Fortrend (Ex. 5, Definition 3)—a name that appears in the subject
8 of the Wow! email. The IRS also defined the “transactions and/or activities” to include the
9 Westside transaction and “all similar transactions,” meaning “each and every transaction that has
10 some, though not all, features in common with the described transaction.” (Ex. 5, Definition 9.)
11 And, again, the IRS explicitly directed that, to the extent PwC did not produce a responsive
12 document on account of spoliation or privilege, PwC was obligated to identify the document not
13 produced. (Ex. 5, Instructions.) But PwC neither produced the Wow! email nor complied with the
14 directive to identify unproduced documents.
15

16 Notably, in 2009 (at Tricarichi's request), Stovsky purported to send to Tricarichi all
17 documents responsive to the IRS summons. (Ex. 6, Hessell Reply Decl. ¶ 8.)
18

19 3. In 2017, Tricarichi served NRCP 56(f) document requests to PwC that encompassed
20 documents relating to the *Marshall* transaction. (PwC Br. Ex. 10.) But PwC failed to produce the
21 Wow! email, even though Weber and one recipient of the Wow! email, Gary Cesnik, were
22 designated custodians and the word “Fortrend” (which appears in the Wow! email's subject line)
23 was an agreed search term.
24

25 4. In 2018, the Marshalls served document requests on PwC. As in this case, the scope
26 of the document requests encompassed the Wow! email, but PwC failed to produce it. Instead,
27 while represented by the same Skadden attorneys that previously represented PwC in this case,
28 PwC wrongly withheld the email as “privileged” and hid the document on its privilege log under

1 an inaccurate description. This ultimately led to the *Marshall* court’s sanction of PwC at trial for
2 violating its discovery obligations. (Mot. Ex. 5 at 2582–85.)

3 **C. None of PwC’s attempts to excuse its misconduct has merit.**

4 With respect to the Wow! email, PwC asserts (without verification under oath) that its
5 document searches in 2017 and 2018 did not uncover the email because the relevant custodians
6 (i.e., Weber and Cesnik) already deleted it. But PwC cannot excuse concealment of the Wow!
7 email by asserting that its partners deleted the email before the searches were run. Under PwC’s
8 own document-retention policies, “[a]ll documents (including those kept in an electronic medium)
9 created, sent or received by the Firm that are necessary or appropriate to record, support or
10 otherwise form the basis of the Firm’s professional work product or administrative functions”
11 were required to “be retained.” (PwC’s Br. Ex 8, ¶ 1.) In addition, PwC was required to “retain
12 all documents (not just working papers) relating to its work that ... is reasonably anticipated to
13 become the subject of a lawsuit, investigation or subpoena.” (*Id.*)

14
15 The Wow! email falls squarely within both retention requirements. It is the only document
16 PwC ever produced that records the advice of PwC’s National Office about a Midco transaction
17 with Fortrend. For that reason alone, the Wow! email had to be retained. Moreover, it is the only
18 document PwC ever produced that explains that PwC may have given its clients the wrong advice
19 and that, if its clients followed that wrong advice, their transaction “probably” would “blow[] up
20 at the IRS” and lead to personal liability. (Hessell Reply Decl. Ex. 2.) Thus, at minimum, PwC
21 reasonably anticipated that its “wrong” advice would result in an investigation or subpoena. For
22 that additional reason, all copies of the Wow! email had to be retained.
23

24
25 Even setting aside issues of document preservation and spoliation, PwC received IRS
26 summonses a full decade before the NRCP 56(f) discovery in 2017 and 2018. As addressed above,
27 PwC’s productions to the IRS should have included the copy of the Wow! email that survived.
28 Producing the email would have been detrimental to PwC, including with respect to its clients’

1 then-unknown malpractice claims against the firm. At minimum, the Wow! email would have
2 been available to clients like Tricarichi regardless of the spoliation that PwC caused or permitted
3 to occur. But PwC did not comply with the IRS summonses—neither producing the Wow! email
4 nor disclosing that it would not do so. PwC offers no plausible justification for its noncompliance.

5 Moreover, PwC’s attorneys at Skadden knew about the Wow! email, because in response
6 to the Marshalls’ document requests in 2018, they improperly designated the Wow! email as
7 “privileged” and hid the email on a privilege log. Yet despite that knowledge, PwC neither
8 included the Wow! email in its 56(f) productions nor made a supplemental production containing
9 it—not even after PwC’s current attorneys at Bartlit Beck took over the representation of PwC in
10 both cases and, after challenges by the Marshalls’ counsel, reviewed and finally produced the
11 Wow! email in February 2023 subject to the *Marshall* protective order.

13 PwC misleadingly highlights that, during a meet-and-confer about the 56(f) discovery,
14 Tricarichi’s counsel said he did not need PwC to produce documents regarding the *Marshall*
15 transaction. (PwC’s Br. at 4, 15.) Not only is the subject matter of the Wow! email not limited to
16 the *Marshall* transaction, because it goes to the dangerous nature of Midco transactions generally,
17 but the comment was based on the obvious presumption that PwC complied with its discovery
18 obligations to the Marshalls. It provides no basis for excusing PwC’s failure produce (or
19 supplement its production with) the Wow! email.

21 With respect to the Risk Management Policy, PwC cannot explain why it failed to produce
22 the document despite representing in August 2017 that it produced “documents related to any
23 internal policies or guidelines regarding on-going communication with a client after PwC’s
24 services had been rendered concerning the client’s engagement.” (PwC’s Br. at 16.) Instead, PwC
25 plays word games—saying that the Risk Management Policy “is *not itself a policy*, but instead a
26 risk management *tool* that *pointed* PwC practitioners to *ARMOR*, the *Firm’s policy repository*,
27 and specifically *to a policy* ... for ‘*detailed guidance* on ... troublesome practice matters,’ and
28

1 that “*provides* practitioners with a *high-level overview* of the steps they should follow if a client
2 brings (or threatens) a claim against the Firm for deficiencies in its services.” (PwC’s Br. at 17
3 (*italics added*)). But PwC may call the document whatever it likes. Call the document a *policy*, or
4 call it a *tool that points to a policy* in PwC’s policy repository while providing a high-level
5 overview. Either way, it is “related to [PwC’s] internal policies and guidelines regarding on-going
6 communications with a client.” It should have been produced.

7 PwC argues alternatively that its representation about what it produced in 2017
8 encompassed only documents supporting Tricarichi’s continuing-representation argument.
9 (PwC’s Br. at 15–18.) In other words, while the Risk Management Policy plainly relates to PwC’s
10 policies regarding “on-going communication with a client after PwC’s services had been
11 rendered,” PwC asserts that the document was properly withheld because the argument it supports
12 is different than the continuing-representation argument. But the scope of the 56(f) discovery and
13 what PwC agreed to produce was in no way confined to that argument. The Court explicitly
14 permitted discovery (among other things) about “the reasons why PwC did not make
15 Mr. Tricarichi aware of those transactions [similar to Mr. Tricarichi’s transaction with Fortrend].”
16 (Dkt. 100, at 1.) Nothing in Tricarichi’s document requests narrowed the discovery’s scope, much
17 less suggested PwC could withhold documents relevant to arguments other than a continuing-
18 representation argument. To the contrary, Tricarichi specifically asked for “[a]ny policies,
19 procedures, internal guidance, and/or directives ... with respect to communications with clients
20 who previously participated in a Midco Transaction or other Listed Transaction.” (PwC’s Br.
21 Ex. 10, Request 3.) That request clearly encompasses documents like the Risk Management
22 Policy.

23 In short, the conclusion reached by the court in the *Marshall* litigation should be reached
24 here. PwC should have produced the Wow! email and Risk Management Policy, and its failure to
25 do so violated its discovery obligations.

1 **III. Tricarichi's motion for relief under Rule 60(b) is timely.**

2 PwC's remaining argument is that Tricarichi's motion should be denied as untimely. PwC
3 concedes that, when it finally produced the Wow! email and Risk Management Policy in the
4 *Marshall* litigation, it designated the documents as confidential. Thus, under the protective order
5 entered by the court in the *Marshall* litigation, those documents could not be disclosed to
6 Tricarichi or this Court. But PwC argues that, because one of Tricarichi's attorneys also represents
7 the Marshalls in their litigation against PwC, his knowledge that PwC finally produced the
8 documents in January and February of 2023 should be imputed to Tricarichi. According to PwC,
9 Tricarichi's attorney should have shown more "diligence" after PwC finally produced those
10 documents under the *Marshall* protective order to make them available in this case.
11

12 The chutzpah of PwC is remarkable. The Wow! email and Risk Management Policy were
13 not available in this case *because PwC failed to produce them*. It should have produced the
14 documents in this litigation in 2017, and it should have produced the Wow! email to the IRS a
15 decade before that. But PwC did not comply with its obligations. It did not produce the Wow!
16 email to the IRS or disclose to the IRS that the Wow! email was not produced. It did not produce
17 the documents to Tricarichi in 2017. And when finally producing the documents under the
18 *Marshall* protective order (after also failing in that litigation to produce them and, instead, hiding
19 the Wow! email on a privilege log), PwC did not supplement its production in this case. PwC is
20 in no position to accuse Tricarichi or his lawyers of failing to act with diligence in forcing PwC
21 to comply with its obligations.
22

23 Nor is there any merit to PwC's accusation. While PwC invokes general agency principles
24 as the basis of its argument, PwC cites no authority for imputing knowledge in circumstances like
25 these—when Tricarichi's attorney learned about the documents in the *Marshall* litigation and was
26 bound by a court order to *not* disclose the documents to Tricarichi. *See* Restatement (Third) of
27 Law Governing Lawyers § 28(1) (2023) (explaining that lawyer's knowledge is not imputed when
28

1 “the lawyer’s legal duties preclude disclosure of the information to the client”); Deborah A.
2 DeMott, *When Is a Principle Charged With an Agent’s Knowledge?*, 13 DUKE J. COMP. & INT’L L.
3 291, 304–05 (2003) (“[A] lawyer’s knowledge is not imputed to a client when communicating the
4 knowledge would breach the lawyer’s duty to another client.”). In addition, PwC fails to suggest
5 any plausible actions that Tricarichi’s attorney could have taken to make PwC’s documents
6 available any earlier in this litigation. He was forbidden from disclosing the documents to
7 Tricarichi or this Court, and because the Marshalls had no reason or obligation to litigate PwC’s
8 assertion of confidentiality under the *Marshall* protective order, he was not free as the Marshalls’
9 attorney to nonetheless litigate PwC’s assertion of confidentiality. And while PwC suggests that
10 Tricarichi’s attorney could have asked the Court to “extend the Rule 59(b) deadline until the
11 confidentiality issue was resolved” (PwC’s Br. at 13), that suggestion is baseless. Even setting
12 aside that the relief sought would have been the same under either rule, Rule 59 is explicit that
13 “the 28-day time periods specified in this rule cannot be extended under Rule 6(b).” NRCP 59(f).
14

15 In short, because Tricarichi filed his motion under Rule 60(b) just two weeks after the
16 improperly withheld documents were made available to him, the motion is timely and should be
17 granted. *See United States v. Walus*, 616 F.2d 283, 285 (7th Cir. 1980) (concluding “in light of
18 the strength of the new evidence,” refusing to grant relief “would be to accept an evil far greater
19 than waste of the court’s or litigant’s time”).
20

21 CONCLUSION

22 The Wow! email and Risk Management Policy are material, noncumulative evidence that
23 should have been produced by PwC in 2017 and likely would have changed the outcome of this
24 case because, at minimum, they raise material questions of fact regarding PwC’s advice and the
25 scope of any notice provided to Tricarichi when he received IRS document requests in 2008. Thus,
26 while Tricarichi acknowledges the additional time and effort that granting Rule 60(b) relief will
27 entail for the Court, he respectfully submits that PwC’s conduct has made that relief unavoidable.
28

1 Indeed, the significance of the documents that PwC withheld cannot be overstated. The
2 jury trial in the *Marshall* litigation was centered on those documents, which led to a jury verdict
3 for more than \$60 million against PwC. In this case, the documents likely would have changed
4 how this Court ruled at various points in the litigation—including in its ruling summary judgment;
5 in its findings of fact and conclusions of law after the bench trial; and in its award of attorney’s
6 fees and costs. In addition, Tricarichi would have had the opportunity to press PwC for additional
7 discovery surrounding the Wow! email and related communications—including by seeking
8 assurance from PwC that it had taken all reasonable steps to search for and recover such
9 communications. Tricarichi also would have had an opportunity to use the documents while
10 deposing PwC witnesses, and he could have sought leave to allege a claim of fraudulent
11 concealment.¹

13 Relief under Rule 60(b) is warranted for all these reasons. At minimum, Tricarichi should
14 be permitted to rebrief his opposition to PwC’s motion for summary judgment on his 2003 claims
15 in light of the previously concealed evidence. Tricarichi thus respectfully asks the Court to grant
16 his motion and communicate the Court’s intentions to the Nevada Supreme Court.

18 Dated: October 25, 2023

SPERLING & SLATER, LLC

19 By: /s/ Scott F. Hessel
Scott F. Hessel (*Pro Hac Vice*)
55 West Monroe Street, 32nd Floor
Chicago, IL 60603

21 HUTCHISON & STEFFEN, LLC
Ariel C. Johnson
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145

24 *Attorneys for Plaintiff Michael A. Tricarichi*

25 ¹ Tricarichi would be able to allege a fraudulent-concealment claim. “To establish a prima facie case of fraudulent
26 concealment, a plaintiff must offer proof that satisfies five elements: (1) the defendant concealed or suppressed a
27 material fact; (2) the defendant was under a duty to disclose the fact to the plaintiff; (3) the defendant intentionally
28 concealed or suppressed the fact with the intent to defraud the plaintiff; that is, the defendant concealed or suppressed
the fact for the purpose of inducing the plaintiff to act differently than she would have if she had known the fact; (4)
the plaintiff was unaware of the fact and would have acted differently if she had known of the concealed or suppressed
fact; (5) and, as a result of the concealment or suppression of the fact, the plaintiff sustained damages.” *Dow Chemical*
Co. v. Mahlum, 114 Nev. 1148, 1485 (1998).

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ALL PARTIES ON THE E-SERVICE LIST

AA 001654

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EXHIBIT PAGE ONLY

EXHIBIT 1

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

PRICEWATERHOUSECOOPERS

Red comments are from Telecom on 8/14/03 w/ Lohrman Folger Tricarichi Stovsky

peril comments are from 2 p/c w/ some going by phone) Lohrman by phone + Mike Tricarichi + Lohrman

Memo

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

From: / Location: Richard P. Stovsky

Date: April 13, 2003 <update>

Subject: Potential transaction

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

Facts:

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

Post sale facts are consumer

- New shareholders borrow approximately \$36,000,000 and purchase 100% of the Westside shares outstanding from Michael Tricarichi ("Tricarichi"), the 100% shareholder. Westside's balance sheet consists of \$40,000,000 of cash (\$65,000,000 of cash from the legal verdict less bonus payments to employees of \$13,000,000 and attorney's fees of \$12,000,000), small accounts receivable, and minor furniture/fixtures/compute equipment (see attached).
- New shareholders contribute to Westside, in an Internal Revenue Code Section 351 transaction, high basis/low fair market value property (the assumption is that these are delinquent receivables)
- Westside is now in the business of purchasing "distressed/charged off" credit card debt from credit card issuers at pennies on the dollar, and collecting on this debt

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

*cut sufficient in to remain in the company to operate business
2ndly
6d to purchase
\$1.6m*

*all L-T
per Tricarichi*

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

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

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

Issues for discussion:

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

PRICEWATERHOUSECOOPERS

AMOUNT RECEIVED BY TRICARICHI: \$36,000,000

AMOUNT THAT TRICARICHI WOULD HAVE RECEIVED HAD HE NOT SOLD THE STOCK, BUT INSTEAD LIQUIDATED WESTSIDE:

WESTSIDE GROSS INCOME: \$65,000,000

LESS ATTORNEY'S FEES & BONUSES: (\$25,000,000)

TAXABLE INCOME: \$40,000,000

CORPORATE FEDERAL TAX RATE: 34%

FEDERAL TAX: \$13,600,000

AMOUNT AVAILABLE FOR LIQ. DIST.: \$26,400,000

COMPARE WITH ACTUAL PROCEEDS ⁶ \$34,000,000

AMOUNT RECHARACT. AS ORD. INC. ⁹ \$7,600,000

LOHNES AND STOVSKY POINTED OUT TO TRICARICHI THAT ONE ALTERNATIVE WOULD BE TO FILE THE 1040 WITH THIS ORDINARY INCOME ELEMENT, THEN IMMEDIATELY FILE A CLAIM FOR REFUND. HOWEVER, TRICARICHI INDICATED THAT HE WOULD NOT BE INCLINED TO DO SO, AND THAT THE STOCK SALE AGREEMENT WOULD PROBABLY PROHIBIT HIM FROM DOING SO. IN ADDITION, LOHNES CONCLUDED THAT ANY 269 ISSUES WOULD BE THE PURCHASER'S PROBLEM, NOT TRICARICHI'S. LOHNES ALSO STATED THAT THE DEDUCTION THE CORPORATION WAS TAKING FOR THE WRITE OFF OF THE HIGH BASIS/LOW VALUE PROPERTY CONTRIBUTED TO WESTSIDE (TO OFFSET THE TAXABLE INCOME IN WESTSIDE RELATIVE TO THE LEGAL VERDICT) WAS SUBJECT TO IRS CHALLENGE (THE IRS COULD PUSH THE DEDUCTION TO THE TIME PERIOD WHEN IT WAS IN THE HANDS OF THE CONTRIBUTING SHAREHOLDER). FURTHER, THE CHARACTER OF THAT LOSS, VS. THE CHARACTER OF THE TAXABLE INCOME FROM THE LEGAL VERDICT MAY NOT MATCH. HOWEVER, THIS IS NOT TRICARICHI'S CONCERN AS THE RESULT WOULD BE A CORPORATE TAX LIABILITY, NOT A SELLING SHAREHOLDER LIABILITY (AND, PER THE DISCUSSION BELOW, TRICARICHI HAS NOT SUCCESSOR/TRANSFERREE LIABILITY FOR WESTSIDE TAXES).

*Per Folkmann -
there is
some risk*

*2- stated that there
is not guarantee
50% Tricarichi
this*

*All sub.
remains
in
Corp.
of 269
is
counted*

*It was
would
apply to
anyone
low property
it would be
corp level*

*Folkmann
only time
for 5/14 is responsible
corp level tax
y of corp
making*

*Folkmann:
even if
this
losses
still held
then not
long deal
this was
again
discuss*

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

*Follows
concern*

*Final
conclusion
by WNTS
Not for
reporting*

3. Does Tricarichi have any liability for the federal income tax liability of Westside should the IRS challenge the write off of assets within Westside that is intended to offset the taxable income from the \$65,000,000 legal verdict (less the deductions for attorneys fees and bonuses) (assuming Westside does not have cash sufficient to cover the tax liability)? PER LOHNES AND DON ROCEN (OF WNTS), TRICARICHI SHOULD HAVE NO SUCCESSOR/TRANSFeree LIABILITY FOR ANY CORPORATE LEVEL TAX AS HE TOOK NOTHING OUT OF WESTSIDE. AT THE TIME TRICARICHI SOLD WESTSIDE, IT WAS A SOLVENT CORPORATION. TRICARICHI WAS NOT THE TRANSFeree OF ANY WESTSIDE ASSET. **ROCEN TO PROVIDE NOTES MESSAGE.**

*Follows
concern*

4. Is there any federal tax provision the would convert Tricarichi's long term capital gain into ordinary income (i.e. the Collapsible Corporation provisions, any other provision) **CALCULATION NEEDED. NOTE THAT SECTION 341 MAY BE REPEALED BY THE NEW TAX LAW. FURTHER, PER JIM BANKS, THE \$65,000,000 TAXABLE INCOME WAS RECOGNIZED (EVEN THOUGH IT WILL ULTIMATELY BE OFFSET WITH DEDUCTIONS SO THAT NO TAX WILL BE INCURRED).**

*341 was
repealed*

yes

5. Westside is planning to pay significant bonuses (total of \$13,000,000) to certain non-shareholder employees unrelated to Tricarichi. In particular, employee A will receive \$2,500,000 (regular compensation \$81,000), employee B will receive \$2,000,000 (regular compensation \$80,000), employee C will receive \$1,500,000 (regular compensation \$76,000). These bonuses are, presumably, for past services during the period in which Westside was in the litigation that yielded the \$65,000,000 verdict (when Westside could only afford to pay modest compensation). Will these bonuses be deductible? PER JIM CONNOR OF WNTS, THESE BONUSSES WILL BE DEDUCTIBLE SINCE THEY ARE PAID FOR COMPENSATORY REASONS.

*5 off follow
concern
- not family
- not gift
- not 100%
S14
no
unrelated
comp.
main*

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

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

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

*Note -
No
installment
sale will be used
for state tax
(to be reviewed)
per Roy Turk.*

45

Memo

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

From: / Location: Richard P. Stovsky

Date: April 13, 2003

Subject: Potential transaction

Facts:

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

New
324
453A

- Newco shareholders borrow approximately \$52,000,000 and purchase 100% of the Westside shares outstanding from Michael Tricarichi ("Tricarichi"), the 100% shareholder. Westside's balance sheet consists of \$60,000,000 cash, small accounts receivable, and minor furniture/fixtures/compute equipment.
- Newco shareholders contribute to Newco, in an Internal Revenue Code Section 351 transaction, high basis/low fair market value property (the assumption is that these are delinquent receivables)
- Newco is in the business of purchasing "charged off" credit card debt from credit card issuers at pennies on the dollar, and collecting on this debt
- The business purpose for the acquisition of Westside is based on Newco's need for cash to purchase the charged off credit card debt as commercial financing for such purchases is, apparently, difficult. Westside's cash and accounts receivable will provide such needed cash
- Newco writes off (apparently deductible for federal income tax purposes) some of the high basis/low fair market value property contributed by its shareholders. This deduction offsets the taxable income created within Westside upon the receipt of the

Memo

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

From: / Location: Richard P. Stovsky

Date: April 13, 2003

Subject: Potential transaction

Facts:

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

- Newco shareholders borrow approximately \$52,000,000 and purchase 100% of the Westside shares outstanding from Michael Tricarichi ("Tricarichi"), the 100% shareholder. Westside's balance sheet consists of \$60,000,000 cash, small accounts receivable, and minor furniture/fixtures/compute equipment.
- Newco shareholders contribute to Newco, in an Internal Revenue Code Section 351 transaction, high basis/low fair market value property (the assumption is that these are delinquent receivables)
- Newco is in the business of purchasing "charged off" credit card debt from credit card issuers at pennies on the dollar, and collecting on this debt
- The business purpose for the acquisition of Westside is based on Newco's need for cash to purchase the charged off credit card debt as commercial financing for such purchases is, apparently, difficult. Westside's cash and accounts receivable will provide such needed cash
- Newco writes off (apparently deductible for federal income tax purposes) some of the high basis/low fair market value property contributed by its shareholders. This deduction offsets the taxable income created within Westside upon the receipt of the

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

- Westside, now a charged off debt business utilizes "cost recovery tax accounting" which, apparently, results in tax deductions as a portion of the purchased credit card debt is collected
- The suggested result, from a federal tax perspective, is as follows:

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

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

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

Issues for discussion:

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

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

PWC-WS 0703

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

(3)

AA 001664
TRICAR-NV0046627

"fully attributable to state"?

-Defective liquidation
-M1010
Cleveland

PRICEWATERHOUSECOOPERS

M1010 using 2001-10
substantially similar
-broadly construed?

Lowder Lowder 258 Fsupp 193

Memo

pay at end
rate -
no understatement
1:54
pay 39.6 on 13

To / Location: Westside Cellular, Inc./Michael Tricarichi files / Cleveland BP Tower
From / Location: Richard P. Stovsky
Date: April 13, 2003
Subject: Potential transaction

• Fortran
• Mid coast
- no adverse
- show disclosure

Media then
- media for agent
- "X's not
Facts:

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

refund claim
6694 expense - no penalty
- punitive
- 1040x - Service agent
to pay -
examine
first

- Don't have
any "depreciation"
- Not trying to
re-establish corp
losses w/out tax
- willing buyer

- Newco shareholders borrow approximately \$52,000,000 and purchase 100% of the Westside shares outstanding from Michael Tricarichi ("Tricarichi"), the 100% shareholder. Westside's balance sheet consists of \$60,000,000 cash, small accounts receivable, and minor furniture/fixtures/compute equipment.
- Newco shareholders contribute to Newco, in an Internal Revenue Code Section 351 transaction, high basis/low fair market value property (the assumption is that these are delinquent receivables)
- Newco is in the business of purchasing "charged off" credit card debt from credit card issuers at pennies on the dollar, and collecting on this debt
- The business purpose for the acquisition of Westside is based on Newco's need for cash to purchase the charged off credit card debt as commercial financing for such purchases is, apparently, difficult. Westside's cash and accounts receivable will provide such needed cash
- Newco writes off (apparently deductible for federal income tax purposes) some of the high basis/low fair market value property contributed by its shareholders. This deduction offsets the taxable income created within Westside upon the receipt of the

Timber
Pattern

EXHIBIT 25-J
Docket No. 23630-12
Page 10 of 12

- Owner
- know
- attorney

PWC-WS 0714

AA 001665
TRICAR-NV0046628

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

West
cash
immediate

- Westside, now a charged off debt business utilizes "cost recovery tax accounting" which, apparently, results in tax deductions as a portion of the purchased credit card debt is collected
- The suggested result, from a federal tax perspective, is as follows:

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

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

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

Issues for discussion:

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

cost recovery tax Acctg

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

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

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

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EXHIBIT PAGE ONLY

EXHIBIT 2

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

Richard P. Stovs

Tricarichi

PricewaterhouseCoopers LLP
BP Tower
200 Public Square, 27th Floor
Cleveland, OH 44114-2301
Telephone 216 875 3111

~~269 - lowest use of
losses~~

~~Other penalty - program
penalty.~~

~~1 - 5 Kathy Bureau~~

~~We have Sub. Authority.~~

Notes:

341

note in 453A

PRICEWATERHOUSECOOPERS

Exhibit #

Stovsky 42

09/01/2020 - MP

PwC200002(Tricarichi)

4/8/03

Tricarichi

WNFS : Jeff Thronson

1. Acquire buy stock & a discount

Feldman - Hahn Loeber - Flat Coast

Zurich - Fortuna

concerned what
Hahn would be
liquidated somewhat
- wanted a ref. the
allot remained
existence

Harsh & AON - main the top exposure

2. Relocate to Nevada bought here no intent (move for one
year then move out)
best of fortune
3. Derivability of business to non-related individuals
4. PNC vs. AET (investment company with interplay)

Michael A Tricarichi

Westside Cellular, Inc.

23632 Merantali Rd

Okla
Beechwood 44122

PwC200003(Tricarichi)

4/10/03

1/2

low

Mail Court Proceedings

HC is in the most recovery business (primary business)

Purchase written off credit card debt from credit card issuer

KMG
Atlanta
Tom Arment

Purchase stock of company ^{with shareholders} interested in selling stock

Keep capital in this company and purchase credit card debt for
6 years. Also contribute delinquent receivables into the
<high basis, low FV debt>
company. ³⁵¹ & collected in order to purchase bad credit
card debt

Need new companies due to 351

Business purpose exists

Atlanta 412 has been collected, and tax paid (can be
uncollected in will)

collect
remaining
stand alone
corp.

cost Recovery Tax Authority 3.0 pt for bad credit card
at 64 on dollar (50% of debt)
and 412 has a basis of 64, collect from city 207.3
the accounts at 709 on dollar. On 70 is collected,
at the same time w/d's
of 80%.

Why is the
lender interested
in this loan
in 1 day?

Why buy collect other assets - and w/i co
and in in co - can leverage

Contributor 3
high basis
asset for
equity

Shelter of gain for litigation purposes - w/d a
high basis low FV asset disposition
352 (p14)

Cash to buy Hiker stock comes from one of the
new shareholders (Bank borrowing)
Tax opinion letter - will include a "no better" ref
- to collect Hot Mike T.

Not a reportable transaction

PwC200004(Tricarichi)

Tax opinion
insurance

Indemnity

But 1 warrant - ^{certains out} coal stays in co.
spent for 5-7 yrs.

If they are effectively gone is disallowed by IRS,
P.L. has no exposure.

Q: What if IRS comes after Mike?

because co. has no coal

Answer - it will generate coal
in time for IRS even 3 yrs down the road

4/11/03

Fortress

own cash to buy company

Re-engineer company to be in charge of debt business

IAS has never come in

company will have cash to pay by via business operations
in cash

Silly
5/14 hit?

Bond hit?

Business purpose: collect her cash, cash is needed for
change of debt business

PWC200006(Tricarichi)

Tru Lohr v. - PE - 1914
202-414 1686

Taicani

Transactions

1. Shareholder borrows funds from lender
2. Shareholder purchases Westside Cellular, Inc. ("Westside") from Taicani. Corporate assets are composed of cash, ^{negligible} receivables, furniture & fixtures, other assets, and a significant litigation receivable (on additional cash)
3. Shareholder contributes to Westside, in an IRC § 351 transaction, high basis, for net assets (credit and debt?)
4. Westside enters into the business of buying distressed credit and debt for pennies on the dollar, and collecting on their debts. Westside employs "cost recovery tax accounting" as follows to generate tax deductions:
\$3,000,000 paid for \$50,000,000 of credit and debt @ .06 on dollar

ES issue
appears
if pay,
if no pay.

OK - in account - Gary Zwick

re: 2003 gain - structure of account

→ Fortness

* Listed Transaction

Not a company selling assets

Tax opinion

~~April~~

* Seller - Ordinary income & collectible
§ 219

- 1) From
- 2) State Tax / Mobile
- 3) Ded. of interest

* 1-T Holding (fiance)

will 1 yr
New capital
to capital

PwC200007(Taicani)

Trevor
Boulder X1849
4970

Duration
20 min call 4/16/03
2131103

Kobner call

Reck: Sale proceeds in excess of what another buyer would pay in ordinary course

Kobner case

Purchaser's treatment - bought case with cash. Purchaser had money cash received vs. paid

Seller still receive loss

As Tricardi actually receiving a fee for facilitating a transaction

\$384

There is still cash as purchaser paid to cash in a comp

If cash is used to pay off bank debt, then business purpose of financing the business of this cash is N/A.

Galanti advise to another client report incremental price on one line then file a refund claim immediately

Hypo begun w/ 0 sale

269 - net all on buyer

IRS can't say all is end

	65	36
Feed	-12	.8
Comp	-13	28.8
Exp		(9.6)
24	40	
x 19.7	7.9	

12	24
.6	.8
7.2	19.2

Free

60,000,000
39,600,000
52,000,000
12,400,000

31,680
7,440
31,480,000
39,120,000
PWC200008(Tricardi)

Tank
Docket of return 1040
road trip freq. - confide

PwC200009(Tricarichi)

5/5/03

Truiche - Conference call

✓ John: high risk to buyers re: low property:

- < 50% chance: ordinary income: would still do the transaction 10 times out of 10.
< less than >

Malware tax ² may apply

✓ Report ordinary income, then file claim for refund.

Risk of reporting all cap. gains: penalty - some on substantial understatement penalty (but since there is substantial authority, taxpayer penalty is minimal)

• Intellectual sale rules of Conn

EXHIBIT 30-J

PWC-WS 0605

Memo

To: / Location: Rich Stovsky / Cleveland
From: / Location: Stephanie Moss / Cleveland
Date: May 22, 2003
Subject: Code Section 384 – Limitation on Use of Pre-acquisition Losses to Offset Built-In Gains

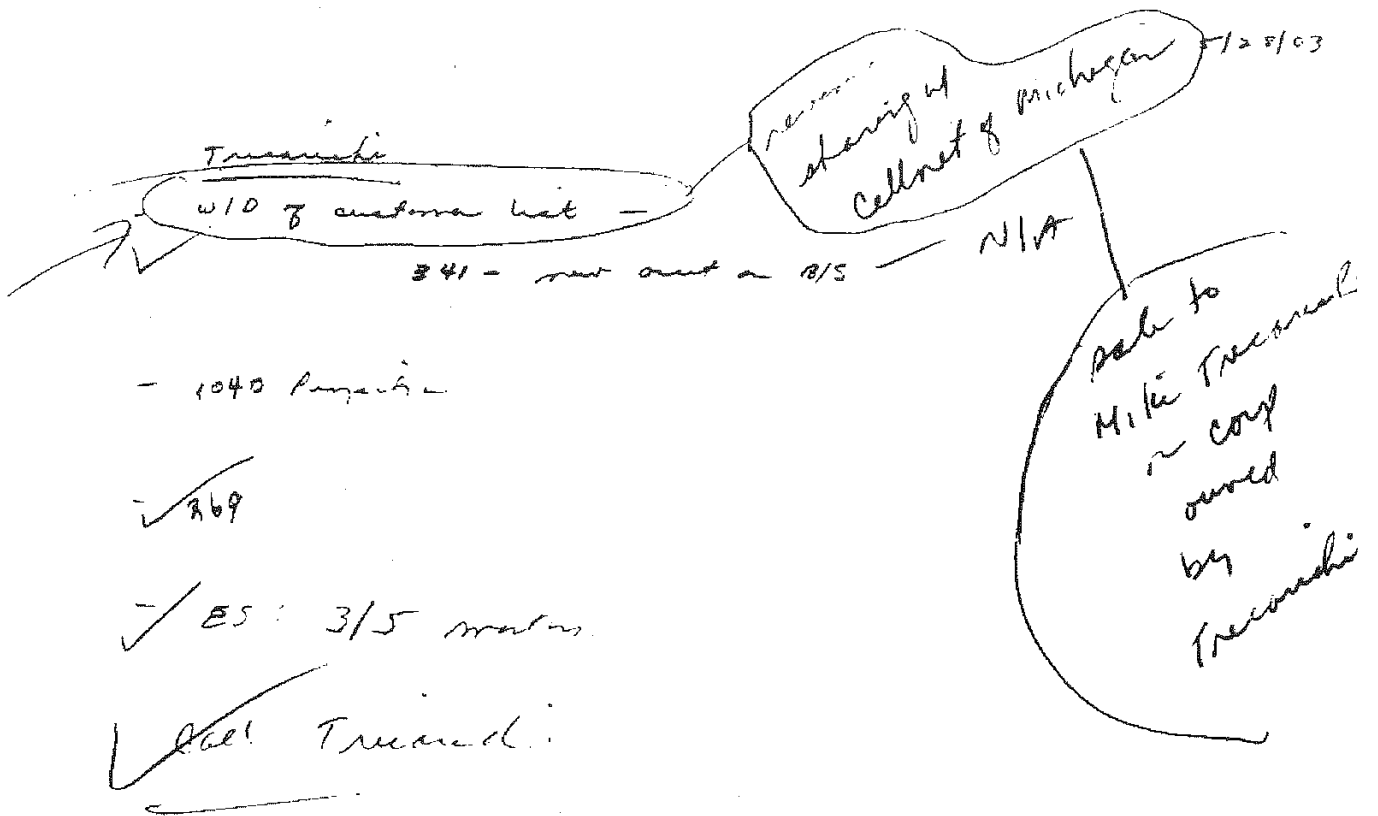
*acquired
same
company*

Internal Revenue Code Section 384 states that a corporation may not use its pre-acquisition losses against the built-in gains of a company (1) whose assets are acquired in an (A), (C), or (D) reorganization or (2) that becomes directly or indirectly controlled by the acquiring corporation. This restriction does not apply to the pre-acquisition loss of any corporation if such corporation and the gain corporation were members of the same controlled group at all times during the five year period prior to the acquisition.

*Lohves / Bonke concern - not an issue
as no corporate purchaser (verify) or
any event, it would not be Anti-Treasury
problem
may be a corporate
purchaser*

EXHIBIT 16-J

PWC-WS 0049



Indemnification for all corp time - is agree.

357 then lost - OK? - Not necessarily -

we should go if

S/H, not way.

341 - N/A - no collasible mts.

if AIR m. cut - still o/c of a
ground method.

if ACT, PCC - co with

- 269

PwC200011(Tricarichi)

Reserve Iron

Section 341 Analysis (Vaught fully understands the section 341 risk and did not want to perform supporting valuations etc.)

1. Section 341 will not apply unless more than 70% of the gain can be traced to section 341 assets. In other words, if we can prove that at least 30% of the gain is attributable to goodwill, then section 341 is not applicable (see examples below)
2. Q: Does section 341 apply to a corporation (P. Joseph) that was NOT formed or availed principally for the manufacture, construction, or production of property, for the purchase of property which (in the hands of the corporation) is (stock, in trade/inventory, unrealized receivables or fees, 1231 property), or for the holding of stock in a corporation so formed or availed of, WITH A VIEW TO

AS P. JOSEPH WAS FORMED TO HOLD A PP INT? and even if the partnership interest fact doesn't avoid 341, clearly P. Joseph was not formed with a view to sell.

P. Joseph Iron & Metal

A/B of RIM, L.P. section 341 assets (@ 8/31/96)	
Inventory	23,375,049.00
Investment in R & M Iron Ltd. (?)	591,075.00
	23,966,124.00
Profit % to be earned on these assets	0.01
Profit to be earned on these assets	239,661.24
P. Joseph % share of this profit	0.25
P. Joseph profit to be earned on these assets	59,915.31
P. Joseph selling price	1,541,660.00
P. Joseph % of selling price attributable to section 341 assets	0.04
P. Joseph % of selling price attributable to non-section 341 assets	0.96

FTL (stevedoring)

A/B of FTL section 341 assets (@ 12/31/95)	
Inventory	74,897.00
Profit % to be earned on these assets	0.03
Profit to be earned on these assets	2,246.91
Joseph family % share of this profit	0.25
Joseph family profit to be earned on these assets	561.73
Joseph family selling price	3,157,818.00
Joseph family % of selling price attributable to section 341 assets	0.00
Joseph family % of selling price attributable to non-section 341 assets	1.00

Recycling (warehousing)

A/B of Hoogewerf Reserve, L.P. section 341 assets	
Profit % to be earned on these assets	0.00
Profit to be earned on these assets	0.00
Joseph family % share of this profit	0.25
Joseph family profit to be earned on these assets	0.00
Joseph family selling price	1,776,272.00
Joseph family % of selling price attributable to section 341 assets	0.00
Joseph family % of selling price attributable to non-section 341 assets	1.00

*Example of 341 -
N/A for Tricarichi
as law changed (341 repealed)*

PwC200012(Tricarichi)

other (440) 54331

Mike Tricarichi cell (216) 918 900

office = (216) 514-4900

- ① furnished home & obtained license last week June, 2003 and son reg'd for grade school prior ~~there~~
- ② family goes out week of 7/7
- ③ deal +/b closed 7/31

④ Draft memo relative to meeting ~~points~~
To Do's

F/UP ① Composite Returns - with w/ Scott to get done - eff 2003 make sense?

② Any comm. details of flow there's make sense? Maybe not.

③ F/4 Rich & Dave - any sense to having LXV acquire customer list for 5/80 K to create cost for equal employees?

wC200015(Tricarichi)

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EXHIBIT PAGE ONLY

EXHIBIT 3

HUTCHISON & STEFFEN
A PROFESSIONAL LLC



LARGE AND MID-SIZE
BUSINESS DIVISION

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
450 GOLDEN GATE AVE, SAN FRANCISCO, CA 94102

Pricewaterhouse Coopers
c/o John Weber, Tax Partner
1300 Fifth Ave., Ste. 3100
Portland, OR 97201

Dear Sir,

Attached is a summons regarding First Associated Contractors, Inc. for the period April 1, 2002 through March 31, 2003. If you have questions regarding the summons, please call me at the number listed below. In lieu of appearing in person, you may mail the records to the following address:

Internal Revenue Service, LMSB
Lynn E. Anderson, Revenue Agent
450 Golden Gate Ave. 6th Floor
MS 6-1-07
San Francisco, CA 94102

If it would be more convenient, you may deliver the records to the following address:

Internal Revenue Service
Sheryl Lafferty Revenue Agent
LMSB CTM 1422
1220 SW 3rd Ave. 8th Floor
Portland, OR 97204

Thank you for your cooperation.

Lynn Anderson
Revenue Agent
Badge Number 94-11702
415-522-4283

Plaintiffs' Trial Ex.

271

AA 001684



Summons

In the matter of First Associated Contractors, Inc, formerly known as Marshall Associated Contractors, Inc (EIN 93-0522225)

Internal Revenue Service (Division): Large and Mid-Sized Business

Industry/Area (name or number): CTM 1232

Periods: Form 1120, for the tax year ended March 31, 2003

The Commissioner of Internal Revenue

To: Pricewaterhouse Coopers c/o John Weber, Tax Partner

At: 1300 Fifth Ave., Ste. 3100, Portland, OR 97201

You are hereby summoned and required to appear before Lynn E. Anderson, ID #94-11702, or other authorized IRS official an officer of the Internal Revenue Service, to give testimony and to bring with you and to produce for examination the following books, records, papers, and other data relating to the tax liability or the collection of the tax liability or for the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws concerning the person identified above for the periods shown.

See attachment A.

IN LIEU OF PERSONAL DELIVERY, YOU MAY MAIL YOUR RESPONSE TO THE ADDRESS LISTED BELOW.

Attestation

I hereby certify that I have examined and compared this copy of the summons with the original and that it is a true and correct copy of the original.

Lynn E. Anderson
Signature of IRS officer serving the summons

Revenue Agent
Title

Business address and telephone number of IRS officer before whom you are to appear:

450 Golden Gate Ave., 6th Floor, MS 6-1-07 San Francisco, CA 94102 415/522-4283

Place and time for appearance at 450 Golden Gate Ave., 6th Floor, San Francisco, CA 94102



Department of the Treasury
Internal Revenue Service

www.irs.gov

Form 2039 (Rev. 12-2001)
Catalog Number 21405J

on the 12th day of February, 2007 at 3:00 o'clock p. m.

Issued under authority of the Internal Revenue Code this 18th day of January, 2007

Lynn E. Anderson
Signature of issuing officer

Revenue Agent

Title

Victoria 94-06323
Signature of approving officer (if applicable)

Group Manager

Title

Part A - to be given to person summoned

AA 001685



Provisions of the Internal Revenue Code

Sec. 7602. Examination of books and witnesses

(a) Authority to Summon, etc. - For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized -

- (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry.
- (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and
- (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(b) Purpose may include inquiry into offense. - The purposes for which the Secretary may take any action described in paragraph (1), (2), or (3) of subsection (a) include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.

(c) Notice of contact of third parties. -

- (1) General Notice. - An officer or employee of the Internal Revenue Service may not contact any person other than the taxpayer with respect to the determination or collection of the tax liability of such taxpayer without providing reasonable notice in advance to the taxpayer that contacts with persons other than the taxpayer may be made.
- (2) Notice of specific contacts. - The Secretary shall periodically provide to a taxpayer a record of persons contacted during such period by the Secretary with respect to the determination or collection of the tax liability of such taxpayer. Such record shall also be provided upon request of the taxpayer.
- (3) Exceptions. - This subsection shall not apply-
 - (A) to any contact which the taxpayer has authorized,
 - (B) if the Secretary determines for good cause shown that such notice would jeopardize collection of any tax or such notice may involve reprisal against any person, or
 - (C) with respect to any pending criminal investigation.

(d) No administrative summons when there is Justice Department referral.-

- (1) Limitation of authority. - No summons may be issued under this title, and the Secretary may not begin any action under section 7604 to enforce any summons, with respect to any person if a Justice Department referral is in effect with respect to such person.
- (2) Justice Department referral in effect. - For purposes of this subsection-
 - (A) In general. - A Justice Department referral is in effect with respect to any person if-
 - (i) the Secretary has recommended to the Attorney General a grand jury investigation of, or the criminal prosecution of, such person for any offense connected with the administration or enforcement of the internal revenue laws or
 - (ii) any request is made under section 6103(h)(3)(B) for the disclosure of any return or return information (within the meaning of section 6103(b)) relating to such person.
 - (B) Termination. - A Justice Department referral shall cease to be in effect with respect to a person when-
 - (i) the Attorney General notifies the Secretary, in writing, that -
 - (I) he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws,
 - (II) he will not authorize a grand jury investigation of such person with respect to such an offense, or
 - (III) he will discontinue such a grand jury investigation.
 - (ii) a final disposition has been made of any criminal proceeding pertaining to the enforcement of the internal revenue laws which was instituted by the Attorney General against such person, or
 - (iii) the Attorney General notifies the Secretary, in writing, that he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws relating to the request described in sub paragraph (A)(i).

(3) Taxable years, etc., treated separately. - For purposes of this subsection, each taxable period (or, if there is no taxable period, each taxable event) and each tax imposed by a separate chapter of this title shall be treated separately.

(e) Limitation on examination on unreported income. - The Secretary shall not use financial status or economic reality examination techniques to determine the existence of unreported income of any taxpayer unless the Secretary has a reasonable indication that there is a likelihood of such unreported income.

Authority to examine books and witness is also provided under sec. 6420 (e)(2) - Gasoline used on farms: sec. 6421(g)(2) - Gasoline used for certain nonhighway purposes by local transit systems, or sold for certain exempt purposes; and sec. 6427(j)(2) - Fuels not used for taxable purposes.

Sec. 7603. Service of summons

(a) In general - A summons issued under section 6420(e)(2), 6421(g)(2), 6427(j)(2), or 7602 shall be served by the Secretary, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty

(b) Service by mail to third-party recordkeepers. -

- (1) In general. - A summons referred to in subsection (a) for the production of books, papers, records, or other data by a third-party recordkeeper may also be served by certified or registered mail to the last known address of such recordkeeper.
- (2) Third party record keeper. - For purposes of paragraph (1), the term *third-party recordkeeper* means -

- (A) any mutual savings bank, cooperative bank, domestic building and loan association, or other savings institution chartered and supervised as a savings and loan or similar association under Federal or State law, any bank (as defined in section 581), or any credit union (within the meaning of section 501 (c)(14)(A));
- (B) any consumer reporting agency (as defined under section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681 a(f)));
- (C) Any person extending credit through the use of credit cards or similar devices;
- (D) any broker (as defined in section 3(a)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)));
- (E) any attorney;
- (F) any accountant;
- (G) any barter exchange (as defined in section 6045(c)(3));
- (H) any regulated investment company (as defined in section 851) and any agent of such regulated investment company when acting as an agent thereof;
- (I) any enrolled agent; and
- (J) any owner or developer of a computer software source code (as defined in section 7612(d)(2)). Subparagraph (J) shall apply only with respect to a summons requiring the production of the source code referred to in subparagraph (J) or the program and data described in section 7612(b)(1)(A)(ii) to which source code relates.

Sec. 7604. Enforcement of summons

(a) Jurisdiction of District Court. - If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement. - Whenever any person summoned under section 6420(e)(2), 6421 (g)(2), 6427(j)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States Commissioner¹ for the district within which the person so summoned resides or is found for an attachment against him as for a contempt, it shall be the duty of the judge or commissioner¹ to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States Commissioner¹ shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

¹Or United States magistrate, pursuant to P. L. 90-578.

Sec. 7605. Time and place of examination

(a) Time and place. - The time and place of examination pursuant to the provisions of section 6420(e)(2), 6421 (g)(2), 6427(j)(2), or 7602 shall be such time and place as may be fixed by the Secretary and as are reasonable under the circumstances. In the case of a summons under authority of paragraph (2) of section 7602, or under the corresponding authority of section 6420(e)(2), 6421 (g)(2) or 6427(j)(2), the date fixed for appearance before the Secretary shall not be less than 10 days from the date of the summons.

Sec. 7610. Fees and costs for witnesses

(a) In general. - The secretary shall by regulations establish the rates and conditions under which payment may be made of -

- (1) fees and mileage to persons who are summoned to appear before the Secretary, and
- (2) reimbursement for such costs that are reasonably necessary which have been directly incurred in searching for, reproducing, or transporting books, papers, records, or other data required to be produced by summons.

(b) Exceptions. - No payment may be made under paragraph (2) of subsection (a) if -

- (1) the person with respect to whose liability the summons is issued has a proprietary interest in the books, papers, records or other data required to be produced, or
- (2) the person summoned is the person with respect to whose liability the summons is issued or an officer, employee, agent, accountant, or attorney of such person who, at the time the summons is served, is acting as such.

(c) Summons to which section applies. - This section applies with respect to any summons authorized under section 6420(e)(2), 6421 (g)(2), 6427(j)(2), or 7602.

Sec. 7210. Failure to obey summons

Any person who, being duly summoned to appear to testify, or to appear and produce books, accounts, records, memoranda or other papers, as required under sections 6420(e)(2), 6421(g)(2), 6427(j)(2), 7602, 7603, and 7604(b), neglects to appear or to produce such books, accounts, records, memoranda, or other papers, shall, upon conviction thereof, be fined not more than \$1,000, or imprisoned not more than 1 year, or both, together with costs of prosecution.

Notice to Third Party Recipient of IRS Summons

As a third-party recipient of a summons, you may be entitled to receive payment for certain costs directly incurred which are reasonably necessary to search for, reproduce, or transport records in order to comply with a summons.

This payment is made only at the rates established by the Internal Revenue Service to certain persons served with a summons to produce records or information in which the taxpayer does not have an ownership interest. The taxpayer to whose liability the summons relates and the taxpayer's officer, employee, agent, accountant, or attorney are not entitled to this payment. No payment will be made for any costs which you have charged or billed to other persons.

The rate for search costs is \$8.50 an hour or fraction of an hour and is limited to the total amount of personnel time spent in locating and retrieving documents or information requested by the summons. Specific salaries of such persons may not be included in search costs. In addition, search costs do not include salaries, fees, or similar costs for analysis of material or for managerial or legal advice, expertise, research, or time spent for any of these activities. If itemized separately, search costs may include the actual costs of extracting information stored by computer in the format in which it is normally produced, based on computer time and necessary supplies; however, personnel time for computer search may be paid for only at the Internal Revenue Service rate specified above.

The rate for reproduction costs for making copies or duplicates of summoned documents, transcripts, and other similar material is 20 cents for each page. Photographs, films, and other material are reimbursed at cost.

The rate for transportation costs is the same as the actual cost necessary to transport personnel to locate and retrieve summoned records or information, or costs incurred solely by the need to transport the summoned material to the place of examination.

In addition to payment for search, reproduction, and transportation costs, persons who appear before an Internal Revenue Service officer in response to a summons may request payment for authorized witness fees and mileage fees. You may make this request by contacting the Internal Revenue Service officer or by claiming these costs separately on the itemized bill or invoice as explained below.

Instructions for requesting payment

After the summons is served, you should keep an accurate record of personnel search time, computer costs, number of reproductions made, and transportation costs. Upon satisfactory compliance, you may submit an itemized bill or invoice to the Internal Revenue Service officer before whom you were summoned to appear, either in person or by mail to the address furnished by the Internal Revenue Service officer. Please write on the itemized bill or invoice the name of the taxpayer to whose liability the summons relates.

If you wish, Form 6863, Invoice and Authorization for Payment of Administrative Summons Expenses, may be used to request payment for search, reproduction, and transportation costs. Standard Form 1157, Claims for Witness Attendance Fees, Travel, and Miscellaneous Expenses, may be used to request payment for authorized witness fees and mileage fees. These forms are available from the Internal Revenue Service officer who issued the summons.

If you have any questions about the payment, please contact the Internal Revenue Service officer before whom you were summoned to appear.

Anyone submitting false claims for payment is subject to possible criminal prosecution.



Department of the Treasury
Internal Revenue Service

www.irs.gov

Form 2039 (Rev. 12-2001)
Catalog Number 21405J

Part B — to be given to person summoned

AA 001687

Sec. 7609. Special procedures for third-party summons

(a) Notice-

(1) In general. - If any summons to which this section applies requires the giving of testimony on or relating to, the production of any portion of records made or kept on or relating to, or the production of any computer software source code (as defined in 7612(d)(2)) with respect to, any person (other than the person summoned) who is identified in the summons, then notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the 23rd day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which has been served and shall contain an explanation of the right under subsection (b)(2) to bring a proceeding to quash the summons.

(2) Sufficiency of notice. - Such notice shall be sufficient if, on or before such third day, such notice is served in the manner provided in section 7603 (relating to service of summons) upon the person entitled to notice, or is mailed by certified or registered mail to the last known address of such person, or, in the absence of a last known address, is left with the person summoned. If such notice is mailed, it shall be sufficient if mailed to the last known address of the person entitled to notice or, in the case of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, to the last known address of the fiduciary of such person, even if such person or fiduciary is then deceased, under a legal disability, or no longer in existence.

(3) Nature of summons. - Any summons to which this subsection applies (and any summons in aid of collection described in subsection (c)(2)(D)) shall identify the taxpayer to whom the summons relates or the other person to whom the records pertain and shall provide such other information as will enable the person summoned to locate the records required under the summons.

(b) Right to intervene; right to proceeding to quash. -

(1) Intervention. - Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604.

(2) Proceeding to quash. -

(A) In general. - Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to begin a proceeding to quash such summons not later than the 20th day after the day such notice is given in the manner provided in subsection (a)(2). In any such proceeding, the Secretary may seek to compel compliance with the summons.

(B) Requirement of notice to person summoned and to Secretary. - If any person begins a proceeding under subparagraph (A) with respect to any summons, not later than the close of the 20-day period referred to in subparagraph (A) such person shall mail by registered or certified mail a copy of the petition to the person summoned and to such office as the Secretary may direct in the notice referred to in subsection (a)(1).

(C) Intervention, etc. - Notwithstanding any other law or rule of law, the person summoned shall have the right to intervene in any proceeding under subparagraph (A). Such person shall be bound by the decision in such proceeding (whether or not the person intervenes in such proceeding).

(c) Summons to which section applies. -

(1) In general. - Except as provided in paragraph (2), this section shall apply to any summons issued under paragraph (2) of section 7602(a) or under sections 6420(e)(2), 6421(g)(2), 6427(j)(2), or 7612.

(2) Exceptions. - This section shall not apply to any summons

(A) served on the person with respect to whose liability the summons is issued, or any officer or employee of such person;

(B) issued to determine whether or not records of the business transaction or affairs of an identified person have been made or kept;

(C) issued solely to determine the identity of any person having a numbered account (or similar arrangement) with a bank or other institution described in section 7603(b)(2)(A);

(D) issued in aid of the collection of-

(i) an assessment made or a judgment rendered against the person with respect to whose liability the summons is issued, or

(ii) the liability at law or in equity of any transferee or fiduciary of any person referred to in clause (i).

(E) - (i) issued by a criminal investigator of the Internal Revenue Service in connection with the investigation of an offense connected with the administration or enforcement of the internal revenue laws, and

(ii) served on a person who is not a third-party recordkeeper (as defined in section 7603(b)), or

(F) described in subsection (f) or (g).

(3) Records. - For purposes of this section, the term records includes books, papers, and other data.

(d) Restriction on examination of records. - No examination of any records required to be produced under a summons as to which notice is required under subsection (a) may be made -

(1) before the close of the 23rd day after the day notice with respect to the summons is given in the manner provided in subsection (a)(2), or

(2) where a proceeding under subsection (b)(2)(A) was begun within the 20-day period referred to in such subsection and the requirements of subsection (b)(2)(B) have been met, except in accordance with an order of the court having jurisdiction of such proceeding or with the consent of the person beginning the proceeding to quash.

(e) Suspension of Statute of Limitations. -

(1) Subsection (b) action. - If any person takes any action as provided in subsection (b) and such person is the person with respect to whose liability the summons is issued (or is the agent, nominee, or other person acting under the direction or control of such person), then the running of any period of limitations under section 6501 (relating to the assessment and collection of tax) or under section 6531 (relating to criminal prosecutions) with respect to such person shall be suspended for the period during which a proceeding, and appeals therein, with respect to the enforcement of such summons is pending.

(2) Suspension after 6 months of service of summons. - In the absence of the resolution of the summoned party's response to the summons, the running of any period of limitations under section 6501 or under section 6531 with respect to any person with respect to whose liability the summons is issued (other than a person taking action as provided in subsection (b)) shall be suspended for the period-

(A) beginning on the date which is 6 months after the service of such summons, and

(B) ending with the final resolution of such response.

(f) Additional requirements in the case of a John Doe summons. -

Any summons described in subsection (c)(1) which does not identify the person with respect to whose liability the summons is issued may be served only after a court proceeding in which the Secretary establishes that -

(1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,

(2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and

(3) the information sought to be obtained from the examination of the records or testimony (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources.

(g) Special exception for certain summonses. -

A summons is described in this subsection if, upon petition by the Secretary, the court determines, on the basis of the facts and circumstances alleged, that there is reasonable cause to believe the giving of notice may lead to attempts to conceal, destroy, or alter records relevant to the examination, to prevent the communication of information from other persons through intimidation, bribery, or collusion, or to flee to avoid prosecution, testifying, or production of records.

(h) Jurisdiction of district court; etc. -

(1) Jurisdiction. - The United States district court for the district within which the person to be summoned resides or is found shall have jurisdiction to hear and determine any proceedings brought under subsection (b)(2), (f), or (g). An order denying the petition shall be deemed a final order which may be appealed.

(2) Special rule for proceedings under subsections (f) and (g). - The determinations required to be made under subsections (f) and (g) shall be made ex parte and shall be made solely on the petition and supporting affidavits.

(i) Duty of summoned party. -

(1) Recordkeeper must assemble records and be prepared to produce records. - On receipt of a summons to which this section applies for the production of records, the summoned party shall proceed to assemble the records requested, or such portion thereof as the Secretary may prescribe, and shall be prepared to produce the records pursuant to the summons on the day on which the records are to be examined.

(2) Secretary may give summoned party certificate. - The Secretary may issue a certificate to the summoned party that the period prescribed for beginning a proceeding to quash a summons has expired and that no such proceeding began within such period, or that the taxpayer consents to the examination.

(3) Protection for summoned party who discloses. - Any summoned party, or agent or employee thereof, making a disclosure of records of testimony pursuant to this section in good faith reliance on the certificate of the Secretary or an order of a court requiring production of records or the giving of such testimony shall not be liable to any customer or other person for such disclosure.

(4) Notice of suspension of statute of limitations in the case of a John Doe summons. - In the case of a summons described in subsection (f) with respect to which any period of limitations has been suspended under subsection (e)(2), the summoned party shall provide notice of such suspension to any person described in subsection (f).

(j) Use of summons not required. -

Nothing in this section shall be construed to limit the Secretary's ability to obtain information, other than by summons, through formal or informal procedures authorized by sections 7601 and 7602.

Attachment A

A. Instructions

(1) In responding to this Summons, the summoned party is required to furnish all documents that are available to it, or subject to its reasonable inquiry, including documents in the possession of its attorneys, accountants, affiliates, advisors, or other persons directly or indirectly employed by, or connected with, the summoned party or its attorneys, and anyone else otherwise subject to the summoned party's control, and only such information as is known to the summoned party of its personal knowledge.

(2) The summoned party is required to make a diligent search of its records and of all other documents and records in its possession or available to it or its representatives.

B. Documents Already in Possession

(1) This summons is not intended to request documents already in the possession of the Internal Revenue Service.

(2) If you believe a document requested by this summons is already in the Service's possession, provide a description of the document, when it was provided and to whom it was provided.

C. Documents Unable to Be Produced

If you are unable to produce a document because it has been destroyed, cannot be located or is otherwise unavailable, provide a description of the document and identify where the document may be located and the last known custodian of the document by name, address and telephone number, and state with specificity the efforts made to locate the documents or records and a specific reason for their disappearance or unavailability. Also, if records or documents are requested but do not exist, please so state.

D. Definitions:

(1) The terms "document" or "documents" means any writings in any form whether of paper, electronic, or other medium, for example, memoranda, correspondence, opinion letters, email, contracts, agreements, invoices, computations, billing records, bank records, trust records, ledgers, books and records, flyers, brochures, promotional materials and appointment books, and includes handwritten records and records maintained in electronic format. All requests are for complete and unedited copies of documents. Requests for contracts and other operative documents are for copies of drafts and intermediate versions as well as final, executed versions.

(2) The terms "First Associated Entity" or "First Associated Entities" means any one or more of the following entities:

First Associated Contractors, Inc., formerly Marshall Associated Contractors, Inc.
Essex Solutions, Inc.
Marshall Associated, LLC

In the matter of First Associated Contractors, Inc.
Summons to: Pricewaterhouse Coopers c/o John Weber, Tax Partner

(3) The term "First Associated Transaction" refers to the formation and any change of ownership occurring in 2002 or 2003 of one or more of the First Associated Entities or of any assets belonging to one or more of the First Associated Entities. Parties to a First Associated Transaction may include, but are not limited to, any one or more of the following:

Willow Investment Trust
Willow Holdings LLC
Richard L. Marshall
Patsy L. Marshall
John M. Marshall
Karen M. Marshall
Fortrend International
MidCoast Credit Corp.
Willow Ventures, LLC
Corinth Trust
Fortrend Securities, Inc.
Forbach, Inc.
Marshall Excavating Inc.
Chestnut, Inc.
Canberra Properties, LLC
Peachtree Financial
Deutsche Bank
First Light Holdings LLC

(4) The term "Woodvale Transaction" refers to the formation and any change of ownership occurring in 2002 or 2003 of Woodvale Investments, LLC or of any assets belonging to Woodvale Investments, LLC. Parties to a Woodvale Transaction may include, but are not limited to, any one or more of the following:

Arizona Media Holdings, Inc.
First Light Holdings LLC
Capital American Associates, Inc.

(5) The term "Receivables Transfer" refers to the transfer of consumer credit card receivables to Arizona Media Holdings, Inc., Woodvale Investments, LLC, Willow Investment Trust or one or more of the First Associated Entities during 2002 or 2003.

(6) The term "Treasury Bills Transfer" refers to any transfer of United States Treasury Bills under IRC section 351 to First Associated Contractors, Inc. during the fiscal year ended March 31, 2003.

(7) The term "Foreign Currency Transfer" refers to any transfer of foreign currency options to First Associated Contractors, Inc., during the fiscal year ended March 31, 2003.

In the matter of First Associated Contractors, Inc.

Summons to: Pricewaterhouse Coopers c/o John Weber, Tax Partner

(8) The term "Rabobank Loan" refers to any loan to one or more of the First Associated Entities from Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A., New York Branch, during the year ended December 31, 2003.

(9) The term "Bad Debt Deduction" refers to the deduction for bad debts claimed by First Associated Contractors, Inc. on its tax return for the fiscal year ended March 31, 2003.

(10) The term "Partnership Loss" refers to the \$6 mi. short-term partnership loss claimed on Schedule D of the Form 1120 for First Associated Contractors, Inc. for the fiscal year ended March 31, 2003.

(11) The term "Distribution" refers to the \$510,000 distribution referred to on line 5a, Schedule M-2 of Form 1120 for First Associated Contractors, Inc. for the fiscal year ended March 31, 2003.

(12) The term "The Sale" refers to the \$2,766,500 reported as the gross sales price on Form 4797, Part III, line 20 of Form 1120 for First Associated Contractors, Inc. for the fiscal year ended March 31, 2003.

(13) The term "identify" in reference to an individual means to provide the individual's name, title (at the time and at present), function in the transaction, and current whereabouts, including place of business or employment, address, and telephone number.

(14) The term "identify" in reference to a document, means to provide the title, description, date prepared, names of those who prepared it, names of those who signed it, and its current whereabouts, including name, address, and telephone number of custodian, librarian, or archivist.

E. Provide the following:

(1) All documents that discuss, describe, effectuate or otherwise relate to any First Associated Transaction, including documents of meetings, negotiations, valuations, billing records, engagement letters, side letters, communications, agreements, due diligence, promotional materials and/or legal opinions.

(2) All documents that discuss, describe, effectuate or otherwise relate to any Woodvale Transaction, including documents of meetings, negotiations, valuations, billing records, engagement letters, side letters, communications, agreements, due diligence, promotional materials and/or legal opinions.

(3) All documents that discuss, describe, effectuate or otherwise relate to any Receivables Transfer, including documents of meetings, negotiations, valuations, billing records, engagement letters, side letters, communications, agreements, due diligence, promotional materials and/or legal opinions.

(4) All documents that discuss, describe, effectuate or otherwise relate to any Treasury Bills Transfer, including documents of meetings, negotiations, valuations, billing records, engagement

In the matter of First Associated Contractors, Inc.
Summons to: Pricewaterhouse Coopers c/o John Weber, Tax Partner

letters, side letters, communications, agreements, due diligence, promotional materials and/or legal opinions.

(5) All documents that discuss, describe, effectuate or otherwise relate to any Foreign Currency Transfer, including documents of meetings, negotiations, valuations, billing records, engagement letters, side letters, communications, agreements, due diligence, promotional materials and/or legal opinions.

(6) All documents that discuss, describe or otherwise relate to any Rabobank Loan, including documents of meetings, negotiations, valuations, billing records, engagement letters, side letters, communications, agreements, due diligence, promotional materials and/or legal opinions.

(7) All documents that discuss, describe or otherwise relate to the Bad Debt deduction, including documents of meetings, negotiations, valuations, billing records, engagement letters, side letters, communications, agreements, due diligence, promotional materials and/or legal opinions.

(8) All documents, including loan documents, promissory notes, wire instructions, and bank statements, that discuss, describe, effectuate or otherwise relate to loans or any money transfer taking place in relation to any First Associated Transaction, Woodvale Transaction, or Receivables Transaction.

(9) All documents that discuss, describe or otherwise relate to the "Partnership Loss" including documents of meetings, negotiations, valuations, billing records, engagement letters, side letters, communications, agreements, due diligence, promotional materials and/or legal opinions

(10) All documents that discuss, describe or otherwise relate to the "Distribution" including documents of meetings, negotiations, valuations, billing records, engagement letters, side letters, communications, agreements, due diligence, promotional materials and/or legal opinions. Also, All documents, including loan documents, promissory notes, wire instructions, and bank statements, that discuss, describe, effectuate or otherwise relate to the "Distribution."

(11) All documents that discuss, describe or otherwise relate to "The Sale" including documents of meetings, negotiations, valuations, billing records, engagement letters, side letters, communications, agreements, due diligence, promotional materials and/or legal opinions. Also, all documents, including loan documents, promissory notes, wire instructions, and bank statements, that discuss, describe, effectuate or otherwise relate to the "Distribution."

F. Claim of Privilege -- For any document you deem privileged, list the following:

- (1) The name and title of the author.
- (2) The name and title of the signor of the document, if signed.
- (3) The type of document (e.g. letter, notebook, etc.) and the number of pages it contains.
- (4) The date of the document.
- (5) The name and title of each recipient or addressee of the document or copies thereof.
- (6) The present location of the document.

In the matter of First Associated Contractors, Inc.

Summons to: Pricewaterhouse Coopers c/o John Weber, Tax Partner

- (7) A statement of the basis for the privilege claim, and the relationship or underlying facts upon which the protection or privilege is claimed.
- (8) A general statement of the subject matter of the document.
- (9) Identify the request to which the production of the document would otherwise be responsive.

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EXHIBIT PAGE ONLY

EXHIBIT 4

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

RICHARD L. MARSHALL and PATSY L.
MARSHALL, TRANSFEREES, et al.,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

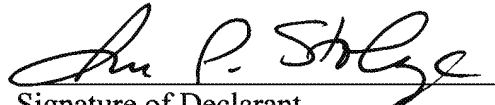
COMMISSIONER OF INTERNAL REVENUE ,
Respondent.

rendered by PricewaterhouseCoopers and invoiced on the dates on the billing statements, together with certain associated documentation.

4. It is the regular practice of PricewaterhouseCoopers to maintain files associated with professional services rendered by PricewaterhouseCoopers.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 27th day of March, 2014.


Signature of Declarant

Ivan P. Stolze, Paralegal

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EXHIBIT PAGE ONLY

EXHIBIT 5

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

Internal Revenue Service

Department of the Treasury
5450 Stratum Drive, Ste 150
Fort Worth, TX 76137

PricewaterhouseCoopers LLP
Attn: Rich Stovsky
200 Public Square, 18th Floor,
BP Tower
Cleveland, OH 44114

Telephone Number:
(817) 232-6383

Refer Reply To:
Denise McCaskill
MC: 4296 NFTW

Date: January 29, 2008

Dear PricewaterhouseCoopers,

Attached is a summons regarding West Side Cellular, Inc. for the year ended 12/31/2003. If you have questions concerning the summons, please call me at the number listed above.

In lieu of appearing in person in order to comply with the summons, you may have the records delivered, no later than the appearance date in the summons, to the following address:

Internal Revenue Service
MC:4296 NFTW / McCaskill
5450 Stratum Drive, Suite 150
Fort Worth, TX 76137

Sincerely,



Denise McCaskill
Revenue Agent
ID No. 75-11917

AA 001698



Summons

In the matter of West Side Cellular, Inc.

Internal Revenue Service (Division): Large and Mid Size Business

Industry/Area (name or number): LMSB:Communication, Technology, Media:Team 1296

Periods: Taxable year ended December 31, 2003

The Commissioner of Internal Revenue

To: PricewaterhouseCoopers LLP

At: Attn: Rich Stovsky; 200 Public Square, 18th Floor; BP Tower, Cleveland, OH 44114

You are hereby summoned and required to appear before Cheryl M. Dever, ID #31-09741, or other authorized IRS official an officer of the Internal Revenue Service, to give testimony and to bring with you and to produce for examination the following books, records, papers, and other data relating to the tax liability or the collection of the tax liability or for the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws concerning the person identified above for the periods shown.

See Attachment 1.

Attestation

I hereby certify that I have examined and compared this copy of the summons with the original and that it is a true and correct copy of the original.

Denise McGaskill

Signature of IRS officer serving the summons

Revenue Agent

Title

Business address and telephone number of IRS officer before whom you are to appear:

Internal Revenue Service, Attn: LMSB:HMT:1486:CD; 5990 West Creek Road; Independence, OH 44131 Phone (216) 520-7084

Place and time for appearance at Internal Revenue Service, 5990 West Creek Road; Independence, OH 44131



Department of the Treasury
Internal Revenue Service

www.irs.gov

Form 2039 (Rev. 12-2001)
Catalog Number 21405J

on the 25th day of February, 2008 at 10 o'clock a m.

Issued under authority of the Internal Revenue Code this 29th day of January, 2008

Denise McGaskill

Signature of issuing officer

Revenue Agent

Title

[Signature]

Signature of approving officer (if applicable)

Team Manager

Title

Part A - to be given to person summoned

AA 001699



Provisions of the Internal Revenue Code

Sec. 7602. Examination of books and witnesses

(a) Authority to Summon, etc. - For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized -

- (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry.
- (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and
- (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(b) Purpose may include inquiry into offense. - The purposes for which the Secretary may take any action described in paragraph (1), (2), or (3) of subsection (a) include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.

(c) Notice of contact of third parties. -

- (1) General Notice. - An officer or employee of the Internal Revenue Service may not contact any person other than the taxpayer with respect to the determination or collection of the tax liability of such taxpayer without providing reasonable notice in advance to the taxpayer that contacts with persons other than the taxpayer may be made.
- (2) Notice of specific contacts. - The Secretary shall periodically provide to a taxpayer a record of persons contacted during such period by the Secretary with respect to the determination or collection of the tax liability of such taxpayer. Such record shall also be provided upon request of the taxpayer.
- (3) Exceptions. - This subsection shall not apply -
 - (A) to any contact which the taxpayer has authorized,
 - (B) if the Secretary determines for good cause shown that such notice would jeopardize collection of any tax or such notice may involve reprisal against any person, or
 - (C) with respect to any pending criminal investigation.

(d) No administrative summons when there is Justice Department referral. -

- (1) Limitation of authority. - No summons may be issued under this title, and the Secretary may not begin any action under section 7604 to enforce any summons, with respect to any person if a Justice Department referral is in effect with respect to such person.
- (2) Justice Department referral in effect. - For purposes of this subsection -
 - (A) In general. - A Justice Department referral is in effect with respect to any person if -
 - (i) the Secretary has recommended to the Attorney General a grand jury investigation of, or the criminal prosecution of, such person for any offense connected with the administration or enforcement of the internal revenue laws or
 - (ii) any request is made under section 6103(h)(3)(B) for the disclosure of any return or return information (within the meaning of section 6103(b)) relating to such person.
 - (B) Termination. - A Justice Department referral shall cease to be in effect with respect to a person when -
 - (i) the Attorney General notifies the Secretary, in writing, that -
 - (I) he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws,
 - (II) he will not authorize a grand jury investigation of such person with respect to such an offense, or
 - (III) he will discontinue such a grand jury investigation.
 - (ii) a final disposition has been made of any criminal proceeding pertaining to the enforcement of the internal revenue laws which was instituted by the Attorney General against such person, or
 - (iii) the Attorney General notifies the Secretary, in writing, that he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws relating to the request described in sub paragraph (A)(i).

(3) Taxable years, etc., treated separately. - For purposes of this subsection, each taxable period (or, if there is no taxable period, each taxable event) and each tax imposed by a separate chapter of this title shall be treated separately.

(e) Limitation on examination on unreported income. - The Secretary shall not use financial status or economic reality examination techniques to determine the existence of unreported income of any taxpayer unless the Secretary has a reasonable indication that there is a likelihood of such unreported income.

Sec. 7603. Service of summons

(a) In general. - A summons issued under section 6420(e)(2), 6421(g)(2), 6427(j)(2), or 7602 shall be served by the Secretary, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty

(b) Service by mail to third-party recordkeepers. -

(1) In general. - A summons referred to in subsection (a) for the production of books, papers, records, or other data by a third-party recordkeeper may also be served by certified or registered mail to the last known address of such recordkeeper.

(2) Third party record keeper. - For purposes of paragraph (1), the term *third-party recordkeeper* means -

- (A) any mutual savings bank, cooperative bank, domestic building and loan association, or other savings institution chartered and supervised as a savings and loan or similar association under Federal or State law, any bank (as defined in section 581), or any credit union (within the meaning of section 501 (c)(14)(A));
- (B) any consumer reporting agency (as defined under section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681 a(f));
- (C) Any person extending credit through the use of credit cards or similar devices;
- (D) any broker (as defined in section 3(a)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4));
- (E) any attorney;
- (F) any accountant;
- (G) any barter exchange (as defined in section 6045(c)(3));
- (H) any regulated investment company (as defined in section 851) and any agent of such regulated investment company when acting as an agent thereof;
- (I) any enrolled agent; and
- (J) any owner or developer of a computer software source code (as defined in section 7612(d)(2)). Subparagraph (J) shall apply only with respect to a summons requiring the production of the source code referred to in subparagraph (J) or the program and data described in section 7612(b)(1)(A)(ii) to which source code relates.

Sec. 7604. Enforcement of summons

(a) Jurisdiction of District Court. - If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement. - Whenever any person summoned under section 6420(e)(2), 6421 (g)(2), 6427(j)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States Commissioner¹ for the district within which the person so summoned resides or is found for an attachment against him as for a contempt, it shall be the duty of the judge or commissioner¹ to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States Commissioner¹ shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

¹ Or United States magistrate, pursuant to P. L. 90-578.

Sec. 7605. Time and place of examination

(a) Time and place. - The time and place of examination pursuant to the provisions of section 6420(e)(2), 6421 (g)(2), 6427(j)(2), or 7602 shall be such time and place as may be fixed by the Secretary and as are reasonable under the circumstances. In the case of a summons under authority of paragraph (2) of section 7602, or under the corresponding authority of section 6420(e)(2), 6421 (g)(2) or 6427(j)(2), the date fixed for appearance before the Secretary shall not be less than 10 days from the date of the summons.

Sec. 7610. Fees and costs for witnesses

(a) In general. - The secretary shall by regulations establish the rates and conditions under which payment may be made of -

- (1) fees and mileage to persons who are summoned to appear before the Secretary, and
- (2) reimbursement for such costs that are reasonably necessary which have been directly incurred in searching for, reproducing, or transporting books, papers, records, or other data required to be produced by summons.

(b) Exceptions. - No payment may be made under paragraph (2) of subsection (a) if -

- (1) the person with respect to whose liability the summons is issued has a proprietary interest in the books, papers, records or other data required to be produced, or
- (2) the person summoned is the person with respect to whose liability the summons is issued or an officer, employee, agent, accountant, or attorney of such person who, at the time the summons is served, is acting as such.

(c) Summons to which section applies. - This section applies with respect to any summons authorized under section 6420(e)(2), 6421 (g)(2), 6427(j)(2), or 7602.

Sec. 7210. Failure to obey summons

Any person who, being duly summoned to appear to testify, or to appear and produce books, accounts, records, memoranda or other papers, as required under sections 6420(e)(2), 6421(g)(2), 6427(j)(2), 7602, 7603, and 7604(b), neglects to appear or to produce such books, accounts, records memoranda, or other papers, shall, upon conviction thereof, be fined not more than \$1,000, or imprisoned not more than 1 year, or both, together with costs of prosecution.

Authority to examine books and witness is also provided under sec. 6420 (e)(2) - Gasoline used on farms: sec. 6421(g)(2) - Gasoline used for certain nonhighway purposes by local transit systems, or sold for certain exempt purposes; and sec. 6427(j)(2) - Fuels not used for taxable purposes.

Notice to Third Party Recipient of IRS Summons

As a third-party recipient of a summons, you may be entitled to receive payment for certain costs directly incurred which are reasonably necessary to search for, reproduce, or transport records in order to comply with a summons.

This payment is made only at the rates established by the Internal Revenue Service to certain persons served with a summons to produce records or information in which the taxpayer does not have an ownership interest. The taxpayer to whose liability the summons relates and the taxpayer's officer, employee, agent, accountant, or attorney are not entitled to this payment. No payment will be made for any costs which you have charged or billed to other persons.

The rate for search costs is \$8.50 an hour or fraction of an hour and is limited to the total amount of personnel time spent in locating and retrieving documents or information requested by the summons. Specific salaries of such persons may not be included in search costs. In addition, search costs do not include salaries, fees, or similar costs for analysis of material or for managerial or legal advice, expertise, research, or time spent for any of these activities. If itemized separately, search costs may include the actual costs of extracting information stored by computer in the format in which it is normally produced, based on computer time and necessary supplies; however, personnel time for computer search may be paid for only at the Internal Revenue Service rate specified above.

The rate for reproduction costs for making copies or duplicates of summoned documents, transcripts, and other similar material is 20 cents for each page. Photographs, films, and other material are reimbursed at cost.

The rate for transportation costs is the same as the actual cost necessary to transport personnel to locate and retrieve summoned records or information, or costs incurred solely by the need to transport the summoned material to the place of examination.

In addition to payment for search, reproduction, and transportation costs, persons who appear before an Internal Revenue Service officer in response to a summons may request payment for authorized witness fees and mileage fees. You may make this request by contacting the Internal Revenue Service officer or by claiming these costs separately on the itemized bill or invoice as explained below.

Instructions for requesting payment

After the summons is served, you should keep an accurate record of personnel search time, computer costs, number of reproductions made, and transportation costs. Upon satisfactory compliance, you may submit an itemized bill or invoice to the Internal Revenue Service officer before whom you were summoned to appear, either in person or by mail to the address furnished by the Internal Revenue Service officer. Please write on the itemized bill or invoice the name of the taxpayer to whose liability the summons relates.

If you wish, Form 6863, Invoice and Authorization for Payment of Administrative Summons Expenses, may be used to request payment for search, reproduction, and transportation costs. Standard Form 1157, Claims for Witness Attendance Fees, Travel, and Miscellaneous Expenses, may be used to request payment for authorized witness fees and mileage fees. These forms are available from the Internal Revenue Service officer who issued the summons.

If you have any questions about the payment, please contact the Internal Revenue Service officer before whom you were summoned to appear.

Anyone submitting false claims for payment is subject to possible criminal prosecution.



Department of the Treasury
Internal Revenue Service

www.irs.gov

Form 2039 (Rev. 12-2001)
Catalog Number 21405J

Part B — to be given to person summoned

AA 001701

Sec. 7609. Special procedures for third-party summons

(a) Notice-

(1) In general. - If any summons to which this section applies requires the giving of testimony on or relating to, the production of any portion of records made or kept on or relating to, or the production of any computer software source code (as defined in 7612(d)(2)) with respect to, any person (other than the person summoned) who is identified in the summons, then notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the 23rd day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which has been served and shall contain an explanation of the right under subsection (b)(2) to bring a proceeding to quash the summons.

(2) Sufficiency of notice. - Such notice shall be sufficient if, on or before such third day, such notice is served in the manner provided in section 7603 (relating to service of summons) upon the person entitled to notice, or is mailed by certified or registered mail to the last known address of such person, or, in the absence of a last known address, is left with the person summoned. If such notice is mailed, it shall be sufficient if mailed to the last known address of the person entitled to notice or, in the case of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, to the last known address of the fiduciary of such person, even if such person or fiduciary is then deceased, under a legal disability, or no longer in existence.

(3) Nature of summons. - Any summons to which this subsection applies (and any summons in aid of collection described in subsection (c)(2)(D)) shall identify the taxpayer to whom the summons relates or the other person to whom the records pertain and shall provide such other information as will enable the person summoned to locate the records required under the summons.

(b) Right to intervene; right to proceeding to quash. -

(1) Intervention. - Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604.

(2) Proceeding to quash. -

(A) In general. - Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to begin a proceeding to quash such summons not later than the 20th day after the day such notice is given in the manner provided in subsection (a)(2). In any such proceeding, the Secretary may seek to compel compliance with the summons.

(B) Requirement of notice to person summoned and to Secretary. - If any person begins a proceeding under subparagraph (A) with respect to any summons, not later than the close of the 20-day period referred to in subparagraph (A) such person shall mail by registered or certified mail a copy of the petition to the person summoned and to such office as the Secretary may direct in the notice referred to in subsection (a)(1).

(C) Intervention, etc. - Notwithstanding any other law or rule of law, the person summoned shall have the right to intervene in any proceeding under subparagraph (A). Such person shall be bound by the decision in such proceeding (whether or not the person intervenes in such proceeding).

(c) Summons to which section applies. -

(1) In general. - Except as provided in paragraph (2), this section shall apply to any summons issued under paragraph (2) of section 7602(a) or under sections 6420(e)(2), 6421(g)(2), 6427(g)(2), or 7612.

(2) Exceptions. - This section shall not apply to any summons

(A) served on the person with respect to whose liability the summons is issued, or any officer or employee of such person;

(B) issued to determine whether or not records of the business transaction or affairs of an identified person have been made or kept;

(C) issued solely to determine the identity of any person having a numbered account (or similar arrangement) with a bank or other institution described in section 7603(b)(2)(A);

(D) issued in aid of the collection of-

(i) an assessment made or a judgment rendered against the person with respect to whose liability the summons is issued, or

(ii) the liability at law or in equity of any transferee or fiduciary of any person referred to in clause (i).

(E) - (i) issued by a criminal investigator of the Internal Revenue Service in connection with the investigation of an offense connected with the administration or enforcement of the internal revenue laws, and

(ii) served on a person who is not a third-party recordkeeper (as defined in section 7603(b)), or

(F) described in subsection (f) or (g).

(3) Records. - For purposes of this section, the term records includes books, papers, and other data.

(d) Restriction on examination of records. - No examination of any records required to be produced under a summons as to which notice is required under subsection (a) may be made -

(1) before the close of the 23rd day after the day notice with respect to the summons is given in the manner provided in subsection (a)(2), or

(2) where a proceeding under subsection (b)(2)(A) was begun within the 20-day period referred to in such subsection and the requirements of subsection (b)(2)(B) have been met, except in accordance with an order of the court having jurisdiction of such proceeding or with the consent of the person beginning the proceeding to quash.

(e) Suspension of Statute of Limitations. -

(1) Subsection (b) action. - If any person takes any action as provided in subsection (b) and such person is the person with respect to whose liability the summons is issued (or is the agent, nominee, or other person acting under the direction or control of such person), then the running of any period of limitations under section 6501 (relating to the assessment and collection of tax) or under section 6531 (relating to criminal prosecutions) with respect to such person shall be suspended for the period during which a proceeding, and appeals therein, with respect to the enforcement of such summons is pending.

(2) Suspension after 6 months of service of summons. - In the absence of the resolution of the summoned party's response to the summons, the running of any period of limitations under section 6501 or under section 6531 with respect to any person with respect to whose liability the summons is issued (other than a person taking action as provided in subsection (b)) shall be suspended for the period-

(A) beginning on the date which is 6 months after the service of such summons, and

(B) ending with the final resolution of such response.

(f) Additional requirements in the case of a John Doe summons. -

Any summons described in subsection (c)(1) which does not identify the person with respect to whose liability the summons is issued may be served only after a court proceeding in which the Secretary establishes that -

(1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,

(2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and

(3) the information sought to be obtained from the examination of the records or testimony (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources.

(g) Special exception for certain summonses. -

A summons is described in this subsection if, upon petition by the Secretary, the court determines, on the basis of the facts and circumstances alleged, that there is reasonable cause to believe the giving of notice may lead to attempts to conceal, destroy, or alter records relevant to the examination, to prevent the communication of information from other persons through intimidation, bribery, or collusion, or to flee to avoid prosecution, testifying, or production of records.

(h) Jurisdiction of district court; etc. -

(1) Jurisdiction. - The United States district court for the district within which the person to be summoned resides or is found shall have jurisdiction to hear and determine any proceedings brought under subsection (b)(2), (f), or (g). An order denying the petition shall be deemed a final order which may be appealed.

(2) Special rule for proceedings under subsections (f) and (g). - The determinations required to be made under subsections (f) and (g) shall be made ex parte and shall be made solely on the petition and supporting affidavits.

(i) Duty of summoned party. -

(1) Recordkeeper must assemble records and be prepared to produce records. - On receipt of a summons to which this section applies for the production of records, the summoned party shall proceed to assemble the records requested, or such portion thereof as the Secretary may prescribe, and shall be prepared to produce the records pursuant to the summons on the day on which the records are to be examined.

(2) Secretary may give summoned party certificate. - The Secretary may issue a certificate to the summoned party that the period prescribed for beginning a proceeding to quash a summons has expired and that no such proceeding began within such period, or that the taxpayer consents to the examination.

(3) Protection for summoned party who discloses. - Any summoned party, or agent or employee thereof, making a disclosure of records of testimony pursuant to this section in good faith reliance on the certificate of the Secretary or an order of a court requiring production of records or the giving of such testimony shall not be liable to any customer or other person for such disclosure.

(4) Notice of suspension of statute of limitations in the case of a John Doe summons. - In the case of a summons described in subsection (f) with respect to which any period of limitations has been suspended under subsection (e)(2), the summoned party shall provide notice of such suspension to any person described in subsection (f).

(j) Use of summons not required. -

Nothing in this section shall be construed to limit the Secretary's ability to obtain information, other than by summons, through formal or informal procedures authorized by sections 7601 and 7602.

ATTACHMENT 1 TO THE SUMMONS OF
PricewaterhouseCoopers LLP

INSTRUCTIONS

When responding to this summons, PricewaterhouseCoopers LLP ("PWC") is required to produce all requested documents. PWC is required to diligently search all available documents to locate the requested documents. All available documents include those in PWC's immediate possession and those that it can locate through a reasonable search. PWC should gather all requested documents in the possession of parties affiliated with PWC, including but not limited to its attorneys, accountants, affiliates, and advisors.

All requests for documents should be construed expansively rather than narrowly. All documents produced should include all attachments, exhibits, addendums, and appendices.

This summons is not intended to request documents that are already in the possession of the Internal Revenue Service. If PWC believes that a document requested by this summons is already in the possession of the Internal Revenue Service, it should describe the document, when it was produced, and to whom it was produced.

If PWC does not produce a requested document, it should state the efforts made to locate the requested document. In addition, PWC must state whether the requested document ever existed, existed but was destroyed, or existed but was misplaced.

If a privilege is being claimed with respect to any requested document, state with specificity the nature of the privilege and the extent of all allegedly privileged matters. If PWC objects to producing part of a document, PWC should provide a redacted copy and retain the original for review by a court. With respect to each allegedly privileged document, or portion of a document, provide the following:

1. The date appearing on such document or, if it has no date, the date or approximate date that such document was created;
2. The identity or descriptive code number, file number, title, or label of such document used by the custodian of the document to identify it for retrieval;
3. The general nature and description of such document and the name, title, and address of the person who signed such document and, if it was not signed, the response shall so state and give the name, title, and address of the person(s) who prepared it;
4. The name, title, and address of the person to whom such document was addressed and the name, title, and address of each person other than such addressee to whom such document, or a copy thereof were given or sent at any time;

5. The name, title, and address, if known, of the person having or who may have present possession, custody, or control of such document or a copy thereof;
6. Whether or not any draft, copy, or reproduction of such document contains any postscripts, notation, change, or addendum not appearing on the document itself and, if so, the response shall give the description of each such draft, copy or reproduction; and
7. The privilege claimed.

DEFINITIONS

References herein to transactions and events are for convenience only and are not a concession by respondent that the transactions and events are properly recognized for federal income tax purposes. Accordingly, descriptive terms herein such as "Stock Sale Transaction," "Contribution Transaction," "Bad Debts Transactions," "Asset Recovery Business," "business," "purchasing," "collecting," and "managing," together with all derivatives thereof and related terms, are used merely for convenience in describing the form of the disputed transactions. By use of such terms in this document, respondent is not agreeing that such terms represent or describe the actual substance or proper characterization of the transactions for federal income tax purposes.

1. The term "document" or "record" is any writing under Rule 1001(1) of the Federal Rules of Evidence, including, but not limited to, memoranda, agreements, contracts, plans, term sheets, opinions, papers, correspondence, notes, studies, graphs, diagrams, photographs, charts, projections, tabulations, analyses, questionnaires and responses, work papers, schedules, summaries, data sheets, reports, statistical or informational accumulations, data processing cards or worksheets, computer stored and generated documents, computer databases, computer disks and formats, machine readable electronic files or records maintained on a computer, telexes, telegrams, electronic mail (commonly referred to as "e-mail"), and similar or related documents and materials.

2. The term "communications" means any contact, oral or written, formal or informal, at any time or place and under any circumstances, whereby information of any nature was recorded, transmitted, or transferred.

3. The term "Relevant Parties" means any one or any group of the following persons, other persons affiliated with the listed persons that are not specifically listed below, and the directors, officers, employees, representatives, agents, and advisors of each listed and affiliated unlisted persons.

West Side Cellular, Inc. d/b/a
Cellnet of Ohio
Michael Tricarichi
Nob Hill Holdings, Inc.
Millennium Recovery Fund
Prime Asset Business Trust

Fortrend International, LLC
MidCoast Credit Corp.
Alice Dill Wendland
Steven Block
Charles G. Klink

4. The term "Stock Sale Transaction" means the 2003 sale by the stockholder of West Side Cellular, Inc. to Nob Hill Holdings, Inc. of West Side Cellular, Inc. stock and all similar transactions.

5. The term "Contribution Transaction" means the 2003 I.R.C. § 351 contribution to West Side Cellular, Inc. by Millennium Recovery Fund of notes receivable with a claimed tax basis of approximately \$43,323,069, and all similar transactions.

6. The term "Bad Debts Transactions" means the 2003 transactions that resulted in a deduction for bad debts being claimed on the Form 1120 of West Side Cellular, Inc. for the taxable year ended December 31, 2003, and all similar transactions.

7. The term "Asset Recovery Business" means West Side Cellular, Inc.'s business of purchasing, collecting, and managing charged off consumer debt during the years 2003 through 2006.

8. The term "Servicing and Management Agreement" means the agreement dated on or about November 6, 2003, between Prime Asset Business Trust and West Side Cellular, Inc. for professional services to be provided by Prime Asset Business Trust.

9. The term "similar transactions" means each and every transaction that has some, though not all, features in common with the described transaction. One or two aspects of a "similar transaction" may vary from the described transaction. For example, if the parties and nature of a transaction match the described transaction, the transaction is similar even though the date and identified asset do not match. Similarly, if an action taken with a specific asset matches the described transaction, the transaction is similar even if one of the parties and the date vary.

REQUESTED DOCUMENTS

1. All documents and communications by, among, or pertaining to the Relevant Parties, that plan, debate, analyze, discuss, describe, effectuate or otherwise relate to the below transactions and/or activities:
 - (a) Stock Sale Transaction
 - (b) Contribution Transaction
 - (c) Bad Debts Transactions
 - (d) Asset Recovery Business
 - (e) Servicing and Management Agreement

The documents produced under 1(a) through 1(e) should include all documents evidencing the transfer of money or property between the Relevant Parties pursuant to these transactions, including but not limited to wire transfers.

2. All schedules and/or proforma or draft tax returns for the year ended December 31, 2003, showing the amount of income tax that would be due from West Side Cellular, Inc. as a result of proceeds from lawsuit settlements being received by West Side Cellular, Inc. during 2003.
3. All documents that substantiate the basis of the notes receivable described in the definition of the term "Contribution Transaction," including but not limited to all documents and communications that evidence the transactions that purportedly generated the claimed basis, loan agreements, certified copies of the registrations of companies entering into the loan agreements, copies of notices relating to the transfer of loans to the Millennium Recovery Fund, copies of post office certificates confirming delivery of the notices, copies of the certificates of the seal impression as of the date that each loan agreement was entered into, and all relevant tax opinions.
4. All documents and communications sent, received, or prepared by any of the Relevant Parties in connection with the transactions and/or activities listed in paragraph 1 above between 2003 and 2006, including but not limited to e mail and facsimile correspondence.
5. All documents and communications between 2003 and 2006 pertaining to buildings and other depreciable assets shown on the balance sheet included with the Form 1120 of West Side Cellular, Inc. in the amount of \$299,682 for the tax year ended December 31, 2003, including but not limited to billings and notices for real estate taxes and records reflecting payments of real estate taxes.
6. All documents, including tax or legal opinions, invoices, statements, billings, and/or any other documents provided to any Relevant Parties by PWC regarding any and all services performed by PWC for the transactions listed in paragraph 1 for the relevant parties during the calendar years 2003 through 2006, as well as detailed billing records relating to such services.

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EXHIBIT PAGE ONLY

EXHIBIT 6

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

September 17, 2009

PricewaterhouseCoopers LLP
200 Public Square, 18th Floor
Cleveland OH 44114-2301
Telephone (216) 875 3000
Facsimile (216) 566 7846

Mr. Michael A. Tricarichi
341 Arbour Garden St.
Las Vegas, NV 89148

Dear Mike:

Per my discussion with Jim Tricarichi, enclosed are copies of the relevant materials you requested. I believe these are essentially the same materials provided to the IRS in February 2008, after review by you and your counsel.

Sincerely,



Richard P. Stovsky

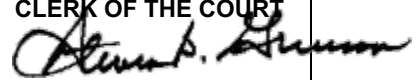
Enclosures

Exhibit #

Stovsky 43

AA 001709

09/01/2020 - MP



1 RTRAN

2
3
4
5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7
8 MICHAEL TRICARICHI,
9 Plaintiff,

) CASE#: A-16-735910-B
)
) DEPT. XXXI
)

10 vs.

11 PRICEWATERHOUSECOOPERS
12 LLP,
13 Defendant.

14 BEFORE THE HONORABLE JOANNA S. KISHNER
15 DISTRICT COURT JUDGE
16 WEDNESDAY, NOVEMBER 1, 2023

17 **RECORDER'S TRANSCRIPT OF PLAINTIFF'S MOTION TO**
18 **RECONSIDER PURSUANT TO NRCP 60(B) BASED ON NEWLY**
19 **DISCOVERED EVIDENCE**

20 APPEARANCES

21 For the Plaintiff: SCOTT F. HESSELL, ESQ., PRO HAC VICE
22 ARIEL C. JOHNSON, ESQ.

23 For the Defendant: MARK L. LEVINE, ESQ., PRO HAC VICE
24 CHRISTOPHER D. LANDGRAFF, ESQ.,
25 PRO HAC VICE
PATRICK G. BYRNE, ESQ.
BRADLEY T. AUSTIN, ESQ.

RECORDED BY: LARA CORCORAN, COURT RECORDER

1 Las Vegas, Nevada, Wednesday, November 01, 2023

2
3 [Case called at 8:29 a.m.]

4 THE COURT: Okay. Page 1. Tricarichi v. Pricewaterhouse
5 735910. Welcome back, counsel. So can we have appearances first on
6 behalf of Plaintiffs?

7 MR. JOHNSON: Good morning, Your Honor. Ariel Johnson,
8 bar number 13357. Local counsel for Plaintiff Michael Tricarichi.

9 THE COURT: Thank you.

10 MR. HESSELL: Scott Hessel on behalf of Plaintiff Michael
11 Tricarichi, pro hac vice admitted.

12 MR. BYRNE: Good morning, Your Honor. Patt Byrne on
13 behalf of Defendant PricewaterhouseCoopers, local counsel.

14 MR. LANDGRAFF: Good morning, Your Honor. Chris
15 Landgraff for PricewaterhouseCoopers. Also, pro hac vice.

16 MR. LEVINE: Good morning, Your Honor. Mark Levine for
17 PricewaterhouseCoopers as pro hac vice.

18 MR. AUSTIN: Good morning, Honor. Brad Austin, on behalf
19 of PricewaterhouseCoopers, local counsel.

20 THE COURT: Are we doing anymore or just observing in our
21 gallery seats? One on each side. Okay. Perfect. And you have someone
22 observing remotely, which means you can't see them, but they can see
23 the screen remotely. So just to let you know. I think it's from your side,
24 somebody's remote, observing.

25 Okay. Well, so counsel, this is -- so let's call this is the

1 motion to reconsider. Plaintiff's motion to reconsider pursuant to NRC
2 60(b), based on newly discovered evidence, document 451. Opposition
3 thereto document 458. Reply thereto document 464. Counsel, feel free
4 to commence with your argument.

5 MR. HESSELL: Well, I know you're very familiar with the
6 case, and I know that you spent a lot of time reviewing briefs. And so I
7 thought I would start out by giving you the opportunity, if you had any
8 questions for me to address that were either unanswered in the reply
9 brief or otherwise.

10 THE COURT: Well, you all know I wasn't the judge back in
11 2017, nor was I the judge in 2018, but I was the trial judge. So you can
12 appreciate I was reading through different things. In fact, before we
13 went on the record, I made a reference to a statement made in the
14 transcript from the September 24, 2018 hearing, which is the subject of
15 your motion for reconsideration. I did have a question from that, which
16 is actually for both sides.

17 And that question is to what extent, if any, does each side
18 argue that the issue was already addressed in the 2018 hearing? And
19 specifically page references, transcript maybe page 6 and transcript
20 maybe page 16/17, and just the general concept. Because the concept
21 was discussed. So for this Court, since I wasn't the one that heard it of
22 each party's perspective of how much it was fleshed out or not fleshed
23 out, so I have to evaluate for the motion for reconsideration of the
24 concept of new evidence, right.

25 MR. HESSELL: And the concept you're referring to is the

1 concept of fraudulent concealment or the failure to have adequate
2 documents?

3 THE COURT: It's actually both, but was more so on the
4 fraudulent concealment generalized concept because there were some
5 statements made in that transcript that -- as not being the trial judge, I
6 wanted to hear each party's perspective, and since I have the two
7 counsel who argued it back in 2018, I thought you might be able to give
8 me the perspective of what you think of the breadth and depth that was
9 discussed.

10 MR. HESSELL: Yeah, I think there's --

11 THE COURT: If you wish to. Nobody's requiring it. That was
12 just going to be my question, if it wasn't addressed.

13 MR. HESSELL: Right. And I think there's no question that we
14 argued that fraudulent concealment under Nevada's accounting statute
15 of limitations, there's an express exception that even if a Plaintiff knows
16 or should have known that they have a claim against an accountant, if
17 the accountant conceals acts or omissions for the period of time that he
18 concealed those acts -- he or she conceals those acts or omissions, then
19 that period does not count for statute of limitations purposes. It's an
20 express statute -- statutory tolling.

21 It is that statutory tolling that precipitated Judge Hardy's
22 order in the first instance in 2017, granting us 56(f) discovery. In fact,
23 things that he ordered that we were entitled to, which were based on an
24 affidavit from Tricarichi saying, I need these things --

25 THE COURT: Yeah. Paragraph 10.

1 MR. HESSELL: -- in order to respond. Yeah. In order to be
2 able to respond to 56(f) is what precipitated the meet and confer and the
3 exchange on what would be relevant.

4 In 2018, in front of Judge Gonzalez, we did then argue that
5 PwC fraudulently concealed and there should be tolling. What is, I think,
6 critical is that PwC, in their reply brief, their entire attack on that defense
7 was that we had not come forward with evidence that showed that PwC
8 knew before Mr. Tricarichi had engaged them or during the course of its
9 engagement, that the transaction was risky, was wrong. That you should
10 not go forward with that transaction. In fact, in their reply brief, at pages
11 -- that's one of the things I was actually going to show you --

12 THE COURT: No worries. Feel free to do it in your ordinary
13 course. I was presuming you all were really incorporating it in each of
14 your arguments, and I was going to ask questions at the end, but since
15 you asked me, I said it. Feel free to just do your regular argument, and
16 you can reference it when you want to. It's fine either way.

17 MR. HESSELL: Well, I think it's -- I think it is directly relevant
18 to the issues at hand. At pages 26 and 25 of their reply brief that
19 preceded the ruling by Judge Gonzalez, they say in response to
20 fraudulent concealment that "there are zero facts supporting Plaintiff's
21 theory that PwC knew its advice to Plaintiff was incorrect, but
22 fraudulently concealed that fact from Plaintiff in order to establish
23 concealment tolling."

24 They go on to say," even though we had 56(f) discovery,
25 there are zero documents that we've come forward that establish that

1 they knew their advice was wrong. And all we could refer to was what
2 they had told the Marshalls, which is that they claimed -- PwC claimed
3 that they told the Marshalls not to do the deal. And that was the subject
4 of lots of litigation at the trial in this case. But what we didn't have at
5 trial and we didn't have in 2018, but they were required to have
6 produced, is the "Wow!" email. And that "Wow!" email was the opening,
7 the examination of every witness at the *Marshall* trial, the closing, and
8 what, in large part, led to the verdict that we got in that case. That
9 document wasn't produced in the *Marshall* case until five months before
10 trial, two weeks before you issued the order in your case.

11 And I thought it would be helpful, which is why I have it up
12 on the screen to at least just walk through what's going on in the "Wow!"
13 email. I know it is somewhat self -- I think Mr. Weber's response is
14 somewhat -- speaks for itself. But what starts the exchange is about a
15 week before the transaction was supposed to close in Marshall -- can you
16 see that all right?

17 THE COURT: Yes.

18 MR. HESSELL: Dempsey -- sorry about that. Dempsey -- Mr.
19 Dempsey, who was the Stovsky of the *Marshall* case. He was the local
20 person who was working on the transaction and had day to day
21 responsibility, reaches out to Dan Mendelsohn, who, as we point out in
22 our brief, was the national risk manager responsible for the reportability
23 of transactions involving PwC. And he writes in his subject Tax Shelter
24 Disclosure Fortrend deal.

25 He attaches -- Mr. Dempsey attaches the stock purchase

1 agreement that was then in draft, and notes that he is concerned about
2 certain provisions in that, the disclosure language and the confidentiality
3 conditions. And could you please email me your comments? Mr.
4 Mendelson then responds 15 minutes later, and not only does he
5 respond to Mr. Dempsey, but he also adds all these other people who
6 are national top of risk management and complex tax shelter
7 transactions at PwC.

8 And just so you know, Mr. Emilian was National Director of
9 Tax at PwC. Mr. Housel was in the same department as Mr. Lohnes was,
10 which was these technical experts on tax shelter and reportable
11 transactions. Gary Cesnik is a name that should be familiar to you
12 because he was one of the people that PwC agreed to search their emails
13 for related to Fortrend during this time period. And Alan Fox, the head
14 of Tax in the Office of General Counsel.

15 And there's a reason why Mr. Mendelson included all those
16 people, which I'll get to in a minute when I refer you to the policy of
17 don't admit responsibility. Fifteen minutes after he first gets the draft
18 engagement agreement -- I mean, the draft stock purchase agreement,
19 he reports to Dempsey that he's had separate conversations with all
20 these people, including Bill Galanis, who was another head National Risk
21 Management Tax shelter guy at PwC at the time.

22 They've all had separate conversations. And we are very
23 uncomfortable taking any advisory role in this transaction. The
24 transaction is way too difficult. And I understand, basically, that we're
25 on the same page, and that you and Gary are going to have a

1 conversation that we shouldn't be advising on this transaction. John
2 Dempsey then forwards that email to Mr. Weber, and that's because Mr.
3 Weber was his supervisor within the Portland office and also working on
4 the transaction. At this point in time, they had been working on the
5 Marshall deal for six months. And this is the eve of closing, when
6 they're finally consulting the national experts.

7 And after Mr. Dempsey forwards that email, Mr. Weber has
8 his "Wow!" response. I mean, there's really no other way to put it. And
9 the "Wow!" response includes just about every aspect of an admission of
10 knowing that this -- now realizing that this transaction, this basic
11 transaction is risky. We didn't think that before. We thought this deal
12 was done all the time, and we may have already given this client the
13 wrong advice.

14 He goes on to say that it appears from whatever advice he's
15 getting from the national office, either in this underlying email or
16 subsequent conversations, that it's going to blow up at the IRS, and that
17 the client may get sued for aiding and abetting a transaction, the sole
18 purpose of which is to evade income tax. And he -- Mr. Mendelson, after
19 getting this email, which Mr. Weber wasn't on the prior email threads,
20 right, it was only Mr. Dempsey and the other individuals.

21 Mr. Mendelson, after receiving the email, forwards the
22 response and you see a blank here, but that's because PwC had marked
23 this as -- whatever this communication was, as attorney-client privilege.
24 And at trial in Marshall, they asked that that redaction be removed so the
25 jury wouldn't intuit something untoward that was being kept from them.

1 That's why there's just a white blank spot, but there's a one line
2 communication that was never produced to us. But he forwards it to
3 Alan Fox, Housel, Galanis, and the rest.

4 This top email was what was on the privilege log in 2019 --
5 June of 2019 that Skadden and Arps put on a privilege log in the
6 *Marshall* case. So this top -- the rest of the privilege log entry did not
7 reveal that there was any more communications, and they certainly
8 didn't produce this in redacted form until February of 2023. PwC doesn't
9 dispute today, and didn't dispute in the *Marshall* case, that all of this
10 underlying communication was relevant in *Marshall* and not privileged.
11 And it sort of speaks for itself that it's not privileged.

12 So as of June of 2019, at which point this case, the summary
13 judgment order, had been granted, but we had sought leave to amend to
14 add the 2008 claims. The Supreme Court had not considered the
15 mandamus petition of PwC on the jury waiver issue. You hadn't had the
16 evidentiary hearing on the jury waiver issue, and the trial hadn't
17 happened. It remained on that privilege log for four years, during which
18 all of those other events happened.

19 So as of June of 2019, PwC, as an institution, knew of the
20 "Wow!" email, knew that they had not produced it in response to
21 custodial searches that required it to be produced.

22 THE COURT: Focus on which case --

23 MR. HESSELL: Oh, yeah.

24 THE COURT: -- when you're switching between --

25 MR. HESSELL: Yeah.

1 THE COURT: -- when you're switching from Marshall to
2 Tricarichi --

3 MR. HESSELL: Yeah.

4 THE COURT: -- I think I know where you're going, but unless
5 you're saying it --

6 MR. HESSELL: Yeah.

7 THE COURT: Okay.

8 MR. HESSELL: Right. So, in Tricarichi, PwC agreed, in
9 response to Judge Hardy's order requiring the production of 56(f)
10 discovery, they agreed to produce, number one, documents related to
11 internal --

12 THE COURT: Hold on. Anybody who's logging on, please
13 we are in the middle of a hearing, so please make sure you mute
14 yourselves. Thank you so much.

15 MR. HESSELL: So, Judge Hardy, and you've probably seen
16 the order requiring 56(f) discovery, right, he denies summary judgment
17 initially on the basis of the 56(f) discovery.

18 THE COURT: Just so that we're clear on the record. Yes, I
19 have the orders. I said I looked at both of the orders 17 and 18 transcript,
20 and everything else that you all provided. Go ahead, please.

21 MR. HESSELL: Right. So 56(f) discovery is required by
22 Judge Hardy. He denies their initial motion to dismiss, requiring that
23 discovery to be produced on fraudulent concealment, among other
24 issues. And Skadden, on behalf of PwC, in August of 2017, represents
25 that they have produced, number one, documents related to any internal

1 policies or guidelines regarding ongoing communication with the client
2 after PW services and advice has been rendered concerning the client
3 engagement. And, number four, documents collected from a custodial
4 search with the following agreed upon search parameters. No one
5 disputes in this case, not even PwC on the motion for reconsideration,
6 that the "Wow!" email meets these search parameters.

7 Their excuse, which by the way, is not supported by any
8 declaration from anyone at PwC, not supported by anybody at Skadden,
9 is that they tried to find the documents responsive to these search
10 parameters and produce them, but nobody says what the nature of the
11 search that they did was at the time, nobody explains how they complied
12 with it, nor, more importantly, does anyone explain why in June of 2019,
13 when Skadden puts the "Wow!" email on a log in *Marshall*, they are not,
14 at the minimum, logging it in this case and allowing us the opportunity
15 to challenge it in the same way we did in *Marshall* and get before the
16 court in all the subsequent proceedings that document. That, by itself,
17 effectively an admission of discovery misconduct in this case.

18 And as a general matter, we come to the Court recognizing
19 that there is a high standard on 60(b) motions, especially one that has
20 involved the extent of the proceedings that have been both before this
21 Court, before the Supreme Court, before Judge Hardy, before Judge
22 Gonzalez. But civil litigation depends on a party's good faith compliance
23 with discovery obligations. And the adversarial process cannot work
24 unless both sides treat discovery not as a game of hide the ball, but
25 where they actually produce what they agreed to produce. And the

1 failure to produce the "Wow!" email and the Don't Admit Wrongdoing
2 Policy, just like in *Marshall*, have fundamentally compromised this
3 litigation process.

4 The "Wow!" email, as I just walked through, I think speaks for
5 itself. But I did want to say that it calls into question Judge Gonzalez's
6 summary judgment order as -- not calls into question, but Judge
7 Gonzalez likely would have reached a different result on the basis of
8 these two documents alone. Reading all of the inferences from those
9 documents in our favor, not their favor, that there was a question of fact
10 as to whether -- why they didn't share the "Wow!" email with Mr.
11 Tricarichi, and the policy then gives the explanation for why they did it.

12 And so, all that needs to be established -- and by the way, I
13 recognize that there is an inclination by courts, especially on motions for
14 reconsideration, to not want to start this whole process all over. But the
15 fact remains that --

16 THE COURT: That's not true.

17 MR. HESSELL: I wasn't speaking specifically to you, but --

18 THE COURT: I can only speak for myself. But records have
19 shown I have granted reconsiderations. I have denied reconsiderations.
20 I've allowed supplemental briefing. It's been all over depending on a fact
21 specific inquiry in accordance with the rules and the law. Go ahead,
22 please.

23 MR. HESSELL: Yes. So the summary judgment order
24 concludes that Mr. Tricarichi knew, by virtue of document requests from
25 the IRS, that PwC's advice was wrong. He could not possibly have

1 known that they were intentionally concealing from him that the national
2 office had concluded that those who participate in these types of
3 transactions subject themselves to potentially aiding and abetting tax
4 evasion by Fortrend because that was never known to him. Their advice,
5 all the way until the end was that this transaction, more likely than not,
6 will not subject you to personal liability. That was the Stovsky memo.
7 Its conclusion was you won't be subject to personal liability.

8 The only response that PwC can make is a claim that
9 somehow the 15 minute reaction by the national office is specific to the
10 Marshall transaction. But there is nothing in that email that suggests
11 that it is anything about the particulars of the Marshall transaction or
12 suggests anything about how it would be different from this.

13 In addition, the enforceability of the engagement agreement
14 was at the center of the evidentiary hearing that you found that the jury
15 trial was --

16 THE COURT: Okay, counsel, please. As much as you might
17 like to play with papers, type and do all sorts of different things, we are
18 in the middle of a hearing. Please do mute yourselves so that they get a
19 nice, clear record. Thank you so very much. Okay. Evidentiary hearing.
20 I heard what you said.

21 MR. HESSELL: Yeah. And the Supreme Court case. How
22 could it? The entire idea behind the engagement agreement being
23 binding on Tricarichi is undermined if, before he even entered that
24 engagement agreement they had disclosed to him what they then knew.
25 This February "Wow!" email is five months before Mr. Tricarichi even

1 engaged PwC or signed the engagement agreement with them, which
2 included the jury trial waiver. We certainly would have been able to
3 cross examine their witnesses, Mr. Stovsky and Mr. Lohnes, saying, did
4 you know that PwC's national office had concluded a nearly identical
5 transaction was going to subject your client to aiding and abetting tax
6 evasion? And did you tell him that before he engaged you?

7 Carrying on to the trial itself, the whole trial was about
8 whether or not they had an obligation to correct their prior advice, right?
9 The entire 2008 negligence claim was about whether they had an
10 obligation to correct their prior advice. Look what the policy says about
11 that. It says that if you learn any matter or event which calls into
12 question the quality of services provided by PwC or which might damage
13 PwC's reputation, is regarded as a troublesome practice matter, what do
14 you do? In the event -- what should you not do in the event of a
15 troublesome practice matter where you might learn that you didn't do --
16 you didn't give the right advice? Don't admit liability, shortcomings, or
17 defects in our services.

18 How could that not be a policy regarding ongoing
19 communications with a client? How could that not have been required to
20 be produced in 2017 or later once we amended our claim to add a 2008
21 claim? How could that not be directly relevant? They produced other
22 policies, but they never produced this one, and we couldn't cross-
23 examine their witnesses on that subject. We couldn't cross-examine
24 their experts on the subject of -- that they had a policy that says don't
25 admit responsibility.

1 Remember, Mr. Lohnes and Mr. Stovsky claimed that they
2 looked at the transaction after 2003, but just concluded that they had
3 given the same advice, that they were standing by their prior advice. But
4 what we didn't know then, but we do know now, is that there's a reason
5 why they were standing by their prior advice because there was a policy,
6 a risk management policy that dictated that they do so. And even if they
7 were to conclude otherwise, that they shouldn't tell the client about
8 screw-ups.

9 So at the end of the day, we recognize that cases must end,
10 and finality is an important goal to the litigation process, but this is not
11 the first time that we've raised the issue of discovery misconduct by
12 PwC.

13 In fact, a year ago yesterday, we brought to your attention a
14 motion for discovery sanctions where we said they have come to us and
15 produced a few handful of additional documents that had not been
16 produced before trial. There's a minute order, entry order on October
17 31st of 2022, that reflects that you imposed a monetary sanction.

18 We actually asked that you also allow us a deposition from a
19 corporate representative witness to confirm that they had produced
20 everything that they had agreed to produce up until that time. And they
21 put in a declaration from Ms. Roin that said that they have gone back and
22 made sure that all responsive documents and that they had agreed to
23 have already been produced. And you took that representation. As I
24 reread the hearing this morning, you relied on that representation from
25 Ms. Roin that they had gone back and made sure nothing else hadn't

1 been produced to deny us the relief of a deposition of a corporate
2 representative deposition. If we had gotten that deposition at the time,
3 we might have unearthed this issue before.

4 At the end of the day, it's in your hands whether to express
5 an intention to give us some of the relief that we're seeking. What would
6 that entail, ultimately? In our view, at a minimum, it would entail
7 briefing the 2018 summary judgment issue with the benefit of the
8 evidence that we now have. Obviously, we raised those issues, and I
9 tried to articulate those issues here now, but as you noted, you weren't
10 the judge that heard the issues at the time, but that order became -- was
11 interlocutory and became incorporated into your final judgment.

12 So do you allow it to proceed on the existing record without
13 the benefit of us briefing the issue and deny us the relief that we're
14 seeking now, or do you give us that opportunity as well as the
15 opportunity to suggest that there may be other claims that we could
16 have made in 2019 when they admit that they knew of the document?

17 THE COURT: Okay. Thank you. Counsel, your response?

18 MR. LEVINE: Yes, Your Honor. I am mindful of your
19 question at the beginning, and I will -- if it's all right with the Court deal
20 with it kind of in a normal course --

21 THE COURT: Sure.

22 MR. LEVINE: -- as I go through, because I think it will make
23 more sense that way, just from a logical standpoint. So I want to
24 address first, why is it the "Wow!" email wasn't produced in the 56(f)
25 discovery and then why, under the standard for newly discovered

1 evidence under Nevada Rule of Civil Procedure 60(b)(2), the relief
2 requested should not be granted.

3 First, the "Wow!" email and when it was produced. And
4 there's all kinds of arguments that we violated discovery rules, et cetera.
5 But as shown in the response, there was an agreement with Mr. Hessel
6 to produce documents in the 56(f) discovery from certain custodians. In
7 fact, there were nine custodians that were agreed to, and those nine
8 custodians is set forth in the August 23, 2017 email. That's for Tricarichi
9 Exhibit 4 at record page 30.

10 And in that it included Weber and Cesnik. But Weber and
11 Cesnik didn't have the "Wow!" email in their files. You know, people,
12 you know, don't always keep emails years and years down the road
13 before the litigation came up, when Tricarichi first approached PwC with
14 the tolling agreement in 2011.

15 So in the *Marshall* case, PwC found the "Wow!" email later
16 on and produced it from the custodial files of Bill Galanis, whose name
17 you heard during the trial. And he was not an agreed -- he was an
18 agreed to custodian for the *Marshall* case, but not for the Tricarichi 56(f)
19 discovery when the parties were negotiating it. So that's why it ended
20 up being put on a privilege log in the *Marshall* case, but not produced in
21 the 56(f) discovery in the Tricarichi case.

22 Now, in his reply, Mr. Hessel pivots and says, well, Weber
23 and Cesnik should have saved the email, so it would have been in their
24 files, but under Nevada law, and we cited the *Bass-Davis v. Davis* case
25 from the Supreme Court in 2006, there's no obligation to save

1 documents until the party is, "on notice of a potential legal claim." And
2 here that didn't happen until we were put on notice in 2011. And PwC
3 immediately did put on a legal hold at that point. And that's in the
4 Genord declaration, paragraphs 19 and 20, which is PwC Exhibit Eleven
5 at 73.

6 And PwC's document retention policy says you save
7 documents that are necessary to show the work done, but emails
8 generally are, "not necessary -- that are not necessary to record or
9 support the firm's work should not be retained." And that's PwC Exhibit
10 8 at 46, paragraph 2(b)(i).

11 THE COURT: Are you saying that an email that references
12 not the "Wow!" email, right, literally, for purposes of the record, it does
13 use the word "wow" in the email, starts it off with the word "wow", which
14 is why I presume you're calling it the "Wow!" email.

15 MR. LEVINE: Sure.

16 THE COURT: Is that didn't have to do with the work
17 performed?

18 MR. LEVINE: It had -- the way that PwC's policy is set up,
19 document retention policy, you take the documents that are necessary,
20 and that's the phrase that's used, necessary to show the work
21 performed, put it in a file and save it. But every email that you have
22 discussing the matter doesn't need to be saved.

23 THE COURT: I'm hearing what you're saying, but you can
24 appreciate with newer eyes on it, right, you're saying the -- in reading
25 the policy that was attached, are you saying that it doesn't require that if

1 you decide not to perform work, that people don't keep the reasons why
2 they chose to limit the scope of representation not to do certain work, or
3 a change in -- hypothetically, a change in an IRS regulation that might
4 modify work that's currently in progress? Don't take that as any
5 comment from the 2008 issue. I'm just saying, hypothetically, it might
6 be work in progress?

7 MR. LEVINE: The standard is you keep what's necessary to
8 show the work that was done. If it's -- you know, possibly what wasn't,
9 you know, decided not to be done. But that is different. It also says
10 every email doesn't have to be saved, every email back and forth on
11 matter. But regardless of that, Nevada law says you don't have an
12 obligation to retain documents until you're put on notice of a claim,
13 which shouldn't happen until 2011.

14 THE COURT: So you're saying PwC was not on notice of the
15 claim when there was earlier IRS issues?

16 MR. LEVINE: Mr. Tricarichi was on notice. And Mr. Tricarichi
17 -- and this is going to be an important point because this is the basis of
18 the Court's ruling in 2018, which was not the four-year prong of statute
19 of limitations, but the two-year prong on discovery.

20 Mr. Tricarichi was on notice that the IRS could come after
21 him. And he was on notice, therefore, that he could have a claim
22 against PwC, but he didn't approach PwC with his request or his tolling
23 agreement to request for that until 2011.

24 So in any event, even if PwC were considered to be on notice
25 in 2008 as well, when the IRS came -- because they sent document

1 requests to PwC too.

2 THE COURT: That's the focus of my question.

3 MR. HESSELL: But that doesn't mean that -- first of all, it
4 doesn't mean that the documents were still in Mr. Weber's or Mr.
5 Cesnik's files at that point because, remember, they're the two
6 custodians from the Tricarichi case. The document was found from Mr.
7 Galanis' files, and so Mr. Galanis had it, but he wasn't a custodian. Mr.
8 Weber didn't keep his emails. That was his testimony. He just deleted
9 emails each day unless it was like a to do item. That's how he did it. He
10 liked a clean inbox. There was not testimony from Mr. Cesnik one way
11 or another. But there isn't evidence that the emails from Mr. -- the
12 "Wow!" email was in Mr. Cesnik's possession in 2008. We do know it
13 was in Mr. Galanis' possession, but he wasn't a custodian in the agreed
14 to list in the Tricarichi case.

15 THE COURT: But you do understand there's a challenge, and
16 that's part of my finding, finding 50, right. The IRS also issued a
17 summons to PwC on January 29th, 2008, seeking documents related to
18 the Westside transaction, Exhibit 152. On February 22, 2008, PwC
19 responded to the summons on its own behalf. In doing so, PwC
20 provided documents that set forth its contention that it had not provided
21 any services to Tricarichi since 2003, Exhibit 155. Tricarichi was not
22 billed for any of these activities. See Exhibit 3.

23 MR. LEVINE: Correct.

24 THE COURT: So when you get a summons from the IRS,
25 PwC, doesn't maintain documents potentially related to that could advise

1 -- are you carving out the IRS' issues in Westside versus Fortrend
2 overall? I'm just -- I'm trying to get the sense because hearing that PwC
3 wouldn't retain documents when they get an IRS subpoena doesn't -- it
4 seems a little inconsistent.

5 MR. LEVINE: And that's not what I'm saying.

6 THE COURT: Okay.

7 MR. LEVINE: And you know, PwC did retain documents then.
8 But when Mr. Stovsky sent in the documents to the IRS in 2007 or '08, I
9 can't remember the exact date, but when he sent it in at that time --
10 remember, he's in the Cleveland office, and the work came out of the
11 Cleveland office and certain people, including Mr. Lohnes in the national
12 office. And he produced the documents that he had that were in the file
13 largely from the Cleveland office.

14 What we're talking about here with that "Wow!" email is
15 something specific to the Marshall transaction in Portland that Mr.
16 Stovsky and Mr. Lohnes, who were working on the transaction -- in the
17 Westside transaction, never saw

18 THE COURT: Do I have that as evidence versus argument?

19 MR. LEVINE: You certainly have it as argument.

20 THE COURT: You have very well written briefs, everyone --

21 MR. LEVINE: Yeah.

22 THE COURT: -- but do I have that as evidence?

23 MR. LEVINE: I would have to go back and -- I can't
24 remember, frankly, Mr. Stovsky's testimony about his -- what he put in --
25 you know, what he produced and when in 2007 or 2008 to the IRS. I

1 would have to go back and look at that. It's certainly not produced -- it's
2 not brought to you by either side as part of this briefing and the 60(b)
3 motion, but there could be testimony from the trial or deposition on that.
4 And I don't recall offhand.

5 THE COURT: Okay. No worries. Please continue. Go ahead.

6 MR. LEVINE: So the standard for newly discovered evidence
7 under Rule 60(b)(2) is an extremely high standard for relief.

8 Now, we cited the 9th Circuit case -- and there's no law in
9 Nevada on that, which is why Nevada Court is saying what the federal
10 rule, it's the same. And the *Feature Realty* case, the 9th Circuit said the
11 standard is that the new evidence is, "of such magnitude that it would
12 have been likely to change the disposition of the case."

13 Now, Mr. Tricarichi cited two cases from the 7th Circuit in his
14 motion, the *Wallace* case from 1980, that talked about a similar kind of
15 standard, probably produced a different result. But also, the *U.S. v.*
16 *McGaughey* case from -- also from the 7th Circuit, 1992, 977 F.2d 1067.
17 The *McGaughey* case is particularly relevant because it took that general
18 standard about -- it would probably produce a different result and laid
19 out some more details about that. It specifically said, that where "the
20 new evidence is virtually determinative on the merits of the litigation is
21 the standard." That's at page 1075. It said the issue is, "whether the
22 document causes us to believe with virtual certainty that the judgment in
23 favor of the government, regardless of whether it was obtained
24 summarily or after trial, is incorrect." Virtual certainty or virtually
25 determinative, that's a pretty strong standard.

1 And here, that test is not met for three reasons. Well, first of
2 all, in the 2008 claim, Mr. Hessel -- which was ignored, in their reply --
3 Mr. Hessel said, "boy, they would have wanted to see this QR&M
4 booklet that said that if you see an issue, don't talk, which is basically
5 don't talk, go talk to the Risk Management folks before you say things to
6 the client. But the court's ruling -- I mean, the Court ruled against -- for
7 PwC against Mr. Tricarichi in the 2008 claim at the trial for four
8 independent reasons, as you know. No duty, no breach, no causation,
9 statute of limitations. They have to overcome all those, and the policy
10 doesn't do that.

11 And on the no duty, which is the one out of the four
12 independent grounds for ruling against Plaintiff, Mr. Hessel said, boy, it
13 would have shown -- you know, this booklet would have shown
14 something. No, because the Court's ruling of no duty was based on the
15 SST's or the standards, and what the standards say about when you
16 need to correct something, and that it doesn't apply to a former client.
17 So that is not affected by these documents.

18 But on the 2003 claim, which I think is the focus of their
19 efforts, I want to make three different points. First, the Court's ruling was
20 that the 2008 document request from the IRS put Mr. Tricarichi on notice
21 of the claim. And therefore there is -- the two-year prong applies. And
22 this goes to, I think, what the Court's question was at the beginning
23 about what was going on at the hearing.

24 PwC had two different reasons why it argued that there
25 should be a finding in its favor on summary judgment on statute of

1 limitations. First, the four-year prong. And there was a question about
2 which law applied New York versus Nevada. But ignoring that, and just
3 focusing on Nevada, there's the four --

4 THE COURT: Yeah, Nevada was longer, so it really doesn't
5 matter.

6 MR. LEVINE: Sure. Right.

7 THE COURT: Got it.

8 MR. LEVINE: So there's the four-year prong under 11.20752,
9 and there the response was fraudulent concealment. And then there's
10 also the two-year prong under 11.20751A. And Mr. Byrne, right here,
11 argued on pages 6 to 7 of the transcript, and I think you referred to those
12 pages, that even if, you know, the Court doesn't find that there was a
13 statute of limitations bar under the four-year prong, the two-year prong
14 is an independent basis because Mr. Tricarichi was on notice as of 2008
15 that the IRS was going to or could go after him.

16 And in fact, this Court had a finding of fact specific to that
17 notice, paragraph 49. It sounds like you've looked at that because you
18 looked at the one after that on paragraph 50, which is that on January
19 22nd, 2008, the IRS sent the information document request to Mr.
20 Tricarichi for documents related to the Westside transaction. The IDR or
21 Information Document Request advised Tricarichi that he may be liable
22 for all or part of Westside's tax liability. That's part of this Court's
23 finding. That's what it said.

24 And when you look at that -- now, Mr. Hessell argued, well,
25 that's not -- didn't give him enough. He didn't really know until 2012 or

1 2013, when he had more information and there was a finding against
2 him, but the Court said no. The Court, who was Judge Gonzalez at that
3 time, said, no, he was on sufficient notice. And PwC had cited a number
4 of cases in its brief that when the IRS gives you that kind of request, it
5 puts you on sufficient notice that you should go and, you know, that you
6 could have this put against you.

7 So the Court ruled that under Nevada's interpretation of the
8 rule, two years after discovery, under the best case scenario for the
9 Plaintiffs was the statute expired before the January 2011 tolling
10 agreement being executed. That's a docket 116 transcript page 19, line 7
11 through 15. So you already have -- you had these two different grounds.
12 And the courts basically said, I don't need to get into this whole
13 fraudulent concealment issue. I can decide it based on the notice that
14 Mr. Tricarichi got in 2008.

15 So this whole argument about the "Wow!" email and
16 fraudulent concealment, et cetera, is beside the point to the Court's
17 ruling, which was on a different prong of the statute of limitations.
18 That's the first point.

19 The second point is that the "Wow!" email wouldn't have
20 changed the thrust of the fraudulent concealment argument because Mr.
21 Hessell argued extensively that PwC didn't tell Mr. Tricarichi that PwC
22 was giving different advice to the Marshalls in 2003. He argued that in
23 the transcript at page 17, which was one of the pages you referred to
24 with page 17, lines 1 through 3. And that was based, you know, on the
25 Tax Court decision and what the findings were there.

1 And in the response to the response brief, docket 113, page
2 20, he made the same point about how "PwC actually gave at least one
3 other taxpayer completely the opposite advice that it gave Mr.
4 Tricarichi." So this is an argument that was made. The "Wow!" email is
5 additional evidence on that point, but the evidence -- the argument was
6 already made.

7 Third, Mr. Hessel's reference to the statements in the
8 "Wow!" email about the transaction don't help him, because the Court's
9 already found the Marshall transaction was different. Now, Mr. Hessel
10 says that this was the National Tax Office making a finding about a basic
11 transaction. If I could use the ELMO here, I want to put this out because
12 -- I don't know what I need to do to turn it on.

13 THE COURT: There you go.

14 MR. LEVINE: All right.

15 THE COURT: Sideways, yeah.

16 MR. LEVINE: Okay.

17 THE COURT: Thank you.

18 MR. LEVINE: I don't know is there -- sorry, I'm not very good
19 at the ELMO. There's a way to --

20 THE COURT RECORDER: There's an arrow.

21 THE COURT: There's an arrow. You see the arrow.

22 [Court and counsel confer re ELMO]

23 MR. LEVINE: I appreciate that. All right. So remember, the
24 second page of the "Wow!" email is someone from -- Mr. Dempsey from
25 the Portland office sending the 57-page stock purchase agreement, the

1 draft, to Dan Mendelson from the national office. And the national office,
2 what do they say about it? So this is commenting on the 57-page draft
3 document that they got. They say -- and I've underlined -- that we talked
4 about this transaction. Were uncomfortable taking an advisory role in
5 this transaction. The 57 stock page stock purchase agreement, you
6 know, et cetera, refers -- and he refers to risks in this transaction. It's
7 referring to the Marshall transaction, the one in the 57 page stock
8 purchase agreement.

9 Now, Mr. Dempsey, the local guy, the local engagement guy,
10 responds by talking about, I didn't know the basic transaction was risky
11 because he didn't know. He wasn't the guy who knew about the
12 different issues in the -- you know, in this which is why he turned to the
13 national office. And the national office focused on this transaction, the
14 Marshall transaction.

15 And as this Court knows, this Court's already found in a
16 couple of different places that the Marshall transaction was different than
17 the Tricarichi transaction. And that's paragraphs 39 and 135 in the
18 Court's findings of fact and conclusions of law, docket 416.

19 So for those three reasons, you have a situation where Mr.
20 Tricarichi can't show -- cannot show that it was likely that the "Wow!"
21 email and the booklet would have likely caused there to be a different
22 result. In all of those, maybe the most important is that the Court ruled,
23 based on the discovery rule, based on a two-year prong, and the two-
24 year prong is not affected by it.

25 There's also a question about whether or not Mr. Hessel

1 exercised reasonable diligence in bringing this to the Court as a Rule
2 60(b)(2) instead of a Rule 59(e) motion when he had knowledge as an
3 attorney. And we're not imputing that knowledge to Mr. Tricarichi, but
4 it's a question of reasonable diligence. And he had knowledge of this
5 email before the 28 days after the judgment was issued, which I believe
6 would be -- February 22nd, was the judgment, so I think it's March 22nd,
7 but that has been briefed and the basic response was, well, you don't
8 impute knowledge to the client. And we're not imputing, we're just
9 saying you could have asked it more diligently.

10 So unless Your Honor has any questions but --

11 THE COURT: I do not.

12 MR. LEVINE: All right. Thank you.

13 MR. LANDGRAFF: Your Honor, I know it's a one rider --

14 THE COURT: Unless I have consent by counsel for Plaintiff.

15 MR. LANDGRAFF: If I can just confer with Mr. Levine? I want
16 to give him the transcript. You asked if there was evidence that Mr.
17 Lohnes or Stovsky knew about this. And there is trial testimony that I
18 wanted to hand to Mr. Levine.

19 THE COURT: He had a full opportunity. He utilized all his
20 time in fairness because realistically, right, it's now 9:15. We've been
21 going about 40ish minutes.

22 MR. LANDGRAFF: Okay. Can I just give a transcript cite or?

23 THE COURT: To a transcript to a particular trial date?

24 MR. LANDGRAFF: Yes. Counsel for Plaintiff, do you have an
25 objection?

1 MR. HESSELL: No, I don't know.

2 THE COURT: No, you don't agree, or no, you don't have an
3 objection?

4 MR. HESSELL: I don't object.

5 THE COURT: Okay. Then feel free to either -- which way do
6 you want to do it most efficiently? He gives me transcript cite, he states
7 it, he tells it to counsel, who's arguing.

8 THE COURT: I think he's just giving -- if he's just giving a
9 transcript site, I don't have any objection to Mr. Landgraff saying it, but it
10 looks like he's already passed it to Mr. Levine.

11 THE COURT: Okay.

12 MR. LANDGRAFF: It's dated -- November -- just so Mr. -- it's
13 in front of Mr. Levine, but it's day two of the trial, November 1st, 2022
14 transcript, at -- he can give you the cite.

15 MR. LEVINE: It's pages 66, line 21 to page 67, line 12.

16 THE COURT: Go ahead, counsel. Would you like to
17 respond?

18 MR. HESSELL: Yeah, briefly. I know that we've already taken
19 up our lot of time.

20 THE COURT: I'm trying to give everyone -- I'm just trying to
21 give everyone the full opportunity. I appreciate it's important to
22 everyone, it's been a long time since this case has been around. Go
23 ahead.

24 MR. HESSELL: Yeah. I want to start with the doesn't make a
25 difference to the 2008 ruling. And I just want to reiterate if I didn't make

1 the point before, the fraudulent concealment statute in Nevada does not
2 speak to what the Plaintiff knows. It speaks to the Defendant's conduct.
3 Where the Defendant fraudulently conceals acts or omissions which it is
4 aware of from the Plaintiff during that period of time, the statute of
5 limitations is tolled. It is an exception to the A(1) and (2) that precede it.

6 And so the defense or the argument that this evidence the
7 "Wow!" email doesn't establish that PwC knew that the transaction -- the
8 national office at PwC, before Mr. Tricarichi even engaged them, knew
9 that it would expose him to aiding and abetting tax evasion and
10 concealed those conclusions to him before he signed the engagement
11 agreement and throughout the entire course of the services that they
12 provided to him.

13 That is then paired with the policy, which is that the national
14 office knows that these transactions, the basic transactions are risky,
15 knows that they are likely to blow up at the IRS, knows that he may be
16 subject to personal liability, but Mr. Lohnes and Mr. Stovsky then give
17 the advice that they gave, which is documented. And the policy
18 suggests that the reason why the "Wow!" email and the conclusions of
19 the national office were not shared with Mr. Tricarichi is because they
20 had a policy against admitting shortcoming.

21 Now, while it is true that the 60(b) standard is a heavy
22 standard, the issue before you is whether this evidence would have
23 allowed Judge Gonzalez or even you, now, to conclude that a reasonable
24 juror could find that PwC concealed this information from him
25 intentionally to accept the statute of limitations. The standard on

1 summary judgment is all inferences must be read in our favor, not their
2 favor. The fact that there's some characterization of this email, the fact
3 that there's a characterization of the policy, that would have been good
4 to have that fight back in the day, but we didn't have the evidence to be
5 able to have that fight. We would have been able to cross-examine their
6 witnesses. We would have been able to present evidence from the
7 witnesses about whether they consulted with any of these individuals on
8 the "Wow!" email, and whether any of them shared this information with
9 him.

10 The other thing that we make the point of in the brief is it
11 should beg the question of how is it possible that after this email gets
12 shared with the Office of General Counsel, with the higher ups at PwC,
13 that there's not one additional email in reference to this document?
14 There's not one additional communication that follows it? And that just
15 leads to the point of -- that Mr. Tricarichi, whatever he knew as a result of
16 receiving document requests from the IRS in 2008, could not possibly
17 include the idea that PwC knew that the transaction was risky, knew that
18 he was proceeding in a transaction that might expose him to aiding and
19 abetting tax evasion.

20 Yes, we did argue to Judge Gonzalez that he didn't know
21 about the Tricarichi advice, but that's not what the "Wow!" email reflects.
22 It's not about that we ultimately told the Marshalls that it was not a
23 Notice 2001-16 transaction. This goes to the heart of why he was found
24 personally liable, and it is the opposite of what Mr. Lohnes and Mr.
25 Stovsky told him, and yet they didn't ever share it.

1 The explanation of how this document wasn't produced in
2 this case, how it wasn't preserved in the custodians that they agreed to
3 produce, is not believable. They get a subpoena from the IRS in 2007 in
4 the Marshall case. They get a summons in Tricarichi in 2008. How are
5 there not litigation holds in all of these people who touched any Midco
6 transaction? And this transaction that's being referred to in the while
7 email is about a Fortrend Midco deal, it is not about the particulars of
8 that deal. They came to that conclusion within 15 minutes. They
9 responded in 15 minutes to the 57-page engagement agreement.

10 Yes, I know you said that it was different or that the advice
11 can be different in Marshall versus Tricarichi based on the evidence that
12 you had before you, but what is spoken to there is the basic idea of a
13 Midco, and the basic idea of a Midco, the national office at PwC knew its
14 clients would be exposed.

15 The idea that a firm of PwC's caliber would come to these
16 conclusions at the highest level and allow any client to get anywhere
17 near these deals after those conclusions, is mind boggling. And we
18 should have the opportunity to make the pitch on fraudulent
19 concealment and probably a fraud claim because they told him the
20 opposite, none of which Judge Gonzalez had before her.

21 THE COURT: Okay. Thank you very much. Everyone's had,
22 well, way more than ten minutes, because it's been about an hour. So
23 everyone had a full opportunity to engage in their argument, but
24 extensive briefing, and historical. As the Court noted, it went back to
25 everyone's rulings and transcripts galore, including the transcript from

1 the 2018 summary judgment hearing, that was on the 24th. So it's all
2 part of the records for the Court to review.

3 The Court has to look at this -- first off, let's go to standards,
4 Rule 60(b) relief from a judgment or Order. 60(b) grounds of relief. On
5 motion and just terms, the court may relieve a party or its legal
6 representative from a final judgment, order, or proceeding for the
7 following reasons. One is mistake, inadvertent, surprise, excusable
8 neglect. Two, which is the focus here, is newly discovered evidence that
9 with a reasonable diligence, could not have been discovered in time to
10 move for a new trial under 59(b). Three, fraud, and then goes into
11 extrinsic and intrinsic. Four, the judgment is void. Five, the judgment
12 has been satisfied, release discharge. Six, any other reason that justifies
13 relief.

14 So realistically, it's subpart two and subpart six, a more
15 global catch all. And then the newly discovered evidence. And then it
16 talks about the timing. It says must -- timing. The motion under Rule
17 60(b) must be made within a reasonable time and for reasons one, two
18 and three, no more than six months after the date of the proceeding or
19 the date of service of the written notice of entry of the judgment or order,
20 whichever date is later. The time for filing the motion cannot be
21 extended under Rule 6(b), effective finality.

22 So here we have a timing of the motion. How do I address
23 that timing issue?

24 MR. HESSELL: Do you want me to address it?

25 THE COURT: I'll give you a minute, and I'll give you a minute

1 response.

2 MR. HESSELL: Sure. Sure. First and foremost B(3), fraud on
3 the Court does not have any time limitation at all.

4 THE COURT: Actually, counsel, a motion under 60(b) must
5 be made within a reasonable time, dash, and for reasons one, two, and
6 three --

7 MR. HESSELL: Right. Fraud.

8 THE COURT: -- no more --

9 MR. HESSELL: Sorry.

10 THE COURT: -- than six months after the date of the
11 proceeding.

12 MR. HESSELL: Right. So --

13 THE COURT: Three, fraud, whether previously called
14 intrinsic or extrinsic, misrepresentation or misconduct by an opposing
15 party, is subpart three.

16 MR. HESSELL: Right. And that's what I was referring to,
17 which is the fraud on the Court can be brought to the court's attention at
18 any time. And they made representations to this Court, both to Judge
19 Gonzalez and later in time, that they produced the documents that said
20 that they produced in response to 56(f) discovery.

21 But more specifically, is that I learned of the "Wow!" email
22 and the policy five months -- in February of 2023. Mister -- the document
23 is produced pursuant to a protective order in *Marshall* that precludes
24 Marshall or its counsel from using it in any other proceeding. I had no
25 ability to come to this Court because the trial is concluded when I learn

1 of it, and I don't even get the "Wow!" email until two weeks before you
2 issued the findings of fact. I cannot share the document with Mr.
3 Tricarichi because it's subject to a protective order. And I cannot ask one
4 client to sacrifice their case or put their case in any kind of disadvantage
5 for the benefit of another client. I did want to make one other point,
6 which is --

7 THE COURT: I was going to tell people who keep on not
8 putting themselves on mute to please put it on mute. Counsel's in the
9 middle of arguing something, you might want to play a record. Thank
10 you.

11 MR. HESSELL: Also, we moved within the six months of final
12 judgment. And as I mentioned earlier, the summary judgment order is
13 an interlocutory ruling --

14 THE COURT: Okay.

15 MR. HESSELL: -- incorporated into your final judgment. And
16 we moved as soon as we could when it became public.

17 THE COURT: Okay. Did you want a moment?

18 MR. LEVINE: Yeah. Two quick things. One is that Mr.
19 Hessell, when he got the "Wow!" email on February 3rd, he had until
20 March 22nd to file a Rule 59(e) motion. He could have asked PwC for
21 permission to use the documents in this case. He could have challenged
22 the confidentiality designations in the *Marshall* Court, and he could have
23 asked the *Marshall* Court, under the protective order there, to be able to
24 use the document in a different case. So all those things could have
25 been done. And that's something that would not only go to timeliness

1 under 60(c)(1), but reasonable diligence under 60 (b)(2).

2 On the fraud on the court argument on 60(b)(3), which really
3 wasn't explicitly made in the motion, which called it a rule
4 60(b)(2)motion, but we addressed it thinking that they might go to it.
5 And as you saw in the case law, *NCDSH v. Garner*, the Nevada Court -- in
6 2009, Nevada Supreme Court said that it is rare and requires egregious
7 misconduct and mere discovery. And then the case out of the 9th Circuit
8 says a mere discovery violation or nondisclosure does not rise to the
9 level of fraud in the Court. That's all I have, Your Honor.

10 THE COURT: Okay. So let's walk through what it is. So
11 looking at 60(b), whether I look at it as b(2) or b(3), they do have the six
12 month provision. So both of those would preclude it if I was looking at it
13 under -- narrowly as written under NRCP 60(b), procedurally. However,
14 the Court finds it's appropriate to give the analysis under 60(b)(6), the
15 any other reason, because here it's been articulated to this Court, so you
16 have the unique aspect of having a protective order in another case that
17 would preclude the counsel from sharing it with the client, which would
18 then preclude the client from authorizing any brief to be submitted to
19 this Court.

20 And so the Court finds, that in interest of justice, the Court
21 has to analyze independently and also under 60(b)(6), but taking into
22 account the assertions are raised under the concept of B(2) and (3), but
23 without that time preclusion under 60(c)(1).

24 So now we look at substance. Realistically, when I look at
25 substance, I have to break it down to two different things. There's two

1 different aspects of relief. One aspect of relief is there should be relief
2 from the summary judgment order from 2018, and September 24th was
3 the actual hearing date, and the order was dated October 24th, 2018,
4 filed at 10:33, and the NEO was shortly thereafter. So that's the first
5 order of relief, and that's been referred to as the 2003 case.

6 When I look at the 2003 case, I have to look at what was
7 available in 2018, and whether or not the said "Wow!" memo and the
8 additional policy would have changed the determination of granting the
9 summary judgment on a statute of limitations ground. And in so doing,
10 the Court relies, in part, on the transcript of the hearing and all the
11 pleadings that were provided. Obviously, your oral argument for this
12 case as well as all your pleadings for this proceeding.

13 But when you look at the actual transcript and the Court
14 already referenced pages 6 and 7, right, counsel for PwC, at the time, did
15 say on page 7, but -- okay, first.

16 "Your Honor, there's nothing to support a fraudulent
17 concealment claim in this case. But even if the Court thinks there is, your
18 Honor has nailed the second issue, and that was not briefed before, but
19 that's under 20751A. The clock started two years after he received this
20 notice." And what is Plaintiff's response to that? "Your Honor, he argues
21 that he did not have definitive knowledge till the IRS completed
22 investigation in June of 2012," which is consistent when you have
23 counsel for Plaintiff, their argument was that it was 2012.

24 I think you used the word bunk. Oh, yes. "The only point in
25 time when he knows the PwC advice is bunk is in 2012." This is on page

1 13, when the IRS formally asserts liability against him. That dispute goes
2 on for six or seven years, and that's a dispute. And then the Court says,
3 "In the Tax Court, yes." And then it continues on. And then it says, "The
4 2015 Tax Court, why not?" And then there's also the argument about it's
5 not triggered by damages. But then -- and it specifically talks about the
6 concealment on pages 15 and 16, asserted therein. And then it talks
7 about the Marshall facts. And it says, "The Marshall facts were" -- the
8 bottom 16, page 7. At the top of page 17, it says -- 17, line 2, "And those
9 facts were never learned until discovery in the Tax Court case. Those
10 facts were concealed from day one of the representation." And sorry,
11 then the Marshall notice argument is also set forth in that hearing
12 transcript.

13 So then what you look at is the Court did have the benefit in
14 2018, of the concept of fraudulent concealment and what impact the
15 fraudulent concealment issue would have for purposes of the statute of
16 limitations argument. And then the Court says specifically, regardless --
17 "Well, thank you. All right, thanks. Regardless of what law applies, even
18 under Nevada law, given the IRS investigation, the statutory
19 interpretation of NRS 11.2075-1, the period is two years after discovery
20 under the best case scenario for Plaintiffs, which would be before
21 whenever the receipt of the information document request was, which
22 was before the response to the information document request is dated
23 February 21st, 2008. Therefore, the statute limitations expired prior to
24 the January 2011 tolling agreement being executed." And then the next
25 paragraph, it's going to go to the 2008 claim. So not going to read that

1 paragraph right now.

2 So it appears from looking, and then it's incorporated in the
3 order as well that I already referenced. And so what it appears is that
4 while both the "Wow!" memo and the policy might have been,
5 "evidence," it was asserted that there would be, "per se negligence, or
6 clearly negligence or "wow," negligence" or -- right, it would be further
7 support for the negligence. It does not address the timing of the
8 notification and when Mr. Tricarichi was on notice, when he needed to
9 file his claim for purposes of statute of limitations. That was fully
10 addressed. It appears that Judge Gonzalez gave the benefit of all the
11 way from 2003 up to 2008.

12 So it took the full time period, even if there was fraudulent
13 concealment, but said, once the IRS put Mr. Tricarichi on notice and
14 rejected the argument of counsel and Mr. Tricarichi, that there was a
15 distinction between whether or not there was corporate liability versus
16 personal liability, but it took all those factors into consideration and then
17 did find that Mr. Tricarichi, for purposes of when he needed to file his
18 case, he had enough information to file his case, was under the
19 discovery rule. It's two years. So that would be from 2008 gets you to
20 2010. It's prior to the tolling agreement of 2011.

21 So the statute of limitations would still apply, fully taking into
22 account -- assuming even with the benefit of the memo and that policy,
23 you've got that still and taken into account, because the factor is not
24 what PwC did in that regard. That is taken into account because the
25 analysis presented in the transcript incorporated in the summary

1 judgment ruling, the written documentation under Rust versus -- *Division*
2 *of Family Services v. Clark County and Rust*. But under both of those,
3 the written memorialization also includes the concept is that Mr.
4 Tricarichi needed to do something once he was put on notice, so he
5 could choose whether he wanted to file the litigation or not. He didn't
6 file litigation until 2016.

7 So the time period under the most general -- generous
8 concept, even taking into account fraudulent concealment, because that
9 was specifically, I said addressed, and I already mentioned different
10 provisions in the transcript, it appears that the Court in 2018 was fully
11 taking that into consideration. So even if the memo and the policy did
12 exist, that might have gone to the concept of whether there was or is not
13 ultimately negligence, but it did not impact the summary judgment
14 ruling on the statute of limitations that was focused on Mr. Tricarichi
15 would have had information, getting notifications from the IRS, being
16 sufficient notification that you have potential liability issues here.

17 And so, therefore, he should have filed his case earlier was
18 the analysis in 2018. And so, therefore, the Court can't find under 60
19 NRCP 60, that relief should be granted from the 2018 ruling on summary
20 judgment. It is so ordered.

21 So now we break down the 2008 case, which is the case that
22 came to trial basically a year ago in this department. So then it goes to
23 whether or not the -- and I have to break this down with two things --
24 with the 2008 concept. What claims were thought to be brought that
25 precipitated the trial that happened in 2022, i.e., the 2008 case, the Court

1 does not see that there is any limitation on the nature of any type of
2 claims. That the concept of fraudulent concealment was already out
3 there, already discussed in 2018, already saying that there could be an
4 amendment. How those claims get phrased and how many claims there
5 are, I don't see any prohibition. Once again, I wasn't the trial judge, so I
6 have to look through the record. I don't see any prohibition. So if there
7 was a concern about fraud in that juncture, it's not saying that it couldn't
8 have been brought. There wasn't a preclusion. The nature of the claims
9 that were brought, were the nature of the claims that were brought and
10 those went to trial in this court.

11 So the Court can't find that there was -- Plaintiff met his
12 burden under 60(b), that somehow, if they got an additional document
13 that says in a different transaction in Portland, Oregon, that does have --
14 and this is where I would look to some of the email language that's been
15 presented to this Court, this transaction was focused on -- it doesn't say
16 all four transactions. The Court then has to look, does that preclude
17 someone from deciding the scope and breadth of the claims they wanted
18 to bring after they've been provided that opportunity in 2018? The Court
19 finds that it does not.

20 So the breadth of claims that could have been brought was
21 the choice of what claims to bring because they already had the
22 information about Marshall and the difference in documentation back at
23 least in 2018, because it was discussed in the transcript of the summary
24 judgment hearing. It was also part of paragraph 10 of Mr. Tricarichi's
25 declaration back in 2017, with the first motion for summary judgment.

1 So there was sufficient basis, and time, and information of whether or
2 not having additional information might have made a trial strategy. It
3 may or may not have, but the Court doesn't have sufficient evidence of
4 proof that it would meet the high standard under 60(b), that somehow
5 that should be a relief on its own that the trial did not incorporate all the
6 claims that were before it. Trial did incorporate all the claims that were
7 before it.

8 So now I have to go to the trial in the 2008 case. Is should
9 there be relief from judgment in that regard? And the assertions there
10 are that the scope of the information, the cross-examination of the
11 witnesses and that the evidence that was presented could have been
12 different if there had been knowledge of that memo. But then the Court
13 has to go back to the claims presented to the Court, the breadth and
14 scope of the trial, the discovery done in that trial. And the Court did --
15 and, yes, the reference on November 1 that starts around page 66, where
16 Mr. Hessell during examination, the Court did allow -- let's go back.
17 Okay.

18 The question was,

19 "Mr. Hessell: Aare you aware that in the Marshall
20 circumstance, they had litigation with the Bureau of Reclamation that
21 resulted in a litigation award 40 million?"

22 "Ms. Roin: Objection. Relevance as to 2008-2011.

23 "The Court: Counsel, do you wish to respond?"

24 "Mr. Hessell: Well, the motions limited that happened before
25 the trial address whether *Marshall* and advice about other transactions

1 that PwC gave to similarly-situated people at the time, determined that
2 they were relevant. But even more importantly, our position is that PwC
3 knew that the transaction was bogus, didn't tell Mr. Tricarichi in 2008."

4 "The Court: Okay. Relevancy objection goes to this case.
5 The Court is going to allow a small area of inquiry so you can tie it into
6 the facts of this case. The Court will overrule it, but you have
7 narrowness here."

8 "Mr. Hessel: Yep."

9 "The Court: Thank you so much."

10 Mr. Hessel, then he broke down -- sorry. Then he states,

11 "Mr. Hessel: Let's sort of break it down to its -- the essence
12 of what happened here. In Marshall, PwC advised the Marshalls that it
13 was a list of reportable transactions of the stock sale of Fortrend,
14 correct?"

15 "Answer: Again, that's what I saw in reading the case, yes."

16 "Mr. Hessel: In fact, it was Don Mendelson in your -- Don
17 Mendelson in your or the tax quality and risk management group that he
18 said that he was concerned about the Marshall transaction."

19 And then the witness says, "Yes, I have no firsthand
20 experience with that, but I remember reading that in the case."

21 "Mr. Hessel: And do you have any explanation why Mr.
22 Mendelson or other PwC advisors concluded that the Marshall
23 transaction was listed or reportable transaction in 2003, in contradiction
24 to your conclusions about the Westside deal?"

25 "I don't know exactly what Dan or Mr. Mendelson, or a larger

1 team. I don't know who worked on it with him or how they reached their
2 conclusion or what was otherwise considered."

3 So the questioning was allowed, at least an example of one
4 witness, right, that was presented. And the Court is trying to say if the
5 witness had said, at that juncture, didn't know how it happened, I'm
6 trying to see what prejudice would result by asking the witness the same
7 question and saying, well, here's a memo. You sure you didn't really
8 know about it? I mean, that means the first time the person -- perjury? It
9 wasn't one of the people that's listed on the email.

10 So when the Court walks through the various aspects of how
11 the trial would be different, and I take it into account on a Rule 60
12 standard, because that's the only motion before me. And my analysis
13 right now as you know is the substance of Rule 60, because I am going
14 to go back in a second and say the first prong, I would say the motion for
15 reconsideration, and I probably should say this first, is whether there are
16 new facts or evidence. I'm treating these -- the memo and the policy as
17 new facts or evidence. So that's why I'm going to give you the
18 substantive analysis.

19 So I'm saying the first prong of a motion for reconsideration,
20 okay, because it's not being asserted there was an error by the Court
21 because the Court can't make it on something it doesn't know about,
22 right. And it wasn't stated that there was new law. So I was presuming
23 for purposes of my analysis, that the first prong of a motion for
24 reconsideration was meant that there was new facts or evidence. The
25 Court is not precluding the analysis on an untimeliness aspect, as I

1 already mentioned a moment ago with the 60(b)(1) and (2) analysis and
2 then the general concept under a motion for reconsideration. So that's
3 why my analysis has been on the substance, automatically the second
4 prong. It's not that I didn't do the first prong, it's just I was taking the
5 first prong as a given for purposes of my analysis.

6 So circling back again to the rest of the 68, what are the
7 aspects of the trial that would have been different and how should there
8 be relief from judgment that was the findings of fact and conclusions of
9 law and judgment from February of 2023 based on the trial the previous
10 October/November.

11 When I look through that and I look at the Court's findings of
12 facts and conclusions of law and judgment, and compared that with the
13 trial transcript, and compared it with the briefs for purposes of this
14 motion, this Court doesn't see that it's met the burden under Rule 60 that
15 there is a direct nexus for what was articulated in the case before this
16 Court that went to trial in October and November of 2022. So I do not
17 see that -- well, let me be clear. There is no way this Court is condoning
18 a failure to disclose anything, okay.

19 The Court really doesn't need to reach, specifically, the issue
20 about whether or not it fell or didn't fall within the actual production
21 requirements of 2017. I'm assuming for this purposes that it did. That's
22 what my whole analysis has been. So I've been evaluating it, taking into
23 account if that information was available, right. If the information should
24 have been provided, what impact would it have, okay? And I'm fully
25 familiar with *Bass v. Bass Davis*, *Franchise Tax Board v. Hyatt*, and the

1 more recent mortgage *MDB Trucking*, you know, on the aspects and
2 where you go for-- and this isn't a destruction case. This is a very
3 disclosed case.

4 But this is coming up to this Court in the context of a 60
5 motion, and I have to take the blend of how it's coming in a 60 motion.
6 And so that's why this Court has presumed that the documentation
7 should have been provided. And I'm not saying that for sanctions
8 purposes. I'm just saying that for my analysis under 60(b), because the
9 Court finds that that would be the most appropriate way, giving all the
10 benefits to the moving party who's presenting this on a motion for
11 reconsideration.

12 I would have needed to do that on summary judgment
13 anyway, all the inferences, but even for the purpose of this trial and
14 making that assumption, because right now, this Court doesn't have true
15 clarity from either side whether or not it should or should not have been
16 produced. So if it didn't need to be produced, that makes the analysis
17 that I would be denying the motion for reconsideration. But, realistically,
18 I'm finding it more appropriate to go on the substantive aspect that it
19 should have been produced and what would be the impact there,
20 because I think that gets you over the breadth of all the issues that are
21 outstanding before the Court.

22 And I don't see how it merits the standards of 60 under
23 Nevada case law, other case law that Nevada relies on, because I don't
24 find it under -- that the newly discovered evidence, taking into account
25 might go ultimately -- could have ultimately maybe gone to the concept

1 of liability or lack of liability for the 2003 case, but there you had the
2 statute of limitations issue, so you didn't need to get to liability.

3 So then you go to what was the focus of the 2008 case. I
4 don't see it in that regard based on issues presented to this Court. When
5 I look if it's fraud, I do not see it as fraud on the Court, because I do not
6 think that that has been established in this case, because I think there is a
7 lack of clarity about whether or not the information should have been
8 provided. I am utilizing that the information should have been provided
9 for my purposes of now analyzing it under newly discovered and justice
10 requires, but I don't see it rises to the level of fraud in the Court under
11 the applicable case law, okay.

12 Given the time period of 2017, there was a 56(f) motion and
13 the documents at issue were more than a decade old, okay, and with
14 regards to retention policies, et cetera. And this Court doesn't know the
15 -- has not been provided sufficient enough information by anybody's
16 declaration, et cetera, that somehow, if they knew, it would have been
17 for Marshall that somehow it would have applied here. And so in the
18 absence of that, that would have been burden of the moving party.

19 But even -- that's why I'm assuming, for purposes of my
20 second round of analysis under the other reasons that justice requires,
21 that they should have been produced, and I don't see it that the Court
22 should give relief from judgment under Rule 60 given the applicable case
23 laws, because I do not see it impacts the actual issues presented to this
24 Court. When the Court goes to whether it's conclusions of law -- I'm not
25 read through my -- okay. Whether you look at the time periods and I did

1 have to incorporate 2018, I'm not going to repeat the analysis there -- so
2 then the Court looks at the professional malpractice claim, right, which
3 was brought, the alleged acts of negligence, the impact. I did look at
4 both, whether it was New York or Nevada law again in 2008, that didn't
5 have any impact here.

6 So what really the Court had to look at is the various prongs.
7 I mean, I'm not going to recite everything that I stated here, but
8 remember, there wasn't any duty, right. PwC did not breach the duty to
9 maintain advice in writing, maintain the documentation. And I made a
10 specific finding that the failure to disclose PwC's prior involvement in
11 *Enbridge* and *Marshall* was not a breach of any duty.

12 So taking into account even if that documentation did exist,
13 right, and should have been provided in this case, there wasn't -- and
14 given the fact that *Marshall* was able to be explored with some of the
15 witnesses, at least one witness during the course of the trial, the Court
16 can't find that if the documents that were presented and being viewed as
17 the new evidence, the policy and the "Wow!" memo that would have
18 changed the judgment of this Court based on the findings of fact and
19 conclusions of law that the Court did in its February 9th, 2023 findings of
20 fact conclusions of law and judgment.

21 So, therefore, the Court needs to deny the motion for
22 reconsideration. I've done so. And the Court reaffirms the prior decision
23 on the summary judgment of 2018 stated herein. The Court reaffirms the
24 Court's findings of fact and conclusions of law of February 9th, 2023 for
25 all the reasons stated herein. And the Court is incorporating the case law

1 without citing each and every case that's in your very well written and
2 long pleadings. I'm incorporating that in, and I've given citations where
3 appropriate and including transcript and order citations. It is so ordered.

4 That means counsel for the non-movant, you prepare the
5 order, circulate it to opposing counsel, provide it back to the Court. It
6 would be nice to say 14 days under EDCR 7.21, but I think you're going to
7 ask me for an extension, so might as well ask me now.

8 MR. AUSTIN: We would ask for 30 days, Your Honor.

9 THE COURT: Counsel, does that meet your needs or you
10 want 14 days? If he insists on 14 days, you know I'm going to say 14
11 days.

12 MR. HESSELL: Fourteen days because we have to move --
13 we have to notice of appeal this along with the underlying case, and so
14 we're already up against it. If they -- we might be able to work
15 something out, but it would require subsequent discussion.

16 MR. AUSTIN: Fourteen days is fine, Your Honor.

17 THE COURT: Okay. Fourteen days EDCR 7.21, unless there's
18 some stipulation by the parties that's requesting something different.
19 Okay. So that leaves everything for you all to discuss it and provide it
20 back to the Court. Okay. It is so order. Thank you so very much. Thank
21 you for your time.

22 MR. HESSELL: Thank you, Your Honor.

23 MR. LEVINE: Thank you, Your Honor.

24 [Proceedings concluded at 9:52 a.m.]

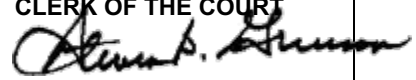
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1 ATTEST: I do hereby certify that I have truly and correctly transcribed the
2 audio-visual recording of the proceeding in the above entitled case to the
3 best of my ability.

4 

5 Maukele Transcribers, LLC

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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI,

Plaintiff,

vs.

PRICEWATERHOUSECOOPERS LLP,

Defendant.

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

**NOTICE OF ENTRY OF ORDER DENYING
PLAINTIFF'S MOTION FOR
RECONSIDERATION PURSUANT TO
NRCP 60(B) BASED ON NEWLY
DISCOVERED EVIDENCE**

AA 001760

PLEASE TAKE NOTICE that an *Order Denying Plaintiff's Motion for Reconsideration Pursuant to NRCP 60(b) Based on Newly Discovered Evidence* was entered in the above-captioned matter on November 28, 2023, a copy of which is attached hereto.

Dated: November 28, 2023

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 November 28, 2023, I caused to be served a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION PURSUANT TO NRCP 60(B) BASED ON NEWLY DISCOVERED EVIDENCE** 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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BY OVERNIGHT MAIL: by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.

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

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

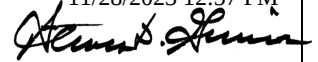
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4869-4356-6484



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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 PLAINTIFF'S MOTION
FOR RECONSIDERATION PURSUANT TO
NRCP 60(b) BASED ON NEWLY
DISCOVERED EVIDENCE**

AA 001763

On November 1, 2023, the Court conducted a hearing on Plaintiff's Motion for Reconsideration Pursuant to NRCP 60(b) Based on Newly Discovered Evidence ("Motion"). Patrick Byrne, Esq. and Bradley Austin, Esq. of Snell & Wilmer L.L.P, and Mark Levine, Esq. and Chris Landgraff, Esq. of Bartlit Beck, L.L.P., appeared on behalf of Defendant PricewaterhouseCoopers LLP ("PwC"). Scott Hessell of Sperling & Slater, LLC and Ariel Johnson of Hutchinson & Steffen, LLC appeared on behalf of Plaintiff Michael Tricarichi. The Court, having reviewed the record, the briefs submitted in support of and in opposition to the Motion, the Court's order granting Plaintiff Tricarichi's motion for Rule 56(f) discovery, the parties' respective briefs submitted in support of and in opposition to PwC's 2018 motion for summary judgment, the transcript from the September 24, 2018 summary judgment hearing, and transcripts from the parties' October and November 2022 bench trial, and the oral arguments of counsel, hereby DENIES the Motion and makes the following findings of fact, conclusions of law, and order:

FINDINGS OF FACT

1. Plaintiff Michael Tricarichi filed his complaint in this case on April 29, 2016, alleging claims of gross negligence, negligent misrepresentation and simple negligence as to PwC.

2. In 2017, PwC moved for summary judgment on Tricarichi's original claims regarding PwC's 2003 advice on the ground that they were barred under the applicable statute of limitations.

3. On May 31, 2017, the Court denied summary judgment, ordering Rule 56(f) discovery as requested by Plaintiff Tricarichi's affidavit submitted as part of the summary judgment briefing. Dkt. 100, Order. PwC produced over 2,000 documents in response but did not produce the "newly discovered" evidence identified by Plaintiff as the subject of this motion. For the purpose of its analysis of this motion, the Court assumes, without deciding, that such evidence should have been produced.

4. PwC renewed its motion for summary judgment on June 14, 2018. *See* Dkt. 107, PwC's Renewed Mot. Summ. J. As part of his response in opposition, Plaintiff argued that he

1 “was entitled to know [at the time of the transaction] and certainly before litigation with the IRS
2 that PwC advised at least one other taxpayer to avoid the very transaction that PwC was advising
3 Plaintiff to proceed with,” and that PwC’s failure to disclose to him this advice on the Marshall
4 transaction amounted to fraudulent concealment that tolled the statute of limitations. Dkt. 113,
5 Pl.’s Resp. Opp’n at 20, 30.

6 5. After considering the parties’ briefing and hearing oral argument on the motion,
7 the Court granted summary judgment, concluding that “regardless of whether New York’s or
8 Nevada’s statute of limitations applies, Plaintiff’s claims are time-barred” because “[i]n the best-
9 case scenario for Plaintiff . . . Plaintiff discovered, or as a matter of law, should have discovered
10 the alleged act, error or omission no later than when he received the IDR [Information Document
11 Request] from the IRS” to which he responded on February 21, 2008. Dkt. 119, Order at ¶¶ 17–
12 18. The Court entered summary judgment “in favor of PwC regarding any and all claims arising
13 from the services PwC provided Plaintiff in 2003.” *Id.* at 3.

14 6. Plaintiff filed an amended complaint on April 1, 2019, which included a negligence
15 claim against PwC based on its alleged failure in “advising Plaintiff regarding [IRS] Notice 2008-
16 111 and its impact on the tax position Plaintiff had taken with respect to the Fortrend transaction.”
17 Dkt. 140, Am. Compl. at ¶ 117.

18 7. The Court held a nine-day bench trial on Plaintiff Tricarichi’s repleaded claim
19 beginning on October 31, 2022. Over the course of the bench trial, this Court heard testimony
20 from 14 different witnesses and received 112 exhibits into evidence.

21 8. The Court entered its Findings of Fact and Conclusions of Law entering judgment
22 for PwC on Plaintiff’s negligence claim on February 9, 2023. Dkt. 416. The Court concluded that
23 PwC did not breach a duty it owed to Plaintiff Tricarichi to render its advice in writing or to
24 disclose earlier transactions to him, that Plaintiff’s claim failed on causation, and also that
25 Plaintiff’s claim was untimely based on the evidence in the trial record. *Id.* at ¶¶ 104, 110–11,
26 114–15, 137, 139–140, 161. Written notice of entry of the Court’s Findings of Fact and
27 Conclusions of Law and Judgment was served on February 22, 2023. Dkt. 420.
28

12. Both documents were used publicly at a jury trial of the Marshall plaintiffs' claims that began on July 31, 2023. After that point, counsel's use of the documents was not restricted by the Marshall litigation protective order.

15. Plaintiff's motion relies on the concepts set out in NRCP 60(b)(2) and (b)(3), but the Court finds it appropriate to analyze Plaintiff Tricarichi's motion under NRCP 60(b)(6), the

1 catchall provision for “any other reason that justifies relief.” NRCP 60(b)(6) is fitting because of
2 the unique circumstances here: a protective order in the Marshall litigation that, absent leave of
3 the Oregon court, prevented Plaintiff Tricarichi’s counsel from sharing the newly discovered
4 evidence with his client in this case, and which in turn prevented Plaintiff Tricarichi from
5 authorizing any Rule 60(b) motion to be submitted to this Court. A motion brought under NRCP
6 60(b)(6) is not subject to the six-month time limit in NRCP 60(c)(1), so the Court concludes
7 Plaintiff Tricarichi’s motion is timely.

8 16. While there is relatively little Nevada caselaw interpreting the substantive
9 requirements for relief under NRCP 60(b)(2), Nevada courts look to how federal courts interpret
10 FRCP 60(b)(2), which is nearly identical. *See Foster v. Dingwall*, 126 Nev. 49, 54, 228 P.3d 453
11 (2010) (explaining that “federal decisions involving the Federal Rules of Civil Procedure provide
12 persuasive authority when this court examines its rules,” and in particular following federal
13 decisions regarding FRCP 60(b) because “NRCP 60(b) largely replicates Fed. R. Civ. P. 60(b)”)
14 (citation omitted); *see also* NRCP 60, Adv. Cmte. Notes to 2019 Amendment (explaining that the
15 “amendments generally conform Rule 60 to FRCP 60”); *Bonnell v. Lawrence*, 128 Nev. 394, 398
16 282 P.3d 712, 714 (2012) (“Rule 60(b) of the Nevada Rules of Civil Procedure is modeled on
17 Rule 60(b) of the Federal Rules of Civil Procedure”).

18 17. To obtain relief under FRCP 60(b)(2), the Ninth Circuit requires that “(1) the
19 moving party [] show that the evidence relied on in fact constitutes ‘newly discovered evidence’
20 within the meaning of Rule 60(b); (2) the moving party exercised due diligence to discover this
21 evidence; and (3) the new evidence must be ‘of such magnitude that it would have been likely to
22 change the disposition of the case.’” *Feature Realty, Inc. v. City of Spokane*, 331 F.3d 1082, 1093
23 (9th Cir. 2003) (citation omitted). The moving party is required to satisfy all three elements. *See*
24 *id.*

25 18. Plaintiff Tricarichi’s Rule 60(b) motion asks for two different forms of relief: (1)
26 relief from the 2018 summary judgment order entered for PwC on Plaintiff Tricarichi’s claim that
27 PwC negligently rendered its advice in 2003; and (2) relief from the Court’s 2023 Findings of Fact
28 and Conclusions of Law entering judgment for PwC on Plaintiff Tricarichi’s claim that PwC was

1 negligent in 2008 for failing to revise its earlier advice after the IRS issued Notice 2008-111. This
2 Order and the corresponding analysis takes into consideration how the newly discovered evidence
3 relates to the claims brought by Tricarichi.

4 **2003 Negligence Claim**

5 19. In evaluating Plaintiff Tricarichi's Rule 60(b) claim for relief as to his 2003
6 negligence claim, the Court must evaluate what evidence was available and in the summary
7 judgment record in 2018 and determine whether the February 14, 2003 email and the PwC policy
8 booklet would have changed the Court's decision to enter summary judgment for PwC on Plaintiff
9 Tricarichi's 2003 claim on statute of limitations grounds.

10 20. In reviewing the pleadings and transcript of the parties' 2018 summary judgment
11 hearing, the Court determines that it considered, in 2018, whether the statute of limitations should
12 be tolled because of fraudulent concealment, and further that it heard argument from the parties
13 on the impact that fraudulent concealment would have on the statute of limitations argument. *See,*
14 *e.g.*, Sept. 24, 2018 Hearing Tr. 6:7–8:8; 12:1–14:7; 15–17.

15 21. The Court concluded in 2018 that regardless of whether New York or Nevada law
16 applied—a point of contention between the parties—Plaintiff had two years after discovery of his
17 claim to file suit, which “under the best case scenario for Plaintiff[]” would be the date that
18 Plaintiff Tricarichi responded to an information document request from the IRS, or February 21,
19 2008. Therefore, the Court concluded, the statute of limitations expired more than two years before
20 execution of the parties' January 2011 tolling agreement. Dkt. 119 ¶¶ 18–19 (“Plaintiff's claims
21 were time-barred no later than February 21, 2010 under NRS § 11.2075(1)(a), nearly a year before
22 the parties entered into a tolling agreement in January 2011.”).

23 22. Neither the email nor the PwC policy booklet addresses the timing of when Plaintiff
24 was on notice and when he needed to file his claim for purposes of the statute of limitations. And,
25 in entering summary judgment for PwC in 2018, the Court concluded that even if there were
26 fraudulent concealment, the IRS put Plaintiff on notice, and it rejected Plaintiff's arguments that
27 the IRS information document request only put him on notice that there might be corporate
28 liability, rather than personal liability for him as a transferee.

23. As a result, even assuming the Court had had the benefit of the email and the policy, it would not have changed the Court's timeliness analysis. There is therefore no basis for Rule 60(b) relief from the Court's 2018 summary judgment order on Plaintiff Tricarichi's 2003 negligence claim.

2008 Negligence Claim

24. Turning to Plaintiff Tricarichi's 2008 claim, the Court first concludes that Plaintiff has not met his burden under Rule 60(b) of demonstrating that the nature and scope of his 2008 negligence claim would have been different if Plaintiff had received the email at the time of the 2018 summary judgment briefing. Plaintiff Tricarichi already knew about the Marshall transaction and PwC's differing advice to its clients in that different transaction at the time of the 2018 summary judgment briefing and as he considered what claims, if any, to pursue after the Court's entry of summary judgment in 2018. The Court therefore has not been presented with sufficient evidence under the high standard of NRCP 60(b) that Plaintiff Tricarichi is entitled to relief on the basis that the parties' 2022 bench trial did not adequately incorporate all of the negligence claims against PwC that were before it – the trial did incorporate all the claims that were before it.

25. Plaintiff Tricarichi also moved for relief from the Court's 2023 Findings of Fact and Conclusions of Law following the 2022 bench trial of Plaintiff's 2008 negligence claim, arguing that he would have presented different evidence and examined (or cross-examined) witnesses differently with the benefit of the February 14, 2003 email. Dkt. 451, Mot. at 7, 11–12. But even if the email and the PwC policy booklet are “newly discovered evidence” under NRCP 60(b)(2)—which the Court will assume for the sake of its analysis—the Court concludes that Plaintiff Tricarichi has not met his burden under NRCP 60(b) on his 2008 negligence claim, either.

26. At the 2022 bench trial, the Court permitted Plaintiff Tricarichi to ask some questions of PwC witnesses, including Washington National Office tax professional Tim Lohnes, regarding their awareness of PwC's work for the Marshalls. Lohnes testified in response to this line of inquiry that he had “no firsthand experience” with PwC's concerns regarding the Marshall transaction, that he did not know who worked on the analysis with PwC Quality & Risk Management partner Dan Mendelson, nor “how they reached their conclusion or what was

1 otherwise considered.” Dkt. 397, Trial Tr. Day 2, 66:3–67:12. Given the witness’s lack of
2 knowledge regarding PwC’s work on the Marshall transaction, the Court concludes that counsel’s
3 cross-examination would not have been materially different with the benefit of an additional
4 document that the witness did not contemporaneously receive.

5 27. Considering the Court’s Findings of Fact and Conclusions of Law, the testimony
6 in the trial transcript, and the parties’ briefing on Plaintiff Tricarichi’s Rule 60(b) motion, the
7 Court further finds no direct nexus between the newly discovered evidence and the case that went
8 to trial in October 2022.

9 28. Based on the evidence at trial, the Court found as a matter of law that PwC did not
10 breach a duty to Plaintiff Tricarichi to document its advice in writing or to maintain that
11 documentation. The Court also made a specific finding that PwC’s failure to disclose its prior
12 involvement in the Enbridge and Marshall transactions was not a breach of any duty PwC owed
13 Plaintiff Tricarichi. *See* Dkt. 416, FOFCOL, ¶¶ 102–104, 117–130, 135. The Court concluded that
14 there were “numerous differences between the Marshall matter” and Tricarichi’s case, and that
15 “[g]iven the differences in the matters, Tricarichi did not meet his burden to show that PwC has
16 liability to him for failing to disclose or take into account the advice given in that transaction.” *Id.*
17 ¶¶ 39, 135, 137.

18 29. The Court cannot conclude that the email or PwC policy booklet would have
19 changed the Court’s judgment on Plaintiff’s 2008 negligence claim as reflected in its February 9,
20 2023 Findings of Fact and Conclusions of Law. The Court therefore denies Plaintiff Tricarichi’s
21 Rule 60(b) motion for relief from its 2023 judgment. *See Renteria v. Canepa*, No. 3:11CV-00534-
22 RCJ, 2013 WL 837127, at *3 (D. Nev. Mar. 5, 2013) (denying Rule 60(b)(2) motion because
23 “[t]he allegedly new evidence does not support a finding that the Court would have decided
24 otherwise had that evidence been before the Court prior to the judgment”); *Abet Just., L.L.C. v.*
25 *Am. First Credit Union*, No. 2:13-CV-02082-MMD-PAL, 2015 WL 4110800, at *2 (D. Nev. July
26 7, 2015) (stating that “the Court would still deny Plaintiffs’ [Rule 60(b)(2)] Motion even if it were
27 timely because the newly discovered evidence would not have changed the outcome of the case”)
28 (citation omitted).

ORDER

The Court having made the foregoing findings of fact and conclusions of law, and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Plaintiff's Motion for Reconsideration Pursuant to NRCP 60(b) Based on Newly Discovered Evidence is **DENIED**.

Dated this 28th day of November, 2023



**050 FCE 23B4 B04E
Joanna S. Kishner
District Court Judge**

Submitted by:

Approved as to form and content:

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Sent: Monday, November 20, 2023 3:39 PM
To: Austin, Bradley
Cc: Ariel C. Johnson; Mark Levine; Chris Landgraff; Kate Roin; Alexandra Genord; Byrne, Pat
Subject: Re: Tricarichi/PwC Proposed Order re Rule 60(b) Mot

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Confirmed

On Nov 20, 2023, at 5:23 PM, Austin, Bradley <baustin@swlaw.com> wrote:

Hi Scott and Ariel,

Following up on our prior correspondence, please confirm that I have authorization to affix your e-signature to the attached order and submit.

Thank you,

Brad

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