## IN THE SUPREME COURT OF THE STATE OF NEVADA

**INDICATE FULL CAPTION:**

MICAEL A. TRICARICHI, AN INDIVIDUAL,

APPELLANT,

vs.

PRICEWATERHOUSECOOPERS, LLP,

RESPONDENT.



No. 87375

DOCKETING STATEMENT
**CIVIL APPEALS**

## GENERAL INFORMATION

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

## WARNING

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

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

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

1. Judicial District Eighth Department 31

County Clark Judge Honorable Joanna S. Kishner

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

**2. Attorney filing this docketing statement:**

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Firm Hutchison & Steffen, PLLC

Address 10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145

Client(s) Plaintiff/Appellant Michael Tricarichi

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

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

Attorney Patrick Byrne Telephone (702) 784-5200

Firm Snell & Wilmer, LLP

Address 3883 Howard Hughes Parkway, Suite 1100
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Client(s) Defendant/Appellee PricewaterhouseCoopers, LLP

Attorney Christopher D. Landgraff Telephone (312) 494-4400

Firm Bartlit Beck LLP

Address 54 West Hubbard Street, Suite 300
Chicago, Illinois 60654

Client(s) Defendant/Appellee PricewaterhouseCoopers, LLP

(List additional counsel on separate sheet if necessary)

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

- ☐ Judgment after bench trial
- ☐ Judgment after jury verdict
- ☐ Summary judgment
- ☐ Default judgment
- ☐ Grant/Denial of NRCP 60(b) relief
- ☐ Grant/Denial of injunction
- ☐ Grant/Denial of declaratory relief
- ☐ Review of agency determination
- ☐ Dismissal:
  - ☐ Lack of jurisdiction
  - ☐ Failure to state a claim
  - ☐ Failure to prosecute
  - ☐ Other (specify): _____
- ☐ Divorce Decree:
  - ☐ Original ☐ Modification
- ☒ Other disposition (specify): _____
  Special order after final judgment re: attorney's fees and costs.

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

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

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

PricewaterhouseCoopers LLP v. The Eighth Judicial District Court, et al., No. 86317

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

Not applicable.

**8. Nature of the action.** Brieflydescribe the nature of the action and the result below:

Please see attached, Exhibit 1, page 4a.

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

Whether the district court erred in its August 25, 2023 order by awarding to PwC $2,425,710.30 in attorney's fees and costs.

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

Not applicable.

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

☒ N/A

☐ Yes

☐ No

If not, explain:

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

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

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

☐ A substantial issue of first impression

☐ An issue of public policy

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

☐ A ballot question

If so, explain:

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

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

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

Was it a bench or jury trial? Bench

**15. Judicial Disqualification.** Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?
No.

## TIMELINESS OF NOTICE OF APPEAL

**16. Date of entry of written judgment or order appealed from** August 25, 2023

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

**17. Date written notice of entry of judgment or order was served** August 28, 2023

Was service by:

☐ Delivery

☒ Mail/electronic/fax

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

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

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

☐ NRCP 59 Date of filing _____

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

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

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

Was service by:

☐ Delivery

☐ Mail

**19. Date notice of appeal filed** September 26, 2023

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

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

NRAP 4(a)

## SUBSTANTIVE APPEALABILITY

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

(a)

☐ NRAP 3A(b)(1) ☐ NRS 38.205

☐ NRAP 3A(b)(2) ☐ NRS 233B.150

☐ NRAP 3A(b)(3) ☐ NRS 703.376

☒ Other (specify) NRAP 3A(b)(8)

(b) Explain how each authority provides a basis for appeal from the judgment or order:
The order awarding attorney's fees and costs is appealable as a special order after final judgment.

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

(a) Parties:

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

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

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

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

Please see attached, Exhibit 1, page 9a.

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

☒ Yes

☐ No

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

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

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

☐ Yes

☐ No

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

☐ Yes

☐ No

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

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

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

## VERIFICATION

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

| Michael A. Tricarichi | Ariel C. Johnson |
|---|---|
| Name of appellant | Name of counsel of record |
| October 25, 2023 | /s/ Ariel C. Johnson |
| Date | Signature of counsel of record |

State of Nevada, County of Clark
State and county where signed

## CERTIFICATE OF SERVICE

I certify that on the 25th day of October , 2023 , I served a copy of this completed docketing statement upon all counsel of record:

☐ By personally serving it upon him/her; or

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

Thomas J. Tanksley
10161 Park Run Drive, Suite 150
Las Vegas, NV 89145
Settlement Judge

X Via Electronic Service to all other parties on the service list.

Dated this 25th day of October , 2023

/s/ Kaylee Conradi
Signature

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EXHIBIT PAGE ONLY

# EXHIBIT 1

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

## 8. Nature of Action.

Plaintiff filed his complaint seeking to hold PwC responsible for negligently representing him with respect to a 2003 transaction commonly referred to as a "Midco transaction." The district court, Judge Elizabeth Gonzalez, entered an October 24, 2018 order granting summary judgment in favor of PwC, ruling that claims arising from services PwC provided Plaintiff in 2003 are time-barred. Plaintiff amended his complaint to allege claims arising against PwC in 2008, and on January 5, 2021, Judge Gonzalez denied PwC's motion to strike Plaintiff's jury demand. On mandamus, Judge Joanna Kishner, who replaced Judge Gonzalez, entered an April 29, 2022 order that Plaintiff was bound by a jury trial waiver under ***Lowe Enters. Residential Partners, L.P. v. Eighth Judicial Dist. Court***, 118 Nev. 92 (2002). The matter proceeded to a bench trial on Plaintiff's amended complaint. On February 9, 2023, Judge Kishner entered Findings of Fact and Conclusions of Law and Judgment, ruling in favor of PwC at trial. Plaintiff timely appealed from that final judgment.

On August 21, 2023, Plaintiff filed a motion for relief from the judgment under NRCP 60(b). The motion is based on newly discovered evidence. The District Court has scheduled a hearing on Plaintiff's NRCP 60(b) motion for November 1, 2023.

On March 15, 2023, before Plaintiff filed his NRCP 60(b) motion, PwC filed a motion seeking its attorneys' fees and costs, based on two $50,000 offers of judgment it made to Plaintiff—the first on September 25, 2019, and the second on October 6, 2021. On August 25, 2023, the District Court entered an order denying PwC's motion with respect to the 2019 offer of judgment, granting the motion with respect to the 2021 offer of judgment, and entering an award to PwC of $2,425.710.30. (Dkt. No. 86317.)

**23. Give a brief description of each party's separate claims.**

Appellant (underlying Plaintiff) Michael Tricarichi's Causes of action against:

- **Respondent (underlying Defendant) PwC**:
    - Negligence, gross negligence & negligent representation for acts in 2003—summary judgment granted in Respondent's favor. *See* Exhibit 2.
    - Negligence, gross negligence & negligent representation for acts arising after 2003—judgment in favor of Respondent PwC following bench trial. *See* Exhibit 5.

- **Defendants (non-Respondents) Cooperatieve Rabobank U.A., Utrecht-America Finance Co., Seyfarth Shaw LLP, and Graham R. Taylor**:

    - Aiding and abetting fraud, civil conspiracy, and racketeering— Court granted motion to dismiss all claims against Defendants Raboban, Utrecht & Seyfarth. *See* Exhibits 12 and 13.
    - All claims against Defendant Graham R. Taylor were dismissed pursuant to NRCP 4(e)(2) as he was never served and made no appearance in the case. *See* Stipulation and Order to Amend Case Caption memorializing dismissal, attached hereto as Exhibit 9. Nevertheless, out of an abundance of caution, Appellant Tricarichi filed in the District Court a notice of voluntary dismissal of all claims against Defendant Taylor without prejudice. *See* Notice of Voluntary Dismissal, attached hereto as Exhibit 11.

- **Defendants (non-Respondents) Cooperatieve Rabobank U.A., Utrecht-America Finance Co.**:
    - Unjust enrichment— Court granted motion to dismiss all claims against Raboban and Utrecht. *See* Exhibit 12.

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# EXHIBIT 2

HUTCHISON & STEFFEN
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DISTRICT COURT

CLARK COUNTY, NEVADA

| | |
|---|---|
| MICHAEL A. TRICARICHI,<br><br>Plaintiff,<br><br>v.<br><br>PRICEWATERHOUSE COOPERS, LLP, COÖPERATIEVE RABOBANK U.A., UTRECHT-AMERICA FINANCE CO., SEYFARTH SHAW LLP and GRAHAM R. TAYLOR,<br><br>Defendants. | CASE NO. A-16-735910-B<br>DEPT NO. XI<br><br>**AMENDED COMPLAINT**<br><br>BUSINESS COURT MATTER<br><br>JURY TRIAL DEMANDED<br><br>EXEMPT FROM ARBITRATION |

## NATURE OF THE CASE[1]

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

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

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

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

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

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

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

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

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

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

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

**PARTIES**

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

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

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

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

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

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

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

**THIRD PARTIES**

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

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

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

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

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

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

## JURISDICTION AND VENUE

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

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

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

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

## FACTUAL BACKGROUND

### Midco Transactions Generally

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**COUNT II**
**NEGLIGENT MISREPRESENTATION AS TO PwC**

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

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

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

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

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

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

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

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

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

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

**COUNT III**
**NEGLIGENCE AS TO PwC**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**COUNT IX**
**UNJUST ENRICHMENT**
**AS TO RABOBANK AND UTRECHT**

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

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

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

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

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

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

D. Costs of investigation and litigation reasonably incurred;

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

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

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

**JURY DEMAND**

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

DATED this 10th day of December, 2018.

HUTCHISON & STEFFEN, LLC

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Todd L. Moody
Todd W. Prall
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Scott F. Hessell
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*Attorneys for Plaintiff*

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*Attorneys for Defendant*
*PricewaterhouseCoopers LLP*



**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

MICHAEL A. TRICARICHI,

Plaintiff,

vs.

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

Defendants.

Case No.: A-16-735910-B

Dept. No.: XI

**ORDER GRANTING SUMMARY JUDGMENT**

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

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

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

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

3. Plaintiff completed the Transaction in September 2003.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**ORDER**

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

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

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

DATED: October 22, 2018.

DISTRICT COURT JUDGE

Respectfully submitted by:

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*Attorneys for Defendant PricewaterhouseCoopers LLP*

Approved as to form and content by:

SPERLING & SLATER, P.C.

*/s/ Scott F. Hessell*
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# EXHIBIT 4

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*Attorneys for Defendant*
*PricewaterhouseCoopers LLP*



**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| MICHAEL A. TRICARICHI,<br><br>Plaintiff,<br><br>vs.<br><br>PRICEWATERHOUSECOOPERS, LLP, COÖPERATIEVE RABOBANK U.A., UTRECHT-AMERICA FINANCE CO., SEYFARTH SHAW LLP and GRAHAM R. TAYLOR,<br><br>Defendants. | Case No. A-16-735910-B<br><br>Dept. No. XI<br><br>**NOTICE OF ENTRY OF ORDER GRANTING SUMMARY JUDGMENT** |

/ / /

/ / /

/ / /

TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL:

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

Dated: October 24, 2018

SNELL & WILMER L.L.P.

By: /s/ *Bradley Austin*
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## CERTIFICATE OF SERVICE

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

| | |
|---|---|
| ☐ | i) **BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document(s). |
| ☐ | ii) **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below. |
| ☐ | iii) **BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day. |
| ☐ | iv) **BY PERSONAL DELIVERY:** by causing personal delivery by _____, a messenger service with which this firm maintains an account, of the document(s) listed above to the person(s) at the address(es) set forth below. |
| ☒ | v) **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case. |
| ☐ | vi) **BY EMAIL:** by emailing a PDF of the document listed above to the email addresses of the individual(s) listed below. |

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*Attorneys for Defendant*
*PricewaterhouseCoopers LLP*



**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

MICHAEL A. TRICARICHI,

Plaintiff,

vs.

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

Defendants.

Case No.: A-16-735910-B

Dept. No.: XI

**ORDER GRANTING SUMMARY JUDGMENT**

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

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

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

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

3. Plaintiff completed the Transaction in September 2003.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**ORDER**

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

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

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

DATED: October 22, 2018.

DISTRICT COURT JUDGE

Respectfully submitted by:

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# EXHIBIT 5

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

**FFCL**

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| MICHAEL A. TRICARICHI,<br><br>Plaintiff,<br><br>vs.<br><br>PRICEWATERHOUSECOOPERS LLP,<br><br>Defendant. | CASE NO.: A-16-735910-B<br><br>DEPT. NO.: XXXI<br><br>**FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT** |

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

**JOANNA S. KISHNER**
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

## FINDINGS OF FACT

### I. Introduction and Relevant Parties

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

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

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

---

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

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

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

**II. The Westside Transaction**

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

6. Tricarichi retained his long-time attorneys at Hahn Loeser & Parks, LLP ("Hahn Loeser") to oversee all aspects of the transaction, including structuring it, drafting the deal documents, and providing advice on how Tricarichi could minimize his tax burden. TT8 (Vol. 2) 9, 12–13 (Hart Dep. 56:14–20, 93:24–94:5).

7. Hahn Loeser corporate and tax attorney Jeff Folkman, among others, had authority to act on behalf of Tricarichi and acted as his agent in various matters with respect to the Westside Transaction. *See, e.g.*, Ex. 127, Email from J. Folkman at 001; TT3 89:7–90:20 (Tricarichi).

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

**III. PwC's Engagement**

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

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

11. As this Court has found previously, Tricarichi received both the Engagement Letter and the Terms of Engagement, and the Engagement Agreement was a valid and binding contract. *See* Dkt. 336, Order Granting PwC's Mot. to Strike Jury Demand ¶ 33.[3]

12. The Engagement Agreement specified that PwC would provide

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

JOANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

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

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

> IN NO EVENT, UNLESS IT HAS BEEN FINALLY DETERMINED THAT [PWC] WAS GROSSLY NEGLIGENT OR ACTED WILLFULLY OR FRAUDULENTLY, SHALL [PWC] BE LIABLE TO THE CLIENT OR ANY OF ITS OFFICERS, DIRECTORS, EMPLOYEES OR SHAREHOLDERS OR TO ANY OTHER THIRD PARTY, WHETHER A CLAIM BE IN TORT, CONTRACT OR OTHERWISE FOR ANY AMOUNT IN EXCESS OF THE TOTAL PROFESSIONAL FEE PAID BY YOU TO US UNDER THIS AGREEMENT FOR THE PARTICULAR SERVICE TO WHICH SUCH CLAIM RELATES.

*Id.* at 007.

14. Section 3 of the Engagement Agreement advised that

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

*Id*. at 006.

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

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

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

and insurance).

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

19. PwC primarily investigated two topics for Tricarichi: (1) whether the Westside Transaction was reportable to the IRS as a so-called "Midco" transaction under IRS Notice 2001-16; and (2) whether Tricarichi could be held liable for Westside's taxes, including under a transferee liability theory. *Id*. at 002–004.[4]

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

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

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

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

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

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

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

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

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

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

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

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

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

30. In light of the foregoing specific facts and evidence presented at

trial, the Court finds that Tricarichi ceased being a PwC client as of October, 2003 when the services pursuant to the specific Engagement Agreement were completed and the final bill sent. By 2008, Tricarichi was a former client of PwC's and had no ongoing professional relationship with the firm.

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

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

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

### A. The Enbridge Matter

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

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

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

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

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

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

**B. The Marshall Matter**

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

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

39. As with the Enbridge matter, the Court finds numerous differences between the Marshall matter and the instant case. The 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. TT8 (Vol. 1) 199:3–12 (Harris). Given the differences in the matters, 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 that transaction.

**V. Tricarichi's Tax Dispute with the IRS and IRS Notice 2008-111**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Transaction. Ex. 174; Ex. 182.

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

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

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

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

**VI. Procedural History of Tricarichi's Dispute with PwC**

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

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

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

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

82. In the meantime, Tricarichi pursued a professional negligence

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

**VII. Standards of Professional Care**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**VIII. Tricarichi's Claimed Damages and PwC's Mitigation Defense**

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

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

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

## CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### III. Second Element: Even if PwC Owed a Duty to Tricarichi, PwC Did Not Breach That Duty

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

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

### A. Failure to Disclose Notice 2008-111 to Tricarichi Was Not a Breach Because Tricarichi Did Not Meet His Burden to Show that the Notice Rendered PwC's Prior Advice Erroneous

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

advice on reportability had such a low confidence level.

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

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

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

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

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

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

### C. Failure to Disclose PwC's Prior Involvement in the Enbridge and Marshall Transactions Was Not a Breach of Any Duty

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

134. The Court disagrees. PwC's involvement with Marshall and Enbridge occurred long before the December 2008 issuance of Notice 2008-111, and the "independent duty" that Tricarichi claims came about at that time as a result of the issuance of that Notice. PwC rendered its advice in the Marshall case in 2003, and its involvement with Enbridge was in 1999.[7]

135. Moreover, as the Court has found above, both 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.

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

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

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

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

### IV. Third Element: Tricarichi Has Not Proven Causation

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

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

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

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

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

143. To the contrary, Tricarichi's lawyers at Sullivan & Cromwell advised

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

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

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

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

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

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

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

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

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

## V. Fourth Element: Damages

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

## VI. Basis of PwC's Affirmative Defenses

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

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

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

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

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

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

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

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

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

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

158. Under N.R.S. 11.2075(1)(a), Tricarichi's action would have needed to be commenced no later than April 29, 2011 (two years from discovery). And under N.R.S. 11.2075(1)(b), the action needed to be commenced by January, 2013 (four years from the alleged malpractice). However, the statute specifies that the earlier of the two dates controls; thus, for limitations purposes, the latest date that Tricarichi could have filed his claim is April 29, 2011. He filed his claim five years too late, on April 29, 2016.[9]

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

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

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

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

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

161. Thus, under either the three-year statute of limitations in New York, or the two-year statute of limitations in Nevada, Tricarichi's claim is time-barred[11].

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

## ORDER AND JUDGMENT

THEREFORE, PURSUANT TO THE ABOVE FINDINGS OF FACT and CONCLUSIONS OF LAW, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Judgment shall be entered in favor of Defendant PwC and Plaintiff Tricarichi shall take nothing from his Complaint.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, and DECREED that any request for fees and costs shall be handled via separate timely-filed Motion.

Counsel for Defendant PwC is directed pursuant to NRCP 58 (b) and (e) to file and serve Notice of Entry of this Findings of Fact, Conclusions of Law, and Judgment within fourteen (14) days hereof.

Dated this 9th day of February, 2023.

**Dated this 9th day of February, 2023**

Joanna S. Kishner

**E78 B8C BD27 5B3C**
**Joanna S. Kishner**
**District Court Judge**

**CSERV**

DISTRICT COURT
CLARK COUNTY, NEVADA

| | |
|---|---|
| Michael Tricarichi, Plaintiff(s)<br><br>vs.<br><br>PricewaterhouseCoopers LLP, Defendant(s) | CASE NO: A-16-735910-B<br><br>DEPT. NO. Department 31 |

**AUTOMATED CERTIFICATE OF SERVICE**

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

Service Date: 2/9/2023

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EXHIBIT PAGE ONLY

# EXHIBIT 6

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*Attorneys for Defendant*
*PricewaterhouseCoopers LLP*



**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| MICHAEL A. TRICARICHI,<br><br>Plaintiff,<br><br>vs.<br><br>PRICEWATERHOUSECOOPERS LLP,<br><br>Defendant. | CASE NO.: A-16-735910-B<br>DEPT. NO.: XXXI<br><br>**NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PWC'S MOTION TO STRIKE JURY DEMAND** |

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

Dated: April 29, 2022.

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

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

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

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

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

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

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| MICHAEL A. TRICARICHI,<br><br>Plaintiff,<br><br>vs.<br><br>PRICEWATERHOUSECOOPERS LLP,<br><br>Defendant. | CASE NO.: A-16-735910-B<br>DEPT. NO.: XXXI<br><br>**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PWC'S MOTION TO STRIKE JURY DEMAND** |

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

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

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**PROCEDURAL BACKGROUND**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**LEGAL STANDARD**

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

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

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

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

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

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

## FINDINGS OF FACT

### 1. Negotiations Regarding the Jury-Waiver Provision

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

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

### 2. Conspicuousness of the Jury-Waiver Provision

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

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

19. Moreover, the "Resolution of Differences" terms includes crystal clear, unambiguous language: "[PwC] and the Client agree not to demand a trial by jury in any action, proceeding or counterclaim arising out of or relating to this Agreement."

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

### 3. Relative Bargaining Power of the Parties

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

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

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**4. Whether Counsel Had an Opportunity to Review the Agreement**

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

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

**5. Other Factors**

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

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

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

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

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

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



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## CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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34. The Court evaluated all the *Lowe* factors as instructed by the Supreme Court's mandate, allowed briefing, took into account the non-compliant and compliant briefing, allowed references to early documentation, and held an Evidentiary Hearing, and now holds that Tricarichi has failed to meet his presumptive burden. Therefore, the Court strikes Tricarichi's jury trial demand.

**ORDER**

**IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:**

That PwC's Motion to Strike Tricarichi's New Argument is DENIED as unnecessary; and

That PwC's Motion to Strike Tricarichi's Jury Demand is GRANTED.

Therefore, the jury demand in Tricarichi's April 1, 2019 Amended Complaint [Dkt 140] is STRICKEN.

**Dated this 27th day of April, 2022**

Joanna S Kishner

**C98 843 1823 D335**
**Joanna S. Kishner**
**District Court Judge**

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**Submitted by:**

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**Approved as to form and content:**

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**Luxford, Lyndsey**

**To:** Scott F. Hessell
**Subject:** RE: Revised

---

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You may include my signature.

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**Subject:** RE: Revised

Hi Scott,

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

Thank you,

Brad

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# EXHIBIT 7

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

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2/9/2023 2:18 PM

Electronically Filed
02/09/2023 1:33 PM
CLERK OF THE COURT

**FFCL**

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| MICHAEL A. TRICARICHI,<br><br>Plaintiff,<br><br>vs.<br><br>PRICEWATERHOUSECOOPERS LLP,<br><br>Defendant. | CASE NO.: A-16-735910-B<br><br>DEPT. NO.: XXXI<br><br>**FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT** |

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

**JOANNA S. KISHNER**
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155



Case Number: A-16-735910-B

## FINDINGS OF FACT

### I. Introduction and Relevant Parties

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

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

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

---

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

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

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

**II. The Westside Transaction**

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

6. Tricarichi retained his long-time attorneys at Hahn Loeser & Parks, LLP ("Hahn Loeser") to oversee all aspects of the transaction, including structuring it, drafting the deal documents, and providing advice on how Tricarichi could minimize his tax burden. TT8 (Vol. 2) 9, 12–13 (Hart Dep. 56:14–20, 93:24–94:5).

7. Hahn Loeser corporate and tax attorney Jeff Folkman, among others, had authority to act on behalf of Tricarichi and acted as his agent in various matters with respect to the Westside Transaction. *See, e.g.*, Ex. 127, Email from J. Folkman at 001; TT3 89:7–90:20 (Tricarichi).

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

**III. PwC's Engagement**

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

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

11. As this Court has found previously, Tricarichi received both the Engagement Letter and the Terms of Engagement, and the Engagement Agreement was a valid and binding contract. *See* Dkt. 336, Order Granting PwC's Mot. to Strike Jury Demand ¶ 33.[3]

12. The Engagement Agreement specified that PwC would provide

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

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

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

> IN NO EVENT, UNLESS IT HAS BEEN FINALLY DETERMINED THAT [PWC] WAS GROSSLY NEGLIGENT OR ACTED WILLFULLY OR FRAUDULENTLY, SHALL [PWC] BE LIABLE TO THE CLIENT OR ANY OF ITS OFFICERS, DIRECTORS, EMPLOYEES OR SHAREHOLDERS OR TO ANY OTHER THIRD PARTY, WHETHER A CLAIM BE IN TORT, CONTRACT OR OTHERWISE FOR ANY AMOUNT IN EXCESS OF THE TOTAL PROFESSIONAL FEE PAID BY YOU TO US UNDER THIS AGREEMENT FOR THE PARTICULAR SERVICE TO WHICH SUCH CLAIM RELATES.

*Id.* at 007.

14. Section 3 of the Engagement Agreement advised that

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

*Id*. at 006.

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

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

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

and insurance).

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

19. PwC primarily investigated two topics for Tricarichi: (1) whether the Westside Transaction was reportable to the IRS as a so-called "Midco" transaction under IRS Notice 2001-16; and (2) whether Tricarichi could be held liable for Westside's taxes, including under a transferee liability theory. *Id*. at 002–004.[4]

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

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

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

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

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

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

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

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

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

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

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

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

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

30. In light of the foregoing specific facts and evidence presented at

trial, the Court finds that Tricarichi ceased being a PwC client as of October, 2003 when the services pursuant to the specific Engagement Agreement were completed and the final bill sent. By 2008, Tricarichi was a former client of PwC's and had no ongoing professional relationship with the firm.

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

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

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

### A. The Enbridge Matter

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

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

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

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

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

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

**B. The Marshall Matter**

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

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

39. As with the Enbridge matter, the Court finds numerous differences between the Marshall matter and the instant case. The 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. TT8 (Vol. 1) 199:3–12 (Harris). Given the differences in the matters, 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 that transaction.

**V. Tricarichi's Tax Dispute with the IRS and IRS Notice 2008-111**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Transaction. Ex. 174; Ex. 182.

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

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

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

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

**VI. Procedural History of Tricarichi's Dispute with PwC**

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

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

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

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

82. In the meantime, Tricarichi pursued a professional negligence

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

**VII. Standards of Professional Care**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**VIII. Tricarichi's Claimed Damages and PwC's Mitigation Defense**

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

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

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

## CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### III. Second Element: Even if PwC Owed a Duty to Tricarichi, PwC Did Not Breach That Duty

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

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

### A. Failure to Disclose Notice 2008-111 to Tricarichi Was Not a Breach Because Tricarichi Did Not Meet His Burden to Show that the Notice Rendered PwC's Prior Advice Erroneous

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

advice on reportability had such a low confidence level.

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

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

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

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

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

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

### C. Failure to Disclose PwC's Prior Involvement in the Enbridge and Marshall Transactions Was Not a Breach of Any Duty

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

134. The Court disagrees. PwC's involvement with Marshall and Enbridge occurred long before the December 2008 issuance of Notice 2008-111, and the "independent duty" that Tricarichi claims came about at that time as a result of the issuance of that Notice. PwC rendered its advice in the Marshall case in 2003, and its involvement with Enbridge was in 1999.[7]

135. Moreover, as the Court has found above, both 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.

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

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

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

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

### IV. Third Element: Tricarichi Has Not Proven Causation

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

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

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

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

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

143. To the contrary, Tricarichi's lawyers at Sullivan & Cromwell advised

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

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

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

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

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

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

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

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

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

## V. Fourth Element: Damages

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

## VI. Basis of PwC's Affirmative Defenses

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

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

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

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

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

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

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

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

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

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

158. Under N.R.S. 11.2075(1)(a), Tricarichi's action would have needed to be commenced no later than April 29, 2011 (two years from discovery). And under N.R.S. 11.2075(1)(b), the action needed to be commenced by January, 2013 (four years from the alleged malpractice). However, the statute specifies that the earlier of the two dates controls; thus, for limitations purposes, the latest date that Tricarichi could have filed his claim is April 29, 2011. He filed his claim five years too late, on April 29, 2016.[9]

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

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

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

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

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

161. Thus, under either the three-year statute of limitations in New York, or the two-year statute of limitations in Nevada, Tricarichi's claim is time-barred[11].

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

## ORDER AND JUDGMENT

THEREFORE, PURSUANT TO THE ABOVE FINDINGS OF FACT and CONCLUSIONS OF LAW, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Judgment shall be entered in favor of Defendant PwC and Plaintiff Tricarichi shall take nothing from his Complaint.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, and DECREED that any request for fees and costs shall be handled via separate timely-filed Motion.

Counsel for Defendant PwC is directed pursuant to NRCP 58 (b) and (e) to file and serve Notice of Entry of this Findings of Fact, Conclusions of Law, and Judgment within fourteen (14) days hereof.

Dated this 9th day of February, 2023.

**Dated this 9th day of February, 2023**

Joanna S. Kishner

**E78 B8C BD27 5B3C**
**Joanna S. Kishner**
**District Court Judge**

**CSERV**

DISTRICT COURT
CLARK COUNTY, NEVADA

| | |
|---|---|
| Michael Tricarichi, Plaintiff(s)<br><br>vs.<br><br>PricewaterhouseCoopers LLP, Defendant(s) | CASE NO: A-16-735910-B<br><br>DEPT. NO. Department 31 |

**AUTOMATED CERTIFICATE OF SERVICE**

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

Service Date: 2/9/2023

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# EXHIBIT 8

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| MICHAEL A. TRICARICHI,<br><br>Plaintiff,<br><br>vs.<br><br>PRICEWATERHOUSECOOPERS LLP,<br><br>Defendant. | CASE NO.: A-16-735910-B<br>DEPT. NO.: XXXI<br><br>**NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT** |

PLEASE TAKE NOTICE that the *Findings of Fact and Conclusions of Law and Judgment* was entered in the above-captioned matter on February 9, 2023, a copy of which is attached hereto as Exhibit 1.

Dated: February 22, 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 February 22, 2023, I caused to be served a true and correct copy of the foregoing **NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT** upon the following by the method indicated:

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

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

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

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

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

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4886-1991-5088

# EXHIBIT 1

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| MICHAEL A. TRICARICHI,<br><br>Plaintiff,<br><br>vs.<br><br>PRICEWATERHOUSECOOPERS LLP,<br><br>Defendant. | CASE NO.: A-16-735910-B<br><br>DEPT. NO.: XXXI<br><br>**FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT** |

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

**JOANNA S. KISHNER**
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

## FINDINGS OF FACT

### I. Introduction and Relevant Parties

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

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

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

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

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

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

**II. The Westside Transaction**

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

6. Tricarichi retained his long-time attorneys at Hahn Loeser & Parks, LLP ("Hahn Loeser") to oversee all aspects of the transaction, including structuring it, drafting the deal documents, and providing advice on how Tricarichi could minimize his tax burden. TT8 (Vol. 2) 9, 12–13 (Hart Dep. 56:14–20, 93:24–94:5).

7. Hahn Loeser corporate and tax attorney Jeff Folkman, among others, had authority to act on behalf of Tricarichi and acted as his agent in various matters with respect to the Westside Transaction. *See, e.g.*, Ex. 127, Email from J. Folkman at 001; TT3 89:7–90:20 (Tricarichi).

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

**III. PwC's Engagement**

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

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

11. As this Court has found previously, Tricarichi received both the Engagement Letter and the Terms of Engagement, and the Engagement Agreement was a valid and binding contract. *See* Dkt. 336, Order Granting PwC's Mot. to Strike Jury Demand ¶ 33.[3]

12. The Engagement Agreement specified that PwC would provide

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

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

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

> IN NO EVENT, UNLESS IT HAS BEEN FINALLY DETERMINED THAT [PWC] WAS GROSSLY NEGLIGENT OR ACTED WILLFULLY OR FRAUDULENTLY, SHALL [PWC] BE LIABLE TO THE CLIENT OR ANY OF ITS OFFICERS, DIRECTORS, EMPLOYEES OR SHAREHOLDERS OR TO ANY OTHER THIRD PARTY, WHETHER A CLAIM BE IN TORT, CONTRACT OR OTHERWISE FOR ANY AMOUNT IN EXCESS OF THE TOTAL PROFESSIONAL FEE PAID BY YOU TO US UNDER THIS AGREEMENT FOR THE PARTICULAR SERVICE TO WHICH SUCH CLAIM RELATES.

*Id.* at 007.

14. Section 3 of the Engagement Agreement advised that

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

*Id*. at 006.

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

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

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

and insurance).

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

19. PwC primarily investigated two topics for Tricarichi: (1) whether the Westside Transaction was reportable to the IRS as a so-called "Midco" transaction under IRS Notice 2001-16; and (2) whether Tricarichi could be held liable for Westside's taxes, including under a transferee liability theory. *Id*. at 002–004.[4]

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

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

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

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

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

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

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

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

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

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

**JOANNA S. KISHNER**
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

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

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

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

30. In light of the foregoing specific facts and evidence presented at

trial, the Court finds that Tricarichi ceased being a PwC client as of October, 2003 when the services pursuant to the specific Engagement Agreement were completed and the final bill sent. By 2008, Tricarichi was a former client of PwC's and had no ongoing professional relationship with the firm.

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

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

32. Tricarichi alleged that PwC's advice and/or involvement with other Midco transactions demonstrated that it knew or had reason to know that the advice it provided to Tricarichi was inaccurate or inconsistent; and thus, he should prevail on his Amended Complaint. In support of that contention, Tricarichi provided argument and/or evidence that advice provided in what was referred to as the "Enbridge Matter" and the "Marshall Matter" was contrary or different that the advice he received. PwC disputed both the allegations as well as the applicability of both matters.

### A. The Enbridge Matter

33. It was undisputed that the Enbridge matter arose in 1999 (prior to the issuance of Notice 2001-16) and involved the purchase of shares from the Bishop Group, Ltd. by Midcoast Energy Resources (which later came to be known as Enbridge). Ex. 156, Enbridge Op. at 001–004. PwC (through its Houston office) gave tax advice to Midcoast in the transaction. *Id*. at 002.

34. While the Enbridge matter involved a purported Midco transaction,

the Court finds numerous differences between it and the instant case. First, there were four parties (including an intermediary entity) to the Enbridge transaction, while the Westside Transaction only involved three parties and lacked an intermediary entity. *Id*. at 002–004.

35. Second, the Westside Transaction also did not include a target corporation with built-in gain assets or a purchaser seeking to achieve a step-up in the tax basis of such assets, as was the case in Enbridge. TT8 (Vol. 1) 196:8–14 (Harris).

36. Third, the Enbridge transaction did not involve questions of transferee liability. *Id.* 195:22–196:7 (Harris).

37. Thus, the evidence presented to this Court demonstrated that there were differences between the two transactions as to not only their structure, but also their timing *vis a vis* applicable IRS rules and regulations. In addition, the Federal District Court's decision in *Enbridge* was published and generally available to the public as of March 2008, including to Tricarichi and his counsel. See, *Enbridge Energy Co. v. United States*, 553 F. Supp. 2d 716 (S.D. Tex. 2008). Specifically to the case at bar, there was a memo from R. Corn to Plaintiff Tricarichi which demonstrated that Tricarichi was advised on the differences between Enbridge and the Westside Transaction so Tricarichi could not have relied on any failure of PwC to provide him information about Enbridge when his own counsel set forth that it was distinguishable from his case. Ex. 169, Memo from R. Corn to M. Tricarichi at 003–004.

**B. The Marshall Matter**

38. In addition to Enbridge, Tricarichi also contended that PwC failed to disclose that it had any prior relationship with Fortrend and any of its prior transactions. The evidence presented to the Court set forth that the Marshall

matter involved the family shareholders of a C corporation who sold their shares to a Fortrend affiliate to minimize their tax liability from an expected litigation settlement. Ex. 56, Marshall Tax Court Op. at 001–003. PwC (through its Portland office) advised John Marshall not to proceed with the transaction and stated that it would not consult or provide advice on the transaction. *Id*. at 004–005. The transaction closed in March 2003. *Id*. at 007.

39. As with the Enbridge matter, the Court finds numerous differences between the Marshall matter and the instant case. The 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. TT8 (Vol. 1) 199:3–12 (Harris). Given the differences in the matters, 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 that transaction.

**V. Tricarichi's Tax Dispute with the IRS and IRS Notice 2008-111**

40. In his Amended Complaint, Tricarichi alleges that his claims are not time barred based on a tolling agreement and instead PwC is liable for his damages and interest because of what PwC did and did not do regarding IRS Notice 2008-11. The gravaman of Tricarichi's claims are his contention that: had PwC informed Mr. Tricarichi of the problems with its advice regarding the Westside Midco Transaction and the resulting error on Mr. Tricarichi's tax return(s), Mr. Tricarichi would have been able to amend his return(s), avoid interest on taxes and penalties, avoid litigation with the IRS, and thereby avoid related legal fees and expenses. Nov. 2, 2022, Trial Tr. 124:12-126:6.

41. PwC contended in its defense *inter alia* that: 1. All of Tricarichi's claims are barred by statute of limitations; 2. Neither its 2003 advice, nor its internal review of the 2008 Notice, which it did not advise Tricarichi it reviewed

in 2008, did not fall below the standard of care based on the information available and the risk factor it placed on its advice even with a retrospective view of the 2008 Notice provisions; 3. Tricarichi hired experienced tax lawyers who he relied upon in making his decisions and those lawyers provided similar advice and analysis as PwC did; 4. There was no client relationship after 2003 and thus no duty was owed in 2008 or later; and 5. Tricarichi's damages are due to his own conduct including not settling with the IRS.

42. It was undisputed that on December 1, 2008, the IRS issued Notice 2008-111, entitled "Guidance on Intermediary Transaction Tax Shelters." The impact and obligations relating to that Notice were disputed at trial. Ex. 44.

43. The plain language of the Notice itself sets forth that the purpose of Notice 2008-111 was to "clarif[y]" the agency's prior notice on Midco transactions, IRS Notice 2001-16. *Id.* at 003.

44. Specifically, Notice 2008-111 advised taxpayers that a transaction would be treated as an "Intermediary Transaction" if: (1) a person engages in that transaction pursuant to a "Plan" (as defined in the Notice); (2) the transaction contains each of four objective components described in the Notice; and, (3) no safe harbor exception applies. *Id*.

45. In so doing, PwC and others interpreted the Notice to mean that the IRS narrowed the scope of Notice 2001-16. TT6 137:17–138:4 (Boyer); TT8 (Vol. 1) 182:23–183:1 (Harris).

46. Notice 2008-111 addressed only *reportability* of transactions to the IRS, not *liability* under the tax laws. Ex. 44 at 003. The Notice did "not affect the legal determination of whether a person's treatment of the transaction [was] proper or whether such person [was] liable, at law or in equity, as a transferee of property in respect of the unpaid tax obligation . . . ." *Id.*

47. After the IRS issued Notice 2008-111, Lohnes responded in an

internal email to a question from Stovsky: "I read through the Notice and agree with your assessment that it shouldn't change any of our prior analysis." Ex. 159, Lohnes Email to Stovsky. Stovsky testified that his receiving the IRS subpoena to PwC relating to the Westside Transaction led him to communicate with Lohnes about the Notice. TT6 67:9–13.

48. It was undisputed that the IRS began auditing Westside's 2003 tax return in August 2005, and it interviewed Tricarichi in connection with that audit in 2007. Ex. 144, IRS Notice of Audit to Westside Cellular. PwC was not involved with the preparation of Westside's 2003 return.

49. On January 22, 2008—roughly ten months before issuing Notice 2008-111—the IRS sent Tricarichi an Information Document Request ("IDR") seeking documents related to the Westside Transaction. Ex. 150. The IDR advised Tricarichi that he may be liable for all or part of Westside's tax liability. *Id*. at 001, See also, Order on Summary Judgment.

50. The IRS also issued a summons to PwC on January 29, 2008, seeking documents related to the Westside Transaction. Ex. 152. On February 22, 2008, PwC responded to the summons, on its own behalf. In so doing, PwC provided documents and set forth its contention that it had not provided any services to Tricarichi since 2003. Ex. 155. Tricarichi was not billed for any of these activities. *See* Ex. 3.

51. The IRS determined that as a result of the Westside transaction the company owed an additional $15.2 million in taxes and $6 million in penalties for 2003. Ex. 66 at 027. In a draft transferee report sent to Tricarichi on February 3, 2009, the IRS sought payment of Westside's outstanding tax liability from Tricarichi. Ex. 161 at 003–025.

52. After receiving the draft transferee report, Tricarichi recruited highly experienced tax counsel to advise him.

53. Among those who Tricarichi hired were Glenn Miller and Michael Desmond of Bingham McCutcheon. Miller has practiced tax law for approximately 30 years. TT7 185:6–8. Desmond is a tax lawyer with over 25 years of experience, including being employed at the DOJ's Tax Division. TT6 169:15–170:1. After his work for Tricarichi, Desmond later served as IRS Chief Counsel. *Id.* 170:18–171:13.

54. Tricarichi also hired a team of lawyers at Sullivan & Cromwell, led by Don Korb, a senior tax lawyer who, at the time of his deposition in 2020, had been practicing tax law for over 45 years. TT8 (Vol. 2) 28 (Korb Dep. 15:25–16:4). Korb's experience included serving as Chief Counsel of the IRS from 2004 to 2008. *Id*. at 28–29 (Korb Dep. 18:13–15, 19:23–20:1).

55. As his trial with the IRS in the Tax Court approached, Tricarichi also hired several lawyers at McGuire Woods, led by one of its partners, Craig Bell. TT6 182:24–183:10 (Desmond).

56. While representing their client before the IRS and consistent with PwC's prior assessment, Tricarichi's lawyers repeatedly argued that under the standards set forth by Notice 2008-111, the Westside Transaction was not an intermediary transaction. *See, e.g.*, Ex. 102, 4/29/09 Response to Draft Protest Letter at 006–010; Ex. 103A, 10/9/09 Formal Protest Letter at 012–016; Ex. 183, 10/27/10 Appeals Conference Presentation at 002–003, 010–012; Ex. 197, 3/18/11 Korb Letter to IRS at 003–004.

57. Each of the communications cited above contained lengthy explanations of Notice 2008-111, by individuals separate from PwC including tax lawyers, and they all set forth a similar opinion that Lohnes had provided internally to Stovsky---i.e. that the 2008 Notice did not apply to the Westside Transaction. *See id*. For example, the admitted exhibits included a March 2011 communication from one of Tricarichi's lawyers in the tax proceedings, Korb,

wherein he contended that "pursuant to the clear and unambiguous language of Notice 2008-111, the sale of West Side Cellular stock is neither an intermediary transaction *nor* substantially similar to an intermediary transaction. *We see no basis on which this conclusion can be challenged.*" Ex. 197 at 004 (emphasis added); *see also* Ex. 183 at 002–003, 010–012.

58. The evidence established that Tricarichi's lawyers and the IRS also undertook efforts to settle the case. For example, in October 2010, the IRS indicated it would be willing to settle the claim for roughly $14.5 million. Ex. 186, Email from D. Korb to M. Tricarichi; Ex. 187, Tricarichi's Baseline Case Calculation at 005; TT6 177:3–9 (Desmond). Tricarichi did not accept this offer.

59. On December 6, 2010, Tricarichi's lawyers at Sullivan & Crowell sent a "decision tree" analysis to the IRS, which purported to calculate the IRS's chances of success at trial as a means of estimating the settlement value of the case. Ex. 190, Email from A. Mason to P. Szpalik at 002. Tricarichi's lawyers took the position that the IRS had only a 17 percent (17%) chance of establishing liability for Tricarichi and an 83 percent (83%) chance of failing to make such a showing. *Id.*

60. At trial, Tricarichi confirmed that as of December 2010, he understood that he had an 83 percent (83%) chance of winning his case against the IRS based on the decision tree presented by his lawyers and which PwC had no part in creating or editing. TT4 75:19–25.

61. On December 8, 2010, the IRS sent a new settlement offer of approximately $16.1 million. Ex. 192, Email from R. Corn to D. Korb; Ex. 193, IRS Settlement Computation at 001. Tricarichi did not accept this offer.

62. The IRS made another settlement offer in August 2011 of approximately $12.4 million. Ex. 201, Facsimile from P. Szpalik to D. Korb at 002. Tricarichi did not accept this offer.

63. Tricarichi did not settle his IRS case. Tricarichi testified that he did not have the ability to settle for the amount that was being sought. TT4 30:23–31:1; *id.* 74:12–14; *id.* 86:11–13. Tricarichi's lawyers also testified that he was not interested in considering settlement offers in the double-digit millions. TT6 198:2–17 (Desmond).

64. On June 25, 2012, the IRS issued a formal "Notice of Liability," asserting that Tricarichi owed $15,186,570 in income tax and underpayment penalties of $6,012,777 (for a total of approximately $21.2 million) for the Westside Transaction. Ex. 210. Tricarichi petitioned the Tax Court for review shortly thereafter. Ex. 66.

65. On May 30, 2014, Tricarichi rejected his lawyers' suggestion that he might consider making a settlement offer to the IRS saying, "I don't want to give the irs (sic) the impression that we think our case is weak, which I don't believe it is." Ex. 228, Email from M. Tricarichi to M. Desmond.

66. In their arguments to the Tax Court, Tricarichi's lawyers continued to argue that the Westside Transaction was not an intermediary transaction and did not satisfy Notice 2008-111. *See, e.g.*, Ex. 225, Tricarichi's Tax Court Cross-Motion in Limine at 005.

67. The Tax Court held a four-day trial on Tricarichi's petition in June 2014. After the trial, but before the Tax Court issued its decision in August 2014, the IRS proposed settling the case for roughly $13.7 million. Ex. 231, Email from M. Desmond to M. Tricarichi; Ex. 232, Draft Settlement Discussion Framework; TT6 201:18–202:3 (Desmond).

68. There was no settlement. Ex. 234, Email from M. Tricarichi to M. Desmond.

69. The Tax Court issued its opinion on October 14, 2015, upholding the IRS's Notice of Liability and ruling for the government on all issues. Ex. 66 at

005. Tricarichi's subsequent appeals were unsuccessful. *Tricarichi v. Comm'r of Internal Revenue*, 752 F. App'x 455, 456 (9th Cir. 2018), cert. denied, 140 S. Ct. 38 (2019).

70. The evidence showed that PwC provided the information required by the IRS or requested by Tricarichi and his agents or lawyers, regarding the tax dispute and/or tax trials. There was no evidence that Tricarichi hired PwC to perform any professional services for him relating to the tax dispute and/or tax trials.

71. The Record further shows that while PwC did not contact Tricarichi before or after Lohnes reviewed the 2008 Notice at Stovsky's request, Tricarichi was familiar with Notice 2008-111 and was repeatedly advised as to its content and applicability by the attorneys he hired.

72. For example, Tricarichi reviewed drafts of the April 29, 2009, and October 9, 2009, letters to the IRS, both of which contained detailed discussions of Notice 2008-111. TT7 189:1–18, 190:6-22 (discussing Ex. 102); Ex. 103A at 030. In fact, Tricarichi signed the October 9, 2009, letter himself, attesting under penalty of perjury that he had "examined this protest, including any accompanying documents," and that the "facts presented in this protest are true, correct, and complete." *Id*.

73. Tricarichi's attorneys also testified that they advised him on Notice 2008-11 specifically, and Midco transactions generally, both orally and in writing. TT7 189:19–190:2, 193:5–15 (Miller).

74. For example, in October 2009, Korb sent a memo to Tricarichi and his personal attorney Randy Hart, advising them that the Westside transaction was "quite different" from the type of transaction described in Notice 2008-111. Ex. 165 at 003. Tricarichi also reviewed settlement presentations to the IRS that discussed Notice 2008-111 and the reasons it did not apply to the Westside

Transaction. Ex. 174; Ex. 182.

75. The Court, therefore, finds that Tricarichi was aware of Notice 2008-111 and his counsel's interpretation of its applicability to the Westside Transaction at least as of April 29, 2009. There was also evidence that during the months and years that followed, his lawyers continued to advise him repeatedly that in their opinion, and/or they had a strong argument to present to a court, that the requirements of Notice 2008-111 were not met. This is the same conclusion that PwC reached when it reviewed Notice 2008-111 shortly after its issuance. *See* Ex. 159.

76. The preponderance of the evidence also shows that Tricarichi was aware, or should have been aware, of the existence and contents of the Stovsky memo no later than 2009. At trial, Tricarichi testified at one point that he first saw a copy of the memo when PwC invited him and his lawyer, Randy Hart, to review a box of documents it was planning to send to the IRS in response to a summons it received regarding the Westside Transaction. TT4 7:21–23; *see also* TT5 89:23–90:2, 90:21-91:1 (Stovsky); TT6 62:19–63:12 (Stovsky). This meeting occurred in February 2008. *See* Ex. 155; TT6 62:11–25 (Stovsky). At another point during his testimony, he stated that he was unsure whether he saw the Stovsky memo in 2008. TT3. 122:14–19

77. Even if Tricarichi did not read the memo at the time he and Mr. Hart were to review the documents to be sent to the IRS, that same memo was cited by the IRS. Specifically, in February and August 2009, the IRS cited the Stovsky memo and described its contents to Tricarichi in the draft and final transferee reports that it issued. Ex. 161 at 009; Ex. 163 at 010. Further, in September 2009, PwC sent Tricarichi a copy of the files it had provided to the IRS, which included the Stovsky Memo. Ex. 51 at 001. Additionally, in October 2009, Sullivan & Cromwell billed Tricarichi, in part, for reviewing the Stovsky

Memo. Ex. 168 at 002. Thus, even though Tricarichi stated at one point that he never heard the phrase "more likely than not" before trial, (TT3 107:17–21) and provided different recollections of when and/or whether he read or was made aware of the contents of the Stovsky memo, the evidence demonstrates that given the number of other witnesses and documents, Tricarichi reasonably should be viewed as being on notice of the contents of the Stovsky memo.

**VI. Procedural History of Tricarichi's Dispute with PwC**

78. On January 14, 2011, Joel Levin, an attorney for Tricarichi, sent Stovsky a letter in which he stated that "it is [Tricarichi's] position that this multi-million dollar potential tax liability [for the Westside Transaction] lies at the feet of PWC for failing to provide him competent services, advice and counsel with respect to the subject stock sale to Fortrend, particularly concerning the potential tax consequences." Ex. 205 at 002.

79. In April 2016, Tricarichi filed a Complaint against PwC in the Eighth Judicial District alleging that PwC's 2003 advice on the Westside Transaction was negligent. Dkt. 1 ¶¶ 37–40, 81–96.

80. On October 22, 2018, the Court granted Summary Judgment in PwC's favor, holding that the statute of limitations barred any claims based on PwC's 2003 advice. Dkt. 119 at 2. The Court entered Judgment in favor of PwC "regarding any and all claims arising from the services PwC provided Tricarichi in 2003." *Id*. at 3.

81. Tricarichi filed an Amended Complaint in which he added a claim for negligence based on PwC's alleged failure to tell him about Notice 2008-111. Dkt. 140 ¶¶ 116–17. Tricarichi alleged that if PwC had told him about Notice 2008-111, he would have immediately stopped litigating against the IRS and paid the tax deficiency. *Id*. ¶ 119.

82. In the meantime, Tricarichi pursued a professional negligence

claim against his attorneys at Hahn Loeser, alleging that they committed malpractice by advising him to enter into the Westside Transaction. After a mediation in September 2012, Tricarichi and Hahn Loeser settled their dispute for $4 million before any litigation was filed. Ex. 217, Letter from J. Levin to N. Schwartz; Ex. 218, Confidential Settlement Agreement at 003 (¶ 5).

**VII. Standards of Professional Care**

83. The primary source of professional responsibility standards for CPA tax practitioners during the time at issue in this case were standards promulgated by the American Institute of Certified Public Accountants ("AICPA").

84. In fact, the Engagement Agreement between PwC and Tricarichi specified that all services were to be performed "in accordance with the AICPA's Statements on Standards for Tax Services." Ex. 100 at 007 (Section 7).

85. Both Nevada (where Tricarichi was located) and Ohio (where PwC dispensed its advice) adopted the AICPA professional standards, at least in part, to govern accountants licensed to practice. Nev. Admin. Code §§ 628.0060-5(a) & (d), 628.500; Ohio Admin. Code § 4701-9-09.

86. AICPA Rule 201 provides that a CPA tax practitioner must exercise professional competence and due care, which depends on the scope of the practitioner's engagement under the particular facts and circumstances. Ex. 4, AICPA Professional Standards.

87. The AICPA has defined the standard of care, and competence in the context of tax planning advice and tax return preparation, in a series of documents known as the Statements on Standards for Tax Services, or SSTSs. Ex. 106, Statements on Standards for Tax Services 1–8 (Aug. 2000).

88. SSTS No. 6 is entitled "Knowledge of Error: Return Preparation." This standard addresses situations in which an accountant (or "member") discovers either an error in a previously filed return or the taxpayer's failure to

file a return in the past. *Id.* at 027.

89. SSTS No. 6 states that "[a] member should inform the taxpayer promptly upon becoming aware of an error in a previously filed return or upon becoming aware of a taxpayer's failure to file a required return." *Id*. (¶ 3).

90. An "error" under SSTS No. 6 is any position that has less than a one-in-three chance of success. Ex. 106 at 027 (¶ 1); *id.* at 008 (¶ 2(a)), *id.* at 011 (Interpretation 1-1); Ex. 149 at 046, IRS Circular 230 (Section 10.34), Definition D1; TT8 (Vol. 1) 191:17–25 (Harris).

91. The "Explanation" section of SSTS No. 6 clarifies that its obligations exist only when the accountant is continuing to represent the client. Both Paragraphs 5 and 9 of SSTS No. 6 refer to telling the "taxpayer" (client) about the error if the member became aware of it "[w]hile performing services for a taxpayer." Ex. 106 at 028–029 (¶¶ 5, 9); TT7 32:16–33:12 (Dellinger).

92. Paragraph 6 of the same section discusses "whether to continue a professional or employment relationship with the taxpayer" if the taxpayer does not correct the error. Ex. 106 at 028 (¶ 6). This, again, presupposes an existing client relationship, a point upon which both PwC's and Tricarichi's experts agreed. TT7 30:22–31:11 (Dellinger); TT8 (Vol. 1) 36:21–37:7 (Greene).

93. Nothing in the text of SSTS No. 6 imposes any obligations on an accountant with respect to a former client. Trial testimony established that such an open-ended obligation on accountants to their former clients would pose enormous practical difficulties. TT7 33:13–22 (Dellinger); *see also* TT8 (Vol. 1) 38:19–22 (Greene).

94. SSTS No. 8 is entitled "Form and Content of Advice to Taxpayers." It addresses the "circumstances in which a member has a responsibility to communicate with a taxpayer when subsequent developments affect advice previously provided." Ex. 106 at 033 (¶ 1).

95. The standard states: "[a] member has no obligation to communicate with a taxpayer when subsequent developments affect advice previously provided with respect to significant matters, except while assisting a taxpayer in implementing procedures or plans associated with the advice provided or when a member undertakes this obligation by specific agreement." *Id*. (¶ 4).

96. The "Explanation" section of the standard further specifies that "a member cannot be expected to communicate subsequent developments that affect such advice unless the member undertakes this obligation by specific agreement with the taxpayer." *Id*. at 034 (¶ 9).

97. Finally, the standard notes that taxpayers should be informed that any advice rendered reflects professional judgment based on an existing situation, and that later developments could affect earlier advice. It further instructs that "Members may use precautionary language to the effect that their advice is based on facts as stated and authorities are subject to change." *Id*. at 035 (¶ 10). PwC included such language in its Engagement Agreement. *See* FOF ¶ 14, *supra*.

**VIII. Tricarichi's Claimed Damages and PwC's Mitigation Defense**

98. Tricarichi seeks, as damages, the legal fees incurred in his IRS litigation, and the interest on his unpaid taxes and penalties that accrued from January 1, 2009, through November 13, 2018. Specifically, in this case Tricarchi contends that PwC is liable to him for $3,180,143.03 in legal fees and costs, and $14,937,400.18 in interest owed to the IRS.

99. As one of its defenses, PwC contended through its expert that the damages asserted are too high and do not reflect appropriate mitigation. PwC contended that had Tricarichi set aside the money he potentially owed the IRS

and invested it in stock funds, bond funds, real estate funds, or some combination of these, he could have enjoyed rates of return on the funds he kept from the IRS significantly higher than the three-to-six percent interest rates charged by the IRS during the same period. TT7 132:5–140:8 (Leaunae).

## CONCLUSIONS OF LAW

### I. Elements of Tricarichi's Cause of Action (Count III)

100. Tricarichi tried a single claim of professional negligence (Count III of his Amended Complaint) to the Court. Dkt. 140 ¶¶ 115–121. Count III focuses only on whether the issuance of Notice 2008-111 in December 2008 gave rise to any duty to Tricarichi that PwC breached. *Id*.[5]

101. Despite the narrow focus of Count III, some of the evidence at trial focused on what was contended to be negligent acts and omissions that occurred in 2003, when PwC originally rendered its advice, or earlier despite the Court's prior Summary Judgment ruling, which barred as untimely "any and all claims arising from the services PwC provided Plaintiff in 2003." Dkt. 191 at 3. Given the time and effort spent on the providing the detailed history of the case, and given the extensive procedural history including appeals and multiple proceedings in other courts, the Court has included historical facts and testimony for clarity of the record. By incorporating a fuller factual background, the Court is not sua sponte altering or amending any prior judgment or ruling as they remain law of the case. See, e.g. *Recontrust Co. v. Zhang*, 130 Nev. 1, 7–8 (2014) ("[A] court involved in later phases of a lawsuit should not re-open

[5] The Amended Complaint also contains Counts I and II against PwC, both of which were included only for preservation purposes after the Court dismissed them on Summary Judgment in 2018. Dkt. 140 n.1. Counts I and II were not tried to the Court, nor was any other claim in the Amended Complaint apart from Count III. TT9 167:25–168:23.

questions decided (*i.e.*, established as law of the case) by that court or a higher one in earlier phases") (quotation omitted); *see also* Dkt. 234 at 4.

102. The elements of a cause of action in tort for professional negligence are:

> (1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) the breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury, and (4) actual loss or damage resulting from the professional's negligence.

*Sorenson v. Pavlokowski*, 94 Nev. 440, 443, 581 P.2d 851, 853 (Nev. 1978).

103. As set forth in more detail below, at trial, Tricarichi failed to meet his burden of proof on all four elements.

## II. First Element: PwC Did Not Owe Tricarichi a Duty of Care in 2008

104. The Court concludes that PwC did not owe any duty to Tricarichi, who ceased being a client in 2003, such that PwC should have updated its previously-provided advice in 2008, after Notice 2008-111 issued. *See Rodriguez v. Primadonna Co., LLC*, 125 Nev. 578, 584, 216 P.3d 793, 798 (Nev. 2009) (existence of duty is a matter of law for the Court to decide).

105. Under the AICPA's SSTS No. 8, a member does not have any obligation to communicate with a taxpayer about subsequent developments, except "while assisting the taxpayer in implementing procedures or plans associated with the advice provided or when the member undertakes this obligation by specific agreement." Ex. 106 at 033.

106. At trial, Tricarichi argued that the first exception ("while implementing plans or procedures") was satisfied because PwC provided comments on the stock purchase agreement between Westside and Nob Hill in 2003, which he claimed created a continuing obligation for PwC to update him

on subsequent developments in 2008. TT9 112:13–24.

107. The Court disagrees. By its plain language, the exception only applies "while" the member is assisting the taxpayer in implementing procedures. TT9 81:17–84:1 (Harris); TT7 67:2–68:5 (Delllinger). Even if providing comments on the agreement counted as "implementing" Tricarichi's plan in 2003 (a question that the Court need not reach here), it is undisputed that those efforts ceased in 2003. By 2008, PwC was not performing any work for Tricarichi.

108. As to the second exception, in the present case there was a specific Engagement Letter signed by Tricarichi. PwC's Engagement Letter, consistent with SSTS No. 8, specifically disclaimed any ongoing obligation for changes to the tax laws after services were rendered. Ex. 100 at 006 (Section 3); Ex. 106 at 006. Further, there was no contention that Tricarichi was not aware of the terms of the Engagement Letter as he even made comments on the Engagement Letter which he signed.

109. Tricarichi also pointed to Paragraphs 6 and 7 of SSTS No. 8, which discusses when a member may consider providing advice in written, as opposed to oral, form. TT8 (Vol. 1) 10:13–14:11 (Greene); Ex. 106 at 034. In the present case, there was disputed testimony about whether there was a specific discussion about obtaining the information orally or in writing or if Tricarichi knew that he could have requested the opinions to be set forth in writing. Regardless of whether there was a difference between the parties whether any discussion took place or not, and even if the Court were to credit Tricarichi's view, the language of Paragraphs 6 and 7 of SSTS No. 8 is what the Court focuses on to determine if the first prong of the cause of action is met. As the plain language of the provision sets forth that the decision regarding the form of advice is left to the "professional judgement" of the member, the Court

cannot find that it imposes any affirmative duty on members to provide written advice. Instead, the Court reads the language as setting forth situations when written advice may be preferable. TT8 (Vol. 1) 208:10–25 (Harris).

110. Thus, the Court concludes that Tricarichi did not meet his burden to demonstrate in the present case that the standards set forth in SSTS No. 8 gave rise to any duty of care on the part of PwC to Tricarichi.

111. SSTS No. 6, likewise, does not create any duty to Tricarichi. The Court has already found that SSTS No. 6 is limited to circumstances involving awareness of an error on a tax return when an accountant is performing services for a *current* client. Here, PwC was no longer performing services for Tricarichi in 2008. At trial, even Tricarichi's expert would not commit to imposing a duty on PwC under these circumstances. TT8 (Vol. 1) 38:19–22 ("[Q.] Let's say there were no services being provided to Mr. Tricarichi by PwC in 2008, in that circumstance would PwC have a duty to disclose an error to a former client, under SSTS 6? A. Perhaps not.").

112. PwC's later, occasional, contact with Tricarichi and his lawyers, while responding to IRS subpoenas for documents in 2008 and later for testimony in 2013 and 2014, does not constitute performing services for Tricarichi. PwC was required by law to respond to IRS subpoenas on its own behalf. Tricarichi concede that he did not seek to engage PwC, and PwC did not invoice Tricarichi for time spent responding to the IRS subpoenas or testifying at his Tax Court trial.

113. Relying on internal PwC policies and a single practice guide published by the AICPA, Tricarichi also asserted at trial that PwC had a duty to maintain a written file documenting how it reached its conclusions about Notice 2008-111. TT7 106:1–14, 109:7–19 (Greene); Ex. 22; Ex. 88.

114. While the Court took into account both the policies and the

practice guide, it cannot find that either of these created a duty that meets the criteria necessary for a professional negligence tort. Furthermore, the practice guide is not authoritative literature and describes only "best practices"; it does not impose requirements on all accountants. TT8 (Vol. 1) 88:1–23 (Greene). Indeed, it would be Tricarichi's burden to establish that a failure to follow internal policies or the terms of a practice guide creates a duty under Nevada law but he did not provide any case law to the Court to support that contention. Instead, the only case cited by either party was outside the jurisdiction and it provided that a company's internal standards are distinct from, and can be more rigorous than, external duties imposed under the law. See, *In re Conticommodity Servs., Inc. Sec. Litig.*, No. MDL 644, 1988 WL 56172, at *1–2 (N.D. Ill. May 25, 1988).[6]

115. Based on the above reasons, the Court concludes, as a matter of law, that PwC did not owe any duty of care to Tricarichi, its former client. Accordingly, Tricarichi has failed to establish the first element of his claim. While the failure to meet all elements of a cause of action would allow Judgment in favor of PwC, the Court addresses each of the other elements as well.

### III. Second Element: Even if PwC Owed a Duty to Tricarichi, PwC Did Not Breach That Duty

116. Even if PwC owed a duty to update its former client, the Court concludes that based on the evidence, Tricarichi has failed to prove that PwC breached its duty.

[6] Plaintiff Tricarichi did cite a one case from a federal District Court in Nevada, *Garner v. Bank of Am. Corp.*, 2014 WL 1945142 at *7–8 (D. Nev. May 13, 2014). That case, however, is inapposite as it discusses generally that a duty can arise from a special relationship but does not address the specific issues raised in this case.

### A. Failure to Disclose Notice 2008-111 to Tricarichi Was Not a Breach Because Tricarichi Did Not Meet His Burden to Show that the Notice Rendered PwC's Prior Advice Erroneous

117. Assuming *arguendo* that SSTS No. 6 did create a duty to Tricarichi, that duty could only be breached if Notice 2008-111 made PwC aware of an "error" in a previously filed return. Ex. 106 at 027 (¶ 3). It did not.

118. First, it is undisputed that PwC was not aware of any error on a previously filed tax return as a result of Notice 2008-111. Tricarichi contends, instead, that PwC should have been aware of an error because it should have interpreted the 2008 Notice as invalidating or being contrary in some respect to the advice given by PwC in 2003. The evidence presented by Tricarichi was that the IRS's position that Tricarichi owed taxes as a result of the Westside transaction was upheld by the tax court, and then the appellate court; and by implication, PwC should have known that Tricarichi would not prevail in either of those courts. The challenge with that argument is that it is flawed and not supported by the facts. First, there was no evidence that the IRS relied on Notice 2008-111, which came out in December 2008, to commence its audit of the Westside transaction, which began in 2005 about three years before the Notice came out. Further, on January 22, 2008 - roughly ten months before issuing Notice 2008-11 was sent to Tricarichi - he had already received an Information Document Request ("IDR") from the IRS seeking documents related to the Westside Transaction. The IDR advised Tricarichi that he may be liable for all or part of Westside's tax liability. Ex. 150. Thus, even if Notice 2008-111 did more than narrow the circumstances in which a transaction would be reportable, as was contended by PwC and others, Tricarichi did not meet his burden to show that PwC breached its duty within the statute of limitations time

frame by failing to update him as there was no evidence that PwC knew that such a Notice would come out in until it actually came out and by that time the IRS had already begun its audit and he had already received the IDR.

119. To the extent that Tricarichi also claims that he would have modified his tax returns and taken other actions after December 1, 2008, if PwC had informed him that Notice 2008-111 impacted the merits of the IRS's position on the audit they had already commenced in 2005, that contention was also not established by the evidence. Instead the evidence showed that even after he had various opportunities to resolve his tax dispute and had the benefit of several legal tax professionals advising him, he chose not to settle the tax dispute.

120. PwC further contended that pursuant to Notice 2008–111, a transaction is treated as a Midco transaction if: (1) a person engages in that transaction pursuant to a "Plan" (as defined in the notice); and (2) the transaction contains each of four objective components described in the Notice. Ex. 44 at 003.

121. There was no dispute that the term "Plan" is defined in Section 2 of the Notice, and it must include the disposition of Built-in Gain Assets. *Id*. at 003-004. "Built-in Gain Assets" is, in turn, defined as an asset "the sale of which would result on taxable gain." *Id*.

122. The undisputed evidence at trial—from fact and expert witnesses called by *both* parties (including Tricarichi himself)—was that Westside did not have any Built-in Gain Assets at the time of the transaction, and that the Westside Transaction did not involve the sale of any Built-in Gain Assets. TT2 95:16–18 (Lohnes); TT4 63:5–10 (Tricarichi) (referring to Ex. 182 at 003); TT8 (Vol. 1) 76:20–22 (Greene); *Id*. 191:11–16 (Harris); TT7 200:3–23 (Miller). The theory espoused in questioning by Tricarichi's counsel, that the release of the

claims in the lawsuit constituted Built-In Gain Assets, was not supported by a single witness or any evidence in the case.

123. At the time of the transaction, Westside had only cash in its bank accounts from the lawsuit settlement with the cell phone carriers, which was considered ordinary income, not taxable gain from the sale of a Built-in Gain Asset, and reported that way on Westside's tax return. TT2 47:12–22 (Lohnes); TT8 (Vol. 1) 76:17–19 (Greene); *Id.* 259:11–21 (Harris); *see also Nahey v. Comm'r*, 111 T.C. 256, 261–65 (1998) (holding that settlement of lawsuits "does not constitute a sale or exchange" and thus would be treated as ordinary income, not capital gain).

124. Thus, given the language of the Notice and how was interpreted by others on behalf of Tricarichi, PwC did not fall below the standard of care by reviewing Notice 2008-111 and making the determination that it did not change the firm's prior analysis that, "more likely than not", the transaction was not reportable. Ex. 45, Lohnes Email to Stovsky.

125. Tricarichi argued at trial that Lohnes or Stovsky should have consulted one of the designated "Subject Matter Experts," or SMEs, at PwC before reaching this conclusion. This argument, however, had no evidentiary support. Tricarichi claimed at trial that it was the failure of PwC to inform him that Notice 2008-111 impacted his personal liability to the IRS as a transferee. Whether PwC had a SME involved or not is irrelevant. It was uncontested that PwC (via Stovsky) did not believe there was any information to provide Tricarichi based on Notice 2008-111. Stovsky was Tricarichi's relationship tax professional at PwC who, in the past, had communicated what he thought should be communicated to Tricarichi. Whether Stovsky communicated internally with only Lohnes, or also with others such as a SME, prior to making that determination, it was PwC's decision, via a tax partner, not to provide

Tricarichi with any analysis of Notice 2008-111, and whether that decision does or does not meet the standard of professional negligence, is the issue before the Court. The issue is not a speculation of whether if Stovsky or Lohnes reached out to a SME would that SME give the same or a different opinion and if so what would have happened. Tricarichi's claim and PwC's defenses are based on what actually occurred - not speculation of what could have occurred with a different set of facts.

126. In addition, in the present case, Tricarichi did not establish that the individuals at PwC who provided the advice in 2003 were not qualified to provide the advice. PwC did provide evidence that Lohnes had prior expertise in Midco transactions, even though he could not recall names of specific matters he worked on. TT3 4:21–5:20 (Lohnes). Second, the directory of SMEs was not an exhaustive list of people at PwC with knowledge about particular transactions, but rather that it served merely as a contact list for people outside of Lohnes' group (Washington National Tax Service). TT2 115:2–116:10 (Lohnes). Finally, a designated SME on Midco transactions, Mark Boyer, testified that Lohnes had a level of expertise in Midco transactions similar to his own. TT6 140:15–141:12.

127. Another reason that PwC's advice in 2003 was not in "error" was because it rendered its advice with a "more likely than not" confidence level. That allows for up to a 49.9 percent (49.9%) likelihood of the result going the other way. Thus, even if IRS 2008-111 did expand, rather than narrow, the reportability standard (and it did not), that would not render earlier advice given with a "more likely than not" standard erroneous.

128. As noted above, an "error" under SSTS No. 6 means that the member advised the taxpayer to take a position with less than a 1-in-3 chance of success. No one testified that as a result of Notice 2008-111, PwC's original

advice on reportability had such a low confidence level.

129. In evaluating the breach element, the Court also has to look at what the other professionals Tricarichi hired advised him with in relation to Notice 2008-111 and its applicability to his risk of liability to the IRS. Both the internal communications, provided as exhibits, as well as the arguments presented to the various courts by Tricarichi's legal tax attorneys as noted herein, were consistent with the advice provided by PwC. See, also Ex. 165. In addition, there was testimony that practitioners before the IRS and the Tax Court must have a "good faith basis" in their positions—the same type of "good faith basis" that is required under SSTS No. 1 when determining whether a position is erroneous. TT8 (Vol. 1) 235:3–25, 237:21–238:16 (Harris); TT6 184:9–12 (Desmond).

130. Therefore, even if PwC had a duty to update Tricarichi about an "error" in its prior advice on whether the transaction was now "reportable" pursuant to Notice 2008-111, based on evidence presented as to the language of the provision as well as the other advise Tricarichi received consistent with PwC's own internal analysis, Tricarichi has failed to show that there was a breach of any asserted duty.

### B. PwC Did Not Breach Any Duty to Provide Advice in Writing or to Maintain Written Documentation

131. As discussed above, PwC did not have any affirmative duty to put its advice in writing, either in 2003 or at any point after. But, even if such a duty existed, it would not have been breached in 2008 when Lohnes and Stovsky reviewed Notice 2008-111 for its applicability to the Westside Transaction.

132. Any duty to provide advice in writing presupposes, as a matter of logic, that some sort of advice is being provided to a client. That was not the case in 2008. Tricarichi neither sought a tax engagement from PwC to receive

any advice from PwC in 2008, nor was he provided any tax advice from PwC in 2008. TT3 162:21–163:5; TT8 (Vol. 1) 113:5–7 (Greene). Thus, it would have been impossible for PwC to breach any hypothetical duty to provide advice in writing to Tricarichi at that time. TT8 (Vol. 1) 114:18–25 (Greene).

### C. Failure to Disclose PwC's Prior Involvement in the Enbridge and Marshall Transactions Was Not a Breach of Any Duty

133. Tricarichi also contends that Notice 2008-111 should have prompted PwC to disclose its prior advice and the outcomes in the Enbridge and Marshall transactions, and that its failure to do so was a negligent omission.

134. The Court disagrees. PwC's involvement with Marshall and Enbridge occurred long before the December 2008 issuance of Notice 2008-111, and the "independent duty" that Tricarichi claims came about at that time as a result of the issuance of that Notice. PwC rendered its advice in the Marshall case in 2003, and its involvement with Enbridge was in 1999.[7]

135. Moreover, as the Court has found above, both 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.

136. Furthermore, the evidence at trial showed that PwC would not have been able to disclose the specific details of these engagements with Tricarichi because of its confidentiality obligations. TT3 35:23–36:7 (Lohnes); TT8 (Vol. 1) 199:17–23 (Harris); *id*. 102:14–103:4 (Greene).

137. Thus, the Court concludes as a matter of law that the failure to disclose details of the Enbridge or Marshall transactions does not constitute a

[7] As noted above, the Court's 2018 Summary Judgment ruling on statute of limitations bars Tricarichi's allegations regarding Marshall and Enbridge.

breach of any duty of care that PwC owed to Tricarichi.

### IV. Third Element: Tricarichi Has Not Proven Causation

138. To prevail on his claim, Tricarichi must prove a "proximate causal connection between the negligent conduct and resulting injury." *Boesiger v. Desert Appraisals, LLC*, 135 Nev. 192, 194–95, 444 P.3d 436, 439 (Nev. 2019).

139. Tricarichi asserts that PwC's alleged negligence (*i.e.*, failing to advise him about Notice 2008-111) caused his alleged injury (the $14,937,400 in interest that accrued after Notice 2008-111 was issued and the $3,180,143 in attorney's fees he spent litigating against the IRS).

140. The Court disagrees and concludes that Tricarichi has failed to establish causation for four independent reasons.

141. First, the record is clear that Tricarichi and his team of tax lawyers were aware of Notice 2008-111 and its implications shortly after the Notice issued as set forth above. The Court has already found that Tricarichi was aware of Notice 2008-111 and its applicability to the Westside Transaction no later than 2009; and further, that Tricarichi's attorneys repeatedly advised him thereafter throughout the course of his litigation with the IRS regarding whether the requirements of Notice 2008-111 were met or not.

142. Thus, Tricarichi's causation arguments rest on the supposition that he would have abandoned his IRS litigation and immediately settled with the government if only PwC had added a contrary voice to the chorus of distinguished tax advisors—which included both former and future IRS Chief Counsels—who were advising Tricarichi that the requirements of Notice 2008-111 were not satisfied. While Tricarichi argued that it would have made a difference in his decisions, he failed to meet his evidentiary burden.

143. To the contrary, Tricarichi's lawyers at Sullivan & Cromwell advised

him that the IRS did not need to rely on Notice 2008-111 to win, and that their argument was "a bit of a red herring." Ex. 165 at 003. And when asked at trial if he knew in 2009 that Notice 2008-111 was a red herring, Tricarichi replied: "The arguments that they're using in 2008-111 -- again, I'm not a tax expert and I keep saying that over and over again. But I can read. Okay? This is not why we lost the [Tax Court] case. It has nothing to do with why we lost the case." TT3 224:19–23 (Tricarichi) (emphasis added). The Court has to take Tricarichi's own testimony into account in evaluating every element of his claim. Giving Tricarichi the benefit of the doubt that his words could be viewed out of context, the weight of the rest of the evidence shows that there were too many intervening causes which prevent holding PwC liable for Tricarichi's asserted damages.

144. Second, the chronology of the case demonstrates that Notice 2008-11 could not have prevented the audit which later resulted in the liability determination. Specifically, Tricarichi did not show that disclosure of Notice 2008-111 would have made any difference to the rulings of the Courts as to his liability because the Notice, on its face, relates only to reportability of transactions and not a taxpayer's underlying liability: The language of the Notice sets forth it: "does not affect the legal determination of whether a person's treatment of the transaction is proper or whether such person is liable, at law or in equity, as a transferee of property in respect of the unpaid tax obligation . . . ." Ex. 44 at 003.

145. Importantly, in the present case, the chronology of facts shows that the IRS had been examining/auditing the Westside Transaction for about three years before Notice 2008-111 issued. The IRS began its audit of the 2003 Westside tax return in 2005, interviewed Tricarichi regarding that audit in 2007, and issued an Information Document Request to Tricarichi in 2008, all before

the issuance of Notice 2008-111. Thus, even if PwC had informed Tricarichi that 2008-111 would require Tricarichi to report the Westside transaction, there was no evidence presented how that would have changed the IRS determination based on the audit that he was liable as a transferee in the instant case since the audit had already progressed for three years prior to the Notice being promulgated and the IRS had already informed him that it was seeking the underpayment from his as a transferee.

146. The third reason, Tricarichi cannot meet the causation prong of his professional negligence claim is that there is no credible evidence to support his contention that if PwC had notified him regarding Notice 2008-111, he would have amended his taxes and settled the case with the IRS in December 2008; and thus, he would not have incurred any of the attorney fees or interest damages he is seeking in the present case. Specifically, his transferee liability stems from the taxes filed by various entities as a result of the Westside transaction, and he did not present any evidence how he could amend the relevant filings in 2008 or 2009 at no cost, and that as a result, the IRS would not pursue him for transferee liability. There was no evidence from any IRS witness or anyone else that the outcome described was possible.

147. Additionally, the evidence presented demonstrated that he had several opportunities to settle the case with the IRS and minimize fees and interest but he chose not to do so. As set forth in the Findings above, these opportunities to settle the case came about after he was advised by experienced tax counsel as to liability and the impact of 2008-111. While the reason Tricarichi chose not to resolve the matter with the IRS was disputed, PwC asserted that the communications between Tricarichi and his tax counsel show he did not have the funds or felt the offers to settle were too high, and the Record was devoid of any exhibit where Tricarichi contended that he did not

settle due to the advice provided by PwC in 2003. Instead, the only testimony in support of that contention is Tricarichi's own testimony which the Court has to weigh in contrast with the other testimony by his tax lawyers and the various exhibits that were introduced which are not in accord with his testimony. In so doing, the Court finds that Tricarichi did not meet his burden to show that Pwc's action or inaction relating to Notice 2008-111 meets the causation element of is claim.

148. Thus, Tricarichi has failed to provide the level of evidence necessary to support the notion that even had PwC advised Tricarichi about Notice 2008-111 when it issued, Tricarichi could have or would have settled with the IRS thereby avoiding the interest and legal fees he now seeks as damages.

149. Fourth, to the extent that Tricarichi's claim is that PwC was negligent in 2008 because it did not advise him at that time of the contents of the Stovsky Memo (as opposed to Notice 2008-111 itself), causation is still defeated because the record is clear that Tricarichi was made aware of either the existence or contents (or both) of the Stovsky memo on at least five separate occasions in 2008 and 2009, either by PwC itself, the IRS, or his attorneys. TT4 at 7:21–25; Ex. 161 at 009; Ex. 163 at 010; Ex. 164 at 001; Ex. 168 at 002.

## V. Fourth Element: Damages

150. As the Court has found that Tricarichi, independently, has not met his burden on any of the first three elements of a cause of action for Professional Negligence, the Court need not, and determines it would not be appropriate, to address the damages element.

## VI. Basis of PwC's Affirmative Defenses

151. PwC tried four of its affirmative defenses to the Court: statute of

limitations (second affirmative defense), failure to mitigate damages (fourteenth affirmative defense), offset/contribution (fifteenth affirmative defense), and limitation of liability (sixteenth affirmative defense).

152. Consistent with the Court's determination that Tricarichi failed to meet his burden on the elements of his cause of action for Professional Negligence, the Court will only address the Second Affirmative Defense relating to statute of limitations.[8]

153. Under Nevada law, an action for professional malpractice must be brought two years from discovery or four years from the alleged malpractice, whichever occurs earlier. NRS § 11.2075(1).

154. Under New York law—the governing law identified in the Engagement Agreement—the statute of limitations is three years from the alleged malpractice. *See Ackerman v. Price Waterhouse*, 644 N.E.2d 1009, 1011 (N.Y. 1994) (citing New York CPLR § 214).

155. Under either, the limitation period of Tricarichi's claim is untimely.

156. PwC's alleged acts of negligence related to Notice 2008-111 occurred in December 2008 or January 2009, shortly after it issued. Thus, under New York law, the statute of limitations would have expired at the latest in January 2013. Tricarichi did not file suit in this case until April 29, 2016, making his claim untimely.

157. The outcome is no different if the Court applies Nevada law. The Court found above that Tricarichi was subjectively aware of Notice 2008-111 at least as of April 29, 2009. Thus, the Court concludes, for limitations purposes,

[8] As set forth above, the Court found that the first three elements of his cause of action were not met for independent reasons. Thus, the Court found that there was not a basis to address the damages element of his cause of action. Consistent therewith, the Court finds no basis to address the other three affirmative defenses which are based on if there was a finding that damages were appropriate - there was not.

that the latest date that Tricarichi knew or should have known about his claim was April 29, 2009.

158. Under N.R.S. 11.2075(1)(a), Tricarichi's action would have needed to be commenced no later than April 29, 2011 (two years from discovery). And under N.R.S. 11.2075(1)(b), the action needed to be commenced by January, 2013 (four years from the alleged malpractice). However, the statute specifies that the earlier of the two dates controls; thus, for limitations purposes, the latest date that Tricarichi could have filed his claim is April 29, 2011. He filed his claim five years too late, on April 29, 2016.[9]

159. At trial, Tricarichi failed to introduce any evidence of a tolling agreement, and expressly declined to do so when the Court inquired about such an agreement immediately prior to closings. TT9 100:7–20 ("MR. HESSELL: Yeah. No, we don't need to -- We don't need that") (referring to proposed Exhibit 83). Furthermore, Tricarichi failed to include any proposed pre-trial findings or conclusions of law on statute of limitations. As such, Tricarichi has waived any argument that the limitations period was tolled by agreement or otherwise.[10] *Nev. Yellow Cab Corp. v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 123 Nev. 44, 49, 152 P.3d 737, 740 (Nev. 2007).

160. Instead, Tricarichi's counsel claimed in his closing argument rebuttal, that the inclusion of a tolling agreement - as an exhibit to a brief in opposition to an earlier Summary Judgment Motion - relieved him of any obligation to introduce it as evidence at trial. The Court disagrees. *See Garcia v. Shapiro*, 515 P.3d 345, (Nev. App. 2022) ("Regardless, motions, statements

[9] In utilizing the January date, the this Court is providing Tricarichi the longer time frame as it is taking into account the Levin letter (Ex. 205).

[10] Tricarichi's failure to disclose any proposed findings of fact or conclusions of law regarding statute of limitations, likewise waives any argument that he is entitled to statutory tolling under N.R.S. 11.2075(2).

and allegations within them, and exhibits attached to them do not necessarily constitute evidence.") (citing EDCR 5.205(g) ("Exhibits [to motions] may be deemed offers of proof but shall not be considered substantive evidence until admitted.")); *cf.* NRAP 28(e) (party raising evidentiary issue on appeal must identify where in the record "evidence was identified, offered, and received or rejected"); *see also Town of Gorham v. Duchaine*, 224 A.3d 241, 244 (Me. 2020) ("[S]imply attaching documents to a motion is not the equivalent of properly introducing or admitting them as evidence. Documents attached to motions are not part of the record and therefore cannot be considered evidence in the record on appeal.") (Collecting state cases).

161. Thus, under either the three-year statute of limitations in New York, or the two-year statute of limitations in Nevada, Tricarichi's claim is time-barred[11].

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[11] As set forth herein, the Court finds that PwC's Statute of Limitations defense was met. The fact that Tricarichi's claim is barred by the Statute of Limitations is an independent basis upon which Judgment for PwC is to be entered in addition to basis that Tricarichi did not meet his burden to establish all four elements of his professional negligence claim.

**ORDER AND JUDGMENT**

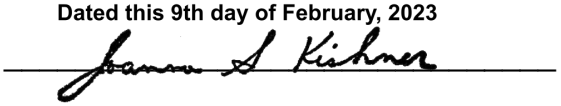
THEREFORE, PURSUANT TO THE ABOVE FINDINGS OF FACT and CONCLUSIONS OF LAW, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Judgment shall be entered in favor of Defendant PwC and Plaintiff Tricarichi shall take nothing from his Complaint.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, and DECREED that any request for fees and costs shall be handled via separate timely-filed Motion.

Counsel for Defendant PwC is directed pursuant to NRCP 58 (b) and (e) to file and serve Notice of Entry of this Findings of Fact, Conclusions of Law, and Judgment within fourteen (14) days hereof.

Dated this 9th day of February, 2023.

Dated this 9th day of February, 2023



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Joanna S. Kishner
District Court Judge

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# EXHIBIT 9

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*Attorneys for Plaintiff Michael Tricarichi*

DISTRICT COURT

CLARK COUNTY, NEVADA

| | |
|---|---|
| MICHAEL A. TRICARICHI,<br><br>Plaintiff,<br><br>v.<br><br>PRICEWATERHOUSECOOPERS, LLP, ET AL.,<br><br>Defendant. | CASE NO. A-16-735910-B<br>DEPT NO. XXXI<br><br>**STIPULATION AND ORDER TO AMEND CASE CAPTION** |

Pursuant to this Court's Orders dismissing Defendants COÖPERATIEVE RABOBANK U.A. AND UTRECHT-AMERICA FINANCE CO., SEYFARTH SHAW, LLP, and GRAHAM

R. TAYLOR from this case (*see* Court's Order Granting Motion to Dismiss the Complaint Against Seyfarth Shaw LLP, **Doc ID#: 64**; and Court's Order Granting Motion to Dismiss the Complaint Against Coöperatieve Rabobank U.A. and Utrecht-America Finance Co., **Doc ID#: 71**), as affirmed by the Nevada Supreme Court (*see* Nevada Supreme Court Clerk's Certificate / Remittitur Judgment – Affirmed, **Doc ID#: 144**), THE REMAINING PARTIES HEREBY STIPULATE AND AGREE to amend the caption in this matter to remove the names of the above-mentioned dismissed Defendants, as represented in the proposed amended caption, attached hereto as **Exhibit 1**.

DATED this 8th day of April, 2022.

HUTCHISON & STEFFEN, PLLC

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DATED this 8th day of April, 2022.

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**ORDER**

IT IS HEREBY ORDERED that the caption be amended in this matter to remove the names of Defendants COÖPERATIEVE RABOBANK U.A. AND UTRECHT-AMERICA FINANCE CO., SEYFARTH SHAW, LLP, and GRAHAM R. TAYLOR, as they have been dismissed from the case.

**Dated this 11th day of April, 2022**

**FAB 1CC 0753 C6C6**
**Joanna S. Kishner**
**District Court Judge**

Submitted by:

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EXHIBIT PAGE ONLY

# EXHIBIT 1

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*Attorneys for Plaintiff Michael Tricarichi*

DISTRICT COURT

CLARK COUNTY, NEVADA

| | |
|---|---|
| MICHAEL A. TRICARICHI,<br><br>Plaintiff,<br><br>v.<br><br>PRICEWATERHOUSECOOPERS, LLP,<br><br>Defendant. | CASE NO. A-16-735910-B<br>DEPT NO. XXXI |

## Maddy Carnate-Peralta

**From:** Austin, Bradley <baustin@swlaw.com>
**Sent:** Friday, April 8, 2022 2:58 PM
**To:** Ariel C. Johnson; Scott F. Hessell; Blake Sercye; Byrne, Pat; mark.levine@bartlitbeck.com; chris.landgraff@bartlitbeck.com; kate.roin@bartlitbeck.com; daniel.taylor@bartlitbeck.com
**Cc:** Maddy Carnate-Peralta; Todd W. Prall
**Subject:** RE: Tricarichi v. PriceWaterhouseCoopers LLP, et al.; Case No. A-16-735910-B

Hi Ariel,

Two minor changes: Can you please change "Defendants" to "Defendant" in the caption (on both the SAO and exhibit), and add Katharine Roin in the place of Krista Perry in the signature block? With those changes, you may affix my e-signature.

Thanks,

Brad

---

**From:** Ariel C. Johnson <ajohnson@hutchlegal.com>
**Sent:** Friday, April 8, 2022 1:47 PM
**To:** Scott F. Hessell <shessell@sperling-law.com>; Blake Sercye <bsercye@sperling-law.com>; Byrne, Pat <pbyrne@swlaw.com>; Austin, Bradley <baustin@swlaw.com>; mark.levine@bartlitbeck.com; chris.landgraff@bartlitbeck.com; kate.roin@bartlitbeck.com; daniel.taylor@bartlitbeck.com
**Cc:** Maddy Carnate-Peralta <mcarnate@hutchlegal.com>; Todd W. Prall <TPrall@hutchlegal.com>
**Subject:** RE: Tricarichi v. PriceWaterhouseCoopers LLP, et al.; Case No. A-16-735910-B

**[EXTERNAL]** ajohnson@hutchlegal.com

---

All,

In light of the Court's recent concern regarding the apparent discrepancy between the Clerk's version of the case caption and what the parties have been using as the caption following the dismissal of the three (3) prior Defendants (COÖPERATIEVE RABOBANK, SEYFARTH SHAW, LLP, and GRAHAM R. TAYLOR), I reached out to the District Court Clerk yesterday afternoon to seek resolution. I was informed that the discrepancy can be easily resolved with a joint Stip and Order to Amend the Case Caption.

For the convenience of all, I have prepared (and attached) a proposed Stipulation and Order to Amend the Case Caption for your review and approval. If you are agreeable to its form and content, please confirm that we can place your e-signature on the document, and we will file with the Court.

As always, please reach out with any questions or concerns.

Thanks,

Ariel

---

**From:** Maddy Carnate-Peralta <mcarnate@hutchlegal.com>
**Sent:** Wednesday, April 6, 2022 10:17 AM
**To:** cordt@clarkcountycourts.us
**Cc:** Ariel C. Johnson <ajohnson@hutchlegal.com>; Scott F. Hessell <shessell@sperling-law.com>; Blake Sercye <bsercye@sperling-law.com>; Byrne, Pat <pbyrne@swlaw.com>; Austin, Bradley <baustin@swlaw.com>; mark.levine@bartlitbeck.com; chris.landgraff@bartlitbeck.com; kate.roin@bartlitbeck.com; daniel.taylor@bartlitbeck.com
**Subject:** Tricarichi v. PriceWaterhouseCoopers LLP, et al.; Case No. A-16-735910-B

Good morning, Ms. Cordoba:

Please see attached correspondence from Ariel Johnson dated April 6, 2022. Thank you.

Ariel C. Johnson
Senior Counsel
HUTCHISON & STEFFEN
ATTORNEYS
HUTCHISON & STEFFEN, PLLC
(702) 385-2500
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**CSERV**

DISTRICT COURT
CLARK COUNTY, NEVADA

| | |
|---|---|
| Michael Tricarichi, Plaintiff(s)<br><br>vs.<br><br>PricewaterhouseCoopers LLP, Defendant(s) | CASE NO: A-16-735910-B<br><br>DEPT. NO. Department 31 |

**AUTOMATED CERTIFICATE OF SERVICE**

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Stipulation and Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 4/11/2022

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| Ariel Johnson | ajohnson@hutchlegal.com |
| Bradley Green | bgreen@swlaw.com |

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EXHIBIT PAGE ONLY

# EXHIBIT 10

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**NTSO**

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bsercye@sperling-law.com

*Attorneys for Plaintiff Michael Tricarichi*

DISTRICT COURT

CLARK COUNTY, NEVADA

| | |
|---|---|
| MICHAEL A. TRICARICHI,<br><br>Plaintiff,<br><br>vs.<br><br>PRICEWATERHOUSECOOPERS LLP,<br><br>Defendant. | CASE NO. A-16-735910-B<br>DEPT. NO. XI<br><br>**NOTICE OF ENTRY OF STIPULATION AND ORDER TO AMEND CASE CAPTION** |

TO: ALL INTERESTED PARTIES

/ / /

/ / /

/ / /

NOTICE IS HEREBY GIVEN that a Stipulation and Order to Amend Case Caption was entered in the above-entitled action on April 11, 2022, a copy of which is attached hereto.

DATED this 11th day of April, 2022.

HUTCHISON & STEFFEN, PLLC

*/s/ Ariel C. Johnson*

Mark A. Hutchison
Ariel C. Johnson
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145

Scott F. Hessell
Thomas D. Brooks
Blake Sercye
(*Pro Hac Vice*)
SPERLING & SLATER, P.C.
55 West Monroe, Suite 3200
Chicago, IL 60603

*Attorneys for Plaintiff Michael A. Tricarichi*

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Hutchison & Steffen, PLLC and that on this 11th day of April, 2022, I caused the above and foregoing documents entitled **NOTICE OF ENTRY OF STIPULATION AND ORDER TO AMEND CASE CAPTION** to be served through the Court's mandatory electronic service system, per EDCR 8.02, upon the following:

**ALL PARTIES ON THE E-SERVICE LIST**

*/s/ Madelyn B. Carnate-Peralta*
An employee of Hutchison & Steffen, PLLC

**SAO**
Mark A. Hutchison (4639)
Ariel C. Johnson (13357)
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tdbrooks@sperling-law.com
bsercye@sperling-law.com

*Attorneys for Plaintiff Michael Tricarichi*

DISTRICT COURT

CLARK COUNTY, NEVADA

| | |
|---|---|
| MICHAEL A. TRICARICHI,<br><br>Plaintiff,<br><br>v.<br><br>PRICEWATERHOUSECOOPERS, LLP, ET AL.,<br><br>Defendant. | CASE NO. A-16-735910-B<br>DEPT NO. XXXI<br><br>**STIPULATION AND ORDER TO AMEND CASE CAPTION** |

Pursuant to this Court's Orders dismissing Defendants COÖPERATIEVE RABOBANK U.A. AND UTRECHT-AMERICA FINANCE CO., SEYFARTH SHAW, LLP, and GRAHAM

R. TAYLOR from this case (*see* Court's Order Granting Motion to Dismiss the Complaint Against Seyfarth Shaw LLP, **Doc ID#: 64**; and Court's Order Granting Motion to Dismiss the Complaint Against Coöperatieve Rabobank U.A. and Utrecht-America Finance Co., **Doc ID#: 71**), as affirmed by the Nevada Supreme Court (*see* Nevada Supreme Court Clerk's Certificate / Remittitur Judgment – Affirmed, **Doc ID#: 144**), THE REMAINING PARTIES HEREBY STIPULATE AND AGREE to amend the caption in this matter to remove the names of the above-mentioned dismissed Defendants, as represented in the proposed amended caption, attached hereto as **Exhibit 1**.

DATED this 8th day of April, 2022.

HUTCHISON & STEFFEN, PLLC

*/s/ Ariel C. Johnson*

Mark A. Hutchison (4639)
Ariel C. Johnson (13357)
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145

Scott F. Hessell
Thomas D. Brooks
Blake Sercye
(Pro Hac Vice)
SPERLING & SLATER, P.C.
55 West Monroe, Suite 3200
Chicago, IL 60603

*Attorneys for Plaintiff Michael Tricarichi*

DATED this 8th day of April, 2022.

SNELL & WILMER, LLP

*/s/ Bradley Austin*

Patrick Byrne (7636)
Bradley Austin (13064)
3883 Howard Hughes Pkwy., Suite 1100
Las Vegas, NV 89169

Mark L. Levine (Admitted Pro Hac Vice)
Christopher D. Landgraff (Admitted Pro Hac Vice)
Katharine Roin (Admitted Pro Hac Vice)
54 West Hubbard Street, Suite 300
Chicago, IL 60654

Daniel C. Taylor (Admitted Pro Hac Vice)
1801 Wewatta Street, Suite 1200
Denver, CO 80202

*Attorneys for Defendant PricewaterhouseCoopers LLP*

**ORDER**

IT IS HEREBY ORDERED that the caption be amended in this matter to remove the names of Defendants COÖPERATIEVE RABOBANK U.A. AND UTRECHT-AMERICA FINANCE CO., SEYFARTH SHAW, LLP, and GRAHAM R. TAYLOR, as they have been dismissed from the case.

**Dated this 11th day of April, 2022**

**FAB 1CC 0753 C6C6**
**Joanna S. Kishner**
**District Court Judge**

Submitted by:

HUTCHISON & STEFFEN, PLLC

*/s/ Ariel C. Johnson*

Mark A. Hutchison (4639)
Ariel C. Johnson (13357)
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145

Scott F. Hessell
Thomas D. Brooks
Blake Sercye
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55 West Monroe, Suite 3200
Chicago, IL 60603

*Attorneys for Plaintiff Michael Tricarichi*

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EXHIBIT PAGE ONLY

# EXHIBIT 1

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tdbrooks@sperling-law.com
bsercye@sperling-law.com

*Attorneys for Plaintiff Michael Tricarichi*

DISTRICT COURT

CLARK COUNTY, NEVADA

| | |
|---|---|
| MICHAEL A. TRICARICHI,<br><br>Plaintiff,<br><br>v.<br><br>PRICEWATERHOUSECOOPERS, LLP,<br><br>Defendant. | CASE NO. A-16-735910-B<br>DEPT NO. XXXI |

## Maddy Carnate-Peralta

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**Cc:** Maddy Carnate-Peralta; Todd W. Prall
**Subject:** RE: Tricarichi v. PriceWaterhouseCoopers LLP, et al.; Case No. A-16-735910-B

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Thanks,

Brad

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**Cc:** Maddy Carnate-Peralta <mcarnate@hutchlegal.com>; Todd W. Prall <TPrall@hutchlegal.com>
**Subject:** RE: Tricarichi v. PriceWaterhouseCoopers LLP, et al.; Case No. A-16-735910-B

**[EXTERNAL]** ajohnson@hutchlegal.com

---

All,

In light of the Court's recent concern regarding the apparent discrepancy between the Clerk's version of the case caption and what the parties have been using as the caption following the dismissal of the three (3) prior Defendants (COÖPERATIEVE RABOBANK, SEYFARTH SHAW, LLP, and GRAHAM R. TAYLOR), I reached out to the District Court Clerk yesterday afternoon to seek resolution. I was informed that the discrepancy can be easily resolved with a joint Stip and Order to Amend the Case Caption.

For the convenience of all, I have prepared (and attached) a proposed Stipulation and Order to Amend the Case Caption for your review and approval. If you are agreeable to its form and content, please confirm that we can place your e-signature on the document, and we will file with the Court.

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Thanks,

Ariel

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**Subject:** Tricarichi v. PriceWaterhouseCoopers LLP, et al.; Case No. A-16-735910-B

Good morning, Ms. Cordoba:

Please see attached correspondence from Ariel Johnson dated April 6, 2022. Thank you.

Ariel C. Johnson
Senior Counsel
HUTCHISON & STEFFEN
ATTORNEYS
HUTCHISON & STEFFEN, PLLC
(702) 385-2500
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**CSERV**

DISTRICT COURT
CLARK COUNTY, NEVADA

| | |
|---|---|
| Michael Tricarichi, Plaintiff(s)<br><br>vs.<br><br>PricewaterhouseCoopers LLP, Defendant(s) | CASE NO: A-16-735910-B<br><br>DEPT. NO. Department 31 |

**AUTOMATED CERTIFICATE OF SERVICE**

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Service Date: 4/11/2022

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| Jeanne Forrest . | jforrest@swlaw.com |
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| Maddy Carnate-Peralta . | maddy@hutchlegal.com |
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| Scott F. Hessell . | shessell@sperling-law.com |
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| Tom Brooks | tdbrooks@sperling-law.com |

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| Todd Prall | tprall@hutchlegal.com |
| Christopher Landgraff | chris.landgraff@bartlitbeck.com |
| Mark Levine | mark.levine@bartlitbeck.com |
| Daniel Taylor | daniel.taylor@bartlitbeck.com |
| Krista Perry | krista.perry@bartlitbeck.com |
| Ariel Johnson | ajohnson@hutchlegal.com |
| Bradley Green | bgreen@swlaw.com |

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EXHIBIT PAGE ONLY

# EXHIBIT 11

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

**NVDP**
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Email: shessell@sperling-law.com

*Attorneys for Plaintiff Michael Tricarichi*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| MICHAEL A. TRICARICHI, and individual<br><br>Plaintiff,<br><br>v.<br><br>PRICEWATERHOUSECOOPERS LLP,<br><br>Defendant. | CASE NO. A-16-735910-B<br>DEPT NO. XXXI<br><br>**NOTICE OF VOLUNTARY DISMISSAL OF DEFENDANT GRAHAM R. TAYLOR WITHOUT PREJUDICE** |

/ / /

/ / /

Pursuant to NRCP 41(a)(1), no Answer nor Motion for Summary Judgment having been served by Defendant Graham R. Taylor ("Defendant"), and the time for Plaintiff Michael Tricarichi ("Plaintiff") to serve Defendant having passed pursuant to NRCP 4(i), Plaintiff here voluntarily dismisses all claims against Defendant Graham R. Taylor in this case without prejudice.

Dated: August 1, 2023.

HUTCHISON & STEFFEN, PLLC

By: */s/ Ariel C. Johnson*

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*Attorneys for Plaintiff Michael A. Tricarichi*

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Hutchison & Steffen, PLLC and that on this 1st day of August, 2023, I caused the above and foregoing documents entitled **NOTICE OF VOLUNTARY DISMISSAL OF DEFENDANT GRAHAM R. TAYLOR WITHOUT PREJUDICE** to be served through the Court's mandatory electronic service system, per EDCR 8.02, upon the following:

**ALL PARTIES ON THE E-SERVICE LIST**

*/s/ Kaylee Conradi*
An employee of Hutchison & Steffen, LLC

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# EXHIBIT 12

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*Attorneys for Defendants*
*Coöperatieve Rabobank U.A. and Utrecht-America Finance Co.*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| MICHAEL A. TRICARICHI,<br>Plaintiff,<br>v.<br><br>PRICEWATERHOUSECOOPERS, LLP, COÖPERATIEVE RABOBANK U.A., UTRECHT-AMERICA FINANCE CO., SEYFARTH SHAW, LLP and GRAHAM R. TAYLOR,<br>Defendants. | ) Case No. A-16-735910-B<br>) Dept.: XV<br>)<br>) **ORDER GRANTING MOTION TO DISMISS THE COMPLAINT AGAINST COÖPERATIEVE RABOBANK U.A. AND UTRECHT-AMERICA FINANCE CO. FOR LACK OF PERSONAL JURISDICTION AND DENYING REMAINDER OF MOTION AS MOOT**<br>)<br>) **Date of Hearing: January 18, 2017**<br>) **Time of Hearing: 9:00 a.m.** |

Defendants Coöperatieve Rabobank U.A. ("Rabobank") and Utrecht-America Finance Company ("Utrecht")'s motion to dismiss for, among other things, lack of personal jurisdiction (the "Motion") came on for hearing on January 18, 2017. Chris Paparella of Hughes Hubbard & Reed LLP, in association with Dan Waite of Lewis Roca Rothgerber Christie LLP, appeared and

argued in support of the Motion for Defendants Rabobank and Utrecht. Thomas D. Brooks of Sperling & Slater, P.C., in association with Todd Prall of Hutchison & Steffen, LLC, appeared and argued in opposition to the Motion for Plaintiff Michael A. Tricarichi.

The Court, having read and considered the Motion papers submitted by the parties and heard and considered the arguments of their counsel, and good cause appearing, grants the Motion for lack of personal jurisdiction based on the following reasons, summary of the allegations in the complaint, and information tendered by the parties to the Court in the exhibits and affidavits submitted in support of and in opposition to the Motion, and denies as moot and without prejudice the remainder of the arguments raised by the Motion.

## BACKGROUND

### The Tax Shelter

In Spring 2003, Mr. Tricarichi, who was then an Ohio resident, owned an Ohio corporation called West Side Cellular, Inc. ("West Side") that was about to receive a $65 million settlement payment from a lawsuit.[1] Mr. Tricarichi and Ohio lawyers at the Hahn Loeser firm began searching for ways to avoid paying all the tax due on the $65 million payment. Mr. Tricarichi decided to engage in a "midco" transaction with a San Francisco-based promoter called Fortrend. The transaction involved the sale by Mr. Tricarichi of West Side to an offshore Fortrend subsidiary called Nob Hill. Mr. Tricarichi would receive most of West Side's cash and Fortrend would receive a $5 million promotion fee. Nob Hill would offset West Side's tax liabilities with tax deductions from distressed debt. Mr. Tricarichi sold West Side to Nob Hill on September 9, 2003, and received $34.6 million in cash.

West Side failed to pay 2003 federal income taxes on the $65 million settlement payment. The IRS sought payment of those taxes, plus penalties and interest, from Mr. Tricarichi. Mr. Tricarichi commenced a proceeding in Tax Court to challenge the IRS's decision. The Tax Court upheld the IRS's determination that Mr. Tricarichi was liable for over $21 million in unpaid taxes, penalties, fees, and pre-judgment interest. In doing so, the Tax Court found after extensive

[1] Although the Tax Court found that Mr. Tricarichi did not move to Nevada until after his midco transaction was consummated, Mr. Tricarichi made a prima facie showing on this Motion that he relocated to Nevada before the transaction was consummated.



Lewis Roca ROTHGERBER CHRISTIE
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

discovery and a trial that Mr. Tricarichi had constructive knowledge that Fortrend intended to implement an illegitimate tax shelter.

**Rabobank and Utrecht**

Rabobank is a cooperative organized under Dutch law. Its principal place of business is in the Netherlands, and it has a branch in New York, New York. Utrecht is a subsidiary of Rabobank that is incorporated in Delaware and has its principal place of business in New York, New York. Rabobank and Utrecht (i) are not licensed to conduct business in Nevada, (ii) do not maintain any offices or branches in Nevada, (iii) do not have any employees in Nevada, (iv) are not required to and do not pay taxes in Nevada, and (v) do not have registered agents in Nevada. All of Rabobank and Utrecht's witnesses and documents relevant to this action are in New York.

Defendants Rabobank and Utrecht provided certain financial services in New York in connection with the subject transaction. Mr. Tricarichi, West Side and Nob Hill set up accounts at Rabobank's New York branch before the closing. Mr. Tricarichi signed a Non-Confidentiality Certificate in which he agreed Rabobank and Utrecht had not made any statement to Mr. Tricarichi about the potential tax consequences of the subject transaction. On September 9, 2003, Utrecht lent Nob Hill $29.9 million in New York, which Nob Hill transferred to Mr. Tricarichi's New York Rabobank escrow account, along with the balance of the $34.6 million purchase price. Mr. Tricarichi transferred the $34.6 million to another bank account he controlled in New York. That same day, Nob Hill repaid Utrecht the $29.9 million loan, along with a $150,000 transaction fee, in New York. Fortrend received $5 million of West Side's cash as a promotion fee.

Mr. Tricarichi and West Side's account agreements with Rabobank and Nob Hill's loan documents with Utrecht use Rabobank and Utrecht's New York addresses. The agreements and loan documents provide they are governed by New York law, and several of them provide for a New York forum for disputes (the others are silent on forum). None of the agreements and loan documents provide for Nevada law or a Nevada forum.

Mr. Tricarichi's Complaint asserts claims against Rabobank and Utrecht for aiding and abetting fraud, civil conspiracy, violations of Nevada Revised Statutes Section 207.400, and unjust enrichment. (Compl. Counts III-VIII.) All of Mr. Tricarichi's claims are based on his contention





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that Rabobank, Utrecht and the other defendants defrauded him into believing that the tax shelter was legitimate. Rabobank and Utrecht filed a motion to dismiss the claims against them based on the following grounds: lack of personal jurisdiction, *forum non conveniens*, statute of limitations, collateral estoppel and failure to state a claim.

**THERE IS NO PERSONAL JURISDICTION OVER RABOBANK AND UTRECHT**

Nevada's long-arm statute allows courts to exercise personal jurisdiction in civil matters "on any basis not inconsistent with the Constitution of [Nevada] or the Constitution of the United States." NEV. REV. STAT. § 14.065 (2015). "When a nonresident defendant challenges personal jurisdiction, the plaintiff bears the burden of showing that jurisdiction exists." *Fulbright & Jaworski v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 5, 7, 342 P.3d 997, 1001 (2015) (internal citation omitted). "In so doing, the plaintiff must satisfy the requirements of Nevada's long-arm statute and show that jurisdiction does not offend principles of due process." *Id.*; *see also Walden v. Fiore*, 134 S. Ct. 1115, 1121, 188 L. Ed. 2d 12, 19 (2014) ("[T]he Fourteenth Amendment "constrains a State's authority to bind a nonresident defendant to a judgment of its courts.") (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291, 100 S. Ct. 559, 564 (1980)). To be subject to jurisdiction in a particular State, a nonresident defendant must have "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339, 342-43 (1940)). Mr. Tricarichi concedes that there is no general jurisdiction over Rabobank and Utrecht. Thus, the inquiry here is focused on whether the Court may exercise specific personal jurisdiction over Rabobank and Utrecht.

The exercise of "specific jurisdiction is proper only where the cause of action arises from the defendant's contacts with the forum." *Fulbright & Jaworski*, 131 Nev. Adv. Op. at 10, 342 P.3d at 1002 (internal citations omitted). In determining whether specific personal jurisdiction over a nonresident is proper, Nevada courts consider (1) whether the defendant purposefully availed itself of the privilege of acting in Nevada or causing important consequences in Nevada,

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(2) whether the cause of action arises out of the defendant's Nevada-related activities, and (3) whether the exercise of jurisdiction over the defendant is reasonable. *Id.*

This inquiry "focuses on the relationship among the defendant, the forum, and the litigation." *Walden v. Fiore*, 134 S. Ct. at 1121, 118 L. Ed. 2d at 19-20 (internal quotations omitted). For specific jurisdiction to comport with due process, "the defendant's suit-related conduct must create a substantial connection with the forum State." *Id.* Two aspects of this necessary relationship are relevant here.

"First, the relationship must arise out of contacts that the 'defendant *himself*' creates with the forum State." *Id.* at 1122, 118 L. Ed. 2d at 20 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 2284 (1985)) (emphasis in original). "Due process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties." *Id.* (citing *World-Wide Volkswagen Corp.*, 444 U.S. at 291-292, 100 S. Ct. at 564-65). "[C]ontacts between the plaintiff (or third parties) and the forum State" do not suffice. *Id.* (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417, 104 S. Ct. 1863, 1873 (1984)). "Put simply, however significant the plaintiff's contacts with the forum may be, those contacts cannot be 'decisive in determining whether the defendant's due process rights are violated.'" *Id.* (quoting *Rush v. Savchuk*, 444 U.S. 320, 332, 100 S. Ct. 571, 579 (1980)).

Second, the "'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Id.* (citing *Int'l Shoe*, 326 U.S. at 319, 66 S. Ct. at 159-60.) Thus, "the plaintiff cannot be the only link between the defendant and the forum." *Id.* at 1122, 188 L. Ed. 2d at 21. "Rather, it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him." *Id.* at 1122-23, 188 L. Ed. 2d at 21. (citing *Burger King*, 471 U.S. at 478, 105 S. Ct. at 2178). Instead, "[d]ue process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the State." *Id.* at 1123, 188 L. Ed. 2d at 21 (citing *Burger King*, 471 U.S. at 475, 105 S. Ct. at 2183).

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The same principles apply to intentional torts, as to which "it is likewise insufficient to rely on a defendant's 'random, fortuitous, or attenuated contacts' or on the 'unilateral activity' of a plaintiff." *Id.* at 1123, 188 L. Ed. 2d at 21 (internal citation omitted). Therefore, "[a] forum State's exercise of jurisdiction over an out-of-state intentional tortfeasor must be based on intentional conduct by the defendant that creates the necessary contacts with the forum." *Id.*

These principles support dismissal here. First, Mr. Tricarichi has not identified any jurisdictionally significant contacts Rabobank or Utrecht directed at Nevada. Second, while Mr. Tricarichi alleges Rabobank and Utrecht had contact with him while knowing he was a Nevada resident at the time of the transaction, his claims do not arise out of those contacts. Third, the Court finds that it would not be reasonable to exercise personal jurisdiction over Rabobank and Utrecht for the reasons below.

Mr. Tricarichi does not identify a single Nevada activity by Rabobank or Utrecht in connection with the matters on which his claims are based. Mr. Tricarichi's transaction was consummated in New York, Ohio and California. Rabobank and Utrecht had no ongoing obligations or continuing contacts with Mr. Tricarichi in Nevada (or elsewhere). Rabobank and Utrecht's services occurred in New York, where they were located, and those services ended on September 9, 2003. While Mr. Tricarichi alleges that Nob Hill communicated with him while he was physically located in Nevada, he does not identify any communication made by Rabobank or Utrecht to him while he was physically located in Nevada. In fact, Mr. Tricarichi identifies only three direct communications with Rabobank or Utrecht, none of which came from Rabobank or Utrecht and none of which touched Nevada. The three communications Mr. Tricarichi identifies were faxes sent from San Francisco to Rabobank and Utrecht in New York. (*See* Exhibit M[2] (escrow account documents), Exhibit N (resignation document), and Exhibit O (wire transfer instructions).)[3]

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[2] Exhibits refer to the Appendix of Exhibits in Support of Plaintiff's (1) Opposition to Defendants Rabobank and Utrecht's Motion to Dismiss, and (2) Counter-Motion for Leave to Take Jurisdictional Discovery, dated Dec. 7, 2016 ("Pl. App. Ex.").

[3] The fax headers on all three faxes show they were faxed from the 415 area code. And the escrow account documents in Exhibit M state Mr. Tricarichi signed them in San Francisco.



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Mr. Tricarichi's allegations that Rabobank and Utrecht knew he had a Nevada address are insufficient to obtain jurisdiction over Rabobank and Utrecht under *Walden*. It is not enough to allege that Rabobank and Utrecht dealt with someone they knew had a physical address in Nevada. The Court held in *Walden* that only the defendant's connections to the forum, not the plaintiff's, are relevant. *See* 134 S. Ct. at 1121-25, 118 L. Ed. at 19-24. The Court reversed a finding of specific personal jurisdiction because the court below, instead of evaluating the defendant's own contacts with Nevada, mistakenly premised jurisdiction on the defendant's knowledge that the plaintiffs had connections with the forum. 134 S. Ct. at 1124, 118 L. Ed. at 23. The Supreme Court held that the lower court had improperly "shift[ed] the analytical focus from [the defendant's] contacts with the forum to his contacts with [the plaintiffs]." *Id.* (internal citations omitted) (holding that "[s]uch reasoning improperly attributes a plaintiff's forum connections to the defendant and makes those connections 'decisive' in the jurisdictional analysis . . . [and] obscures the reality that none of petitioner's challenged conduct had anything to do with Nevada itself"). The Supreme Court found that the plaintiffs' reliance on *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482 (1984) — a decision on which Mr. Tricarichi also relies here — for the argument that "they suffered the 'injury' caused by petitioner's allegedly tortious conduct . . . while they were residing in the forum" was "misplaced" because "*Calder* made clear that mere injury to a forum resident is not a sufficient connection to the forum" and "[r]egardless of where a plaintiff lives or works, an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State" through conduct that "connects him to the forum in a meaningful way." *Walden*, 134 S. Ct. at 1125, 118 L. Ed. at 23.

Here, Rabobank and Utrecht's New York activity "did not create sufficient contacts with Nevada simply because [they may have] directed [their] conduct at [Mr. Tricarichi] whom [they allegedly] knew had Nevada connections." *Walden*, 134 S. Ct. at 1125, 118 L. Ed. 2d at 23. "Such reasoning improperly attributes a plaintiff's forum connections to the defendant and makes those connections 'decisive' in the jurisdictional analysis . . . [and] obscures the reality that none of [Rabobank or Utrecht]'s conduct had anything to do with Nevada itself." *Id.* (internal citation

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omitted). Nevada jurisdiction over Rabobank and Utrecht must instead be based on acts by them that were purposefully directed at Nevada. No such acts are identified by Mr. Tricarichi.

Accordingly, Mr. Tricarichi's "claimed injury does not evince a connection between [him] and Nevada" because "it is not the sort of effect that is tethered to Nevada in any meaningful way." *Walden v. Fiore*, 134 S. Ct. at 1125, 118 L. Ed. 2d at 23. The fact that Mr. Tricarichi now has to repay the IRS from Nevada the amounts he wrongfully sought to evade paying is not due to anything that independently occurred in Nevada—in fact, as stated above, the Tax Court found that the relevant actions happened in Ohio—rather Mr. Tricarichi must pay the IRS from Nevada "because Nevada is where [he] chose to be at a time when [the IRS sought to recover the funds at issue]." *Id.* (noting that "Respondents would have experienced this same lack of access in California, Mississippi, or wherever else they might have traveled and found themselves wanting more money than they had."); *see also Picot v. Weston*, 780 F.3d 1206, 1212 (9th Cir. 2015); *Olivine Int'l Mktg. v. Texas Packaging Co.*, No. 2:09-CV-02118-KJD, 2010 WL 4024232, at *4 (D. Nev. Sept. 27, 2010). Mr. Tricarichi would be liable to the IRS for his tax obligations wherever he moved in the United States. The fact that he chose Nevada is, by itself, insufficient to establish specific jurisdiction. *Picot*, 780 F.3d at 1126.

Moreover, the few communications Mr. Tricarichi identifies between himself and Rabobank and Utrecht were ministerial in nature. These communications concerned the accounts Mr. Tricarichi opened for himself and West Side at Rabobank, his and his wife's resignations as officers of West Side, and the transfer of funds. Mr. Tricarichi's claims do not arise out of these communications.

In view of the foregoing facts, the Court also finds that it would not be reasonable to exercise personal jurisdiction over Rabobank or Utrecht.

**Mr. Tricarichi Cannot Base Personal Jurisdiction on His Conspiracy Claims**

In light of these recent cases from our Supreme Court, the U.S. Supreme Court, and the Nevada U.S. District Court, *Walden* confirms that Mr. Tricarichi misplaces his reliance on *Davis v. Eighth Jud. Dist. Ct.*, 97 Nev. 332, 629 P.2d 1209 (1981). *Davis* held that defendants who conspired out-of-state could be subject to jurisdiction for injuries alleged to have occurred in



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Nevada as a consequence of their acts elsewhere. *Walden*, however, appears to overrule *Davis* because, as the U.S. Supreme Court declared, "mere injury to a forum resident is not a sufficient connection to the forum. . . . The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way." 134 S. Ct. at 1125. *See also id.* at 1122 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984) ("[The] unilateral activity of another party or a third party is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction.")).

Thus, Rabobank and Utrecht's alleged "facilitation" of a transaction between Mr. Tricarichi and others in an out-of-state conspiracy that Mr. Tricarichi says injured him in Nevada does not appear to be consistent with *Walden's* holding that "jurisdiction over an out-of-state intentional tortfeasor must be based on intentional conduct by the defendant that creates the necessary contacts with the forum." 134 S. Ct. at 1125. Moreover, even if *Davis* has survived *Walden*, which is highly questionable to the Court, the circumstances alleged by Mr. Tricarichi are distinguishable from the limited facts recited in the *Davis* opinion, which still do not make out a prima facie case for jurisdiction under *Viega Gmbh. Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 40, 16-18, 328 P.3d 1152, 1157, 1160-61 (2014), *Daimler AG v. Bauman*, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014), or *Walden*. The facts of this case are also distinguishable from the post-*Walden* authority Mr. Tricarichi cites. *See Best Chairs Inc. v. Factory Direct Wholesale, LLC*, 121 F. Supp. 3d 828 (S.D. Inc. 2015); *First Cmty. Bank, N.A. v. First Tennessee Bank, N.A.*, 489 S.W.2d 369 (Tenn. 2015); *Khan v. Gramercy Advisors, LLC*, 2016 Ill. App. (4th) 150435, 2016 Ill. App. LEXIS 425 Ill. App. Ct. 2016).

**THERE IS NO BASIS FOR JURISDICTIONAL DISCOVERY**

There is no basis for jurisdictional discovery here because Mr. Tricarichi has failed to establish a prima facie basis for specific personal jurisdiction. *See Viega Gmbh. Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 40, 16-18, 328 P.3d 1152, 1157, 1160-61 (2014); *Daimler*, 134 S. Ct. at 751, 760 (insufficient facts alleged to support either general or specific jurisdiction; absent such facts, no basis to allow jurisdictional discovery); *see also Western States Wholesale Nat. Gas*



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*Litig.*, 605 F. Supp. 2d 1118, 1140 (D. Nev. 2009) and *Menalco, FZE v. Buchan*, 602 F. Supp. 2d 1186, 1194 n. 1 (D. Nev. 2009) (personal jurisdiction cannot be based on the actions of co-conspirators). Moreover, the fact that Mr. Tricarichi has already had the benefit of extensive discovery from Rabobank and Utrecht in the Tax Court proceeding prior to filing his Complaint, as evidenced by his filing of numerous documents in this action produced by Rabobank in the Tax Court action, further supports denial of jurisdictional discovery here.

**OTHER ARGUMENTS**

Given the dismissal of all claims against Rabobank and Utrecht on personal jurisdiction grounds, the rest of the arguments raised by the Motion are denied, without prejudice, as moot.

**CONCLUSION**

Now, for the foregoing reasons, the Court grants the Motion and by this Order dismisses the Complaint against Rabobank and Utrecht for lack of personal jurisdiction, and denies the remainder of the arguments raised by the Motion, without prejudice, as moot.

IT IS SO ORDERED.

Dated: February 7, 2017

DISTRICT COURT JUDGE

Submitted by:

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By: 1/30/17

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EXHIBIT PAGE ONLY

# EXHIBIT 13

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DISTRICT COURT
CLARK COUNTY, NEVADA

| | |
|---|---|
| MICHAEL A. TRICARICHI,<br><br>Plaintiff,<br><br>v.<br><br>PRICEWATERHOUSECOOPERS, LLP, COÖPERATIEVE RABOBANK U.A., UTRECHT-AMERICA FINANCE CO., SEYFARTH SHAW, LLP and GRAHAM R. TAYLOR,<br><br>Defendants. | Case No. A-16-735910-B<br>Dept.: XV<br><br>**ORDER GRANTING MOTION TO DISMISS THE COMPLAINT AGAINST SEYFARTH SHAW LLP FOR LACK OF JURISDICTION** |

Defendant Seyfarth Shaw (Seyfarth) LLP's motion to dismiss for lack of personal jurisdiction came on for hearing on November 16, 2016. Steve Morris of Morris Law Group appeared and argued for Seyfarth; Mark A. Hutchison of Hutchison & Steffen, LLC, in association with Scott F. Hessell and Thomas D. Brooks of Sperling & Slater, P.C., appeared for Plaintiff, Michael A. Tricarichi, to oppose the motion. Mr. Hutchison argued for Mr. Tricarichi.

The Court, having read and considered the motion papers submitted by the parties and heard and considered the arguments of their counsel, and good cause appearing, grants Seyfarth's motion based on the following reasons and summary of the allegations in the complaint and in the uncontested information tendered by the parties to the Court in the exhibits and affidavits submitted in support of and in opposition to the motion.

Seyfarth is an international law firm headquartered in Chicago, Illinois. It is organized under Illinois law as a limited liability partnership. The firm has offices in 10 locations in the United States, none of which is in (or was in) Nevada. Seyfarth does not employ staff, attorneys, or agents who are domiciled in Nevada, nor does the firm own or hold security in real property in Nevada. It is not registered with Nevada's Secretary of State to do business in Nevada.

Although Seyfarth attorneys have from time to time appeared in Nevada federal district court on behalf of clients unrelated to this case, or have acted as counsel in transactions involving Nevada real property not related to this case, and one of Seyfarth's lawyers (since 2015) is a non-resident member of the Nevada Bar, none of Seyfarth's 850 attorneys has been in Nevada in connection with any matter involving Plaintiff Tricarichi, who has never been a client of Seyfarth.

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Against this background, Plaintiff contends that Seyfarth "facilitated" a transaction to minimize federal income taxes that had its origins in Ohio in 2003, when Plaintiff sold a cellular telephone business he operated in Ohio and moved to Nevada. Seyfarth played no part in the transaction by which Plaintiff's business, West Side Cellular, Inc. (West Side) was sold to another entity. The "transaction" and the steps which followed it were later found by the Internal Revenue Service to be a fraudulent tax avoidance scheme, of which the Tax Court held Plaintiff had constructive knowledge sufficient to impose liability on Plaintiff for the taxes owed by West Side. The transaction began in Ohio and Seyfarth is alleged to have "facilitated" the transaction by a former Seyfarth California partner, Graham Taylor, rendering an opinion in 2003 to Millennium Recovery Fund in Ireland, which involved a specific transaction which took place outside of Nevada in 2001 and was unrelated both to this case and to Plaintiff Tricarichi. Although the opinion expressly states it could only be relied on by Millennium, Plaintiff alleges the opinion somehow "facilitated" the transaction with him that the IRS later found was an abusive tax shelter. None of the transactional activity Plaintiff alleges to have injured him took place in Nevada or was directed to the state by Seyfarth.

The Court finds that the Plaintiff has not alleged facts that would establish personal jurisdiction over Seyfarth in Nevada. **First**, Seyfarth, an Illinois limited liability partnership with no offices in Nevada, is not subject to general jurisdiction in Nevada because it is not "at home" here. *Viega Gmbh. Eighth Jud. Dist. Ct.*, 328 P.3d 1152, 1158 (2014); *Daimler AG v. Bauman*, 134 S. Ct. 746, 751 (2014).

**Second**, Seyfarth is not subject to specific jurisdiction in Nevada. Plaintiff has not shown that Seyfarth purposefully established contacts with Nevada that resulted in injury to him, as *Walden v. Fiore*, 135 S. Ct. 1115,

1121-23 (2014), requires. *Accord, Baker v. Eighth Jud. Dist. Ct.*, 116 Nev. 527, 533, 999 P.2d 1020, 1024 (2000) (same). The "'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Id.* at 1122 (citing *Int'l Shoe*, 326 U.S. 310, 319, 66 S. Ct. 154, 159-60 (1945).) Plaintiff cannot be the only link between Seyfarth and Nevada. *Id.* Rather, due process requires that jurisdiction must be founded on the defendant's contacts with Nevada, "not based on the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the State." *Id.* citing *Burger King*, 471 U.S. 462, 475, 105 S. Ct. 2174, 2183 (1985). "Put simply, however significant the plaintiff's contacts with the forum may be, those contacts cannot be 'decisive in determining whether the defendant's due process rights are violated.'" *Id.* (quoting *Rush v. Savchuk*, 444 U.S. 320, 332, 100 S. Ct. 571, 579 (1980)). In this case, Plaintiff has not shown any conduct by Seyfarth in Nevada, or directed by Seyfarth to Nevada, that injured him here.

**Third**, the same analysis applies to the intentional torts alleged against Seyfarth (conspiracy, racketeering). Jurisdiction over Seyfarth as an intentional tortfeasor must be based on intentional conduct that is alleged or has been shown to have been directed to Nevada. *Id.* at 1123 (holding that "it is likewise insufficient to rely on a defendant's 'random, fortuitous, or attenuated contacts' or on the 'unilateral activity' of a plaintiff" with respect to intentional tort claims). Plaintiff has not shown that Seyfarth "purposefully enter[ed] the forum's market or establish[ed] contacts in the forum and affirmatively direct[ed] conduct there, and [that his] claims arise from that purposeful contact or conduct," as *Viega* requires to support specific jurisdiction over an alleged tortfeasor. 328 P.3d at 1157. Plaintiff has not made a prima facie showing that the opinion delivered to

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Millennium in Ireland by defendant Graham Taylor was intended to have an effect in Nevada or that Plaintiff was aware of the opinion when he entered into the tax avoidance transaction with others in 2003 that the IRS later found was fraudulent. Seyfarth's out-of-state activity "did not create sufficient contacts with Nevada simply because [Seyfarth may have] directed [its] conduct at [Plaintiff] whom [Seyfarth allegedly] knew had Nevada connections." *Walden*, 134 S. Ct. at 1125. "Such reasoning improperly attributes a plaintiff's forum connections to the defendant and makes those connections 'decisive' in the jurisdictional analysis . . . [and] obscures the reality that none of [Seyfarth]'s conduct had anything to do with Nevada itself." *Id.* (internal citation omitted).

Absent alleging a prima facie case that Seyfarth is "at home" in Nevada or "affirmatively directed contact" with the state to deal with Plaintiff Tricarichi, such as he fails to do by his conspiracy and racketeering claims, he is not entitled to jurisdictional discovery before the Court rules on Seyfarth's motion to dismiss for lack of jurisdiction. *Viega*, 328 P.3d at 1157, 1160-61; *Daimler*, 134 S. Ct. at 751, 760 (insufficient facts alleged to support either general or specific jurisdiction; absent such facts, no basis to allow jurisdictional discovery); *see also, Western States Wholesale Nat. Gas Litig.*, 605 F. Supp. 2d 1118, 1140 (D. Nev. 2009) and *Menalco, FZE v. Buchan*, 602 F. Supp. 2d 1186, 1194 n. 1 (D. Nev. 2009) (personal jurisdiction cannot be based on the actions of co-conspirators).

In light of these recent cases from our Supreme Court, the U.S. Supreme Court, and the Nevada U.S. District Court, Plaintiff's reliance on *Davis v. Eighth Jud. Dist. Ct.*, 97 Nev. 332, 629 P.2d 1209 (1981) is misplaced, as *Walden* clearly confirms. *Davis* held that defendants who conspired out-of-state could be subject to jurisdiction for injuries alleged to have occurred in Nevada as a consequence of their acts elsewhere. *Walden*, however,

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appears to overrule *Davis* because, as the U.S. Supreme Court declared, "mere injury to a forum resident is not a sufficient connection to the forum. . . . The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way." 134 S. Ct. at 1125. *See also id.* at 1122 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984) ("[The] unilateral activity of another party or a third party is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction.")).

Thus, the opinion rendered by defendant Graham Taylor to Millennium in Ireland that allegedly "facilitated" a transaction between Plaintiff and others in an out-of-state conspiracy that Plaintiff says injured him in Nevada does not appear to be consistent with *Walden's* holding that "jurisdiction over an out-of-state intentional tortfeasor must be based on intentional conduct by the defendant that creates the necessary contacts with the forum." 134 S. Ct. at 1125. Moreover, even if *Davis* has survived *Walden*, which is highly questionable to the Court, the circumstances alleged by Plaintiff are distinguishable from the limited facts recited in the Davis opinion, and still do not make out a prima facie case for jurisdiction under *Viega, Daimler*, or *Walden*. The facts of this case are also distinguishable from the post-*Walden* authority Plaintiff cites. *See Best Chairs Inc. v. Factory Direct Wholesale, LLC*, 121 F. Supp. 3d 828 (S.D. Inc. 2015); *First Cmty. Bank, N.A. v. First Tennessee Bank, N.A.*, 489 S.W.2d 369 (Tenn. 2015); *Khan v. Gramercy Advisors, LLC*, 2016 Ill. App. (4th) 150435, 2016 Ill. App. LEXIS 425 Ill. App. Ct. 2016).

Now, for the foregoing reasons, the Court grants Seyfarth's motion to dismiss and by this order dismisses the complaint against Seyfarth Shaw, LLP, for lack of personal jurisdiction.

IT IS SO ORDERED.

Dated: December 16, 2016

JOE HARDY, DISTRICT COURT JUDGE

Submitted by:

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# EXHIBIT 14

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DISTRICT COURT
CLARK COUNTY, NEVADA

| | |
|---|---|
| MICHAEL A. TRICARICHI, an individual<br><br>Plaintiff,<br><br>vs.<br><br>PRICEWATERHOUSECOOPERS LLP,<br><br>Defendant. | Case No.: A-16-735910-C<br><br>Dept. No.: XXXI<br><br>**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT PRICEWATERHOUSE COOPERS LLP'S MOTION FOR ATTORNEYS' FEES AND COSTS**<br><br>**and**<br><br>**ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF TRICARICHI'S MOTION TO RETAX AND SETTLE PWC'S AMENDED VERIFIED MEMORANDUM OF COSTS** |

## I. FACTUAL BACKGROUND

This matter came on for hearing on May 30, 2023, on Defendant Pricewaterhouse Coopers LLP's Motion For Attorneys' Fees And Costs (DOC 427) and Plaintiff Tricarichi's Motion to Retax and Settle PWC's Amended Verified Memorandum of Costs (DOC 414). Present at the hearing was Scott F. Hessell, Esq., and Ariel Clark Johnson, Esq. for Plaintiff Tricarichi; and Bradley Austin, Esq., Patrick G. Byrne, Esq., and Chris Landgraff, Esq., for Defendant Pricewaterhouse Coopers (hereinafter PwC). At the hearing, the parties agreed

JOANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

to meet among themselves to determine if there could be agreement on outstanding fee and cost issues. The parties also agreed to provide the written positions of the parties post-hearing to the Court. The Court, having reviewed the papers and pleadings on file herein, having heard oral arguments of the parties, and then reviewed the additional information provided by the parties, makes the following ruling:

The bench trial commenced on October 31, 2022, and the trial concluded on November 10, 2022. At the trial, Ariel C. Johnson, Esq. of Hutchison & Steffen PLLC appeared for Plaintiff, along with *pro hac vice* counsel Scott F. Hessell, Esq. and Blake Sercye, Esq. of Sperling & Slater, P.C. Patrick G. Byrne, Esq. and Bradley T. Austin, Esq., of Snell & Wilmer LLP, and *pro hac vice* counsel Mark L. Levine, Esq., Christopher D. Landgraff, Esq., and Katharine A. Roin, Esq., of Bartlit Beck, LLP, appeared for Defendant PwC.

The trial encompassed approximately nine trial days as well as additional motion hearing days. During the course of the bench trial, four experts were called both in person and via video. At the conclusion of the trial, the Court set forth its ruling in its Findings of Fact and Conclusions of Law.[1] In sum, the Court found in favor of Defendant PwC and that "Plaintiff Tricarichi shall take nothing from his Complaint"[2] as there was no evidence proving three elements of his claim and due to the single cause of action being barred by both Nevada and New York statute of limitations.[3] After the ruling had been entered, and based on stipulations by the parties, Defendant filed its Memorandum of Costs and its Amended Memorandum of Costs as well as a Motion for Attorney Fees and Costs. Plaintiff

[1] February 9, 2023, Findings of Fact and Conclusions of Law, DOC 416 at ¶100.
[2] Findings of Fact Conclusions of Law at P. 41, DOC 416, filed February 9, 2023; Notice of Entry of Order thereof, DOC 420, filed February 22, 2023.
[3] Findings of Fact Conclusions of Law, DOC 416 at ¶¶ 115, 130, 132, 137, 148, 161.

filed his Motion to Retax and Oppositions to Defendant's Motion. The pleadings were timely filed.

## II. Defendant is Entitled in Part to Reasonable Attorney Fees Pursuant to Applicable Law Based on its Second Offer of Judgment

"Ultimately, the decision to award attorney fees rests within the district court's discretion, and we review such decisions for an abuse of discretion." *O'Connell v. Wynn*, 134 Nev. 550, 554, 429 P.3d 664, 668 (2018); *Frazier v. Drake*, 131 Nev. 632, 641-42; 357 P.3d 365, 372 (2015). Further, as reiterated by the Nevada Appellate Court in *O'Connell v. Wynn*, 134 Nev. 550, 429 P.3d 664 (2018), "[a] party may seek attorney fees when allowed by an agreement, rule, or statute. *See* NRS 18.010 (governing awards of attorney fees); *RTTC Commc'ns, LLC v. The Saratoga Flier, Inc.*, 121 Nev. 34, 40, 110 P.3d 24, 28 (2005) (noting that "a court may not award attorney fees absent authority under a specific rule or statute")." Here, Defendant seeks fees, pursuant to Nevada Rules of Civil Procedure 54(d), which provides "[a] claim for attorney fees must be made by motion. The court may decide a post judgment motion for attorney fees despite the existence of a pending appeal from the underlying final judgment." Defendant also seeks fees pursuant to Nevada Rules of Civil Procedure 68(f) which directs that:

> "If the offeree rejects an offer and fails to obtain a more favorable judgment: … (B) the offeree must pay the offeror's post-offer costs and expenses, including a reasonable sum to cover any expenses incurred by the offeror for each expert witness whose services were reasonably necessary to prepare for and conduct the trial of the case, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney fees, if any be allowed, actually incurred by the offeror from the time of the offer. If the offeror's attorney is collecting a contingent fee, the amount of any attorney fees awarded to the party for whom the offer is made must be deducted from that contingent fee.

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Defendant made Plaintiff an Offer of Judgment on September 25, 2019, and then made a second Offer of Judgment October 6, 2021.[4] The parties agree that the 2019 update to the Nevada Rules of Civil Procedure apply to both Offers of Judgment. Neither Offer was accepted by Plaintiff, and the case proceeded to trial in October and November 2022. Following the conclusion of the bench trial, the Court issued its Findings of Fact and Conclusions of Law on February 9, 2023, entering Judgment in favor of Defendant PwC.[5] The Order continued that "any request for fees and costs shall be handled via separate timely-filed Motion."[6] As noted, the Court finds that Defendant has met the timeliness standards to seek reasonable fees pursuant to Nevada Rules of Civil Procedure 54(d) and 68(f).

As the fee request was timely, the Court next considers whether Defendant has met the factors necessary pursuant to NRCP 68 and applicable case law including *Beattie v. Thomas*, 99 Nev. 579, 588-89, 688 P.2d 268, 274 (1983) with respect to each of its Offers of Judgment. Pursuant to *Beattie* and its progeny, the Court considers the following factors to determine whether attorneys' fees are appropriate:

> (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendant's offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount.

*Beattie v. Thomas*, 99 Nev. 579, 588-89, 688 P.2d 268, 274 (1983).

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[4] Both Offers of Judgment are provided as Exhibits 1 and 2 in the Appendix of Exhibits to the Motion for Attorney's Fees and Costs filed March 15, 2023, with electronic service stamps reflecting the dates of service (DOC 428). Each Offer of Judgment was for $50,000.00.

[55] Findings of Fact, Conclusions of Law, DOC 416 at ¶¶ 115, 130, 132, 137, 148, 161.

[6] Findings of Fact, Conclusions of Law, DOC 416 at 41:6-7.

### *A. The Court Finds That Fees Are Not Appropriate Under The 2019 Offer of Judgment*

As there were two Offers of Judgment, the Court addresses each of them in turn. With respect to the 2019 Offer, the Court has to consider what was known about the claims and defenses at the time the offer was made as well as other *Beattie* factors.

#### 1. **The Court Finds That the First *Beattie* Factor Weighs in Favor of Plaintiff**.

First, when considering whether Plaintiff's claim was brought in good faith, the Court sees that at the time of the 2019 offer, while Plaintiff had lost on Summary Judgment on the statute of limitations on the 2003 claim, the 2008 claim was still in the early stages of the litigation from a timing standpoint as it had been newly added to the Complaint.[7] This factor weighed in favor of it being pursued in good faith by Plaintiff.

#### 2. **The Court Finds That the Second *Beattie* Factor Weighs in Favor of Defendant**.

When analyzing the second factor, the Court looks to whether Defendant's 2019 Offer of Judgment was reasonable and in good faith, both in its timing and amount. As to timing, the Court considers that the Offer was made following the Summary Judgment ruling on the 2003 claim.[8] The 2008 claim was just beginning in the case.[9] At that time, the limitation of liability issue had not been resolved either.[10] Accordingly, at the time the Offer was made, given the status of the case and what was known by Defendant, the timing component was reasonable.

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[7] May 30, 2023, Hearing Transcript at 56:6-16.
[8] May 30, 2023, Hearing Transcript at 56:20-23.
[9] May 30, 2023, Hearing Transcript at 56:23-24.
[10] May 30, 2023, Hearing Transcript at 56:23-57:2.

As to the amount offered of $50,000.00, the Court also sees that amount as reasonable and in good faith because $50,000.00 was consistent with the limitation of liability which was an issue that had not yet been resolved.[11] Thus, the second factor would weigh in favor of Defendant's offer being both reasonable and in good faith.

**3. <u>The Court Finds That the Third *Beattie* Factor Weighs in Favor of Plaintiff</u>.**

Next, the Court considers whether Plaintiff's decision to reject the Offer and proceed to trial was grossly unreasonable or in bad faith. Regardless of whether the Court looks at what issues actually went to trial, or could have gone to trial from a September 2019 lens before the statute of limitation issue was decided, or from the lens of considering Summary Judgment had been granted on the 2003 claim, and what the risk then was of the 2008 claim, the Court finds the factor weighs in favor of Plaintiff.[12] At this juncture, there were appeal and writ opportunities available; the 2008 claim was still in its infancy in this case.[13] The decision to reject the Offer at that time was not grossly unreasonable or in bad faith as there were still other avenues.

**4. <u>The Court Need Not Reach the Fourth *Beattie* Factor.</u>**

Lastly, the Court would consider whether the fees sought by the Offeror are reasonable and justified in amount. Here, though, the Court finds it does not need to address whether the fees sought were reasonable and justified as two of the

[11] May 30, 2023, Hearing Transcript at 56:20-57:2.
[12] May 30, 2023, Hearing Transcript at 57:3-58:25.
[13] May 30, 2023, Hearing Transcript at 57:3-58:25.

three preceding *Beattie* factors weighed in favor of Plaintiff. In sum, the Court finds that fees would *not* be appropriate under the 2019 Offer of Judgment.[14]

### *B. The Court Finds That Fees Are Appropriate Under the 2021 Offer of Judgment*

The Court next considers the 2021 Offer of Judgment which was also for $50,000.00 exclusive of fees, interest, and costs to determine if that Offer meets the requisite criteria to impose fees against Plaintiff.

#### 1. **The Court Finds That the First *Beattie* Factor Weighs in Favor of Defendant.**

The Court first considers whether the Plaintiff's claim was brought in good faith. The Court finds that at the time of the 2021 Offer, there was an existing ruling from the Nevada Supreme Court and the prior the Summary Judgment ruling on the 2003 claim. Further, the parties had the intervening time to flush out the issues that eventually went to trial. Thus, given the posture of the remaining claim, the Court finds that the first factor weighs in favor of Defendant.[15]

#### 2. **The Court Finds That the Second *Beattie* Factor Weighs in Favor of Defendant**.

The Court next looks to whether the 2021 Offer was reasonable and in good faith in both its timing and amount. As to amount, the Court considers that there was the issue of the same limitation of liability as with the 2019 Offer; and thus, the $50,000.00 would still be appropriate in light of the matters still at issue.[16] The Court also evaluated the nature of the claims including that it was uncontested in the case that there was no work done by PwC in the intervening five years between

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[14] May 30, 2023, Hearing Transcript at 59:1-6.
[15] May 30, 2023, Hearing Transcript at 60:3-8.
[16] May 30, 2023, Hearing Transcript at 60:9-17.

Plaintiff's 2003 and 2008 issues. The Court also had to look at the fact that Plaintiff was premising his liability claim on potential duties he asserted PWC owed him retrospectively without there being any duty triggered from actual work performed.[17] The 2021 Offer also followed the Nevada Supreme Court's ruling in Defendant's favor pertaining to that limitation of liability, along with the prior Summary Judgment on the 2003 claim. In light of the procedural posture and facts, the Court finds that the timing of the 2021 Offer of Judgment was in good faith.[18] The second factor, thus, weighs in favor of Defendant.

**3. <u>The Court Finds That the Third *Beattie* Factor Weighs in Favor of Defendant.</u>**

Then the Court must consider whether the Plaintiff's decision to reject the Offer and proceed to trial was grossly unreasonable or in bad faith. Here, the Court does find that the rejection of the 2021 Offer was grossly unreasonable. At the time of the 2021 Offer, there was the benefit of knowledge of all of the proceedings in the tax court and other courts up to that point and Plaintiff also had the benefit of the opinions of top tax experts in the field.[19] The Court must also consider if Plaintiff had a reasonable expectation based on the evidence known, whether he would meet his burden would at trial. At the time of the 2021 Offer, Plaintiff was aware of at least three hurdles. First, there was a statute of limitations issue. Second, even if duty, breach, causation, and damages were proven, then Plaintiff would still need to prove a type of retrospective fraud. Third, per the agreement, Plaintiff would also

[17] May 30, 2023, Hearing Transcript at 60:23-61:5.
[18] May 30, 2023, Hearing Transcript at 60:9-61:6.
[19] May 30, 2023, Hearing Transcript at 61:7-61:18.

need to meet the burden of establishing gross negligence.[20] Plaintiff also was pursuing an action premised on the finding of a failure to act retrospectively, with no supporting case law.[21] For those reasons the Court finds that the third *Beattie* factor was not met as to reasonableness of proceeding to trial and the factor then weighs in favor of Defendant.

The remaining question is whether the fees sought were reasonable and justified.

**4. <u>The Fees Sought by the Offeror are reasonable and justified in amount, as reduced by the Court</u>.**

In In light of Defendant meeting its burden on the first three factors, the next step the Court must then determine if "whether the fees sought by the offeror are reasonable and justified in amount." *Beattie*, 99 Nev. at 588-89, 688 P.2d at 274 (1983).

In so doing, the Court engages in a multi- step process. First, the Court must determine what method should be used to calculate the fees amount given the multiple methods used by Defendant's various counsel. Second, the Court must analyze the amount requested utilizing the appropriate method to determine what is the reasonable and necessary amount that Defendant should be awarded and ensure that the amount was actually incurred in accordance with applicable law.

[20] May 30, 2023, Hearing Transcript at 61:19-63:13.
[21] May 30, 2023, Hearing Transcript at 63:3-63:13.

### a. The Court Finds a Lodestar Calculation to be the Proper Method of Fee Calculation in This Case

The Court may use any method to calculate a reasonable amount of fees, including a lodestar amount based on the hourly rates charged by each counsel or contingency fee pursuant to *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864 (2005). Defendant's counsels' law firms utilize two different methods for calculating their fees: Bartlit Beck utilized a flat fee, and Snell & Wilmer utilized an hours billed/lodestar calculation. As set forth in the Motion, Bartlit Beck billed on a monthly flat-fee basis, and did a separate daily flat fee for hearings and their preparation.[22] The Motion noted that "[s]hould this Court determine that the total fee amount is unreasonable, it may calculate a reasonable fee based on any other method, including the lodestar method, which would account for the 'hours reasonably spent on the case' multiplied 'by a reasonable hourly rate.'"[23] The Court does not find that the method of using a flat fee is comparable to a contingency fee with zero risk factor. Instead, the first method proposed by Bartlitt Beck tries to cap fees which may be desirable between an attorney and its client, but such a method does not consider what would be reasonable under *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969).[24] Instead, the Court finds that a lodestar approach taking into account billing records to be a more appropriate method in considering what work was really reasonable and necessary from the 2021 Offer of Judgment onward.[25] As set forth above, the Court deferred on ruling on the fee amount to

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[22] PricewaterhouseCoopers LLP's Motion for Attorneys' Fees and Costs DOC 427 18:4-8; Declaration of Mark L. Levine in Support of Motion for Attorneys' Fees and Costs (DOC 429 filed under seal).

[23] PricewaterhouseCoopers LLP's Motion for Attorneys' Fees and Costs DOC 427 18:9-11 (*citing to Shuette v. Beazer Homes Holding Corp*., 121 Nev. 837, 864 n.98, 124 P.3d 530, 549 n. 98 (2005).

[24] May 30, 2023, Hearing Transcript at 65:14-66:1.

[25] May 30, 2023, Hearing Transcript at 66:9-22.

allow the parties time until late July 2023 to either come to an agreement as to an appropriate fee amount or to propose alternate fee amounts that the Court could consider.

**b. The Reasonable Hourly Rate and Reasonable Number of Hours for the Work Performed**

The second step of the analysis is for the Court to determine what the reasonable hourly rate is for each of the counsel and legal team. The Court then determines what are the reasonable number of hours for each of the individuals for whom fees are sought.

Defendant in their Motion for Attorney's Fees seeks $662,029.40 post-Offer fees for the work of Snell & Wilmer, and $9,171,309.00 post-Offer fees for the work of Bartlit Beck. Although the Court provided the parties an opportunity to try and seek an agreement on the fee amount, the parties were unable to agree. Instead, each party submitted its own proposed fee amount that is sought the Court to award.

Plaintiff initially proposed that Defendant was entitled to $370,448.50 in fees for work by Snell & Wilmer only, and no fees for Bartlit Beck due to lack of information as to the tasks billed and no detail as to time spent on any given task. Within that proposal, the number of hours billed by Snell & Wilmer of 975.0 was agreed to, but different rates were proposed. In a subsequent letter, Plaintiff then proposed that the Court should award $555,000.00 in fees for Bartlit Beck, the number was based on a rounded-up calculation of a 1.5 times multiplier of the 975.0 hours incurred by Snell & Wilmer at Plaintiff's proposed hourly average rate of $375.00 per hour.

Defendant proposed a total of $2,284,357.48 in fees, broken down with $1,857,338.68 sought for Bartlit Beck, using a lodestar calculation at the same rates used for local counsel Snell & Wilmer, and then sought $427,018.80 for

Snell & Wilmer. The Court must consider the factors articulated in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969) to assess what a reasonable hourly rate and reasonable number of hours are for the work performed in this case.

When determining a fee amount under *Beattie*, the Court also needs to look to *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969) which sets forth factors the Court can consider to ascertain a reasonable fee amont. Pursuant to *Brunzell* and its progeny, the Court *inter alia*, considers (1) the ***qualities of the advocate***: his ability, his training, education, experience, professional standing and skill; (2) ***the character of the work to be done***: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties when they affect the importance of the litigation; (3) ***the work actually performed by the lawyer***: the skill, time and attention given to the work; (4) **the result**: whether the attorney was successful and what benefits were derived. *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969) (emphasis in original, internal quotation omitted).

**i. A Reduced Fee Award for Snell & Wilmer is Appropriate Under *Brunzell***

**a. The Qualities of the Advocate: their ability, their training, education, experience, professional standing and skill.**

Defendant set forth the qualities of the advocates, supported by declarations of Counsel. The qualifications of each of the defense counsel were not disputed. Counsel for Snell & Wilmer included Patrick G. Byrne, Esq.; Bradley T. Austin, Esq.; Kelly H. Dove, Esq.; Erin Gettel, Esq.; Gil Kahn, Esq.;

Christian P. Ogata, Esq.; and Skylar N. Arakawa-Pamphilon, Esq. Work was also performed by Dawn Davis, Esq.; V.R. Bohman, Esq.; and Michael Paretti, Esq.; however, Defendant did not seek fees of those attorneys.[26]

Patrick G. Byrne, Esq. graduated from law school in 1988, is a partner in the Snell & Wilmer's commercial litigation group, has extensive litigation experience, and billed at $515.00, $617.50, $637.00, $662.00, and $695.00.[27] Bradley T. Austin, Esq. graduated from law school in 2013, is a partner in Snell & Wilmer's commercial litigation group, experienced in complex business, civil, and commercial disputes, and billed at $280.00, $380.00, $410.00, $426.00, and $447.00 per hour.[28] Kelly H. Dove, Esq. graduated from law school in 2007, is a partner in Snell & Wilmer's commercial litigation group, is experienced in litigation and appellate work, and billed at $635.00 and $660.00 per hour.[29] Erin Gettel, Esq. graduated law school in 2015 and is an associate in Snell & Wilmer's commercial litigation group and billed at $385.00 per hour.[30] Gil Kahn, Esq. graduated law school in 2016 and is an associate in Snell & Wilmer's commercial litigation group who bills at $320.00 per hour; however, despite providing a Brunzell analysis for Mr. Kahn, there were no billing entries attributed to him in the provided invoices.[31] Christian P. Ogata, Esq. graduated from law school in 2020 and is an associate in Snell & Wilmer's commercial litigation group and

[26] Declaration of Bradley T. Austin, Esq. in Support of Motion for Attorneys' Fees and Costs (DOC 428 BATES 016:18-22.
[27] Declaration of Bradley T. Austin, Esq. in Support of Motion for Attorneys' Fees and Costs (DOC 428 BATES 014:11-21.
[28] Declaration of Bradley T. Austin, Esq. in Support of Motion for Attorneys' Fees and Costs (DOC 428 BATES 014:22-015:3.
[29] Declaration of Bradley T. Austin, Esq. in Support of Motion for Attorneys' Fees and Costs (DOC 428 BATES 015:04-15.
[30] Declaration of Bradley T. Austin, Esq. in Support of Motion for Attorneys' Fees and Costs (DOC 428 BATES 015:16-22.
[31] Declaration of Bradley T. Austin, Esq. in Support of Motion for Attorneys' Fees and Costs (DOC 428 BATES 015:23-016:2.

billed at $345.00 per hour.[32] Skylar N. Arakawa-Pamphilon, Esq. graduated from law school in 2021 and is an associate in Snell & Wilmer's commercial litigation group and billed at $323.00 per hour.[33] Snell & Wilmer also utilized paralegals that all possessed bachelor's degrees and paralegal certification.[34] The Court finds that Defendant's counsel at Snell & Wilmer are experienced and qualified and that the rates are generally customary for this type of specific work for most of the tasks performed.

**b. The Character of the Work Performed**

Plaintiff, in its Opposition to PwC's Motion for Attorneys' Fees and Costs (DOC 444), challenged the character of the work and work actually performed due to generic descriptions contained in the billing. The Court reviewed the record as to what work was completed after October 6, 2021, the work's intricacy and importance, and time and skill required. The matter involved complex analysis of professional tax services, tax liability and damages. Overall, Defense counsel was effective as demonstrated by the results. The issue is whether some of the work which based on the more general time entries was not as complex could have been done by a person at a lower rate.

**c. An Award of Attorney's Fees is Reasonable Based on the Work Actually Performed**

As noted above, Plaintiff, in its Opposition to PwC's Motion for Attorneys' Fees and Costs (DOC 444) challenged the work actually performed. The parties came to an agreement as to the total number of hours billed overall by Snell &

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[32] Declaration of Bradley T. Austin, Esq. in Support of Motion for Attorneys' Fees and Costs (DOC 428 BATES 016:3-10.

[33] Declaration of Bradley T. Austin, Esq. in Support of Motion for Attorneys' Fees and Costs (DOC 428 BATES 016:11-17.

[34] Declaration of Bradley T. Austin, Esq. in Support of Motion for Attorneys' Fees and Costs (DOC 428 BATES 016:23-26.

Wilmer of 975.00 in the correspondence submitted to the Court July 11, 2023. The number agreed upon was comprised of 104.20 hours billed by Patrick G. Byrne, Esq.; 717.90 hours billed by Bradley T. Austin, Esq.; 3.40 hours billed by Kelly H. Dove, Esq.; 9.40 hours billed by Erin Gettel, Esq.; 56.40 hours billed by Christian P. Ogata, Esq.; 5.30 hours billed by Skylar N. Arakawa-Pamphilon, Esq.; 0.50 hours billed by Dawn Davis, Esq.; 53.60 hours billed by Kathy Casford; 1.10 hours billed by Sev Redd; and 23.20 hours billed by Deborah Shuta. Due to the nature of the case and character of the work done, with the agreed-upon number of hours, the Court finds that the rates sought are customary and reasonable in light of this particular case but that some of the work that was not as complex based on the general time entries could have been done by a person with a lower billing rate. Thus, the Court finds it appropriate to grant fees for the work performed by Snell & Wilmer in the amount of $407,018.80.

**d. The Outcome Obtained for Defendant**

It is undisputed that Defendant prevailed. In light of the foregoing analysis, the Court finds that the *Brunzell* factors are met. The parties agreed as to the number of hours sought of 975.00. The Court further finds that most of the rates are customary with prevailing rates of other attorneys in Nevada with similar qualifications but the Court had to reduce the total award due to the general time entries which did not demonstrate that the work could have been performed by someone at a lower rate. Based on all of the factors and discretion of the Court, considering the nature of the work performed, the Court finds that the $407,018.80 of fees sought for Snell & Wilmer is reasonable and appropriate.

### ii. The Fee Award for Bartlit Beck Must Be Evaluated Under a Lodestar Analysis and Appropriately Reduced

As set forth above, $9,171,309.00 post-Offer fees were initially sought for the work of Bartlit Beck. A supplemental declaration and monthly descriptions summarizing the work performed were provided as exhibits in support of the correspondence submitted to the Court on July 11, 2023. The Supplemental Declaration of Mr. Levine set forth that internal data reflected 4,200 hours during the relevant time frame and an average blended rate of $700.00 per hour. This rate was reached by counsel utilizing the local Nevada rates of Snell & Wilmer. In its proposal, counsel provided a lodestar calculation adopting the effective hourly rates of local counsel, noting that the proposed rate was based on the average weighted rates actually billed by Snell & Wilmer given that Snell & Wilmer counsel had rate increases during the relevant time frame resulting in a range of rates being used for some counsel. The average rates proposed were as follows: $664.76 for Mark Levine, Esq. and Christopher Landgraff; $429.95 for Katharine Roin, Esq. and Daniel Taylor, Esq.; $377.34 for Alexandra Genord, Esq.; and $251.00 for both Lori Barnicke and Kim Solorzano. The updated lodestar amount provided based on the foregoing was $1,857,338.68.

#### a. The Qualities of the Advocate: their ability, their training, education, experience, professional standing and skill.

As noted above, the qualifications of Counsel was not contested. Counsel for Bartlit Beck included Mark Levine, Esq.; Christopher D. Landgraff, Esq.; Katharine A. Roin, Esq.; Daniel C. Taylor, Esq.; Sundeep K. (Rob) Addy, Esq.; Alexandra Genord, Esq.; and Krista Perry, Esq. Mark Levine, Esq. graduated from law school in 1989, is partner in Bartlit Beck's Chicago office, and is an

experienced litigator and well qualified.[35] Christopher D. Landgraff, Esq. graduated from law school in 1994, is partner in Bartlit Beck's Chicago office, and has a wealth of litigation experience.[36] Katharine A. Roin, Esq. graduated from law school in 2010, is a partner in Bartlit Beck's Chicago office, and has experience as co-lead counsel in litigation.[37] Daniel C. Taylor, Esq. also graduated from law school in 2010, and is partner in Bartlit Beck's Denver office, with experience on multiple trial teams.[38] Sundeep K. (Rob) Addy, Esq. graduated law school in 2004, and is partner in Bartlit Beck's Denver office, and has experience in multiple multi-million and billion-dollar cases.[39] Alexandra Genord, Esq. graduated from law school in 2020 and is an associate in Bartlit Beck's Chicago office.[40] Krista Perry, Esq. graduated from law school in 2016 and was formerly an associate with Bartlit Beck.[41] Bartlit Beck also utilized paraprofessional and support staff whose qualifications were not detailed.

The Court notes that fees were originally requested for Mr. Addy, and pursuant to the correspondence submitted to the Court July 11, 2023, as part of the efforts of the parties to reach an agreeable fee amount, Defendant agreed to remove all fees incurred by Mr. Addy (who initially sought $388,884.60). In an effort to provide an appropriate lodestar calculation, Defendant also proposed utilizing the same rates as Snell & Wilmer to be consistent with the local market.

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[35] Declaration of Mark L. Levine in Support of Motion for Attorneys' Fees and Costs (DOC 429 filed under seal BATES 136:6-13).
[36] Declaration of Mark L. Levine in Support of Motion for Attorneys' Fees and Costs (DOC 429 filed under seal BATES 136:14-19).
[37] Declaration of Mark L. Levine in Support of Motion for Attorneys' Fees and Costs (DOC 429 filed under seal BATES 136:20-7:2).
[38] Declaration of Mark L. Levine in Support of Motion for Attorneys' Fees and Costs (DOC 429 filed under seal BATES 137:3-9).
[39] Declaration of Mark L. Levine in Support of Motion for Attorneys' Fees and Costs (DOC 429 filed under seal BATES 137:10-16).
[40] Declaration of Mark L. Levine in Support of Motion for Attorneys' Fees and Costs (DOC 429 filed under seal BATES 137:17-21).
[41] Declaration of Mark L. Levine in Support of Motion for Attorneys' Fees and Costs (DOC 429 filed under seal BATES 137:22-25).

The rates proposed by Defendant, as set forth above, were as follows: $664.76 per hour for Mark Levine, Esq., and Christopher Landgraff, Esq.; $429.95 per hour for Katharine Roin, Esq., and Daniel Taylor, Esq.; $377.34 per hour for Alexandra Genord, Esq.; and $251.00 per hour for Lori Barnicke and Kim Solorzano. No *Brunzell* analysis was provided for Barnicke or Solorzano. Based on review of the record, the Court cannot guess as to their qualifications or the basis of how fees were sought for their work. The proposal did not include a rate for Krista Perry, Esq. As articulated above, and in the declarations supporting the Motion, the Court finds Defendant's counsel has met the first *Brunzell* factor other than as specifically stated.

**b. The Character of the Work Performed**

The Court reviewed the record as to what work was completed after October 6, 2021, the work's intricacy and importance, and time and skill required. The matter involved complex analysis of professional tax services, tax liability and damages. The Court also had to look at what work was done by Snell & Wilmer firm and what work was done by Bartlit Beck. Defense counsel was effective as demonstrated by the results as discussed infra.

**c. An Award of Reduced Attorney's Fees is Reasonable Based on the Work Actually Performed**

As noted above, Plaintiff, in its Opposition to PwC's Motion for Attorneys' Fees and Costs, challenged the work actually performed (DOC 444). Plaintiff maintained that due to the flat fee billing, lack of hourly time records, and no tasks identified with the amount of time dedicated to the task provided, no fees should be awarded beyond the amount proposed for Snell & Wilmer fees. The initial records provided did not contain hourly descriptions of the work performed due to the billing structure of the firm. A supplemental declaration and monthly

descriptions summarizing the work performed were provided as exhibits in support of the correspondence submitted to the Court on July 11, 2023. The Supplemental Declaration of Mr. Levine set forth that internal data reflected 4,200 hours during the relevant time frame and an average blended rate of $700.00 per hour. Additionally, a description was provided for tasks done that month. December 2021 included preparing status reports, reviewing the mandamus decision, preparing for and attending hearings, drafting briefs, and preparing for argument at an upcoming hearing. January 2022 included working on briefs and preparing for and attending an Evidentiary Hearing. February 2022 included preparing for Evidentiary Hearing and associated briefing and attending the hearing. March 2022 included drafting briefs, preparing witnesses, and attending an Evidentiary Hearing. April 2022 included drafting proposed Orders, mandamus hearings, preparing Motions and preparing for hearings, as well as communications with various parties. May 2022 included work on the Reply in support of Summary Judgment. June 2022 included preparation and attendance at the summary judgment hearing and planning for pretrial work. July 2022 included preparing exhibits, deposition designations, trial preparations, and drafting pretrial memorandum. August 2022 similarly included trial preparation including witness, exhibit, deposition preparation, preparing objections, trial briefs, and other drafts. September 2022 included witness meetings and preparation, and further work on pretrial documents. October 2022 included preparation for trial and attendance at pretrial matters. November 2022 included the trial fees at $50,000.00 per day for 10 days. December 2022 included preparing Orders from trial and drafting proposed Findings of Fact and Conclusions of Law. A breakdown was also given by each counsel for hours billed in each month.

The Court evaluates the hours billed by the three trial counsel in October and November 2022 when the trial occurred. Mark Levine, Esq. billed 145 hours; Chris Landgraff, Esq. billed 161.90; and Katharine Roin, Esq. billed 184.00. The Court is fully appreciative that counsel is highly qualified and this was a complex matter, but the Court also considers whether all three counsel were required for all tasks at trial. Considering all of these factors, the Court finds it appropriate to reduce the hours for Landgraff to 121.90, for Levine to 130.00, and for Roin to 142.00. The Court also considers that Alexandra Genord, Esq. billed 180.48 hours in October 2022 and 182.37 hours in November 2022. In light of the hours spent by the trial counsel, the Court does not see a basis for the total amount sought in that time period given that Ms. Genord is an associate, and appears to have come into the case only in October 2022, and in those two months billed over 362 hours. The Court finds it appropriate to reduce the hours to for that time period. The Court also considers that there is a lack of support for work performed by Lori Barnicke and Kim Solorzano and there was no detail as to their qualifications or anything for the Court to analyze based on the pleadings. The Court finds that there is insufficient support in the application to justify the 176.25 hours sought by Lori Barnicke and 158.50 hours sought by Kim Solorzano for November 22, 2022. Thus, the Court finds it appropriate to reduce the hours to zero as *Brunzell* and *Beattie* require the Court to evaluate each individual for whom fees are sought and the Court cannot do so based on the lack of information provided.

**d. The Outcome Obtained for Defendant**

It is undisputed that Defendant prevailed. The Court, thus, finds that it is appropriate to award fees to Bartlit Beck; however, the overall fees do need to be reduced both in amount and in hours and $1,695,735.59 is appropriate.

In sum, based on the foregoing, the Court awards fees in the amount of $407,018.80 for Snell & Wilmer and $1,695,735.59 for Bartlit Beck.

### III. Defendant's Request for Costs and Plaintiff's Motion to Retax And Costs.

The February 9, 2023, Findings of Fact and Conclusions of Law set forth that that "any request for fees and costs shall be handled via separate timely-filed Motion."[42] On February 14, 2023, Defendant PwC timely filed a Verified Memorandum of Costs (DOC 417), and Appendix thereto (DOC 418). Then on February 15, 2023, the parties then filed a Stipulation and Order to Extend Time to File Memorandum of Costs and Motion to Retax (DOC 419). Thereafter, on February 24, 2023, Defendant filed an Amended Verified Memorandum of Costs (DOC 422) and Appendix thereto (DOC 423), seeking a total of $921,833.58 in costs. Plaintiff then filed Tricarichi's Motion to Retax and Settle PWC's Amended Verified Memorandum of Costs (DOC 424). Defendant filed an Opposition to Plaintiff's Motion to Retax Costs (DOC 440) on March 31, 2023. Pursuant to NRS 18.020(3), costs must be awarded to the prevailing party against any adverse party in an action where Plaintiff sought to recover more than $2,500.00. In this action, Plaintiff was seeking far in excess of that amount. Following conclusion of the bench trial, Judgment was entered in favor of Defendant and Plaintiff was awarded nothing from his Complaint.[43] Thus, an award of costs is appropriate here.

Additionally, as set forth at the May 30, 2023, hearing, costs sought under NRS 18 pre-date the 2021 Offer of Judgment; and thus, the statute is the basis of the award of costs. As the Court has found that the elements of NRCP 68 were

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[42] Findings of Fact Conclusions of Law at P. 41, DOC 416 filed February 9, 2023, Notice of Entry of Order thereof DOC 420 filed February 22, 2023.

[43] Findings of Fact Conclusions of Law at P. 41, DOC 416 filed February 9, 2023, Notice of Entry of Order thereof DOC 420 filed February 22, 2023.

met based on the 2021 Offer of Judgment, NRCP 68 provides an independent basis for costs incurred after the 2021 Offer of Judgment. Although both the NRS and the NRCP provide independent basis for costs post the 2021 Offer, as those amounts are not cumulative, the Court analyzes the total costs that are to be awarded utilizing the statutory framework. [44]

**A. Defendant Was the Prevailing Party Pursuant to NRS 18 et seq**.

**1. Based on the Documentation and Applicable Authority, Defendant's Cost Request is Reduced.**

NRS 18.005 allows recovery of the following amounts:

(1) Clerks' fees.
(2) Reporters' fees for depositions, including a reporter's fee for one copy of each deposition.
(3) Jurors' fees and expenses, together with reasonable compensation of an officer appointed to act in accordance with NRS 16.120.
(4) Fees for witnesses at trial, pretrial hearings and deposing witnesses, unless the court finds that the witness was called at the instance of the prevailing party without reason or necessity.
(5) Reasonable fees of not more than five expert witnesses in an amount of not more than $1,500 for each witness, unless the court allows a larger fee after determining that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee.
(6) Reasonable fees of necessary interpreters
(7) The fee of any sheriff or licensed process server for the delivery or service of any summons or subpoena used in the action, unless the court determines that the service was not necessary.
(8) Compensation for the official reporter or reporter pro tempore.
(9) Reasonable costs for any bond or undertaking required as part of the action.

[44] May 30, 2023 Transcript DOC 448 at 73:15-18.

(10) Fees of a court baliff or deputy marshal who was required to work overtime.
(11) Reasonable costs for telecopies.
(12) Reasonable costs for photocopies.
(13) Reasonable costs for long distance telephone calls.
(14) Reasonable costs for postage.
(15) Reasonable costs for travel and lodging incurred taking depositions and conducting discovery.
(16) Fees charged pursuant to NRS 19.0335.
(17) Any other reasonable and necessary expense incurred in connection with the action, including reasonable and necessary expenses for computerized services for legal research.

Applicable case law provides that any award of costs must be "reasonable, necessary, and actually incurred, and supported by justifying documentation submitted to the Court. *In re Dish Network,* 133 Nev. 438, 452, 401 P.3d 1081, 1093 (2017); *Cadle v. Woods & Erickson*, *LLP*, 131 Nev. 114, 120-121, 345 P.3d 1049, 1054 (2015); *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352-53, 971 P.2d 383, 386 (1998); *Fairway Chevrolet Company v. Kelley*,484 P.3d 276 (Nev. 2021) (unpublished). As set forth in *Cadle,* sufficient documentation requires more than an itemized memorandum, there must be evidence presented to substantiate the cost requested. 131 Nev. at 120-121, 345 P.3d at 1054-1055 (2015). The Amended Verified Memorandum of Costs (DOC 422) sought the following costs:

**a. <u>Reporters' Fees for Depositions, Hearings, and Trial</u>**

Reporters' fees requested are broken down by the amount sought by each firm representing Defendant and by the type of reporter fees. Defendant seeks $73,354.31 for reporters' fees for depositions incurred by the Bartlit Beck firm under NRS 18.005(2). The amount included $59,221.51 for deposition transcripts and $15,554.11 for daily transcript fees for the Trial. The Court considers *North Las Vegas Infrastructure Investment and Construction, LLC v.*

*City of North Las Vegas*, 139 Nev. Adv. Op. 5, 525 P.3d 836 (2023). There, costs for videotaped depositions were denied because the depositions were not used at trial and there was no explanation of why the videos were necessary. The Court notes that here, Plaintiff challenges, within the reporters' costs for the depositions, optional reporting services such as RealTime, rush fees, and videotaping.

Invoices for deposition transcripts were provided for services dated August 3, 2020, for $750.00, $443.50, and $1,382.15 including a $175.00 Realtime Setup Fee and $239.80 Realtime Over Internet Fee; August 4, 2020, for $2,481.20 including a $695.20 Realtime Over Internet fee, and $665.00 including a $190.00 rush fee; August 11, 2020, for $1,100.00, $641.50, and $2,280.85 including a $175 Realtime Setup Fee and $385.00 Realtime Over Internet Fee; August 18, 2020, for $542.50, $925.00, and $1,478.75 including a $175.00 Realtime Setup Fee and a $204.60 Realtime Over Internet Fee,; August 19, 2020, for $542.50, $925.00, and $1,878.10 including a $175.00 Realtime Setup Fee and $325.60 Realtime Over Internet fee; September 1, 2020, for $805.00, $1,317.40, and $1,176.75; September 16, 2020, for $1,450.00, $839.50, and $4,064.20 which included a $175.00 Realtime Setup Fee and a $576.40 Realtime Over Internet fee; September 17, 2020, for $685.00 for videography services for the deposition of Mark Boyer, and $2,683.90 which also included a $424.60 Realtime Over Internet fee; September 18, 2020, for $635.00, and $2,023.50 which included a $367.40 Realtime Over Internet fee; September 22, 2020, for $610.00 and $2,233.50 which included a $446.60 Realtime Over Internet fee; September 25, 2020, for $790.00, $1,362.50, and $3,555.90 which included a $175.00 Realtime Setup Fee and $565.40 Realtime Over Internet fee; September 29, 2020, for $490.00 and $1,638.90 which included a $301.40 Realtime Over Internet Fee; September 30, 2020, for $2,750.30 which included a

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$550.00 Realtime Over Internet fee; October 1, 2020, for $988.00, $1,712.50 for videography services for the deposition of Michael Tricarichi, for $3,665.90, $780.00 for videography services for the deposition of Kenneth Harris, and for $2,675.70 which included a $492.80 Realtime Over Internet fee; October 9, 2020, for $2,050.70 including a $567.60 Realtime Over Internet fee, and $780.00 for videography services for the deposition of Brian Meighan. Invoices for daily transcript fees for trial are provided dated October 31, 2022, for $1,830.84; November 2, 2022, for $1,140.26; November 3, 2022, for $2,039.62; November 4, 2022, for $1,919.17; November 5, 2022, for $939.51; November 9, 2022, for $1,718.42; November 10, 2022, for $1,862.96 and $2,682.02, and November 11, 2022 for $1,421.31.

While under NRCP 68, the costs pre-dating the 2021 Offer of Judgment would not be recoverable. Here, the deposition costs are allowable under NRS 18 and, in general, are supported by adequate documentation as reasonable, necessary, and actually incurred as required under *In re Dish Network*, *Cadle*, *Berosini,* and *Fairway*. Based on the invoices provided, $57,800.20 in deposition transcripts incurred by Bartlit Beck is supported; however, that amount includes a $190.00 in rush fees, $7,192.40 in Realtime Fees, and $3,957.50 in videography services for depositions, which the Court finds would not be appropriate. Nothing is provided be Defendant showing that these extra reporter services were reasonable and necessary to this case. The Court then also considers and finds that the invoices provided support the $15,554.11 sought for daily transcript fees. Therefore, the Court finds that $62,014.41 in reporters' and transcript fees incurred by Bartlit Beck is appropriate under NRS 18.

Defendant also seeks $4,894.97 in Reporters' Fees for Hearings incurred by Snell & Wilmer under NRS 18.005(8). Invoices are provided for hearings dated November 16, 2016, for $270.54 and $80.00; May 10, 2017, for $318.53;

September 24, 2018, for $169.63 and $40.00; March 21, 2019, for $42.07; July 8, 2019, for $144.54 and $40.00; March 31, 2020, for $168.63 for an expedited transcript; March 24, 2022, for $40.00; March 30, 2022, for $120.00; March 31, 2022, for $1,216.93 and for $120.00; June 13, 2022, for $186.31 for an expedited transcript; October 25, 2022, for $725.16; November 16, 2022, for $944.38; and December 27, 2022, for $268.25.

While, under NRCP 68, the costs pre-dating 2021 Offer of Judgment would not be recoverable, here the hearing and trial costs are allowable under NRS 18 and are supported by adequate documentation as reasonable, necessary, and actually incurred as required under *In re Dish Network*, *Cadle*, *Berosini,* and *Fairway*. Based on the invoices provided, the Court finds that the amount sought for reporters' fees for hearings is supported; however, as noted above, some invoices indicate expedited fees without a basis provided for the rush charge. Therefore, the Court finds it must reduce the amount to account for the rush charges and that $4,540.03 is appropriate in reporters fees incurred by Snell & Wilmer for hearings.

**b. <u>Printing, Copying, and Scanning</u>**

Defendant seeks $5,468.66 for printing, copying, and scanning under NRS 18.005(12). Four separate invoices were provided: an October 21, 2019, invoice for $1,252.46; a July 27, 2020, invoice for $380.00; an October 20, 2022, invoice for $2,354.70; and an October 31, 2022, invoice for $1,481.50. While, under NRCP 68, the costs pre-dating 2021 Offer of Judgment would not be recoverable, here the copying costs are allowable under NRS 18 and are supported by adequate documentation as reasonable, necessary, and actually incurred as required under *In re Dish Network*, *Cadle*, *Berosini,* and *Fairway*. The full $6,468.66 is, therefore, appropriate.

### c. Travel and Lodging for Hearings and Depositions

Defendant seeks $4,585.60 for travel and lodging costs incurred by Bartlit Beck associated with counsel traveling for hearings and depositions. Defendant seeks the amount under NRS 18.005(15). Invoices were provided for: September 4, 2020, travel by Christopher Landgraff for $1,339.65; September 4, 2020, meals for Christopher Landgraff of $192.50; September 8, 2020, conference room, beverage service, and internet for $2,178.36; September 30, 2022, travel for Christopher Landgraff for $464.53; September 30, 2022, air fare for Christopher Landgraff for $323.18; and September 30, 2022, meals for $87.38. At the May 30, 2023, hearing the Court set forth that meals would not be appropriate to recover as counsel would have to eat regardless, and that hotel costs and tickets would not be appropriate, acknowledging that while parties have their choice of counsel, those costs are client driven based on their selection of counsel and Plaintiff should not have to bear additional cost for the choice of the Defendant.[45] After the Court allowed time for the parties to reach an agreement as to fees and costs, per the correspondence submitted to the Court on July 11, 2023, counsel withdrew the request for travel and meal expenses. Thus, the Court need not address the initial travel and lodging and meal request.

### d. Pro Hac Vice Admissions

Defendant seeks $5,000.00 in costs related to Pro Hac Vice Admissions incurred by Bartlit Beck and $3,700.00 in costs related to Pro Hac Vice Admissions incurred by Snell & Wilmer. Defendant seeks these costs under NRS 18.005(17) as an "other" reasonable and necessary expense. Invoices were provided for Application fees, Pro Hac Vice fees, and Annual Renewal Fees. Plaintiff challenged the cost in its entirety as not authorized under NRS

[45] May 30, 2023, Transcript DOC 448 at 73:19-74:11.

18.[46] At the May 30, 2023, hearing the Court stated the cost would not be appropriate as it was counsel's choice to associate pro hac counsel.[47] After the Court allowed time for the parties to reach an agreement as to fees and costs, per the correspondence submitted to the Court on July 11, 2023, counsel withdrew the request for Pro Hac Vice fees. Thus, the Court need not address the initial Pro Hac Vice fee request.

**e. Clerk's Fees**

Defendant seeks $3,386.00 in Clerk's Fees under NRS 18.005(1). The register of actions was provided showing filing fees on July 11, 2016, for $1,483.00; March 6, 2017, for $200.00; August 12, 2019, for $223.00; November 13, 2020, for $200.00; April 28, 2022, for $200.00; June 13, 2022, for $40.00; October 24, 2022, for $120.00; and November 16, 2022, for $920.00. While under NRCP 68 the fees pre-dating 2021 Offer of Judgment would not be recoverable, here, the Clerk's fees are allowable under NRS 18 and are supported by adequate documentation as reasonable, necessary, and actually incurred as required under *In re Dish Network*, *Cadle*, *Berosini,* and *Fairway*. The full $3,386.00 sought is, therefore, appropriate.

**f. Subpoena Costs**

Defendant seeks various costs associated with subpoenas consisting of Clerk's Fees under NRS 18.005(1); Witness fees under NRS 18.005(4); Service of Subpoena under NRS 18.005(7); Messenger Services for Filing/Obtaining Foreign Subpoenas under NRS 18.005(17); for a total of $2,081.06. Invoices are provided dated February 4, 2020, for $85.00 to serve a subpoena to Levin & Associates; February 7, 2020, for $215.00 for filing fees to issue a foreign

[46] Plaintiff's Motion to Retax and Settle PWC's Amended Verified Memorandum of Costs DOC 414 at 5:5-18.
[47] May 30, 2023, Transcript DOC 448 at 75:21-25.

subpoena; February 28, 2020, for $418.50 to serve a subpoena to Carla Tricarichi and Randy Hart; February 28, 2020, for $172.50 to serve a subpoena to James Tricarichi; February 28, 2020, for $110.00 for the messenger to the courthouse to serve the out-of-state subpoenas; March 20, 2020, for $275.00 for a court filing fee on the subpoena to Richard Corn; March 20, 2020, for $560.00 for a court filing fee on the subpoena to Andrew Mason; May 20, 2020, for $120.00 for a court filing fee on the subpoena for Donald Korb; September 8, 2020, for $84.00 for service of subpoena to Telecom Acquisition Corp.; and June 13, 2022, for $41.06 in court fees. While under NRCP 68 the fees pre-dating 2021 Offer of Judgment would not be recoverable, here, the various subpoena costs are allowable under NRS 18 and are supported by adequate documentation as reasonable, necessary, and actually incurred as required under *In re Dish Network*, *Cadle*, *Berosini*, and *Fairway*. The $2,081.06 sought is therefore appropriate.

**g. <u>Mediator Fees and Messenger Fees</u>**

Defendant seeks the costs under NRS 18.005(17) as an "other" reasonable and necessary expense for both Mediator Fees and Messenger Fees. The Court addresses both in turn.

Defendant seeks $3,850.00 for Mediation fees. Plaintiff challenged the cost as not authorized under NRS 18.[48] At the May 30, 2023, hearing, counsel confirmed that the mediation was voluntary. [49] After the Court allowed time for the parties to reach an agreement as to fees and costs, per the correspondence submitted to the Court on July 11, 2023, counsel withdrew the request for Mediator fees. Thus, the Court need not address the initial Mediator fee request.

[48] Plaintiff's Motion to Retax and Settle PWC's Amended Verified Memorandum of Costs DOC 414 at 5:5-18.
[49] May 30, 2023, Transcript DOC 448 at 72:19-73:14.

Defendant also seeks $1,226.00 in Messenger Services costs pursuant to NRS 18.005(17). Receipts were provided for: September 20, 2016, for $37.00; September 21, 2016, for $47.00; September 27, 2016, for $94.00; August 11, 2016, for $35.00; November 8, 2016, for $25.00; February 8, 2017, for $62.00; February 10, 2017, for $25.00; May 17, 2017, for $21.00; May 15, 2017, for $35.00; July 26-29, 2019, for $40.00; September 9-10, 2020, for $90.00; September 23, 2020, for $76.50; October 2, 2020, for $25.00; October 27-31, 2022, for $350.00; March 25-28, 2022, for $152.50; June 6-10, 2022, for $111.00. Plaintiff challenged the cost in its entirety as not authorized under NRS 18.[50] The Court finds that messenger fees are appropriate, per the statute, and supported by documentation for the hearings listed above and thus the Court awards $1,226.00.

**h. <u>Expert Witness Fees</u>**

Defendant seeks $814,286.98 in Expert Witness Fees for three experts. The amount sought is broken down as $84,655.50 for Joseph Leauanae; $36,584.25 for Arthur Dellinger; and $693,046.73 for Kenneth Harris. Plaintiff challenged the amount in its entirety. In the alternative, if fees were awarded, Plaintiff argued that costs should capped at $1,500.00 under NRS 18.005(5).[51] At the May 30, 2023, hearing, the Court set forth that the amount sought needed to be reduced given overlap with the tax court issues, general advice, benefit of video, and what the experts needed to specifically look at and do.[52] After the Court allowed time for the parties to reach an agreement as to fees and costs,

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[50] Plaintiff's Motion to Retax and Settle PWC's Amended Verified Memorandum of Costs DOC 414 at 5:5-18.

[51] Plaintiff's Motion to Retax and Settle PWC's Amended Verified Memorandum of Costs DOC 414 at 3:19-5:4. The Motion and all documents were provided to the Court prior to the Nevada Legislature's amendedments to the Statute and thus the prior statutory amount applied. Even utilizing the current 2023 statute, the Court's analysis would be the same.

[52] May 30, 2023 Transcript DOC 448 at 74:12-75:20.

per the correspondence submitted to the Court July 11, 2023, defense counsel agreed to reduce the fee sought for Harris by 50 percent (50%), to $346,523.36. Plaintiff's counsel still objected to that reduced amount.

In *Frazier v. Drake*, 131 Nev. 632, 650-51, 357 P.3d 365, 377-78 (Nev. Ct. App. 2015), the Court of Appeals set forth that awarding expert witness fees more than $1,500.00 per expert requires an analysis of various factors, where "not all of these factors may be pertinent to every request for expert witness fees in excess of $1,500 per expert under NRS 18.005(5), and thus, the resolution of such requests will necessarily require a case-by-case examination of appropriate factors":

> (1) the importance of the expert's testimony to the party's case;
> (2) the degree to which the expert's opinion aided the trier of fact in deciding the case;
> (3) whether the expert's reports or testimony were repetitive of other expert witnesses;
> (4) the extent and nature of the work performed by the expert;
> (5) whether the expert had to conduct independent investigations or testing;
> (6) the amount of time the expert spent in court, preparing a report, and preparing for trial;
> (7) the expert's area of expertise;
> (8) the expert's education and training;
> (9) the fee actually charged to the party who retained the expert;
> (10) the fees traditionally charged by the expert on related matters;
> (11) comparable experts' fees charged in similar cases; and,
> (12) if an expert is retained from outside the area where the trial is held, the fees and costs that would have been incurred to hire a comparable expert where the trial was held.

*Frazier v. Drake*, 131 Nev. 632, 650-51, 357 P.3d 365, 377-78 (Nev. Ct. App. 2015). The Court notes that there was no *Frazier* analysis provided in the

Verified Memorandum of Costs (DOC 417), nor the Amended Verified Memorandum of costs (DOC 424) beyond a footnote stating that the experts "have specialized and substantial knowledge in the foregoing field(s)," and that the cost was warranted because each expert "(1) prepared a comprehensive expert report, (2) sat for a deposition, and (3) testified at trial (and as such, incurred the additional time required to sufficiently prepare for both deposition and trial)" with the result being in Defendants' favor.[53] Nevertheless, PwC's Opposition to Plaintiff's Motion to Retax Costs (DOC 440) addressed the *Frazier* factors; and thus, the Court analyzes each as set forth below.

***i. The Court Finds That Most of the* Frazier *Factors Presented Are Met As To Expert Joseph Leauanae but Defendant Did Not Provide the Court With All the Required Information Pursuant to Frazier and Other Case Law and Thus, the Amount Sought Needs to Be Reduced.***

Defendant seeks $84,655.50 in expert fees for Joseph Leauanae. Mr. Leauanae is a business appraiser and forensic accountant with over 25 years of experience in financial evaluation and litigation.[54] Mr. Leauanae is a CPA in Nevada, Utah, and California, and has additional certifications in information technology, financial forensics, and as a fraud examiner.[55] The nature of the work performed by Mr. Leauanae involved providing an opinion on economic damages of Plaintiff.[56] Defendant set forth that Mr. Leauanae drafted an expert report, rebuttal report, was deposed, prepared demonstrative exhibits, and

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[53] Pricewaterhouse Coopers LLP's Verified Memorandum of Costs DOC 417 at 3 n.1; Pricewaterhouse Coopers LLP's Amended Verified Memorandum of Costs DOC 422 at 3 n.2.
[54] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 21:5-14.
[55] *Id.*
[56] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 21:17-18.

testified at trial.[57] No further details were provided in the analysis. The reports and testimony were not repetitive as the three experts were opining from three different fields of expertise. Defendant set forth that the independent investigation performed by Mr. Leauanae involved review of documents, pleadings, production, discovery, representations to the IRS, Plaintiff's expert report on damages, and deposition transcripts.[58] As to the time spent preparing a report, preparing for trial, and in court, Mr. Leauanae spent 317.50 hours at a rate of $375.00 per hour in 2020 through 2021, and $415.00 per hour in 2022, and provided invoices as to the time.[59] Defendant provided nothing to show the fee charged was in accordance with those traditionally charged by the expert in related matters as it instead stated that, "this Court is well positioned to determine the reasonableness of the same based on its vast experience with similar experts in complex civil litigation matters as well as the submitted invoices."[60] While the Court has addressed numerous experts in a wide variety of settings, *Frazier* and the case law regarding costs in general, *see e.g. In re Dish Network,* 133 Nev. 438, 452, 401 P.3d 1081, 1093 (2017); *Cadle v. Woods & Erickson*, *LLP*, 131 Nev. 114, 120-121, 345 P.3d 1049, 1054 (2015); *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352-53, 971 P.2d 383, 386 (1998); *Fairway Chevrolet Company v. Kelley*,484 P.3d 276 (Nev. 2021) (unpublished) all set forth that it is the responsibility of the party who is seeking the costs to provide the documentation and explanation necessary for the Court to fully analyze any costs sought. In this case, Defendant has failed to provide any

[57] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 21:20-22:1.
[58] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 22:21-23.
[59] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 24:11-15; 25:3-4.
[60] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 25:9-15.

information related to multiple *Frazier* factors. As a result of Defendant's decision to provide the Court only limited information, the Court can only take into account what was provided and reduces the cost allowed for Mr. Leauanae to $46,655.50.

### *ii. The Court Finds That the Frazier Factors Are Met As To Expert Arthur Dellinger*

Defendant seeks $36,584.25 in expert fees for Arthur Dellinger. Mr. Dellinger is a CPA with 53 years of experience with a specialty in tax matters.[61] As to the nature of the work performed, Dellinger provided an opinion on whether the standards for disclosures of errors applies to former clients.[62] Defendant set forth that Mr. Dellinger drafted an expert report, rebuttal report, was deposed, prepared demonstrative exhibits, testified at trial, reviewed standards for tax services, conducted research, and reviewed information on the case provided by counsel.[63] The reports and testimony were not repetitive as the three experts were opining from three different fields of expertise. Defendant also sets forth that the independent investigation performed by Mr. Dellinger was that he "extensively reviewed the statements on standards for tax services, conducted research, and reviewed case information provided by counsel".[64] Unlike Mr. Leauanae, however, Defense counsel did provide support of showing that the expert's testimony was of significant importance to the decision. Specifically, Defendant pointed to the Findings of Fact and Conclusions of Law and stated that it referenced the testimony of Mr. Dellinger on the standard of professional

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[61] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 20:7-12.
[62] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 21:16-17.
[63] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 21:20-22:4.
[64] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 22:19-20.

care and Statements on Standards for Tax Services."[65] As to the time spent preparing a report, preparing for trial, and in court, Mr. Dellinger spent 72.45 hours at a rate of $500.00 per hour, and provided invoices as to the time.[66] Defendant provided nothing to show the fee charged was in accordance with those traditionally charged by the expert in related matters. Instead, it again set forth that "this Court is well positioned to determine the reasonableness of the same based on its vast experience with similar experts in complex civil litigation matters as well as the submitted invoices."[67] Nevertheless, to support that the fee was comparable to what would have been incurred by a local expert, Defendant compared Dellinger's rate of $500.00 to Plaintiff's local expert, Greene's, rate of $400.00 who has been practicing for roughly 15 less years than Dellinger.[68] As a result of the more detailed analysis, the Court finds that there is enough support, pursuant to the case law and given the nature of the instant case, to award Defendant the entirety of the costs sought on behalf of Mr. Dellinger in the amount of $36,584.25.

### *iii. The Court Finds That the Frazier Factors and Applicable Case Law Warrant a Reduction As to Expert Kenneth Harris*

Defendant initially sought $693,046.73 in expert fees for Kenneth Harris, and in the correspondence submitted to the Court wherein the parties sought to reach an agreement as to fees and costs Defendants had agreed to reduce the amount by 50 percent (50%) to $346,523.36. Mr. Harris has practiced in tax law

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[65] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 23:15-16.
[66] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 24:6-10; 25:1.
[67] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 25:9-15.
[68] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 26:7-9.

for 35 years, with experience in mergers, acquisitions, spin offs, divestitures, and internal reorganizations.[69] Mr. Harris also teaches tax law at Northwestern School of Law.[70] As to the nature of the work performed, Defendant sparsely provided that Mr. Harris gave an opinion as to Defendant's conduct in advising Plaintiff on the transaction.[71] Defendant set forth the same description for all of its experts -- that Mr. Harris drafted an expert report, rebuttal report, was deposed, prepared demonstrative exhibits, and testified at trial.[72] No further details were included in Defendant's *Frazier* analysis as to this factor. Defendant then addressed that the reports and testimony were not repetitive as the three experts were opining from three different fields of expertise. In support of showing that the expert's testimony was of significant importance to the decision, Defendant pointed to the Findings of Fact and Conclusions of Law referencing the testimony of: "Mr. Harris twelve separate times when: (1) analyzing standard tax industry terms, (2) distinguishing facts between the Westside, Enbridge, and Marshall transactions, (3) interpreting Notice 2008-111, (4) interpreting of the Statements on Standards for Tax Services, (5) and analyzing PwC's confidentiality obligations under applicable standards."[73] It is asserted by Defendant that Mr. Harris spent 1,089.90 hours preparing a report, preparing for trial, and in court at a rate of $775.00 per hour. It did provide invoices as to the time, as noted in the Opposition, and it also contended that Harris also utilized lower billing associates at $525.00 per hour.[74] It is not clear to the Court the role of the "billing

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[69] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 20:13-21:4.
[70] *Id.*
[71] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 21:18-19.
[72] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 21:20-22:1.
[73] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 23:11-14.
[74] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at

associates" or how those rates could be justified, pursuant to Nevada law, given the limited billing details provided. Defendant also failed to provide anything to show the fee charged was in accordance with those traditionally charged by the expert in related matters, instead relying on the assertion that "this Court is well positioned to determine the reasonableness of the same based on its vast experience with similar experts in complex civil litigation matters as well as the submitted invoices."[75] Next, to support that the fee was comparable to what would have been incurred by a local expert, Defendant compared Harris' rate of $775.00, and experience as an attorney since 1985, to its own retained counsel Mr. Byrne's rate of $750.00 who has been practicing since 1988.[76] The comparison provided by Defendant was a rate for an attorney, and while the Court acknowledges Mr. Harris is an attorney, no comparison was provided for what is the appropriate rate for an expert standard who plays a different role than counsel for the party. In short, there was no analysis as what a comparable attorney acting in an expert capacity would charge in Nevada or Clark County. Considering the invoices provided, the fee summary description for Mr. Harris is listed under "Lawyer" and other lawyers at the firm are also listed as billing on the matter. Based on the limited analysis given of the foregoing *Frazier* factors, the Court finds it appropriate to reduce the expert fee sought for Mr. Harris.

For example, some of the items in the invoices contain insufficient detail for the Court to consider, appear to be representation work beyond the scope necessary for an expert opinion, appear to be other parties conducting review for the expert, or appear to be duplicative intra-office conferencing with the expert,

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24:16-20; 25:5-6.

[75] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 25:9-15.

[76] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 26:5-7.

as further discussed below. The invoices reflect the billings of Mr. Harris (KLH) and other billing entries are included billed by Andrea M. Despotes (AMD) and Matthew Koenders (KM) yet there is nothing to provide the Court how three attorneys were needed to prepare an expert report particularly when there were other experts that presented opinions that overlapped but were not duplicative.

The following entries show billing for intra-office communications and, in some instances, duplicative billing for the same intra-office meeting. On August 6, 2019, MK billed $1,207.50 to conference with KLH as well as to review the complaint, research, and analysis, and did not parse out the amount of time spent conferring with KLH. Then on August 26, 2019, AMD billed $1,840.00 to review the file, conduct research, and confer with KLH; again, not breaking down the amount of time spent for inter-office conferencing. On August 27, 2019, MK again billed $1,312.50 to again review the complaint, analysis, and confer with KLH. On August 30, 2019, there are billing entries for KLH for conferencing with MK, as well as a duplicative $525.00 entry for MK for conferencing with KLH. On September 5, 2019, MK billed $1,050.00 to review the record and confer with KLH. On September 16, 2019, AMD billed $2,760.00 for an office conference with KLH and work on research, with no breakdown for the timing as to each. On September 18, 2019, AMD billed $172.50 for an office conference. On February 20, 2020, and February 27, 2020, MK billed $787.50 and $2,467.50, respectively, to review record and analysis and confer with KLH; again, with no breakdown of the time spent on intra-office conference. Then on March 21, 2020, and March 31, 2020, MK billed $1,680.00 and $367.50, respectively, to work on the draft expert report, research, and conference with KLH with no temporal breakdown. On April 8, 2020, and April 12, 2020, AMD billed $230 and $57.50, respectively, to conference with KLH. On April 13, 2020, there are billing entries for KLH for conferencing with MK, as well as a duplicative $787.50 entry for MK for

conferencing with KLH. Similarly, on April 14, 2020, there are billing entries for KLH conferencing with MK on the report, and a duplicative entry for $1,470.00 MK to conference with KLH and review and revise the draft report, the time is not parsed out for the activities. On April 20, 2020, and April 21, 2020, AMD billed $115.00 for both entries to conference with KLH. On April 27, 2020, MK billed $1,207.50 for an entry covering work on a draft report and conferencing with KLH, with no breakdown of the time spent on each task. On May 7, 2020, MK billed $210.00 to conference with KLH. On June 5, 2020, KLH billed to conference with AMD, and there was a duplicative billing entry by AMD for $1,207.50 to conference with KLH and work on the rebuttal report, with no breakdown of the time allotted to each activity.

Some billed activities appear to be representation work beyond the scope necessary of an expert opinion and the entries do not contain sufficient detail for the Court to fully evaluate the distinction between expert tasks and tasks that would be handled by counsel. For example, on November 16, 2020, KLH billed $630.000.00 to review a Motion in Limine pertaining to expert testimony, and then on November 19, 2020, billed $232.50 for "research re: MIL issue."

Additionally, there were billing entries for drafting the expert report and rebuttal report performed by parties that were not expert Mr. Harris. There was no information provided as to the nature or scope of the work, whether this work was duplicative, or what role each person had in the preparation of the report for the Court to assess in its review of the records. On January 24, 2020, AMD billed $632.50 for a generic entry of "worked on matters re: expert opinion." On February 4, 2020, AMD billed $920.00; on February 7, 2020, AMD billed $805.00; on February 11, 2020, AMD billed $2,127.50; on February 12, 2020, AMD billed $1,782.50; on February 14, 2020, AMD billed $115.00; on February 19, 2020, AMD billed $977.50; on February 21, 2020, AMD billed $3,220.00; on

February 25, 2020, AMD billed $2,300.00; on February 26, 2020, AMD billed $2,507.50; on February 28, 2020, AMD billed $2,817.50; all of the foregoing entries were for a generic description of "worked on expert opinion matter." It is unclear to the Court whether these were part of preparing the opinion or whether they were other actions associated with the file as there is minimal description of the work given.

Then, turning to entries where it was apparent the work was pertaining to the report, on March 2, 2020, KLH billed $4,107.50 and on March 5, 2020, billed $1,007.50 to research and work on the expert report. On March 6, 2020, KLH billed $5,580.00 to work on the expert report while MK also billed $1,942.50 that same day to work on the draft report and research. Similarly, on March 7, 2020, KLH billed $2,480.00 to work on the expert report and MK also billed $1,312.50 to work on the draft. Thereafter, KLH billed $1,162.50 for "work on expert report" on March 8, 2020; $5,037.50 on March 9, 2020; $5,435.00 on March 10, 2020; $2,325.00 on March 11, 2020; $3,100.00 on March 12, 2020; $3,100.00 on March 13, 2020; $1,550.00 on March 14, 2020; $2,945.00 on March 15, 2020; $4,262.50 on March 16, 2020; $4,107.50 on March 17, 2020; $4,262.50 on March 18, 2020; $4,650.00 on March 19, 2020; $4,495.00 on March 20, 2020; $3,875.00 on March 21, 2020; $3,875.00 on March 22, 2020; $5,347.50 on March 23, 2020; $5,192.50 on March 24, 2020; $3,487.50 on March 25, 2020; $4,650.00 on March 26, 2020; $4,650.00 on March 27, 2020; $5,037.50 on March 28, 2020; $3,875.00 on March 29, 2020; $4,650.00 on March 30, 2020; and $3,487.50 on March 31, 2020. Overlapping many of those same dates, MK billed $1,680.00 on March 21, 2020, (which was already referenced above for overlapping with intra-office conferencing with KLH); $1,050.00 on March 22, 2020; $787.50 on March 23, 2020; $1,470.00 on March 24, 2020; $1,312.50 on March 27, 2020; $3,150.00 on March 28, 2020; $3,937.50 on March 29, 2020;

$1,995.00 on March 30, 2020; and $367.50 on March 31, 2020, (this entry was also accounted for above for the overlapping conference with KLH), all for generic descriptions of "work on draft report."

KLH then billed for revisions to the report on April 1, 2020; April 2, 2020; April 11, 2020; and April 20, 2020, in the amounts of $2,945.00, $2,092.50, $1,395.00, and $1,705.00 respectively. For further work on the expert report, KLH billed $1,782.50 on April 13, 2020; $3,022.50 on April 14, 2020; $1,162.50 on April 15, 2020; $775.00 on April 16, 2020; $2,712.50 on April 17, 2020; $3,100.00 on April 19, 2020; $3,875.00 on April 20, 2020; $3,642.50 on April 21, 2020; $3,410.00 on April 22, 2020; $2,712.50 on April 23, 2020; $4,107.50 on April 24, 2020; $3,177.50 on April 27, 2020; $1,550.00 on April 28, 2020; and $1,937.50 on April 29, 2020. Overlapping many of those same dates, MK billed $787.50 on April 13, 2020 (addressed above for the entry also covering intra-office conference); $1,470.00 on April 14, 2020; $945.00 on April 25, 2020; and $1,207.50 on April 27, 2020 (addressed above for the entry overlapping intra-office conference as well), all to "work on draft report." AMD also billed $345.00 on April 15, 2020; $115.00 on April 17, 2020; $3,392.50 on April 22, 2020; $2,875.00 on April 23, 2020; $3,162.50 on April 24, 2020; $4,772.50 on April 25, 2020; $3,622.50 on April 26, 2020; $4,657.50 on April 27, 2020; and $3,277.50 on April 28, 2020, for generic entries of "worked on opinion draft."

KLH then made further revisions to the report as part of billing blocks, including multiple other activities without distinguishing the time spent specifically on the report for $2,170.00 on May 13, 2020, and $1,705.00 on May 15, 2020. KLH billed $1,937.50 on May 30, 2020; $2,325.00 on June 1, 2020; $3,255.00 on June 2, 2020; $2,170.00 on June 3, 2020; $3,487.50 on June 5, 2020; $3,100.00 on June 7, 2020; $3,642.50 on June 8, 2020; $3,100.00 on June 9, 2020; $2,712.50 on June 10, 2020; $3,487.50 on June 11, 2020; $3,487.50 on June 12,

2020; $3,100.00 on June 13, 2020; $3,487.50 on June 14, 2020; $2,712.50 on June 15, 2020; $1,782.50 on June 16, 2020; $2,092.50 on June 17, 2020; $3,875.00 on June 18, 2020; $3,100.00 on June 19, 2020; and $1,705.00 on June 24, 2020, to work on his rebuttal report and make revisions thereto. Some of the foregoing entries were also lumped with activities such as reviewing production without breaking down the time spent for the Court to consider. Again, overlapping many of these same dates, there were entries by other persons for work on the expert rebuttal report. There were also billing entries by MK for work on the rebuttal report of $1,312.50 on June 28, 2020, and $2,782.50 on June 29, 2020. AMD billed $575.00 on June 1, 2020; $2,645.00 on June 2, 2020; $2,645.00 on June 3, 2020; $1,207.50 on June 5, 2020; $2,990.00 on June 9, 2020; $2,645.00 on June 10, 2020; $2,875.00 on June 11, 2020; $3,162.50 on June 12, 2020; $2,760.00 on June 13, 2020; $3,392.50 on June 14, 2020; $172.50 on June 15, 2020; $690.00 on June 18, 2020; $1,035.00 on June 19, 2020; $1,035.00 on June 23, 2020; $920.00 on June 24, 2020; $1,610.00 on June 26, 2020; $632.50 on June 27, 2020; and $2,472.50 on June 28, 2020. The Court notes that in addition to the foregoing entries that specifically referenced work on the report, and as highlighted above, AMD frequently billed generic entries for “work on expert matter” and it is not clear for the Court to assess the work done and whether it was in preparation of the report or another matter. On July 1, 2020, KLH billed $1,085.00 to review comments and edits to the rebuttal report; on July 2, 2020, KLH billed $1,162.50 to revise the rebuttal report; and on July 7, 2020, KLH billed $1,937.50 to conference with AMD and work on final edits to the rebuttal report for which AMD also billed $575.00 to work on “expert opinion matters.”

While the Court appreciates that the testimony was important to the Defendant’s case, and it is cited as being an aid to the Court’s decision, it is

unclear how the expert report and rebuttal reports alone could be billed at over $302,400.00, including work by two persons who were not the expert himself, and have that amount be considered "reasonable." The Court fully considers the nature of the case, the sophisticated parties, and the complex matters involved. The Court also fully considers that due to the nature of the invoices, some of the matters have other activities included in the line item accounting for the total time billed for that entry, but also notes that there are many other generic entries that could have involved billing for work on the report that were unclear, and the foregoing entries were only the ones that it was clear to the Court that the work done pertained to the actual reports.

Next, the Court also considers the billing entries pertaining to Mr. Harris' participation in trial. On November 1, 2022, KLH billed $3,875.00 to review the transcript of the first day of trial and prepare for testimony; AMD also billed $3,852.50 that day to review the transcript, research tax issues, prepare notes for KLH, and partake in "related expert preparation activities." On November 2, 2022, KLH billed $5,037.50 to review the transcript of the second day of trial, prepare for testimony, and travel to Las Vegas; AMD also billed $3,450.00 that day to again review the transcript, research tax issues, prepare notes for KLH, and "related expert preparation activities." On November 3, 2022, KLH billed $6,200.00 to attend trial; AMD billed $3,852.50 to review the transcript, research tax issues, prepare notes for KLH, and "related expert preparation activities." On November 4, 2022, KLH billed $5,812.50 to prepare in the morning and then attend trial in the afternoon; AMD billed $2,530.00 for the same activities articulated in the preceding entries. On November 5, 2022, KLH billed $6,200.00 to prepare for cross examination. On November 6, 2022, KLH billed $5,425.00 to again prepare for cross examination; AMD billed $2,587.50 that day for the same activities articulated in the preceding entries. On November 7, 2022, KLH billed

$6,975.00 to attend trial and prepare for direct testimony; AMD billed $3,852.50 for the same activities articulated in the preceding entries. On November 8, 2022, KLH billed $6,975.00 to attend trial and prepare for direct testimony. On November 9, 2022, KLH billed $6,975.00 to attend trial and give direct and cross examination testimony. On November 10, 2022, KLH billed $3,875.00 to attend trial and give cross examination testimony, as well as billed travel time. Upon review, the Court notes that Mr. Harris testified 4 hours and 44 minutes over two days at the trial, and pursuant to applicable law the Court takes that into account in ascertaining what is the reasonable and necessary cost amount that Plaintiff should be responsible for.

In sum, while the Court is appreciative of the extent of Mr. Harris' expertise, based on the limited information provided by Defendant, the requirements of Nevada case law, and the analysis of entries set forth above, the Court finds that costs to be borne by Plaintiff associated with Mr. Harris should be reduced to $160,000.00

As noted above, while Defendant's prevailed on their 2021 Offer of Judgment which would entitle them to costs after said Offer was declined, that amount is subsumed in the NRS 18 analysis. Accordingly, there are no additional costs that the Court need address.

**ORDER**

Having reviewed the papers and pleadings on file herein, including, but not limited to, the pleadings, exhibits and affidavits; having heard oral arguments of the parties, this Court makes the following ruling:

IT IS, THEREFORE, HEREBY ORDERED, ADJUDGED, and DECREED that Defendant Pricewaterhouse Coopers LLP's Motion For Attorneys' Fees and Costs (DOC 427) is granted in part and denied in part without prejudice as follows:

The Court finds it appropriate to award Defendant Attorney's Fees for the work of Snell & Wilmer in the amount of $407,018.80.

The Court finds it appropriate to award Defendant Attorney's Fees for the work of Bartlit Beck in the amount of $1,695,735.59.

The Court further finds it appropriate to award costs, as set forth above pursuant to NRS 18 without being duplicative of NRCP 68 in the amount of $322,955.91.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiff Tricarichi's Motion To Retax and Settle PwC's Amended Verified Memorandum Of Costs (DOC 414) is granted in part and denied in part without prejudice consistent with the Court's ruling on Defendant Pricewaterhouse Coopers LLP's Motion For Attorneys' Fees And Costs as set forth herein.

IT IS SO ORDERED.

DATED this 25th day of August, 2023.

**Dated this 25th day of August, 2023**

Joanna S Kishner

HON. JOANNA S. KISHNER
DISTRICT COURT JUDGE

**AF1 140 9206 BF45**
**Joanna S. Kishner**
**District Court Judge**

**CERTIFICATE OF SERVICE**

I hereby certify that on or about the date filed, a copy of this Order was served via Electronic Service to all counsel/registered parties, pursuant to the Nevada Electronic Filing Rules, and/or served via in one or more of the following manners: fax, U.S. mail, or a copy of this Order was placed in the attorney's file located at the Regional Justice Center:

/s/ Tracy L. Cordoba
TRACY L. CORDOBA-WHEELER
Judicial Executive Assistant

**JOANNA S. KISHNER**
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

**CSERV**

DISTRICT COURT
CLARK COUNTY, NEVADA

| | |
|---|---|
| Michael Tricarichi, Plaintiff(s)<br><br>vs.<br><br>PricewaterhouseCoopers LLP, Defendant(s) | CASE NO: A-16-735910-B<br><br>DEPT. NO. Department 31 |

**AUTOMATED CERTIFICATE OF SERVICE**

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

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EXHIBIT PAGE ONLY

# EXHIBIT 15

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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 GRANTING IN PART AND DENYING IN PART DEFENDANT PRICEWATERHOUSECOOPERS LLP'S MOTION FOR ATTORNEYS' FEES AND COSTS AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF TRICARICHI'S MOTION TO RETAX AND SETTLE PWC'S AMENDED VERIFIED MEMORANDUM OF COSTS**

PLEASE TAKE NOTICE that the *Order Granting in Part and Denying in Part Defendant PricewaterhouseCoopers LLP's Motion for Attorneys' Fees and Costs and Order Granting in Part and Denying in Part Plaintiff Tricarichi's Motion to Retax and Settle PWC's Amended Verified Memorandum of Costs* was entered in the above-captioned matter on August 25, 2023, a copy of which is attached hereto as Exhibit 1.

Dated: August 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 August 28, 2023, I caused to be served a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT PRICEWATERHOUSECOOPERS LLP'S MOTION FOR ATTORNEYS' FEES AND COSTS AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF TRICARICHI'S MOTION TO RETAX AND SETTLE PWC'S AMENDED VERIFIED MEMORANDUM OF COSTS** upon the following by the method indicated:

☐ **BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail addresses set forth below and/or included on the Court's Service List for the above-referenced case.

☐ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.

☐ **BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.

☐ **BY PERSONAL DELIVERY:** by causing personal delivery via messenger service of the document(s) listed above to the person(s) at the address(es) set forth below.

☒ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

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*/s/ Lyndsey Luxford*
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4876-0543-7052

# EXHIBIT 1

ELECTRONICALLY SERVED
8/25/2023 4:27 PM

Electronically Filed
08/25/2023 4:26 PM
CLERK OF THE COURT

**ORDR**

DISTRICT COURT
CLARK COUNTY, NEVADA

| | |
|---|---|
| MICHAEL A. TRICARICHI, an individual<br><br>Plaintiff,<br><br>vs.<br><br>PRICEWATERHOUSECOOPERS LLP,<br><br>Defendant. | Case No.: A-16-735910-C<br><br>Dept. No.: XXXI<br><br>**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT PRICEWATERHOUSE COOPERS LLP'S MOTION FOR ATTORNEYS' FEES AND COSTS**<br><br>**and**<br><br>**ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF TRICARICHI'S MOTION TO RETAX AND SETTLE PWC'S AMENDED VERIFIED MEMORANDUM OF COSTS** |

## I. FACTUAL BACKGROUND

This matter came on for hearing on May 30, 2023, on Defendant Pricewaterhouse Coopers LLP's Motion For Attorneys' Fees And Costs (DOC 427) and Plaintiff Tricarichi's Motion to Retax and Settle PWC's Amended Verified Memorandum of Costs (DOC 414). Present at the hearing was Scott F. Hessell, Esq., and Ariel Clark Johnson, Esq. for Plaintiff Tricarichi; and Bradley Austin, Esq., Patrick G. Byrne, Esq., and Chris Landgraff, Esq., for Defendant Pricewaterhouse Coopers (hereinafter PwC). At the hearing, the parties agreed

JOANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155



Case Number: A-16-735910-B

to meet among themselves to determine if there could be agreement on outstanding fee and cost issues. The parties also agreed to provide the written positions of the parties post-hearing to the Court. The Court, having reviewed the papers and pleadings on file herein, having heard oral arguments of the parties, and then reviewed the additional information provided by the parties, makes the following ruling:

The bench trial commenced on October 31, 2022, and the trial concluded on November 10, 2022. At the trial, Ariel C. Johnson, Esq. of Hutchison & Steffen PLLC appeared for Plaintiff, along with *pro hac vice* counsel Scott F. Hessell, Esq. and Blake Sercye, Esq. of Sperling & Slater, P.C. Patrick G. Byrne, Esq. and Bradley T. Austin, Esq., of Snell & Wilmer LLP, and *pro hac vice* counsel Mark L. Levine, Esq., Christopher D. Landgraff, Esq., and Katharine A. Roin, Esq., of Bartlit Beck, LLP, appeared for Defendant PwC.

The trial encompassed approximately nine trial days as well as additional motion hearing days. During the course of the bench trial, four experts were called both in person and via video. At the conclusion of the trial, the Court set forth its ruling in its Findings of Fact and Conclusions of Law.[1] In sum, the Court found in favor of Defendant PwC and that "Plaintiff Tricarichi shall take nothing from his Complaint"[2] as there was no evidence proving three elements of his claim and due to the single cause of action being barred by both Nevada and New York statute of limitations.[3] After the ruling had been entered, and based on stipulations by the parties, Defendant filed its Memorandum of Costs and its Amended Memorandum of Costs as well as a Motion for Attorney Fees and Costs. Plaintiff

[1] February 9, 2023, Findings of Fact and Conclusions of Law, DOC 416 at ¶100.
[2] Findings of Fact Conclusions of Law at P. 41, DOC 416, filed February 9, 2023; Notice of Entry of Order thereof, DOC 420, filed February 22, 2023.
[3] Findings of Fact Conclusions of Law, DOC 416 at ¶¶ 115, 130, 132, 137, 148, 161.

filed his Motion to Retax and Oppositions to Defendant's Motion. The pleadings were timely filed.

## II. Defendant is Entitled in Part to Reasonable Attorney Fees Pursuant to Applicable Law Based on its Second Offer of Judgment

"Ultimately, the decision to award attorney fees rests within the district court's discretion, and we review such decisions for an abuse of discretion." *O'Connell v. Wynn*, 134 Nev. 550, 554, 429 P.3d 664, 668 (2018); *Frazier v. Drake*, 131 Nev. 632, 641-42; 357 P.3d 365, 372 (2015). Further, as reiterated by the Nevada Appellate Court in *O'Connell v. Wynn*, 134 Nev. 550, 429 P.3d 664 (2018), "[a] party may seek attorney fees when allowed by an agreement, rule, or statute. *See* NRS 18.010 (governing awards of attorney fees); *RTTC Commc'ns, LLC v. The Saratoga Flier, Inc.*, 121 Nev. 34, 40, 110 P.3d 24, 28 (2005) (noting that "a court may not award attorney fees absent authority under a specific rule or statute")." Here, Defendant seeks fees, pursuant to Nevada Rules of Civil Procedure 54(d), which provides "[a] claim for attorney fees must be made by motion. The court may decide a post judgment motion for attorney fees despite the existence of a pending appeal from the underlying final judgment." Defendant also seeks fees pursuant to Nevada Rules of Civil Procedure 68(f) which directs that:

> "If the offeree rejects an offer and fails to obtain a more favorable judgment: … (B) the offeree must pay the offeror's post-offer costs and expenses, including a reasonable sum to cover any expenses incurred by the offeror for each expert witness whose services were reasonably necessary to prepare for and conduct the trial of the case, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney fees, if any be allowed, actually incurred by the offeror from the time of the offer. If the offeror's attorney is collecting a contingent fee, the amount of any attorney fees awarded to the party for whom the offer is made must be deducted from that contingent fee.

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DISTRICT JUDGE
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Defendant made Plaintiff an Offer of Judgment on September 25, 2019, and then made a second Offer of Judgment October 6, 2021.[4] The parties agree that the 2019 update to the Nevada Rules of Civil Procedure apply to both Offers of Judgment. Neither Offer was accepted by Plaintiff, and the case proceeded to trial in October and November 2022. Following the conclusion of the bench trial, the Court issued its Findings of Fact and Conclusions of Law on February 9, 2023, entering Judgment in favor of Defendant PwC.[5] The Order continued that "any request for fees and costs shall be handled via separate timely-filed Motion."[6] As noted, the Court finds that Defendant has met the timeliness standards to seek reasonable fees pursuant to Nevada Rules of Civil Procedure 54(d) and 68(f).

As the fee request was timely, the Court next considers whether Defendant has met the factors necessary pursuant to NRCP 68 and applicable case law including *Beattie v. Thomas*, 99 Nev. 579, 588-89, 688 P.2d 268, 274 (1983) with respect to each of its Offers of Judgment. Pursuant to *Beattie* and its progeny, the Court considers the following factors to determine whether attorneys' fees are appropriate:

> (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendant's offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount.

*Beattie v. Thomas*, 99 Nev. 579, 588-89, 688 P.2d 268, 274 (1983).

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[4] Both Offers of Judgment are provided as Exhibits 1 and 2 in the Appendix of Exhibits to the Motion for Attorney's Fees and Costs filed March 15, 2023, with electronic service stamps reflecting the dates of service (DOC 428). Each Offer of Judgment was for $50,000.00.

[55] Findings of Fact, Conclusions of Law, DOC 416 at ¶¶ 115, 130, 132, 137, 148, 161.

[6] Findings of Fact, Conclusions of Law, DOC 416 at 41:6-7.

### *A. The Court Finds That Fees Are Not Appropriate Under The 2019 Offer of Judgment*

As there were two Offers of Judgment, the Court addresses each of them in turn. With respect to the 2019 Offer, the Court has to consider what was known about the claims and defenses at the time the offer was made as well as other *Beattie* factors.

#### 1. **The Court Finds That the First *Beattie* Factor Weighs in Favor of Plaintiff**.

First, when considering whether Plaintiff's claim was brought in good faith, the Court sees that at the time of the 2019 offer, while Plaintiff had lost on Summary Judgment on the statute of limitations on the 2003 claim, the 2008 claim was still in the early stages of the litigation from a timing standpoint as it had been newly added to the Complaint.[7] This factor weighed in favor of it being pursued in good faith by Plaintiff.

#### 2. **The Court Finds That the Second *Beattie* Factor Weighs in Favor of Defendant**.

When analyzing the second factor, the Court looks to whether Defendant's 2019 Offer of Judgment was reasonable and in good faith, both in its timing and amount. As to timing, the Court considers that the Offer was made following the Summary Judgment ruling on the 2003 claim.[8] The 2008 claim was just beginning in the case.[9] At that time, the limitation of liability issue had not been resolved either.[10] Accordingly, at the time the Offer was made, given the status of the case and what was known by Defendant, the timing component was reasonable.

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[7] May 30, 2023, Hearing Transcript at 56:6-16.
[8] May 30, 2023, Hearing Transcript at 56:20-23.
[9] May 30, 2023, Hearing Transcript at 56:23-24.
[10] May 30, 2023, Hearing Transcript at 56:23-57:2.

As to the amount offered of $50,000.00, the Court also sees that amount as reasonable and in good faith because $50,000.00 was consistent with the limitation of liability which was an issue that had not yet been resolved.[11] Thus, the second factor would weigh in favor of Defendant's offer being both reasonable and in good faith.

**3. The Court Finds That the Third *Beattie* Factor Weighs in Favor of Plaintiff.**

Next, the Court considers whether Plaintiff's decision to reject the Offer and proceed to trial was grossly unreasonable or in bad faith. Regardless of whether the Court looks at what issues actually went to trial, or could have gone to trial from a September 2019 lens before the statute of limitation issue was decided, or from the lens of considering Summary Judgment had been granted on the 2003 claim, and what the risk then was of the 2008 claim, the Court finds the factor weighs in favor of Plaintiff.[12] At this juncture, there were appeal and writ opportunities available; the 2008 claim was still in its infancy in this case.[13] The decision to reject the Offer at that time was not grossly unreasonable or in bad faith as there were still other avenues.

**4. The Court Need Not Reach the Fourth *Beattie* Factor.**

Lastly, the Court would consider whether the fees sought by the Offeror are reasonable and justified in amount. Here, though, the Court finds it does not need to address whether the fees sought were reasonable and justified as two of the

[11] May 30, 2023, Hearing Transcript at 56:20-57:2.
[12] May 30, 2023, Hearing Transcript at 57:3-58:25.
[13] May 30, 2023, Hearing Transcript at 57:3-58:25.

three preceding *Beattie* factors weighed in favor of Plaintiff. In sum, the Court finds that fees would *not* be appropriate under the 2019 Offer of Judgment.[14]

### *B. The Court Finds That Fees Are Appropriate Under the 2021 Offer of Judgment*

The Court next considers the 2021 Offer of Judgment which was also for $50,000.00 exclusive of fees, interest, and costs to determine if that Offer meets the requisite criteria to impose fees against Plaintiff.

#### 1. **The Court Finds That the First *Beattie* Factor Weighs in Favor of Defendant.**

The Court first considers whether the Plaintiff's claim was brought in good faith. The Court finds that at the time of the 2021 Offer, there was an existing ruling from the Nevada Supreme Court and the prior the Summary Judgment ruling on the 2003 claim. Further, the parties had the intervening time to flush out the issues that eventually went to trial. Thus, given the posture of the remaining claim, the Court finds that the first factor weighs in favor of Defendant.[15]

#### 2. **The Court Finds That the Second *Beattie* Factor Weighs in Favor of Defendant**.

The Court next looks to whether the 2021 Offer was reasonable and in good faith in both its timing and amount. As to amount, the Court considers that there was the issue of the same limitation of liability as with the 2019 Offer; and thus, the $50,000.00 would still be appropriate in light of the matters still at issue.[16] The Court also evaluated the nature of the claims including that it was uncontested in the case that there was no work done by PwC in the intervening five years between

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[14] May 30, 2023, Hearing Transcript at 59:1-6.
[15] May 30, 2023, Hearing Transcript at 60:3-8.
[16] May 30, 2023, Hearing Transcript at 60:9-17.

Plaintiff's 2003 and 2008 issues. The Court also had to look at the fact that Plaintiff was premising his liability claim on potential duties he asserted PWC owed him retrospectively without there being any duty triggered from actual work performed.[17] The 2021 Offer also followed the Nevada Supreme Court's ruling in Defendant's favor pertaining to that limitation of liability, along with the prior Summary Judgment on the 2003 claim. In light of the procedural posture and facts, the Court finds that the timing of the 2021 Offer of Judgment was in good faith.[18] The second factor, thus, weighs in favor of Defendant.

**3. <u>The Court Finds That the Third *Beattie* Factor Weighs in Favor of Defendant.</u>**

Then the Court must consider whether the Plaintiff's decision to reject the Offer and proceed to trial was grossly unreasonable or in bad faith. Here, the Court does find that the rejection of the 2021 Offer was grossly unreasonable. At the time of the 2021 Offer, there was the benefit of knowledge of all of the proceedings in the tax court and other courts up to that point and Plaintiff also had the benefit of the opinions of top tax experts in the field.[19] The Court must also consider if Plaintiff had a reasonable expectation based on the evidence known, whether he would meet his burden would at trial. At the time of the 2021 Offer, Plaintiff was aware of at least three hurdles. First, there was a statute of limitations issue. Second, even if duty, breach, causation, and damages were proven, then Plaintiff would still need to prove a type of retrospective fraud. Third, per the agreement, Plaintiff would also

[17] May 30, 2023, Hearing Transcript at 60:23-61:5.
[18] May 30, 2023, Hearing Transcript at 60:9-61:6.
[19] May 30, 2023, Hearing Transcript at 61:7-61:18.

need to meet the burden of establishing gross negligence.[20] Plaintiff also was pursuing an action premised on the finding of a failure to act retrospectively, with no supporting case law.[21] For those reasons the Court finds that the third *Beattie* factor was not met as to reasonableness of proceeding to trial and the factor then weighs in favor of Defendant.

The remaining question is whether the fees sought were reasonable and justified.

**4. <u>The Fees Sought by the Offeror are reasonable and justified in amount, as reduced by the Court</u>.**

In In light of Defendant meeting its burden on the first three factors, the next step the Court must then determine if "whether the fees sought by the offeror are reasonable and justified in amount." *Beattie*, 99 Nev. at 588-89, 688 P.2d at 274 (1983).

In so doing, the Court engages in a multi- step process. First, the Court must determine what method should be used to calculate the fees amount given the multiple methods used by Defendant's various counsel. Second, the Court must analyze the amount requested utilizing the appropriate method to determine what is the reasonable and necessary amount that Defendant should be awarded and ensure that the amount was actually incurred in accordance with applicable law.

[20] May 30, 2023, Hearing Transcript at 61:19-63:13.
[21] May 30, 2023, Hearing Transcript at 63:3-63:13.

### a. The Court Finds a Lodestar Calculation to be the Proper Method of Fee Calculation in This Case

The Court may use any method to calculate a reasonable amount of fees, including a lodestar amount based on the hourly rates charged by each counsel or contingency fee pursuant to *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864 (2005). Defendant's counsels' law firms utilize two different methods for calculating their fees: Bartlit Beck utilized a flat fee, and Snell & Wilmer utilized an hours billed/lodestar calculation. As set forth in the Motion, Bartlit Beck billed on a monthly flat-fee basis, and did a separate daily flat fee for hearings and their preparation.[22] The Motion noted that "[s]hould this Court determine that the total fee amount is unreasonable, it may calculate a reasonable fee based on any other method, including the lodestar method, which would account for the 'hours reasonably spent on the case' multiplied 'by a reasonable hourly rate.'"[23] The Court does not find that the method of using a flat fee is comparable to a contingency fee with zero risk factor. Instead, the first method proposed by Bartlitt Beck tries to cap fees which may be desirable between an attorney and its client, but such a method does not consider what would be reasonable under *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969).[24] Instead, the Court finds that a lodestar approach taking into account billing records to be a more appropriate method in considering what work was really reasonable and necessary from the 2021 Offer of Judgment onward.[25] As set forth above, the Court deferred on ruling on the fee amount to

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[22] PricewaterhouseCoopers LLP's Motion for Attorneys' Fees and Costs DOC 427 18:4-8; Declaration of Mark L. Levine in Support of Motion for Attorneys' Fees and Costs (DOC 429 filed under seal).

[23] PricewaterhouseCoopers LLP's Motion for Attorneys' Fees and Costs DOC 427 18:9-11 (*citing to Shuette v. Beazer Homes Holding Corp*., 121 Nev. 837, 864 n.98, 124 P.3d 530, 549 n. 98 (2005).

[24] May 30, 2023, Hearing Transcript at 65:14-66:1.

[25] May 30, 2023, Hearing Transcript at 66:9-22.

allow the parties time until late July 2023 to either come to an agreement as to an appropriate fee amount or to propose alternate fee amounts that the Court could consider.

**b. The Reasonable Hourly Rate and Reasonable Number of Hours for the Work Performed**

The second step of the analysis is for the Court to determine what the reasonable hourly rate is for each of the counsel and legal team. The Court then determines what are the reasonable number of hours for each of the individuals for whom fees are sought.

Defendant in their Motion for Attorney's Fees seeks $662,029.40 post-Offer fees for the work of Snell & Wilmer, and $9,171,309.00 post-Offer fees for the work of Bartlit Beck. Although the Court provided the parties an opportunity to try and seek an agreement on the fee amount, the parties were unable to agree. Instead, each party submitted its own proposed fee amount that is sought the Court to award.

Plaintiff initially proposed that Defendant was entitled to $370,448.50 in fees for work by Snell & Wilmer only, and no fees for Bartlit Beck due to lack of information as to the tasks billed and no detail as to time spent on any given task. Within that proposal, the number of hours billed by Snell & Wilmer of 975.0 was agreed to, but different rates were proposed. In a subsequent letter, Plaintiff then proposed that the Court should award $555,000.00 in fees for Bartlit Beck, the number was based on a rounded-up calculation of a 1.5 times multiplier of the 975.0 hours incurred by Snell & Wilmer at Plaintiff's proposed hourly average rate of $375.00 per hour.

Defendant proposed a total of $2,284,357.48 in fees, broken down with $1,857,338.68 sought for Bartlit Beck, using a lodestar calculation at the same rates used for local counsel Snell & Wilmer, and then sought $427,018.80 for

Snell & Wilmer. The Court must consider the factors articulated in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969) to assess what a reasonable hourly rate and reasonable number of hours are for the work performed in this case.

When determining a fee amount under *Beattie*, the Court also needs to look to *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969) which sets forth factors the Court can consider to ascertain a reasonable fee amont. Pursuant to *Brunzell* and its progeny, the Court *inter alia*, considers (1) the ***qualities of the advocate***: his ability, his training, education, experience, professional standing and skill; (2) ***the character of the work to be done***: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties when they affect the importance of the litigation; (3) ***the work actually performed by the lawyer***: the skill, time and attention given to the work; (4) **the result**: whether the attorney was successful and what benefits were derived. *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969) (emphasis in original, internal quotation omitted).

**i. A Reduced Fee Award for Snell & Wilmer is Appropriate Under *Brunzell***

**a. The Qualities of the Advocate: their ability, their training, education, experience, professional standing and skill.**

Defendant set forth the qualities of the advocates, supported by declarations of Counsel. The qualifications of each of the defense counsel were not disputed. Counsel for Snell & Wilmer included Patrick G. Byrne, Esq.; Bradley T. Austin, Esq.; Kelly H. Dove, Esq.; Erin Gettel, Esq.; Gil Kahn, Esq.;

Christian P. Ogata, Esq.; and Skylar N. Arakawa-Pamphilon, Esq. Work was also performed by Dawn Davis, Esq.; V.R. Bohman, Esq.; and Michael Paretti, Esq.; however, Defendant did not seek fees of those attorneys.[26]

Patrick G. Byrne, Esq. graduated from law school in 1988, is a partner in the Snell & Wilmer's commercial litigation group, has extensive litigation experience, and billed at $515.00, $617.50, $637.00, $662.00, and $695.00.[27] Bradley T. Austin, Esq. graduated from law school in 2013, is a partner in Snell & Wilmer's commercial litigation group, experienced in complex business, civil, and commercial disputes, and billed at $280.00, $380.00, $410.00, $426.00, and $447.00 per hour.[28] Kelly H. Dove, Esq. graduated from law school in 2007, is a partner in Snell & Wilmer's commercial litigation group, is experienced in litigation and appellate work, and billed at $635.00 and $660.00 per hour.[29] Erin Gettel, Esq. graduated law school in 2015 and is an associate in Snell & Wilmer's commercial litigation group and billed at $385.00 per hour.[30] Gil Kahn, Esq. graduated law school in 2016 and is an associate in Snell & Wilmer's commercial litigation group who bills at $320.00 per hour; however, despite providing a Brunzell analysis for Mr. Kahn, there were no billing entries attributed to him in the provided invoices.[31] Christian P. Ogata, Esq. graduated from law school in 2020 and is an associate in Snell & Wilmer's commercial litigation group and

[26] Declaration of Bradley T. Austin, Esq. in Support of Motion for Attorneys' Fees and Costs (DOC 428 BATES 016:18-22.
[27] Declaration of Bradley T. Austin, Esq. in Support of Motion for Attorneys' Fees and Costs (DOC 428 BATES 014:11-21.
[28] Declaration of Bradley T. Austin, Esq. in Support of Motion for Attorneys' Fees and Costs (DOC 428 BATES 014:22-015:3.
[29] Declaration of Bradley T. Austin, Esq. in Support of Motion for Attorneys' Fees and Costs (DOC 428 BATES 015:04-15.
[30] Declaration of Bradley T. Austin, Esq. in Support of Motion for Attorneys' Fees and Costs (DOC 428 BATES 015:16-22.
[31] Declaration of Bradley T. Austin, Esq. in Support of Motion for Attorneys' Fees and Costs (DOC 428 BATES 015:23-016:2.

billed at $345.00 per hour.[32] Skylar N. Arakawa-Pamphilon, Esq. graduated from law school in 2021 and is an associate in Snell & Wilmer's commercial litigation group and billed at $323.00 per hour.[33] Snell & Wilmer also utilized paralegals that all possessed bachelor's degrees and paralegal certification.[34] The Court finds that Defendant's counsel at Snell & Wilmer are experienced and qualified and that the rates are generally customary for this type of specific work for most of the tasks performed.

**b. The Character of the Work Performed**

Plaintiff, in its Opposition to PwC's Motion for Attorneys' Fees and Costs (DOC 444), challenged the character of the work and work actually performed due to generic descriptions contained in the billing. The Court reviewed the record as to what work was completed after October 6, 2021, the work's intricacy and importance, and time and skill required. The matter involved complex analysis of professional tax services, tax liability and damages. Overall, Defense counsel was effective as demonstrated by the results. The issue is whether some of the work which based on the more general time entries was not as complex could have been done by a person at a lower rate.

**c. An Award of Attorney's Fees is Reasonable Based on the Work Actually Performed**

As noted above, Plaintiff, in its Opposition to PwC's Motion for Attorneys' Fees and Costs (DOC 444) challenged the work actually performed. The parties came to an agreement as to the total number of hours billed overall by Snell &

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[32] Declaration of Bradley T. Austin, Esq. in Support of Motion for Attorneys' Fees and Costs (DOC 428 BATES 016:3-10.

[33] Declaration of Bradley T. Austin, Esq. in Support of Motion for Attorneys' Fees and Costs (DOC 428 BATES 016:11-17.

[34] Declaration of Bradley T. Austin, Esq. in Support of Motion for Attorneys' Fees and Costs (DOC 428 BATES 016:23-26.

Wilmer of 975.00 in the correspondence submitted to the Court July 11, 2023. The number agreed upon was comprised of 104.20 hours billed by Patrick G. Byrne, Esq.; 717.90 hours billed by Bradley T. Austin, Esq.; 3.40 hours billed by Kelly H. Dove, Esq.; 9.40 hours billed by Erin Gettel, Esq.; 56.40 hours billed by Christian P. Ogata, Esq.; 5.30 hours billed by Skylar N. Arakawa-Pamphilon, Esq.; 0.50 hours billed by Dawn Davis, Esq.; 53.60 hours billed by Kathy Casford; 1.10 hours billed by Sev Redd; and 23.20 hours billed by Deborah Shuta. Due to the nature of the case and character of the work done, with the agreed-upon number of hours, the Court finds that the rates sought are customary and reasonable in light of this particular case but that some of the work that was not as complex based on the general time entries could have been done by a person with a lower billing rate. Thus, the Court finds it appropriate to grant fees for the work performed by Snell & Wilmer in the amount of $407,018.80.

**d. The Outcome Obtained for Defendant**

It is undisputed that Defendant prevailed. In light of the foregoing analysis, the Court finds that the *Brunzell* factors are met. The parties agreed as to the number of hours sought of 975.00. The Court further finds that most of the rates are customary with prevailing rates of other attorneys in Nevada with similar qualifications but the Court had to reduce the total award due to the general time entries which did not demonstrate that the work could have been performed by someone at a lower rate. Based on all of the factors and discretion of the Court, considering the nature of the work performed, the Court finds that the $407,018.80 of fees sought for Snell & Wilmer is reasonable and appropriate.

### ii. The Fee Award for Bartlit Beck Must Be Evaluated Under a Lodestar Analysis and Appropriately Reduced

As set forth above, $9,171,309.00 post-Offer fees were initially sought for the work of Bartlit Beck. A supplemental declaration and monthly descriptions summarizing the work performed were provided as exhibits in support of the correspondence submitted to the Court on July 11, 2023. The Supplemental Declaration of Mr. Levine set forth that internal data reflected 4,200 hours during the relevant time frame and an average blended rate of $700.00 per hour. This rate was reached by counsel utilizing the local Nevada rates of Snell & Wilmer. In its proposal, counsel provided a lodestar calculation adopting the effective hourly rates of local counsel, noting that the proposed rate was based on the average weighted rates actually billed by Snell & Wilmer given that Snell & Wilmer counsel had rate increases during the relevant time frame resulting in a range of rates being used for some counsel. The average rates proposed were as follows: $664.76 for Mark Levine, Esq. and Christopher Landgraff; $429.95 for Katharine Roin, Esq. and Daniel Taylor, Esq.; $377.34 for Alexandra Genord, Esq.; and $251.00 for both Lori Barnicke and Kim Solorzano. The updated lodestar amount provided based on the foregoing was $1,857,338.68.

#### a. The Qualities of the Advocate: their ability, their training, education, experience, professional standing and skill.

As noted above, the qualifications of Counsel was not contested. Counsel for Bartlit Beck included Mark Levine, Esq.; Christopher D. Landgraff, Esq.; Katharine A. Roin, Esq.; Daniel C. Taylor, Esq.; Sundeep K. (Rob) Addy, Esq.; Alexandra Genord, Esq.; and Krista Perry, Esq. Mark Levine, Esq. graduated from law school in 1989, is partner in Bartlit Beck's Chicago office, and is an

experienced litigator and well qualified.[35] Christopher D. Landgraff, Esq. graduated from law school in 1994, is partner in Bartlit Beck's Chicago office, and has a wealth of litigation experience.[36] Katharine A. Roin, Esq. graduated from law school in 2010, is a partner in Bartlit Beck's Chicago office, and has experience as co-lead counsel in litigation.[37] Daniel C. Taylor, Esq. also graduated from law school in 2010, and is partner in Bartlit Beck's Denver office, with experience on multiple trial teams.[38] Sundeep K. (Rob) Addy, Esq. graduated law school in 2004, and is partner in Bartlit Beck's Denver office, and has experience in multiple multi-million and billion-dollar cases.[39] Alexandra Genord, Esq. graduated from law school in 2020 and is an associate in Bartlit Beck's Chicago office.[40] Krista Perry, Esq. graduated from law school in 2016 and was formerly an associate with Bartlit Beck.[41] Bartlit Beck also utilized paraprofessional and support staff whose qualifications were not detailed.

The Court notes that fees were originally requested for Mr. Addy, and pursuant to the correspondence submitted to the Court July 11, 2023, as part of the efforts of the parties to reach an agreeable fee amount, Defendant agreed to remove all fees incurred by Mr. Addy (who initially sought $388,884.60). In an effort to provide an appropriate lodestar calculation, Defendant also proposed utilizing the same rates as Snell & Wilmer to be consistent with the local market.

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[35] Declaration of Mark L. Levine in Support of Motion for Attorneys' Fees and Costs (DOC 429 filed under seal BATES 136:6-13).
[36] Declaration of Mark L. Levine in Support of Motion for Attorneys' Fees and Costs (DOC 429 filed under seal BATES 136:14-19).
[37] Declaration of Mark L. Levine in Support of Motion for Attorneys' Fees and Costs (DOC 429 filed under seal BATES 136:20-7:2).
[38] Declaration of Mark L. Levine in Support of Motion for Attorneys' Fees and Costs (DOC 429 filed under seal BATES 137:3-9).
[39] Declaration of Mark L. Levine in Support of Motion for Attorneys' Fees and Costs (DOC 429 filed under seal BATES 137:10-16).
[40] Declaration of Mark L. Levine in Support of Motion for Attorneys' Fees and Costs (DOC 429 filed under seal BATES 137:17-21).
[41] Declaration of Mark L. Levine in Support of Motion for Attorneys' Fees and Costs (DOC 429 filed under seal BATES 137:22-25).

The rates proposed by Defendant, as set forth above, were as follows: $664.76 per hour for Mark Levine, Esq., and Christopher Landgraff, Esq.; $429.95 per hour for Katharine Roin, Esq., and Daniel Taylor, Esq.; $377.34 per hour for Alexandra Genord, Esq.; and $251.00 per hour for Lori Barnicke and Kim Solorzano. No *Brunzell* analysis was provided for Barnicke or Solorzano. Based on review of the record, the Court cannot guess as to their qualifications or the basis of how fees were sought for their work. The proposal did not include a rate for Krista Perry, Esq. As articulated above, and in the declarations supporting the Motion, the Court finds Defendant's counsel has met the first *Brunzell* factor other than as specifically stated.

**b. The Character of the Work Performed**

The Court reviewed the record as to what work was completed after October 6, 2021, the work's intricacy and importance, and time and skill required. The matter involved complex analysis of professional tax services, tax liability and damages. The Court also had to look at what work was done by Snell & Wilmer firm and what work was done by Bartlit Beck. Defense counsel was effective as demonstrated by the results as discussed infra.

**c. An Award of Reduced Attorney's Fees is Reasonable Based on the Work Actually Performed**

As noted above, Plaintiff, in its Opposition to PwC's Motion for Attorneys' Fees and Costs, challenged the work actually performed (DOC 444). Plaintiff maintained that due to the flat fee billing, lack of hourly time records, and no tasks identified with the amount of time dedicated to the task provided, no fees should be awarded beyond the amount proposed for Snell & Wilmer fees. The initial records provided did not contain hourly descriptions of the work performed due to the billing structure of the firm. A supplemental declaration and monthly

descriptions summarizing the work performed were provided as exhibits in support of the correspondence submitted to the Court on July 11, 2023. The Supplemental Declaration of Mr. Levine set forth that internal data reflected 4,200 hours during the relevant time frame and an average blended rate of $700.00 per hour. Additionally, a description was provided for tasks done that month. December 2021 included preparing status reports, reviewing the mandamus decision, preparing for and attending hearings, drafting briefs, and preparing for argument at an upcoming hearing. January 2022 included working on briefs and preparing for and attending an Evidentiary Hearing. February 2022 included preparing for Evidentiary Hearing and associated briefing and attending the hearing. March 2022 included drafting briefs, preparing witnesses, and attending an Evidentiary Hearing. April 2022 included drafting proposed Orders, mandamus hearings, preparing Motions and preparing for hearings, as well as communications with various parties. May 2022 included work on the Reply in support of Summary Judgment. June 2022 included preparation and attendance at the summary judgment hearing and planning for pretrial work. July 2022 included preparing exhibits, deposition designations, trial preparations, and drafting pretrial memorandum. August 2022 similarly included trial preparation including witness, exhibit, deposition preparation, preparing objections, trial briefs, and other drafts. September 2022 included witness meetings and preparation, and further work on pretrial documents. October 2022 included preparation for trial and attendance at pretrial matters. November 2022 included the trial fees at $50,000.00 per day for 10 days. December 2022 included preparing Orders from trial and drafting proposed Findings of Fact and Conclusions of Law. A breakdown was also given by each counsel for hours billed in each month.

The Court evaluates the hours billed by the three trial counsel in October and November 2022 when the trial occurred. Mark Levine, Esq. billed 145 hours; Chris Landgraff, Esq. billed 161.90; and Katharine Roin, Esq. billed 184.00. The Court is fully appreciative that counsel is highly qualified and this was a complex matter, but the Court also considers whether all three counsel were required for all tasks at trial. Considering all of these factors, the Court finds it appropriate to reduce the hours for Landgraff to 121.90, for Levine to 130.00, and for Roin to 142.00. The Court also considers that Alexandra Genord, Esq. billed 180.48 hours in October 2022 and 182.37 hours in November 2022. In light of the hours spent by the trial counsel, the Court does not see a basis for the total amount sought in that time period given that Ms. Genord is an associate, and appears to have come into the case only in October 2022, and in those two months billed over 362 hours. The Court finds it appropriate to reduce the hours to for that time period. The Court also considers that there is a lack of support for work performed by Lori Barnicke and Kim Solorzano and there was no detail as to their qualifications or anything for the Court to analyze based on the pleadings. The Court finds that there is insufficient support in the application to justify the 176.25 hours sought by Lori Barnicke and 158.50 hours sought by Kim Solorzano for November 22, 2022. Thus, the Court finds it appropriate to reduce the hours to zero as *Brunzell* and *Beattie* require the Court to evaluate each individual for whom fees are sought and the Court cannot do so based on the lack of information provided.

**d. The Outcome Obtained for Defendant**

It is undisputed that Defendant prevailed. The Court, thus, finds that it is appropriate to award fees to Bartlit Beck; however, the overall fees do need to be reduced both in amount and in hours and $1,695,735.59 is appropriate.

In sum, based on the foregoing, the Court awards fees in the amount of $407,018.80 for Snell & Wilmer and $1,695,735.59 for Bartlit Beck.

### III. Defendant's Request for Costs and Plaintiff's Motion to Retax And Costs.

The February 9, 2023, Findings of Fact and Conclusions of Law set forth that that "any request for fees and costs shall be handled via separate timely-filed Motion."[42] On February 14, 2023, Defendant PwC timely filed a Verified Memorandum of Costs (DOC 417), and Appendix thereto (DOC 418). Then on February 15, 2023, the parties then filed a Stipulation and Order to Extend Time to File Memorandum of Costs and Motion to Retax (DOC 419). Thereafter, on February 24, 2023, Defendant filed an Amended Verified Memorandum of Costs (DOC 422) and Appendix thereto (DOC 423), seeking a total of $921,833.58 in costs. Plaintiff then filed Tricarichi's Motion to Retax and Settle PWC's Amended Verified Memorandum of Costs (DOC 424). Defendant filed an Opposition to Plaintiff's Motion to Retax Costs (DOC 440) on March 31, 2023. Pursuant to NRS 18.020(3), costs must be awarded to the prevailing party against any adverse party in an action where Plaintiff sought to recover more than $2,500.00. In this action, Plaintiff was seeking far in excess of that amount. Following conclusion of the bench trial, Judgment was entered in favor of Defendant and Plaintiff was awarded nothing from his Complaint.[43] Thus, an award of costs is appropriate here.

Additionally, as set forth at the May 30, 2023, hearing, costs sought under NRS 18 pre-date the 2021 Offer of Judgment; and thus, the statute is the basis of the award of costs. As the Court has found that the elements of NRCP 68 were

[42] Findings of Fact Conclusions of Law at P. 41, DOC 416 filed February 9, 2023, Notice of Entry of Order thereof DOC 420 filed February 22, 2023.

[43] Findings of Fact Conclusions of Law at P. 41, DOC 416 filed February 9, 2023, Notice of Entry of Order thereof DOC 420 filed February 22, 2023.

met based on the 2021 Offer of Judgment, NRCP 68 provides an independent basis for costs incurred after the 2021 Offer of Judgment. Although both the NRS and the NRCP provide independent basis for costs post the 2021 Offer, as those amounts are not cumulative, the Court analyzes the total costs that are to be awarded utilizing the statutory framework. [44]

**A. Defendant Was the Prevailing Party Pursuant to NRS 18 et seq**.

**1. Based on the Documentation and Applicable Authority, Defendant's Cost Request is Reduced.**

NRS 18.005 allows recovery of the following amounts:

(1) Clerks' fees.
(2) Reporters' fees for depositions, including a reporter's fee for one copy of each deposition.
(3) Jurors' fees and expenses, together with reasonable compensation of an officer appointed to act in accordance with NRS 16.120.
(4) Fees for witnesses at trial, pretrial hearings and deposing witnesses, unless the court finds that the witness was called at the instance of the prevailing party without reason or necessity.
(5) Reasonable fees of not more than five expert witnesses in an amount of not more than $1,500 for each witness, unless the court allows a larger fee after determining that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee.
(6) Reasonable fees of necessary interpreters
(7) The fee of any sheriff or licensed process server for the delivery or service of any summons or subpoena used in the action, unless the court determines that the service was not necessary.
(8) Compensation for the official reporter or reporter pro tempore.
(9) Reasonable costs for any bond or undertaking required as part of the action.

[44] May 30, 2023 Transcript DOC 448 at 73:15-18.

(10) Fees of a court baliff or deputy marshal who was required to work overtime.
(11) Reasonable costs for telecopies.
(12) Reasonable costs for photocopies.
(13) Reasonable costs for long distance telephone calls.
(14) Reasonable costs for postage.
(15) Reasonable costs for travel and lodging incurred taking depositions and conducting discovery.
(16) Fees charged pursuant to NRS 19.0335.
(17) Any other reasonable and necessary expense incurred in connection with the action, including reasonable and necessary expenses for computerized services for legal research.

Applicable case law provides that any award of costs must be "reasonable, necessary, and actually incurred, and supported by justifying documentation submitted to the Court. *In re Dish Network,* 133 Nev. 438, 452, 401 P.3d 1081, 1093 (2017); *Cadle v. Woods & Erickson*, *LLP*, 131 Nev. 114, 120-121, 345 P.3d 1049, 1054 (2015); *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352-53, 971 P.2d 383, 386 (1998); *Fairway Chevrolet Company v. Kelley*,484 P.3d 276 (Nev. 2021) (unpublished). As set forth in *Cadle,* sufficient documentation requires more than an itemized memorandum, there must be evidence presented to substantiate the cost requested. 131 Nev. at 120-121, 345 P.3d at 1054-1055 (2015). The Amended Verified Memorandum of Costs (DOC 422) sought the following costs:

**a. <u>Reporters' Fees for Depositions, Hearings, and Trial</u>**

Reporters' fees requested are broken down by the amount sought by each firm representing Defendant and by the type of reporter fees. Defendant seeks $73,354.31 for reporters' fees for depositions incurred by the Bartlit Beck firm under NRS 18.005(2). The amount included $59,221.51 for deposition transcripts and $15,554.11 for daily transcript fees for the Trial. The Court considers *North Las Vegas Infrastructure Investment and Construction, LLC v.*

*City of North Las Vegas*, 139 Nev. Adv. Op. 5, 525 P.3d 836 (2023). There, costs for videotaped depositions were denied because the depositions were not used at trial and there was no explanation of why the videos were necessary. The Court notes that here, Plaintiff challenges, within the reporters' costs for the depositions, optional reporting services such as RealTime, rush fees, and videotaping.

Invoices for deposition transcripts were provided for services dated August 3, 2020, for $750.00, $443.50, and $1,382.15 including a $175.00 Realtime Setup Fee and $239.80 Realtime Over Internet Fee; August 4, 2020, for $2,481.20 including a $695.20 Realtime Over Internet fee, and $665.00 including a $190.00 rush fee; August 11, 2020, for $1,100.00, $641.50, and $2,280.85 including a $175 Realtime Setup Fee and $385.00 Realtime Over Internet Fee; August 18, 2020, for $542.50, $925.00, and $1,478.75 including a $175.00 Realtime Setup Fee and a $204.60 Realtime Over Internet Fee,; August 19, 2020, for $542.50, $925.00, and $1,878.10 including a $175.00 Realtime Setup Fee and $325.60 Realtime Over Internet fee; September 1, 2020, for $805.00, $1,317.40, and $1,176.75; September 16, 2020, for $1,450.00, $839.50, and $4,064.20 which included a $175.00 Realtime Setup Fee and a $576.40 Realtime Over Internet fee; September 17, 2020, for $685.00 for videography services for the deposition of Mark Boyer, and $2,683.90 which also included a $424.60 Realtime Over Internet fee; September 18, 2020, for $635.00, and $2,023.50 which included a $367.40 Realtime Over Internet fee; September 22, 2020, for $610.00 and $2,233.50 which included a $446.60 Realtime Over Internet fee; September 25, 2020, for $790.00, $1,362.50, and $3,555.90 which included a $175.00 Realtime Setup Fee and $565.40 Realtime Over Internet fee; September 29, 2020, for $490.00 and $1,638.90 which included a $301.40 Realtime Over Internet Fee; September 30, 2020, for $2,750.30 which included a

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$550.00 Realtime Over Internet fee; October 1, 2020, for $988.00, $1,712.50 for videography services for the deposition of Michael Tricarichi, for $3,665.90, $780.00 for videography services for the deposition of Kenneth Harris, and for $2,675.70 which included a $492.80 Realtime Over Internet fee; October 9, 2020, for $2,050.70 including a $567.60 Realtime Over Internet fee, and $780.00 for videography services for the deposition of Brian Meighan. Invoices for daily transcript fees for trial are provided dated October 31, 2022, for $1,830.84; November 2, 2022, for $1,140.26; November 3, 2022, for $2,039.62; November 4, 2022, for $1,919.17; November 5, 2022, for $939.51; November 9, 2022, for $1,718.42; November 10, 2022, for $1,862.96 and $2,682.02, and November 11, 2022 for $1,421.31.

While under NRCP 68, the costs pre-dating the 2021 Offer of Judgment would not be recoverable. Here, the deposition costs are allowable under NRS 18 and, in general, are supported by adequate documentation as reasonable, necessary, and actually incurred as required under *In re Dish Network*, *Cadle*, *Berosini,* and *Fairway*. Based on the invoices provided, $57,800.20 in deposition transcripts incurred by Bartlit Beck is supported; however, that amount includes a $190.00 in rush fees, $7,192.40 in Realtime Fees, and $3,957.50 in videography services for depositions, which the Court finds would not be appropriate. Nothing is provided be Defendant showing that these extra reporter services were reasonable and necessary to this case. The Court then also considers and finds that the invoices provided support the $15,554.11 sought for daily transcript fees. Therefore, the Court finds that $62,014.41 in reporters' and transcript fees incurred by Bartlit Beck is appropriate under NRS 18.

Defendant also seeks $4,894.97 in Reporters' Fees for Hearings incurred by Snell & Wilmer under NRS 18.005(8). Invoices are provided for hearings dated November 16, 2016, for $270.54 and $80.00; May 10, 2017, for $318.53;

September 24, 2018, for $169.63 and $40.00; March 21, 2019, for $42.07; July 8, 2019, for $144.54 and $40.00; March 31, 2020, for $168.63 for an expedited transcript; March 24, 2022, for $40.00; March 30, 2022, for $120.00; March 31, 2022, for $1,216.93 and for $120.00; June 13, 2022, for $186.31 for an expedited transcript; October 25, 2022, for $725.16; November 16, 2022, for $944.38; and December 27, 2022, for $268.25.

While, under NRCP 68, the costs pre-dating 2021 Offer of Judgment would not be recoverable, here the hearing and trial costs are allowable under NRS 18 and are supported by adequate documentation as reasonable, necessary, and actually incurred as required under *In re Dish Network*, *Cadle*, *Berosini,* and *Fairway*. Based on the invoices provided, the Court finds that the amount sought for reporters' fees for hearings is supported; however, as noted above, some invoices indicate expedited fees without a basis provided for the rush charge. Therefore, the Court finds it must reduce the amount to account for the rush charges and that $4,540.03 is appropriate in reporters fees incurred by Snell & Wilmer for hearings.

**b. <u>Printing, Copying, and Scanning</u>**

Defendant seeks $5,468.66 for printing, copying, and scanning under NRS 18.005(12). Four separate invoices were provided: an October 21, 2019, invoice for $1,252.46; a July 27, 2020, invoice for $380.00; an October 20, 2022, invoice for $2,354.70; and an October 31, 2022, invoice for $1,481.50. While, under NRCP 68, the costs pre-dating 2021 Offer of Judgment would not be recoverable, here the copying costs are allowable under NRS 18 and are supported by adequate documentation as reasonable, necessary, and actually incurred as required under *In re Dish Network*, *Cadle*, *Berosini,* and *Fairway*. The full $6,468.66 is, therefore, appropriate.

### c. Travel and Lodging for Hearings and Depositions

Defendant seeks $4,585.60 for travel and lodging costs incurred by Bartlit Beck associated with counsel traveling for hearings and depositions. Defendant seeks the amount under NRS 18.005(15). Invoices were provided for: September 4, 2020, travel by Christopher Landgraff for $1,339.65; September 4, 2020, meals for Christopher Landgraff of $192.50; September 8, 2020, conference room, beverage service, and internet for $2,178.36; September 30, 2022, travel for Christopher Landgraff for $464.53; September 30, 2022, air fare for Christopher Landgraff for $323.18; and September 30, 2022, meals for $87.38. At the May 30, 2023, hearing the Court set forth that meals would not be appropriate to recover as counsel would have to eat regardless, and that hotel costs and tickets would not be appropriate, acknowledging that while parties have their choice of counsel, those costs are client driven based on their selection of counsel and Plaintiff should not have to bear additional cost for the choice of the Defendant.[45] After the Court allowed time for the parties to reach an agreement as to fees and costs, per the correspondence submitted to the Court on July 11, 2023, counsel withdrew the request for travel and meal expenses. Thus, the Court need not address the initial travel and lodging and meal request.

### d. Pro Hac Vice Admissions

Defendant seeks $5,000.00 in costs related to Pro Hac Vice Admissions incurred by Bartlit Beck and $3,700.00 in costs related to Pro Hac Vice Admissions incurred by Snell & Wilmer. Defendant seeks these costs under NRS 18.005(17) as an "other" reasonable and necessary expense. Invoices were provided for Application fees, Pro Hac Vice fees, and Annual Renewal Fees. Plaintiff challenged the cost in its entirety as not authorized under NRS

[45] May 30, 2023, Transcript DOC 448 at 73:19-74:11.

18.[46] At the May 30, 2023, hearing the Court stated the cost would not be appropriate as it was counsel's choice to associate pro hac counsel.[47] After the Court allowed time for the parties to reach an agreement as to fees and costs, per the correspondence submitted to the Court on July 11, 2023, counsel withdrew the request for Pro Hac Vice fees. Thus, the Court need not address the initial Pro Hac Vice fee request.

**e. Clerk's Fees**

Defendant seeks $3,386.00 in Clerk's Fees under NRS 18.005(1). The register of actions was provided showing filing fees on July 11, 2016, for $1,483.00; March 6, 2017, for $200.00; August 12, 2019, for $223.00; November 13, 2020, for $200.00; April 28, 2022, for $200.00; June 13, 2022, for $40.00; October 24, 2022, for $120.00; and November 16, 2022, for $920.00. While under NRCP 68 the fees pre-dating 2021 Offer of Judgment would not be recoverable, here, the Clerk's fees are allowable under NRS 18 and are supported by adequate documentation as reasonable, necessary, and actually incurred as required under *In re Dish Network*, *Cadle*, *Berosini,* and *Fairway*. The full $3,386.00 sought is, therefore, appropriate.

**f. Subpoena Costs**

Defendant seeks various costs associated with subpoenas consisting of Clerk's Fees under NRS 18.005(1); Witness fees under NRS 18.005(4); Service of Subpoena under NRS 18.005(7); Messenger Services for Filing/Obtaining Foreign Subpoenas under NRS 18.005(17); for a total of $2,081.06. Invoices are provided dated February 4, 2020, for $85.00 to serve a subpoena to Levin & Associates; February 7, 2020, for $215.00 for filing fees to issue a foreign

[46] Plaintiff's Motion to Retax and Settle PWC's Amended Verified Memorandum of Costs DOC 414 at 5:5-18.
[47] May 30, 2023, Transcript DOC 448 at 75:21-25.

subpoena; February 28, 2020, for $418.50 to serve a subpoena to Carla Tricarichi and Randy Hart; February 28, 2020, for $172.50 to serve a subpoena to James Tricarichi; February 28, 2020, for $110.00 for the messenger to the courthouse to serve the out-of-state subpoenas; March 20, 2020, for $275.00 for a court filing fee on the subpoena to Richard Corn; March 20, 2020, for $560.00 for a court filing fee on the subpoena to Andrew Mason; May 20, 2020, for $120.00 for a court filing fee on the subpoena for Donald Korb; September 8, 2020, for $84.00 for service of subpoena to Telecom Acquisition Corp.; and June 13, 2022, for $41.06 in court fees. While under NRCP 68 the fees pre-dating 2021 Offer of Judgment would not be recoverable, here, the various subpoena costs are allowable under NRS 18 and are supported by adequate documentation as reasonable, necessary, and actually incurred as required under *In re Dish Network*, *Cadle*, *Berosini*, and *Fairway*. The $2,081.06 sought is therefore appropriate.

**g. <u>Mediator Fees and Messenger Fees</u>**

Defendant seeks the costs under NRS 18.005(17) as an "other" reasonable and necessary expense for both Mediator Fees and Messenger Fees. The Court addresses both in turn.

Defendant seeks $3,850.00 for Mediation fees. Plaintiff challenged the cost as not authorized under NRS 18.[48] At the May 30, 2023, hearing, counsel confirmed that the mediation was voluntary. [49] After the Court allowed time for the parties to reach an agreement as to fees and costs, per the correspondence submitted to the Court on July 11, 2023, counsel withdrew the request for Mediator fees. Thus, the Court need not address the initial Mediator fee request.

[48] Plaintiff's Motion to Retax and Settle PWC's Amended Verified Memorandum of Costs DOC 414 at 5:5-18.
[49] May 30, 2023, Transcript DOC 448 at 72:19-73:14.

Defendant also seeks $1,226.00 in Messenger Services costs pursuant to NRS 18.005(17). Receipts were provided for: September 20, 2016, for $37.00; September 21, 2016, for $47.00; September 27, 2016, for $94.00; August 11, 2016, for $35.00; November 8, 2016, for $25.00; February 8, 2017, for $62.00; February 10, 2017, for $25.00; May 17, 2017, for $21.00; May 15, 2017, for $35.00; July 26-29, 2019, for $40.00; September 9-10, 2020, for $90.00; September 23, 2020, for $76.50; October 2, 2020, for $25.00; October 27-31, 2022, for $350.00; March 25-28, 2022, for $152.50; June 6-10, 2022, for $111.00. Plaintiff challenged the cost in its entirety as not authorized under NRS 18.[50] The Court finds that messenger fees are appropriate, per the statute, and supported by documentation for the hearings listed above and thus the Court awards $1,226.00.

**h. Expert Witness Fees**

Defendant seeks $814,286.98 in Expert Witness Fees for three experts. The amount sought is broken down as $84,655.50 for Joseph Leauanae; $36,584.25 for Arthur Dellinger; and $693,046.73 for Kenneth Harris. Plaintiff challenged the amount in its entirety. In the alternative, if fees were awarded, Plaintiff argued that costs should capped at $1,500.00 under NRS 18.005(5).[51] At the May 30, 2023, hearing, the Court set forth that the amount sought needed to be reduced given overlap with the tax court issues, general advice, benefit of video, and what the experts needed to specifically look at and do.[52] After the Court allowed time for the parties to reach an agreement as to fees and costs,

[50] Plaintiff's Motion to Retax and Settle PWC's Amended Verified Memorandum of Costs DOC 414 at 5:5-18.
[51] Plaintiff's Motion to Retax and Settle PWC's Amended Verified Memorandum of Costs DOC 414 at 3:19-5:4. The Motion and all documents were provided to the Court prior to the Nevada Legislature's amendedments to the Statute and thus the prior statutory amount applied. Even utilizing the current 2023 statute, the Court's analysis would be the same.
[52] May 30, 2023 Transcript DOC 448 at 74:12-75:20.

per the correspondence submitted to the Court July 11, 2023, defense counsel agreed to reduce the fee sought for Harris by 50 percent (50%), to $346,523.36. Plaintiff's counsel still objected to that reduced amount.

In *Frazier v. Drake*, 131 Nev. 632, 650-51, 357 P.3d 365, 377-78 (Nev. Ct. App. 2015), the Court of Appeals set forth that awarding expert witness fees more than $1,500.00 per expert requires an analysis of various factors, where "not all of these factors may be pertinent to every request for expert witness fees in excess of $1,500 per expert under NRS 18.005(5), and thus, the resolution of such requests will necessarily require a case-by-case examination of appropriate factors":

> (1) the importance of the expert's testimony to the party's case;
> (2) the degree to which the expert's opinion aided the trier of fact in deciding the case;
> (3) whether the expert's reports or testimony were repetitive of other expert witnesses;
> (4) the extent and nature of the work performed by the expert;
> (5) whether the expert had to conduct independent investigations or testing;
> (6) the amount of time the expert spent in court, preparing a report, and preparing for trial;
> (7) the expert's area of expertise;
> (8) the expert's education and training;
> (9) the fee actually charged to the party who retained the expert;
> (10) the fees traditionally charged by the expert on related matters;
> (11) comparable experts' fees charged in similar cases; and,
> (12) if an expert is retained from outside the area where the trial is held, the fees and costs that would have been incurred to hire a comparable expert where the trial was held.

*Frazier v. Drake*, 131 Nev. 632, 650-51, 357 P.3d 365, 377-78 (Nev. Ct. App. 2015). The Court notes that there was no *Frazier* analysis provided in the

Verified Memorandum of Costs (DOC 417), nor the Amended Verified Memorandum of costs (DOC 424) beyond a footnote stating that the experts "have specialized and substantial knowledge in the foregoing field(s)," and that the cost was warranted because each expert "(1) prepared a comprehensive expert report, (2) sat for a deposition, and (3) testified at trial (and as such, incurred the additional time required to sufficiently prepare for both deposition and trial)" with the result being in Defendants' favor.[53] Nevertheless, PwC's Opposition to Plaintiff's Motion to Retax Costs (DOC 440) addressed the *Frazier* factors; and thus, the Court analyzes each as set forth below.

***i. The Court Finds That Most of the* Frazier *Factors Presented Are Met As To Expert Joseph Leauanae but Defendant Did Not Provide the Court With All the Required Information Pursuant to Frazier and Other Case Law and Thus, the Amount Sought Needs to Be Reduced.***

Defendant seeks $84,655.50 in expert fees for Joseph Leauanae. Mr. Leauanae is a business appraiser and forensic accountant with over 25 years of experience in financial evaluation and litigation.[54] Mr. Leauanae is a CPA in Nevada, Utah, and California, and has additional certifications in information technology, financial forensics, and as a fraud examiner.[55] The nature of the work performed by Mr. Leauanae involved providing an opinion on economic damages of Plaintiff.[56] Defendant set forth that Mr. Leauanae drafted an expert report, rebuttal report, was deposed, prepared demonstrative exhibits, and

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[53] Pricewaterhouse Coopers LLP's Verified Memorandum of Costs DOC 417 at 3 n.1; Pricewaterhouse Coopers LLP's Amended Verified Memorandum of Costs DOC 422 at 3 n.2.
[54] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 21:5-14.
[55] *Id.*
[56] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 21:17-18.

testified at trial.[57] No further details were provided in the analysis. The reports and testimony were not repetitive as the three experts were opining from three different fields of expertise. Defendant set forth that the independent investigation performed by Mr. Leauanae involved review of documents, pleadings, production, discovery, representations to the IRS, Plaintiff's expert report on damages, and deposition transcripts.[58] As to the time spent preparing a report, preparing for trial, and in court, Mr. Leauanae spent 317.50 hours at a rate of $375.00 per hour in 2020 through 2021, and $415.00 per hour in 2022, and provided invoices as to the time.[59] Defendant provided nothing to show the fee charged was in accordance with those traditionally charged by the expert in related matters as it instead stated that, "this Court is well positioned to determine the reasonableness of the same based on its vast experience with similar experts in complex civil litigation matters as well as the submitted invoices."[60] While the Court has addressed numerous experts in a wide variety of settings, *Frazier* and the case law regarding costs in general, *see e.g. In re Dish Network,* 133 Nev. 438, 452, 401 P.3d 1081, 1093 (2017); *Cadle v. Woods & Erickson*, *LLP*, 131 Nev. 114, 120-121, 345 P.3d 1049, 1054 (2015); *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352-53, 971 P.2d 383, 386 (1998); *Fairway Chevrolet Company v. Kelley*,484 P.3d 276 (Nev. 2021) (unpublished) all set forth that it is the responsibility of the party who is seeking the costs to provide the documentation and explanation necessary for the Court to fully analyze any costs sought. In this case, Defendant has failed to provide any

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[57] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 21:20-22:1.
[58] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 22:21-23.
[59] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 24:11-15; 25:3-4.
[60] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 25:9-15.

information related to multiple *Frazier* factors. As a result of Defendant's decision to provide the Court only limited information, the Court can only take into account what was provided and reduces the cost allowed for Mr. Leauanae to $46,655.50.

### *ii. The Court Finds That the Frazier Factors Are Met As To Expert Arthur Dellinger*

Defendant seeks $36,584.25 in expert fees for Arthur Dellinger. Mr. Dellinger is a CPA with 53 years of experience with a specialty in tax matters.[61] As to the nature of the work performed, Dellinger provided an opinion on whether the standards for disclosures of errors applies to former clients.[62] Defendant set forth that Mr. Dellinger drafted an expert report, rebuttal report, was deposed, prepared demonstrative exhibits, testified at trial, reviewed standards for tax services, conducted research, and reviewed information on the case provided by counsel.[63] The reports and testimony were not repetitive as the three experts were opining from three different fields of expertise. Defendant also sets forth that the independent investigation performed by Mr. Dellinger was that he "extensively reviewed the statements on standards for tax services, conducted research, and reviewed case information provided by counsel".[64] Unlike Mr. Leauanae, however, Defense counsel did provide support of showing that the expert's testimony was of significant importance to the decision. Specifically, Defendant pointed to the Findings of Fact and Conclusions of Law and stated that it referenced the testimony of Mr. Dellinger on the standard of professional

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[61] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 20:7-12.
[62] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 21:16-17.
[63] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 21:20-22:4.
[64] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 22:19-20.

care and Statements on Standards for Tax Services."[65] As to the time spent preparing a report, preparing for trial, and in court, Mr. Dellinger spent 72.45 hours at a rate of $500.00 per hour, and provided invoices as to the time.[66] Defendant provided nothing to show the fee charged was in accordance with those traditionally charged by the expert in related matters. Instead, it again set forth that "this Court is well positioned to determine the reasonableness of the same based on its vast experience with similar experts in complex civil litigation matters as well as the submitted invoices."[67] Nevertheless, to support that the fee was comparable to what would have been incurred by a local expert, Defendant compared Dellinger's rate of $500.00 to Plaintiff's local expert, Greene's, rate of $400.00 who has been practicing for roughly 15 less years than Dellinger.[68] As a result of the more detailed analysis, the Court finds that there is enough support, pursuant to the case law and given the nature of the instant case, to award Defendant the entirety of the costs sought on behalf of Mr. Dellinger in the amount of $36,584.25.

### *iii. The Court Finds That the Frazier Factors and Applicable Case Law Warrant a Reduction As to Expert Kenneth Harris*

Defendant initially sought $693,046.73 in expert fees for Kenneth Harris, and in the correspondence submitted to the Court wherein the parties sought to reach an agreement as to fees and costs Defendants had agreed to reduce the amount by 50 percent (50%) to $346,523.36. Mr. Harris has practiced in tax law

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[65] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 23:15-16.
[66] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 24:6-10; 25:1.
[67] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 25:9-15.
[68] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 26:7-9.

for 35 years, with experience in mergers, acquisitions, spin offs, divestitures, and internal reorganizations.[69] Mr. Harris also teaches tax law at Northwestern School of Law.[70] As to the nature of the work performed, Defendant sparsely provided that Mr. Harris gave an opinion as to Defendant's conduct in advising Plaintiff on the transaction.[71] Defendant set forth the same description for all of its experts -- that Mr. Harris drafted an expert report, rebuttal report, was deposed, prepared demonstrative exhibits, and testified at trial.[72] No further details were included in Defendant's *Frazier* analysis as to this factor. Defendant then addressed that the reports and testimony were not repetitive as the three experts were opining from three different fields of expertise. In support of showing that the expert's testimony was of significant importance to the decision, Defendant pointed to the Findings of Fact and Conclusions of Law referencing the testimony of: "Mr. Harris twelve separate times when: (1) analyzing standard tax industry terms, (2) distinguishing facts between the Westside, Enbridge, and Marshall transactions, (3) interpreting Notice 2008-111, (4) interpreting of the Statements on Standards for Tax Services, (5) and analyzing PwC's confidentiality obligations under applicable standards."[73] It is asserted by Defendant that Mr. Harris spent 1,089.90 hours preparing a report, preparing for trial, and in court at a rate of $775.00 per hour. It did provide invoices as to the time, as noted in the Opposition, and it also contended that Harris also utilized lower billing associates at $525.00 per hour.[74] It is not clear to the Court the role of the "billing

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[69] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 20:13-21:4.
[70] *Id.*
[71] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 21:18-19.
[72] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 21:20-22:1.
[73] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 23:11-14.
[74] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at

associates" or how those rates could be justified, pursuant to Nevada law, given the limited billing details provided. Defendant also failed to provide anything to show the fee charged was in accordance with those traditionally charged by the expert in related matters, instead relying on the assertion that "this Court is well positioned to determine the reasonableness of the same based on its vast experience with similar experts in complex civil litigation matters as well as the submitted invoices."[75] Next, to support that the fee was comparable to what would have been incurred by a local expert, Defendant compared Harris' rate of $775.00, and experience as an attorney since 1985, to its own retained counsel Mr. Byrne's rate of $750.00 who has been practicing since 1988.[76] The comparison provided by Defendant was a rate for an attorney, and while the Court acknowledges Mr. Harris is an attorney, no comparison was provided for what is the appropriate rate for an expert standard who plays a different role than counsel for the party. In short, there was no analysis as what a comparable attorney acting in an expert capacity would charge in Nevada or Clark County. Considering the invoices provided, the fee summary description for Mr. Harris is listed under "Lawyer" and other lawyers at the firm are also listed as billing on the matter. Based on the limited analysis given of the foregoing *Frazier* factors, the Court finds it appropriate to reduce the expert fee sought for Mr. Harris.

For example, some of the items in the invoices contain insufficient detail for the Court to consider, appear to be representation work beyond the scope necessary for an expert opinion, appear to be other parties conducting review for the expert, or appear to be duplicative intra-office conferencing with the expert,

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24:16-20; 25:5-6.

[75] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 25:9-15.

[76] Pricewaterhouse Cooper LLP's Opposition to Plaintiff's Motion to Retax Costs DOC 440 at 26:5-7.

as further discussed below. The invoices reflect the billings of Mr. Harris (KLH) and other billing entries are included billed by Andrea M. Despotes (AMD) and Matthew Koenders (KM) yet there is nothing to provide the Court how three attorneys were needed to prepare an expert report particularly when there were other experts that presented opinions that overlapped but were not duplicative.

The following entries show billing for intra-office communications and, in some instances, duplicative billing for the same intra-office meeting. On August 6, 2019, MK billed $1,207.50 to conference with KLH as well as to review the complaint, research, and analysis, and did not parse out the amount of time spent conferring with KLH. Then on August 26, 2019, AMD billed $1,840.00 to review the file, conduct research, and confer with KLH; again, not breaking down the amount of time spent for inter-office conferencing. On August 27, 2019, MK again billed $1,312.50 to again review the complaint, analysis, and confer with KLH. On August 30, 2019, there are billing entries for KLH for conferencing with MK, as well as a duplicative $525.00 entry for MK for conferencing with KLH. On September 5, 2019, MK billed $1,050.00 to review the record and confer with KLH. On September 16, 2019, AMD billed $2,760.00 for an office conference with KLH and work on research, with no breakdown for the timing as to each. On September 18, 2019, AMD billed $172.50 for an office conference. On February 20, 2020, and February 27, 2020, MK billed $787.50 and $2,467.50, respectively, to review record and analysis and confer with KLH; again, with no breakdown of the time spent on intra-office conference. Then on March 21, 2020, and March 31, 2020, MK billed $1,680.00 and $367.50, respectively, to work on the draft expert report, research, and conference with KLH with no temporal breakdown. On April 8, 2020, and April 12, 2020, AMD billed $230 and $57.50, respectively, to conference with KLH. On April 13, 2020, there are billing entries for KLH for conferencing with MK, as well as a duplicative $787.50 entry for MK for

conferencing with KLH. Similarly, on April 14, 2020, there are billing entries for KLH conferencing with MK on the report, and a duplicative entry for $1,470.00 MK to conference with KLH and review and revise the draft report, the time is not parsed out for the activities. On April 20, 2020, and April 21, 2020, AMD billed $115.00 for both entries to conference with KLH. On April 27, 2020, MK billed $1,207.50 for an entry covering work on a draft report and conferencing with KLH, with no breakdown of the time spent on each task. On May 7, 2020, MK billed $210.00 to conference with KLH. On June 5, 2020, KLH billed to conference with AMD, and there was a duplicative billing entry by AMD for $1,207.50 to conference with KLH and work on the rebuttal report, with no breakdown of the time allotted to each activity.

Some billed activities appear to be representation work beyond the scope necessary of an expert opinion and the entries do not contain sufficient detail for the Court to fully evaluate the distinction between expert tasks and tasks that would be handled by counsel. For example, on November 16, 2020, KLH billed $630.000.00 to review a Motion in Limine pertaining to expert testimony, and then on November 19, 2020, billed $232.50 for "research re: MIL issue."

Additionally, there were billing entries for drafting the expert report and rebuttal report performed by parties that were not expert Mr. Harris. There was no information provided as to the nature or scope of the work, whether this work was duplicative, or what role each person had in the preparation of the report for the Court to assess in its review of the records. On January 24, 2020, AMD billed $632.50 for a generic entry of "worked on matters re: expert opinion." On February 4, 2020, AMD billed $920.00; on February 7, 2020, AMD billed $805.00; on February 11, 2020, AMD billed $2,127.50; on February 12, 2020, AMD billed $1,782.50; on February 14, 2020, AMD billed $115.00; on February 19, 2020, AMD billed $977.50; on February 21, 2020, AMD billed $3,220.00; on

February 25, 2020, AMD billed $2,300.00; on February 26, 2020, AMD billed $2,507.50; on February 28, 2020, AMD billed $2,817.50; all of the foregoing entries were for a generic description of "worked on expert opinion matter." It is unclear to the Court whether these were part of preparing the opinion or whether they were other actions associated with the file as there is minimal description of the work given.

Then, turning to entries where it was apparent the work was pertaining to the report, on March 2, 2020, KLH billed $4,107.50 and on March 5, 2020, billed $1,007.50 to research and work on the expert report. On March 6, 2020, KLH billed $5,580.00 to work on the expert report while MK also billed $1,942.50 that same day to work on the draft report and research. Similarly, on March 7, 2020, KLH billed $2,480.00 to work on the expert report and MK also billed $1,312.50 to work on the draft. Thereafter, KLH billed $1,162.50 for "work on expert report" on March 8, 2020; $5,037.50 on March 9, 2020; $5,435.00 on March 10, 2020; $2,325.00 on March 11, 2020; $3,100.00 on March 12, 2020; $3,100.00 on March 13, 2020; $1,550.00 on March 14, 2020; $2,945.00 on March 15, 2020; $4,262.50 on March 16, 2020; $4,107.50 on March 17, 2020; $4,262.50 on March 18, 2020; $4,650.00 on March 19, 2020; $4,495.00 on March 20, 2020; $3,875.00 on March 21, 2020; $3,875.00 on March 22, 2020; $5,347.50 on March 23, 2020; $5,192.50 on March 24, 2020; $3,487.50 on March 25, 2020; $4,650.00 on March 26, 2020; $4,650.00 on March 27, 2020; $5,037.50 on March 28, 2020; $3,875.00 on March 29, 2020; $4,650.00 on March 30, 2020; and $3,487.50 on March 31, 2020. Overlapping many of those same dates, MK billed $1,680.00 on March 21, 2020, (which was already referenced above for overlapping with intra-office conferencing with KLH); $1,050.00 on March 22, 2020; $787.50 on March 23, 2020; $1,470.00 on March 24, 2020; $1,312.50 on March 27, 2020; $3,150.00 on March 28, 2020; $3,937.50 on March 29, 2020;

$1,995.00 on March 30, 2020; and $367.50 on March 31, 2020, (this entry was also accounted for above for the overlapping conference with KLH), all for generic descriptions of "work on draft report."

KLH then billed for revisions to the report on April 1, 2020; April 2, 2020; April 11, 2020; and April 20, 2020, in the amounts of $2,945.00, $2,092.50, $1,395.00, and $1,705.00 respectively. For further work on the expert report, KLH billed $1,782.50 on April 13, 2020; $3,022.50 on April 14, 2020; $1,162.50 on April 15, 2020; $775.00 on April 16, 2020; $2,712.50 on April 17, 2020; $3,100.00 on April 19, 2020; $3,875.00 on April 20, 2020; $3,642.50 on April 21, 2020; $3,410.00 on April 22, 2020; $2,712.50 on April 23, 2020; $4,107.50 on April 24, 2020; $3,177.50 on April 27, 2020; $1,550.00 on April 28, 2020; and $1,937.50 on April 29, 2020. Overlapping many of those same dates, MK billed $787.50 on April 13, 2020 (addressed above for the entry also covering intra-office conference); $1,470.00 on April 14, 2020; $945.00 on April 25, 2020; and $1,207.50 on April 27, 2020 (addressed above for the entry overlapping intra-office conference as well), all to "work on draft report." AMD also billed $345.00 on April 15, 2020; $115.00 on April 17, 2020; $3,392.50 on April 22, 2020; $2,875.00 on April 23, 2020; $3,162.50 on April 24, 2020; $4,772.50 on April 25, 2020; $3,622.50 on April 26, 2020; $4,657.50 on April 27, 2020; and $3,277.50 on April 28, 2020, for generic entries of "worked on opinion draft."

KLH then made further revisions to the report as part of billing blocks, including multiple other activities without distinguishing the time spent specifically on the report for $2,170.00 on May 13, 2020, and $1,705.00 on May 15, 2020. KLH billed $1,937.50 on May 30, 2020; $2,325.00 on June 1, 2020; $3,255.00 on June 2, 2020; $2,170.00 on June 3, 2020; $3,487.50 on June 5, 2020; $3,100.00 on June 7, 2020; $3,642.50 on June 8, 2020; $3,100.00 on June 9, 2020; $2,712.50 on June 10, 2020; $3,487.50 on June 11, 2020; $3,487.50 on June 12,

2020; $3,100.00 on June 13, 2020; $3,487.50 on June 14, 2020; $2,712.50 on June 15, 2020; $1,782.50 on June 16, 2020; $2,092.50 on June 17, 2020; $3,875.00 on June 18, 2020; $3,100.00 on June 19, 2020; and $1,705.00 on June 24, 2020, to work on his rebuttal report and make revisions thereto. Some of the foregoing entries were also lumped with activities such as reviewing production without breaking down the time spent for the Court to consider. Again, overlapping many of these same dates, there were entries by other persons for work on the expert rebuttal report. There were also billing entries by MK for work on the rebuttal report of $1,312.50 on June 28, 2020, and $2,782.50 on June 29, 2020. AMD billed $575.00 on June 1, 2020; $2,645.00 on June 2, 2020; $2,645.00 on June 3, 2020; $1,207.50 on June 5, 2020; $2,990.00 on June 9, 2020; $2,645.00 on June 10, 2020; $2,875.00 on June 11, 2020; $3,162.50 on June 12, 2020; $2,760.00 on June 13, 2020; $3,392.50 on June 14, 2020; $172.50 on June 15, 2020; $690.00 on June 18, 2020; $1,035.00 on June 19, 2020; $1,035.00 on June 23, 2020; $920.00 on June 24, 2020; $1,610.00 on June 26, 2020; $632.50 on June 27, 2020; and $2,472.50 on June 28, 2020. The Court notes that in addition to the foregoing entries that specifically referenced work on the report, and as highlighted above, AMD frequently billed generic entries for “work on expert matter” and it is not clear for the Court to assess the work done and whether it was in preparation of the report or another matter. On July 1, 2020, KLH billed $1,085.00 to review comments and edits to the rebuttal report; on July 2, 2020, KLH billed $1,162.50 to revise the rebuttal report; and on July 7, 2020, KLH billed $1,937.50 to conference with AMD and work on final edits to the rebuttal report for which AMD also billed $575.00 to work on “expert opinion matters.”

While the Court appreciates that the testimony was important to the Defendant’s case, and it is cited as being an aid to the Court’s decision, it is

unclear how the expert report and rebuttal reports alone could be billed at over $302,400.00, including work by two persons who were not the expert himself, and have that amount be considered "reasonable." The Court fully considers the nature of the case, the sophisticated parties, and the complex matters involved. The Court also fully considers that due to the nature of the invoices, some of the matters have other activities included in the line item accounting for the total time billed for that entry, but also notes that there are many other generic entries that could have involved billing for work on the report that were unclear, and the foregoing entries were only the ones that it was clear to the Court that the work done pertained to the actual reports.

Next, the Court also considers the billing entries pertaining to Mr. Harris' participation in trial. On November 1, 2022, KLH billed $3,875.00 to review the transcript of the first day of trial and prepare for testimony; AMD also billed $3,852.50 that day to review the transcript, research tax issues, prepare notes for KLH, and partake in "related expert preparation activities." On November 2, 2022, KLH billed $5,037.50 to review the transcript of the second day of trial, prepare for testimony, and travel to Las Vegas; AMD also billed $3,450.00 that day to again review the transcript, research tax issues, prepare notes for KLH, and "related expert preparation activities." On November 3, 2022, KLH billed $6,200.00 to attend trial; AMD billed $3,852.50 to review the transcript, research tax issues, prepare notes for KLH, and "related expert preparation activities." On November 4, 2022, KLH billed $5,812.50 to prepare in the morning and then attend trial in the afternoon; AMD billed $2,530.00 for the same activities articulated in the preceding entries. On November 5, 2022, KLH billed $6,200.00 to prepare for cross examination. On November 6, 2022, KLH billed $5,425.00 to again prepare for cross examination; AMD billed $2,587.50 that day for the same activities articulated in the preceding entries. On November 7, 2022, KLH billed

$6,975.00 to attend trial and prepare for direct testimony; AMD billed $3,852.50 for the same activities articulated in the preceding entries. On November 8, 2022, KLH billed $6,975.00 to attend trial and prepare for direct testimony. On November 9, 2022, KLH billed $6,975.00 to attend trial and give direct and cross examination testimony. On November 10, 2022, KLH billed $3,875.00 to attend trial and give cross examination testimony, as well as billed travel time. Upon review, the Court notes that Mr. Harris testified 4 hours and 44 minutes over two days at the trial, and pursuant to applicable law the Court takes that into account in ascertaining what is the reasonable and necessary cost amount that Plaintiff should be responsible for.

In sum, while the Court is appreciative of the extent of Mr. Harris' expertise, based on the limited information provided by Defendant, the requirements of Nevada case law, and the analysis of entries set forth above, the Court finds that costs to be borne by Plaintiff associated with Mr. Harris should be reduced to $160,000.00

As noted above, while Defendant's prevailed on their 2021 Offer of Judgment which would entitle them to costs after said Offer was declined, that amount is subsumed in the NRS 18 analysis. Accordingly, there are no additional costs that the Court need address.

**ORDER**

Having reviewed the papers and pleadings on file herein, including, but not limited to, the pleadings, exhibits and affidavits; having heard oral arguments of the parties, this Court makes the following ruling:

IT IS, THEREFORE, HEREBY ORDERED, ADJUDGED, and DECREED that Defendant Pricewaterhouse Coopers LLP's Motion For Attorneys' Fees and Costs (DOC 427) is granted in part and denied in part without prejudice as follows:

The Court finds it appropriate to award Defendant Attorney's Fees for the work of Snell & Wilmer in the amount of $407,018.80.

The Court finds it appropriate to award Defendant Attorney's Fees for the work of Bartlit Beck in the amount of $1,695,735.59.

The Court further finds it appropriate to award costs, as set forth above pursuant to NRS 18 without being duplicative of NRCP 68 in the amount of $322,955.91.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiff Tricarichi's Motion To Retax and Settle PwC's Amended Verified Memorandum Of Costs (DOC 414) is granted in part and denied in part without prejudice consistent with the Court's ruling on Defendant Pricewaterhouse Coopers LLP's Motion For Attorneys' Fees And Costs as set forth herein.

IT IS SO ORDERED.

DATED this 25th day of August, 2023.

**Dated this 25th day of August, 2023**

Joanna S Kishner

HON. JOANNA S. KISHNER
DISTRICT COURT JUDGE

**AF1 140 9206 BF45**
**Joanna S. Kishner**
**District Court Judge**

## CERTIFICATE OF SERVICE

I hereby certify that on or about the date filed, a copy of this Order was served via Electronic Service to all counsel/registered parties, pursuant to the Nevada Electronic Filing Rules, and/or served via in one or more of the following manners: fax, U.S. mail, or a copy of this Order was placed in the attorney's file located at the Regional Justice Center:

/s/ Tracy L. Cordoba
TRACY L. CORDOBA-WHEELER
Judicial Executive Assistant

**JOANNA S. KISHNER**
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155