IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL TRICARICHI, Appellant, v. PRICEWATERHOUSECOOPERS, LLP, Respondent.	Electronically Filed Apr 08 2024 10:36 PM Elizabeth A. Brown Clerk of Supreme Court Supreme Court No: 86317 87375 87835

Appeal from the District Court of Clark County, Nevada

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

APPELLANT'S APPENDIX TO OPENING BRIEF

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CERTIFICATE OF SERVICE

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

ALL COUNSEL ON SERVICE LIST

/s/ Kaylee Conradi
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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL TRICARICHI, Plaintiff, vs. PRICEWATERHOUSECOOPERS LLP, Defendant.	CASE#: A-16-735910-B DEPT. XXXI

BEFORE THE HONORABLE JOANNA S. KISHNER,

DISTRICT COURT JUDGE

TUESDAY, MAY 30, 2023

RECORDER'S TRANSCRIPT OF HEARING:

SEE NEXT PAGE FOR MATTERS

APPEARANCES:

For the Plaintiff:	SCOTT F. HESSEL, ESQ. - PRO HAC VICE- ARIEL CLARK JOHNSON, ESQ.
For the Defendant:	PATRICK G. BYRNE, ESQ. CHRIS LANDGRAFF, ESQ. BRADLEY AUSTIN, ESQ.

RECORDED BY: LARA CORCORAN, COURT RECORDER

MATTERS

PRICEWATERHOUSECOOPERS LLP's MOTION TO SEAL EXHIBITS 5 AND 6 TO MOTION FOR ATTORNEYS' FEES AND COSTS

TRICARICHI'S MOTION TO RETAX AND SETTLE PWCs AMENDED VERIFIED MEMORANDUM OF COSTS

PRICEWATERHOUSECOOPERS LLP's MOTION FOR ATTORNEY FEES AND COSTS

Las Vegas, Nevada, Tuesday, May 30, 2023

[Case called at 11:23 a.m.]

THE COURT: Yeah, let's just -- I'll just do appearances. We get -- talk slowly. Okay. Everybody ready? Good, good, good. Okay. We are going to page 9, Tricarichi versus PricewaterhouseCoopers, case 735910. On behalf of Plaintiff, please?

MR. JOHNSON: Good morning, Your Honor. Ariel Johnson here on behalf of the Plaintiff. Alongside me here at the table is Scott Hessell for the Plaintiff as well, admitted *Pro Hac Vice*.

THE COURT: Appreciate it. Thanks. Go ahead.

MR. BYRNE: Good morning, Your Honor. Pat Byrne on behalf of PricewaterhouseCoopers. With me is Chris Landgraff of Bartlit Beck and behind me is Brad Austin. I believe we also have a couple in the cheap seats attending by video.

THE COURT: Okay. Are they appearances or just observing?

MR. BYRNE: Just observing, Your Honor.

THE COURT: Okay. No worries.

Okay. Thank you so very much. So what we have is -- welcome back -- we have the Motion to Seal Exhibits 5 and 6 and Motion for Attorneys' Fees and Costs, document 426. Pricewaterhouse Motion for Attorneys' Fees and Costs, document 427. Opposition 444 -- document 444; reply document 445; motion

to retax and settle, document 414; opposition thereto, document 440. Realistically, the Court was going to address the motion to seal. It seems to me unopposed. I can just grant it. It meets Supreme Court Rule 3. Does anyone need any discussion on it? Can we --

MR. HESSEL: No for the Plaintiff.

THE COURT: -- would that work?

MR. BYRNE: No for Defendant, Your Honor.

THE COURT: Since there's no discussion requested even though I kind of have a double negative. Sorry about that.

The Court is going to grant the motion to seal Exhibits 5 and 6, document 426. Court finds it appropriate under Supreme Court Rule 3 and the appropriate standards.

So now let's go to substance. And here comes a question with regards to -- pops up two questions actually. A procedural question on the timing and order of oral argument. I don't know if the parties are going to -- since I have a retax and I have a motion. Are -- is it going to be argued together or are you each wanting one or two or however -- how is it thought that you all wish these to be argued because of their overlapping aspect and since it started out with a -- well, memorandum of costs and fees; so --

MR. BYRNE: Your Honor, we were planning on combining them since the offer of judgment does also include a cost component.

THE COURT: Mm-hmm.

MR. BYRNE: So we just thought it made the most sense to combine them for efficiency purposes.

THE COURT: Okay. So --

MR. BYRNE: I mean, it was initiated with our memorandum, Your Honor. They filed a motion to retax. But they didn't file a reply, so we -- we essentially got the last word on -- on both motions.

THE COURT: Right. Where I am going to oral argument, is one party going to say that you should have first and last words or the party is going to say each side should get two proverbial bites of the argument or some other agreement?

How -- are we doing something different than the memorandum, personally, who filed the memorandum of cost would go first. The party that filed the motion to retax would go second and then the party combined in the arguments, the fees and costs component because of the overlapping 68(b) and NRS 18's and all sorts of things thrown in there. Or do you want something different?

What meets your all's needs?

MR. BYRNE: What I -- what I would propose, Your Honor, consistent with what I think you just said is, we would go first combined. Mr. Hessel would go. We would reply and then Mr. Hessel would get last word on the costs because it is his -- it is the motion to retax.

THE COURT: Okay. Does that meet your needs, Counsel?

MR. HESSEL: No problem with that.

THE COURT: Okay. So my next question even -- is anyone going to assert that this is *Honeycutt, Foster vs. Dingwall* issue that I need to address because of things pending in the appellate processes? If so, speak now.

If not, I am moving forward and because nobody put it in the papers, but I ask as a just in case because sometimes people like to raise that at the time of oral argument. Not saying you can't, but people do. So I deal with reality. No? Any?

MR. BYRNE: Nothing from Defendant, Your Honor.

MR. HESSEL: I think it is within the Court's discretion to wait until the appeal is decided to address these issues. But we're not -- we didn't raise it in our brief and we're not -- we're not saying that the hearing shouldn't go forward today to consider the arguments.

THE COURT: Okay. Since the Nevada Supreme Court has stated that fees and costs is a separate appealable order, then the Court is going to move forward.

I just was making sure there wasn't something. I realize, I mean, realize, I don't read your appellate papers, so I don't know if there's some issue that somebody has nuanced that could impact me, okay. Unless you all have attached those same arguments in pleadings before me then I would see it, but, you know, don't go digging. Okay. Then Counsel, feel free to proceed.

MR. BYRNE: Your Honor, we -- we've extensively briefed

this. We had the last word because the Plaintiffs did not file a reply on their motion to retax.

THE COURT: Mm-hmm.

MR. BYRNE: I know the Court is really familiar with this case. I know the Court's read everything and I know the Court doesn't want me repeating anything that it's already read.

THE COURT: Oh, I don't care.

MR. BYRNE: So having said that, Your Honor, I have nothing to add at this point. I'll just reserve -- unless the Court has any specific questions at this time, I'll reserve it for my rebuttal.

THE COURT: As you know, the Court is going to ask standard questions. I'm going to ask, right? The Rule 68 analysis, the *Beattie* factors, the *Brunzell* factors, *Cadle versus Woodson & Erickson, Bobby Berosini*, *In Re Dish Network*, and throw in a *Fairway Chevrolet*, okay? Covering fees and costs and the analysis of both the statutory and the rule aspect.

Realistically, feel free -- I mean, I don't limit -- I should also mention NRS 18, right? But --

MR. BYRNE: Your Honor, there really is everything we have -- we have really covered everything in our brief. I guess the -- the only thing I would mention because, you know, we -- again, you're really familiar. The only thing that I've got down in my notes that --

THE COURT: Mm-hmm.

MR. BYRNE: -- we didn't maybe take on head -- head on,

is the imbalance between the fee request and the offer of judgment. And that goes to the reasonableness of the amount, the timing and the amount, Your Honor.

And I would point out that the case law does not relate costs of defense to the amount of the offer and we think such an approach would throw principle out the door if it did. And it would allow Plaintiffs to essentially extort Defendants by making things very, very expensive. They make things very expensive here, Your Honor.

So I guess the question is why would Pricewaterhouse spend 10 million dollars defending a $50,000 case? Well, Your Honor, it goes right back to principle and not the "A-L", the "L-E."

Pricewaterhouse's reputation is its most valuable asset. And in this case, Pricewaterhouse was defending its professional reputation. The offer, however, Your Honor, was tethered to a limitation of liability provision. And to offer any other number --

THE COURT: Mm-hmm.

MR. BYRNE: -- than that 50,000, would essentially be arbitrary, given that the parties agreed to the cap. And Pricewaterhouse had no interest in undermining its professional services contract.

And, Your Honor, I'd point out that even if Pricewaterhouse had offered a substantial amount, well above the 50,000, the evidence at trial was pretty clear, it wasn't going to go anywhere because the Plaintiff was out for a ransom because he

was trying to get out from underneath a 40 million dollar judgment.

And in his own papers he says he needed a substantial recovery. So I didn't want to point out --

THE COURT: Mm-hmm.

MR. BYRNE: -- that the imbalance between the costs of defense and the offer that wasn't specifically addressed, but it really was about defending Pricewaterhouse's reputation.

I think the other factors are all fully addressed. I recognize that through Mr. Hessel's argument, there will be points that I'll probably address or the Court --

THE COURT: Mm-hmm.

MR. BYRNE: -- will raise questions, but I think otherwise this Court has discretion to affix whatever number it thinks is appropriate based on the -- the factor analysis and so if you believe and we recognize that the -- the attorneys' fees are substantial and if you believe that that number is inappropriate, there should be a different number.

There's any number of ways that you can re-assess to get to a number that you think is reasonable, including, Your Honor, lodestar, there's an 11,000 hour -- there's an affidavit from -- or declaration from Mr. Levine verifying that they had -- that Bartlit Beck had over 11,000 hours of time, professional time.

And if the Court thinks that there's an appropriate lodestar number for that, whatever that number is, we would certainly accept it and I recognize this Court's handled these things a lot and is

familiar, both by the way, Your Honor, on the bench and in private practice.

And so I know that this Court is more than capable of substituting its judgment having seen the expert, having seen the -- the attorneys and worked with the parties through a lot of contested motions, an evidentiary hearing, and a two-week trial.

And so the Court is more than capable of assessing and applying and determining what's the appropriate attorneys' fees and then also, Your Honor, what would be the appropriate expert fees underneath the cost analysis.

But other than that, Your Honor, I don't have any points beyond the papers and I'll rest.

THE COURT: Mm-hmm. Okay. I do have a couple. Just -- can you refresh the Court's recollection the timing of the 2019 offer of judgment. Where the Court is going with that is, as you know the changes in the rules of civil procedure in March 2019 and including the changes to the offer of judgment rule and whether or not that triggers any impact here that either side is saying is triggered or not really because you got the 2021.

I just -- could I have a little bit more of a clarification of that because you picked the magic year for 2019.

MR. BYRNE: Your Honor, that is a great question. I don't believe it had any impact. The '19 offer was a result of Judge Gonzalez dismissing their case.

THE COURT: Mm-hmm.

MR. BYRNE: She -- and again, this was way back with even prior counsel before Bartlit Beck. And we went in on a motion to dismiss. It was denied. We went in on a motion for summary judgment. They requested 56(f) relief and three years after the complaint was filed and substantial discovery, we were in arguing the statute of limitations.

She wiped out everything that was based on 2003 services, Your Honor, which this Court ultimately found was the only time that Pricewaterhouse had a fiduciary duty or duties at all because that was the time of when the engagement started and ended.

And so given that ruling and this -- we made the offer of judgment tethered again to the limitation of liability. But I don't believe that procedural rules would have changed that. But that was the timing on the '19 and why it was made.

Of course, they then manufactured what we think is they manufactured claim that they did not initially plead in attempt to try to get around that ruling and the rest is history.

And of course, the second offer came after the Nevada Supreme Court granted the writ.

THE COURT: Okay. So --

MR. BYRNE: But I don't believe the changes affected -- would have affected the -- the offer, Your Honor.

THE COURT: So you're saying the operative offer from your viewpoint [indiscernible]

MR. BYRNE: Would be the initial 2019 offer, but the Court, you know, as you know, the Court could determine that under the *Beattie* factors it doesn't -- it doesn't hit for example on timing, amount, or the Plaintiff's decision --

THE COURT: Mm-hmm.

MR. BYRNE: -- not to accept may have not been in bad faith or grossly unreasonable. So the analysis could have changed from '19 to '21. We recognize that.

THE COURT: Mm-hmm.

MR. BYRNE: I don't think it did just because that -- that was tethered -- the original offer was tethered to the -- to the motion for summary judgment ruling that wiped out their entire case.

The next offer came as a result of the Nevada Supreme Court affirming the engagement letter and the terms which included the limitation of liability. So that's what prompted the second offer of judgment to hopefully get them to revisit and accept and move on and that didn't happen.

THE COURT: Okay. My next things are -- and you may want to wait until after you hear from opposing side. I have costs -- anyone who's been before this Court, you know what I'm going to ask. It's going to be, you got to eat, right?

So why should the other side be responsible for the meals? I'll be asking that because realistically this was not a situation that we've had -- in rare cases like in a jury trial where we have to take a shortened lunch, right? And like, feed the jury and

then the attorneys have to eat because we're doing a shortened thing.

We all had plenty of time for lunch. The Court is also going to ask about, and you know this, is choice of lawyers great, but choice of lawyer, why should the other side have to pay for flights and hotels for choice of lawyer to come in here to Nevada, when there -- since you're the one who's going to be arguing, you know --

MR. BYRNE: Not, Your Honor, I -- I appreciate it.

THE COURT: -- there's experienced counsel -- there's experienced counsel here in the state.

MR. BYRNE: Your Honor, I -- I appreciate it.

THE COURT: So whether you want to address --

MR. BYRNE: I will --

THE COURT: -- that now or you want to wait to hear what Plaintiff's --

MR. BYNE: I -- I would certainly have no problem with the Court exercising its discretion to not award the -- the meals on travel. I would note, Your Honor, that when you travel, you don't -- you're not afforded the luxury of eating at home and it is substantially more expensive. But I get it.

THE COURT: There's grocery stores in the greater Las Vegas area. I recall once I rented an Airbnb to save on costs and all this, right?

MR. BYRNE: I haven't visited once since 2020 in the

pandemic, Your Honor, so I don't know.

THE COURT: I believe when you all were talking about where you were staying --

MR. BYRNE: No. I -- I --

THE COURT: -- during the course of the trial. One side was telling me where they were staying, the other side went in an Airbnb which --

MR. BYRNE: I -- I --

THE COURT: -- and I remember some people bringing in lunches. I'm just saying. We have grocery stores here.

MR. BYRNE: Your Honor, I recognize, again --

THE COURT: Yeah, yeah.

MR. BYRNE: -- the idea that -- that meals are going to be incurred whether you're in trial, you're traveling, is -- is absolutely fair and I also recognize that a decision to retain outside counsel is certainly within the -- the client's prerogative.

THE COURT: Mm-hmm.

MR. BYRNE: -- but the -- the travel then becomes a component that you wouldn't have if you had local counsel. So I recognize and appreciate all of that.

THE COURT: Okay. Except you can say that if you want after Plaintiff's counsel if I have any, I let you know, or maybe you don't know. But of course, I was going to ask that. Okay. So big ticket items. Go ahead, Counsel with the general concept and then your big ticket items.

MR. HESSEL: Sure. Thank you. Scott Hessel --

THE COURT: Or whatever else you want to say. I mean, sorry about that.

MR. HESSEL: I assumed that that was the case. Scott Hessel, for the Plaintiff, Michael Tricarichi, who is also, as I'm sure you noted, in the courtroom here.

THE COURT: Bless you.

MR. HESSEL: I thought I deal -- Gesundheit. I thought I deal with the motion for costs and then the attorney fee award separately, mostly because they deal with different statutory and fact and -- and law factors.

So with respect to PWC's motion for costs --

THE COURT: Mm-hmm.

MR. HESSEL: -- obviously the Court knows that NRS 18.005 defines a particular cost that a prevailing party can ask the Court to award following a trial. The lion share of what PWC seeks in their $921,000 and 80 -- 921,834 -- are the expert fees. In fact, $815,000 roughly of the 921 are expert fees. 18.005(5) provides that the default reasonable fee for experts is an amount of not more than $1,500 for each witness.

PWC's motion obviously seeks 600 times the statutory amount and fails to satisfy the statutory requirement that the Court, there's obviously a proviso in the $1,500 cost determination that provides that the Court can determine that the circumstances surrounding the expert's testimony were of such necessity as to

require a larger fee. And *Frazier v. Drake* which we cite in our brief, 131 Nev. 632 provides that any award for expert fees in excess of $1,500 per expert, must be supported by an express careful and preferably written explanation of the Court's analysis of factors pertaining to determining a reasonableness of the requested fees and whether circumstances surrounding the expert's testimony were of such necessity as to require the larger fee.

PWC's opening brief relegates to a footnote a justification for why the three experts who total -- whose total fees were $814,000 satisfy the factors in *Frazier*, largely focusing on the credentials of the experts, but ignoring that their work was necessary to this Court's ultimate adjudication of the case or important to this Court's ultimate adjudication of the case. Or that their work was consistent or comparable to experts from Nevada who would have testified on the same subjects and whether the extent and nature of the work performed justifies something more than what was paid.

They just ignore all those factors and -- so for that reason we - -we believe that at best the Court should award the $1,500 default rule because they haven't satisfied the factors to justify something more than that.

The costs - there are certain costs that are included in their motion for costs, like mediator fees, *Pro Hac Vice* fees for six or more attorneys from Bartlit Beck, some of whom didn't even file their motions for *Pro Hac* until trial. And messenger services. Those

fees are not authorized expressly under NRS 18 and we say they shouldn't come in.

Obviously, the trial Court could in its discretion decide to include them, but we don't think that they've done anything to justify that they should.

As to the remaining costs, PWC does not provide an adequate basis for the Court to assess whether those costs are reasonable and necessary. There's some $100,000 in additional costs other than the expert fees.

PWC has provided nothing other than an itemized list and a generic claim in the affidavit that they're reasonable and necessary. But the Nevada Supreme Court has a number of times held that such blanket assertions without more are inadequate. We cite the three I think we cite in our motion to retax that says that just listing what your fees are, and then putting in an affidavit saying that they're reasonable and necessary is insufficient as a matter of law. You have to explain why the particular costs were reasonable and necessary and they clearly failed to do so.

And one final point in this regard is that both of these motions, they bear the burden of proof. So if they have failed to meet their burden --

THE COURT: Mm-hmm.

MR. HESSEL: -- on the elements required, the appropriate remedy is to deny the relief requested. They obviously spent considerable amount of time and expense putting together their fee

petitions and their cost petitions, adding, you know, insult to injury to the fact that the client as it sits here due to relying on the advice in 2003, has a 40 million dollar judgment against them, they're seeking to pile on. But ultimately, what matters is, do they meet the elements? Did they meet their burden of proof?

And there I want to sort of segway then to the motion for attorneys' fees. The parties are generally in agreement and I think the Court recited what the relevant factors are and what the relevant criteria is.

Is PWC entitled to an award of attorneys' fees under Rule 68. Is -- that determination is committed to this Court's discretion and based on an analysis of the *Beattie v. Thomas* factors and progeny that have interpreted those factors.

The number one factor and number three factor in the *Beattie* test whether Plaintiff's claim was brought in good faith and whether Mr. Tricarichi rejection of a $50,000 offer was grossly unreasonable or in bad faith, we think are largely dispositive of the motion.

And the evidence of why Mr. Tricarichi's rejection of the $50,000 offers and his determination that the claims were brought in good faith, is found in the Court's rulings that led up to the trial. It's not dispositive and certainly the cases that we found on this point that we cite to trial Courts determination and a Supreme Court -- an unpublished Supreme Court decision saying that denial of summary judgment does provide some evidence that the claims were pursued

in good faith.

We're not suggesting that they're dispositive of those factors, but we're suggesting that the record here from the point where the initial 2003 claims were dismissed, evidences good faith by the client in continuing to pursue those claims.

And we do set it forth in the briefs but just, I think, a brief reminder just how many times PWC moved to have these claims dismissed on many of the same arguments that they ultimately presented at trial.

Docket 107 is the order that granted a renewed motion for summary judgment that the 2003 claims were time barred, but it did so without prejudice to whether the Plaintiff could assert claims arising out of the conduct into 2008.

That argument actually was not prompted by the Plaintiff. It was prompted by Judge Gonzalez' reaction to our claim that the 2008 conduct should evidence fraudulent concealment and tolled the statute of limitation as to the original 2003 claim.

In any event, the Judge in its order at docket 107 said, if you can assert a claim as to 2008 conduct, you're entitled to do so.

So then we over PWC's opposition moved for leave to amend and at docket 138 and 139, which is in March of 2019, the Plaintiff was granted leave to allege claims based on PWC's post 2008 failure to disclose material information about the transaction following IRS notice 2008-111.

And obviously, Your Honor heard all the evidence at trial

about those things, but the point is that -- at -- that even at that early stage in March of 2019, PWC argued that there was no duty in 2008, that were was no causation, that there's nothing that they were going to share with the client, that was going to change how he was going to proceed in litigation and that even those claims were time barred.

And we responded and the Judge ultimately granted us leave to amend. At docket 148 after leave was granted to file the amended complaint that focused on 2008 claims, they moved to dismiss those claims, arguing that they were time-barred, arguing that they had no duties to Mr. Tricarichi, arguing that they failed -- that we failed to plead causation arising out of those claims and the Court denied those motions -- the motion to dismiss and allowed the case to proceed forward with discovery.

It was at that point the third -- by my count, sort of, the third attack on the 2008 claims that they served their first offer of judgment after the Court denied the motion to dismiss and offered for the first time $50,000, which, you know, for a moment I just want to sort of back up, big picture, the claim as you heard at trial was for 20 million dollars in damages. The $50,000 offer of judgment no doubt had related to the fee award or the fee limitation in the engagement agreement.

But at this point in time the Supreme Court had not granted mandamus. The allegations in the original --

THE COURT: Just -- sorry, just tie -- I need you to tie --

MR. HESSEL: - Oh, 2019.

THE COURT: Since I've got two offers --

MR. HESSEL: Yeah.

THE COURT: -- I need you to be clear which this time you're referring to.

MR. HESSEL: Yeah. In 2019, the state of the world was that we were alleging claims not arising out of an engagement agreement, but out of later discovered facts.

And so there was no connection to any damage limitation clause and as I point out next, you have a January 5th, 2021, order which we attached to our motion because that was the order that you vacated following the mandamus because this was the joint motion for summary judgment and motion to strike the jury demand.

And because that -- that order, the January 5th order had both components, and then the mandamus vacated that order, it's actually not on the docket anymore. So we couldn't refer to the docket number. But my -- the point, the reason why we're citing it is because they also moved for summary judgment and fought leading up to the hearing on January 5th, 2021, and the Court denied a motion for summary judgment, dismissing the 2008 claims and then also denied the, you know, the jury demand issue which is how we get up to the mandamus petition.

And I know you know this, but there was some sleight of hand in counsel's argument. The issue that was presented in the

mandamus solely related to the jury waiver. It did not relate to the damage limitation clause that wasn't before the Supreme Court.

Yes, the Supreme Court then remanded to you to have an evidentiary hearing on whether the jury waiver was binding which you held that it was, but then even after that, there was subsequent briefing on the damage limitation clause which brings me to docket number 356, another motion for summary judgment by PWC, where they raised many of the same issues they've been raising since the outset of the 2008 claims, as well as a new motion to limit the damages to the amount of fees paid.

Both motions were denied because there were disputed questions of fact to be resolved at trial concerning whether PWC's conduct rises to gross negligence.

Now, I go through that whole history just to establish that while it's not dispositive of factors one and three, it also cannot be ignored that the Plaintiff, when evaluating an offer for $50,000 in the face of a 20 million dollar claim, is going to look to how has the Court assessed the claims to date.

And five times by my count, PWC sought to have the claims kicked and in each instance at various different procedural postures, the Court denied those motions and said that there were issues of fact to be considered at trial.

THE COURT: Mm-hmm.

MR. HESSEL: To be sure, this Court ruled that we didn't meet the burden of the malpractice claims with respect to 2008. But

that fact, the fact that the Court ultimately decided that the claims were not well founded, is -- does not establish that the claims in their origination were brought in bad faith or that Mr. Tricarichi's evaluation of the $50,000 offer was in bad faith or grossly unreasonable.

What they established is exactly what this Court found at docket 356, which is these were questions of fact that a trier of fact needed to consider and that by itself does suggest that the claims were pursued in good faith.

If the Court resolved those two factors which, you know, pertained to one and three, in our view it's within the Court's discretion to on that basis alone deny PWC's motion for fees.

So it also bears noting that PWC's focus entirely on the 2008 claims in arguing that the claims were pursued in bad faith and further suggesting that Mr. Tricarichi made some sort of misrepresentations ignores that the offers of judgment, which are made in 2019 and 2021, require that Mr. Tricarichi not only release his claims as to the then pending 2008 conduct, but also give up his right to appeal the dismissal of the 2003 claims because the offers of judgment say you have to settle for $50,000 and you're done.

On their face, they say that the exchange is $50,000 for full releases in all respects.

THE COURT: Can we go back to the -- sorry, I'm trying to brief on the face of the actual offers of judgment.

MR. HESSEL: Yeah. It's in the appendix to -- if you look at

Exhibit 1 to PWCs motion.

THE COURT: Give me a second. I just need my facts so I -- I didn't mean to interrupt.

MR. HESSEL: That's okay.

THE COURT: The time is yours. It's just --it's just --

MR. HESSEL: So Exhibit 1 to the appendix in support of PWCs motion and Exhibit 2 I think are the two relevant offers of judgment and they both reiterate that the terms of the offer of judgment are $50,000 for full releases.

THE COURT: Okay. Thanks --

MR. HESSEL: And that's typical right? That's typical of offers of judgment. You can't actually make by -- by the rules as I read them. The offers of judgment are to be for full and final resolution of all -- all pending claims -- all -- all claims between the parties. There's no partial settlements or partial offers and the -- I'll give you a second if you want to --

THE COURT: No, it's -- go ahead.

MR. HESSEL: Sure. So the point here is on the one hand PWC says, oh well, you should have taken your appeal of the dismissal of the 2003 claims in 2019 when the judge granted the motion for summary judgment without prejudice.

But then on the other -- because they apparently are of the belief that those are the -- those are the only claims that had any merit. But the offers of judgment required that Mr. Tricarichi not only settle the 2000 -- the 2008 claims for 50,000, but also give up his

right to appeal the dismissal of the 2003 claims, which is the exact issue that we are now appealing to the -- to the Court. It pertains to that 2019 order granting summary judgment on the 2003 claims.

And so the point is that by itself makes the offer unreasonable and Mr. Tricarichi's rejection of it not in bad faith.

The 2003 claims not only doubled the exposure to PWC because as we pointed out at trial and pointed out here today, his exposure to the government as it stands today was $40,000. The 2003 claims suggest that PWCs original advice was not well founded and had he -- had they given him the appropriate advice, he wouldn't have gone forward with the transaction.

The 2008 claims cut those damages in half. So the considerations at the moment were $50,000 versus exposure of 40 million. And that -- to be sure I'm not arguing and I wouldn't suggest that in every case where the Defendant offers very little and the Plaintiff has lots of exposure, that that necessarily means that the Defendant's offer is unreasonable and the Plaintiff's rejection of it is -- is reasonable, but on the facts of this case I think it does support that contention.

PWCs offer of 50,000 was never reasonable and PWCs decision to then incur 9 million dollars plus in fees for a 20 million dollar exposure, is frankly beyond comparison in the case law. There is no -- no -- the cases that we've, that I've read, that I've looked at in the -- in the Rule 68 context, they are talking about offers that are in the ballpark, in the realm of what the exposure is.

They relate in some way to the exposure.

Here, to be sure PWC was entitled to stick to their damage limitation clause and no one is saying that they -- they didn't have a reason why they chose $50,000, but they bear no -- it bears no connection to the potential exposure at issue.

PWC is asking the Court to approve in order to get to the 9 million, a first-of-its-kind flat fee arrangement, whereby PWC agreed to incur $275,000 a month in the discovery phase of this case, $300,000 for the month before trial and $50,000 a day during trial while only offering $50,000 to settle the case.

Now, it's true there are contingency fee cases out there that say you don't have to submit your hourly fees where you're acting on a contingency fee arrangement, but those cases back up the reasonableness of the fee with comparisons where there are other contingency -- personal injury contingency lawyers who charge a third, or charge 35 percent. Where the exposure at least is connected to the amount of the fee.

Now, PWC may have decided that their reputation was worth what they charged and it may be that PWC thought that they got a good deal ultimately. But it doesn't establish the reasonableness of their fees. It makes it seem like this was a vendetta to demonstrate to Mr. Tricarichi and to other clients that they would spare no expense regardless of the exposure.

But the inquiry that is now before the Court is whether the reasonableness of their -- whether you can assess the

reasonableness of their fees without any invoices reflecting the actual amount of time incurred.

Mr. Byrne made reference to the 11,000 hours that were spent by Bartlit Beck, but they didn't -- that's just put in via affidavit. They do not put in time records for the time actually incurred.

Plaintiff -- both the Plaintiff and the Court had no basis to assess the reasonableness of their fee other than PWCs willingness to pay it because we can't say what do they spend on a particular task. We can't say how much time did they -- did Bartlit Beck spend on that task versus local counsel and the mere fact that contingency fee arrangements have been approved without hourly fee cases, does not justify the fixed monthly fees without hourly accounting, which would be not only a first of its kind under Rule 68 or under Nevada jurisprudence, but they don't cite a case anywhere from any forum that says a flat fee arrangement like what PWC agreed to here is reasonable.

It bears no relation to the amount of work that they actually would perform in a given month. It was without regard to that.

So ultimately while the papers do go through a lot of this analysis and set forth certain challenges about certain costs that were included in their fee petitions, to me the bigger picture issue here is that the clients can only be expected to assess the value of their case and the whether it should be pursued, continued to be pursued in response to how the Court deals with its claims.

And at every turn PWC attacked these 2008 claims citing similar arguments that they ultimately proved at trial, but what those pre-trial rulings suggest is that the claims were brought in good faith and did need to be adjudicated in front of a trier of fact. And if that's the case under those circumstances, then the *Beattie* factors, I think both one and three suggest that the motion should be denied because the offer of judg-- the Plaintiff's pursuit of the claims was not in bad faith and his rejection of the $50,000 offer was not in bad faith or unreasonable.

To address I think the -- some of the issues that you brought up to -- to counsel as to the timing of 2019 and the timing of the 2021. As I pointed out in the chronology, the 2019 offer of judgment followed on a denial of a motion to dismiss by PWC, stating that the 2008 claims were adequately pled.

Those claims were always about the facts which PWC knew and the client didn't after notice 2008-111. They were never about you didn't tell them about notice 2008-111. They were always about you knew things that would have changed how he pursued the litigation.

Ultimately, this Court found that -- that based on the evidence, those claims didn't hold water, but that by itself does not support a fee petition. That by itself does not establish that the claims were not pursued in good faith in their first instance.

It just suggests that sometimes cases need to be tried and the evidence laid out for a finder of fact. But that doesn't make an

unreasonableness.

And I pointed it out in passing, but I note that my client would think that I wasn't doing my job if I didn't emphasize here adding 10 million dollars in fees and costs on top of what he already owes the government is sort of the definition of insult to injury. So I'd ask that you deny both motions and I will --

THE COURT: I got questions.

MR. HESSEL: Okay.

THE COURT: [indiscernible]

MR. HESSEL: Yeah.

THE COURT: Okay. Okay. Broad picture question first. I'm looking at -- and I was waiting to hear what you said -- I was going to start out with before I ask this question. Exhibit 1, the motion for fees and the offer of judgment dated September 25th, 2019, okay?

And I'm looking at page 2, starting around line 17, right, I mean, realistically on page 2 but where it starts with PWCs offer does not include --

MR. HESSEL: Yeah.

THE COURT: -- and what it does include?

MR. HESSEL: Yeah.

THE COURT: What is your statement of what that offer includes? 50,000 covers what? Obviously, I'm going to ask opposing counsel what that 50,000 covers.

MR. HESSEL: Yes, I -- so to me what -- what is at issue is

not what is excluded, which is the line 17 that you just referenced, but what follows.

THE COURT: Because of what I'm trying to go is, you know what I mean, in Nevada and several other places, right, an offer of judgment can be award specific, it can include -- be inclusive of attorneys' fees, costs and interest, can be inclusive of attorneys' fees, not costs, not interest -- a variety of different things. So --

MR. HESSEL: Right.

THE COURT: -- where I'm trying to go is what are you viewing is bundled in that offer for that 50K?

MR. HESSEL: Yeah, what -- what I -- what I focused on is actually the -- the end, which is, if you look at page 3, beginning at line 4 --

THE COURT: Mm-hmm.

MR. HESSEL: -- or really, I think it's line 8. If Tricarichi accepts this offer, PWC will pay the amount of the offer within 21 days and all claims of Tricarichi's claims against PWC will be dismissed with prejudice.

THE COURT: Mm-hmm.

MR. HESSEL: The caveat that you referenced earlier, the line 17, this offer does not include pre-judgment interest. What I deduced that to mean is basically that in offering $50,000, we don't also get pre-judgment interest on that $50,000 if we were to accept it.

THE COURT: Oh, no, no, no. I'm sorry. My question may

not have been clear.

MR. HESSEL: Oh.

THE COURT: You can have 50K inclusive of attorneys' fees -- it's the comparison number, right? 50K is that also taking into account attorneys' fees, costs and interest, or is the 50K exclusive of attorneys' fees, costs, and interest? And don't worry, I was going to ask the page 3 question in just a moment.

MR. HESSEL: Okay.

THE COURT: I was going page by page on that because --

MR. HESSEL: Right, so --

THE COURT: -- my page 3 question, to give everyone the heads up, in case, I know people are evaluating it, is you know that's more than the standard NRCP 68, which judgment against it is not a dismissal with prejudice. But I'll get there in a second. But --

MR. HESSEL: So the -- the two, the attorneys' fees and costs that Tricarichi has incurred in this case are not covered by this offer. That's what I read the --

THE COURT: So to merit of his --

MR. HESSEL: -- line 17, 18.

THE COURT: -- underlying claim, but exclusive of attorneys' fees, costs, and interests. Is that what you're reading it?

MR. HESSEL: Yes.

THE COURT: Okay.

MR. HESSEL: Tricarichi's attorneys' fees and costs and pre-judgment interest as distinct from interest on the underlying tax

court judgment.

THE COURT: Okay.

MR. HESSEL: And then -- so -- so the way that I read this is, is that PWCs offer does not include, meaning that it is -- it is -- has no -- it is -- it is expressly excluding any claim for pre-judgment interest or attorneys' fees and costs that Tricarichi has incurred at that time.

THE COURT: Okay. Then maybe let me word a couple of examples and maybe --

MR. HESSEL: Sure.

THE COURT: -- I see if I'm on the same page as what you're saying. Hypothetically, in a different world, not the court's order, but in a hypothetical different world, if the court had awarded $49,000 for the claim portion, would that have -- and the attorneys' fees from Plaintiff was -- how much you want me to put, whatever --

MR. HESSEL: More. More than a thousand dollars.

THE COURT: More than a thousand dollars.

MR. HESSEL: Yes.

THE COURT: A million, whatever, okay? More than a thousand dollars or the costs, okay? Any bundling of those, right? Make my life easy to this one and say it was 100,000 in attorneys' fees. It really doesn't matter if I say 2,000 or 100,000 or if it's 8000 and 1 dollars, get's you the same.

So $40,000 award and attorneys' fees of somewhere over a thousand and one dollars just in case somebody is going to say it

matters in that exact numerical thing, right? So --

MR. HESSEL: So by my reading of this offer --

THE COURT: Does that feed the offer of judgment or --

MR. HESSEL: No, it does not.

THE COURT: Okay.

MR. HESSEL: So we would -- by my reading of this, if we're, if we win $49,990 --

THE COURT: Mm-hmm.

MR. HESSEL: -- then we're under the $50,000 cap and anything else is not -- is not -- does not increase that number.

THE COURT: Okay. And the liability provision was under 50,000 --

MR. HESSEL: It was.

THE COURT: -- in your contention or 50,000 exactly, like, under the limitation of liability provision, going back to your earlier argument, are you saying it was $49,999.99?

MR. HESSEL: No, I think --

THE COURT: Or could it have gotten to 50,000?

MR. HESSEL: Well, the actual amount of fees that were billed by PWC I think at trial, the evidence was it was $48,773, something like that.

THE COURT: Mm-hmm.

MR. HESSEL: But clearly, they rounded off for the purposes of the offer of judgment to get to 50 -- of an even number.

THE COURT: I'm sorry. My question is a little different.

MR. HESSEL: Oh, we --

THE COURT: The party analysis that was stated is that the 50,000 came from the idea that there was a view that there was a limitation of liability provision capping it at --

MR. HESSEL: Yeah.

THE COURT: -- X, right?

MR. HESSEL: Right.

THE COURT: The X was stated to be 50,000.

MR. HESSEL: Ah, I see where you getting.

THE COURT: So --

MR. HESSEL: I think it's closer --

THE COURT: -- the next question is, were you contending that, well, 50,000 and a penny, right?

MR. HESSEL: Well, I think the -- if you had concluded that we were only entitled to fees $48,773, that were actually billed by PWC, that number also would come below the offer of judgment of $50,000 and would mean that --

THE COURT: Okay.

MR. HESSEL: -- that we would be in the same -- we would be having the same debate even if you had concluded that we were entitled to the amount of fees that PWC had billed.

THE COURT: Okay. I'm trying to see if you're all on the same page for my, you know what I mean, to look at -- what you're looking at for spot-on analysis.

Mr. HESSEL: Yeah.

THE COURT: So next question. Since you already jumped ahead to page 3, correctly anticipating I was heading there. The with prejudice, right? The claims against PWC will be dismissed with prejudice with the reference to 68(d)(2).

Were you saying that was an additional term on offer of judgment? It's straight out of 68(d)(2). Are you -- because what was your point that you were trying to say with regards to the dismissal with prejudice pleas?

MR. HESSEL: Sure. The point is that the offers of judgment are required dismissal of all claims that Mr. Tricarichi brought against PWC, not only the 2008 claims that were ultimately tried. They would have required that he agree to exchange $50,000 for any and all claims that he has ever alleged against PWC, including the 2003 claims that are the subject of the current appeal.

Those claims were at this moment in time dismissed on statute of limitations grounds. But the point that I'm making here is that the analysis that the Court needs to consider at this stage to assess the reasonableness of him rejecting the offer of judgment, both in 2019 and in 2021, is not just what were the value of his 2008 claims --

THE COURT: Mm-hmm.

MR. HESSEL: -- that were ultimately tried, but also the value of the appeal. And my point there is that the value of the 2003 claims increases by 2 X the potential damages because -- and this gets into the weeds a little bit, but the offer of -- the 2003 claims say I

would never have gotten into this transaction at all. I would never have gone forward with this transaction at all and so the full amount of exposure is in play, whereas the 2008 claims are only basically half of the total damages.

And ultimately what I want to focus on is --

THE COURT: Mm-hmm.

MR. HESSEL: -- this issue of damage limitation clause warranted a Supreme Court appeal, required an evidentiary hearing by Your Honor as to a good faith dispute by the parties which is PWC never showed that they actually sent him the terms and conditions that bound him to the damage of limitation clause and Mr. Tricarichi was adamant from the beginning of this case until the end of this case that he never got those terms and conditions.

Now, again, reasonable people can disagree and a finder of fact can conclude otherwise, but no one could say that that wasn't a good faith dispute because in neither his files, nor in the files of PWC was there any evidence that they'd ever actually sent the terms and conditions to the client.

Now, you know, there was evidence that was put on about how they were incorporated by reference and he says, Stasky [phonetic] says that he sent it to him and that's all well and good. But what we're evaluating at this moment is, was it unreasonable for him --

THE COURT: Mm-hmm.

MR. HESSEL: -- in 2019 and then in 2021 --

THE COURT: Okay.

MR. HESSEL: -- before those were all assessed, to say no. To say no, I'm not going to give up my 40 million dollar claim or 20 million dollar claim and accept a $50,000 offer.

THE COURT: Okay.

MR. HESSEL: Other questions? I know that you are -- I see [indiscernible].

THE COURT: Yes, I'm looking at the clock intentionally and making sure you all notice I'm looking at the clock because I need -- I have the unfortunate challenge that today some of my early, I put on a very light calendar so that it was easy to start this, right, at least I thought it was going to be.

But we had some ones that took a lot longer, so I have two choices folks. I can send you out to lunch at your own expense. You know I had to say that. Or maybe you don't eat. I don't even know if people are eating.

MR. BYRNE: We will not amend our memorandum, Your Honor.

THE COURT: Okay. And have you come back because I can't keep my team. Or my other choice is I limit you to a total of no more than five minutes to finish up. I'm trying not to do that because I realize the importance [indiscernible] or whatever you feel like, so you can come back after lunch or we can sum up in five minutes because I got state and federal law folks, so that's going to take precedence. What's your choices?

MR. HESSEL: I'm fine with five minutes.

MR. BYRNE: Five minutes, Your Honor.

THE COURT: Okay. That includes my questions, which you know I'm going to have questions on these offers of judgment under the per se rule of NRCP, right? And it's a 21-day payment issue, not a conditional offer of judgment provision. That's going to be my question.

MR. BYRNE: So -- so, Your Honor --

THE COURT: You understand what I'm saying? I think you already --

MR. BYRNE: Right.

THE COURT: -- figured out my questions because I think we were already talking about it.

MR. BYRNE: So on the -- on the two -- on both offers, Your Honor --

THE COURT: Yes.

MR. BYRNE: -- our dilemma was we knew -- we were comfortable that -- that the limitation of liability provision would apply and so his damages were going to be kept under 50,000, 48 something.

THE COURT: Total damages including attorneys' fees and costs?

MR. BYRNE: His -- his --

THE COURT: Because he had exclusive --

MR. BYRNE: -- no, no, no, no --

THE COURT: -- okay.

MR. BYRNE: -- that's -- I'm talking about the damage portion at trial. Then we knew there could come a cost memorandum and potentially attorneys' fees. Potentially.

THE COURT: Mm-hmm.

MR. BYRNE: That would likely and almost certainly exceed 50,000. So we -- trying to guess that number and the number --

THE COURT: Counsel --

MR. BYRNE: -- is nearly impossible. So to avoid that exercise we said this is just for your -- your money damages and oh, by the way, pre-judgment interest, costs, expenses, attorneys' fees may be added by the Court to the extent they are permitted by law or contract. So they could have accepted and in theory, sought costs and that was --

THE COURT: So 50, exclusive of attorneys' fees, costs, and interest?

MR. BYRNE: Yeah. That was to avoid this exercise of trying to predict what their costs would be because we didn't know. So we said, okay, look, you can go get your costs as the prevailing party. If you accept this offer, we allow that in this offer of judgment, and if you look at line 21, Your Honor, on page 2 --

THE COURT: Uh-huh.

MR. BYRNE: And that was to avoid that issue of trying to guess what their costs would be. We were less concerned about

attorneys' fees, Your Honor, but -- but costs --

THE COURT: Okay.

MR. BYRNE: -- certainly would -- would exceed the 50,000. And so to avoid the exercise of guessing wrong because we knew we could guess under 50,000 number and be right because it was the limitation of liability.

THE COURT: Sure.

MR. BYRNE: So that's -- that's how we drafted both offers. So in theory, Mr. Tricarichi could have gone and sought costs, attorneys' fees, whatever was allowed as the prevailing party on the offer of judgment.

That's how we carved it out to avoid that -- that confusion of is it better or what -- is the ultimate number at trial better or worse? And so that's why we did it that way, Your Honor.

On the -- let me deal real quickly because I got little time. Let me --

THE COURT: You know, I'm going to ask you on page 3 because here you have a dismissal with prejudice, right?

MR. BYRNE: Right.

THE COURT: NRCP 68(d)(2) doesn't necessarily dismiss it with prejudice, right? And if it's silent it's assumed to be a dismissal without prejudice, right, and is alternative to a judgment.

So what's your interpretation? I'm not saying that there's been an interpretation of 2019 changes to 68 that directly impact

(d)(2). I'm asking your thoughts.

MR. BYRNE: Your Honor, the intent was to buy peace with this. And that's why we drafted it that way. We -- we did not want subsequent litigation. And I recognize with Mr. Hessel's arguing, which is well, then we have to dismiss the claims that we already lost on, on an order with prejudice, Your Honor, from Judge Gonzalez. They still had appellate rights. And that gets me back to their good faith or lack of good faith, Your Honor, in pursuing those claims, the 2008 claims.

When they decided to go down the road and drag us down on their frolicking detour for the 2008 claim, Your Honor, they were at cross-roads. They should have appealed.

Judge Gonzalez just did what Judge Gonzalez did. She hears them arguing that oh, Your Honor, that they were concealing all these facts and Judge Gonzalez looked and said well, I don't know, is there an ongoing duty, is there -- she raised a bunch of questions.

And had they -- she didn't answer those questions for them and they then went out and went down this road, Your Honor, and asserted a claim. And Mr. Hessel can now try to spin away because it was undisputed that his client knew about notice 2008-111 long before PWC would have been around to tell him about it. He knew; his team knew.

They drafted a claim that was based on, oh, if PWC would have just told us. And, Your Honor, there was nothing PWC could

have done to change Mr. Tricarichi's direction he was going. He brought in PWC for a very limited purpose, to get him essentially his insurance policy opinion. And then he wanted nothing to do with Pricewaterhouse, Your Honor. He wasn't looking for Pricewaterhouse's opinion. He had his own experts.

And, Your Honor, let's be clear. On this 2008 claim. Yes, we went at and we came back many times. We were frustrated. We thought it should have been dismissed, Your Honor, with all due respect. We lost. But ultimately at trial, Your Honor, they lost on duty. They lost on breach. And they lost on causation and it wasn't close, Your Honor.

Because Mr. Tricarichi indisputably knew that the premise of his claim was false. He knew it. He didn't need discovery. He knew it. And his team of experts were opining exactly like Pricewaterhouse opined. That's the irony in all of this. Is his own lawyers, you saw -- you've seen the internal communications, were -- were -- were concluding the same as Pricewaterhouse.

Now, they weren't telling him that it was a hundred percent, nor did Pricewaterhouse --

THE COURT: Mm-hmm.

MR. BYRNE: -- and the problem is, unless it's a hundred percent, you are taking the risk. You could be wrong. A court could go the wrong way.

THE COURT: Mm-hmm.

MR. BYRNE: So he was getting the exact same advice

from his own experts and there was nothing that Pricewaterhouse could have done or said and that's absolutely clear and he knew it.

So when he took Pricewaterhouse down this road in -- in 2019, when his other claims were dismissed, that was the bad faith, Your Honor. And then we were down the road and we were incurring substantial fees.

And ultimately, Your Honor, that's the same reason why he should have accepted the offer of judgment and it was in bad faith not to do it because he was continuing to send Pricewaterhouse down this road of very expensive litigation.

Your Honor, in terms of the fees, look, we recognize that the total fees requested are substantial.

THE COURT: Mm-hmm.

MR. BYRNE: The work that was done was substantial, Your Honor. And if the Court believes that the fees are too high, the Court has absolute discretion to reduce those fees. The answer isn't to say no, it's to say, okay, what would be reasonable?

And this Court has the experience to do that. Both -- and Your Honor, again, you're intimately familiar with the work that was done since the offer of judgment. The numerous contested motions, the evidentiary hearing, the trial and all of that. You know exactly what was done.

The Plaintiffs complain that Bartlit Beck fees lack sufficient breakdown of hours and tasks. But the O'Connell case says, it's not required. This is an area where the Court has great discretion.

And a flat fee arrangement that Pricewaterhouse negotiated -- a very sophisticated party negotiated with another sophisticated party -- really got expensive, Your Honor, because this case got protracted and dragged out.

THE COURT: But -- but can I -- compare, right, *O'Connell* with -- because that was contingency, right?

MR. BYRNE: Yes, Your Honor.

THE COURT: With the risks of contingency. That was a PI case, right?

MR. BYRNE: Yeah.

THE COURT: And the fact that what it did -- actually, that case, they actually had separate hourly billing anyway, but it was a concept.

But here isn't it just the opposite because here is no risk, because here's a -- oh, no, excuse me, not a risk because you can spend more billable time than a flat fee. But that's not being argued to this Court. What's being argued is that Plaintiffs should be responsible for these minimums, but doesn't allow the Court to get an itemization to determine number of attorneys, right, number of hours. And that's not in any way a criticism. It's -- it's what I'm hearing in their argument is, I can't see -- not only can I not see the blades of grass, right? I can't see the turf. It's kind of just bundled up in the whole yard.

MR. BYRNE: And that would be no different in a contingency, the context. I recognize that there's a difference in the

contingency fee. There's certain risks that the law firm takes on.

THE COURT: Zero.

MR. BYRNE: Right. You could get -- you could get a zero. And the risks here are a little different. Now, for example, the overstaffing, Your Honor, that's a risk. Bartlit Beck takes that on. The client doesn't pay any more because they have six lawyers, seven lawyers at trial. They're paying the flat fee. So when they argue too many lawyers, well, that's -- that's part of what Pricewaterhouse paid for, which was they didn't want to have to look at 8,000 billing entries and -- and get to the same number.

So but the Court has the ability, the discretion to affix a different number, Your Honor. And -- and we -- I talk about the lodestar because yes, there is a representation --

THE COURT: Mm-hmm.

MR. BYRNE: -- under oath from Mr. Levine, that more than 11,000 professional hours were expended. So the Court thinks 100 dollars, 200, 300 per hour is a reasonable rate. The Court can certainly affix that rate, Your Honor, and we'll accept it.

We recognize that the fees here are substantial and -- but again, they were substantial because there was a significant amount of work and at each step of the way there was a contest. There wasn't a lot of, okay, we agree, we stipulate. Everything was fought, Your Honor.

And I think, Your Honor, on the motion for cause, the default, Your Honor, the expert default, as you know, that -- that's

where the starting point -- I would argue that I can't get an expert to pick up a phone for $1,500, but apparently our legislature doesn't appreciate that fact.

But again, this Court is given great discretion and we came back and, Your Honor, our memorandum of costs did exactly what you're supposed to do.

The justifying documentation that the case talked about, are the actual receipts that we provided. They're all spelled out right in there, Your Honor. But we came back because they did a generic, everything is not, doesn't have enough detail. We came back and provided a substantial amount of additional detail in declarations. They did not file a reply.

And then in terms of the categories that are not expressly included in the statute --

THE COURT: Mm-hmm.

MR. BYRNE: -- section 17 allows other reasonable and necessary expenses, Your Honor, and again everything we - we spell out why those expenses were incurred, why they were reasonable.

Again, frankly, Your Honor, some of it is just common sense and but again, if for example, if the Court thinks well, if he would have had local counsel, he wouldn't need *Pro Hac's* then maybe the Court makes a decision to exclude the *Pro Hac* fees. That would be certainly within the Court's discretion.

But -- but we detail why we believe the fees were reasonable and necessary and the statute carves out that there are

going to be items and expenses that aren't covered by the statute that the Court has discretion to grant.

And then with respect to the experts. We addressed all the *Frazier* factors after they objected; after the billing records and all the details were provided. We addressed those in our -- in our papers with supplemental affidavits. They didn't file a reply. We didn't hear anything further.

But again, the Court has discretion to -- as long as it addresses the factors in its rulings as a discretion to substitute its own belief as to what the reasonable expert fees would be. And again, that doesn't get overturned unless it's an abuse of discretion. I'm pretty confident that the Court understands that.

Unless the Court has any other questions, I'll sit down.

THE COURT: I'm the most appealed Court. Everybody usually [indiscernible]

MR. BYRNE: Uh?

THE COURT: Sorry. Attorneys' fees and costs, I'm the most that ever go before the Nevada Supreme Court or the Court of Appeals.

MR. BYRNE: Right.

THE COURT: Last place, including a recent North Las Vegas case, 139 Nev. Adv. Op 5, if someone is referencing. Okay. I do have another question. Sorry folks. Do you mind if we wait a few moments until we're done? You're okay? Okay.

MR. HESSELL: Do I have my five minutes or?

THE COURT: I got -- I got to ask.

MR. HESSEL: Oh, yeah. You want to ask him a question. Yeah, go, please.

THE COURT: I want to ask Counsel.

MR. BYRNE: I'm not done getting grilled.

THE COURT: I want to ask Counsel a question. I have two -- no it's not being grilled. These -- I mean, if I don't ask you questions --

MR. BYRNE: I understand.

THE COURT: -- yeah, I mean, realistically, you want to know what I'm potentially thinking about in the areas I'm potentially going to go and I might as well give you the opportunity to respond, right, rather than --

MR. BYRNE: I appreciate that, Your Honor.

THE COURT: -- you all know the rule, right? Did that give a chance to set forth your positions? Okay. So on page 3, it's in both of them, right, if Tricarichi accepts the offer PWC will pay the offer within the 21 days and all claims of Tricarichi's claims against PWC will be dismissed with prejudice. And then you have a citation, see NRCP, right, 68(d)(2).

So what I'm trying to get an understanding, is that a term of the offer of judgment that they have to allow it to be dismissed with prejudice, or is it something else?

MR. BYRNE: To the extent it isn't, which I believe it is as a matter of law, Your Honor. But to eliminate any ambiguity, we put

that in as a condition, so that we wouldn't have a subsequent fight over it.

Again, we were trying to -- this offer was intended to buy complete peace.

THE COURT: But I'm looking at -- my question is relating to, right, the reasonableness, sorry, the reasonableness of an offer. As you can tell, it's been a longer day. So the value of the with prejudice or having the certainty that it's with prejudice is something that you're acknowledging the Court should be taking into account, right?

MR. BYRNE: That -- that is correct, Your Honor. We -- I -- I to be absolutely candid, we wanted to eliminate any uncertainty that we would be dealing with a new motion, a new complaint, something after this -- we were - we were again.

But it's belts and suspenders more than anything else, Your Honor.

THE COURT: Okay. Why renew in 2021?

MR. BYRNE: Because the Nevada Supreme Court grants the writ.

THE COURT: Mm-hmm.

MR. BYRNE: And determines that the subject to the court findings, some -- some what we think were fairly low evidentiary hurdles.

THE COURT: Mm-hmm.

MR. BYRNE: They -- the -- the -- the attached terms

controls. At that point, Your Honor, Mr. Hessel can say, well, oh, it's a jury waiver. But the jury waiver was within the same terms as the limitation of liability. So the analysis was the same. And ultimately this Court found that in order for them to prevail, they had to get the gross negligence or they were stuck with the limitation of liability.

THE COURT: Sure. My question was kind of focusing on, you know, since the 2019 amendments, right, in March of 2019, and the concept with changes in offer of judgment, right, because it used to be the question about, you know, if you had two offers of judgment with different amounts, which one prevailed depending on the timing of when the offer [indiscernible] right? That -- I was trying to just get more of a concept of it because was there con--

MR. BYRNE: We -- we viewed that --that -- that the amendment would control in terms of both offers would stand independently and the Court could, you know, in other words, the Court could look at the first offer and say, it was -- it was not grossly unreasonable. Weigh the factors and go that -- that decision doesn't trigger Rule 68 and --

THE COURT: That's what -- okay.

MR. BYRNE: -- attorneys' fees. But then when we get to 2021, well, now we have the Nevada Supreme Court essentially ruling that the - -that the -- that the -- the attached terms control --

THE COURT: Mm-hmm.

MR. BYRNE: -- which has the limitation of liability provision and at that point Mr. Tricarichi knows that he's -- he's

looking at $50,000 for his --

THE COURT: Okay.

MR. BYRNE: -- 48,000 for his damages.

THE COURT: Okay.

Mr. BYRNE: So that's what triggered the second and we viewed, we've viewed both of them as independent offers that would be evaluated independently.

THE COURT: Okay.

MR. BYRNE: And you might reject the first. We didn't think there'd be -- we did not think that -- that -- we recognize the second has a more compelling argument because of the writ, but the first was triggered by Judge Gonzalez dismissing all of the 2003 claims.

THE COURT: Okay. I appreciate that clarification. That was my question. Thank you so very much. Yes, Counsel, you want to come on. You have a few more minutes. You get last word.

MR. HESSELL: That will do. Five minutes. So I think two things really. The clarification that was brought on by Your Honor I think is significant.

The page 3 dismissal on the offers of judgment require that Mr. Tricarichi give up all claims against PWC, not just the 2008 claims, but also the claims that he originally pled against them in 2003 and at that, you know, in 2019 and then again in 2021, come to the conclusion -- the Court would have to come to the conclusion that his believe as to the value of those claims was not in good faith.

THE COURT: Mm-hmm.

MR. HESSELL: That the -- that he could not possibly have believed that PWC was grossly negligent in either 2003 or 2008 to get outside of the damage limitation clause.

And that -- that exception to the damage limitation clause is exactly the reason why Your Honor denied the motion for summary judgment on the limitation of damages.

But the motion for summary judgment and the earlier motion to dismiss and the renewed motion to dismiss and the motions for leave, all of them were PWC attacking the legal elements of the claims and none of them established that -- or all of them helped establish why Mr. Tricarichi continued to pursue these claims because in good faith.

Because he was of the belief, not that notice 2008-111 was the salient factor that he even know of 2008-111, that has always been how PWC has tried to recharacterize what our claims are. They were -- it was about the material facts that they had available to them following notice 2008-111 that they didn't disclose and that he says he -- and he testified at trial, would have changed how he pursued the litigation.

But even if you were to conclude that all of that was not in good faith, you still are left with the -- with the fact that have they demonstrated in their case that his pursuit of even of the original 2003 claims was not in good faith, that those claims were also not worth 50,000 or were only worth $50,000.

That he should be forced to give up that claim as well and the right to appeal that the dismissal on statute of limitations ground and his rejection of the offer that included dismissal of those original claims was grossly unreasonable or in bad faith.

And I just don't see how based on this record, given the repeated motions and repeated denials by the Court, that you could conclude that.

The -- and the complaint I think sets this out, but the briefs that led up to Your Honor's denial of summary judgment which are -- which were very similar to the briefs that we briefed to Judge Gonzalez on motions to dismiss and motion for summary judgment. They made clear that the 2008 case was not just about disclosing notice 2008-111.

So I know we've taken up a lot of time and I want your staff to be able to get our of here, but -- but I would just leave you with the -- everything I heard was, like, bargaining with Your Honor about how you can award some but not all, or reduce the amount that you give them and my point is that the *Beattie* factors require a conclusion on one and three in their favor or at least the sum of all factors lead in their favor.

Even if you conclude that there's some reduced number that would be reasonable from the 9 million that they originally proposed, if you cannot conclude that his claims are broad, in bad faith, or that his rejection of a $50,000 offer was grossly unreasonable or in bad faith, then you have to deny the motion.

That's what *Beattie* and the progeny suggest.

THE COURT: Okay. Here's the Court's ruling.

As the parties agree, right, it was reiterated back in 2018 by Nevada Appellate Court in *O'Connell versus Wynn*, party may seek attorneys' fees when allowed by an agreement, rule or statute, see NRS 18.010 governing board of attorneys' fees, *RTTC Communications LLC versus the Saratoga Flier* 121 Nev. 34 110 P.3d 24, (2005) noting that the Court may not award attorneys' fees absent authority under a specific rule or statute.

You all agree that there is a rule here. You just disagree on whether it should or should not apply. NRCP does establish the rules regarding offers of judgment. You all agree that the 2019 forward Nevada Rules of Civil Procedure are the applicable one because the two offers of judgment are both in September 2019 and then in 2021, both post-date of the changes.

So NRCP provides basically the party makes the offer and the offer of judgment is rejected, then the offering party obtains a more favorable result than the offer. The offering party can, not will, be entitled to its reasonable attorneys' fees.

So then the question becomes -- and the present case was the factual scenario. There is two offers of judgment, 2019 and 2021. In September 2019 the landscape was such that there was a summary judgment with regards to statute of limitations issue with 2003 claims as they were generally referred to and there was the newer claims with regards to the 2008 [indiscernible] notice of

limitation and liability and the fraud-based claims.

At that juncture -- that was the first one. The second one was in 2021. You all agree with regards to the timing. That was post-decision of writ by the Nevada Supreme Court.

It's been asserted to this Court that realistically it's not, well, that it could trigger the 2019 or the '21 -- 2021, could trigger that this is not an issue that's stated in the 2019 amendments to the Nevada Rules of Civil Procedure that somehow this was a lesser offer and you could look at either because they're the exact same amount. There's these two trigger dates, okay?

So then you look to what the award was. The award was a zero. You all have cited the Court's analysis in its order. So we do have that Defendants prevailed. That fact is there. So then what you really have to look at is you have to look at *Beattie versus Thomas* 99 Nev. 579 668 P.2d 268 (1983).

In *Beattie* the Nevada Supreme Court did set out four factors for the Courts to consider when determining whether to grant fees under NRCP 68. The factors to be considered are whether or not the Plaintiff is regardless of whether the Plaintiff or Defendant is seeking fees pursuant to NRCP 68, see *Yamaha Motor USA versus Arnoult* 114 Nev. 233 955 P.2d 661 (1998), decided *inter alia* that when the Defendant is the offeree, the Court should consider if the Defendant's defense was brought in good faith.

But here what we have is, we have it from the Defendant to the Plaintiff. So the *Beattie* court held that exercising discretion

regarding the allowance of fees and costs under 68, the trial court must carefully evaluate the following factors.

One, whether the Plaintiff's claim was brought in good faith. I'm going to stop there and evaluate both of the offers of judgment.

Well, when I look at the 2019, I find that that factor lies in favor of Plaintiff because as of September 2019, while Plaintiff had lost on summary judgment with regards to the statute of limitations in 2003, they basically had a pretty brand new claim. I'm using brand new in the timing of when it was added to the complaint, not brand new because it was back to 2008.

And so realistically you can see that that's in good faith. They requested it to be granted, leave to amend to add the claim in. The claim had recently been added in. I'm saying recently within the same year and so when you look at that, that claim still would be appropriate that lies in favor of Plaintiff.

Two, whether -- I'm going to go through all the factors for each one and then I circle back around rather than back and forth, okay?

Two, whether Defendant's offer was reasonable and in good faith both to its time and amount. Well, this one does lie in favor of Defendant. It is both timing and amount. It's post the decision on summary judgment. It's the early stages kind of what's being fleshed out with regards to 2008 claim, the amount of 50,000 since Defendants have to consistently said that the most they would

be responsible for, was the limitation of liability and at that time that issue had not been resolved. That one lies in favor of Defendants.

Three, whether the Plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith. When I'm looking at this with the rubric of the two -- so I have to look at what was the lens in this juncture. And here is where it's a little bit challenging because there's really two different lenses the Court has to look at.

Do I look at the go to trial and what actually went to trial or go to trial and what could have gone to trial because you have pending appeal issue with regards to statute of limitation of 2003 that was not decided as of September 2019. And we know that because we know where it's at right now, okay?

Or does the Court look at the lens of well, summary judgment has already been granted on 2003 and what's the risk factor for 2008?

Realistically, when I think regardless of which lens the Court looks at, that favorably leans towards Plaintiff because they know they have appeal/writ opportunities depending on exactly what they may be providing to an appellate court. Could be a writ, could be an appeal, could be both potentially. Plus, what they have, is they have the 2008 newer claim that's in its more early stage, infancy, and from their perspective, it was brought about through the arguments after a ruling where the summary judgment issue was on the then pending 2003 statute of limitations claim and then

this 2008 claim.

You all know what I'm talking about when I'm calling 2003 versus 2008. Does anyone need me to get more specific? I'm seeing negatory nods, so nobody needs me to be more specific.

So when I look at that with regards of which lens I'm looking at, it really leans in favor of like I said, the Plaintiff, because here they are thinking, look, we think we have a writ/appeal issue on the statute of limitations because not only is there a potentially ongoing conduct potentially because of course this Court ruled there wasn't and I think properly, but in any event, but I also have this newer concept that's come post summary judgment, which gets to be fully fleshed out.

So it would be hard to put a lens in September 2019 and say, look, it's unreasonable when I have this other avenue that I shouldn't proceed to something for trial.

And the thing about the *Beattie* factors are -- is, because now I have to go back to *Capanna versus Orth*, right, with the partial prevailing. Because you have to look at with that rubric of *Capanna versus Orth* where the Court has said that you can prevail in part and still get NRCP 68 attorneys' fees under an apportioned concept. So I have to look at that with this lens when I look at the *Beattie* factors I think, realistically I do.

So I think either one really lies in favor of Plaintiff. So I do not find the Plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable and in bad faith.

Four, are the fees sought by the offeror reasonable and justified in amount. Well, you don't need to get to that one if I got two out of three aligned in favor of Plaintiff.

So for the 2019 offer of judgment, the Court would find that the *Beattie* factors are such that I shouldn't find that fees should be granted under the 2019 offer of judgment.

So, now let's look at the 2021 offer of judgment and that's 50,000 -- the bids were both 50,000 exclusive of fees, interest ,and costs, which is a huge factor for the Court because taking into account that there could be still -- this is the actual damages portion.

So now I have to look at for the 2021, is what -- this is interesting. Is -- is the expectation because we're now two years later that are you going to file a writ on a decision right from 2019, right, or ultimately go to trial on that? Because now you don't have -- what I'm trying to say is your lens in September of 2019, it's a more recent decision on the summary judgment decision, right, and whether you are going to appeal or file a writ.

The reason why I use appeal or file a writ depends on the breadth and scope of how it may have come down, right, so I'm leaving any appellate opportunities.

In 2021 we already have a ruling from the Nevada Supreme Court. So not only have you lost on the summary judgment on the 2003 claims. The issue that has then been brought forward to the Nevada Supreme Court and got to choose which issues got forwarded to the Nevada Supreme Court, the Plaintiff did

not prevail on the jury issue, didn't necessarily -- and then other issues came back to this Court.

So then you look at what -- I'm going to reasonableness. So the Plaintiffs -- so when you go back to those factors, one where the Plaintiff's claim was brought in good faith. I think that's still generalized in favor of Plaintiff because that one I have to do the full retrospective, right, back to when the 2008 claim came about in 2019. So that one still lies in favor of Plaintiff.

But then when I go to prong two, whether the Plaintiff's offer of judgment, I'm sorry, Defendants offer of judgment was reasonable and in good faith in its timing. Yes, once again, that goes in favor of Defendant.

You got the same limitation of liability, but not only do you have the limitation of liability, but you also have, look, 2003 is probably out the door because that's granted in summary judgment has now been about almost two years since that ruling has happened.

There's been no appellate processes. Not saying it was completely prevented because you have the full case and then you decide at the end of the entire case which you got two years. Plus you then got the Nevada Supreme Court ruling in your favor as well. So 50,000 at that time, obviously reasonable and with under the limitation of liability still in there, still being processed and you now are looking at what are the nature of your claims as a accounting firm for not done work for someone for five years in the intervening

time between the 2003 and the 2008 issues and whether there is affirmative duty.

So it's not triggering on actual work performed. It's triggering on what are potential duties looking at the retrospective aspect. So those all go to Defendants for reasonable, in good faith in both its timing and amount.

So then you go to prong three. Whether the Plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith.

For 2021 I do think it was. And here's the reasoning why. Everything I just said with regards to what your landscape is in 2021. What do you really have? You're trying to proceed and here at this juncture, you have benefit of everything that's happened in the tax courts. You had the benefit of everything that you knew from -- you got some incredibly qualified -- let me get my *Frazier versus Drake* analysis. And don't hold this one against me, but on both sides, I mean, you've -- no one's is going to disagree that you had some of the top people who are currently in the tax area in this case.

So you already have this realm, plus what you're doing, you're trying to create a new type of issue to have a retrospective fraud, and then even if you get over the fraud issue you have to get to the over the grossly negligent on duties that are looked back at for five years and then find in order to avoid the limitation of liability which is the lens that this Court has to look at because it's not just looking at an unknown liability. It's like two choices of liability. Is it

the chance of the 20 million, is it the 50,000, you know what I mean, or zero or some other number. But those are the three most likely numbers'ish and I can't see it in 2021.

This Court is fully cognizant of its rulings in the time period, but those are based on how those issues were presented to this Court under those particular provisions. And remember, when you look at *Beattie*, he's going to trial. Trial is the ultimate burden, right? Will you meet your burden at trial, not whether you can overcome a 56, okay?

And that is what *Beattie* requires this Court to look at. So to reject the offer and to proceed to trial, I don't think it's bad faith, but I think it's grossly unreasonable. Realistically, I think it is under the *Beattie* components, and when you look at what *Beattie* interprets as grossly unreasonable, okay, not how some other people might put a dictionary definition.

You have to look at *Beattie* in the case law. Since *Beattie* and what would have been grossly unreasonable. When you know your statute of limitations claims have been out, yes, you may or may not have a -- you may have a timing issue of the ability to appeal, right, because of conclusion of trial, but you've already heard from the Supreme Court subsequently and reading everything that it did, plus you have a judge's determination. You got a bench trial, so you're not going to have passions of the jury, et cetera to come back to and you have to look at the 2008. Your 2008 based claims are -- I'm repeating myself a little bit, saying are to affirmative

duties to have done -- see my ruling and decision, right, on how my duty wasn't met, okay?

And then you have not only that. Because even if you prevailed on duty, breach, causation, and some damages, you'd have to get over the grossly negligent in addition. And that's really where I get into grossly negligent, grossly unreasonable.

Because to think that, to find a failure to act retrospectively with no case law that supports that concept and you all did a wonderful job of providing the case law around the country, okay? That would be, like, an issue for the first time to kind of proceed at that. I appreciate why they have, but I just don't see that that was -- meets the standards of *Beattie* to go forward to trial, that's why it's in favor of Defendant.

So whether the fees sought, were the offer of reasonable and justified amount. That's going to be in part with amount to be determined. Because in light of everything you all said, you can appreciate I'm not going to do the calculation today. And I do think there needs to be a significant reduction.

I have concerns about the flat fee. I have concerns about -- because how the flat fee I see, I do see flat fee different than the *O'Connell* concept with the risks of contingency where the attorney can get an ultimate zero.

Here, you may have had a sophisticated client minimizing their risk of what they may pay from an overage, but that doesn't lie neutrally with what a Plaintiff may have to pay.

So the Court has to re-evaluate everything in light of everything you said today to come to a fee amount and I will tell you, I'm probably putting this on chambers calendar a couple of weeks out because I'm going to give you all a chance to see if you can come to a resolution yourselves. I'm ever hopeful. You know, I don't physically have my rosy-colored glasses on today, but I do in spirit, okay?

So -- so see also *Frazier versus Drake*. Ultimately, the award of attorneys' fees rests within the Court's discretion when you view discretions for abuse and that is 131 Nev. 632 Court of Appeals (2015).

So now you go to -- that's the fees component. With regards to the costs component, and by the way, the Court in its analysis did fully take into *Shuette versus Beazer Home Holdings,* 121 Nev. 837 124 P.3d where the Nevada Supreme Court found in Nevada the method upon a reasonable fee is determined is subject to the discretion of the Court, which is tempered only by reason and fairness.

According to determining the amount of fees to award, the Court is not limited to one specific approach. So that's why I can't evaluate the flat fee, although I am reducing it. Its analysis may be given with any method rationally designed to calculate a reasonable amount including those based on a lodestar amount or a contingency fee.

And I realize why you had with subsequent case law is

you already had *Beazer versus Shuette,* that already said you could have a contingency fee, so that really wasn't new news, but you know.

And then *Beazer* goes on to say we emphasize that whichever method is chosen as the starting point, however, the court must continue its analysis by considering the requested amount in light of the factors enumerated by this Court in *Brunzell versus Golden Gate* mainly the advocate's professional qualities, nature of litigation, the work performed, the result, its manner.

Whichever method the Court ultimately uses, the result will prove reasonable as long as the Court provides sufficient reasoning and findings in support of its ultimate determination, sorry, quotation in *Beazer versus Shuette.*

So realistically what the Court has to look at is the method suggested by Defendant is to award, first -- first alternative is your flat fee. The Court really doesn't find that that flat fee is the parallel that would be appropriate to a contingency type component because realistically there's no zero risk factor.

What there really is, there is a ceiling factor for capping on fees which may be nice between the counsel and the client, but it doesn't take into account what the party who is going to have to pay those fees, what would be reasonable under *Brunzell*. By the way, the Court obviously first factor not applying contested on *Brunzell* or the quality of the advocates, the work performed, nature, result. However, the Court has to look at the reasonableness of those and

all those factors. Anyone want me to articulate each of the *Brunzell*? Okay. I'm seeing negatory nods. Is that correct?

MR. HESSELL: No, for Plaintiff.

MR. BYRNE: No for Defendant, Your Honor.

THE COURT: So the Court has to look at those for what this case was. But the Court also has to look for what this case is because I do have to do a *Capanna vs. Orth* partial aspect here because it's prevailed.

In looking at the 2021 rubric I have to see what was really left there from 2021 going forward and I have to look to see what actually was successful in certain aspects from 2021 going forward and then do a reduction because realistically the Court is looking more toward lodestar balance.

I think it's a better opportunity here than I think the flat fee component. But I'm evaluating that. So that's, okay, so that part is deferred, but I'm trying to give you all the analysis.

But I really think lodestar more accurately takes into account something that has already been viewed in Nevada as being (a) appropriate, (b) I think it gives the correct Nevada perspective. Nothing insulting to -- I'm having people throughout the whole country and the world practicing here and myself in private practice, so that's not a negative.

But I have to look at it with the Nevada rubric here, okay, so I think that's going to take it into account.

So look at timing of the 2021, is what the Court's only

evaluating. The Court is not allowing backward, but then realize you all are going to have to do some math here and you have to figure that one out.

I'm going to take into account, like, I said, the percentages with regards to *Brunzell* and its progeny, *Nuerenberger Hercules - Werke GmbH versus Virostek,* 107 Nev. 873, which was abrogated on other grounds, *Costello versus Cosier,* 127 Nev. 436.

So I'm not giving you work for the entire period. I have to break it down consistent with what I said with the offers of judgment and also consistent with where this case was and the different issues that actually prevailed on.

So lodestar is allowed. The lodestar amount and the lodestar multiplier method. District Court first calculates the lodestar, then multiply a reasonable number of hours expended at a reasonable hourly rate. [indiscernible] *Bank of versus City of Seattle and the Washington Public Supply Systems,* that's a 9th Circuit federal court, but the Nevada Supreme Court has relied on federal authority in similar cases and has found it -- so in the lodestar issue so the Court does need to defer that.

I don't think it's appropriate to do that right now and we're going to have a real question about what you may want to do on that; so --

I also mentioned *O'Connell versus Wynn*. Court looked at under that NRCP.

So, like I said, I went over the *Brunzell* factors, *Brunzell*

versus Golden Gate National Bank 85 Nev. 345 455 P.2d 31 (1969). The *Brunzell* factors follow the advocate that's not contested nor is the training, education, experience, professional standing, and skill of all of the attorneys that wasn't contested.

So definitely that one is met. The character of the work to be done. This is sophisticated stuff. This is -- stuff, not my best choice of words. This is sophisticated legal work from both sides. You all did -- from this Court taking on this case from 2021 forward, I mean I can see the breadth and depth of what everyone did.

It was difficult. It was intricate. It was important in time and skill. It was responsible and the promise and care to the parties affected the importance of litigation. So that factor is met.

The work actually performed by the lawyers, skill, time, and attention given to the work. That's clear. The question really comes, is how many lawyers were really necessary, fully appreciating that Nevada has a local counsel issue, fully appreciating the rates on out-of-state counsel may be different than Nevada and other factors the Court needs to look at and the result.

The result whether the attorney was successful and what benefits were derived. Well, zero is zero and so it was a Defense verdict. In addition to -- it was a Defense verdict.

So I already went through all those. You all don't need me to reiterate those, correct? Because if I don't reiterate them and you all are requesting me to, let me know right now if you want me to reiterate all the factors in more depth.

I walked through them in a summary fashion and I'm incorporating the pleadings. If anyone wants me to go to each and every attorney on this case and go through all the qualities and all the work performed and everything under *Brunzell* I will, so you have a full, fair rendition and an opinion.

But if you all say that the Court is fine to incorporate the pleadings, then I will do that. What is the choice of counsel for Plaintiff?

[Counsel conferring with client]

THE COURT: I'm not to costs yet. Accoustics are very good from there to here. So I'm not to costs yet.

MR. HESSEL: Yeah, what you just - the summary is fine.

MR. BYRNE: Your Honor, Defendants are fine with what the Court is presenting.

THE COURT: Okay. I'm just saying. I'm going to avoid [indiscernible] issue somebody saying, I didn't articulate it and if you want me to articulate it, I will. Okay. So with regards to fees before I get to costs. Oh shoot, I got to get people out of here.

Fees. I think the fair thing to do is I have two choices with regards to fees. One was I defer this on my chambers calendar for about 30 days, actually a little bit longer than 30 days because I'm out of the jurisdiction at the State Bar conference the very last week in June. But it's a little bit more than 30 days to see if (a) the parties can come to an agreement either on what they think the fee amount should be or maybe two alternative fee amounts that the two parties

think that the Court should consider without waiving the fact that Plaintiff may disagree with the entirety of the Court's ruling. But I think that might be a more efficient use of your time to let you all re-evaluate that.

If, however, you choose not to, then you're going to get a number from me. But I found that you all have worked very well together. This might be a chance to try and see, like I said, if it's a number A proposed by Plaintiff and a number B proposed by Defendant or maybe you can come to an agreed upon number, that might be an economic way to address that or --

MR. BYRNE: We're talking about the costs, Your Honor, correct?

THE COURT: No, I'm on fees first.

MR. BYRNE: Oh, okay. Fees first.

THE COURT: I'm [indiscernible] the pocket. What I'm saying is, the fees -- I have to look. Well, you know I'm heading towards a lodestar because I think that's more appropriate than a flat fee, so you can evaluate with the people. I appreciate you got people around, but you might be needing to evaluate that.

Same here. You know I'm giving -- to giving attorneys' fees. You may want to talk among each other, okay? We're going to evaluate how many attorneys were here, right? In light of what you really did. I'm not saying that people didn't have different roles, but I can appreciate there's a lot of billing on a lot of different things. I'm going to have to review with regards to the billing going back

with parsing out of what truly was 2019 issues that people may have prepped or reviewed with changes of new counsel coming in for a 2021 rubric, right?

All these factors you may want to talk among yourselves and see if you can come up with either (a) an agreed upon number or (b) two alternative numbers. So do you want that option and so I should defer this for 30'ish days, more like 40 days on my chambers calendar? Because you're going to ask me for a stipulation to continue even if I gave you a couple weeks, so I might as well do it right up front.

MR. BYRNE: Your Honor, since it's Defendant's motion, we would have no objection. We would be more than willing to sit down and try to reach an agreement to submit a joint number and then if unable to do that we can each then submit our own number for the Court's consideration in chambers.

THE COURT: Right. And I'm not asking you to waive your number that you currently have. I'm not asking you to waive your zero --

MR. BYRNE: No, but we understand.

THE COURT: -- I'm just saying, that might be more efficient. Counsel for Plaintiff?

MR. HESSEL: It's fine.

THE COURT: Okay. So then we're going to put based on agreement of the parties, the Court will defer this to chambers calendar. Going to give out 40 days, second week in July; after July

11th. So for deferral of that number.

Costs. Here's where the costs are going to go. Costs -- I can't go through the whole litany right now with all the *Frazier* factors incorporating all the *Frazier* factors. It's a pure timing issue.

I will tell you -- and taking into account that the Supreme Court's most recent decision in North Las Vegas that just came out within the last couple of weeks 139 Nev. Adv. Op .5 I think is the citation to it. That was with regards to some of the presentation costs, like using an outside third-party vendor for presentation costs.

The reason why I'm going to say I'm taking that into account is (a) it's the most recent case, but (b) I'm taking it into account because I think that changes the concept I think with regards to mediation, one mediation of splitting that cost because I think -- and I would have to double-check. I thought it was a court-ordered mediation or settlement conference versus a purely voluntary one.

So I had to evaluate that and double-check that factor. If it's court-ordered in any manner, the North Las Vegas, I think --

MR. BYRNE: It was voluntary, Your Honor.

THE COURT: Oh, fully voluntary?

MR. BYRNE: That's my memory.

MR. HESSEL: Yeah.

MR. TRICARICHI: Yeah.

THE COURT: Okay. If it's fully voluntary, no court, not in any trial order, not pre-dating me in any way?

MR. BYRNE: I don't remember that there were -- I think it was an agreement of the parties, Your Honor.

THE COURT: Okay. Then it's out. Because if it had any court component to it similar to a third party, you know, helping with trial prep and things like that and -- or an ESI protocol that you're using a third-party vendor, I would have included it under the most recent case.

If it was purely, purely voluntary then -- unless it was an agreement between the parties, that it could later on become for costs, I see that as a fully voluntary agreement between the parties and it comes within the NRS or 68, okay? And I'm combining the NRS and my 68, because realistically since I said the 2021, that gets you fees and costs, but the analysis has to be under 68 and 18 for your costs.

Of course 20 -- because your 18 costs are going to go pre-dating 2021 and your NRCP 68 costs are only going to go 2021 forward, is what the Court was saying. That's the reason why I said to evaluate both.

Realistically, I'm going to tell you some broad areas. I can take a look at them or I'm going to offer you the same opportunity in the next few days broad areas, sorry, you have to eat, okay? I do not see how meals -- I do not see first-class tickets or any kind of tickets coming here. I do not see hotel costs, okay? I think those are all client driven. I think -- and I think the case law supports me because while the client has the choice of counsel, we have very, very

competent counsel here in the State of Nevada.

It's wonderful to have everyone throughout the country, that's not me being negative. You've all have been wonderful. It's been great. Very professional. All wonderful. But I don't think Plaintiff should have to bear that additional cost for people to come here to Nevada. This is not a choice to file here, but realistically there's issues, okay?

And with us having all remote appearance available and in fact, you all took into account that; so -- since you utilized that, it was an available option and so I don't see air flights, I don't see flights, I don't see hotels.

Those are all going to go out. I will tell you with regards to the expert fees, I do see that it's more than $1,500. I can't really offer some of you all this because I can offer the Nevada counsel. Nevada counsel I usually ask them that if they want me to hold every single case that will ever be before this Court and I can pass it on through some email, this might be one, to all my colleagues that they're agreeing $1,500 for experts in every case that they'll have in the 8th Judicial District, no one's taken me up on that one.

Because the realistic thing is, no one picks up a phone call for $1,500 unless you're, like, maybe an auto-mechanic we had less than $1,500 one time, okay? So I'm a realist. I think -- and there's enough there that needs some [indiscernible] but it's too thigh. It's too high for the work that they did for this case under both NRS 18 rubric as well as an NRCP 68 rubric.

I think there's a huge overlap between what happened with some of the tax court issues, general advice, et cetera, et cetera, et cetera, okay? Don't take my word, when I say the word huge, I don't mean all caps huge, I just mean, it's going to be significantly reduced consistent with what was the work actually done in this case.

And I think you can particularly highlight that because you can -- I had the benefit of video -- most people were from video and they were succinct in what their scope was here.

And remember, what actually the Court is looking at is kind of two discrete issues. One of the things you argue with regards to why your offer of judgment should have been, right, or you got fees on the offer of judgment and costs is because is kind of a more narrow issue. Complex, but narrow.

And that also goes to what the experts needing to really look at and what to do. And a lot of the tax document post-tax document viewpoints may not have necessarily been from Defendants side, right? I got some issues, okay? I'm going to say, I have issues. I think the case law has issues. I think it needs to be reduced.

So *Pro Hac's* don't come in because that's counsel's choice. Those -- that's the minor stuff. Some of you are verified costs you have cited how under *Cadle* they didn't put some of the copying costs.

I'm not really down to copying costs. So I can offer you

the same opportunity. Either the Court can go through and walk through all the costs and reduce them to what the Court thinks is appropriate consistent with the case law, consistent with NRCP 68, consistent with 18 to the extent it falls within the different times of rubrics, right, or I can give you all since you've taken that time and opportunity with regards to fees that you can look at it yourselves and try and reduce the costs which you each deem appropriate, either a joint agreed upon number or two numbers to present to the Court.

What would the parties like to do?

MR. HESSEL: That's fine.

MR. BYRNE: Your Honor -- Your Honor, for the Defendant we would -- we would agree to the same procedure we did with respect to the fees. Same approach.

MR. HESSEL: We agree.

THE COURT: Thanks. I don't really see that that's increasing the costs and fees too much from either side. I think it's probably efficient because if not and I have to call back here for a hearing and have you walk through a lot of these costs and I think that's going to be more expensive than having you spend some time among yourselves as professionals

So the Court is agreeable to that. That same date. What we have July what?

THE CLERK: 14th.

THE COURT: So my chambers calendar for July 14th for

my written memorialization under *Rust versus Clark County and Division* -- sorry, *Division of Family Services and Rust versus Clark County* for my memorialization. What date do you all -- should I give it more than that date? I was going to give you all to the end of June to provide the Court the various --

MR. BYRNE: More time would probably be better than less.

MR. HESSEL: Agreed.

THE COURT: Here's what I'm going to ask you all to do. Send me a letter sometime by Friday of this week, a joint letter on the deadlines that you want.

MR. BYRNE: Okay.

THE COURT: Okay. But just make sure you give this Court -- because what your order that's going to come from this Court, right, is going to be more likely to be a minute order. I'm not going to repeat everything I said in open Court. I've gone through body of case -- oh, I'm incorporating *In Re Dish Network*, *Bobby Berosini, Fairway Chevrolet, Cadle versus Woods & Erickson* okay, in my analysis of the costs.

But since you all want to talk -- have the opportunity to talk amongst yourselves, it seems to me that if you send me a joint letter on some dates that make sense to you, is that the best way to do it?

MR. HESSEL: Sounds good.

MR. BYRNE: Yes, Your Honor.

THE COURT: Okay. Does anyone feel that you want to come back after the lunch hour that there's anything else that needs to be addressed?

MR. HESSEL: Can I say one thing that will be very short?

THE COURT: Okay. Famous lawyers words. Go ahead.

MR. HESSEL: Yeah, just for the record on the dispositive third factor on the 2021 offer of judgment because that appeared to be the difference between the two rulings. The Supreme -- the offer of judgment came after the mandamus from the Supreme Court but before this Court's adjudication of the evidentiary hearing.

So the question of the enforceability of the damage -- or of the jury waiver and whatever impact it had was not yet decided as of that time. So to the extent -- to the extent that -- I --

THE COURT: I am --

MR. HESSEL: -- I think there was something in Your Honor's ruling that suggested that we were out on the offer of judgment as of the mandamus.

THE COURT: If I did, that was not my intention. You did a very nice chronology which was very helpful to the Court, which the Court was looking at.

MR. HESSEL: All right.

THE COURT: So if it's to the extent I may have said something that inadvertently implied that, I did not. I think the clear direction from the Supreme Court with what was there and the rest of the landscape which you had, had all your water lilies on a Monet,

okay?

You may have had a few little planks on the bridge across said water lilies, but I think it was pretty clear.

MR. HESSEL: Also for the record, the state of the 2003 claims was unchanged for -- between 2019 offer of judgment and 2021 offer of judgment. As the Court pointed out, we have to -- we had to wait til the outcome of the full litigation in order to appeal as we now have. So at least as far as the evaluation of 2003 versus 2008, just so the record is clear.

THE COURT: Sure. Sure. I'm understanding what you're saying, which is why this Court used the term appellate process writ and/or appeal, depending on what you were thinking of doing depending on the scope and breadth on what you wish to do, and depending on what you wanted to bring potentially to appellate court issue, because potentially certain -- it wouldn't be the first time that people -- that's why the Court was using the terms writ and/or appeal, okay? Because I was taking that into account.

Okay. I do appreciate it. Anything else? Does anyone want to come back after lunch? Think there's anything else that needs to be re-argued? Anymore? Counsel for the Plaintiff?

MR. HESSEL: Not for Plaintiff.

MR. BYRNE: Nothing from Defendant, Your Honor.

THE COURT: Okay.

MR. BYRNE: Thank you for taking the extra time and your staff.

THE COURT: Well, thank my team --

MR. HESSEL: Thank you team.

THE COURT: -- because they're the ones that I impacted.

MR. BYRNE: Appreciate it.

THE COURT: Sorry about that, folks. Thank you very much. Okay --

[Hearing concluded at 1:11 p.m.]

* * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff Michael Tricarichi submits his NRCP 60(b)(2) Motion for Reconsideration of the February 22, 2023 Final Judgment in this case due to newly-discovered evidence that only became public during a jury trial in Portland, Oregon captioned *Marshall et. al. v. PricewaterhouseCoopers, LLP*, Case No. 17CV11907 (Multnomah County Circuit Court) (the

"*Marshall* lawsuit"), where the jury found PwC negligent in its advice to a similarly-situated client also considering a Midco transaction in 2003, and awarded the clients there $66.5 million (Hessell Decl. Ex. 1). The newly discovered evidence includes a February 2003 PwC email thread warning of the dangers of a proposed Midco transaction with Fortrend ***before*** Mr. Tricarichi even engaged PwC to consult on the Midco transaction:

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)---Priviileged & 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.

Hessell Decl. Ex. 2. PwC was obligated to produce the so-called "Wow! email" in this case following Judge Hardy's 2017 Order Denying Summary Judgment on NRCP 56(f) grounds [Doc. No. 101], and the parties' agreement relating to such Rule 56(f) discovery. Indeed, PwC specifically represented that it had produced documents relating to "Fortrend" – in the subject – from two recipients of the Wow! email. PwC's failure to produce this document as well as other related documents warrants reconsideration of the final judgment entered in this case.

Despite the currently pending appeal of the Final Judgment, this court retains limited jurisdiction to review motions made pursuant to Rule 60(b). *See e.g., Foster v. Dingwall*, 126 Nev. 49, 52, 228 P.3d 453, 455 (2010).

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WHEREFORE, for the foregoing reasons, the points and authorities that follow, the attached declaration of Scott Hessell, and any oral argument allowed by the Court, Plaintiff respectfully requests that the Court, pursuant to NRCP 60(b), certify its intent to grant Plaintiff's motion for reconsideration.

Dated: August 21, 2023.

SPERLING & SLATER, P.C.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

Before Mr. Tricarichi engaged PwC in April 2003 to evaluate a proposed Fortrend transaction, PwC internally concluded that such transactions were "**risky**," probably will "**blow up at the IRS**," and any client participating in such a transaction may get "**sued for aiding and abetting a transaction the sole purpose of which was to evade income tax**." Hessell Decl. Ex. 2. In the precipitating email, PwC's National Office personnel advised that they were "**very uncomfortable taking any advisory role** in [Fortrend] transactions" and were "on the same page as to **the risks in this transaction**." *Id*. at PwC-038939 (emph. added). And yet, six months later, in September 2003, PwC advised Tricarichi that the transaction did not need to be reported to the IRS and that he faced little risk of personal liability associated with participating in a nearly identical Fortrend transaction. Findings of Fact, Conclusions of Law and Judgment, filed 2/9/23, [Dkt. No. 416], at ¶¶ 19-21.

Plaintiff recently learned the reason PwC concealed the Wow! email conclusions from Tricarichi is because it had a Risk Management Policy – never produced in this case despite representations to the contrary – that directed its employees: "**Don't** . . . admit liability, shortcomings, or defects in our services" if there are "circumstances we discover that might call into question the quality of PwC's services whether or not the client has knowledge." Hessell Decl. Ex. 3.

PwC was obligated to produce the Wow! email and the Risk Management Policy in this case over 6 years ago and its failure to do so calls into doubt the Court's 2018 dismissal of Tricarichi's 2003-based malpractice claims because these documents, at least, create questions of fact regarding when Tricarichi knew or should have known of his claim. Specifically, in 2017, the Court denied without prejudice PwC's motion for summary judgment on statute of limitations grounds, ordering that Plaintiff was entitled to NRCP 56(f) discovery. [Dkt. No. 101]. To comply with this obligation, PwC represented, after meet and confer discussion, that it produced documents related to "any internal policies or guidelines regarding on-going communications with a client . . ." **and** documents collected from a custodial search with agreed search terms

including the term "Fortrend"—which is contained in the subject line of the Wow! Email—and from custodians including two recipients of the Wow! email (its author Michael Weber & recipient Gary Cesnik). Hessell Decl. Ex. 4. Without the benefit of the Wow! email and related Risk Management Policy to establish PwC's fraudulent concealment, the Court granted PwC's renewed motion for summary judgment, dismissing its 2003-based malpractice claims. [Dkt. No. 119]

Just as here, in the Marshalls' own malpractice case against PwC, the Court imposed discovery sanctions on PwC for its failure to produce the Wow! email after being subject to a 2018 Court order requiring its production. (Hessell Decl. Ex. 5 at 2582-2585). There PwC hid the Wow! email on a privilege log until February 2023. The case was tried to verdict last week and with the benefit of these key documents, the jury found PwC was negligent and awarded the Marshalls $66.5 million. (Hessell Decl. Ex. 1). As indicated on the face of the documents, the Wow! email and Risk Management Policy were not produced in Marshall until after trial in this case and were not available to Tricarichi until they were admitted into evidence in open court two weeks ago, due to confidentiality restrictions.

II. FACTUAL BACKGROUND.

A. PwC misrepresents its production of documents and obtains summary judgment on Tricarichi's 2003-based claims.

As the Court is no doubt aware, this case has been pending for over six years. In 2017, PwC moved for summary judgment on statute of limitation grounds as to Plaintiff's original claims alleging PwC was negligent in providing tax advice in 2003. Judge Hardy denied PwC's motion on the basis of NRCP 56(f) and specifically ordered that Plaintiff was entitled to discovery into PwC's advice to a similarly-situated PwC client (the Marshalls) who entered a Midco transaction in 2003 before Mr. Tricarichi engaged PwC. [Dkt 101]. As a result, Plaintiff sought 56(f) discovery from PwC as ordered by Judge Hardy and, after extensive meet and confer conferences, the parties reached agreement on the scope of PwC's production. In August 2017, PwC's counsel at the time represented to Plaintiff that it was producing "documents related to any internal policies or guidelines regarding on-going communications with a client after PwC's

services/advice has been rendered concerning the client's engagement." Hessell Decl. Ex. 4 at 1 (confirmatory email).

In addition, Mr. Hsiao represented PwC was producing documents collected from a custodial search with the following agreed upon search parameters:

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

Hessell Decl. Ex. 4. The highlighted search parameters should have resulted in the Wow! email being produced then and there. Gary Cesnik and Mike Weber were both recipients of the Wow! email, it was within the agreed date range, and the subject of the email included "Fortrend." But it was not produced. Similarly, the PwC Risk Management Policy provided:

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PwC "Risk Management" Policy Focuses on Risks to PwC

PwC must manage its risks to prevent negative consequences, which threaten PwC's profitability and assets through immediate monetary expenditures and cause long-term damage to PwC's reputation.

Source: PX-230 3

PwC's "Troublesome" Policy to Cover-up its "Wrong Advice"

TROUBLESOME PRACTICE MATTERS

- circumstances we discover that might call into question the quality of PwC's services, whether or not the client has knowledge

- Detection of technical error in services provided to a client
- PwC's final opinion differs from that upon which the client based its decision to implement a transaction

DON'T...

- *admit liability, shortcomings, or defects in our services*

Source: PX-230 4

Following 56(f) discovery in the instant matter, PwC renewed its motion for summary judgment on statute of limitations grounds in 2018. In this renewed motion for summary judgment, PwC touted its compliance with Judge Hardy's order, noting: "After a meet-and-confer process regarding interrogatories and scope of document production, PwC served interrogatory responses and produced over 2,000 documents totaling over 30,000 pages." PwC's Renewed

Motion for Summary Judmgent, filed 6/14/2018, [Dkt. 107] at 6:17-21 (citing Affidavit of PwC Counsel Winston Hsiao ¶ 11).

In reply to Plaintiff's claim of fraudulent concealment tolling, PwC told the Court "the fact that PwC individuals in other PwC offices were involved in other potential Midco transactions with other clients **in no way proves that PwC . . . knew that the advice given to Plaintiff for his Transaction was wrong**. Plaintiff provides no evidence or explanation for this assertion, and Plaintiff cannot avoid summary judgment with 'gossamer threads of whimsy, speculation, and conjecture.'" PwC Reply, filed 8/29/2018, [Dkt No. 114] at 28:11-15. The Wow! email would have provided exactly that – it demonstrates PwC knew its advice to Tricarichi was wrong before they were even engaged. In addition, PwC also claimed "Plaintiff provides no evidence that PwC did so with the intent to conceal its alleged error," (*Id*. at 28:16-18) but as detailed above, the concealed Risk Management Policy proves exactly that.

Without the benefit of the Wow! email or the Risk Management Policy, Judge Gonzalez granted PwC's renewed motion for summary judgment on statute of limitations grounds related to PwC's 2003 advice about the Fortrend transaction. Dkt 119. The Court's Order did not specifically address Plaintiff's contention that PwC fraudulently concealed from Tricarichi the basis for its claims.

B. PwC misrepresented its production of documents as to Tricarichi's 2008 claims.

Even after dismissal of the 2003 claims, PwC continued to represent to Plaintiff and the Court that it had searched for and produced responsive documents that should have included the Wow! email. For example, in May 2020, in opposition to Plaintiff's motion to compel, PwC's counsel submitted a declaration where it again represented to the Court, now under penalty of perjury, that it produced internal policies regarding on-going communication with a client and performed the custodial searches and produced all responsive documents in response to agreed search terms, which should have included the Wow! email. Dkt. No. 220 at pg. i-ii (Krista Perry Decl. ¶¶ 4-6). Relying on these representations, the Court denied Plaintiff's motion to compel

[Dkt. No. 234]. Despite Court orders and express PwC representations, the Wow! email and Risk Management Policy were not produced in 2017, 2020 or at any other time in this case.

C. Plaintiff did not discover the Wow! Email or Risk Management Policy until it was published in open Court in the *Marshall v. PwC* Jury Trial.

The Risk Management Policy (Ex. 3) was never produced in this case and was only produced in the *Marshall* litigation in January 20, 2023. (Hessell Decl. ¶ 5). Even in the *Marshall* litigation, the Wow! email (Hessell Decl. Ex. 2) was not produced until February 3, 2023 – 5 years after PwC was obligated to produce it. *Id*. at ¶ 4. As a result of PwC's non-production of the Wow! email, the Court in *Marshall* imposed discovery sanctions against PwC and instructed the jury about PwC's failure to produce earlier. Hessell Decl. Ex. 5 at 2582-95 (*Marshall* Trial Trans. Imposing sanctions).

Further, both documents were subject to a Confidentiality Protective Order entered in the *Marshall* litigation prohibiting their disclosure to Tricarichi and their use in any other litigation, including this one, until it became a matter of public record when it was admitted into evidence at the trial that began July 31 and concluded August 14. (Hessell Decl. ¶¶ 4-5). For that reason, Plaintiff's counsel could not bring the newly-discovered evidence to this Court's attention until now. Regardless, the evidence was not even produced to Plaintiff's counsel until after trial in this case and right before the Court entered the Final Judgment.

III. ARGUMENT

PwC's failure to produce the Wow! email and Risk Management Policy in this case despite an express agreement and obligation to do so has forever changed the course of this litigation. Plaintiff was wrongly deprived of the ability to use the documents to specifically rebut PwC's contentions regarding fraudulent concealment and demonstrate questions of fact requiring its renewed motion for summary judgment to be denied. Plaintiff was also deprived of using the key documents at trial in this case even as to the 2008 claims – to establish that PwC as an institution knew its original advice that the transaction was not risky was wrong, and to further explain why Stovsky and Lohnes were reluctant to revisit that advice –because there was an express policy against it.

A. Jurisdiction & Procedural Process.

As the Court may be aware, Plaintiff filed a notice of appeal within the statutorily required 30-day timeline following entry of the Final Judgment in this matter. This Court nonetheless has jurisdiction to hear and consider this Motion. While it is generally true that "the perfection of an appeal divests the district court of jurisdiction to act except with regard to matters collateral to or independent from the appealed order, the district court nevertheless retains a limited jurisdiction to review motions made in accordance with [Rule 60(b) motions]." *Foster v. Dingwall*, 126 Nev. 49, 52, 228 P.3d 453, 455 (2010). Specifically, "if the district court is inclined to grant the [60(b)] relief requested, then it may certify its intent to do so." *Id*.

Tricarichi, as the moving party, would then "file a motion (to which the district court's certification of its intent to grant relief is attached) with [the Supreme Court] seeking a remand to the district court for entry of an order granting the requested relief." *Id*. Thus, if this Court determines, as Tricarichi argues, that NRCP 60(b)(2) relief is warranted, Tricarichi respectfully requests that the Court certify its intent to grant the motion or, at least, that there is a substantial issue warranting further district court proceedings to the Supreme Court, after which Tricarichi will file a motion with the Supreme Court to remand the case to this Court "for entry of an order granting the requested relief" or other appropriate relief. *Id*.

B. Plaintiff's Rule 60(b) Motion is timely.

Notice of entry of the final judgment in this matter was filed on February 22, 2023. Because the Court granted Tricarichi leave to amend following the 2018 dismissal, the final judgment incorporated Judge Gonzalez 2018 summary judgment order. Under the Rule, a motion seeking relief under NRCP 60(b) must be made within a reasonable time and for (b)(1), (2), or (3) no more than 6 months after the date of service of written notice of entry of the judgment. Here, Tricarichi moved to reconsider as soon as the newly discovered evidence was no longer subject to confidentiality restrictions from the Marshall litigation and could be made known to him.

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Hessell Decl. ¶¶ 4-5. In all events, the motion was filed within 6 months after the notice of entry of final judgment.[1]

In addition, there is no statutory deadline to seek reconsideration when a motion is based upon fraud on the court or attorney misconduct, which have no statutory deadline. *See Kaur v. Singh*, 477 P.3d 358, 361 (2020) (explaining Rule 60(b)(3)'s 6-month deadline applies to fraud "'by an opposing party' and does not apply to fraud on the court.") (quoting NRCP 60(b)(3) and citing *NC-DSH, Inc. v. Garner*, 218 P.3d 853, 857 (2009)); *see also Est. of Adams By & Through Adams v. Fallini*, 386 P.3d 621, 625 (Nev. 2016) (construing a Rule 60(b) motion as one properly based upon attorney misconduct before the court); *Murphy v. Murphy*, 734 P.2d 738, 739 (Nev. 1987) ("[I]f a court can proceed *sua sponte*, we perceive no reason to limit the avenues by which the court's attention may be directed to the fraud."). For these reasons, Tricarichi's motion is timely under Rule 60(b)(2) & (3).

C. Rule 60(b) Relief is Warranted.

The Wow! email and Risk Management Policy are "smoking gun" documents in every sense of the word – and lest there was any doubt, the jury's verdict in the Marshall case which was largely based on PwC's failure to disclose the conclusions reached in the Wow! email and the Risk Management Policy's explanation for why confirm as much.

Nevada Rule of Civil Procedure 60(b)(2) states in part:

> "On motion and upon such terms as are just, the court may relieve a party's legal representative from a final judgment, order, or proceeding for the following reasons: (2) newly discovered evidence which by due diligence could not have been discovered in time to move or a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party[.]"

[1] EDCR 2.24(b)'s 14-day time limitation does not apply to the instant motion. The Rule's plain language forecloses its application to "any order that may be addressed by motion pursuant to NRCP 50(b), 52(b), 59 or 60." EDCR 2.24(b). Rule 60(b) is squarely applicable because Tricarichi seeks a remedy based on newly-discovered evidence, NRCP 60(b)(2), and fraud upon the court, NRCP 60(b)(3). It is well established that the NRCP will govern over a conflicting District's local rules, and that a more specific provision will govern over one stated more generally. *See* NRCP 83(a)(1) ("A local rule must be consistent with-but not duplicate-these rules."); *Cheek v. FNF Constr., Inc.*, 112 Nev. 1249, 1253, 924 P.2d 1347, 1350 (1996) ("'[t]he district courts have rule-making power, but the rules they adopt must not be in conflict with the Nevada Rules of Civil Procedure'"); *Williams v. State Dep't of Corr.*, 133 Nev. 594, 601, 402 P.3d 1260, 1265 (2017) ("Under the general/specific canon, the more specific statute will take precedence and is construed as an exception to the [*35] more general statute[.]") (internal citations omitted).

In addition, the Rule also allows this Court to relieve Plaintiff for "any other reason that justifies relief."

The Wow! email and Risk Management Policy described above could not have been discovered by due diligence because only PwC knew of their existence, and PwC specifically represented to Plaintiff that all such documents had already been produced. PwC chose to hide the Wow! Email on a privilege log in the *Marshall* litigation until months after the trial in this case and 5.5 years after it supposedly performed agreed upon search terms that should have uncovered its existence. So too regarding its representations that all policies with respect to mistaken advice had been produced.

As stated in *United States v. McGaughey*, Rule 60(b) relief is available when the new evidence is not merely cumulative or impeaching and is likely to change the outcome. 977 F.2d 1067, 1075 (7th Cir. 1992). Here, the evidence is more than merely cumulative or impeaching. The new evidence clearly shows that, ***before*** Tricarichi even engaged PwC, PwC knew the transaction was risky, would blow up at the IRS and could get Tricarichi sued for aiding and abetting Fortrend's tax fraud – the latter of which is exactly what happened in the instant case. This newly acquired evidence would certainly allow the Court to find that PwC fraudulently concealed its claims from Tricarichi sufficient to create a question of fact warranting denial of summary judgment.

While Nevada has little case law regarding the discovery of new evidence in vacating judgments under NRCP 60(b)(2), other circuits provide guidance on the matter. In *United States v. Walus*, the United States sought to revoke the defendant's citizenship, alleging that he was a member of the Gestapo, Shutzsaffeln, or other similar groups that committed atrocities in Poland, and failed to disclose these facts during the naturalization process. 616 F.2d 283, 285 (7th Cir. 1980). The trial court entered judgment in favor of the government. *Id*. After his citizenship was revoked, Walus filed two motions to vacate under FRCP 60(b) for newly discovered evidence, which contradicted the Government's basis for impeachment of the defendant's alibi evidence. *Id*, at 302. The Government argued that the defendant's newly-discovered evidence would have been available for trial had the defendant put forth the proper due diligence when searching for

the evidence. *Id*. at 303. The court characterized Rule 60(b)(2) as a rule of reason, stating: "Perhaps if the defendant had been more wealthy, his attorney eventually would have discovered this evidence. Even if this failure could be characterized as neglect. . . [the court] cannot hold that the results of this trial are forever insulated from re-examination." *Id*. at 304. The court concluded, "**in light of the strength of the new evidence, affirmance of the district court's decision would be to accept an evil far greater than waste of the court's or litigant's time**." *Id*. The *Wains* court set forth a test of the prerequisites for relief from a judgment under FRCP 60(b)(2):

1. The evidence was discovered following the trial;

2. Due diligence on the part of the movant to discover the new evidence is shown or may be inferred;

3. The evidence is not merely cumulative or impeaching;

4. The evidence is material;

5. The evidence is such that a new trial would probably produce a new result. *Id*. at 287-88.

Using the *Walus* test as guidance in the instant case, the prerequisites for relief from a judgment pursuant to Rule 60(b)(2) are clearly met here. Evidence of the Wow! email and Risk Management Policy was discovered following the trial. Tricarichi used the proper due diligence to obtain the evidence prior to trial, but PwC failed to disclose it. Further, as the court stated in *Walus*, even if the evidence could have been discovered under different circumstances, the strength of the new evidence would make deciding for PwC an evil far greater than waste of the court's or the litigant's time. The evidence revealing that PwC knew of the Midco transaction's risks to Tricarichi before he even engaged them, then intentionally covering it up, and then advising him that the risks were minimal is more than impeaching or cumulative.

PwC's failure to produce the Wow! email and related documents deprived the Court and Plaintiff of the ability to argue that they create questions of fact about whether PwC fraudulent concealed its negligence. Further, PwC also deprived Plaintiff of the ability to argue at the bench trial in this matter that PwC, as an institution, knew well before 2003 and certainly by 2008 that

this transaction was dangerous and Tricarichi should get away as soon as possible, none of which it did.

III. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that the Court, pursuant to NRCP 60(b), certify its intent to grant Plaintiff's motion for reconsideration or, at least, indicate that there are substantial issues warranting further review.

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED: August 21, 2023.

SPERLING & SLATER, P.C.

By: */s/ Scott Hessell*
Scott F. Hessell (*Pro Hac Vice*)
55 West Monroe, Suite 3200
Chicago, IL 60603

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

Attorneys for Plaintiff Michael A. Tricarichi

DECLARATION OF SCOTT F. HESSELL IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER PURSUANT TO NRCP 60(b)(2) BASED ON NEWLY DISCOVERED EVIDENCE

I, Scott F. Hessell, declare as follows:

1. I am a resident of Illinois and am an attorney with the law firm of Sperling & Slater, P.C., acting as plaintiff's counsel in this matter.

2. I submit this declaration in support of PLAINTIFF'S NRCP 60(b)(2) MOTION TO RECONSIDER BASED ON NEWLY DISCOVERED EVIDENCE (the "Motion").

3. Attached as Exhibit 1 is a true and correct copy of the Jury Verdict in *Marshall et. al. v. PricewaterhouseCoopers, LLP*, Case No. 17CV11907 (Multnomah County Circuit Court) ("*Marshall* lawsuit"), dated August 14, 2023.

4. Attached as Exhibit 2 is a true and correct copy of an email, dated February 14, 2003, from Dan Mendelson to William Galanis, Mark Housel, Gary Cesnik and Alan Fox, and underlying emails in the thread, which was first produced in the *Marshall* lawsuit on February 3, 2023 ("Wow! Email"). The Wow! Email was never produced in the instant litigation, and it was subject to confidentiality restrictions in the *Marshall* lawsuit that prevented its use in this case or disclosure to Tricarichi until it was admitted into evidence in the *Marshall* trial as Joint Exhibit 903 on or about August 1, 2023.

5. Attached as Exhibit 3 is a true and correct copy of PwC's Risk Management Booklet, copyrighted 2002 by PwC. The Policy was never produced in this matter, and it was subject to confidentiality restrictions in the *Marshall* litigation that prevented its use in this case or disclosure to Tricarichi until it was admitted into evidence in the *Marshall* trial on or about August 1, 2023. The Policy was first produced in the *Marshall* lawsuit on or about January 20, 2023.

6. Attached as Exhibit 4 is a true and correct copy of an email, dated August 23, 2017, from PwC's Counsel Winston Hsiao from Skadden to me and co-counsel Todd Prall and Tom Brooks regarding the parties' agreed 56(f) discovery.

7. Attached as Exhibit 5 is a true and correct copy of an excerpt from Day 10 of the Trial Transcript in the Marshall lawsuit, reflecting the hearing and Court's ruling on Plaintiff's motion for discovery sanctions related to the non-production of the Wow! Email.

I declare under penalty of perjury under the law of the State of Illinois that the foregoing is true and correct based upon my knowledge, information, and belief.

DATED this 21st day of August, 2023.

/s/ Scott F. Hessell
Attorney Scott F. Hessell, *Pro Hac Vice*

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Hutchison & Steffen, PLLC and that on this 21st day of August, 2023, I caused the above and foregoing documents entitled **PLAINTIFF'S MOTION TO RECONSIDER PURSUANT TO NRCP 60(B) BASED ON NEWLY DISCOVERED EVIDENCE** 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, PLLC

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EXHIBIT 1

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

KAREN M. MARSHALL, as TRUSTEE OF THE MARSHALL FAMILY TRUST; PATSY L. MARSHALL, an individual; PATSY L. MARSHALL, as personal representative of the ESTATE OF RICHARD L. MARSHALL, deceased; and MARSHALL ASSOCIATED, LLC, an Oregon limited liability corporation, Plaintiffs, vs. PRICEWATERHOUSECOOPERS LLP, a limited liability partnership, Defendant.	Case No. 17CV11907 **VERDICT**

At least the same nine jurors must agree to the answer for each of the following questions that you answer:

We, the jury, find:

1. Was the Defendant PricewaterhouseCoopers LLP (PwC) negligent in one or more of the ways the Marshalls claim?

ANSWER: Yes X No_____

If "Yes," go to question 2.
If "No," your verdict is for PwC. Do not answer any more questions. Your presiding juror must sign this verdict form.

2. Was PwC's negligence a cause of damages to the Marshalls?

ANSWER: Yes X No_____

If "Yes," go to question 3.
If "No," then your verdict is for PwC. Do not answer any more questions. Your presiding juror must sign this verdict form.

3. Were the Marshalls at fault in one or more of the ways that PwC claims?

ANSWER: Yes X No_____

If "Yes," go to question 4.
If "No," go to question 6. Do not answer questions 4 or 5.

4. Was the Marshalls' fault a cause of damages to the Marshalls?

ANSWER: Yes X No_____

If "Yes," go to question 5.
If "No," go to question 6. Do not answer question 5.

5. What is the percentage of each of the parties' fault or negligence that caused damages to the Marshalls?

ANSWER:

PricewaterhouseCoopers LLP 77.5 %

Marshalls 22.5 %

(The percentages must total 100%)

If the Marshalls' percentage of fault is 50% or less, go to question 6.
If the Marshalls' percentage of fault is greater than 50%, your verdict is for PwC. Do not answer any more questions. Your presiding juror must sign this verdict form.

6. What are the Marshalls' damages?

ANSWER: Economic Damages $ 84,539,143.05

Do not reduce the damages by the Marshalls' percentage of fault, if any, because the Court will do that when entering judgement.

7. Did the Marshalls file their claims after the time limit set by the statute of limitations?

ANSWER: Yes_____ No X

If "Yes," the Marshalls' claim was filed after the time limit in the statute of limitations and your verdict is for PwC.

8

Date: August 14, 2023

Presiding Juror (Juror number **ONLY**)

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EXHIBIT 2

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

Message

From: Dan L. Mendelson ["cn=dan l. mendelson/ou=us/ou=tls/o=pwc"]
Sent: 2/14/2003 8:26:14 PM
To: William Galanis ["cn=william galanis/ou=us/ou=tls/o=pwc@americas-us"]; Mark Housel ["cn=mark housel/ou=us/ou=tls/o=pwc@americas-us"]; Gary Cesnik ["cn=gary cesnik/ou=us/ou=tls/o=pwc@americas-us"]; Alan S. Fox ["cn=alan s. fox/ou=us/ou=ogc/o=pwc@americas-us"]
Subject: Re: Tax Shelter Disclosure (Fortrend deal)---Priviileged & Confidential

----- Forwarded by Dan L. Mendelson/US/TLS/PwC on 02/14/2003 03:25 PM -----

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)---Priviileged & 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.

<Removed files: Essex Sale doc - Email to WNTS.DOC>

John Dempsey

John Dempsey 02/14/2003 11:59 AM	To: Mike Weber/US/TLS/PwC@Americas-US cc: Subject: Re: Tax Shelter Disclosure (Fortrend deal)---Priviileged & Confidential

I want to make sure you are in the loop on this.

----- Forwarded by John Dempsey/US/TLS/PwC on 02/14/2003 11:58 AM -----

Dan L. Mendelson 02/14/2003 11:55 AM 202-414-1034 Washington, D.C. US	To: John Dempsey/US/TLS/PwC@Americas-US cc: Jim Emilian/US/TLS/PwC@Americas-US, Mark Housel/US/TLS/PwC@Americas-US, Gary Cesnik/US/TLS/PwC@Americas-US, Alan S. Fox/US/OGC/PwC@Americas-US Subject: Re: Tax Shelter Disclosure (Fortrend deal)---Priviileged & Confidential{doclink : document = 'CEF69EE91A6C23F388256CCD006BF3D9' view = '5E502A1BAAAF40CA85256197006C1A32' database = '882568550000C9E3' }

John, Bill Galanis, Mark Housel, and I talked in separate conversations today about this transaction. We are very uncomfortable taking any advisory role in this transaction. The 57 page stock purchase agreement alone suggests that this is way too difficult. Bill feels that you and he are on the same page as to the risks in this transaction. He and I agreed

that as preparers we may conclude that based on the Lowndes Case (4th Cir), it may be prudent, if legal counsel advises the taxpayers to do the deal, to report the ordinary income element and then seek a refund for that element to avoid penalty exposure. Mark would like for us to have a conversation with Gary before we undertake any advising on this transaction. Dan

John Dempsey

John Dempsey 02/14/2003 02:44 PM	To: Dan L. Mendelson/US/TLS/PwC@Americas-US cc: Subject: Tax Shelter Disclosure (Fortrend deal)

Dan,

Attached is the a copy of the stock purchase agreement that was sent to our client (seller of C Corp stock). I am concerned about the disclosure language and confidentiality conditions that may make this transaction reportable.

Could you please email me your comments after reading the attached agreement. The areas highlighted in green were in my opinion the most serious.

Thank You

John Dempsey
971 544 4334

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EXHIBIT 3

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

PRICEWATERHOUSECOOPERS

US Tax Quality & Risk Management

AA 001384

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Quality & Risk Management on Our Tax Practice

Introduction

As our tax practice becomes more specialized, the business environment more competitive, and the tax laws more complex, managing our business risk and assuring the overall quality of our service delivery are increasingly more challenging. Accordingly, the goal of Quality and Risk Management is to control risk from the outset of a tax engagement while promoting the highest quality of service throughout the conduct of the engagement.

This booklet highlights some of the key policies comprising standards of conduct as well as specific procedural requirements for PricewaterhouseCoopers' Tax practice in the United States. Details of these and other Quality and Risk Management policies reside in ARMOR – a database that is more fully described on the next page.

Tax Risks

PwC must manage its risks to prevent negative consequences, which threaten PwC's profitability and assets through immediate monetary expenditures and cause long-term damage to PwC's reputation. Specific risks faced in the Tax practice include:

- Errors and omissions
- Project mismanagement
- Independence impairment
- Conflicts of interest
- Association with disreputable persons
- Client dissatisfaction
- Penalties against PwC or PwC's clients

Approach

"Risk management," by definition, contrasts with "damage control." While quality review is essential to confirming our continued adherence to sound risk management procedures, PwC's Tax Quality and Risk Management program is driven by proactive procedures designed to prevent substandard performance of any kind from occurring. The policies contained herein reflect the emphasis on this proactive approach.

Tax Quality & Risk Management Policies - ARMOR

Introduction to ARMOR

Assignment Risk Management and Opportunity Review

ARMOR is the principal repository for quality and risk management policies, procedures and practice aids for Global TLS. ARMOR contains information applicable to the Global firm and to each territory. US Quality & Risk Management (Q&RM) maintains the US portions of ARMOR. ARMOR is a Lotus Notes database and is accessible through TALK.

What's in ARMOR?

Global TLS Fundamental Policies

- US Tax Q&RM Policies
- US Tax Q&RM guidance
- Helpful tools & practice aids:
  - Standard engagement letters
  - Engagement Checklist
  - Client acceptance checklist
  - Other checklists & questionnaires
  - Primary-source material governing tax practice
  - Links to other helpful guidance
- Contact information for Q&RM resources

10 Global TLS Fundamental Policies

1. *Primary responsibility for quality and risk management rests with the engagement partner.*
2. *The acceptability of all clients must be considered.*
3. *Conflicts of interest: relationship checks must be made and detrimental consequences for clients avoided.*
4. *All business opportunities must be assessed before accepted and the additional procedures followed before committing to an assignment with large financial implications for the Firm.*
5. *Engagements must not be commenced if the terms or scope will breach audit independence.*
6. *Engagement terms must be agreed before work is commenced.*
7. *Liability-limiting language must be incorporated into engagement terms and advice documents.*
8. *All PwC Firms have a formal policy on liability capping which must be complied with.*
9. *All client work must be reviewed by an appropriately experienced professional.*
10. *There must be a written record of all work performed and advice provided.*

Partner & Staff Responsibilities

Your Responsibilities

PwC partners and staff must maintain high standards of professional, ethical, and legal conduct. Regardless of affiliation with the AICPA or status as a CPA, all PwC Tax partners and staff must be familiar with and observe:

- Tax Q&RM Polices contained in ARMOR
- PwC's Code of Business Conduct and other policies found on KnowledgeCurve™
- Rules of Professional Conduct of the AICPA, including the AICPA's Statements on Standards for Tax Services, and similar promulgations by state boards of accountancy and CPA societies
- Applicable US and state laws
- IRS Circular 230 and pertinent regulations of the IRS
- Regulations of the SEC and other regulatory authorities

Statements on Standards for Tax Services

The Statements on Standards for Tax Services and Interpretation 1-1 (SSTSs) reflect the AICPA's standards of tax practice and describe AICPA members' responsibilities to taxpayers, the public, the government, and the profession.

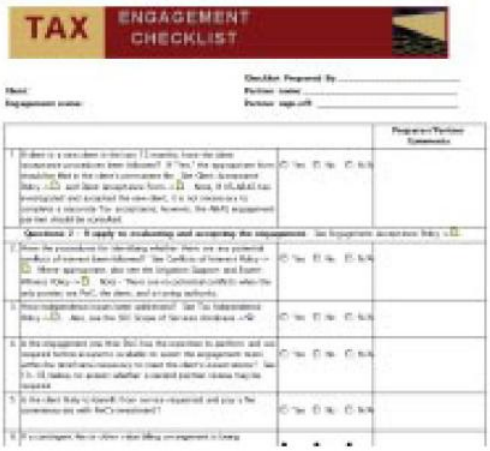
The SSTSs provide practical guidance on many situations faced in the Tax practice. For example, do you know what to do when you find an error in a client's previously filed tax return? Or, do you know whether, in some circumstances, it might be appropriate to use estimates when preparing a tax return? Further, the SSTSs provide the threshold ethical standard for tax return positions – the "realistic possibility of success" standard, which is defined in Interpretation 1-1.

The SSTSs are available on the AICPA website and in ARMOR *(see US Policy & Guidance – Partner and Staff Responsibilities – Compliance with Standards of Professional Conduct in ARMOR)*.

Engagement Management: The Engagement Checklist

The Engagement Checklist

- Summarizes key Q&RM issues to consider and procedures to follow when procuring and executing assignments
- Located in ARMOR, under "Assignment Acceptance"
- Should be included in the file for all tax engagements



Using the Engagement Checklist

When you access the Engagement Checklist in ARMOR, you will be given the option of sending an electronic copy to your Lotus Notes mail or printing a hardcopy. (Note, you cannot complete and save the Engagement Checklist within ARMOR.) Most people prefer to complete the Engagement Checklist electronically in their mail files. When you use the Engagement Checklist in this manner, you have instant access to the relevant firm policies and guidance through the many content-specific doclinks embedded in the Engagement Checklist.

The Engagement Checklist is organized into five sections:

- Client acceptance
- Engagement acceptance
- Risk assessment
- Engagement terms and engagement letter
- Engagement execution

You should complete the Engagement Checklist throughout the various stages of an engagement. It will highlight the key quality and risk management concerns you should consider from the time a client engagement first becomes an opportunity until you provide the final deliverable to your client.

You should maintain the completed Engagement Checklist in the file containing the work papers for your engagement.

Client Acceptance

Client Acceptance Policy & Guidance

For all prospective Tax clients – individuals and business alike – the Tax engagement partner is responsible for assessing client acceptability based on careful and diligent inquiries. The assessment must be documented and properly approved in accordance with Tax Q&RM policy. *See US Policy & Guidance – Client Acceptance in ARMOR.*

What is the purpose of our client acceptance procedures?

PwC wants to ensure that:

- The prospective client has integrity
- We do not risk adverse publicity from the client relationship
- The prospective client is viable and capable of paying our fees
- There is no undue risk of litigation indicated by the prospective client's prior behavior
- The initial assignment is acceptable

ABAS Clients

If a prospective Tax client is an existing ABAS client, the Tax engagement partner typically needs only to confirm the acceptability of a client with the ABAS partner. Additional acceptance procedures are required only where ABAS has concerns about whether the client relationship should be continued.

Tax Clients Referred by Another PwC Firm or Office

If a new Tax client is referred by another PwC firm or office, the acceptability of the client must not be assumed and the client acceptance procedures must be followed. However, where the PwC firm or office referring the work has a significant ongoing relationship with the client, it may be possible for the receiving PwC firm or office, with the cooperation of the referring PwC firm or office, to reduce the amount of screening necessary.

Client Acceptance Tools

A Client Acceptance Questionnaire must be completed for all prospective Tax clients. To access the Client Acceptance Questionnaire, *see Risk Management Tool – Client Acceptance in ARMOR.*

Engagement Acceptance

Engagement Acceptance Policy & Guidance

Why evaluate engagement acceptability if the client has been accepted?

Even though we may have accepted a client, we will only provide a particular service to a client if the engagement does not result in the assumption of undue risk. For detailed guidance on Engagement Acceptance, *see US Policy & Guidance – Assignment Acceptance in ARMOR.*

Tax engagement partners are responsible for assessing a particular service prior to accepting the work. Key items to be addressed include:

- The client's ability to benefit from the services in light of the potential fee
- Any conflicts of interest
- Scope of services limitations under the independence rules
- Availability of the requisite resources and capabilities
- The reasonableness of any constraints placed on PwC (e.g., as to timing, resources, or the agreed level of fees)
- The overall risk of the services to be provided

The Tax engagement partner should document the assessment and where the engagement involves potentially greater-than-normal risk, he/she should consult a second partner or Tax Q&RM. For guidance on when second partner reviews are required, *see US Policy & Guidance – Review Procedures – Second Partner Review in ARMOR.*

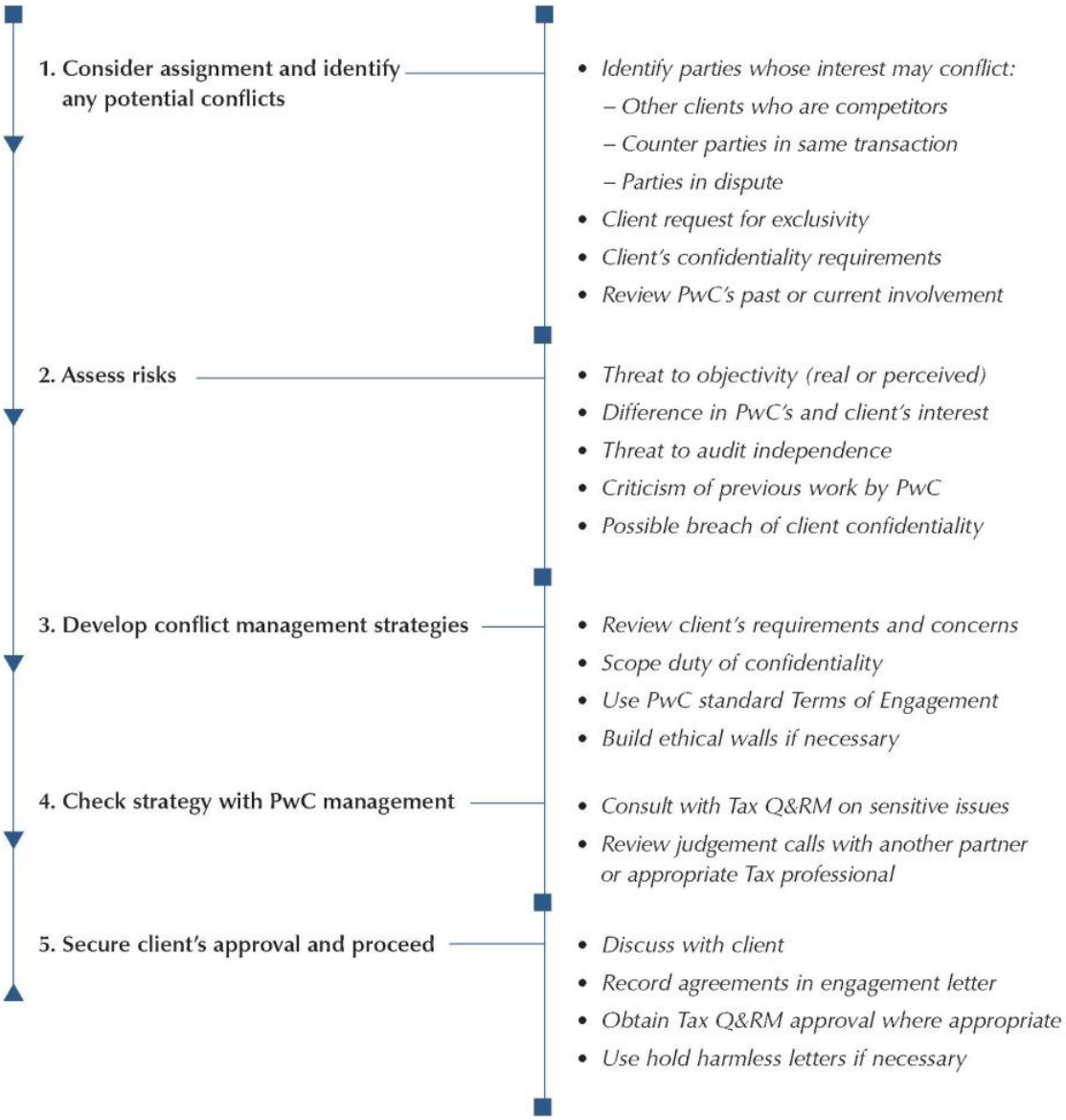
Engagement Acceptance Tools

The Engagement Checklist may be used to facilitate and document engagement acceptance procedures. *See US Risk Management Tool – Assignment Acceptance in ARMOR.*

The requirement for an engagement acceptance assessment applies, not only to engagements with new clients, but also to new engagements with existing clients.

Engagement Acceptance – Conflicts of Interest

Conflicts of Interest



For guidance on Conflicts of Interest, *see US Policy & Guidance – Conflicts of Interest in ARMOR.*

Engagement Acceptance – Independence (Scope of Services)

Independence – Scope of Services

In addition to independence issues that arise because of investments by or relationships of an auditor, "scope of services" issues may arise. Under SEC scope of service rules, an auditor's independence may be impaired if:

- There is a mutual or conflicting interest between the auditor and the client
- The auditor is placed in the position of auditing its own work
- The auditor is acting as management or as an employee of the client
- The auditor is acting as an advocate for the client

How can I ensure that the services we provide do not breach audit independence?

For SEC-registrant attest clients, access the SEC Scope of Services database through ARMOR *(see US Policy & Guidance – Independence and SEC – SEC Scope of Services Link to database)*.

Services covered by the SEC Scope of Services database include:

- Advocacy in tax courts and tribunals
- Appraisal and valuation services
- Bookkeeping services
- Contingent and similar fees
- Corresponding with tax authorities
- Delivery of client checks
- Outsourcing tax compliance
- Payroll services
- Seconding staff (i.e., "loaned staff")
- Tax provision advice

For non-SEC Registrant attest clients, familiarize yourself with PwC's independence policy and the AICPA independence rules. AICPA independence rules can be accessed through the AICPA website.

How do I identify my SEC Registrant attest clients?

Access the PwC US Independence List at: http://independence.knowledgecurve.com

Engagement Acceptance – Contingent and Value-Added Fee Arrangements

Contingent and Value-Added Fee Arrangements

Because of the potential for ethical or independence (scope of services) violations, extra care should be taken when considering contingent and value-added fee arrangements. *See US Policy & Guidance - Independence and SEC – Value billing and contingent fees in ARMOR.*

What are Value-Added and Contingent Fee Arrangements?

A "Valued-added fee arrangement" (or "value billing") is a billing based upon the value of the services rendered, rather than, or in addition to, time-based billings.

Contingent fees are a form of value billing that generally link the amount billed directly to the outcome or the results of our services. Thus, while value billing can be based on a number of factors, such as expected or actual benefits from the service, uniqueness of the ideas, complexity of service, risks assumed, etc., contingent fee arrangements are generally based only on the results from the services provided.

What are the procedures regarding contingent fees and value billing?

- The Tax engagement partner should preliminarily determine whether the proposed arrangement satisfies the applicable ethical and independence rules (including the rules of any applicable state(s) – *see US Policy & Guidance - Independence and SEC – Contingent fees - State rules in ARMOR)*
- All contingent and value-added fee arrangements must be reviewed and approved by a Tax Q&RM partner prior to sending an engagement letter to the client
- The ABAS client-service partner should be advised of all contingent and value-added fee arrangements with attest clients
- To identify tax clients which could become attest clients, the Tax engagement partner should notify the Office Managing Partner and the ABAS Regional Industry Leader of any proposed contingent and value-added fee arrangements with non-attest clients.

Engagement Acceptance – Unauthorized Practice of Law

PwC May Not Practice Law in the US

Except where PwC's work is performed at the direction of the client's legal counsel (in-house or outside counsel), or when PwC works directly for attorneys and bills the attorneys for such services, we shall not undertake any work involving the practice of law and must advise clients, where appropriate, to consult legal counsel.

PwC partners and staff must be careful that they are not holding themselves out as practicing law even if they are attorneys.

Additional guidance

Additional guidance can be found in ARMOR regarding:

- Prohibition against PwC engaging a lawyer to provide legal services to a client
- Restrictions related to drafting of documents for engagements
- Restrictions related to providing specimen legal documents to clients
- Restrictions related to litigation

For guidance on Unauthorized Practice of Law, *see US Policy & Guidance - Regulated Services – Unauthorized Practice of Law in ARMOR.*

Engagement Acceptance – Refuse to Lose

Refuse to Lose

What is it?

Refuse to Lose is a process for the review of major Tax engagement opportunities in the US.

Why do we have it?

For any major engagement opportunity, it is essential that, from the start of the proposal, those involved in direct negotiations have access to the firm's accumulated experience in order to evaluate the commercial, quality, and risk management aspects of the opportunity.

What is a major opportunity?

For purposes of Refuse to Lose, a major Tax engagement opportunity is any opportunity presented to the firm where the amount of our proposal or the likely fee could exceed $500,000. Some Regions have lowered this fee threshold to $250,000. Major opportunities include:

- A request for a proposal
- Submission of an non-competitive proposal
- An "add-on" opportunity to a project in process
- Participation in a multi-disciplinary proposal where the Tax fees are $500,000 or more ($250,000 or more in certain Regions)

Benefits

- The benefits of the Refuse to Lose process include:
- Consideration of quality and risk issues early in the proposal process
- Assessment of PwC's ability to provide the services
- Adequate allocation of resources and appointment of team members
- Determination of optimal pricing strategy
- Evaluation of proposal success/rejection and communication of findings

Major tax opportunities, whether sole-sourced (non-competitive) or competitive, are subject to the same quality and risk issues. Thus, all major tax opportunities, including those without any competitive setting or proposal must go through the Refuse to Lose process.

Engagement Terms and Engagement Letter

Policy & Guidance

The use of engagement letters is one of PwC's primary tools to manage engagement risk, while also improving engagement profitability and overall client satisfaction. Accordingly, Firm policy requires obtaining or confirming the existence of a signed engagement letter for every project before any significant work is commenced. *See US Policy & Guidance – Engagement Terms – Engagement letters in ARMOR.*

To be in compliance with Firm policy, an engagement letter must:

- Have the applicable standard Terms of Engagement attached
- Explicitly state the:
  - Scope of the engagement,
  - Timing and content of deliverables,
  - PwC and client responsibilities,
  - Fee arrangements, and
  - Payment terms.

Without an engagement letter, profitability can suffer due to "scope creep," bad budgeting, client objections to our bill, and stale time charges causing both PwC and the client to forget the value we provided in an engagement.

Preparing a good engagement letter will force you to define the deliverables and consider how you will conduct the project. Our efforts will likely increase net fees per hour because you will have budgeted the work and will be in a better position to negotiate an appropriate fee with your client. Typically, when we perform in accordance with our engagement letters and our deliverables meet the clients' expectations, our clients are satisfied and promptly pay our bills.

Where do I find sample engagement letters?

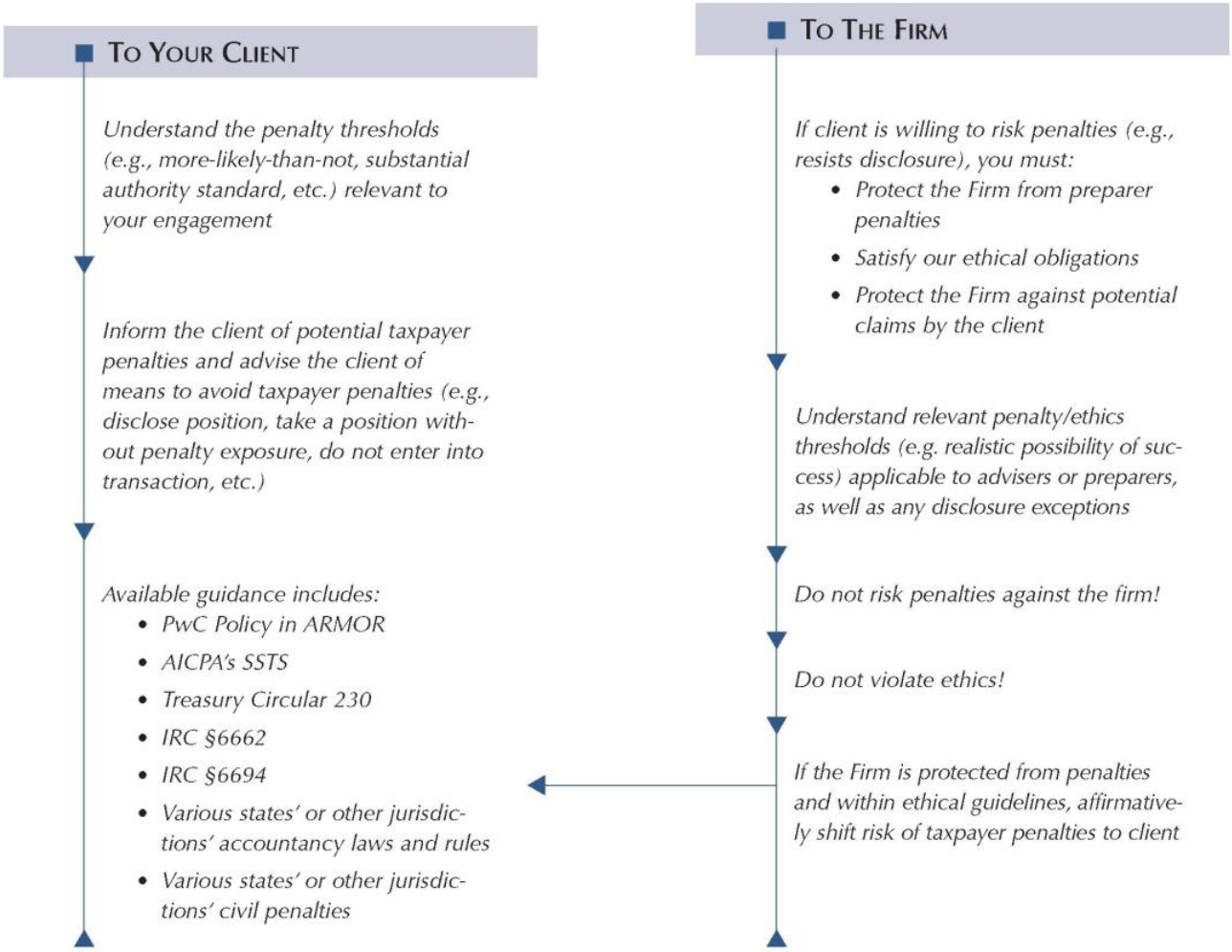
Standard letters for Tax consulting, compliance, and recurring services are available in ARMOR. In addition, engagement letters for many specific Tax services are available in ARMOR. You should always use the standard engagement letters in ARMOR as a starting point. *See US Risk Management Tools – Engagement Terms in ARMOR.*

Any modifications to engagement letters or the standard terms, which deal with sensitive legal matters, must be reviewed and approved by a Tax Q&RM partner. See US Policy & Guidance – Engagement Terms – Request for Modifications to Engagement Letters in ARMOR.

Engagement Execution–Penalties

Penalties

In advising clients or preparing tax returns, you need to evaluate the potential of penalties being assessed against our client and/or PwC and take appropriate action to mitigate any risk thereof. For detailed guidance, *see US Policy & Guidance – Methodologies – Penalties - Accuracy-related and Preparer Penalties in ARMOR.*
As a Tax professional, you have a responsibility to both your client and to PwC to appropriately manage risks surrounding penalty assessments:



- Contact Q&RM if preparer penalties are threatened against PwC
- Contact Q&RM if a client is willing to risk penalty and refuses to disclose

Engagement Execution–Review Procedures

Review Procedures

All written client correspondence, whether transmitted in hard copy or electronically, must be reviewed by an appropriately experienced PwC professional. This policy is referred to as the "four-eyes" review.

In addition to the "four-eyes" review, high-risk engagements, third-party opinions, public communications, and other tax technical projects are subject to additional review procedures. See Summary of Review Procedures below:

Summary of Review Procedures

Output	Review Procedures
Written Communication (including e-mails)	*Four-eyes review*
High-Risk Engagements	*Second partner review*
Third-Party Opinions	*Second partner review; Additional review by a National Q&RM partner; At least a "more likely than not" opinion; Caveats required in opinion letter*
Public Communications Public Relations Review	*Second partner review*
Projects over $500,000*	*Refuse to Lose*
National Office Filings	*WNTS review*
Other Tax Technical Projects	*Review by Tax professionals with subject matter experience*
Expert Witness and Litigation Support Services	*Involve Tax Q&RM; Involve FAS (DA&I) partner (Conflict check; Court requirements)*

* Some Regions have a lower threshold.

Engagement Execution–Other Considerations

Tax Shelter Rules

For engagements that involve US Federal income tax, you must consider and fully comply with any applicable Tax Shelter regulations (e.g. registration, list maintenance, and/or tax return disclosure).

Documentation

You must record the content of and technical support for all opinions or advice. Substantive opinions or advice should be in writing. In addition to stating conclusions or opinions, the documentation should contain fully developed statements of facts and assumptions used, and the rationale for conclusions. The documentation should be maintained and readily accessible in the client's file in accordance with firm policy.

Tax Advisor Privilege

Various confidentiality privileges may apply to communications you have with your clients. Types of confidentiality privileges include:

- IRC §7525 – for tax advice rendered by a federally authorized tax practitioner
- Attorney-client
- Work-product doctrine
- Derivations thereof

Where a confidentiality privilege may apply, you should consider special procedures, including: (1) stamping or adding legends to work product, (2) include related work papers in separate, limited-access files, and/or (3) bifurcate engagement between privileged and non-privileged communications. When a client requests, it may be appropriate for client's counsel to engage PwC (i.e., a "Kovel" arrangement).

Signing Tax Returns & Substantive Correspondence

Partners should sign all tax returns and substantive correspondence, including engagement letters. Where warranted, a partner may delegate signature authority to directors or managers. Such authority should be evidenced in writing and maintained with the file containing the outgoing document. The appropriate forms for delegating signing authority are contained in ARMOR.

Details

Further information on the procedures discussed above can be found in ARMOR.

E-Mail: Best Practices

Providing advice to a client via e-mail should involve the same standards as any other oral or written advice. Thus, it is as important to adopt quality and risk management procedures when using e-mail, as it is with any form of communication. Below are some "DOs" and "DON'Ts" for e-mails to clients.

Do...

- *gather all facts and support conclusions reached*
- *be professional in content, style, and use of language*
- *secure appropriate reviews prior to pushing the "send" button*
- *follow up formal correspondence (e.g., engagement letters, opinions, etc.) sent by e-mail with signed hard-copies*
- *maintain copies of e-mails either in a hard-copy file or a firm-approved electronic system (e.g., Engage)*
- *take reasonable care to maintain the confidentiality of client information*
- *follow up e-mails with a phone call*

Don't...

- *casually advise clients without doing adequate work*
- *write in a style that is more appropriate in an Internet chatroom :-)*
- *send drafts as a substitute for finalizing a deliverable*
- *send substantive e-mails without proper delegation by a partner in accordance with firm policy*
- *use your Lotus Notes mailbox as a filing system!*
- *e-mail sensitive information without the client's approval*
- *assume your client has read your important e-mail*

Troublesome Practice Matters

What is a Troublesome Practice Matter ("TPM")?

Any matter or event which calls into question the quality of the services provided by PwC, or which might damage PwC's reputation.

What are the forms of TPMs?

- a formal claim (i.e. court proceedings) for damages, costs, or compensation
- an informal claim or threatened claim for damages, costs, or compensation
- circumstances we discover that might call into question the quality of PwC's services, whether or not the client has knowledge

Examples of TPMS in Tax

- Detection of technical error in services provided to a client
- Missed due date for a tax return, election, or estimated tax payment
- PwC's final opinion differs from that upon which the client based its decision to implement a transaction

Required Consultation

In the event a Troublesome Practice Matter (TPM) is discovered:

- The engagement partner must notify a Q&RM partner
- Q&RM will contact the Office of General Counsel if necessary

A Few Words of Advice . . .

Do...

- *report TPMs promptly to Q&RM*
- *get assistance early*
- *take advice from Q&RM or OGC*

Don't...

- *admit liability, shortcomings, or defects in our services*
- *try to keep the problem to yourself*
- *try for a quick, quiet fix or cover up the problem*
- *offer a settlement or commit the Firm*
- *destroy or alter papers – secure them*

For detailed guidance on TPMs, *see US Policy & Guidance - Claims against PwC in ARMOR.*

Other Issues to Consider

New Solutions

- All new tax ideas and marketing materials must be developed in coordination with PINNACLE and/or Think Tank
- Most P&S and Industry groups have a coordinated methodology for submitting new solutions for Q&RM approval, either prior to or in conjunction with submission to PINNACLE
- Ideas or services being marketed (regardless of whether they are new or existing ideas or services) and any corresponding marketing materials must be submitted to PINNACLE for proper review and Q&RM approval

Confidentiality Agreements

Do not ask our clients to sign conditions of confidentiality protecting our tax solutions.

Because we always maintain the confidentiality of our clients' information, we do not generally need to sign a separate confidentiality agreement. Nevertheless, clients may sometimes insist on a separate agreement. In those instances, you should present to the client PwC's model confidentiality agreement contained in ARMOR. If the client requires that we use their form of agreement, you should follow the guidance in ARMOR to evaluate the client's agreement.

For guidance on Confidentiality agreements, *see US Policy & Guidance - Confidentiality Undertakings in ARMOR.*

Privacy Disclosure Rules

- PwC is required to provide a privacy policy notice to each new individual client when a client relationship is established. PwC is required to provide subsequent annual privacy notices to individual clients as long as the client relationship continues.

For guidance on PwC's Privacy Policy, *see US Policy & Guidance - Engagement Terms - US federal privacy disclosure rules for tax preparers and tax advisors in ARMOR.*

Who do I Contact?

A list of the Tax Q&RM Team members can be found in ARMOR. *See Advice Line – Q&RM Team – US Tax in ARMOR.*

Your worlds  Our people

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EXHIBIT 4

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

From: Hsiao, Winston P <Winston.Hsiao@skadden.com>
Sent: Wednesday, August 23, 2017 8:40 PM
To: Scott F. Hessell
Cc: Todd Prall (TPrall@hutchlegal.com); Tom Brooks
Subject: RE: [Ext] Re: Tricarichi v PwC: Discovery Responses
Attachments: PwC - Amended Responses to Interrogatories.pdf

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

Please also find an FTP link to PwC's second document production.
Link: https://secureftp.skadden.com
Username: sk1214271
Log-in password: JpB9fNZJ (this is case sensitive)
File Encryption password: 3*U#NBT@(Ts (this is case sensitive)

As we have discussed before, the document production contains:

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

- Date Range: 1/1/1999 through 12/31/2012
- Custodians:
  - Elaine Church
  - Marissa Nelson
  - Mark Boyer
  - Richard Stovsky
  - Tim Lohnes
  - Rochelle Hodes
  - Stephen Anderson
  - Gary Cesnik
  - Michael Weber

- Search Terms:
  - Tricarichi
  - Fortrend
  - Midco
  - Midcoast
  - Notice 2001-16
  - Notice 2008-20
  - Notice 2008-111
  - "10.21" w/10 "230"
  - "AICPA Statement on Standards" w/10 "6"
  - "intermediary transaction"

Thanks.

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

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

Winston

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

Scott

Vfrw#I1#K hvvhoo

Vshuolqj#\#Vodwhu/#S1F1

88#Z hvw#P rqurh/#Vxlwh#6533

Fklfdjr/#LO#93936

W=#645,#97407;;5

I=#645,#97097<5

z z z 1vshuolqjodz 1frp

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

> Sure.
>
> On Jul 13, 2017, at 7:09 PM, Hsiao, Winston P <Winston.Hsiao@skadden.com> wrote:
>
> > How about 2 pm et tomorrow? I'll give you a call. Thanks.
> >
> > ---
> >
> > **From:** Scott F. Hessell [mailto:SHessell@sperling-law.com]
> > **Sent:** Thursday, July 13, 2017 12:00 PM

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

That's fine. Let me know.

Vfrw#I1#K hvvhoo

Vkuqkqj# #Vodwhu#S1F1

88#Z hvw#P rqurh/#Vxlwh#5533

Fklfdjr/#LO#93936

W=#645,#974;;5

I=#645,#9740<5

z z z 1vkuqkqjOodz 1frp

From: "Hsiao, Winston P" <Winston.Hsiao@skadden.com>
Date: Thursday, July 13, 2017 at 1:51 PM
To: Scott Hessell <shessell@sperling-law.com>, "Todd Prall (TPrall@hutchlegal.com)" <TPrall@hutchlegal.com>, Thomas Brooks <tdbrooks@sperling-law.com>
Subject: Re: [Ext] Re: Tricarichi v PwC: Discovery Responses

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

Thanks
Winston

Sent from my BlackBerry 10 smartphone.

From: Scott F. Hessell
Sent: Thursday, July 13, 2017 11:45 AM
To: Hsiao, Winston P (LAC); Todd Prall (TPrall@hutchlegal.com); Tom Brooks
Subject: Re: [Ext] Re: Tricarichi v PwC: Discovery Responses

Winston

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

Scott

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88#Z hvw#P rqurh/#Vxlwh#6533

Fklfdjr/#LO#93936

W=#645,#97407;;5

I=#645,#974097<5

z z z 1vshuodqj0odz 1frp

From: "Hsiao, Winston P" <Winston.Hsiao@skadden.com>
Date: Friday, July 7, 2017 at 7:26 PM
To: Scott Hessell <shessell@sperling-law.com>, "Todd Prall (TPrall@hutchlegal.com)" <TPrall@hutchlegal.com>, Thomas Brooks <tdbrooks@sperling-law.com>
Subject: RE: [Ext] Re: Tricarichi v PwC: Discovery Responses

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

Have a good weekend.

Winston

Winston P. Hsiao
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300 South Grand Avenue | Los Angeles | California | 90071-3144
T: 213.687.5219 | F: 213.621.5219
winston.hsiao@skadden.com

Skadden

From: Scott F. Hessell [mailto:SHessell@sperling-law.com]
Sent: Thursday, July 06, 2017 9:03 AM
To: Hsiao, Winston P (LAC); Todd Prall (TPrall@hutchlegal.com); Tom Brooks
Subject: [Ext] Re: Tricarichi v PwC: Discovery Responses

Winston

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

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

Scott

Vfrw#I1#K hvvhoo
Vshuolqj# #Vodwhu/#S1F1
88#Z hvw#P rqurh/#Vxlwh#5533
Fklfdjr/#LO#93936
W=#645,#97407;;5
I=#645,#974097<5
z z z 1vshuolqjodz 1frp

From: "Hsiao, Winston P" <Winston.Hsiao@skadden.com>
Date: Monday, July 3, 2017 at 7:17 PM
To: Scott Hessell <shessell@sperling-law.com>, "Todd Prall (TPrall@hutchlegal.com)" <TPrall@hutchlegal.com>, Thomas Brooks <tdbrooks@sperling-law.com>
Subject: Tricarichi v PwC: Discovery Responses

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

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

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

Skadden

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email in error please immediately notify me at (212) 735-3000 and permanently delete the original email (and any copy of any email) and any printout thereof.

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

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

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

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EXHIBIT 5

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

JOHN M. MARSHALL and KAREN M. MARSHALL, individuals; PATSY L. MARSHALL, an individual; PATSY L. MARSHALL, as personal representative of the ESTATE OF RICHARD L. MARSHALL, deceased; and MARSHALL ASSOCIATED, LLC, an Oregon limited liability corporation,

Plaintiffs,

v. Case No. 17CV11907

PRICEWATERHOUSECOOPERS, LLP, a limited liability partnership; and SCHWABE WILLIAMSON & WYATT, P.C., an Oregon professional corporation,

Defendants.

TRANSCRIPT OF PROCEEDINGS

VOLUME 10

August 11, 2023

BE IT REMEMBERED THAT the above-entitled Court and Cause came regularly on for trial before the Honorable Katharine von Ter Stegge, said trial was reported by Julie A. Walter, Certified Shorthand Reporter and Registered Professional Reporter, on August 10, 2023, commencing at the hour of 8:08 a.m., the proceedings held at the Multnomah County Courthouse, 1200 SW First Avenue, Portland, Oregon

* * *

APPEARANCES

PITZER LAW
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210 SW Morrison, Suite 600
Portland, Oregon 97204

and

SPERLING & SLATER, PC
Mr. Scott Hessell
Mr. Matthew Rice
Mr. Robert Cheifetz
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Chicago, Illinois 60603
Counsel for the Plaintiffs

APPEARANCES CONTINUED:

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Mr. Mark Levine
Mr. Christopher Landgraff
Ms. Katharine Roin
Ms. Alexandra Genord
54 West Hubbard Street, Suite 300
Chicago, Illinois, 60754
Counsel for Defendant
PricewaterhouseCoopers

and

LANE POWELL PC
Mr. Bruce Cahn
601 SW Second Avenue
Portland, Oregon 97204
Counsel for Defendant
PricewaterhouseCoopers

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FRIDAY, AUGUST 11, 2023

THE COURT: Good morning. We are here for the tenth day of trial, possibly last day of trial in -- every time I look at different caption there's somebody new at the beginning. So I'm just going to say Marshall Family Trust, Karen Marshall Trustee, et al., versus PricewaterhouseCoopers, LLP, 17CV11907.

And we have Mr. Grabiel and Mr. Rice present. We have the plaintiffs present, and we have all defense counsel present, and we don't have Mr. Weber present yet.

Okay. So I understand there are -- there is a new negligence instruction. Is it agreed upon?

MR. RICE: Not yet.

THE COURT: So can somebody tell me what the dispute is.

MR. RICE: Sure. So it looks like you maybe have the one that the plaintiffs sent. Defendants also sent in a version which has -- makes two changes. One is to propose striking from plaintiffs' description -- what we did, Judge, is we took the long list, and we compressed it down.

THE COURT: Okay.

MR. RICE: Defendants object to the reference to the Marshalls' counsel in the description of their claim, which we think is an accurate description of the claim and one that the jury has heard evidence about. And we think it should stay. Defendants also have proposed language that I can -- I guess I would just characterize as argument about what -- why they are not liable for negligence, and in an instruction that is -- its purpose is to define the claim, and it's a claim that we have the burden of proof on. We don't think it's appropriate for there to be a long list of PwC's arguments about why there is no liability.

THE COURT: Okay. And so, Mr. Cahn, did you send us your version?

MR. CAHN: We did not, Your Honor, because were still negotiating. I didn't realize that Mr. Rice had sent you a version. I can send you ours as well to look at. It does do two things.

MR. RICE: I'm sorry, I sent it last night.

MR. CAHN: I didn't know you sent it to Andrew last night. I've got 500 emails in my inbox.

THE COURT: No doubt.

MR. CAHN: But give me a second and I will forward this to Andrew.

(Pause in proceedings)

MR. CAHN: Let me explain a couple of things, Your Honor. First off, on the issue, the first issue about the reference to failing to disclose to the Marshalls or the Marshalls' counsel, that's exactly the argument that we've been having since motions in limine on a duty to Schwabe, and it implies within it the duty to the Schwabe, that we were negligent by not giving it to -- allegedly not telling Schwabe. And either that comes out because there is no duty to tell Schwabe or the other instruction that there is no duty to Schwabe comes in because you can't -- we talked about this last night and -- when we were quite surprised to see that they still put that reference in even though they said themselves last night, Oh, you won't hear a thing about a duty to Schwabe, and yet it's being implicitly stated in this instruction.

THE COURT: Right. Mr. Rice, I can imagine your response, which is that it doesn't say "duty." So, Mr. Rice, if we are in a universe where you have to choose to keep your instruction as it is and have a separate instruction about no direct duty to Schwabe or you don't have -- or option B is no direct duty to the Schwabe instruction, no

direct duty to Schwabe instruction, and taking legal counsel out of your negligence instruction, do you have a preference?

MR. RICE: I don't think we have -- I don't think we with have a preference on that, Judge. I think it accurately describes our claim. I think what we could do is we could change the language -- change the language of the description of the claim to make -- to further make clear that there is no alleged duty owed to the Marshalls' attorneys.

THE COURT: Okay. Do you have an idea about how you could do that?

MR. RICE: Yes. So I think the -- if I am recalling it correctly, the current instruction states that PwC failed to disclose to the Marshalls or their -- to the Marshalls or their attorneys, and I think you could say to the Marsh- -- to the Marshalls, including to their attorneys.

MR. CAHN: No, Your Honor. It's the same thing.

THE COURT: I agree. It's the same thing.

Okay. Here is what I'm going to do. I am going to give the -- so -- and I don't know if I have the defendants' proposed version of this or

not.

MR. CAHN: It did get to sent Andrew a moment ago.

THE COURT: Okay. So my plan is to leave the plaintiffs' proposed instruction as it is, to include some kind of not-very-strident sentence about the defendants denying the allegations but not the particulars of the denials and then to give this -- to give the no direct duty to Schwabe instruction that we took out, if we can find it again.

MR. CAHN: I can get that to you, Your Honor.

THE COURT: Okay.

(Simultaneous speakers)

MR. LEVINE: We'll find it and send it.

THE COURT: Okay. All right. Is there anything else we need to talk about with regard to the instructions?

MR. RICE: There are two issues, Your Honor. One is we have the admissions instruction, which was a bullet-point list, and if you will indulge me, I wanted to make one point about that.

THE COURT: Okay.

MR. RICE: And I will admit, as difficult as it is to admit a mistake, I think that I have been

educated by both counsel and the court about this notion that a statement in a trial court brief can be received as an admission of a party opponent when it's supported in the record.

What I don't think is that this is the appropriate instruction for communicating that evidence --

THE COURT: Okay.

MR. RICE: -- to the jury. And I -- you know, we had a -- we add colloquy during the testimony of Mr. Holmes in which, during cross-examination, Mr. Levine sought to admit the very documents that are the basis for, I think, all of the proposed admissions. And I think if -- I think that the appropriate thing to do would be to admit in evidence the excerpts of those briefs that they want the jury to see, those admissions and to not have the court instruct them on those facts.

THE COURT: Okay.

MR. RICE: And -- I'm sorry.

THE COURT: No, no, no.

MR. RICE: And just one more sentence. The reason for that is based on the committee note to the form instruction which refers to admissions in the pleadings or admissions received in response to

a request for admission which is different than an evidentiary admission, in my view.

THE COURT: Okay. But you do agree there is a uniform jury instruction for party admissions?

MR. RICE: I don't think it's referring to -- I don't think it's referring to the admissions that are in this brief. Those are evidentiary admissions in the brief. I believe that that instruction -- based on the commentary from the committee, I believe that instruction is intended to deal with things that are admitted in a complaint or admitted in an answer or admitted in response to a request for admissions.

THE COURT: Okay. Does the defense have a position about this?

Do you have access to the committee note?

MR. RICE: I will read it to you, Your Honor.

THE COURT: Okay.

MR. RICE: Comment, this instruction --

THE COURT: So it's a comment to the Oregon Standards of Instruction?

MR. RICE: Yes.

THE COURT: Okay.

MR. RICE: This instruction provides a framework for instructing a jury on matters that

see a party admitted in pleadings or in response to a request for admission under ORC 45. It may be requested and given at an appropriate point during a party's presentation of evidence at trial, see Yates v. Large, and then there is a citation and then a second citation to ORCP 45D and the description of the effect of a request for admission -- of an admitted fact.

THE COURT: Does anybody from the defense --

MR. LEVINE: A couple things, Your Honor. One is if you look at the cite to Yates there, it refers to admission of fact in the pleading as a potential admission and normally conclusive on the party making such an admission. We're not even seeking the conclusive part of it. Remember we took that out.

The other thing is, as I think it was clear, at the point where I was excluded -- I wasn't even offering the briefs into evidence. I was just trying to show it to them. I wasn't allowed to show the briefs to him, and I wasn't planning on introducing the entire brief into evidence but only the relevant excerpts. Now to go through the morning of closing and try to get the briefs and cull out -- these were long briefs. There is going

to be lots of white pages there. All we're going to do is take -- turn it into a page.

It's the same thing as here. These are party admissions. They are party admissions under the rule. That's what the standard is. It's in pleadings, and this is briefs or pleadings from related case, not just some random case, but a related case, the underlying case here where the Marshalls made those arguments.

THE COURT: Mr. Rice.

MR. RICE: Typically a pleading is a complaint, an answer, a reply, a counterclaim. It's not typically -- at least in my understanding of the word, is not typically a brief to a court.

THE COURT: Okay. I'm just going -- I think I'm going to give the instruction. Can somebody give me the cite to that case, the Yates case again.

MR. CAHN: It's 284 Or. 217, Your Honor.

THE COURT: Okay. All right. So I will look at that.

Anything else? There is an agency instruction?

MR. LEVINE: Yeah, I think there was a question yesterday about, you know -- I wasn't here at the

time, but it was about whether or not during closing we were going to argue that Schwabe acted as an agent for the Marshalls, and therefore any negligence of Schwabe should be imputed to the Marshalls under agency.

And the law is pretty clear. There is a case from the Oregon Supreme Court Prauss versus Adamski, 195 Ore. 1, at pages 11 to 12. This is 1952. This is during the contributory negligence regime before Oregon adopted comparative negligence, which actually was stricter, as you know. And it said -- it's a rule of law that if a principal suffers injury, by the reason of negligence of a third party, or the negligence of the agent concurred as a proximate cause, the principal, though not personally negligent, cannot recover damages, from a third party --

(Reporter clarification)

MR. LEVINE: I'm sorry. -- because the contributory negligence of the agent will be imputed to him.

Now, there is an exception that it notes, and the exception is, but as between the principal and the agent, the negligence of the agent will not be imputed to the principal.

That makes sense, right? If the plaintiffs, if the Marshalls, are suing Schwabe and that was the trial, Schwabe can't say, no, our negligence should be imputed to you. That's what the court cases say.

That's not what the we're talking about here. We are a third party compared to the principal agency relationship between Schwabe. And you know what, you know who said Schwabe was an agent of the Marshalls? Mr. Holmes. Mr. Holmes said it. I was pressing him on advice to taxpayer, and he said, Oh, no, the taxpayer or agent, and they are an agent.

THE COURT: Okay. Just, can we take a step back, and can you -- I have this document that says "Agency consolidated instruction." I don't know who it came from and I don't know whether it's disputed, and I'm assuming it's disputed.

MR. LEVINE: There is no dispute as to form, no. You said that happened this morning in an email, Mr. Rice.

MR. RICE: Hold on. I said that we had not been informed what we had surmised and -- to the Court yesterday, that they were going to make an argument that's improper -- entirely improper in

our view.

MR. CAHN: Let me just reset you, Your Honor, so you do know what the instruction is that you are looking at.

THE COURT: Okay.

MR. CAHN: And why Mr. Rice did say he was fine with the form other than the caveat that he just described. That is purely taken verbatim from the various UCJIs on agency. I reordered them slightly. I moved one up so that it made logical sense of what is a prin- -- a principal is bound by the actions of an agent. I moved that up. And then it's who is an agent, what is a principal, what is an agent, what's actual authority, what's apparent authority. It's all directly from the UCJI. So textually there is nothing in there that is modified. All I did was take these rather than five pages and I just put them into one.

THE COURT: Okay. So, Mr. Rice, do you have an issue with the content of this consolidated instruction as not being a correct statement of the law?

MR. RICE: The content is directly from -- it is reordered.

THE COURT: Okay.

MR. RICE: It is reordered. The content is from the pattern instruction.

THE COURT: Okay. So what -- tell me again what your concern is.

MR. RICE: I mean, our concern is what we guessed at yesterday and what Mr. Levine just confirmed, even though last night we heard from -- we heard from Mr. Cahn that he wasn't aware that there was a plan to make this sort of new end-run around the Court's ruling on contributory -- on comparative fault.

THE COURT: Okay. Just so that I remember, the issue is a potential argument that negligence of Schwabe can be imputed to the Marshalls in the comparative fault analysis?

MR. RICE: Correct.

THE COURT: Okay.

MR. RICE: And Your Honor has previously denied a motion for leave to amend to add a defense of comparative fault as to Schwabe. The -- Schwabe is not a party to the case. This case is from 1950, suggests that it was decided when the Oregon comparative fault regime was not in place. We have already briefed, and it is clear that a nonparty cannot be allocated fault by the jury. And we also

have a pattern instruction that speaks to how you deal with nonparty fault, and it is the instruction that Your Honor has already determined to give, which is that if the nonparty -- it's not even fault. If the nonparty -- act of a nonparty was the sole cause of injury to the plaintiff, then the -- it breaks the chain of causation essentially. The pattern instruction on nonparty -- on acts of nonparties.

So the argument that Mr. Levine is describing is going to be inconsistent with Your Honor's prior ruling, inconsistent with the Oregon statutory scheme on comparative fault, inconsistent with the instruction on -- on nonparty -- the effect of nonparties on causation and would be -- with a three-paragraph agency instruction stating the general law of agency will be both confusing and prejudicial.

THE COURT: Mr. Levine.

MR. LEVINE: Two points. I know we're getting near to the time for the jury. One is just to set the table here. Agency -- you know, there are two agency arguments. One agency argument is that John Marshall was an agent or representative of his family. I don't think there is a dispute that we

can have an agency instruction for that. So this really isn't a question of whether there is an agency instruction. It's whether or not we can make the argument about Schwabe being an agent. And it's true, the Court said we can't have comparative negligence against Schwabe itself because, you know, the reasons were given in the opinion. But we're not doing that. We're doing it against the Marshalls as with Schwabe as their agent imputed to the principal. That's different, agency law is different and it's something, frankly, that came up in trial when their own expert said, yeah, Schwabe is an agent.

THE COURT: You can't make that argument. So that's my ruling.

Okay. I want to just ask, do the plaintiffs have any specific issues with the revised verdict form?

MR. RICE: The form is -- that my only dispute was that my agreement to the form was before we had heard that one of the intended uses for this instruction was the argument that we have discussed. Otherwise, the form is from the pattern instruction. We don't have the an objection to how it's reordered.

THE COURT: Okay.

(Pause in proceedings)

THE COURT: All right. We're just going to take out the line for the date because there are just two places to put the date.

MR. RICE: And I apologize, Your Honor. I thought we were still on the agency instruction. There is no objection to the form of verdict.

THE COURT: Okay. Mr. Grabiel.

MR. GRABIEL: Thank you, Your Honor. I'll keep it brief. I know we want to get the jury in. Can I give you the statute at issue here which is ORCP 46?

THE COURT: Sure.

MR. GRABIEL: I have highlighted the provision I'm going to talk about. I have got a copy for opposing.

THE COURT: It looks like Mr. Pitzer's highlighting.

MR. GRABIEL: You know, I am learning a lot from Mr. Pitzer, and one of them is highlighting and markers.

THE COURT: I don't think that's the one lesson you should take home.

(Pause in proceedings)

MR. GRABIEL: Your Honor, this motion is not trying to revisit matters that have been negotiated among the parties and the Court for weeks such as the jury instructions. All those issues were resolved in a world where there was not a case dispositive violation of the Oregon rules. A case dispositive violation of this Court's orders. This motion is seeking just relief for those violations. ORCP 46 where there is such violations grants this Court broad authority to make any order as is just when the violations occur to remedy the violations. And there is specific relief that's enumerated below which we will go through briefly but -- but those things, those specifically is also going to touch upon matters that have been decided among the parties. But I think that's completely appropriate. What's happened here has affected every single facet of this case and the relief and response to that violation, that gross injustice will also have to address every -- you know, almost every facet of this case, because what happened here is an abomination. And, you know, I don't think there is any question that we've had a violation of the rules. We requested documents in January of 2018. They refused -- PwC and their

then counsel Skadden Arps, they refused to give us a single document for more than a year. I was the attorney begging for the documents. Finally we had a conferral on a motion to compel, and I said I am going to file a motion to compel. They said, oh, here's your first set of copies --

(Reporter clarification)

MR. GRABIEL: I'm sorry. I'm a little excited.

Here's your first set of documents. It's the exact same documents we gave the IRS in 2007. It did not include the "Wow" email. I said that's not sufficient. You need to go look for documents. I'm filing a motion. After we filed our motion to compel, we started to get documents. One of those documents was a time record that had reflected that there was a key email from Michael Weber to John Dempsey on February 14th, 2003. It said to respond to John's emails. But I didn't get any emails. So we went to court. Mr. Pitzer argued, and we got a motion to compel. The court ordered that the "Wow" email be produced. PwC and Skadden knew about this since 2003. The head of the office of general counsel, Alan Fox, was forwarded the email immediately by the head of QRM, the internal risk. Other key executives were all on this email. Weber

knew of its importance and existence. Dempsey knew of it. Everybody did. So I don't think there is any question that we've had a massive abuse here.

And then as I pieced together the time records, I said I'm going to -- I told them in a conferral. By the way, Your Honor, everything I'm saying to right you now I can back up with a document. This is not me playing games with the Court. I'm an officer of the court. I take that obligation very seriously. So we had a conferral call about whether we needed to file a motion for spoliation. And after that conferral suddenly a February 14 email appears on a privilege log. But it's logged in a way that you would never know that it was the "Wow" email. It was Mendelson forwarding to Alan Fox.

As you know, history, we got thrown out on summary judgment for statute of limitations reasons. And for years Bartlit came in and surely they must have known this documents exists. This is the most important piece of evidence in the case. Nobody talked about it. Went up to the court. We came back and finally we got the document.

And, you know, we just talked about -- and I

guess in these situations, Judge, if you look at 46B(2), you're authorized to do and make any order as is just. And so I want you to think creatively about what that means. We just had an example where were talking about admissions of parties, and they want to use things that we thought about this case before we ever received the "Wow" email. The "Wow" email flipped our theories of this case on its head. Our allegations of what may or may not have happened we didn't -- it shouldn't be used against us now when they were based on information that was withheld, fraudulently concealed from our clients.

And I think we also talked about -- yeah, so let's just go through what you can do specifically. So I want you to think creatively, but let's think specifically.

(Reporter clarification)

BY MR. GRABIEL: I directed you to establishment of facts, when what I meant to say was designated matters. And so when I think about this case and what's just, I think all of the ill-gotten gains from this fraudulent concealment should be taken out of this case. I think that's the most logical way to do justice. And the most

obvious ill-gotten gain is the conclusive facts. They wouldn't have got that -- this isn't about issue preclusion. This is not about a motion for reconsideration. It's not about law of the case. This is about sanctions for gross violations of the rules and what's just. Is it just that the Court has to hear conclusions of fact that wouldn't be binding on us but for the fraudulent concealment? That's a question for you, Judge.

Another form of relief, it says you can strike pleadings here in 46B(2)(C). I heard a conversation -- heard a conversation about a jury instruction of fraudulent concealment as it pertains to a permanent defense of statute of limitations. I think you should strike the entire affirmative defense.

In 2007 there was an IRS summons and the summons required all documents -- especially they knew about this "Wow" email to be produced, and Mr. Levine stood up in court yesterday and told you, Oh, but they wouldn't have had access to that information until the actual tax court. That is a lie. Mr. Hornecker and Mr. Marshall were deposed in 2007 using those very documents that were produced. Can you imagine what would have happened

if they produced the "Wow" email and the jury said -- or the IRS who took the deposition said, Mr. Marshall, did you know this, this, this we would have had a tolling agreement the next day, and now they are saying our failure to get a tolling agreement back then should preclude us from being able to bring this suit when our failure was caused by the fraudulent concealment.

And the same thing for mitigation. Strike the affirmative defense of mitigation. They say they should have mitigated in 2010. If we would have known we were dead, if my clients would a known that PwC had determined we were dead in 2003, then, yeah, we probably would have mitigated and sued PwC, but we didn't because we didn't know.

So I think justice requires that those ill-gotten gains, those affirmative defenses be taken out of this case.

Finally, we've got to a render a judgment by default. You can do that. You have the authority to do that. And I want to read from the Heath case. This is the concept behind this relief. And so in the Heath case they granted a default, and they were arguing, no, just hit us with monetary damages. And the court says simply assessing

monetary damages does not adequately ensure future compliance. This was in federal court, with the Federal Rules of Civil Procedure. And as a highlighted for Your Honor, that's the basis for our rule here in Oregon.

The Court is concerned that sanctions would create an incentive for law firms and parties to make a calculated decision to engage in discovery abuse. Parties and their counsel should not be encouraged to weigh the benefits of withholding discoverable information against the risk of sanction can for nondisclosure in the event the abuse is discovered. The Court believes that the only adequate deterrent in this case under all the circumstances is a finding of liability against the defendants represented by the firm.

And so if you can imagine, Judge, the sanction here is -- not making $2 million seem trivial, but if you just sanction them for two million of attorneys' fees, they can do this ruse 50 times. This is a hundred million dollar case. They could pull this scam 50 times. The Skadden Arps in the world and the PwCs of the world will know that they can go into Oregon, make case dispositive violations in a hundred million dollar case and

only get hit with $2 million of fees. They should be doing that. They should calculate 50 times before it's not worth it.

And so these are the options. My clients, the Marshalls, you know, they didn't want to be part of this game. They were pawns in a big game. They came to the legal system seeking justice. By statute, Oregon says Your Honor is the person to mete out that justice. When a violation occurs, the court where the case is pending is where you get your relief. And so what my clients are asking you to do, Your Honor, is make an order that gives them justice. Thank you.

THE COURT: All right. Thank you, Mr. Grabiel.

Anybody responding for PwC?

MR. CAHN: Thank you, Your Honor. So let's first start talk about timing, just general timing. The document that they are claiming was fraudulently concealed, horrible sham, all the language that is unsupported by anything in the record, but, you know, it's the common vernacular these days is to call somebody horrible, disgusting, a scam artist, whatever. The timing. The document was provided on February 3rd of 2023. This motion was filed on August 9th, 2023. They

have used this document for six months. They have used it with countless witnesses. They have used it so much in this trial that the jury can probably recite it in their sleep. They probably have dreams about "Wow." They've seen it so many times.

The only thing that they truly, without speculation, can point to is the failure to have been able to show it to their client before Mr. Marshall passed. And I'll get to that in a second. But they have not been harmed in any meaningful way in terms of something that is not speculative because they have had the use of this document for as long as they have had it and they've utilized it in a manner that is, as Mr. Grabiel said, it's been the center point of their case for the last six months.

They bring this motion in the middle of trial, while we are all working on things like jury instructions and the like, and demand in the context of this motion that everything that has been done be upset. From a timing perspective, this is highly suspect. If they believed the outrage that you just heard from Mr. Grabiel when they got this document, they would have brought this motion immediately. They would have brought

this motion in March. They would have brought this in April. They would have brought this later or earlier than they've done now.

So let's just think about the timing. What it does to everything that has been presented to the jury. Everything that's been presented by the clients. There is no harm that he can meaningfully point to because they got the document in February.

Most importantly, though, I think we need to look at a couple of very important things. Number one, Mr. Grabiel points to ORCP 46 as if there has been no judicial loss on any of the remedies and sanctions that are available to parties under Section B. And that is woefully wrong.

First and foremost is that the -- some of the remedies that he is talking about have been deemed by both the U.S. Supreme Court and adopted by the Oregon Supreme Court as being unconstitutional, a violation of Fifth Amendment due process rights. So to terminate the action, to give a default judgment is a violation of constitutional rights.

THE COURT: I am not going to order a default judgment.

MR. CAHN: Thank you, Your Honor.

Now, there is no bases for the relief as well.

And the reason for that is you need to look very closely at the materials they submitted to the Court. There was a Request for Production. There was a meet and confer. There was a set of production that was provided. There was a hearing, and there was a generalized order by the court to produce all documents relating to. Documents were produced. A privilege log of documents that were being withheld was provided. There is -- right there, there is no violation of the court order.

And Mr. Grabiel points out a couple of times in the brief, but he didn't say so here, that somehow we had admitted that there was some impropriety with respect to the privilege log. That is not true, and if you look at the record from the trial in this matter, there is no statement on the record by us that the Skadden firm did anything improper when they put the document on the privilege log. So it's not a violation of the court order. So you can't issue a sanction unless there is a willful, knowledgeable -- what's the actual term? It is -- sorry. I had it and I moved my page. But it's willful, knowledgeable or bad faith. There is no action that can be described as willful, bad faith or a fault of similar nature.

And look at what the Supreme Court has determined to be willfulness. There is a case involving Anheuser-Busch, Inc. versus Natural Beverage Distributors, a 1995 case from the Ninth Circuit, 69 F. 3d 337. There, the defendant lied and said documents that he possessed for three years had been destroyed in a fire, so he perjured himself. Then when he was asked to specifically produce documents that he finally admitted he had, he refused order after order after order multiple times. So the Ninth Circuit found that in addition to committing perjury -- and he repeatedly and willfully disregarded multiple court orders and was found in contempt of court. So they went through an entire due process program before they issued any sanction. That's the kind of willfulness, bad faith conduct that has to be found in order to give any of these sanctions.

So you have already said the terminating sanction is off the table. It is unconstitutional.

Without a violation of order of a court order, the rest of these sanctions are unavailable.

Furthermore, the relief from the tax court pleadings is, in fact, the request to revisit for the sixth time those findings and to try with pure

speculation to say, Well, you know, we wouldn't be here if that document had been produced, but Your Honor just found two weeks ago, quote, "the 2023 emails, they just don't move the needle on the tax court findings, as I read them," and that is the case. They would not have moved the needle. Anything else is speculation at this point.

So there is no reason, especially since we have gone through the laborious process of this trial to now tell the jury -- and by the way, it would put us in a disadvantage because everything that we have done and we've talked about in connection with the prep and setup for this trial and presentation of the evidence was premised on what the state of the play was. So now to tell us on the last day of trial, right before closing, after we have rested, that the defense component is now being taken away and shifted and leaving us bare is prejudicial beyond any scope that is expected under the rules or allowed under due process.

The fee request that they are asking for is, one, wrong because there's no violation of a direct order to produce this document. Two, it's not allowed under the case law. The cases specifically say you're only entitled to fees relating to

conduct necessary to get the document. It's not five years of attorney fees starting from 2018 to the present, and, in fact, the cases say that is reversible error.

And I will find that case for you. That is Dahl v. St. John, 152 Or. App. 748. It's a 1998 case. It says it is reversible error to award attorney fees sanctions when the record does not, quote, "indicate whether those expenses were the direct result of the failure to provide discovery or if they reflect expenses for the entire case."

So none of the relief they are asking for is allowed. What you have done already has, in fact, cured the one thing they can point to without speculation, and that is the introductory instruction that you provided to the jury before Mr. Marshall's video testimony was provided. That curative sanction allows the jury to make the determinations that they need to make in connection with the case.

You have already provided the less satisfactory instruction, so they have gotten that as well. So those curative actions have already been undertaken.

And the last thing that I do need to point out:

This is the third, maybe the fourth time this issue of spoliations has come up before the Court, and we keep pointing out Kerr and Markstrom, and they have never yet once in their briefing or in argument mentioned Kerr or Markstrom, and that's vitally important because they spent the entire last part of this sanctions brief talking about things that happened prelitigation, and Markstrom specifically says that is not sanctionable conduct. As egregious as it was in Markstrom, the plaintiff going into her work computer, unauthorized, after hours, deleting emails and text messages and then suing for her employer for discrimination where those emails and text messages would have been beneficial evidence for the defense of the employer, that was not sanctionable under Markstrom. So that's not sanctionable.

The rest of this stuff, just as a bright-line rule, is not on the table. And they've never addressed that, and it's important to note. Before they filed the lawsuit, Oregon courts cannot sanction conduct relating to documentation, document retention. They can do so after the lawsuit is filed and after orders are in place and obligations are in place, but before the filing of

a lawsuit, there is no remedy there under Markstrom.

THE COURT: All right. Thank you, Mr. Cahn.

So, Mr. Grabiel, I don't have time for a reply.

MR. GRABIEL: I can do it in 30 seconds.

THE COURT: Well, here is what I need. Can you tell me what the specific motion to compel was that you think is covered by -- that covered this email.

MR. GRABIEL: Yes. We filed a motion to compel, I think it was in January of 2019. It was granted by Judge Hodson, and the order is April 5, 2019 in the binder of documents. Do you have that in front of you? Do you want to see my copy?

THE COURT: No. I'm sure I have it here. I have a lot of binders.

MR. GRABIEL: It says any -- every document related to any deal with Fortrend in 1990 -- in involving Fortrend -- or sorry.

Any Midco deal -- sorry -- from 1995 and 2005 that was subsequently investigated by the IRS. Clearly the Marshall transaction which closed in March 7 of 2003 is covered by that specific order, and it was investigated by the IRS. And so that order identifies all the documents relating to the Marshall transaction. They had this document.

They knew about it. To the extent you need more discovery, you know, let's get a subpoena of Alan Fox. Let's get a subpoena Skadden Arps. Let's find out what happened. This is crazy. And then you can make further findings.

THE COURT: Okay.

MR. CAHN: Your Honor, if you have any inclination to do anything other than relating to specifically what is before this jury in this trial, we will request briefing and a hearing schedule on that. I mean, with we got this two days ago. We haven't had a chance to read it. I'm reading off of notes of a draft that we were working on until the wee hours.

THE COURT: Okay. So I'm going to talk to you about this at the next break. We need to get the jury in here. Are we still at the one hour rebuttal case estimate?

MR. PITZER: Probably less. We have one video we're going to play, a very short video.

THE COURT: Okay. And then have you timed your closings? Somebody timed the closings?

MR. LEVINE: I actually have a question on that, which is I think you said an hour five minutes per side, and then they get rebuttal. But

is the rebuttal out of hour and five minutes?

THE COURT: No, it's not. I thought about that. But no it's in another ten minutes just because it's a stage of the case. It is not debate or an oral argument. They don't reserve the time for the rebuttal. At least that's sort of how I got there.

Would you like an hour and ten minutes, Mr. Levine?

MR. LEVINE: That would be great, thanks.

THE COURT: Okay. You can have an hour and ten minutes.

MR. LEVINE: Thank you.

MR. PITZER: So, Judge, I guess we're ready to play our rebuttal video.

(Discussion off the record)

(The following proceedings were held in the presence of the jury.)

THE COURT: Please be seated. Welcome back, jurors. I wanted to give you, I guess, a more updated version of how I think today might go. The plaintiffs rebuttal case has been reduced from an hour to a very short video clip -- it sounds like it's very short -- and then that will be the close of the evidence. I'm still working on some of the

details of the jury instructions with the lawyers. Lawyers generally don't like to split up opening statements or closing arguments, meaning one side doesn't want the other side to do a closing argument and then have the jurors take a big break and then come back for the second.

So here is how we're going to handle this. Just keep in mind a lot of my job involves picking the least bad of all the bad timing options. So we're going to close the evidence which, you know, it might be -- you might be out of here in another five minutes. And then I'm going to send you on a one-hour break. Then you are going to come back -- get snacks. Then you are going to come back and we're going to do the jury instructions and the closing arguments straight through, although we'll probably take a break in between the closing arguments. And then I'll dismiss the alternates. We will send you out to deliberate. That might be sort of at a late lunchtime, and then you can deliberate. So that's the plan. And it's going to involve kind of a I'm just going to say a breakfast break -- it's not even late enough for brunch -- and then a late lunch going into the deliberations. Okay.

So we are ready for the video.

MR. LEVINE: Your Honor, the instruction, too, please.

THE COURT: Oh, yes. Okay. So you are about to hear some brief testimony again from John Marshall and you are to consider this particular portion of his testimony, so this short video clip only, for the purpose of evaluating Larry Brown's testimony only. So Mr. Brown was the witness we heard from last -- yesterday. So it's not testimony that you can consider for evaluating any other witness' testimony, just Mr. Brown's.

(Video played)

BY MR. HESSELL:

"QUESTION: Just to be clear, at any point in time from the time that you first informed them of the offer until the closing on the transaction, did anyone from PwC express to you that you should not go forward with the transaction?

"ANSWER: No."

(End of video)

THE COURT: Okay. That's the end of the video and your rebuttal case?

MR. PITZER: Yes.

THE COURT: So, Jurors, this begins your one-hour breakfast break. Please be back in the jury room at 10:00.

Can you rest?

MR. PITZER: Yes, we are resting our case.

THE COURT: So we are going to take a break. Do you have -- do you have your motion?

MR. CAHN: I do.

THE COURT: I'm going to come back at 9:30, and we're going to talk about the motion for sanctions, the JNOV and then the final go-through on the jury instructions.

(RECESS 9:00 to 9:57)

THE COURT: Please be seated. So I have a ruling on the motion for sanctions. I'm going to grant the motion for sanctions. And I don't know whether or not I need to make findings. But I will say that this email was probably subject to the IRS subpoena, which obviously is not an issue before me since it predates this case. And it's not just one email. It's more than one email, right? It was two emails?

MR. GRABIEL: There is two emails.

THE COURT: Okay. So these emails should have been disclosed. So I find these emails should have

been disclosed in this case by some point in 2018. Also that they were properly withheld under a claim of privilege for at least five years in this litigation, which was especially problematic in light of the fact that PwC employees deleted their emails related to the work for the Marshalls. And I think that that was in violation of the PwC retention policy at the time they were deleted. Is that known? When were these deleted?

MR. LEVINE: 200- -- well, Mr. Mendelson and Mr. Dempsey, they left in 2005.

THE COURT: Okay. And so what is the PwC retention policy from that era?

MS. ROIN: 30 days after the employee leaves the accounts are deleted unless they are already under a litigation hold, which neither of these people were under a litigation hold because there was no claim against PwC.

THE COURT: There was no general document retention policy at the time?

MR. LEVINE: Yeah, the general document retention policy was you keep the documents only that are necessary to show the work that was done, but beyond that it explicitly talks about you don't need to keep all emails, you don't need to keep all

draft documents. It's just the documents in the work file that need to be kept. There was a work file, and that work file was produced to the IRS in 2007.

THE COURT: Okay. So I think that the plaintiffs were harmed by not having the emails at the summary judgment stage and they were also harmed at the Court of Appeals stage. There is an interesting line in the Court of Appeals opinion talking about how the plaintiffs are still talking at the Court of Appeals stage about how PwC is hiding documents or not producing documents, and that that's an argument that they made I think at the tax court trial stage. And then the Court of Appeals says it's the same argument but there is really no evidence that this is happening. But, of course, there are these key emails that were in fact being improperly withheld at the Court of Appeals stage.

So they didn't have those at critical procedural points in this litigation. They also didn't have the benefit of being able to perpetuate John Marshall's testimony regarding the information contained in the emails. I find that the failure to produce them was in fact a violation of Judge

Hodson's order to compel from April of 2019. So what I'm going to do is add some facts to the conclusive facts, and I'm going to award fees to the plaintiffs on the motion -- the motion to compel that was the motion that Judge Hodson's order resolved, and then also the motion for a full and fair hearing because that's just sort of a continuation of what happened because the emails were not produced in a timely fashion.

So the facts that I'm going to add -- the first fact I'm going to add to the conclusive facts is that -- and then is PwC had an obligation to provide the "Wow" email to plaintiffs in 2018. PwC withheld the email and did not provide it until January of 2023. I'm not going to tell them what to think about that. It's just going to be included. And then I do think it's appropriate to add something about -- so Mr. Weber did not delete emails, it was just Mr. Mendelson.

MR. GRABIEL: Your Honor --

MR. LEVINE: Your Honor, Mr. Weber deleted emails as he was going through. I mean, every day he would delete an email once he was done with it.

THE COURT: Okay. Okay.

MR. LEVINE: You know, so he probably deleted

February 14th or 15th, 2003.

THE COURT: Okay. So I need the plaintiffs to propose some kind of conclusive fact about the deleting emails and the obligation to retain emails. And then we can talk about whether or not that's factually accurate.

And then with regard to the attorneys fees, obviously PwC will have the ability to challenge the reasonableness of the fees. Okay.

So I don't know if you've had an opportunity to look at the most recent version of the jury instructions?

MR. CAHN: Doing so right now, Your Honor.

MR. PITZER: Judge, do you want us to propose something with respect to the obligation to preserve these documents?

THE COURT: Yes.

MR. PITZER: Right this minute?

THE COURT: Well, I'm going to instruct the jury soon.

(Pause in proceedings)

MR. PITZER: As I understand it, Judge, you have already indicated you would give a couple of additional conclusive facts, one being -- one would read, as I wrote it, just listening to what you

articulated, PwC had an obligation to produce the "Wow" email to the Marshalls in 2018. That would be Conclusive Fact Number 9. Number 10 would be PwC withheld the "Wow" email until February 23 --

MR. GRABIEL: No, it's February 3.

MR. PITZER: -- February 3, 2023, after John Marshall's death. And then number -- the next one, Number 11, would be PwC had an obligation based on a reasonable expectation of an IRS investigation or litigation as of the date of the "Wow" email to preserve all records concerning the Marshall transaction including the "Wow" email.

THE COURT: Okay. Ms. Roin.

MS. ROIN: So if we're going to do this, which we object to across the board.

THE COURT: Sure.

MS. ROIN: But we need to be correct.

THE COURT: I agree.

MS. ROIN: So on Number 9, understanding what you have, PwC had an obligation to provide the February 14th, 2003, "Wow" email to the Marshalls in 2018. PwC listed the "Wow" email on a privilege log in 2019. Your Honor, you have ruled that that top email is, in fact, privileged. So the "Wow" email's top email, you have ruled was a proper

privilege claim. It was on our log in 2019. It is still on our log to this day because that top email you have ruled is properly claimed as privileged. So what we're talking about is the below email on the same email chain that you have already ruled in this case as a proper privilege claim. So to not include that we do have a proper privilege claim is not giving the full facts of what has happened here, which is we produced it on our privilege log per the court's ruling on the motion to compel. It was listed on that log.

Then the case was stayed. And this is also factually very important because five years is very misleading. From 2019 to 2022, the case was completely stayed. And then it was produced -- was pulled off the privilege log in part in February of 2023. And that top email -- I mean, to ignore the fact that we have a proper and upheld privilege claim on that top email just completely changes the facts and what have happened with regards to this email and it is highly prejudicial to not explain to the jurors that there -- how that process works and just say we withheld the document for five years.

So if we're going to do this, it has to lay out

the facts of what happened accurately and not in a way that suggests the foul play that Mr. Grabiel spoke about, but that is -- there was proper privilege claim on that top email. You have already ruled on that. We cannot ignore that, and we cannot ignore the fact that the case was stayed for three of the years that we are talking about right now.

THE COURT: Okay. So the third email was sequentially the third email in time. So your choices are it reads the way it is or it just includes also additional language that says withheld under an improper claim of attorney-client privilege.

MS. ROIN: Can we acknowledge that there also is a proper claim?

THE COURT: No. It's a sanction.

Okay. So I'm going to leave it the way it is and then.

MS. ROIN: But what the five years? I mean, we at least tell the five years -- the case was stayed for three years in the middle of there. So we at least need to say that if you're going to say that they were entitled to it in 2018 and we didn't produce it until 2023, this case was stayed between

2019 and 2022.

THE COURT: Mr. Pitzer, do you -- and Mr. Grabiel, do you have issue with just including the information about the stay?

MR. PITZER: I mean, we asked for this email in 2018. We had to file a motion to compel to get it. Had an argument on the motion to compel. Judge Hodson granted the motion to compel, and it was still never produced. At some point after that -- I don't have the exact timing in front of me right now, but at some point after that the case does go up on appeal. But it wasn't like that happened right away. In our view, they had obligations to produce this email before the case went up on appeal.

THE COURT: Of course, they did. So we can include the case was stayed for two years. The jury isn't going to understand.

MS. ROIN: Three. It's 2019 to 2022. Until 12/29/2021. It should be -- five year -- I understand, but if we're going to say that there was a five-year --

THE COURT: Calculate the actual time it was stayed.

MS. ROIN: Okay.

THE COURT: And then if you care, the jury does not understand what that means, what a case being stayed.

MS. ROIN: We care.

THE COURT: Right. So somebody can explain it to them, but they don't know what word means. I don't think just saying it's on hold necessarily gets there.

So, Mr. Pitzer, what is your proposed additional fact?

MR. PITZER: The third?

THE COURT: Yes.

MR. PITZER: So as we laid out in our briefing in a variety of places and a variety of motions over the course of this case, Pricewaterhouse has a internal document retention policy relating to litigation holds in cases where there is a reasonable expectation of potential investigation or potential litigation. And so it's our view that the "Wow" email in and of itself, based on the testimony of Michael Weber himself and what he wrote in that email, creates a reasonable expectation of both an investigation and both litigation, both of the which promptly ensued.

And so our view is they had under their

document retention policy, they had an obligation as of the time they realized that this -- that this transaction was facing disaster, was going to "blow up at the IRS," could get the Marshalls sued for aiding and abetting a criminal tax fraud, that they had an obligation under their own litigation retention policy to preserve all records relating to the Marshall transaction, which would obviously include this record.

And so the findings that we would propose would be that PwC had an obligation based on a reasonable expectation of an IRS investigation or litigation as of the date of the "Wow" email itself, to preserve all records concerning the Marshall transaction.

THE COURT: Okay. So what I'm going to do is I'm not going to say that they had a duty. I will state what the policy was. Okay.

And so can somebody tell me -- yes, Ms. Roin.

MS. ROIN: So we need to go back to 9 because 9 is an incorrect statement of the policy in itself.

THE COURT: Okay.

MR. GRABIEL: The policy is here in the materials, Judge.

THE COURT: Okay.

MR. GRABIEL: Do you have yours in front of you? Or should I just give it to Mr. Pitzer?

MS. ROIN: Sorry, 10. The way it's written, it says that we have a company policy that internal documents related to client work -- it's the client file. I mean --

THE COURT: Okay. So hopefully we can agree this is the policy.

MR. PITZER: I'm going to hand you a document, Judge, which is called PricewaterhouseCoopers LLP policy for retention of firm documents. It's Plaintiffs' Trial Exhibit 216.

MS. ROIN: Is this in evidence?

MR. GRABIEL: Yes.

MR. PITZER: It is evidence. And this is --

MS. ROIN: 216 has not been admitted in this case.

MR. GRABIEL: It was discussed with the experts. Is it under a different -- is it a joint exhibit.

MS. ROIN: It's not.

THE COURT: Okay. So here is what I am going to say -- and, Andrew, I'm just going to hand this to you so that you can see what it says. So it will just say it will be the title, it will say

PricewaterhouseCoopers LLP," I guess apostrophe S, Policy for Retention of Firm Documents states that -- and then I'm looking down at the second paragraph -- the firm must retain all documents (not just working papers) relating to work that is the subject of a pending or threatened lawsuit, government investigation or subpoena, or is reasonably anticipated to become the subject of a lawsuit, investigation or subpoena. In such situations all documents (including notes, drafts and e-mails) that relate to the subject matter of the proceeding or anticipated proceeding that were in existence at the time the firm became aware of the proceeding and/or reasonably anticipated such a proceeding, should be preserved unaltered. So I'm just going to state what the policy is.

MR. LEVINE: Is that your proposal instead of what's in Number 10 that's written?

THE COURT: Yes, but then you tell me about the destruction of -- there is going to be a fact about the destruction of emails and who and when, right? I know you object.

MS. ROIN: There has just been no factual record laid for this at all.

THE COURT: I mean, Mr. Dempsey was crossed

about destroying his emails or deleting his emails.

(Simultaneous speakers)

MR. GRABIEL: That was Mr. Weber.

MR. LEVINE: Yeah, Mr. Weber, who, as a matter of practice, deleted his email every day.

THE COURT: Sure.

MR. GRABIEL: And the firm did the same.

MR. LEVINE: So they deposed a PwC corporate representative on the policy and how it works. Mr. Meighan. And he explained that, first of all, on the policy generally, you keep the documents necessary, there is a first paragraph to support your work essentially, and that's described in the second page under -- the very bottom there, explains documents to "record, support, or otherwise form the basis" for work is more limited and not all documents do that. And it says documents such as electronic mail and correspondence should not be -- should be included if it's necessary, in paper form, but if it's email correspondence or draft documents that are not necessary, it doesn't need to be retained. So that's point one.

Point two, in terms of the retention if there is reasonable anticipation of litigation, an email

from someone saying maybe there will be lawsuit one day, that's not enough to have reasonable anticipation of litigation. You have to have a little bit more than that. Maybe a subpoena, maybe a summons, maybe a complaint or a threat of a complaint. But it's not -- just an offhand email doesn't do that under the standards. Number one.

Number two, I know we cited earlier cases that Mr. Cahn knows well about reasonable anticipation, any kind sanction for not producing or for documents that were destroyed before the lawsuit shouldn't come in. Mr. Cahn can refer to those cases.

THE COURT: So we are -- I'm putting the policy in, and I want to know what has been the evidence here at trial about destruction of emails. Somebody talked about deleting emails.

MR. PITZER: I asked Mr. Weber about his policies in terms of an effect. I played his deposition testimony where he talked about his own personal policy to basically delete -- and they can correct me if I'm wrong, but to delete all of his emails relating to a matter at the conclusion of that matter as a regular course -- in the regular course, which we believe is directly

consistent -- inconsistent with Pricewaterhouse's own, very clear internal document retention policies, which that policy has been admitted into evidence. I don't have it in front of me, but it says -- it's the one that says like three times, you know, all records relating to, you know, advice given must be preserved. Especially records relating to verbal advice must be preserved. And so it's our view that Mr. Weber's own destruction of his own emails and records relating to, you know, this Marshall matter were in violation of Pricewaterhouse's own internal policies, document retention policies.

That's all I'm aware of that was introduced at trial in connection with some of the briefing. I think in connection -- well, I know in connection with the motion for a full and fair hearing, we submitted email correspondence from the lawyers at Skadden Arps, who preceded the folks from Bartlit Beck where they told us directly that emails from Mr. Dempsey and I believe Mr. Mendelson and Mr. Galanis no longer existed because they were just -- they were just destroyed when they left the firm. So our view is that, again, there should have been a litigation hold in place way back in

'03 that would have preserved all of that information. But I want to be clear that that I don't think is -- was made part of the trial record.

THE COURT: Okay. So I'm only going to put conclusive facts in there that are facts that came into evidence.

MR. PITZER: Sure.

MR. LEVINE: I think the only thing in evidence is Mr. Weber as a matter of practice deleted his emails at end of the day, unless there was something to do and he kept it as a to-do list. And that if it was something that needed to go in the file, he printed it out and it went in the file.

THE COURT: Okay. At the end of the day?

MS. GENORD: It was not at the end of the matter.

MS. ROIN: It was at the end of the day.

MR. LEVINE: Every day. If he was done with an email, it's like click, he wanted a clean inbox. I kind of understand that.

MR. PITZER: I think he testified that he admitted that that was a violation of the firm's own document retention policy.

MR. LEVINE: No. First of all, we're mixing up a couple of different things. There is a firm internal documentation policy about documenting things that's been talked a lot about in the trial -- a lot in the trial. That is different than the document retention policy, Exhibit 216, which is not in evidence which was handed to you just now. That is very different.

THE COURT: Okay. Here is what I am thinking. Mike Weber as a matter of practice deleted his emails related to the Marshall matter.

MS. ROIN: All matters.

MR. CAHN: All matters.

MR. LEVINE: Everything. Not just the Marshall matter. Everything.

THE COURT: At the end of the day.

MR. GRABIEL: Judge, isn't that crediting Mr. Weber's testimony in a way because, I mean, I don't think he is a very credible witness, but you are telling the jury on that component you must credit Mr. Weber's story of how this thing got destroyed.

MR. CAHN: It's the only evidence in the record. And, Your Honor, again, Kerr says a litigation hold it might be prudent but is not

mandatorily required in the state of Oregon.

THE COURT: I'm not talking about a legal or required litigation hold. It's just in reference to the policy.

MR. CAHN: Right. But Markstrom says if it happened before the case, it doesn't -- it doesn't get in. So we're putting something in that is in complete violation about a Kerr and Markstrom.

THE COURT: Okay. So here is the fact. I mean, he deleted his email. The soonest he could have deleted his email was the same day, right? So I don't --

MR. PITZER: I don't know if he said the same day. He might have said at the end of the matter. I do note which it was.

MR. LEVINE: No, he didn't. He said every day.

MR. PITZER: Fine every day.

MR. LEVINE: I don't know if it was morning or afternoon, but every day he would clean out his inbox.

MR. CAHN: And frankly, there have been emails.

THE COURT: Sure, sure. Right. This is all in the context of PwC objects strenuously. So this is the last fact. Mike Weber as a matter of personal practice deleted his emails related to the Marshall

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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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4876-0543-7052

EXHIBIT 1

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DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI, an individual Plaintiff, vs. PRICEWATERHOUSECOOPERS LLP, Defendant.	Case No.: A-16-735910-C Dept. No.: XXXI **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT PRICEWATERHOUSE COOPERS 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**

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

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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

[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

$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

[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