

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL TRICARICHI,

Appellant,

v.

PRICEWATERHOUSECOOPERS,
LLP,

Respondent.

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Elizabeth A. Brown
Clerk of Supreme Court
Supreme Court No: 86317

MOTION TO ENLARGE THE
LENGTH OF REPLY IN SUPPORT
OF EMERGENCY MOTION TO
STAY ENFORCEMENT PENDING
APPEAL WITHOUT BOND

DECLARATION OF COUNSEL IN SUPPORT OF MOTION

1. Following a bench trial that resulted in judgment in Respondent's ("PwC") favor and against Appellant ("Tricarichi"), PwC was awarded approximately \$2.4 million in fees and costs.

2. On October 12, 2023, Tricarichi filed a motion to stay enforcement of that order, seeking the extraordinary relief of a stay without supersedeas bond and without alternate security.

3. The district court denied in part and deferred in part that motion, ordering a judgment debtor exam, supplemental briefing, and a supplemental hearing on the Motion.

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4. Following the completion of the judgment debtor exam, the supplemental briefing, and supplemental hearing, the district court orally denied Tricarichi's Motion on February 29, 2024.

5. The underlying briefing was collectively more than 40 pages in length.

6. With leave of Court, PwC's Response to the pending Motion was fourteen (14) pages, four (4) pages more than the limitation prescribed NRAP 27(d)(2).

7. Accordingly, Tricarichi respectfully requests an additional four (4) additional pages for a total of nine (9) pages to adequately address the relevant issues in his Reply.

8. Tricarichi's counsel has diligently worked to make his Reply as concise as possible and seeks only a modest enlargement of length.

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9. In accordance with NRAP 32(a)(7)(D), a copy of the Reply is attached as “Exhibit A.”

Dated: April 5, 2024

HUTCHISON & STEFFEN, PLLC

By: /s/ Ariel C. Johnson

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Attorneys for Plaintiff Michael A. Tricarichi

INTRODUCTION

Appellant, Tricarichi, respectfully requests leave to enlarge the length limitation of his Reply in support of his pending Emergency Motion to Stay Enforcement Pending Appeal Without Bond, filed concurrently herewith, to allow him the ability to adequately address the applicable issues raised in PwC's expanded Response. Tricarichi and his counsel recognize that enlargement of page limits is generally disfavored and seek only an additional four (4) pages to address the enlarged briefing of PwC. This request is made only after diligently working to make the Reply as concise as possible.

ARGUMENT

NRAP 27(d)(2) provides that the maximum length of a Reply is five (5) pages. Tricarichi respectfully requests that he be permitted a Reply of nine (9) pages—just four pages more than the 5-page limitation. Notably, PwC also sought leave of this Court and concurrently filed its Response to the Motion at issue with four (4) pages more than what is permitted by rule, for a total of fourteen (14). Tricarichi similarly and respectfully requests an enlargement of pages to adequately respond to PwC's lengthened Response.

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CONCLUSION

For the reasons explained above, Tricarichi respectfully requests that he be permitted to file a nine (9) page Reply to Response to his Emergency Motion.

Dated: April 5, 2024

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Attorneys for Plaintiff Michael A. Tricarichi

CERTIFICATE OF SERVICE

I hereby certify pursuant to NRAP 25(c), that on the this 5th day of April, 2024, I caused service of a true and correct copy of the above and MOTION TO ENLARGE THE LENGTH OF RESPONSE TO REPLY TO EMERGENCY MOTION TO STAY ENFORCEMENT PENDING APPEAL WITHOUT BOND pursuant to the Supreme Court Electronic Filing System to the following:

ALL COUNSEL ON SERVICE LIST

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

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EXHIBIT PAGE ONLY**

EXHIBIT A

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL TRICARICHI,

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v.

PRICEWATERHOUSECOOPERS, LLP,

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Supreme Court No: 86317

REPLY IN SUPPORT OF
EMERGENCY MOTION TO
STAY ENFORCEMENT
PENDING APPEAL WITHOUT
BOND

The accounting firm PwC advised Tricarichi to proceed with a transaction it knew, but failed to tell Tricarichi, was “risky” and may expose him to liability for “aiding and abetting a transaction whose sole purpose was tax evasion.” The transaction later caused Tricarichi to owe the IRS more than \$35 million. PwC wants to “jump” ahead of the IRS’s final judgment and immediately execute on his limited assets, under the guise of “maintaining the status quo.” As explained in Tricarichi’s opening motion and further below, the status quo is the IRS has a final, non-appealable judgment and, thus, a superior claim to Tricarichi’s assets. It is also undisputed that Tricarichi does not have anywhere close to enough assets to satisfy that judgment and, therefore, cannot obtain a supersedeas bond without risking further liability to the IRS. Absent relief from this Court, PwC will attempt to immediately grab Tricarichi assets and substantially undermine the IRS’s ability to collect.

In addition to its motion, Tricarichi’s merits appeal brief will be filed one business day after this reply and will further satisfy NRAP 8 for purposes of this motion. If any part of the underlying case is reversed on appeal, PwC’s Fee Award also falls away. Among other issues, the Fee Award depends on the District Court’s finding that Tricarichi acted in bad faith when he rejected PwC’s \$50,000 offer of judgment to settle a \$20 million plus malpractice claims against them. But at the time of PwC’s offer of judgment, PwC concealed from Tricarichi a “smoking gun” document – the Wow! Email, attached hereto as Ex. A:

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|---|---|
| Mike Weber 02/14/2003 03:19 PM | To: John Dempsey/US/TLS/PwC@Americas-US cc: Dan L. Mendelson/US/TLS/PwC@Americas-US Subject: Re: Tax Shelter Disclosure (Fortrend deal)---Privileged & Confidential{doclink : document = 'C7D546621049EE8888256CCD006DBBC7' view = '5E502A1BAAAF40CA85256197006C1A32' database = '852567C9004D4259' } |
|---|---|

Wow! I didn’t know the basic transaction was risky. I thought we were told this was done all the time and there was not risk to our client. We may have already given our client the wrong advice. We need to talk with the attorneys at Schwabe the first of next week and explain that if this blows up at the IRS as it probably will we have a client that doesn’t want to give their money back. I can’t guarantee the client he won’t get sued for aiding and abetting a transaction the sole purpose of which was to evade income tax. If Schwabe can’t give that guarantee we need to back off right now.

The concealed Wow! Email establishes that **before** Tricarichi even engaged PwC to look at his Midco transaction, PwC National Office experts advised that the “basic [Midco] transaction was risky,” it “probably will” “blow[] up at the IRS,” and could get Tricarichi “sued for aiding and abetting” the counterparty’s tax fraud. Tricarichi also did not have the benefit of the Wow! Email to oppose PwC’s Motion for Fees because **it was never produced in this case**, despite a Court order requiring its production 4 years earlier. Tricarichi only learned of the Wow! Email in August

2023 when it was publicly used at a jury trial, which resulted in a \$65 million verdict against PwC for malpractice arising out of another failed Midco transaction.

PwC should not be rewarded for its concealment or allowed to seize assets ahead of the IRS when PwC knowingly put Tricarichi in the IRS's crosshairs in the first place.

A. Requiring Tricarichi to post a bond will diminish the funds available to pay the IRS.

PwC takes issue with the fact that Tricarichi focuses only on the fifth factor articulated by the Court in *Nelson v. Heer*, 121 Nev. 832 (2005). PwC Brief at 5. But that fifth factor is plain on its face: “whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position.” As PwC itself points out, the factors articulated in *Nelson* apply “when unusual circumstances exist.” Certainly, it is not typical for an Appellant to come before the Court with a judgment by the IRS that far exceeds both the Appellant’s financial condition and the amount owed to Respondent for attorneys’ fees. The Fifth Factor is the focus of Tricarichi’s current Motion because the Court in *Nelson* identified as the factor which applies to the facts before the Court here.

Tricarichi agrees that “[t]he impact on Tricarichi has no bearing on whether to grant the Motion.” PwC Resp. at 6. The only question that needs to be asked is whether providing security for PwC will in any way place “another creditor” – here

the IRS, within the context of *Nelson*, in a more insecure position. Since Tricarichi does not have assets sufficient to satisfy the IRS judgment, any payment toward a bond for the Fee Award will automatically deprive the IRS of those very same assets that PwC seeks to have Tricarichi encumber for its own benefit and not the benefit of the superior creditor – the IRS.

B. Granting the Motion Preserves the Rights of the IRS, Not Tricarichi.

PwC’s claim that *Leister v. Dovetail*, 2007 WL 9757956 (C.D. Ill. Nov. 13, 2007) is “identical” to the instant case ignores the facts of the two cases. PwC Resp. at 6-7. In *Leister*, the Court refused to eliminate the bond requirement not because other creditors would suffer harm, but because it felt that the relief would allow the judgment debtors to “favor themselves” and that the requested relief would only allow such creditors to protect “their own financial condition.” Here, the instant Motion will not protect Tricarichi’s financial condition, nor will the requested relief personally benefit him at all. The fact is that the United States Government has obtained a final judgment against Tricarichi for more than \$35 million, and that judgment was issued long before PwC’s award of attorneys’ fees. Equally undisputed is that Tricarichi does not have assets more than the value of the IRS judgment. Thus, it is simple math that any dollar used to secure PwC means that those same assets are no longer available to satisfy the IRS.

Further it is illogical for PwC to claim that “Tricarichi has provided no legal or evidentiary support that the IRS’s position would be insecure.” PwC Brief at 7. As an initial matter, Tricarichi provided a declaration and sat for a debtor’s exam demonstrating that he did not have sufficient assets to satisfy the IRS debt. *See Mot. Exs. B & C.*

This same illogical approach is exhibited in PwC’s argument where it claims Tricarichi has not presented evidence that the IRS (a) believes that it would somehow be impacted by the bond, (b) that the IRS was put on notice of whether it would be impacted or (c) could not attach any posted bond during the intervening time that this case would be on appeal.” PwC Resp. at 8. First, as to evidence of the IRS’s belief that it would be impacted by the bond, Nelson does not require an examination of the other creditor’s subjective beliefs. But even so, taking money from Tricarichi to secure a bond in favor of PwC only *a fortiori* deprives the IRS of the very assets used to pay PwC and thus, regardless of the IRS’s subjective belief, it is a mathematic certainty that depriving the IRS of assets lowers the amount of money that the IRS can collect. Likewise, the fifth factor in *Nelson* does not depend on whether notice is provided to the other creditor, in this case the IRS.

Finally, whether the IRS may be able to later attach a bond in favor of PwC is neither supported by *Nelson*, nor relevant. From either perspective, *Nelson* favors a stay without bond. First, the IRS lien on Tricarichi’s assets means he cannot freely

pledge assets to secure a bond in the first instance, nor otherwise freely transfer assets. If the IRS can attach the bond in favor of PwC, then the bond is not security for PwC and thus, PwC would be in the same position as if the Court granted the instant Motion. On the other hand, if the IRS cannot attach the bond, then Tricarichi's assets are diminished in favor of PwC, a result that *Nelson* seeks to avoid.

C. A Stay is Required to Maintain the Status Quo.

PwC is wrong when it claims that the status quo would not be maintained in the absence of a bond. PwC Brief at 9 – 11. Its entire argument in this regard is centered on its position that somehow Tricarichi has squandered his resources. While there is no record set forth by PwC to support that assertion, even if true it would not support PwC's position. With or without a bond, and with or without Tricarichi allegedly depleting his assets, PwC's position never changes. Under any scenario there is not enough money to support the entire IRS judgment which is superior to PwC's attorneys' fee award. Thus, there is no scenario in which PwC could ever receive payment on any portion of that award without also reducing the amount available for the IRS. In fact, to illustrate this point, in just the past two weeks, PwC has taken steps in Nevada to seize an automobile owned by Tricarichi. It is estimated that the car has a value of approximately \$20,000. If PwC takes that asset, then PwC will be depriving the IRS of that asset. Since there are not enough assets to pay the

IRS in full, the IRS will then have \$20,000 less than it would by preventing the seizure by PwC. Thus, in the absence of some drastic increase in Tricarichi’s wealth, any transfer of assets to, or collection by, PwC, would act as a fraudulent transfer. As to PwC, the status quo is only maintained if it is not allowed to diminish, in any respect, amounts available for the IRS. PwC only focuses on Tricarichi’s use of his assets to obscure that the issue is not whether Tricarichi is diminishing assets, but rather, whether PwC would be putting itself in a position to “jump” the priority of the IRS and thereby destroy the status quo. If, as PwC contends, Tricarichi depletes his limited assets, the IRS would also have priority over the PwC to pursue fraudulent transfer claims as to the assets transferred.

D. The Other *Nelson* Factors are not dispositive.

Finally, PwC argues that the other *Nelson* factors “all favor a denial of the Motion.” PwC Resp. at 11. But that argument fundamentally mischaracterizes and misapplies *Nelson*. The framework adopted in *Nelson* provides five factors “to consider,” but there is nothing in *Nelson* (and PwC cites no authority for the notion) that district courts must count how many *Nelson* factors weigh for and against the stay and, based on the final tally, declare the winner. To the contrary, that method of analysis would be unworkable because three of the factors, by definition, are diametrically opposed. While the second and third factors support a stay without bond when a party has the clear ability to pay, the fifth factor supports a stay in the

opposite circumstance: when a party’s financial situation is too “precarious.” Those opposing factors cannot logically be weighed against each other. When a party has an undisputed ability to pay, it is no answer in support of bond that the “precarious financial situation” factor is not met. Likewise, in this case, when Tricarichi’s financial situation is too precarious, it is no answer that he does not have the undisputed ability to pay. That is what it means to be in a precarious financial situation.

E. Tricarichi has satisfied NRAP 27 and NRAP 8.

All of the certifications required under NRAP 27(e) were addressed explicitly in Tricarichi’s opening brief. *See* Mot. at 1-5. Nonetheless, in an abundance of caution, a Certificate of Counsel is specifically appended to this Reply to further support the need for emergency relief. *See* NRAP 27(e) Certificate of Counsel, attached hereto as Ex. B. Notably, since the filing of the opening motion, PwC has been busy – it issued a wage garnishment writ; a writ of execution on all “other property” of Tricarichi, attempted to seize a vehicle, and executed on a bank account. *See* NRAP 27(e) Certificate of Counsel Exs. 1-4. If the Court does not temporarily

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stay PwC's efforts until the appeal can be decided, PwC appears committed to grab and sell any and all assets of Tricarichi regardless of the IRS lien or the likelihood that Fee Award may ultimately be set aside.

Dated: April 5, 2024

HUTCHISON & STEFFEN, PLLC

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ALL COUNSEL ON SERVICE LIST

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