IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL TRICARICHI, Appellant, v. PRICEWATERHOUSECOOPERS, LLP, Respondent.	Supreme Court No: 86317 EMERGENCY MOTION TO STAY ENFORCEMENT PENDING APPEAL WITHOUT BOND

Appellant-Plaintiff Michael Tricarichi ("Tricarichi") respectfully moves the Court for an Emergency Order staying, without bond, execution on the District Court's award of $2.4 million in attorneys' fees and costs ("Fees and Costs Order") pending appeal.

In accordance with NRAP 8(a), before filing this motion, Tricarichi first moved in the District Court for a stay of execution without bond and, on March 13, 2024, the District Court denied Tricarichi's motion. As explained below, Tricarichi respectfully submits that the District Court abused its discretion by failing to adequately consider the relevant facts—including that Tricarichi's financial situation is so precarious that, not only could he *not* obtain a bond without putting the IRS in an insecure position, but he is unable to obtain a bond at all. *See* District Court's Order denying Tricarichi's Motion for Stay, attached hereto as Exhibit A. Absent an emergency stay by this Court, Respondent-Defendant PricewaterhouseCoopers, LLP ("PwC") intends to immediately begin executing on the Fees and Costs Order. *See* Transcript of Hearing on Tricarichi's Motion for Stay, filed March 1, 2024, attached hereto as Exhibit B, at 32:20-24. PwC would not agree to a 30-day stay to allow this Court to consider the motion. *Id*. at 46:4–14.

"The purpose of security for a stay pending appeal is to protect the judgment creditor's ability to collect the judgment if it is affirmed by preserving the status quo and preventing prejudice to the creditor arising from the stay." *Nelson v. Heer*, 121 Nev. 832, 835 (2005). But as the Nevada Supreme Court explained in *Nelson*, under appropriate circumstances, courts may reduce the bond amount or eliminate it entirely, including when the party subject to a judgment "is in such a precarious

financial situation that the requirement to post a bond would place other creditors in an insecure position." *Id*. at 835–36.

In this case, PwC advised Tricarichi to enter a transaction that resulted in an IRS tax judgment against Tricarichi—a tax judgment that now sits, with interest, at more than $35 million. *See* Declaration of Michael Tricarichi, attached hereto as Exhibit C, at ¶ 4. That amount vastly exceeds Tricarichi's ability to pay. *Id*. at ¶¶ 5-7. As established at the recent debtor's exam, the value of Tricarichi's total assets is estimated to be just $900,000. More than half of that estimated value comes from the home in which Tricarichi resides, which is subject to homeowner's exemption.

Under these circumstances, requiring a supersedeas bond puts Tricarichi in an impossible situation for two reasons.

First, while litigants normally have the option to post a supersedeas bond in order to obtain an automatic stay of execution pending appeal, Tricarichi lacks the resources to obtain a supersedeas bond. Tricarichi has attempted to obtain a supersedeas bond through a national insurance brokerage firm, but that brokerage firm confirmed that bonding companies would require Tricarichi to obtain an irrevocable letter of credit from a reputable bank in the full amount of the bond. Declaration of Mark Rader, attached hereto as Exhibit D, at ¶¶ 1–5 (originally attached as an exhibit to Tricarichi's Motion for Stay with the District Court). Tricarichi then asked his banker at Chase Bank about obtaining an irrevocable letter of credit, but the banker twice confirmed that, based on Tricarichi's limited assets, Chase would not issue such a letter of credit. *Id*. ¶¶ 8–11.

Second, even setting aside that Tricarichi cannot obtain a supersedeas bond, there is no dispute that he is in a precarious financial situation. Because the IRS tax judgment vastly exceeds his assets, requiring Tricarichi to use his limited assets in order to post a bond in favor of PwC would put the IRS in an insecure position. *Nelson*, 121 Nev. at 836.

Tricarichi respectfully submits that, under *Nelson*, these are precisely the type of circumstances in which a court should eliminate the bond requirement, particularly given that the IRS tax judgment already has resulted in a federal tax lien over Tricarichi's assets. Given that federal tax lien, the purpose of requiring security pending appeal—i.e., to "maintain the status quo and protect the judgment creditor pending an appeal," *id*.—is fully met.

The District Court nonetheless denied Tricarichi's motion for a stay without bond, concluding that the IRS would not be in an insecure position if Tricarichi were to post bond. But the District Court did not explain how Tricarichi, with his limited assets, could post a $2.4 million bond. Nor did the District Court explain how Tricarichi, if he were able to post a bond, could do so in favor of PwC without diminishing assets available to satisfy the IRS tax judgment (and, arguably, violating his obligations under the federal tax lien). Because every dollar bonded in favor of PwC necessarily diminishes the funds available to satisfy the tax judgment, the posting of a bond would place the IRS in an insecure position. A stay without bond is thus warranted under *Nelson*.

In addition, Tricarichi respectfully submits that the merits of his currently pending appeal of the Fees and Cost Order (Appeal No. 87375) provide further

support for a stay. In the Fees and Costs Order, the District Court considered two $50,000 offers of judgment made by PwC. The first offer of judgment was made in 2019, and the District Court awarded no fees and costs based on that offer, finding that (a) Tricarichi brought his claims in good faith and (b) it was not grossly unreasonable or in bad faith for Tricarichi to reject the 2019 offer of judgment. The second offer of judgment was made two years later in 2021, and the only material change in the case in 2021 was that this Court had granted PwC's writ of mandamus and remanded the case for the District Court to decide whether Tricarichi waived his right to a jury trial. But the District Court flipped its conclusion regarding fees and costs—finding that (a) Tricarichi had *not* brought his claims in good faith, and (b) it was grossly unreasonable to reject an identical offer of judgment.

Those inconsistent findings in the Fees and Costs Order cannot be reconciled. There is no basis to find that Tricarichi brought his claims in good faith with respect to the 2019 offer of judgment but that Tricarichi did not bring the same claims in good faith with respect to the 2021 offer of judgment. Nor is there any basis for concluding that it was grossly unreasonable for Tricarichi to reject a $50,000 offer of judgment in October 2021 when, six months later in April 2022, the District Court itself denied summary judgment because Tricarichi had a reasonable basis for seeking his full asserted damages. As the District Court explained in denying PwC's motion for summary judgment, it "[could not] grant partial summary judgment that Plaintiff's claim cannot exceed $48,552" under a limitation-of-damages provision because there were "disputed questions of fact to be resolved at trial concerning whether PwC's conduct rises to gross negligence." Order Denying PwC's Renewed

Motion for Partial Summary Judgment, dated June 16, 2022, attached hereto as Exhibit E, at ¶¶ 7-8.

For these reasons, and those set forth below and substantiated by the attached exhibits from the record below, the Court should grant Tricarichi's emergency motion to temporarily stay execution on the Fees and Cost Order without a supersedeas bond.

BACKGROUND

In April 2003, Tricarichi engaged PwC to provide "tax research and evaluation services" regarding a proposed stock sale transaction. District Court's Findings of Fact and Conclusions of Law and Judgment, filed on February 9, 2023, attached hereto as Exhibit F, at ¶¶ 1, 9, 12. Among other things, PwC advised Tricarichi that he would not be held personally liable for the taxes of the company whose stock he sold in an arm's length transaction. *Id*. at ¶¶ 19-21 Tricarichi followed PwC's advice and closed on the stock sale transaction in September 2003, netting him (after taxes) roughly $25 million. More than ten years later, the Tax Court found Tricarichi personally liable for more than $35 million in unpaid corporate taxes (plus interest) of the company he sold years before. *Id*. at ¶¶ 2, 67. That decision became final in 2019 when it was affirmed on appeal.

Thus, as of December 2019, Tricarichi owes the IRS over $35 million, plus interest that is still running, as result of PwC's advice. That amount not only vastly exceeds what Tricarichi received for selling a company he started from scratch but is substantially greater than Tricarichi's ability to pay. *See* Exhibit C, at ¶¶ 4-7. Under

federal law, the IRS obtained a federal tax lien against all Tricarichi's property once the tax court judgment was final. 26 U.S.C. § 6321.

The underlying action, including the Fees and Costs Order, is now a consolidated appeal before this Court. (Appeal Nos. 86317, 87375, 87835.) Specifically, Tricarichi is seeking review of the February 2023 final judgment in favor of PwC, including the interlocutory summary judgment order dismissing his primary claims as untimely, which has shielded PwC from responsibility for putting Tricarichi in the situation he now finds himself. Tricarichi's consolidated appeal brief is due April 8, 2024.

With respect to the Fees and Costs Order (originally appealed as Appeal No. 87375, now consolidated herein), the District Court granted in part PwC's motion for attorney's fees and costs and entered an award of more than $2 million. PwC initially sought more than $10 million in legal fees for services rendered by lead counsel (Bartlit Beck) under a "flat rate monthly" arrangement. As a result, Bartlit Beck does not maintain and did not provide the District Court with any time records reflecting time worked on task. The District Court also failed to take this into account in making its decision. PwC's offers of judgment were not made in good faith and should not be a basis for awarding legal fees.

Tricarichi timely appealed from the Fees and Costs Order, a special order entered after final judgment. After the District Court denied Tricarichi's motion to stay execution without a bond, PwC refused to agree to stay execution even for 30-days to allow this Court to hear this motion on a normal scheduled, thus necessitating the emergency nature of this Motion. Exhibit B, at 32:20-24, 46:4-14.

DISTRICT COURT DECISION ON ISSUE

The District Court (Judge Joanna Kishner) heard this matter on briefs and argument. On March 13, 2024, the District Court denied Tricarichi's Motion for a Stay without bond. In evaluating the critical issue of Tricarichi's precarious financial position, the Court ruled, as follows:

> In analyzing factor five ("whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position"), the Court finds this factor in favor of PwC. Specifically, the Court finds that the IRS – the only other creditor presented to this Court – would not be in an insecure position were Plaintiff to post a bond because:
>
> a. First, the IRS already has a judgment.
>
> b. Second, the IRS is part of the federal government. While the Court takes no position on whether preemption may or may not apply, it must take into consideration that the IRS is a bureau of the federal government, and the instant dispute is a matter of state law in a Nevada state court.
>
> c. Third, Plaintiff has not presented evidence that: (1) the IRS believes it would be somehow impacted by the bond, (2) the IRS was put on notice of whether it would be impacted, or (3) the IRS couldn't attach any posted bond during the intervening time that this case would be on appeal.
>
> Therefore, in reviewing the briefs at issue, Nevada case law (including *Nelson*), the case law from other jurisdictions upon which Nevada case law relies, related case law from other jurisdictions (which are not precedential, but are informative in similar situations), and the oral argument of counsel, the Court needs to deny Plaintiff's Motion.

Exhibit A at ¶¶15 – 16.

The District Court's ruling forces Tricarichi to commit his already limited resources toward securing a bond, placing PwC's interests ahead of those of the IRS. The Court's statement that "Plaintiff has not presented evidence that … the IRS

believes it would be somehow impacted by the bond" fails to follow this Court's decision in *Nelson*. Respectfully, the impact on the IRS necessarily follows from the size of the IRS tax judgment and Tricarichi's limited resources. Every dollar put toward securing a bond solely for PwC's benefit is a dollar less that the IRS can collect from Tricarichi, given the insufficiency of assets that currently exist to satisfy the IRS in full.

ARGUMENT

Under NRCP 62(d)(1), a party may obtain an automatic stay of execution by posting a supersedeas bond. But NRCP 62(d)(1) allows the Court to approve other forms of security, and the Nevada Supreme Court held that courts have "inherent power" to reduce or waive the bond requirement in the appropriate circumstances. *Nelson*, 121 Nev. at 834–35 (citing with approval *Dillon v. City of Chicago*, 866 F.2d 902, 904 (7th Cir. 1988) (same)). Emphasizing that the purpose of the bond requirement is to preserve the status quo, the Supreme Court identified several factors Nevada courts should consider in deciding whether to reduce or waive the bond requirement—including:

> (1) the complexity of the collection process; (2) the amount of time required to obtain a judgment after it is affirmed on appeal; (3) the degree of confidence that the district court has in the availability of funds to pay the judgment; (4) whether the defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money; and (5) **whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position**.

Id. at 836 (quoting *Dillon*, 866 F.2d at 904–05) (emphasis added).

Under *Nelson*, a stay without bond is warranted. Because the IRS's tax judgment vastly exceeds Tricarichi's ability to pay, the fifth *Nelson* factor is directly applicable: Tricarichi "is in such a precarious financial situation that the requirement to post bond would place other creditors"—i.e., the IRS—"in an insecure position." *Nelson*, 121 Nev. at 836. By statute, the federal tax lien applies against "all property and rights to property, whether real or personal, belonging to" Tricarichi. 26 U.S.C. § 6321. It therefore fulfills the very purpose a bond is meant to serve: to "maintain the status quo and protect the judgment creditor pending an appeal." *Id.*

The District Court's analysis centered solely on whether the IRS has appeared in Nevada and asserted the rights it has to Tricarichi's assets. That analysis is not supported by *Nelson*. Under *Nelson*, the District Court must assess whether the IRS would be adversely affected by allowing collection by PwC—who is in an indisputably inferior position to the IRS as its judgment is on appeal—to effectively "jump" the IRS in priority, thereby making the IRS "further insecure." Here, the undisputed facts are that the IRS has a judgment against Tricarichi for more than $35 million dollars and that he does not have that amount in assets. Exhibit C, at ¶¶ 4–7. Simple math shows that every dollar necessary to secure a bond in favor of PwC is a dollar not available to the IRS. Thus, by definition, the IRS would be "further insecure." To maintain the status quo pending this appeal, collection should be stayed until the matter is finally resolved.[1]

[1] Whether all *Nelson* factors weigh in favor of a stay without a bond is irrelevant. The framework adopted in *Nelson* provides five factors "to consider," but there is no suggestion that a court must count how many *Nelson* factors weigh for and against the stay and, based on the final tally, declare the winner. To the contrary, that method of analysis would be unworkable because three of the factors, by definition, are diametrically opposed. While the second and third factors support a stay

Indeed, Tricarichi is unable to obtain a bond due to his precarious financial circumstances. In the fall of 2023, Tricarichi, through his lawyer Randy Hart, contacted Mark Rader at the Oswald Company, a national insurance brokerage firm, about obtaining a supersedeas bond in the amount of $2.4 million with respect to the PwC fee order. Exhibit D, at ¶¶ 1-3, attached as Exhibit . Mr. Rader confirmed that all bonding companies of which he was aware require an irrevocable letter of credit issued by a reputable bank for the full amount of the bond. *Id*., at ¶¶ 4-5. Mr. Tricarichi in turn contacted his banker at Chase Bank and asked whether he could obtain a letter of credit supporting an appeal bond. Exhibit C, at ¶¶ 8-11. The banker has twice confirmed that, based on Tricarichi's personal assets, no bank could provide a $2.4 million letter of credit. *Id*. In addition, since Tricarichi would have to disclose the IRS judgment on any credit application, it is inconceivable that any reputable lender would provide a $2 million loan when Tricarichi's assets are subject to a potential IRS lien.

CONCLUSION

Because the posting of bond would put the IRS in an unsecure position and, in addition, is unnecessary in the presence of a federal tax lien that itself preserves the status quo, Tricarichi respectfully asks the Court to stay, without bond, PwC's execution of the award of attorney's fees and costs.

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without bond when a party has the clear ability to pay, the fifth factor supports a stay in the opposite circumstance: when a party's financial situation is too "precarious." Those opposing factors cannot logically be weighed against each other. When a party has an undisputed ability to pay, it is no answer in support of bond that the "precarious financial situation" factor is not met. Likewise, in this case, when Tricarichi's financial situation is too precarious, it is no answer that he does not.

Dated: March 21, 2024

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CERTIFICATE OF SERVICE

I hereby certify pursuant to NRAP 25(c), that on this 21st day of March, 2024, I caused service of a true and correct copy of the above motion to consolidate appeals pursuant to the Supreme Court Electronic Filing System to the following:

ALL COUNSEL ON SERVICE LIST

/s/ Kaylee Conradi
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EXHIBIT PAGE ONLY

EXHIBIT A

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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI, Plaintiff, vs. PRICEWATERHOUSECOOPERS LLP, Defendant.	CASE NO.: A-16-735910-B DEPT. NO.: XXXI **NOTICE OF ENTRY OF ORDER DENYING: (1) PLAINTIFF'S MOTION FOR STAY OF EXECUTION WITHOUT SUPERSEDEAS BOND AND (2) PLAINTIFF'S ORAL MOTION TO STAY EXECUTION FOR THIRTY DAYS**

PLEASE TAKE NOTICE that an *Order Denying: (1) Plaintiff's Motion for Stay of Execution Without Supersedeas Bond and (2) Plaintiff's Oral Motion to Stay Execution for Thirty Days* was entered in the above-captioned matter on March 13, 2024, a copy of which is attached hereto.

Dated: March 13, 2024

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By: /s/ *Bradley Austin*

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On March 13, 2024, I caused to be served a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER DENYING: (1) PLAINTIFF'S MOTION FOR STAY OF EXECUTION WITHOUT SUPERSEDEAS BOND AND (2) PLAINTIFF'S ORAL MOTION TO STAY EXECUTION FOR THIRTY DAYS** upon the following by the method indicated:

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

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

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

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

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

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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI, Plaintiff, vs. PRICEWATERHOUSECOOPERS LLP, Defendant.	CASE NO.: A-16-735910-B DEPT. NO.: XXXI **ORDER DENYING: (1) PLAINTIFF'S MOTION FOR STAY OF EXECUTION WITHOUT SUPERSEDEAS BOND AND (2) PLAINTIFF'S ORAL MOTION TO STAY EXECUTION FOR THIRTY DAYS**

On February 29, 2024, the Court conducted a hearing on Plaintiff's Motion for Stay of Execution Without Supersedeas Bond ("Motion"). Patrick Byrne, Esq. of Snell & Wilmer L.L.P appeared on behalf of Defendant PricewaterhouseCoopers LLP ("PwC"). Scott Hessell of Sperling & Slater, LLC and Ariel Johnson of Hutchinson & Steffen, LLC appeared on behalf of Plaintiff Michael Tricarichi. During the hearing, Plaintiff made an oral motion to stay enforcement of the Fees and Costs Judgment for 30 days ("Oral Motion to Stay"). The Court, having reviewed the record, the briefs submitted in support of and in opposition to the Motion, and the oral arguments of counsel, hereby **DENIES the Motion** and **DENIES the Oral Motion to Stay** and makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. On August 25, 2023, the Court entered its Order Granting in Part and Denying in Part Defendant PwC'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, wherein the Court awarded Defendant PwC $2,102,754.39 in attorneys' fees and $322,955.91 in costs ("Fees and Costs Order"). Dkt. No. 453.

2. On September 22, 2023, Plaintiff filed a notice of appeal with respect to the Fees and Costs Order.

3. On October 12, 2023, Plaintiff Tricarichi filed his Motion (Dkt. No. 462), arguing that, because Tricarichi was allegedly in such a precarious financial situation that the requirement to post a bond would place his other creditors – specifically the IRS, who holds an approximate $35 million judgment against Tricarichi – in an insecure position, the Court should stay execution of the Fees and Costs Order without requiring Plaintiff Tricarichi to post a bond.

4. Following briefing on the Motion, the Court held a hearing on November 14, 2023, wherein the Court denied in part and deferred in part Plaintiff's Motion, ordering a judgment debtor exam, supplemental briefing, and a supplemental hearing on the Motion. Dkt. No. 478.

5. Following the judgment debtor exam, Plaintiff filed a supplemental brief in support of the Motion on February 8, 2024, and PwC filed a supplemental opposition to the Motion on

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February 21, 2024. The Court conducted a supplemental hearing on the Motion on February 29, 2024, during which, Plaintiff made his Oral Motion to Stay.

CONCLUSIONS OF LAW

6. NRCP 62(d) governs stays pending appeal and provides:

> (1) **By Supersedeas Bond**. If an appeal is taken, the appellant may obtain a stay by supersedeas bond, except in an action described in Rule 62(a)(2). The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay is effective when the supersedeas bond is filed.
>
> (2) **By Other Bond or Security**. If an appeal is taken, a party is entitled to a stay by providing a bond or other security. Unless the court orders otherwise, the stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or other security.

7. "The purpose of security for a stay pending appeal is to protect the judgment creditor's ability to collect the judgment if it is affirmed by preserving the status quo and preventing prejudice to the creditor arising from the stay." *See Nelson v. Heer*, 121 Nev. 832, 835, 122 P.3d 1252, 1254 (2005), *as modified* (Jan. 25, 2006).

8. In *Nelson*, the Court adopted five factors from the Seventh Circuit for the Court to consider when analyzing whether to waive the bond and/or accept alternate security in lieu of a bond:

> (1) the complexity of the collection process; (2) the amount of time required to obtain a judgment after it is affirmed on appeal; (3) the degree of confidence that the district court has in the availability of funds to pay the judgment; (4) whether the defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money; and (5) whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position.

Id.

9. The burden is on the movant to support its request under the foregoing factors.

10. The Court finds that movant Tricarichi fails to support the same.

11. In analyzing factor one ("the complexity of the collection process"), the Court finds this factor in favor of PwC. Specifically, the Court finds that the collection process would be complex for the reasons articulated via briefing and oral argument and given that there are

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complexities with respect to community property, competing judgments, and multistate property, among others.

12. In analyzing factor two ("the amount of time required to obtain a judgment after it is affirmed on appeal"), the Court finds this factor in favor of PwC, as the appeal process will likely take at least a year.

13. In analyzing factor three ("the degree of confidence that the district court has in the availability of funds to pay the judgment"), the Court finds this factor in favor of PwC, as the Parties do not dispute the lack of available funds, as further established via Plaintiff's judgment debtor exam.

14. In analyzing factor four ("whether the defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money"), the Court finds this factor in favor of PwC, as Plaintiff argues the opposite – that he does *not* have the ability to pay the Fees and Costs Judgment.

15. In analyzing factor five ("whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position"), the Court finds this factor in favor of PwC. Specifically, the Court finds that the IRS – the only other creditor presented to this Court – would not be in an insecure position were Plaintiff to post a bond because:

a. First, the IRS already has a judgment.

b. Second, the IRS is part of the federal government, and is not a private creditor. While the Court takes no position on whether preemption may or may not apply, it must take into consideration that the IRS is a bureau of the federal government, and the instant dispute is a matter of state law in a Nevada state court.

c. Third, Plaintiff has not presented evidence that: (1) the IRS believes it would be somehow impacted by the bond, (2) the IRS was put on notice of whether it would be impacted, or (3) the IRS couldn't attach any posted bond during the intervening time that this case would be on appeal.

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16. Therefore, in reviewing the briefs at issue, Nevada case law (including *Nelson*), the case law from other jurisdictions upon which Nevada case law relies, related case law from other jurisdictions (which are not precedential, but are informative in similar situations), and the oral argument of counsel, the Court needs to deny Plaintiff's Motion.

17. The Court makes this ruling under an NRCP 62(d)(1) analysis, as NRCP 62(d)(2) (*i.e.*, alternate security) was not proposed by Plaintiff, and Plaintiff argues that no adequate alternate security exists.

18. For the same reasons set forth above, the Court finds that there is no basis to grant Plaintiff's Oral Motion to Stay (made during the February 29th Hearing, and requesting to stay enforcement of the Fees and Costs Order for 30 days while Plaintiff petitions the Appellate Court for stay relief) and denies the same. and to which Pwc objeceted Joanna S Kishner

ORDER

The Court having made the foregoing findings of fact and conclusions of law, and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Plaintiff's Motion for Stay of Execution Without Supersedeas Bond is **DENIED**.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiff's Oral Motion to Stay is **DENIED**.

Dated this 13th day of March, 2024

Joanna S Kishner

CC2 536 6EBB EB4A
Joanna S. Kishner
District Court Judge

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Luxford, Lyndsey

Subject: RE: PwC/Tricarichi: Draft Order Denying Motion to Stay

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From: Scott F. Hessell <shessell@sperling-law.com>
Sent: Tuesday, March 12, 2024 6:37 PM
To: Austin, Bradley <baustin@swlaw.com>
Cc: Ariel C. Johnson <ajohnson@hutchlegal.com>; Byrne, Pat <pbyrne@swlaw.com>; randyjhart@gmail.com
Subject: Re: PwC/Tricarichi: Draft Order Denying Motion to Stay

[EXTERNAL] shessell@sperling-law.com

Brad

Ok to affix sig as to form of revised order.

Scott

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

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

AUTOMATED CERTIFICATE OF SERVICE

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EXHIBIT PAGE ONLY

EXHIBIT B

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

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CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

MICHAEL TRICARICHI, Plaintiff, vs. PRICEWATERHOUSECOOPERS, LLP, Defendant.	)	CASE NO. A-16-735910-B DEPT NO. XXXI **TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE JOANNA S. KISHNER, DISTRICT COURT JUDGE

THURSDAY, FEBRUARY 29, 2024

TRANSCRIPT OF HEARING RE:

MOTION FOR STAY OF EXECUTION

PLAINTIFF'S MOTION TO FILE UNDER SEAL SUPPLEMENTAL BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR STAY OF EXECUTION WITHOUT SUPERSEDEAS BOND ON ORDER SHORTENING TIME

APPEARANCES:

FOR THE PLAINTIFF: SCOTT F. HESSELL, ESQ.*
ARIEL C. JOHNSON, ESQ.*

FOR THE DEFENDANT: PATRICK G. BYRNE, ESQ.

*Via BlueJeans

RECORDED BY: LARA CORCORAN, COURT RECORDER
TRANSCRIBED BY: JD REPORTING, INC.

LAS VEGAS, CLARK COUNTY, NEVADA, FEBRUARY 29, 2024, 8:28 A.M.

*** * * * ***

THE COURT: Okay. So let's call page 1, please, Case 735910, Tricarichi versus Pricewaterhouse.

Counsels for plaintiff, please.

MR. JOHNSON: Good morning, Your Honor. Ariel Johnson, Bar Number 13357, on behalf of the plaintiff.

THE COURT: Go ahead, Mr. Hessell. Go ahead.

MR. BYRNE: Yeah, Scott Hessell on behalf of Michael Tricarichi.

THE COURT: Thank you. Counsel here in court on behalf of defendant, and then you can say who's remote if you want. Go ahead, please.

MR. BYRNE: Good morning, Your Honor. Patrick Byrne on behalf of the defendant, PricewaterhouseCoopers.

THE COURT: Okay. Is there anybody else you need to introduce for appearances?

MR. BYRNE: No one that needs --

THE COURT: Just observing?

MR. BYRNE: Yeah, nobody that needs an appearance, Your Honor.

THE COURT: Okay. No worries.

Okay. So welcome for those back.

So on your 2016 case, we are here today for a couple of different items: One, plaintiff's motion to file under seal

the supplemental brief in support of plaintiff's motion for stay of execution without supersedeas bond on order shortening time, Document 47. Pricewaterhouse's limited opposition 488, reply 491, supplemental brief on the stay of execution without supersedeas bond, 46; opposition, 490, and then we have some of the outstanding kind of I'll call it deferral issues from when I saw you in November.

So my first question to the parties are, in looking at the dates of when these pleadings were filed and have the parties had an opportunity to fully read *Falconi* and know that it's a case that recently came out by the Nevada Supreme Court that talks -- well, it's in the -- I cannot express any opinion on what it substantively says, which is why I'm freezing my question as if people had an opportunity to read it, and it's in the middle of the rehearing period because it does address certain concepts which this Court takes no position of breadth and scope. That would be up to the Supreme Court, the breadth and scope.

The case arose in the family division, but to the breadth and scope, like you can appreciate, a District Court Judge has no opinion on -- I just follow what the Supreme Court says; right? And since the rehearing period is not yet over, the breadth and scope, where I was just going with that is since it's currently case law, okay, I just didn't know if anybody was going to say with regards to the sealing request

that the Court should or should not be taking *Falconi* into account, and I wasn't sure in light of its most recent timing and the way it came up in the different division that may not normally be seen by business court type practitioners, I just wasn't sure, and so if it's a nonissue, that's perfectly fine. If it's something that anybody is going to ask the Court to consider, then I'm going to listen to what you have to say.

So, Counsel for plaintiff, you are putting on your little yellow box. So go ahead.

MR. HESSELL: You know, as usual, the Court is or as has often been the case, the Court is on top of the case that we are not or at least I personally am not familiar with and what its application might be to the pending motion to seal. I have not -- so therefore I had not planned to make any comment or refer the Court to *Falconi*. If -- if it's the Court's desire to give us the opportunity to review it and then let you know if we think it changes anything, I'm happy to do that.

THE COURT: Okay. Counsel for defense.

MR. BYRNE: Your Honor, I have not read the case. I'm not familiar with it. I certainly don't have a problem with the Court applying it given it's the current law of the State of Nevada, but I -- I'm not in a position to comment about it obviously.

THE COURT: I will give you both as much as I feel this Court can say about something, right, that's a Supreme

Court case that is published, but still in the rehearing period, right. So is -- it did arise in the family court arena and the underlying issue was access to a actual proceeding in court under a particular statute and some local rules, and those local rules are in the fives, which means they apply to the family division, okay, rather than the twos and sevens which are generally civil, okay.

So there is -- the Court cannot take any position about whether any of the language in said case could have a broader application. I would say for purposes of this case, since you're asking for sealing under Supreme Court Rule 3, which has its own analysis, I think the Court can do its well-determined analysis under Supreme Court Rule 3 if neither side is saying that I should be taking something else affirmatively into account.

Would that meet the parties' needs, or are you requesting something different?

Counsel for plaintiff, I'm going to ask you first because it's your motion.

MR. HESSELL: Yeah, that will meet our needs.

THE COURT: Counsel for defense, would that meet your needs?

MR. BYRNE: Your Honor, I think applying Rule 3 is appropriate, and that would meet our needs.

THE COURT: Okay. So then that's what the Court's

going to do because I'm not being asked to do something different, and since that requires the heightened analysis and well-articulated analysis with regards to any sealing anyway, then I think we'll just address it that way because the parties are not asking me to address anything differently.

Okay. So in that regard then, I've got a limited opposition. So, Counsel for movant, go ahead on your analysis, and then counsel feel free to have an opportunity to respond, please.

MR. HESSELL: You know, I think that the papers have fairly articulated the parties' positions. We filed obviously a limited reply with respect to PWC's opposition. And unless the Court has a particular question for me, I think I stand on the papers.

THE COURT: Sure.

MR. HESSELL: Other than to say I really can't imagine information being more appropriately confidential and subject to sealing then the personal financial information of a party.

THE COURT: Sure.

MR. HESSELL: And so --

THE COURT: Okay. What the Court's question is going to be, and this is straight Rule 3 analysis and even to the extent it could have other applications is, remember, there's a preference for redacting versus sealing if something can be

redacted versus sealed. And so the question becomes is it more appropriate to grant a redaction of the financial information component of said brief versus the entirety of the brief.

Counsel for plaintiff, would you like to address that, or do you want to address it in your final response after I hear from defense? Either is fine.

MR. HESSELL: I'll go now. I think it is appropriate to redact rather than fully seal the entirety of our brief, and we, in our reply, submitted a proposed reactions which is really just a few paragraphs of our -- of our supplement, and that otherwise we agree that, you know, if you're taking kind of the narrowest view of what should be sealed, it should just be the paragraphs that we identify and the debtor's exam itself. And other than that, everything else is appropriate for publishing on the public record.

THE COURT: Okay. And you can appreciate why the Court raised that question because it was brought up for the first time in the reply.

So, Counsel for defense, are you amenable to the alternative request of redaction, which is in the reply, which you have not yet have had an opportunity to respond to, or what's your position? Go ahead, please.

MR. BYRNE: We are, Your Honor. And I think had that approach been -- had that been the approach initially, we probably wouldn't even have filed a limited opposition. I just

in good faith did not believe that entire transcript would be designated. And while we hadn't sought the D designated, that's why it was a limited opposition, we just, you know, we know the Court has an independent duty here anyway, and so we wanted to raise the issue. And I think what Mr. Hessell is proposing is appropriate.

THE COURT: Okay. So it sounds to me by agreement of the parties, and now the Court, of course, does its analysis under Rule 3, the Court's analysis under Rule 3 is, yes, the specific financial information is private and confidential. There is no public interest in the specific financial information. It's not anything that has been presented to this Court that it raises any issues of any public concern versus unique to this specific case, these specific parties. You could still move forward with anything, and honestly, a redaction doesn't preclude anyone from filing whatever they wish to file if they feel that the Court should revisit the issue down the road.

And so the Court is going to grant the alternative -- well, I'm going to view it as -- should I view it as agreed to by the party, the alternative relief for redaction? Does that meet your needs, Counsel for plaintiff?

MR. HESSELL: I think it does. It's a redaction as to the brief, and sealing as to the exhibit, the debtors exam exhibit.

THE COURT: Sure. Okay. And let's find out, Counsel for defense, does that meet your needs?

MR. BYRNE: It does, Your Honor.

THE COURT: Okay. So by agreement of the parties, as stated in open court and the Court doing its own independent analysis under Supreme Court 3 finds the redaction appropriate, which means, Counsel, please -- you can do this order, and I think we need to, because sometimes I need to get a clarification. Then the -- we're going to need to get the order first. They need to sign the order, and then you can file your sealed document pursuant to said order, okay? The quicker I get the order, the quicker I can get that taken care of.

Now with regards to -- let's walk through -- I want to make sure there's no unintended consequences because right now you have a defendant, Pricewaterhouse, yours is also your opposition in its entirety is temporarily sealed, and I appreciate why, such as the confidentiality agreement subject to the request of this motion.

So are you asking any relief, like to refile yours in a redacted format, or are you requesting that yours still remain under seal in light of what's just taken place? Can I just get a clarification of what you're requesting. Go ahead, please.

MR. BYRNE: Your Honor, we do -- and we do have a

motion pending on this, and it's set for March. We would ask under the local Rule 2.23 you move that up to now so we can just resolve it all at once. We would propose that we submit a amended -- amended redacted consistent with Mr. Hessell's redactions. We could even run it by him. And then this way we would have it all done at once.

THE COURT: Okay. So, Counsel for plaintiff, are you amenable EDCR 2.23 means to advance a motion that is set out in the future. Are you amenable to the Court -- it's originally set for 3/26/2024, are you amenable to advancing that to today --

MR. HESSELL: Yes.

THE COURT: -- 2.23?

MR. HESSELL: Yes.

THE COURT: Okay. So now then substantively, are you amenable to the proposal of what's being requested in said motion which is going to be advanced from 3/26 to today pursuant to the agreement of the parties in accordance with EDCR 2.23 --

MR. HESSELL: Yeah.

THE COURT: -- are you amenable to the relief requested?

MR. HESSELL: Yes. I'm amenable so long as we confer before the defendants file their amended brief, but other than that, I think that it's perfectly appropriate.

THE COURT: Okay. So the Court is going to grant that.

Now, are the parties then going to request and possibly maybe put in said stipulation, right, because it would be a stipulation because it's agreement of the parties, a request to strike the documents that were, quote, temporarily sealed in light of the Court's order that you're going to have redacted versions, or what are you requesting, if anything, with regards to those documents that were temporarily sealed but don't have the redactions that now the parties have agreed upon?

All right. You know, come on. It's procedural Thursday. Go ahead.

MR. BYRNE: Your Honor, I would propose that they be stricken once the amended briefs are on file.

THE COURT: Okay. Counsel for plaintiff --

MR. HESSELL: I agree.

THE COURT: Okay. Thanks. And you may want to -- you may be thinking that you're going to be putting that in your proposed stipulation so it's clear so that if anyone needs it for purposes of record, if you ever need the full complete, right, version, you've got taken care of what you've got taken care of.

Okay. So shall we now get to substance of today's hearing? So let me, just for clarification, the motion to

seal, given its modified request to redact just by agreement of the parties that was set for hearing today, and that was plaintiff's motion, defendant Pricewaterhouse motion as was advanced, EDCR 2.23, granted by agreement of the parties. And the doc -- new document after a stipulation is going to be filed which has the redacted version of the opposition. The parties are going to take care of the issue with regards to the underlying temporarily sealed documents in said stipulation. It is so ordered.

So now let's go to what you want. Now, what you want to do is the Court to address now the motion for stay of execution, which is now what's left because it was after the judgment debtor exam and what needs to be taken here because we still have the motion with regards to a stay of execution without a supersedeas bond.

So, Counsel for plaintiff, it's your motion. Go ahead on what you -- is left for the Court to address, and I've got all of that. Go ahead, please.

MR. HESSELL: Thank you, Your Honor. Sorry I can't be there. I do -- it is -- it's a little sad for me to see the courtroom from afar.

THE COURT: No worries. It's perfectly fine. It's more efficient. It's (indiscernible). Really appreciate it.

Go ahead, please.

MR. HESSELL: Yes. So, as I know the Court is aware,

on December 4th, the Court denied in part and deferred in part our motion to stay execution without posting of a supersedeas bond, and the Court, as far as the deferral part allowed PWC to take a debtor's exam to allow the Court to fully analyze the *Nelson* factors, which, in particular, the Court felt that the Tricarichi declaration that we had submitted with the original motion was lacking details, and in particular, I think the focus of the inquiries were on the *Nelson* factors themselves because, you know, that's what the Nevada Supreme Court has told Courts in this State to evaluate when considering a request like what the plaintiffs are proposing here. That is to stay enforcement of a judgment without the posting of a bond.

And just by way of reminder, obviously the Court is aware that Mr. Tricarichi -- that the IRS has a judgment in excess of $35 million against Mr. Tricarichi, and I think there's no dispute even in PWC's somewhat aggressive supplement that neither in 2019, when the judgment became final from the tax board case, nor today does Mr. Tricarichi -- has Mr. Tricarichi ever had 35 million or $40 million, and he definitely doesn't have that today.

So the *Nelson* factors, we, in our supplement supplemented the details that were set forth in Mr. Tricarichi's original declaration which related to the efforts that he made to obtain a bond in the first instance,

and in particular I reference Exhibit F to our supplement, which is the declaration of insurer, an insurance company executive who Mr. Tricarichi's lawyer, Randy Hart contacted about getting a bond, and there's not much dispute about any of this, and it's also not, I don't think, terribly surprising that somebody who owes the IRS $35 million and doesn't have sufficient assets to cover an existing judgment is going to have difficulty getting a bond, an appeal bond of an additional $2 million because, as set forth in the Raydar (phonetic) declaration, to get a bond you have to either have the assets or get a letter of credit from a financial institution to back up the bond.

And in the fall of last year, Mr. Hart reached out to the bonding company, and I think the declaration establishes that Mr. Tricarichi can't get a bond given his current financial situation.

And while that is not expressly addressed in *Nelson*, what is addressed in *Nelson* are the five factors the Court may analyze, and in particular, you know, we're focused on the fifth factor, whether the defendant is in such precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position.

I don't think there's much dispute in PWC's opposition or in their supplement that the IRS will be in a more insecure position if the Court were to require

Mr. Tricarichi to put an additional $2 million of assets in backing up his bond given his currently precarious financial situation.

And the only thing that PWC says in response is that the IRS has not yet begun collections activity, but that doesn't really address the fifth factor, which doesn't speak to whether or not the current creditors started to collect or not. It speaks to whether or not they'll be in a more insecure position by virtue of the requirement to post a bond.

The second thing that PWC says in response is what about the other factors, and I think that's a fair -- a fair point.

And in that respect I'd say that as to Factors 3 and 4, and this is set forth in the Judge's -- in your order of December 4th at paragraph 6, Factor 3 is the degree of confidence that the District Court has in the availability of funds to pay the judgment. Factor 4, whether the defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money.

Those two factors will never be present in a situation where you have Factor Number 5. They are contemplating a scenario where a judgment debtor has more than sufficient assets available to them to cover the bond, and so a bond would be unnecessary or that they'll have assets after an appeal for whatever reason. That's what I think Factor 3 is

contemplating. So it can never be a situation -- *Nelson* can't possibly be suggesting that you have to look at all of the factors given the circumstances that you have present here when contemplating Factor Number 5 because that would never happen. It could never exist. You can't both have too many assets and also be in such a precarious financial situation that somebody else will be more insecure. So it can't be that you have -- you can't analyze all of the factors obviously, but the fact that Factors 3 and 4 are not present here can't be a reason not to consider Factor Number 5.

And then as to the other two factors, the complexity of the collection process, there's nothing that's complex about this particular -- this particular collection process other than the fact that there's a judgment debtor ahead of PWC who has the final judgment as we're sitting here today that's greater than the available assets.

And then as to the amount of Factor Number 2, the amount of time required to obtain a judgment after it is affirmed on appeal, here, I think that circumstance is not present here at all because PWC already has a judgment. And if it's affirmed on appeal, that judgment will remain in place. There's no time lag between judgment and affirmance on appeal.

So that just leaves you with 5 and then the more -- the general -- most of what PWC attacks is not any of the *Nelson* factors. It's the argument by us that the IRS's lien

protects PWC.

And the first thing I want to say about that and much of their supplement is that -- is that the fundamental facts are not disputed, again, which is that the IRS in 2019, when the Supreme Court case went final, obtained by operation of law, a lien on all of Mr. Tricarichi's assets, and that is, we cited in our brief, it's 26 USC 6321, which says if any person liable to pay any tax neglects, refuses to pay the same after demand, the amount, including any interest, additional amount, additional tax, associated penalties together with any costs shall be a lien in favor of the United States upon all property and rights to property, whether real or personal belonging to such a person.

Again, they don't dispute that. They take issue with the expenses that have been incurred since the judgment. And in that respect, much of what they say is both hyperbole and a mischaracterization of the testimony, which we obviously didn't have the opportunity to respond to because they submitted their supplement after we submitted our supplement, but the -- I did want to make a couple of comments on some of the statements in their record -- in their supplement.

And the major one is the issue with respect to telecom acquisition because that -- that is their claim that he has been dissipating assets notwithstanding the lien, and that number, the $8 million or so number that's in telecom

acquisition is really the only material item that is identified in their opposition.

But the telecom transfer to a trust occurred before the IRS had a judgment, had a final judgment or a lien because the transfer happened before the tax court case was final, and it was based on the advice from Nevada counsel established by Nevada counsel, all of which PWC asked Mr. Tricarichi about at his deposition.

The remainder of the items that are identified are, for lack of a better term, relatively small potatoes. They are not millions of dollars that are being dissipated. They are not hundreds and hundreds of thousands of dollars. Most of them are relatively low dollar numbers. They are just characterized in such a way as to try and convince the Court that Mr. Tricarichi is a bad guy who's, you know, dissipating assets and lying about what he said in his brief. But all of them were subject to inquiry at deposition.

But what, you know, PWC leaves out is Mr. Tricarichi's explanation on a number of these items. Just, for example, the Florida home was in the name of his wife, had always been in the name of his wife, and he -- the part of the testimony that they cite to was from earlier in the deposition, and in recross and in rebuttal, he clarified that it had always been in the name of his wife. So she sold and then reported the income on their joint tax returns.

There's much made of the community property issue, and, frankly, I'm not really in a position to comment on whether or not the IRS can attach the assets of Barbara Tricarichi because that is not an issue that has come up. Barbara Tricarichi is not -- was never a party in the IRS case, and that obviously has never been a party to this case.

And so there are other things, but the bottom line is that the question before the Court is analyzing the *Nelson* factors. When you take those *Nelson* factors in light of the circumstances that Mr. Tricarichi is now faced with, there's not really any dispute that as to those factors that apply to this situation, which is where somebody owed somebody else a lot of money, and the requirement of posting a bond will put that other party, here, the government, the IRS, in a more insecure position, there's not much dispute.

The fact that the IRS hasn't actively begun collection activity, none of us can really speak to other than to say they have 10 years from assessment to collect. Why they haven't begun collecting activity yet, I don't know, but Mr. Tricarichi has been, with advice of counsel, act inconsistent with the -- what he perceives to be the lien rights that they have, which is that they could show up at any time and start asking questions about what he owes them.

The other thing I want to say is that none of the transfers that are identified by PWC are post the judgment at

issue here or very few of them are. And all this stuff about what happened, has happened from 2019 till today or until they got their judgment is not really even germane to the issues at hand.

So with that I'll turn it to Mr. Byrne.

THE COURT: Sure. I do have one question on problem 5.

MR. HESSELL: Yeah.

THE COURT: Okay. The statement that somehow that a bond in this case, a private party action, for lack of a better term, right, is somehow going to disadvantage the IRS is a concept that I did not see any legal support for. It's nicely argued, right, but did not see any legal support how a private contractual judgment can somehow step in the shoes and disadvantage the federal government to the extent that they have a lien right. I mean --

MR. HESSELL: I see what you're saying.

THE COURT: Can you explain how you're saying that that would apply in this case. I understand, the general concept obviously under *Nelson*, right, okay, if you have equal A and B, but here you've got the IRS. Are you saying that they can take away the rights of the IRS by a bond?

MR. HESSELL: No. No. What we're saying is that the IRS has their judgment against Mr. Tricarichi, and that covers all possible assets at his disposal. In order to post a

$2 million bond, Mr. Tricarichi would have to take or acquire some of the assets that are available to him and dissipate those assets for the benefit of only PricewaterhouseCoopers because it would be bonding the judgment that was entered by this Court in their favor, either by a letter of credit or by the assets themselves backing the bond.

So he can't get a bond unless he takes assets that are currently subject to an IRS lien and makes them for the benefit of PWC and to the detriment of the IRS.

THE COURT: But, Counsel, the reason why I was asking that question.

MR. HESSELL: Yeah.

THE COURT: Walk it through; right? If the bond occurs, it seemed to be saying that somehow the IRS couldn't say at any time, guess what, that bonded money really is ours, and we get it because we're the IRS, and we have a priority lien so that it may be held for one particular purpose, but I didn't see any analysis legally how PWC can tell the government, guess what, we really get the money, not you, and that may not be my best legalese, but I really was just trying to get to the heart of where my question was.

MR. HESSELL: Right.

THE COURT: So are you contending that and that I as a Nevada Judge could somehow preclude that? I didn't see any way I could.

MR. HESSELL: No. I think that you're right that perhaps the IRS could later claim, oh, well, we see that bond money that's been transferred for the benefit of PricewaterhouseCoopers, and we'll now take it. But the way -- the whole point of a bond is to ensure that if PWC wins or has the fee award affirmed that the money is freely available to them and no other party.

THE COURT: Okay.

MR. HESSELL: Now, as to -- I think the real issue here is that in requiring a bond you will basically be forcing Mr. Tricarichi to have to make that choice, which is, does he risk further exposure to the IRS, who may later say fraudulently transferred $2 million, even though we had a $35 million judgment against you that was final in order to prevent PWC from going and executing on assets that we otherwise also claim are ours.

THE COURT: No worries. I appreciate it.

MR. HESSELL: So.

THE COURT: I appreciate it. I get the concept. Thank you. The reason why I have, is you're going to have a final word, but I need to let opposing counsel. I've got my 9:00 o'clock's who are starting to come in as well. So you've got to balance everyone's time.

MR. BYRNE: Thank you, Your Honor.

THE COURT: So go ahead, Counsel.

MR. BYRNE: And your question is exactly why the IRS is not in an insecure position. And I want to walk through the origin of that fifth factor. It's a case that is cited in our brief, but not discussed.

This is what Mr. Hessell told the Court at our last hearing. Page 4, line 15 of the transcript. At the end of the day, the whole point of why a supersedeas bond is required is to ensure that the status quo is maintained. And the status quo is maintained by virtue of the fact that the IRS has a substantially greater tax judgment against the plaintiff and a lien against the plaintiff. So PWC is nowhere (indiscernible) in the pendency of the appeal than they would be with a bond because his assets are already tied up.

Your Honor, the deposition revealed that that statement, as supported in our papers, is false. The IRS judgment has not had the effect of maintaining the assets. In fact, Your Honor, it's had the opposite effect.

Plaintiff has been rapidly disposing and transferring assets since that judgment was incurred. And let's not play the game. It was incurred in 2016. He took it up on a Hail Mary all the way to the U.S. Supreme Court. And just before they, of course, denied the writ, as they almost always do, he transferred all of the assets into an asset protection trust or a substantial portion in the telecom assets.

And I tried to ask him about that, Your Honor, and he

refused to answer those questions.

Now, I'm hearing from Mr. Hessell that everything he did was on advice of counsel. Well, that's fantastic. He's now waived the privilege. So we'll --

THE COURT: Before this Court at this moment today, we're talking about supersedeas bond.

MR. BYRNE: Correct. Correct.

THE COURT: Thank you.

MR. BYRNE: Correct, Your Honor. But since 2019 alone, Your Honor, he's dissipated 90 percent of his assets, and they have the burden, Your Honor, to show that my client will not be prejudiced by a stay.

Now, the default is a supersedeas bond. And I'll take their word that they can't secure one, Your Honor. Nevada then allows alternative security to substitute for a bond. And then in rare circumstances, which are the two factors that Mr. Hessell addressed, they'll say no security is required at all because the defendant has such -- or because the judgment debtor has such substantial assets that there is really no risk of noncollection.

But here, Your Honor, plaintiff seeks a stay with no alternative security and woefully insufficient assets. He simply does not qualify for that stay, Your Honor. And this is the *Nelson* case, and the *Nelson* case cited in your order adapted the Seventh Circuit test, Your Honor, from *Dillon* about

when alternative security would be appropriate. And this is how the Court in Nevada framed the issue:

> Quote, the focus is properly on what security will maintain the status quo and protect the judgment creditor pending an appeal.

The focus is on my client, Your Honor, according to *Nelson*. So then the Court set forth the five factors.

Now, plaintiff relies exclusively on this fifth factor because the others don't support him, Your Honor, notwithstanding the attempt to say this is not complex. We have the whole issue of community property. We believe without a doubt Barbara Tricarichi is responsible, her half of the community is responsible on our debt because it was a community debt where he was defending the tax liability. But again that's an issue for another day, but there are complex issues.

There's a transfer that we think was a fraudulent conveyance against the IRS into the telecom trust. There are plenty of complex issues. And the delay of the appeal, which will take a year, will give Mr. Tricarichi more time to play his games.

So, but let's look at this fourth factor, Your Honor, because they hang it all on that fourth factor, that posting a bond would place other creditors in an insecure position. We did not simply --

THE COURT: Counsel, I'm just -- I think you

inadvertently said fourth versus fifth, just so you've got a clear record.

MR. BYRNE: Oh, okay. I'm sorry, Your Honor.

THE COURT: No worries.

MR. BYRNE: It's the insecure position factor. That's where they put all their eggs.

Now, we did not address the origin of that factor in our papers. We did cite the case, but I think it's worth a look, a closer look for context, Your Honor.

The Seventh Circuit addresses tests in *Dillon*. That was 866 F.2d 902 (1988), the year I started practicing. So it's a very old case. That opinion, Your Honor, references all of the factors, and then it cites a specific Seventh Circuit case where that factor was applied. So essentially *Dillon* was an act to kind of call all the cases together and say here are the things that we've looked at and put it all together in a nice package.

Now, on the fifth factor, they cited *Olympia Equipment versus Western Union*, which is referenced on page 6 of our original opposition, Your Honor. That's 786 F.2d 794. I have a copy of that for Your Honor if I can approach and provide it for you.

THE COURT: Do I have an objection by counsel for plaintiff? Because I have the unique circumstance since you are remote, it's not exactly like they can hand you something

across the aisle; right? I mean, so are you okay with --

MR. HESSELL: I have no objection to him handing it up to you. I just would reserve the right to address the case since it obviously hasn't been a focus up until now.

MR. BYRNE: Your Honor, it has been cited, but Mr. Hessell raises a fair point. It hasn't been discussed in any detail, but I'm going to do that because context is critical.

This is the origin of the fifth factor, Your Honor. *Olympia* involved a $36 million judgment against Western Union. Your Honor, this is 1986. That's a huge judgment under 1986 dollars. Ironically, it's about the same amount of Mr. Tricarichi's judgment. Western Union argued, Your Honor, that it was financially distressed and couldn't post a bond. And, Your Honor, by allowing collection, it would force a bankruptcy. They'd have -- if you allowed them to just start enforcing this, that will harm the creditors because we'll have to file bankruptcy.

But Western Union did not make plaintiff's argument that they make here. Western Union came back and said alternative security, and the Court, Your Honor, allowed them to post alternative security, a pledge of 10 million in cash, a pledge of 10 million in accounts receivable and then a security interest in miscellaneous property that was allegedly worth 70 million.

But plaintiff, Your Honor, appealed that use of alternative security, and the Seventh Circuit affirmed. And this is the quote: It noted that alternative security made sense, quote, in an age of titanic damage judgments where the requirement would put the defendant's other creditors in undue jeopardy.

But critically, Your Honor, the Court recognized that the judgment creditor was still protected by the alternative security. And this quote really says it best, Your Honor, and it's on page 5 of the opinion I handed to you at 799 of the cite. And this is critical. The Court says, quote, But we are reluctant to conclude that a district judge commits an abuse of discretion by refusing to allow a plaintiff to execute a judgment in circumstances where the execution may cause a billion-dollar bankruptcy merely because the alternative security to a supersedeas bond that the defendant apparently cannot post provides slightly inferior protection to the plaintiff's interests.

Your Honor, *Olympia* is not our case. It's not even close. Here, plaintiff is proposing no alternative security, let alone security that would be, quote, slightly inferior protection to a supersedeas bond, which was in *Olympia*.

The plaintiffs have only identified one creditor, the IRS. In *Olympia*, there were numerous creditors, Your Honor, and the IRS, unlike the creditors in *Olympia*, is not in an

insecure position. It's not a general unsecured creditor. It has a judgment. It's not like the creditors in *Olympia*. And most importantly, Your Honor, unlike the creditors in *Olympia*, the IRS will not be harmed if Mr. Tricarichi has to file bankruptcy. Why is that? Because his judgment is not dischargeable.

So this isn't -- this isn't the insecure position factor, Your Honor. It's not even close. Our research could not find a single case addressing this last factor where the Court entered a stay without requiring alternative security but, Your Honor, and this is in our brief at page 6, we did find one where the plaintiff tried to make -- where the judgment creditor tried to make the exact same argument that Mr. Hessell was making here, and this is page 6 of our original opposition, and the case is *Leister versus Dovetail*. It's a District Court case out of the Central District of Illinois in the Seventh Circuit. And the judgment debtor made the same argument. No security, but here's that last factor, and here's the *Olympia* case.

They cited the *Olympia* case, and the Court just rejected the comparison outright and said, quote, Western Union, although financially distressed and illiquid was able to post alternate security in the form of cash receivables, and company assets.

Your Honor, and this is quoted in our brief, then the

Court flatly rejects the judgment debtor's request for a free pass: Quote, the defendants offered no alternative security. Moreover, they argue they can't post a bond without harming their own financial condition and that of other creditors. In essence, the defendants seek the Court's blessing to favor themselves and their other creditors over the prevailing plaintiff while the case proceeds on appeal. This Court cannot endorse a plan that allows the defendants to continue to pay other creditors and in so doing potentially harm the status quo vis-à-vis the plaintiff.

Your Honor, the plaintiff is asking here to do the exact same thing. He wants this Court to endorse his plan to favor himself and his lifestyle over PricewaterhouseCoopers while this matter proceeds on appeal. That defeats the entire purpose of Rule 62. It's a nonstarter.

To be clear, Your Honor, we are not asking that this Court favor Pricewaterhouse over the IRS during the appeal. You couldn't do it if you wanted to, Your Honor, and we're not asking you to. We're just asking you that you don't favor the plaintiff over Pricewaterhouse during the appeal.

If the plaintiff is worried about the IRS's position, the plaintiff should notify the IRS and let them take whatever steps they think they need to take to protect their judgment, Your Honor. That's what the plaintiff should do.

And just to be clear, we're not asking plaintiff to

voluntarily transfer anything. The writ -- the Sheriff will attach. It will all be (indiscernible). There will not be any concern on his part about whether he is cooperating with my client in transferring -- in fraudulently transferring assets.

By the way, Your Honor, I think that's the least of his problems right now.

In summary, Your Honor, the plaintiff has not met his burden to prove -- of proof necessary to justify a stay. My client will be prejudiced by a stay, and the motion should be denied.

THE COURT: Okay. So just a quick point of clarification. So is Pricewaterhouse's position that alternate security should be allowed, be required or you don't care where the money comes from as long as the bond gets posted or there's something that equals the bond amount? I just need a clarification what that ultimate position is because I understand you want a denial, but I need to --

MR. BYRNE: Your Honor, it's the plaintiff's job to propose alternate security. In the absence of alternate -- which by the way, is not -- that's an alternative to the plaintiff. The cases are really clear. Post a supersedeas bond or we collect. They have the job to come and say, hey, no look, we'll put you in a position where you're protected. They haven't done that. They said they can't do it.

THE COURT: I think that's before me today. That's

really why I'm trying to get the essence of where my question is. There's been a lot of discussion about what, quote, all of the alternative assets may be, but is that really before the Court today from your position? Because the motion is to, to be clear, it's the exact title; right? Motion to stay execution without a supersedeas bond. It's not, slash, post alternative security, slash, anything else. And the substance is consistent with that titling. So I'm not just taking titling.

MR. BYRNE: That is correct. The issue that you've raised which, Your Honor, is a fair issue is not before this Court. And what the plaintiffs have put before this Court is a request that they get a free pass, no bond, and you enter a stay, and that, Your Honor, under any analysis, we believe, is unsupported. The idea that they could post alternative security, they've all but told you they can't, but that's not in front of the Court. And if it gets in front of the Court, the Court can then consider it.

THE COURT: Okay.

MR. BYRNE: But right now, Your Honor, it's my client's view that we have a judgment that we are allowed to start enforcement actions. It will -- likely the next step will be Barbara Tricarichi's deposition, and we intend on doing that if the Court denies the stay.

Now, plaintiffs can always move again for alternative

relief, and at that point the issue would be in front of the Court.

THE COURT: Okay. Thank you so very much.

Okay. Counsel for plaintiff, you understand I'm going to ask you that same question of, because the way the motion is phrased versus how some of the briefing, and I appreciate good lawyers expand briefing, right, to cover a lot of different topics, but I want to make sure the actual motion before the Court, is it just no bond or, yes -- well, no bond, or is it no bond, slash, also seeking the Court alternative security.

Go ahead, whenever you'd like for your final words. Go ahead, please, Counsel.

MR. HESSELL: Sure. I think as to the question at hand, there isn't a proposal for alternate security because I think Mr. Byrne said it correctly, we -- we don't feel that we are in a position to be able to offer alternative security because, for the reasons, the same reasons why we can't get a bond, which is that the government has a final judgment against Mr. Tricarichi, and if he were to transfer assets for the benefit of PWC, he would be subjecting himself to potential liability, further potential liability to the IRS arising out of the judgment and the lien they already have.

That's why we suggested in the brief that if PWC was willing to indemnify Mr. Tricarichi for the posting of the bond

from potential liability for the IRS, we'd be happy to post the bond and let PWC and the IRS fight over whose money that is, but they cast judgment at that, laughed at that in the brief, and I think I just returned to where you started, which is at the end the inquiry over Factor 5.

And until today, even though there have been two rounds of briefing, Mr. Byrne hadn't done or cited or analyzed any of the things he just said. So I wasn't prepared to dive into those cases because I didn't -- they weren't a point of emphasis. Up until today they had not disputed that Factor 5 here was satisfied, and they had more disputed whether that alone is sufficient.

I just returned to what it says, what *Nelson* says and not the four cases behind it or the other case that they cite to, which is it says, will the defendant, or here, Mr.-- is Mr. Tricarichi in such precarious financial situation that the requirement to post a bond will place other creditors in a further insecure position.

We're not talking about, like, involuntary collection activity that might come in the event that you deny the motion. That's a different issue. The question that is before us is, will a requirement that Mr. Tricarichi voluntarily, meaning post a bond on the PWC judgment, he would have to take his assets to secure the bond, will that process, put the IRS in a more insecure position, and there's really no way to deny that

it will because the taking of that money, the bond is solely for the benefit of PWC. It's not a bond that then secures the IRS judgment. Those assets are irretrievably transferred, and so --

THE COURT: Counsel, can I pause you for a quick second.

MR. HESSELL: Yeah.

THE COURT: I think preemption issues and things like that aren't before the Court, but I'm hearing you say that, but are you -- I have to go back. I'm a Nevada District Court Judge; right? Federal issues of tax lien enforcement is, shall we say, challenging for how you're saying that the posting of a bond takes away the right from the IRS. I really am getting to the heart of it.

And by the way, just FYI, counsel for defendant is correct. Page 6 of their brief does specifically, notably absent from Tricarichi's motion is any case analyzing the factor Tricarichi attempts to utilize, and it goes through *Leister*. It goes through *Milwaukee*. It goes through a whole bunch of different cases for different jurisdictions.

So the Court does find it's before the Court because it was analyzed in the original briefing. The other case was cited in the supplemental briefing. So I do see that. That's why I was asking my questions on 5 because it seems like what you're relying on, it seems like what they're disputing.

So, but going back to the question, how are you saying that a Nevada Judge in denying a motion for allowing a stay without a supersedeas bond has somehow impacted the United States government, slash, Internal Revenue Service's right to anything here potentially, $2 million of 35 million that they haven't sought to do an X amount of time. I just -- I don't see that that's been presented to the Court of how that impact would happen.

Go ahead, please.

MR. HESSELL: Yeah. The way that it's being presented to Your Honor is not to rule on who has priority between PWC and the IRS, but the way that it's being presented to you is under the fifth factor in *Nelson's* analysis.

The question that you are faced with is will the requirement to post a bond for the benefit only of PWC put other creditors, i.e., the IRS, in a more insecure position? And there's really no way to deny that because taking $2 million of his assets and making them be behind a bond that is only for PWC's benefit will put the IRS in a more insecure position. So while --

THE COURT: How though, Counsel -- Counsel, the reason why I'm asking and I'm walking it through its logical result; right? Say Tricarichi does the $2 million bond, okay. So then walk it through. The IRS either, A, doesn't do anything during the pendency of the appeal; or B, says they

want to collect. The first situation, nothing happens because they haven't done anything, like they haven't done anything for years, okay.

Choice two is they determine to collect. That's really not Tricarichi's issue; right? Because then PWC would have to say sorry, IRS, you can't take this money. It's just for us, and we're a private company, and that would be before some other Judge addressing that issue if they contested that. So I really just -- where I'm really seeing is where the money is being placed; right? Is it in pot A or pot B? You know, I'm not seeing how it actually disadvantages them because of the nature of the creditor being the IRS, which is distinguishable from all the cases cited to this Court, and that's why I'm asking you the question. Go ahead, please.

MR. HESSELL: Right. I think two points there. One is the issue of the requirement of posting a bond puts Mr. Tricarichi in further jeopardy vis-à-vis the IRS because they would suggest you have transferred our money that we have a lien on to the benefit of a different creditor who doesn't even yet have a final judgment.

THE COURT: But doesn't -- but doesn't that apply to every penny that he's been spending since their judgment? See that's why I don't see the distinction; right? I mean, I appreciate it's smaller amounts of money of what the supposedly three women, the assistant, you know, I owe the assistant,

okay, here and all those things; right, but I'm not seeing how it's a different argument.

For here, it's in a bond; right? So it is a lot more secure. You're not having to go chase after person A, B, C. You're not having to chase after potentially clawing back money from a property that was sold, whether it was or was not a community property assets, not before this Court. So I don't have to go there.

But I just -- it really seems to me is it's a nice little safe place to put the money. If the IRS thinks it wants it, then that's really between it and PWC, subject to whichever Court has to address that issue, which is not before me today.

You understand where I'm coming from?

MR. HESSELL: I do.

THE COURT: Because I'm hearing what you're saying, but -- so the $8 million was okay for him to spend in different concepts, but this is not -- is the argument that PWC has raised, and that's why I'm asking you the question.

MR. HESSELL: Well, I mean, the telecom is a totally different situation because it's prejudgment by the IRS.

As to the expenses between then and now that he has incurred, he may very well be in jeopardy for those expenses, but those expenses are not before the Court.

What is before the Court is a requirement to post a bond. And if what you're saying is I don't think the IRS will

be in any worse situation because the bond can be set for the benefit of either PWC or the IRS, and that's how you want to address the potential insecurity created under Factor 5, I think that's a reasonable resolution, but is PWC going to agree on the record that the money can be for the benefit of either the IRS or them, that they're not asserting and not insisting that the money be set aside only for their benefit, but also for the benefit of the $35 million that Mr. Tricarichi owes the IRS? Because if they're willing to stipulate to that, then maybe we have an agreement.

THE COURT: Well, you get last word, but would you like me to ask counsel for PWC? You realize the Court wasn't proposing that. The Court was asking questions based on the issues raised in the opposition and the supplemental briefs, taking into account all of the pleadings.

Counsel for PWC, do you wish to respond to that question by counsel for plaintiff?

MR. BYRNE: Your Honor, if the plaintiff will allow me.

THE COURT: Counsel, are you okay with Mr. Byrne answering the question that you just raised?

MR. HESSELL: Sure.

MR. BYRNE: Your Honor, he's missing your point, first off. The point is it doesn't need to be the IRS's --

THE COURT RECORDER: Mr. Byrne --

MR. BYRNE: It doesn't need to be.

THE COURT RECORDER: Mr. Byrne (indiscernible).

MR. BYRNE: It doesn't need to be a joint parties in the supersedeas bond. It's the whole reason why the IRS is not in an insecure position if you believe what they're telling you. They can step in and say this is our asset at any time. That's why they're not insecure. Unlike in Western Union where the creditors were -- the unsecured creditors without a judgment.

The IRS has their judgment. They're not insecure, and that's why the whole analysis falls right there. And you're right. If he gets a supersedeas bond, at any point the IRS decides that they're going to stop taking their eight-year nap, they can come in and start enforcing their rights.

THE COURT: Well, I'm not making a ruling. I'm asking the question because you raised that in your brief. Remember, I'm a little Nevada District Court Judge. I don't make federal court decisions. I don't make bankruptcy decisions. I don't make decisions in other states; right? I present -- I make a decision on the actual cases before me.

Okay. Thank you.

So, Counsel, I need you just to finish up if you don't mind.

MR. HESSELL: Sure.

THE COURT: It seems like you don't seem to --

MR. HESSELL: I just want to say -- yeah, I just want to say one more thing, which is the reason why the IRS is in a more insecure position by virtue of requiring a bond is because everybody agrees that Mr. Tricarichi does not have sufficient assets, wherever they may be found, to cover the $35 million that's currently owed, much less an additional 2 to PWC. So taking 2 of what he does have and making it solely for the benefit of the PWC -- solely for the benefit of PWC does put the IRS in a more insecure position today than it would if you granted the motion to stay.

And that's the point is that if they're unwilling to acknowledge or agree that the bond can be for the benefit of the IRS or PWC, whoever ends up fighting over it, then I think it necessarily follows that Factor 5 has been satisfied because the requirement to post a bond will put the IRS in a worse position than it would be in the absence of the requirement to post a bond, and *Nelson* says that that's sufficient for this Court to stay enforcement of the judgment until -- this is not forever; right? I mean, we're talking about a year maybe on the appeal.

THE COURT: Okay. I appreciate it. Thank you so much.

Once again, thank you again for excellent argument. You all had over an hour or excuse me, about 58 minutes I probably should say more accurately. So everyone's had a full

time to argue it. You had supplemental briefs. The Court's (indiscernible) everyone has had a full opportunity to fully take this as far as you wished to go, and the Court needs to deny plaintiff's motion for a stay of execution without supersedeas bond, okay.

And the reasoning is, realistically, straight *Nelson* factors. So complexity of the collection process. The Court does find that there is a complexity of the collection process. As you've all raised, they're community property issues, the issues with regards to competing judgments. There's a lot of very complex issues.

I think the fact that this case has been going on since 2016 might highlight that this is, well, (indiscernible) a long-standing issue that's gone up and down with a whole bunch of variety of different courts.

The amount, and I'm only looking at the complexity of the collection process, where we are standing today, my statement in no way is to be intended that somehow I'm looking at historical aspects. I'm just saying it's been complex from start to finish, and it continued to be complex with new complexities coming into play with regards to specifically like the community property issue, the two judgment issues, et cetera, the multistate property issue. There's a whole bunch of complex issues.

Two, the amount of time the party obtained the

judgment after it's affirmed on appeal, well, that factor also goes in favor of PWC.

The degree of confidence that the District Court has in the availability of funds.

Well, you aren't disputing that. There's not really an availability of funds. So that goes to PWC why the Court needs to deny it, and that was confirmed with the judgment debtor exam.

Whether the defendant's ability to pay the judgment is so plain that the cost of the bond would be a waste of money. Well, that's not really even being argued because it's saying the opposite, saying that there isn't so many funds there, and so therefore that Factor 4 goes in favor of PWC as well.

Factor 5, the crux of where you all are going, the Court is, as you all asked me to, take into account the initial briefing and the supplemental briefing. The Court does not find that, and let me read the factors so we're clear.

Factor 5 reads, whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position.

The Court can't find as a matter of law that the IRS, which is the only, quote, other creditor that's been presented to this Court would be in a insecure position because, A, the

IRS already has a judgment. It's undisputed.

B, the IRS is the internal revenue service with regards to the federal government, and the issues here is a matter of state law and a bond issue for a state law case in the State of Nevada. The Court takes no position with regards to whether preemption may or may not occur, but the Court has to take that into account, and C, there hasn't even been any evidence.

While I appreciate excellent oral argument that somehow putting $2 million into a bond potentially might have some impact, but there's been nothing presented to this Court that the IRS feels that it would somehow impact it or even was put on notice of whether it would be impacted or that the IRS couldn't attach said bond or that the IRS would even attempt to attach said bond during the intervening time that this case would be on appeal.

So therefore Factor 5 goes by straight Nevada case law, looking at the cases that Nevada case law was -- relied on in coming to the *Nelson* decision and even just looking at some of the other cases that were cited around the country which are not precedential, but are at least informative in a similar type situation, but here you have the Internal Revenue Service. You don't have one private creditor in one state. You have the federal government.

So when I look at all those factors, those all being

that the Court needs to, as I stated, deny the motion for a stay of execution without supersedeas bond.

The parties have specifically articulated to the Court that that is a 62(d)(1) issue, that 62(d)(2), the other, quote, security issue is not before the Court because that is not being proposed as an alternative either specifically in the pleadings or articulated in oral arguments because, in fact, just the opposite has been stated in saying that there wasn't other security.

So the Court analyzes what was actually before the Court, made its ruling. It is so ordered. The motion is denied.

That means counsel for the nonmovant, i.e., PWC, you get to prepare the order. Please circulate it to opposing counsel before you provide it back to the Court in accordance with EDCR 7.21 to the DC XXXI inbox in accordance with the administrative order.

Is there any reason that you think you need more then the 14 days to get this order? If so, please let the Court know.

Counsel for defense, any reason that you think so?

MR. BYRNE: No. 14 days is sufficient, Your Honor.

THE COURT: Okay. So please do make sure you circulate it. Thank you so very much.

Once again, thank you again for excellent briefing

and oral argument. Have a great day and week, everyone. Take care.

MR. BYRNE: Thank you, Your Honor.

MR. HESSELL: One more thing, Your Honor, before we go off the record. I know it's going to take them a couple weeks or it may take them some time to draft the order, but in the intervening period of time, because we undoubtedly are going to ask the Court of Appeals to revisit this issue, will you stay enforcement for 30 days to give us the opportunity to do so?

THE COURT: Counsel for defense, what's your position?

MR. BYRNE: Well, our position is absolutely not, Your Honor.

THE COURT: Okay. Well, the Court doesn't see, A, and I appreciate oral motions come up during a hearing, but the Court doesn't see that there would be a basis to do so for a couple of different reasons. One, for the whole analysis that the Court just provided on why I am denying the motion, but two, you also have the issue of the Court really would need this order in order to -- and these are two independent reasons; right?

The Court really would need the order in which to make a change to said order. Even the fact that it was an oral pronouncement, I don't see that there is a basis to do so that,

realistically, in light of the Court's whole analysis, whether it's -- and by the way, the order has got to get to the Court within 14 days, and there's no reason why counsel can't get it to the court sooner; right? It's got to be under EDCR 7.21, 14 days. The Court doesn't see a basis with regards to those 14 days because, realistically, as all parties know, *Division of Family Services* and *Rust versus Clark County*, I'm not seeing how PWC says that somehow they're going to be able to enforce something before they actually have an order with regards to that, but -- so I don't see that there's --

MR. BYRNE: Thank you for the warning, Your Honor.

THE COURT: Huh?

MR. BYRNE: Thank you for the warning.

THE COURT: I take no positions. The quickly you get an order is the quickly as you get an order. I'm not saying -- now, remember, this order is denying the bond, supersedeas bond at no cost. That's the scope of the Court's full order.

The Court's not taking any position on any prior orders that the Court has already made, any prior judgments, but it really is in the hands of PWC, how quickly they want to get an order in on today's motion and where you all go for your very next step.

But, realistically, in light of the Court's analysis, I don't see that the stay for 30 days, because it could have some of the same impact with regards to the various factors

asserted in the opposition.

So, A, no, I cannot. So therefore I have to deny that oral request since it was objected to by opposing counsel, who also would not have had an opportunity to brief the issue, and so I've got a due process additional issue.

Thank you so very much, everyone. Have a great one.

MR. BYRNE: Thank you, Your Honor.

(Proceedings concluded at 9:34 a.m.)

-oOo-

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.

Dana L. Williams
Transcriber

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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 **DECLARATION OF MICHAEL TRICARICHI IN SUPPORT OF PLAINTIFF'S MOTION FOR STAY OF EXECUTION WITHOUT SUPERSEDEAS BOND**

I, Michael Tricarichi, declare and state under penalty of perjury as follows:

1. I am of legal age and am competent to make this declaration.

2. I am a Nevada resident and reside at 8440 Warbonnet Way, Las Vegas, Nevada 44113.

3. This declaration is based on information which I specifically observed and is intended to be filed in support of Plaintiff's Motion For Stay of Execution Pending Appeal Without Supersedeas Bond.

4. In 2018, the Internal Revenue Service of the United States obtained a final judgment in a tax court case against me, affirming an IRS notice of transferee liability against me personally for a sum in excess of Thirty-Five Million Dollars (the "IRS Judgment").

5. I do not have personal assets sufficient to pay the IRS Judgment or the interest charges that continue to accrue.

6. In February 2023, this Court awarded Defendant PriceWaterhouseCoopers LLP its attorneys' fees and costs totaling approximately $2.4 million.

7. I do not have personal assets sufficient to pay the attorneys' fee award.

8. In connection with the award of attorneys' fees in this case, I have approached both a bank and a bond broker to try to obtain a credit line and/or a bond in the amount of the fee award.

9. I do not have the personal collateral necessary to support such a credit line or bond, even without taking into consideration that my personal assets are encumbered by a federal tax lien.

10. I do not have the personal cashflow necessary to support the maintenance of such a credit line or bond.

11. Given the above, I am not able to secure a credit line or bond to stay execution of the attorneys' fees award pending appeal.

FURTHER DECLARANT SAYETH NAUGHT.

Michael Tricarichi

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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 **DECLARATION OF MARK RADER IN SUPPORT OF PLAINTIFF'S MOTION FOR STAY OF EXECUTION WITHOUT SUPERSEDEAS BOND**

I, Mark Rader, declare and state under penalty of perjury as follows:

1. I am of legal age and am competent to make this declaration.

2. I am an Ohio resident and am employed by Oswald Company, a national insurance broker, with locations including Cleveland, Ohio.

3. This declaration is based on information of which I am aware due to my employment with Oswald.

4. In the fall of 2023, I was approached by Randy J. Hart, a Cleveland-based attorney regarding his client securing a supersedeas appellate bond.

5. At that time, I informed Mr. Hart that in order to obtain such a bond from the companies of which I am aware, those companies would need an Irrevocable Letter of Credit issued by a reputable bank in the full amount of the bond.

FURTHER DECLARANT SAYETH NAUGHT.

Mark Rader

Mark Rader

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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. 31 **ORDER DENYING DEFENDANT PRICEWATERHOUSECOOPERS LLP'S RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT**

The Court, having read and considered Defendant PricewaterhouseCoopers, LLP ("PwC")'s Renewed Motion for Partial Summary Judgment ("Motion"), Plaintiff Michael Tricarichi ("Plaintiff")'s Opposition and PwC's Reply; having heard and considered the oral argument of counsel Mark Levine of Bartlit Beck, LLP, appearing on behalf of PwC, and Scott Hessell of Sperling & Slater, P.C., on behalf of Plaintiff, and with good cause appearing, the Court denies PwC's Motion for the following reasons:

/ / /

1. PwC's Motion requests the Court grant partial summary judgment on Count III of Plaintiff's amended complaint, dated April 1, 2019, enforcing a contractual limitation of liability clause contained in the "Terms of Engagement" to the parties' engagement letter, and thereby limit Plaintiff's potential damages to $48,552.

2. The relevant provision found in section 7 of the Terms of Engagement is entitled "Limitation of Liability" and provides in relevant part as follows:

> IN NO EVENT, UNLESS IT HAS BEEN FINALLY DETERMINED THAT [PWC] WAS GROSSLY NEGLIGENT OR ACTED WILLFULLY OR FRAUDLENTLY, SHALL [PWC] BE LIABLE TO THE CLIENT . . . FOR ANY AMOUNT IN EXCESS OF THE TOTAL PROFESSIONAL FEE PAID BY YOU TO US UNDER THIS AGREEMENT FOR THE PARTICULAR SERVICE TO WHICH SUCH CLAIM RELATES.

3. Plaintiff contends (1) the provision is inapplicable to the pending claim (Count III) arising out of IRS Notice 2008-111 rather than those previously alleged under the engagement letter and found untimely by the Court's Order, dated October 22, 2018, and (2) there are questions of fact concerning whether PwC's conduct is excepted by the Limitation of Liability provision as gross negligence or otherwise.

4. PwC disputes both of Plaintiff's contentions and further argues Plaintiff was required to plead gross negligence but failed to do so.

COURT'S RULING

5. The Court finds there are disputed questions of fact to be resolved at trial concerning whether PwC's conduct rises to gross negligence, which preclude granting the Motion.

6. As to PwC's contention that Count III does not specifically allege a claim for "Gross Negligence," in Nevada, the concept of gross negligence is subsumed within a claim for negligence—that is, there need not be a separate and distinct cause of action for gross negligence. Often, courts receive motions to strike complaints alleging separate causes of action for gross negligence and negligence because such allegations are duplicative. Regardless, there are allegations in the amended complaint putting PwC on notice of Plaintiff's intent to establish gross

negligence. *See, e.g.*, Am. Compl. ¶¶ 3, 115, 120. Given the standard for a motion for partial summary judgement under Rule 56, which compels the Court to view the arguments in favor of the non-moving party, the Court cannot conclude that the Amended Complaint does not, on its face, allege gross negligence such that the Court would foreclose damages on a Rule 56 standard.

7. The Court cannot rule as matter of law that gross negligence is not part of this case, which means Plaintiff ~~will be~~ may if there is a basis permitted to present evidence and make arguments about the full asserted damages. On that basis, the Court cannot grant partial summary judgment that Plaintiff's claim cannot exceed $48,552.

8. As to the applicability of the Limitation of Liability provision to Count III, the Court cannot conclude, as a matter of law, that the Limitation of Liability provision applies to Plaintiff's operative claim. The Court finds the movant has not met its initial burden to say as a matter of law that the provision applies and therefore must deny without prejudice PwC's request to find the provision applicable.

Accordingly, **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that PwC's Renewed Motion for Partial Summary Judgment is **DENIED** without prejudice.

Dated this 16th day of June, 2022

C49 8E1 F496 CFAB
Joanna S. Kishner
District Court Judge

SUBMITTED BY:

/s/ Ariel C. Johnson
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APPROVED AS TO FORM AND CONTENT BY:

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Attorneys for Defendant PricewaterhouseCoopers LLP

Alexandria Jones

From: Austin, Bradley <baustin@swlaw.com>
Sent: Wednesday, June 15, 2022 1:00 PM
To: Ariel C. Johnson
Cc: Mark Levine; Chris Landgraff; Daniel Taylor; Kate Roin; Byrne, Pat; shessell@sperling-law.com; bsercye@sperling-law.com; Maddy Carnate-Peralta; Alexandria Jones
Subject: RE: Proposed SAO - Extend Briefing Schedule - PwC's MPSJ

Hi Ariel,

Thank you for preparing. We recommend removing the blank date above the judge's signature line so that it conforms to the format outlined in Admin. Order 22-07. With that minor change, you may affix my e-signature and submit.

Thanks,

Brad

From: Ariel C. Johnson <ajohnson@hutchlegal.com>
Sent: Tuesday, June 14, 2022 9:20 AM
To: Austin, Bradley <baustin@swlaw.com>
Cc: Mark Levine <mark.levine@bartlitbeck.com>; Chris Landgraff <chris.landgraff@bartlitbeck.com>; Daniel Taylor <dan.taylor@bartlitbeck.com>; Kate Roin <kate.roin@bartlitbeck.com>; Byrne, Pat <pbyrne@swlaw.com>; shessell@sperling-law.com; bsercye@sperling-law.com; Maddy Carnate-Peralta <mcarnate@hutchlegal.com>; Alexandria Jones <ajones@hutchlegal.com>
Subject: RE: Proposed SAO - Extend Briefing Schedule - PwC's MPSJ

[EXTERNAL] **ajohnson@hutchlegal.com**

Good morning,

Please find attached Plaintiff's Proposed Order Denying PwC's Motion for Partial Summary Judgment for your review and comment.

If you are agreeable to the proposed Order in its current form, please respond to this email confirm the same as well as your approval to affix your electronic signature to the Order.

Sincerely,

Ariel

From: Austin, Bradley <baustin@swlaw.com>
Sent: Thursday, May 12, 2022 10:22 AM
To: Ariel C. Johnson <ajohnson@hutchlegal.com>
Cc: Mark Levine <mark.levine@bartlitbeck.com>; Chris Landgraff <chris.landgraff@bartlitbeck.com>; Daniel Taylor <dan.taylor@bartlitbeck.com>; Kate Roin <kate.roin@bartlitbeck.com>; Byrne, Pat <pbyrne@swlaw.com>;

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

AUTOMATED CERTIFICATE OF SERVICE

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

Service Date: 6/16/2022

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2/9/2023 2:18 PM

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

FFCL

DISTRICT COURT

CLARK COUNTY, NEVADA

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

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

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

Case Number: A-16-735910-B

FINDINGS OF FACT

I. Introduction and Relevant Parties

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

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

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

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

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

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

II. The Westside Transaction

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

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

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

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

III. PwC's Engagement

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

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

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

12. The Engagement Agreement specified that PwC would provide

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

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

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

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

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

Id. at 007.

14. Section 3 of the Engagement Agreement advised that

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

Id. at 006.

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

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

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

and insurance).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. The Enbridge Matter

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

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

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

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

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

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

B. The Marshall Matter

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

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

39. As with the Enbridge matter, the Court finds numerous differences between the Marshall matter and the instant case. The Marshalls undertook an integrated transaction with significant non-cash built-in gain assets (as opposed to none in the Westside Transaction), and the nature of this transaction presented greater risks of transferee liability than the Westside Transaction. TT8 (Vol. 1) 199:3–12 (Harris). Given the differences in the matters, Tricarichi did not meet his burden to show that PwC has liability to him for failing to disclose or take into account the advice given in that transaction.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Transaction. Ex. 174; Ex. 182.

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

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

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

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

VI. Procedural History of Tricarichi's Dispute with PwC

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

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

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

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

82. In the meantime, Tricarichi pursued a professional negligence

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

VII. Standards of Professional Care

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

advice on reportability had such a low confidence level.

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

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

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

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

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

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

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

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

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

135. Moreover, as the Court has found above, both the Enbridge and Marshall transactions were substantially distinct from the Westside Transaction, and there is no reason to believe that PwC's work in those two matters rendered their advice to Tricarichi any more or less correct.

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

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

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

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

IV. Third Element: Tricarichi Has Not Proven Causation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. Fourth Element: Damages

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

VI. Basis of PwC's Affirmative Defenses

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ORDER AND JUDGMENT

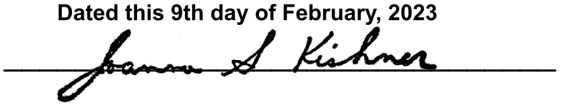
THEREFORE, PURSUANT TO THE ABOVE FINDINGS OF FACT and CONCLUSIONS OF LAW, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Judgment shall be entered in favor of Defendant PwC and Plaintiff Tricarichi shall take nothing from his Complaint.

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

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

Dated this 9th day of February, 2023.

Dated this 9th day of February, 2023



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Joanna S. Kishner
District Court Judge

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

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

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

AUTOMATED CERTIFICATE OF SERVICE

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

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