

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL TRICARICHI,

Appellant,

v.

PRICEWATERHOUSECOOPERS,
LLP,

Respondent.

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Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court No: 86317

87375

87835

Appeal from the District Court of Clark County, Nevada

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

APPELLANT'S APPENDIX TO OPENING BRIEF

VOLUME 1 of 8

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CERTIFICATE OF SERVICE

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

ALL COUNSEL ON SERVICE LIST

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

BUSINESS COURT CIVIL COVER SHEET A-16-735910-B

Clark County, Nevada

XV

Case No. _____
(Assigned by Clerk's Office)

I. Party Information *(provide both home and mailing addresses if different)*

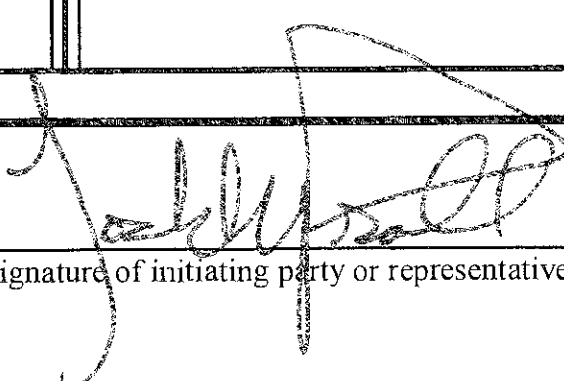
Plaintiff(s) (name/address/phone): MICHAEL A. TRICARICHI	Defendant(s) (name/address/phone): PRICEWATERHOUSE COOPERS, LLP, et al.
Attorney (name/address/phone): Mark A. Hutchison, Esq., Todd L. Moody, Todd W. Prall Hutchison & Steffen, LLC, 10080 W. Alta Drive, Suite 200, Las Vegas, NV 89145, Tel: 702-385-2500	Attorney (name/address/phone):

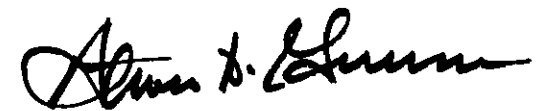
II. Nature of Controversy *(Please check the applicable boxes for both the civil case type and business court case type)*

☐ Arbitration Requested

Civil Case Filing Types		Business Court Filing Types
Real Property Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant Title to Property <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Other Title to Property Other Real Property <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	Torts Negligence <input type="checkbox"/> Auto <input type="checkbox"/> Premises Liability <input type="checkbox"/> Other Negligence Malpractice <input type="checkbox"/> Medical/Dental <input type="checkbox"/> Legal <input type="checkbox"/> Accounting <input type="checkbox"/> Other Malpractice Other Torts <input type="checkbox"/> Product Liability <input checked="" type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Employment Tort <input type="checkbox"/> Insurance Tort <input type="checkbox"/> Other Tort	CLARK COUNTY BUSINESS COURT <input type="checkbox"/> NRS Chapters 78-89 <input type="checkbox"/> Commodities (NRS 91) <input type="checkbox"/> Securities (NRS 90) <input type="checkbox"/> Mergers (NRS 92A) <input type="checkbox"/> Uniform Commercial Code (NRS 104) <input type="checkbox"/> Purchase/Sale of Stock, Assets, or Real Estate <input type="checkbox"/> Trademark or Trade Name (NRS 600) <input type="checkbox"/> Enhanced Case Management <input checked="" type="checkbox"/> Other Business Court Matters
Construction Defect & Contract Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect Contract Case <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input type="checkbox"/> Other Contract	Civil Writs <input type="checkbox"/> Writ of Habeas Corpus <input type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrant <input type="checkbox"/> Writ of Prohibition <input type="checkbox"/> Other Civil Writ	WASHOE COUNTY BUSINESS COURT <input type="checkbox"/> NRS Chapters 78-88 <input type="checkbox"/> Commodities (NRS 91) <input type="checkbox"/> Securities (NRS 90) <input type="checkbox"/> Investments (NRS 104 Art.8) <input type="checkbox"/> Deceptive Trade Practices (NRS 598) <input type="checkbox"/> Trademark/Trade Name (NRS 600) <input type="checkbox"/> Trade Secrets (NRS 600A) <input type="checkbox"/> Enhanced Case Management <input type="checkbox"/> Other Business Court Matters
Judicial Review/Appeal/Other Civil Filing Judicial Review <input type="checkbox"/> Foreclosure Mediation Case Appeal Other <input type="checkbox"/> Appeal from Lower Court		
Other Civil Filing <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Other Civil Matters		

29th Apr 2016
Date


Signature of initiating party or representative



CLERK OF THE COURT

1 COMP

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24 DISTRICT COURT

25 CLARK COUNTY, NEVADA

A-16-735910-B

26 MICHAEL A. TRICARICHI,

27 Plaintiff,

28 v.

29 PRICEWATERHOUSECOOPERS, LLP,

30 COÖPERATIEVE RABOBANK U.A.,

31 UTRECHT-AMERICA FINANCE CO.,

32 SEYFARTH SHAW LLP and GRAHAM R.

33 TAYLOR,

34 Defendants.

) CASE NO.

) DEPT NO. XV

) COMPLAINT

) BUSINESS COURT MATTER

) JURY TRIAL DEMANDED

) EXEMPT FROM ARBITRATION

NATURE OF THE CASE

1
2 1. Plaintiff, Michael Tricarichi, built a cellular telephone business from the ground
3 up and preserved that business through years of litigation necessitated by the illegal trade
4 practices of several larger, competing cellular providers. After those competitors were found
5 liable for their anticompetitive actions, Mr. Tricarichi and his company, Westside Cellular,
6 resolved the damages owed for those actions via a substantial settlement. As part of the
7 settlement, Mr. Tricarichi's company exited the cellular phone business.
8

9 2. Faced with the question of what to do next, Mr. Tricarichi considered a number
10 of options, including investing in other ventures via Westside, of which he was the sole
11 shareholder. During this process, Mr. Tricarichi met with representatives of another company,
12 Fortrend International, LLC ("Fortrend"), which offered to buy all his shares in Westside and
13 employ Westside in Fortrend's debt-collection business. Fortrend represented, among other
14 things, that Westside's remaining assets would facilitate this business, and that it would employ
15 Westside's tax liabilities to legitimately offset tax deductions associated with the debt-collection
16 business. As a result, Fortrend said, Mr. Tricarichi would realize a greater net return on his
17 investment in Westside than would otherwise be the case if Westside were liquidated.
18 Fortrend assured Mr. Tricarichi that the proposed transaction, including its tax aspect, was
19 legitimate and in accordance with the tax laws. Unbeknownst to Plaintiff, Fortrend's
20 representations and assurances were knowingly false.
21
22

23 3. Mr. Tricarichi retained a nationally recognized accounting firm with expertise in
24 tax matters – Defendant PricewaterhouseCoopers LLP ("PwC") – to review the proposed
25 transaction. PwC, via its senior partner Richard Stovsky and tax experts in its National Tax
26 Office, did so, ultimately advising Mr. Tricarichi that the proposed transaction was legitimate
27 for tax purposes, and that Mr. Tricarichi had no ongoing exposure related to Westside once the
28

1 transaction with Fortrend was completed. Unbeknownst to Mr. Tricarichi at the time, PwC's
2 advice in this regard was, at minimum, grossly negligent.

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

8
9 5. Defendants Seyfarth Shaw LLP ("Seyfarth") and Graham R. Taylor – a law firm
10 and a now-disbarred lawyer who was a Seyfarth partner at the time – unbeknownst to Plaintiff
11 until years later, further facilitated the transaction by providing Fortrend with a legal opinion
12 blessing steps that Fortrend would take but that Seyfarth and Taylor actually knew to be
13 illegitimate for tax purposes – also in return for a substantial fee.

14
15 6. Despite their representations and advice to the contrary to Mr. Tricarichi,
16 Fortrend knew and PwC should have known that the Fortrend transaction was illegitimate for
17 tax purposes, and would result in substantial tax and penalty exposure to Mr. Tricarichi
18 personally. Defendants Rabobank, Utrecht, Seyfarth and Taylor knew the same thing, but they
19 failed to disclose this material information to Mr. Tricarichi and otherwise facilitated the
20 transaction that would result in harm to him.

21
22 7. As a result of Defendants' actions, Plaintiff was forced to defend himself before
23 the IRS and in the U.S. Tax Court, and was found liable in October 2015 for millions of dollars
24 in back taxes, penalties and interest, which Fortrend did not pay.

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

PARTIES

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

10. Defendant PricewaterhouseCoopers LLP ("PwC") is a limited liability partnership organized and existing under the law of Delaware, and is registered with the Nevada Secretary of State to do business in the State of Nevada. PwC engages in the business of tax and business consulting and has maintained a Nevada CPA License (PART-0663) since at least 1990. PwC has offices and is doing business in the City of Las Vegas, Clark County, Nevada and PwC has partners who reside in the State of Nevada. At all times material to this Complaint, PwC held itself out to the public, including to the Plaintiff, as having specialized knowledge and skill possessed by a specialist in the field of income taxes, tax savings transactions, and business tax consulting.

11. Defendant Coöperatieve Rabobank U.A. ("Rabobank"), formerly known as Coöperatieve Centrale Raiffeisen-Boerenleenbank, B.A., is a bank with principal branches in New York, New York and Utrecht, Netherlands. Rabobank is organized as a Dutch cooperative and regulated in the U.S. by the Federal Reserve Bank of New York and other agencies. Rabobank did business with Plaintiff in Nevada via its New York branch. Rabobank also has other offices throughout the world and the United States and does business in the U.S. and, on information and belief, Nevada via a number of branches, divisions and affiliates, including Defendant Utrecht-America Finance Co. During the period relevant to this complaint, Rabobank's business included financing and facilitating, via such

1 units, certain tax savings transactions promoted by third parties including Fortrend
2 International, LLC and Midcoast Credit Corp. Rabobank purposefully did business with
3 Plaintiff in Las Vegas, Clark County, Nevada in connection with such a transaction,
4 including entering a deposit account agreement with Plaintiff in Las Vegas.

5
6 12. Defendant Utrecht-America Finance Co. ("Utrecht"), a wholly-owned
7 subsidiary of Rabobank, is a Delaware corporation with its principal place of business in New
8 York. Utrecht was, on information and belief, a subsidiary via which Rabobank financed
9 transactions promoted by Fortrend, Midcoast and related entities, and financed the transaction
10 into which Plaintiff was drawn. Utrecht purposefully directed its activities complained of
11 herein toward and established contacts with Las Vegas, Clark County, Nevada in
12 participating in the transaction described below.

13
14 13. Defendant Seyfarth Shaw LLP ("Seyfarth") is a law firm with its principal
15 office in Chicago, Illinois. Seyfarth has offices and is doing business in a number of
16 different cities and states including San Francisco, California, and, on information and belief,
17 Nevada. At least one Seyfarth attorney maintains a Nevada bar license and on information
18 and belief Seyfarth partners reside and/or do business in Nevada. During the period relevant
19 to this complaint, Seyfarth's business included providing opinion letters that facilitated certain
20 tax savings transactions promoted by third parties including Fortrend International, LLC.

21
22 14. Defendant Graham R. Taylor ("Taylor") is a disbarred lawyer residing, on
23 information and belief, in Tiburon, California. During the period relevant to this complaint,
24 Taylor was a partner at and agent of Seyfarth whose business included providing opinion
25 letters that facilitated certain tax savings transactions promoted by third parties such as
26 Fortrend International, LLC, including a transaction promoted to Plaintiff. After his
27 involvement in this transaction, Taylor pleaded guilty in Utah federal court to conspiring to
28 commit tax fraud, and was subsequently disbarred.

THIRD PARTIES

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

16. Timothy H. Vu (f/k/a Timothy H. Conn, a/k/a Timothy Conn Vu) (“Conn Vu”) is an individual residing in San Francisco, California, who has held himself out as a tax practitioner. In or about March 2003, Conn Vu began working with Fortrend as its agent to promote and facilitate certain tax-shelter transactions, including the transaction promoted to Plaintiff. On information and belief, Conn Vu managed various companies acquired by Fortrend, which he and other co-promoters used to facilitate tax-avoidance transactions. These companies included Westside Cellular. Conn Vu is currently the subject of a federal criminal investigation in New York with respect to such conduct, and it is anticipated that he will be indicted.

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

18. Midcoast Credit Corp. (“Midcoast”) is, on information and belief, a defunct Florida corporation that had its principal place of business in West Palm Beach, Florida. During the period relevant to this complaint, Midcoast and its affiliates were engaged in the promotion of certain tax-shelter transactions, including a transaction promoted to Plaintiff. In October 2013, the principals of Midcoast, along with other individuals, were indicted and charged with

criminal conspiracy to commit fraud and other offenses for allegedly designing and implementing fraudulent tax schemes.

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

JURISDICTION AND VENUE

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

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

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

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

FACTUAL BACKGROUND

Midco Transactions Generally

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

25. Midco-type transactions were generally promoted to shareholders of closely held C corporations that had incurred large taxable gains. Promoters of Midco transactions targeted such shareholders and offered a purported solution to “double taxation,” that is, the taxation of gains at both the corporate and individual shareholder levels. Generally speaking, Midco transactions proceeded as follows: First, an “intermediary company,” or “midco,” affiliated with the promoter – typically a shell company, often organized offshore – would purchase the shares of the target company, and thus its tax liability. After acquiring the shares and this tax liability, the intermediary company would engage in a second step that was supposed to offset the target’s realized gains and eliminate the corporate-level tax. This second step, unbeknownst to the selling shareholder(s), would itself constitute an improper tax-avoidance maneuver, frequently a “distressed asset/debt,” or “DAD,” tax shelter (discussed in more detail below). The promoter received cash via the transaction, and represented to the target company’s shareholders that they would legitimately net more for their shares than they otherwise would absent the intermediary transaction.

26. As was the case with Plaintiff’s transaction, however, such representations often proved, years later, to be false. As set forth below, Plaintiff (and others like him)

1 subsequently found himself “holding the bag” after the transaction that was promoted to him
2 by Fortrend and Midcoast; facilitated by Defendants Rabobank, Utrecht, Seyfarth and
3 Taylor; and blessed by Defendant PwC, resulted in substantial tax liabilities and penalties
4 for Plaintiff personally.

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

6 27. Prior to 2003, Plaintiff was the president and sole shareholder of Westside
7 Cellular, Inc. (“Westside”). From 1991 through 2003, Westside undertook various
8 telecommunication activities in Ohio, including the resale of cellular phone service. In
9 particular, beginning in 1991, Westside purchased network access from major cellular
10 service providers in order to serve its customers. Plaintiff, as Westside’s president, soon
11 came to believe, however, that certain of these providers were discriminating against
12 Westside. So, in 1993 he engaged the Cleveland law firm of Hahn Loeser & Parks, LLP
13 (“Hahn Loeser”), to file a complaint with the Public Utilities Commission of Ohio
14 (“PUCO”) against certain of these providers, alleging anticompetitive trade practices.
15 Westside’s survival hung in the balance.

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

1 29. Anticipating the settlement, Plaintiff asked Hahn Loeser to look into tax
2 matters related to the anticipated settlement. Because Westside was a C Corporation, there
3 was a concern that the settlement proceeds could be subject to double taxation. Hahn Loeser
4 had prior experience with Midcoast and thought Midcoast might assist Plaintiff in this
5 regard. So, a meeting between Plaintiff and Midcoast representatives was arranged for
6 February 19, 2003.
7

8 30. At the February 19 meeting, Midcoast's representatives (including Donald
9 Stevenson and Louis Bernstein) explained to Plaintiff that it was in the debt collection
10 business and that, as part of its business model, it purchased companies in postures like
11 Westside's.
12

13 31. Thereafter, Plaintiff was also introduced to Fortrend and received an
14 informational letter from Fortrend's Steven Block. Plaintiff and his representatives
15 subsequently had multiple calls and at least one face-to-face meeting with Fortrend
16 representatives, including Block, in or about March/April 2003. Like Midcoast, Fortrend
17 claimed that it was involved in the distressed debt receivables business and that it wanted to
18 purchase Plaintiff's Westside stock as part of this business.
19

20 32. Midcoast and Fortrend each expressed interest in acquiring Plaintiff's
21 Westside stock, and each made an offer proposing essentially the same transactional
22 structure: An intermediary company would borrow money to purchase the stock. After the
23 sale closed, the intermediary company would merge into Westside, and Fortrend / Midcoast
24 would employ Westside in its distressed-debt collection business. The purchaser would
25 fund its operations with Westside's remaining cash (Fortrend represented that financing for
26 its distressed-debt recovery business was otherwise difficult to obtain), and employ
27 Westside's tax liabilities to legitimately offset tax deductions associated with this business.
28

1 33. Fortrend and Midcoast represented to Plaintiff that the transactions they
2 were each proposing would result in legitimate tax benefits and thus a greater net return
3 to Plaintiff than he would otherwise realize. These representations included the
4 assurance that the acquiring party had successfully undertaken numerous other
5 transactions like the one being proposed to Plaintiff and that such transactions were
6 proper under the tax laws. Neither party told Plaintiff that the IRS was scrutinizing and
7 challenging similar transactions as improper tax shelters.
8

9 34. Absent Defendants' improper actions, Plaintiff would have left the settlement
10 proceeds in Westside, paid the corporate-level tax and invested in other business ventures
11 through Westside, thereby avoiding any shareholder-level tax on a distribution from Westside.
12

13 35. Because Plaintiff thought Midcoast and Fortrend were competitors, he began
14 negotiating with both in the hope of stirring up a bidding war. Rather than continue to compete,
15 though, Midcoast and Fortrend secretly agreed that Midcoast would step away from the
16 transaction in exchange for a kickback of \$1,180,000. As a result of this bid-rigging,
17 Midcoast's final offer was intentionally unattractive, and Plaintiff chose to proceed with
18 Fortrend.

19 36. Based on the representations made by Fortrend, Plaintiff was inclined to
20 proceed with the Fortrend transaction. But, not wanting to run afoul of the tax laws, Plaintiff
21 engaged a nationally regarded accounting firm, Defendant PwC, to independently evaluate
22 the bids and proposed transactions for his Westside stock, verify that they and the purchasers
23 were legitimate, and evaluate any potential tax issues.
24

25 37. On or about April 25, 2003, Plaintiff signed a letter agreement (the "PwC
26 Engagement Letter") whereby PwC agreed to provide such tax research and evaluation
27 services relating to the proposed sale of Westside's stock. The PwC Engagement Letter
28 specifically noted that PwC had an obligation to determine whether Plaintiff would be

1 participating in a reportable transaction as defined by the IRS. The PwC Engagement Letter
2 further noted that it would work with Plaintiff to avoid the imposition of any tax penalty.
3 Plaintiff is unsophisticated in tax matters and was relying on PwC's expertise in deciding
4 whether to proceed with the transaction.
5

6 38. Unbeknownst to Plaintiff, PwC had on at least one prior occasion brought
7 Fortrend to the table to facilitate a Midco transaction that PwC itself had advocated. In
8 particular, in late 1999, PwC advocated that a Midco transaction be used in the purchase of the
9 Bishop Group Ltd. ("Bishop") by PwC's client Midcoast Energy Resources, Inc.; PwC
10 approached Fortrend to serve as an intermediary; and a Fortrend affiliate in fact served as an
11 intermediary, purchasing the Bishop stock in a Midco transaction that PwC helped negotiate.
12 As it did in Mr. Tricarichi's case, Rabobank also facilitated the Bishop transaction by loaning
13 Fortrend the purchase price and serving as the conduit through which funds changed hands at
14 closing, all in return for a substantial fee. PwC disclosed none of this to Plaintiff. The Bishop
15 Midco transaction was audited by the IRS starting in late 2003 (but before Plaintiff had
16 reported the Westside stock sale on any tax returns), found deficient by the IRS in 2004, and
17 confirmed by the courts in 2008 and 2009 to be an illegal tax shelter.
18

19 39. Consistent with the Engagement Letter, during the period April-August 2003,
20 a team of PwC tax professionals, including Rich Stovsky, Timothy Lohnes and Don Rocen,
21 set out to examine and advise Plaintiff regarding the transactions proposed by Fortrend and
22 Midcoast. PwC personnel put between 150 and 200 hours into this effort, for which PwC
23 charged approximately \$48,000 in fees. PwC participated in various calls with the parties
24 and/or their representatives, reviewed transaction documentation, and undertook research.
25 PwC understood, among other things, that Fortrend would borrow a substantial sum from
26 Rabobank in order to finance the transaction; that Fortrend intended to employ Westside's
27
28

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

3 40. PwC further understood but failed to properly advise Plaintiff that IRS Notice
4 2001-16, which had been issued in January 2001, applied to Midco transactions described
5 therein and to "substantially similar" transactions; that the term "substantially similar" was
6 broadly construed in this context; and that the proposed transaction and its tax implications
7 posed risk for Plaintiff.

8
9 41. On or about July 22, 2003, Fortrend (via an affiliate) sent Plaintiff a letter of
10 intent, signed by Conn Vu, regarding the proposed purchase of Plaintiff's Westside stock.
11 The letter of intent proposed, among other things, that Fortrend would pay \$34.9 million
12 (later reduced slightly to \$34.6 million) for the stock. The parties proceeded to discuss and
13 negotiate a proposed stock purchase agreement, with PwC reviewing the terms thereof as
14 part of its engagement.

15
16 42. Fortrend would use its affiliate Nob Hill, Inc. ("Nob Hill"), of which McNabola
17 was the president, as the intermediary company to purchase the Westside stock. Nob Hill's sole
18 shareholder was Millennium Recovery Fund, LLC, a Fortrend affiliate formed in the Cayman
19 Islands. In the stock purchase agreement, which McNabola signed, Nob Hill represented that
20 Westside would remain in existence for at least five years after the closing and "at all times be
21 engaged in an active trade or business." Nob Hill also provided purported tax warranties. The
22 agreement represented that Nob Hill would "cause ... [Westside] to satisfy fully all United
23 States ... taxes, penalties and interest required to be paid by ... [Westside] attributable to
24 income earned during the [2003] tax year." Nob Hill agreed to indemnify Plaintiff in the event
25 of liability arising from breach of its representation to satisfy Westside's 2003 tax liability, and
26 represented that it had sufficient assets to cover this indemnification obligation. Nob Hill
27
28

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

3 43. Plaintiff relied on these material representations and warranties, as well as
4 PwC's evaluation and assessment of them, in deciding to proceed with the Fortrend transaction.
5 Unbeknownst to Plaintiff, however, these representations and warranties were false when
6 made; and they were not subsequently fulfilled, as PwC knew or should have known that they
7 would not be. Although the stock purchase agreement contained covenants by the purchaser
8 to pay Westside's taxes, and despite the fact that the agreement contained an
9 indemnification provision in that regard, such provisions were without any value because,
10 upon information and belief, the indemnitor/purchaser had insufficient assets with which
11 to satisfy them when they were made and going forward, and simply intended to
12 misappropriate Westside's funds, offset its tax liabilities with a bogus deduction via a
13 reportable transaction, and conduct no business of substance.
14

15
16 44. Defendants Rabobank and Utrecht provided Fortrend financing for the vast
17 majority of the purchase price, and Rabobank was the key conduit for the funds that changed
18 hands in order to close the transaction. Without such participation and substantial assistance
19 by Rabobank and Utrecht, Fortrend would not have been able to proceed with the transaction.
20 Rabobank frequently partnered with Fortrend in executing Midco deals, and had done dozens
21 of transactions with Fortrend prior to Plaintiff's transaction.
22

23 45. On information and belief, from 1996 to 2003, Fortrend promoted almost one
24 hundred Midco transactions, and worked closely with Rabobank to obtain financing for many
25 of those transactions. In Plaintiff's case, of the \$34.6 million agreed purchase price for
26 Westside's stock, \$29.9 million would come from Rabobank, via Utrecht. (The remainder was
27 loaned to Nob Hill by another Fortrend affiliate, Moffat.) The loan and the closing were
28

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

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

14 47. Among the financing documents subsequently executed by Nob Hill (the
15 Fortrend affiliate) were a promissory note for \$29.9 million, a security agreement, and a pledge
16 agreement dated as of September 9, 2003. McNabola signed all these documents as Nob Hill's
17 president. Pursuant to the security agreement, the Tax Court subsequently found, Nob Hill
18 granted Rabobank a first priority security interest in a Rabobank account that Plaintiff would
19 open for Westside in connection with the transaction, in order to secure Nob Hill's repayment
20 obligation. Pursuant to the pledge agreement, the Tax Court also found, Nob Hill granted
21 Rabobank a first-priority security interest in the Westside stock and the stock sale proceeds as
22 collateral securing Nob Hill's repayment obligation. Among the financing documents to be
23 executed by Westside were security and guaranty agreements in favor of Rabobank, and a
24 control agreement. McNabola also signed these documents. Via the security and guaranty
25 agreements, the Tax Court further found, Westside unconditionally guaranteed payment of Nob
26 Hill's obligations to Rabobank, and granted Rabobank a first priority security interest in
27
28

1 Westside's Rabobank account. The control agreement further gave Rabobank control over
2 Westside's account – including all cash, instruments, and other financial assets contained
3 therein from time to time, and all security entitlements with respect thereto – in order to ensure
4 that Westside did not default on its commitments, the Tax Court determined, further
5 concluding that these agreements effectively gave Rabobank a “springing lien” on Westside's
6 cash at the moment it funded the loan. For all practical purposes, therefore, the Tax Court
7 found, the Rabobank loan was fully collateralized with the cash in Westside's Rabobank
8 account, consistent with the R-1 risk rating that Rabobank assigned to that loan.
9

10 48. As noted above, in order to facilitate the transaction, Plaintiff and Westside
11 were required to open accounts at Rabobank. The account opening documentation reflects
12 Plaintiff's and Westside's residence in Las Vegas, Clark County, Nevada, where Rabobank and
13 Utrecht thus knew Plaintiff resided, and where they proceeded to do business with, and direct
14 their actions toward, Plaintiff and Westside. Plaintiff was relying on Rabobank, a large bank
15 with a worldwide presence, to serve as an independent escrow agent and lender, rather than as
16 a self-interested facilitator and co-conspirator of Fortrend's fraud – which, unbeknownst to
17 Plaintiff, was Rabobank's actual role.
18

19 49. Rabobank and Utrecht proceeded with the transaction and the loan to Fortrend
20 (Nob Hill) despite knowing that the Fortrend transaction in this case was a Midco deal that
21 constituted a reportable transaction considered by the IRS to be an improper tax-avoidance
22 mechanism. During the years 1998 – 2002, Rabobank (via, on information and belief,
23 subsidiaries including Utrecht) had financed a total of 88 Midco transactions, at the pace of
24 about 18 transactions per year. Rabobank earned considerable and attractive fees via the loans,
25 which ranged in amount between \$6 million and \$260 million, and were mostly for terms of
26 only one to three days. At the time, Rabobank was experiencing difficulty in other areas of its
27
28

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

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

- 5
- 6 a. Bishop Group: In or about October 1999, Rabobank facilitated the purchase of
7 Bishop stock by loaning another special-purpose Fortrend affiliate (K-Pipe
8 Merger Corp.) approximately \$200 million short-term for the purchase price,
9 and by serving as the conduit through which funds changed hands at closing, in
10 return for a substantial fee. Like Nob Hill in this case, K-Pipe was a shell
11 company with no assets and conducted virtually no business after the purchase.
12 A federal court in Texas subsequently found that the Bishop transaction was a
13 sham and constituted an improper Midco tax shelter, and that determination
14 was affirmed by the U.S. Court of Appeals for the Fifth Circuit.
- 15
- 16 b. Town Taxi and Checker Taxi: In or about October 2000, Rabobank loaned
17 Three Wood LLC, a newly formed Fortrend special-purpose affiliate, \$30 million
18 short-term to purchase the stock of Town Taxi Inc. and Checker Taxi Inc. from
19 the Frank Sawyer Trust after those companies had sold all their assets.
20 Rabobank again served as the conduit through which funds changed hands at
21 closing, on information and belief in return for a substantial fee. On
22 information and belief, in order to induce the Trust into the transaction, Fortrend
23 falsely represented to the Trust that Fortrend had a strategy to legitimately offset
24 the taxes due as a result of the taxi companies’ asset sales. Within about two
25 months of the closing, Fortrend stripped Town Taxi and Checker Taxi of their
26 remaining funds, totaling millions of dollars, moving that money to other
27 Fortrend affiliates. Late in 2000, Fortrend contributed to Town Taxi and
28

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

5
6 c. St. Botolph Holding Co.: In or about February 2001, Rabobank loaned \$19
7 million to Monte Mar, Inc., a special-purpose Fortrend affiliate, to purchase from
8 the Frank Sawyer Trust the stock of St. Botolph, which was in the process of
9 selling its assets. Rabobank again served as the conduit through which funds
10 changed hands at closing, on information and belief in return for a substantial
11 fee. On information and belief, in order to induce the Trust into the transaction,
12 Fortrend falsely represented to the Trust that Fortrend had a strategy to
13 legitimately offset the taxes due as a result of St. Botolph's asset sales. Over the
14 next ten months, Fortrend stripped St. Botolph of its remaining cash. In 2001,
15 Fortrend contributed to St. Botolph stock that had ostensibly declined in value,
16 subsequently claiming tax losses that offset nearly all the gains from the St.
17 Botolph asset sale. After the IRS examined the transaction, the U.S. Tax Court
18 found in 2014 that it constituted an improper Midco tax shelter.

19
20 d. Slone Broadcasting: In December 2001, after the assets of Slone Broadcasting
21 had been sold, Utrecht loaned another special-purpose Fortrend affiliate,
22 Berlinetta, Inc., \$30 million short-term to purchase the stock of Slone. Fortrend
23 represented to the shareholders of Slone that it had a legitimate strategy to reduce
24 the taxes due as a result of the asset sale. On information and belief, Rabobank
25 served as the conduit through which funds changed hands at closing, in return
26 for a substantial fee. Slone Broadcasting and Berlinetta merged, and the
27 company's named was changed to Arizona Media, which then claimed an
28

1 inflated basis for certain Treasury bills contributed to the company by another
2 Fortrend affiliate. Conn Vu was also Arizona Media's president, secretary and
3 treasurer. The IRS maintains that the Slone-Fortrend transaction was an illegal
4 Midco tax shelter, with the former Slone shareholders having transferee
5 liability, and the matter is currently in litigation.
6

7 51. However, on information and belief, in or about October 2002 – that is,
8 approximately ten months before it financed the transaction involving Plaintiff – Rabobank
9 determined that many if not all of the Midco transactions it had previously financed were
10 reportable transactions as defined by the IRS. As a result, the number of Midco transactions
11 executed by Rabobank after October 2002 decreased significantly. Rabobank undertook only
12 five Midco financing transactions in 2003, one of those being the financing in Plaintiff's case.
13 In 2004, Rabobank undertook only one Midco financing transaction, its last. A Rabobank
14 internal audit further found in 2005 that Rabobank's internal controls had been inadequate in
15 numerous respects with respect to the Midco transactions in which it had participated. The
16 audit found, among other things, that it was at least "questionable" whether Midco promoters
17 like Fortrend could be described as "reputable" companies with which Rabobank should be
18 doing business. Rabobank would have stopped financing Midco transactions entirely after
19 October 2002 were it not for the fact that it did not want to harm its existing relationships with
20 Midco promoters like Fortrend.
21

22 52. In addition to its own activities directed toward Plaintiff and the Nevada forum,
23 Rabobank/Utrecht knew or should have known – via their participation in this and prior
24 Fortrend transactions – that their co-conspirators Fortrend, McNabola and Conn Vu were
25 directing and undertaking the acts alleged herein at Plaintiff and in the Nevada forum.
26 Rabobank's / Utrecht's actions caused harm to Plaintiff in Nevada.
27
28

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

12
13 54. The parties executed the stock purchase agreement, and the Fortrend
14 transaction closed on September 9, 2003. As part of the closing, Nob Hill's Rabobank account
15 was credited with the \$29.9 million Rabobank loan proceeds; Nob Hill transferred the purchase
16 price from its Rabobank account into the Rabobank account that Plaintiff had been required to
17 open; Nob Hill acquired Plaintiff's Westside stock; Plaintiff's resignation as an officer and
18 director of Westside became effective (with Plaintiff being replaced by Fortrend personnel);
19 and Nob Hill paid Rabobank a \$150,000 fee. After the Rabobank and Moffat loans were
20 repaid the same day, however, Westside's remaining funds, rather than being used to facilitate
21 Fortrend's debt-collection business as represented, were actually drained by Fortrend, as set
22 forth below.

23
24 55. The day after the closing, Nob Hill merged into Westside with Westside being
25 the surviving corporation. By that point, there was approximately \$5.2 million left in
26 Westside's bank account. Westside – now under Fortrend's control – proceeded over the next
27
28

1 seven months to transfer about \$4.8 million of that amount to various Fortrend affiliates and
2 co-promoters, including MidCoast, which in mid-September received its \$1,180,000 payoff for
3 stepping away from the transaction. After Conn Vu transferred the remaining funds to another
4 bank in or about April 2004, Fortrend emptied the account and it was closed. Westside did not
5 engage in the debt-collection business as Fortrend had represented to Plaintiff it would.
6

7 56. Notwithstanding the multiple representations of Fortrend and PwC to
8 Plaintiff that the Fortrend transaction was proper under the tax laws, and the silence of
9 Rabobank and Utrecht in this regard, Defendants and Fortrend knew that on January 18,
10 2001 the IRS had issued Notice 2001-16 ("the 2001 Tax Notice"). The 2001 Tax Notice
11 describes transactions where a corporation disposes of substantially all of its assets and then
12 the corporation's shareholders sell their stock to another party who seeks favorable tax
13 treatment. The 2001 Tax Notice states that any transactions that are the same as, or
14 substantially similar to, those described in the 2001 Tax Notice are "listed transactions."
15 Listed transactions are deemed by the IRS to be abusive tax shelters. Persons failing to
16 report these tax shelters may be subject to penalties. The IRS in the 2001 Tax Notice
17 concluded that it "may challenge the purported tax results of these transactions on several
18 grounds." It further warned that it "may impose penalties on participants in these
19 transactions."
20

21 57. The publication of the 2001 Tax Notice put Defendants and Fortrend, who
22 were experienced in tax matters, on notice that there was, at minimum, a significant
23 likelihood that the IRS would consider the Fortrend transaction to be a listed
24 transaction. In addition, as a result of the 2001 Tax Notice, Defendants and Fortrend,
25 who were experienced in tax matters, knew or should have known that there was, at
26 minimum, a significant likelihood that the IRS would hold Plaintiff liable as a transferee
27
28

1 for the unpaid taxes owed by Westside.

2 58. Defendants and Fortrend failed to properly advise Plaintiffs about the
3 2001 Tax Notice and its significance for the Fortrend transaction. To the contrary, PwC
4 advised Plaintiff that the Fortrend transaction did not fall within, and was not substantially
5 similar to the transaction listed in, the 2001 Tax Notice, and was not a listed transaction as
6 defined by the IRS; PwC advised Plaintiff that he would not be exposed to transferee liability
7 with respect to the Fortrend transaction; Fortrend also made such representations; and
8 Rabobank and Utrecht remained silent, facilitating the transaction despite knowing that it was a
9 listed transaction per the 2001 Tax Notice.
10

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

13 59. After the closing, Fortrend did not conduct business via Westside in the manner
14 Fortrend had told Plaintiff it would. In fact, in order to draw Plaintiff into the Midco
15 transaction, Fortrend had made various misrepresentations to Plaintiff when it described,
16 represented and warranted how Westside's business would proceed after the stock sale.
17 Contrary to what Fortrend represented, Fortrend's plan was never to operate Westside going
18 forward as part of a legitimate debt-collection business, and its plan was never to "cause ...
19 [Westside] to satisfy fully all United States ... taxes, penalties and interest required to be paid
20 by ... [Westside] attributable to income earned during the [2003] tax year." Contrary to its
21 representations via Nob Hill and otherwise, Fortrend always intended to engage in an IRS
22 reportable transaction; avoid paying Westside's taxes; strip Westside of its assets; and leave
23 Plaintiff "holding the bag" for transferee liability imposed by the IRS.
24
25

26 60. Unbeknownst to Plaintiff, Fortrend's efforts to set the stage in this regard dated
27 back to at least 2001. As part of Fortrend's ongoing promotion of Midco transactions, in or
28 about March 2001, Millennium (the Fortrend and Nob Hill affiliate) obtained a portfolio of

1 distressed Japanese debt then valued at \$137,109 for a cost of \$137,000. Although
2 Millennium/Fortrend thus acquired the Japanese debt portfolio for only \$137,000 in March
3 2001, it later claimed that its tax basis in that portfolio was actually more than \$314 million.

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

9
10 62. By obtaining and claiming an artificially high basis in the Japanese debt – and
11 by “blessing” this maneuver – Fortrend, and Defendants Seyfarth and Taylor, facilitated the
12 Midco transaction that defrauded Plaintiff by effectuating a maneuver that Fortrend, Seyfarth
13 and Taylor all knew to be improper under the tax laws: a distressed asset/debt (or “DAD”)
14 scheme.

15
16 63. A DAD scheme uses purportedly high-basis, low-value distressed debt acquired
17 from foreign entities that are not subject to United States taxation. The distressed debt is
18 passed through one or more U.S. entities that fail to claim the proper basis for that debt. The
19 U.S. taxpayer that finally ends up holding the debt – here, Westside under Fortrend’s
20 ownership – then claims the significant tax loss that has passed through in order to offset other
21 U.S. income or gain. The effect is that the U.S. taxpayer (Westside under Fortrend’s
22 ownership) is seeking to benefit from the built-in economic losses in the foreign party’s
23 distressed asset when the U.S. taxpayer did not incur the economic costs of that asset.

24
25 64. As the Tax Court noted, Seyfarth “gained notoriety for issuing bogus tax-shelter
26 opinions,” and the opinion issued to Fortrend in Plaintiff’s case “seems par for the course.”
27 Rogers conceived of and created a DAD shelter in early 2003, shortly before he became a
28

1 Seyfarth partner in July 2003, and Seyfarth, Rogers and Taylor subsequently promoted,
2 facilitated and participated in numerous DAD and other illegal tax shelters thereafter with
3 Fortrend and others. Upon information and belief, numerous clients of Seyfarth, Taylor and
4 Rogers were – like Fortrend – themselves tax shelter promoters who used the purported losses
5 from DAD and similar schemes as part of abusive Midco transactions.
6

7 65. Rogers and Taylor were both partners at the law firm Altheimer & Gray before
8 joining Seyfarth, after Altheimer went bankrupt in 2003. Rogers and Taylor both left Seyfarth
9 in 2008, Rogers after the firm – no longer comfortable with him promoting tax shelters –
10 forced him to resign, and Taylor after he pleaded guilty in January of that year to conspiring to
11 commit tax fraud.
12

13 66. In 2010, Taylor was disbarred, and the U.S. Department of Justice, based on a
14 years-long investigation, filed a complaint in federal court in Illinois accusing Rogers of tax
15 fraud and other offenses based on his creation and promotion of DAD shelters and similar tax
16 schemes dating back to at least 2003. Rather than contest the complaint's allegations, Rogers
17 agreed, in September 2011, to a permanent injunction against him directly or indirectly
18 organizing, promoting, advising, implementing, carrying out, managing or selling DAD or
19 similar transactions.
20

21 67. As was known at the time pertinent to this complaint by Fortrend, Seyfarth,
22 Taylor and Rogers, who were sophisticated practitioners in the tax arena, a DAD shelter
23 violates the legal doctrines of (1) economic substance; (2) substance over form; (3) step
24 transaction; and (4) sham partnership. Even though they violated such doctrines from their
25 inception, DAD shelters were widely promoted in the early 2000s by Fortrend, Seyfarth,
26 Taylor, Rogers and others. As a result, Congress emphasized their illegality by outlawing all
27 DAD schemes via the consideration and passage of the American Jobs Creation Act, with
28

1 which Fortrend, Seyfarth, Taylor and Rogers, as sophisticated tax practitioners, must have been
2 familiar. *See* American Jobs Creation Act of 2004, P.L. 108-357 (amending, among other
3 provisions, I.R.C. §§ 704(c), 734 and 743).

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

7
8 69. In Plaintiff's case, and unbeknownst to Plaintiff, the second-stage DAD
9 transaction continued (after the Westside stock sale) this way:

- 10 a. On November 6, 2003, Millennium contributed to Westside a subset of the
11 Japanese debt portfolio, consisting of two defaulted loans (the "Aoyama
12 Loans"). The Aoyama Loans had a purported tax basis of \$43,323,069. Between
13 November 6 and December 31, 2003, Westside wrote off the Aoyama Loans as
14 worthless. On its Form 1120, U.S. Corporation Income Tax Return, for 2003,
15 Westside claimed a bad debt deduction of \$42,480,622 on account of that write-
16 off.
17
18 b. As the Tax Court found, Westside conducted no meaningful business operations
19 after September 10, 2003; it reported no gross receipts, income, or business
20 expenses relating to its supposed "debt collection" business; and it undertook no
21 efforts to collect the Aoyama Loans or contract with a third party to do so.
22 During this period, Conn Vu served Fortrend as Westside's president, secretary
23 and treasurer, signing Westside's tax returns and nominally presiding over the
24 company's "business" until Fortrend drained it of its last assets.
25
26 c. On its tax return for 2003, Westside (under Fortrend's control) reported total
27 income of \$66,116,708 and total deductions of \$67,840,521. The deductions
28

1 included purported bad debt losses of \$42,480,622 based on the Aoyama Loans.

2 Westside did not pay any amount of taxes.

3 70. By providing the purported justification for the \$42,480,622 deduction claimed
4 regarding the Aoyama Loans, Seyfarth and Taylor knowingly and substantially assisted the
5 fraud that Fortrend perpetrated upon Plaintiff. On information and belief, Seyfarth and Taylor
6 received a substantial fee in return for the Seyfarth Opinion Letter.
7

8 71. In addition to their own activities undertaken in or directed toward the Nevada
9 forum, Seyfarth and Taylor, on information and belief, knew or should have known – via their
10 participation in this transaction and otherwise – that their co-conspirators Fortrend, McNabola
11 and Conn Vu were directing and undertaking the acts alleged herein at Plaintiff and in the
12 Nevada forum. Seyfarth and Taylor's actions caused harm to Plaintiff in Nevada.
13

14 72. The Seyfarth Opinion Letter in this case was, on information and belief, not the
15 only time that Seyfarth and Taylor were involved in similar transactions with McNabola, Conn
16 Vu and Fortrend. The U.S. Department of Justice, based on its investigation, has stated that
17 McNabola, with the assistance of Taylor, structured and/or assisted with setting up a DAD
18 transaction by which First Active Capital Inc. ("First Active"), in or about August 2005,
19 acquired distressed Chinese debt with a supposed basis of more than \$57 million. First Active,
20 which was incorporated in August 2005, and of which McNabola was the sole officer and
21 director until 2006, then used this distressed debt to offset gains in connection with other
22 transactions in which it participated in 2005, 2006, 2008, 2009 and 2010. In each of these
23 transactions, the DoJ has stated, Conn Vu, who replaced McNabola as an officer and director
24 of First Active, used the distressed debt that First Active had obtained to offset gains otherwise
25 incurred. Per the DoJ, First Active had no legitimate business purpose and was used solely to
26 facilitate illegal tax avoidance schemes. Moreover, while Taylor was indicted in November
27
28

1 2005 for tax fraud, and subsequently pleaded guilty to tax evasion, on information and belief,
2 he continued to practice law and provide advice to McNabola through at least 2008.

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

4 73. Defendants and their co-conspirators engaged in affirmative conduct designed
5 to prevent Plaintiff's discovery of their wrongdoing. These acts prevented Plaintiff's discovery
6 of the fraud and other misdeeds. PwC and its personnel were fiduciaries of Plaintiff, and the
7 remaining Defendants and conspirators were in a position of superior knowledge and/or trust,
8 and thus owed Plaintiff a duty to disclose the concealed facts, which they nonetheless
9 concealed or suppressed. Had Plaintiff known these facts, which came to light as a result of
10 the Tax Court trial or thereafter, he would have acted differently, but instead was damaged as a
11 result of the concealment.
12

13 74. Defendants' acts of concealment and omission included those set forth above,
14 and also continued after Plaintiff's agreement to and participation in the Fortrend transaction,
15 including: (i) Defendants' concealment of the second-stage DAD transaction with respect to
16 Westside; (ii) Defendants' concealment of their ongoing involvement in similar illegitimate
17 Midco and DAD transactions; (iii) Defendants' concealment of their knowledge of the
18 illegitimacy of these transactions and the transaction involving Plaintiff; (iv) Fortrend's
19 concealment of its ongoing involvement with Midcoast; and (v) Fortrend and Conn Vu's
20 concealment of their post-closing actions despite the fact that Plaintiff's representatives were in
21 touch with them in 2006 and 2007 regarding the filing of a claim for the refund of excise taxes
22 for Westside.
23
24

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

26 75. As a result of the foregoing events, the IRS audited Westside's 2003 tax return.
27 At the conclusion of the audit, the IRS disallowed the \$42,480,622 bad-debt deduction, and
28

1 another \$1,651,752 deduction claimed by Fortrend for legal and professional fees (on the
2 ground that these fees were incurred in connection with a transaction entered into solely for tax
3 avoidance). During the audit, the IRS was unable to find any assets or current sources of
4 income for Westside. On February 25, 2009, the IRS mailed a notice of deficiency to Westside
5 determining a deficiency of \$15,186,570 and penalties totaling \$6,012,777 under the tax code.
6

7 76. Westside – which had no assets or resources by this point as a result of
8 Fortrend's actions – did not pay any of these amounts and did not petition the U.S Tax Court
9 for relief. So, on July 20, 2009, the IRS assessed the tax and penalties set forth in the notice of
10 deficiency, plus accrued interest.

11 77. The IRS also proceeded with a transferee liability examination concerning
12 Westside's 2003 tax liabilities. Transferee liability is a method of imposing tax liability on a
13 person (here, Plaintiff) other than the taxpayer who is directly liable for the tax. This method is
14 used by the IRS when a person transfers property and tax related to that property subsequently
15 goes unpaid. In that case, the IRS goes after the person who made the transfer to recover the
16 taxes.
17

18 78. As a result of its examination, the IRS determined that Plaintiff had transferee
19 liability for Westside's tax deficiency and penalties – a total of about \$21.2 million. The IRS
20 sent Plaintiff a notice of liability to that effect on June 25, 2012. (Years before, Plaintiff had
21 timely paid the IRS more than \$5 million in taxes relating to the long-term gain incurred in
22 2003 as a result of the sale of Plaintiff's Westside stock.)
23

24 79. Plaintiff petitioned the U.S. Tax Court in September 2012 for review of the IRS
25 notice of liability. The matter was litigated during 2013 and 2014, proceeding to a four-day
26 trial in June 2014. After trial, the Tax Court found in October 2015 that – contrary to what
27 Defendants and Fortrend had led Plaintiff to believe – the Fortrend transaction into which
28 Plaintiff had been drawn was an improper Midco transaction, and Plaintiff was liable under

1 transferee liability principles for Westside's tax deficiency and penalties totaling about \$21.2
2 million, plus interest and interest penalties, which are estimated by Plaintiff to total
3 approximately \$17.8 million (and counting).

4 80. Moreover, as a further result of Defendants' actions, and in addition to such
5 amounts, Plaintiff has been required to spend a considerable amount of money in fees and
6 expenses in the IRS and Tax Court proceedings. To date these fees and expenses exceed about
7 \$5 million and continue to be incurred. Additionally, Plaintiff lost other sums in connection
8 with the Fortrend transaction, including a \$5.4 million Fortrend "premium" and \$125,000 in
9 professional fees paid upfront for review and advice regarding the transaction. All told,
10 Plaintiff has suffered tens of millions of dollars in damages as a result of Defendants' actions.

11
12
13 **COUNT I**
GROSS NEGLIGENCE AS TO PwC

14 81. Plaintiff repeats and realleges paragraphs 1 through 80 above as though fully
15 set forth herein.

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

21 83. wC breached that duty by committing, among others, one or more or a
22 combination of all of the following acts or omissions:

23
24 a. Failing to advise Plaintiff of PwC's prior dealings with Fortrend and
25 advocacy of a Midco transaction in the Bishop deal;

26
27 b. Advising Plaintiff that the transaction proposed by Fortrend was legal
28 and proper and in compliance with the tax laws;

1 c. Failing to properly advise Plaintiff about the significance of the
2 2001 Tax Notice or, in the alternative, failing to be fully aware of the 2001 Tax
3 Notice and/or its potential adverse consequences to Plaintiff as a result of the
4 Fortrend transaction; and

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

8
9 84. Acting in reliance on the advice and opinions given by PwC, Plaintiff
10 proceeded with the Fortrend transaction.

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

16
17 86. PwC's actions compel Plaintiff to employ an attorney for redress, entitling
18 Plaintiff to obtain attorneys' fees and costs for pursuing this action.

19
20 **COUNT II**
 NEGLIGENT MISREPRESENTATION AS TO PwC

21 87. Plaintiff repeats and realleges paragraphs 1 through 86 above as though fully
22 set forth herein.

23 88. In consulting and otherwise representing Plaintiff with respect to the sale of
24 Plaintiff's shares of stock in Westside and otherwise with respect to the Fortrend transaction,
25 Defendant PwC owed a duty to Plaintiff to communicate accurate information to Plaintiff.
26
27
28

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

4 90. PwC was grossly negligent in failing to ascertain that these statements were,
5 in fact, false and in otherwise conveying inaccurate information to Plaintiff.
6

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

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

11 93. Plaintiff was thereby induced into going forward with and completing
12 the Fortrend transaction.

13 94. Plaintiff reasonably, justifiably and actually relied upon the said false
14 and otherwise inaccurate statements made by PwC and went forward with and
15 completed the transaction.
16

17 95. The said false and otherwise inaccurate statements made by PwC caused
18 Plaintiff to incur damages in excess of \$10,000, including but not limited to Plaintiff's
19 expenditure of a considerable amount of money in fees and expenses to respond to and
20 defend the examination by the IRS and to litigate the matter in Tax Court, and the
21 assessment of taxes, penalties and interest by the IRS in sums far greater than Plaintiff
22 would otherwise have had to pay, and other losses.
23

24 96. PwC's actions compel Plaintiff to employ an attorney for redress, entitling
25 Plaintiff to obtain attorneys' fees and costs for pursuing this action.
26
27
28

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

97. Plaintiff repeats and realleges paragraphs 1 through 96 above as though fully set forth herein.

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

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

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

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

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

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

15 103. Such actions by Rabobank, Utrecht, Seyfarth, and Taylor compel Plaintiff to
16 employ an attorney for redress, entitling Plaintiff to obtain attorneys' fees and costs for
17 pursuing this action.

18 **COUNT IV**
19 **CIVIL CONSPIRACY**
20 **AS TO RABOBANK, UTRECHT, SEYFARTH AND TAYLOR**

21 104. Plaintiff repeats and realleges paragraphs 1 through 103 set forth above
22 as though fully set forth herein.

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

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

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

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

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

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

110. Plaintiff repeats and realleges paragraphs 1 through 109 set forth above as though fully set forth herein.

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

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

3 112. These crimes related to racketeering include obtaining possession of money
4 or property valued at \$650 or more, or obtaining signature by false pretenses (NRS
5 207.360(26)); fraud in connection with the offer, sale or purchase of a security (NRS
6 207.360(30) and NRS 90.570); and multiple transactions involving fraud or deceit in the
7 course of an enterprise or occupation (NRS 207.360(33) and NRS 205.377).

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

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

20 114. Plaintiff repeats and realleges paragraphs 1 through 113 set forth above as
21 though fully set forth herein.

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

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

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

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

118. Plaintiff repeats and realleges paragraphs 1 through 117 set forth above as though fully set forth herein.

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

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

1 207.360(26)); fraud in connection with the offer, sale or purchase of a security (NRS
2 207.360(30) and NRS 90.570); and multiple transactions involving fraud or deceit in the
3 course of an enterprise or occupation (NRS 207.360(33) and NRS 205.377).

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

11 **COUNT VIII**
12 **UNJUST ENRICHMENT**
13 **AS TO RABOBANK AND UTRECHT**

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

16 123. Approximately \$29.9 million of the PUCO settlement proceeds in Westside's
17 bank account were used by Nob Hill to repay the Rabobank / Utrecht loan to Nob Hill. By
18 keeping these funds as part of the improper tax scheme described above, in which they
19 participated, Rabobank and/or Utrecht had and retained a benefit which in equity and good
20 conscience belongs to another, namely, Plaintiff, the sole shareholder of Westside, who was
21 wrongfully drawn into Defendants' scheme, as set forth above.
22

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

25 A. A judgment for compensatory damages in favor of Plaintiff and against
26 Defendant(s), jointly and severally on all applicable claims in an amount in excess of \$10,000 to
27 be determined at trial.
28

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

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

7 D. Costs of investigation and litigation reasonably incurred;

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

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

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

13
14
15 **JURY DEMAND**

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

17 DATED this 29th day of April, 2016.

18 HUTCHISON & STEFFEN, LLC

19
20
21 
22 Mark A. Hutchison

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Todd W. Prall

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24 Scott F. Hessell

25 Thomas D. Brooks

(Pro Hac Vice Application Pending)

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Chicago, IL 60603

28 *Attorneys for Plaintiff*

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23 *Attorneys for Plaintiff*

24 DISTRICT COURT

25 CLARK COUNTY, NEVADA

26 A-16-735910-B

27 MICHAEL A. TRICARICHI,

28 Plaintiff,

29 v.

30 PRICEWATERHOUSECOOPERS, LLP,
31 COÖPERATIEVE RABOBANK U.A.,
32 UTRECHT-AMERICA FINANCE CO.,
33 SEYFARTH SHAW LLP and GRAHAM R.
34 TAYLOR,

35 Defendants.

) CASE NO.

) DEPT NO.

XV

) INITIAL APPEARANCE FEE

) DISCLOSURE (NRS CHAPTER

) 19)

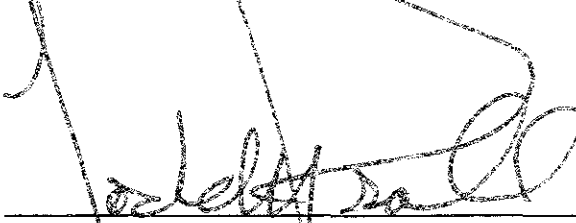
1 Pursuant to NRS Chapter 19, as amended by Senate Bill 106, filing fees are submitted
2 for parties appearing in the above-entitled action as indicated below:

3 MICHAEL A. TRICARICHI, Plaintiff \$1,530.00

4 TOTAL REMITTED: (required) \$1,530.00

5 DATED this 29th day of April, 2016.

6 HUTCHISON & STEFFEN, LLC

7
8
9 

10 Mark A. Hutchison

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12 Todd W. Prall

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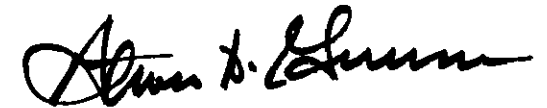
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17 *Attorneys for Plaintiff*



CLERK OF THE COURT

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Attorneys for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI,
Plaintiff,

vs.

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

CASE NO.: A-16-735910-B

DEPT. NO.: XV

**ACCEPTANCE OF SERVICE
OF COMPLAINT & SUMMONS**

Service of Complaint and Summons herein upon Defendant PricewaterhouseCoopers LLP
is accepted this twentieth (20th) day of May, 2016, by Pat Byrne, Esq. and Snell & Wilmer, who
warrants that he is duly authorized to accept service on behalf of named Defendant
PricewaterhouseCoopers LLP specified above.

1 In return for agreeing to accept service of process, Plaintiffs agrees to provide
2 PricewaterhouseCoopers LLP with an extension of time of 30 days to respond to the complaint.
3 Because a 30 day extension of time results in a response date on a weekend (Saturday, July 9),
4 PricewaterhouseCoopers LLP's response to the complaint will be due on July 11, the immediately
5 following Monday.

6 The parties reserve, and do not waive, any and all rights concerning all claims and
7 defenses.

8
9 Dated: May 20th, 2016

SNELL & WILMER L.L.P.

10 By: 

11 Patrick G. Byrne (Nevada Bar 7636)
12 Sherry Ly (Nevada Bar 13529)
13 3883 Howard Hughes Parkway
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Las Vegas, Nevada 89169

14 *Attorneys for Defendant*
PricewaterhouseCoopers LLP

15 24148871

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23 *Attorneys for Plaintiff*

24 DISTRICT COURT

25 CLARK COUNTY, NEVADA

26 MICHAEL A. TRICARICHI,

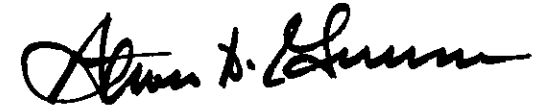
27 Plaintiff,

28 v.

29 PRICEWATERHOUSE COOPERS, LLP,
30 COÖPERATIEVE RABOBANK U.A.,
31 UTRECHT-AMERICA FINANCE CO.,
32 SEYFARTH SHAW LLP and GRAHAM R.
33 TAYLOR,

34 Defendants.

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CLERK OF THE COURT


) CASE NO. A-16-735910-B
) DEPT NO. XV
)
)
) NOTICE OF ENTRY OF ORDER
) REGARDING DEFENDANT
) PRICEWATERHOUSE
) COOPERS, LLP'S MOTION
) TO DISMISS BASED ON
) STATUTE LIMITATIONS AND
) COLLATERAL ESTOPPEL
)
)
)

1 TO: ALL INTERESTED PARTIES

2 NOTICE IS HEREBY GIVEN that an Order Regarding Defendant Pricewaterhouse
3 Coopers, LLP's Motion to Dismiss Based on Statute Limitations and Collateral Estoppel was
4 entered in the above-entitled action on December 12, 2016, a copy of which is attached hereto.
5

6 DATED this 13th day of December, 2016.

7 SPERLING & SLATER, P.C.

8 

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10 Thomas D. Brooks

11 (*Pro Hac Vice*)

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Hutchison & Steffen, LLC and that on this 13th day of December, 2016, I caused the document entitled **NOTICE OF ENTRY OF ORDER REGARDING DEFENDANT PRICEWATERHOUSE COOPERS, LLP’S MOTION TO DISMISS BASED ON STATUTE LIMITATIONS AND COLLATERAL ESTOPPEL** to be served on the following by Electronic Service to:

ALL PARTIES ON THE E-SERVICE LIST

/s/ Madelyn B. Carnate-Peralta
An employee of Hutchison & Steffen, LLC



CLERK OF THE COURT

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24 DISTRICT COURT

25 CLARK COUNTY, NEVADA

26 MICHAEL A. TRICARICHI,

27 Plaintiff,

28 v.

29 PRICEWATERHOUSECOOPERS LLP,
30 COÖPERATIEVE RABOBANK U.A.,
31 UTRECHT-AMERICA FINANCE CO.,
32 SEYFARTH SHAW LLP and GRAHAM R.
33 TAYLOR,

34 Defendants.

) CASE NO. A-16-735910-B

) DEPT NO. XV

) ORDER REGARDING

) DEFENDANT

) PRICEWATERHOUSECOOPERS

) LLP'S MOTION TO DISMISS

) BASED ON STATUTE

) LIMITATIONS AND

) COLLATERAL ESTOPPEL

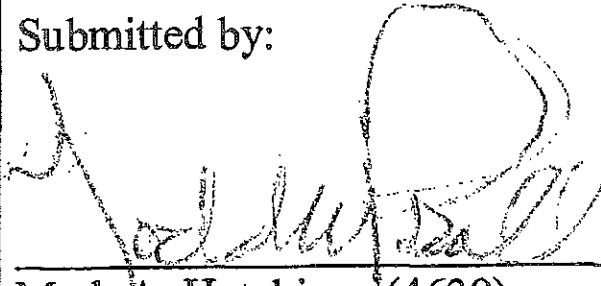
1 Defendant PricewaterhouseCoopers LLP's Motion to Dismiss based on statute of
2 limitations and collateral estoppel came on for hearing before this Court on November 15, 2016.
3 Mark A. Hutchison, Scott F. Hessell, and Thomas D. Brooks, appeared on behalf of Plaintiff
4 Michael A. Tricarichi. Richard C. Gordon, Peter B. Morrison and Winston P. Hsiao appeared
5 on behalf of Defendant PricewaterhouseCoopers LLP. Steve Morris and Ryan M. Lower
6 appeared on behalf of Defendant Seyfarth Shaw LLP. Dan R. Waite appeared on behalf of
7 Defendants Cooperative Rabobank, U.A., and Utrecht-America Finance Co. The Court, having
8 reviewed the papers on file herein and having heard argument from the parties and good cause
9 appearing,
10

11 IT IS HEREBY ORDERED that Defendant PricewaterhouseCoopers LLP's Motion to
12 Dismiss is DENIED without prejudice. Pursuant to the parties' agreement, Defendant
13 PricewaterhouseCoopers LLP shall have until January 17, 2017 to file an answer to the
14 complaint.
15

16 DATED: December 8, 2016


DISTRICT COURT JUDGE

17 Submitted by:

18 
19
20 Mark A. Hutchison (4639)
21 Todd L. Moody (5430)
22 Todd W. Prall (9154)
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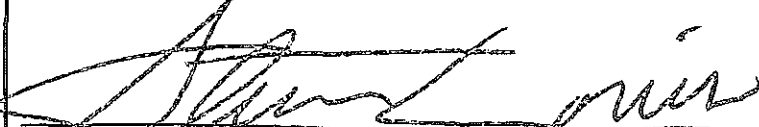
26 Scott F. Hessell
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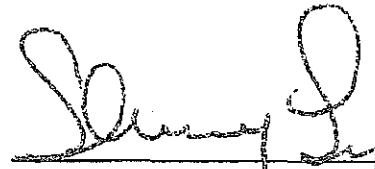
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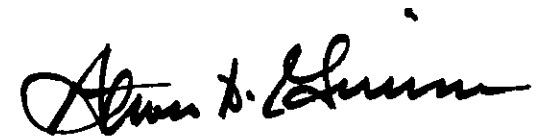
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Attorneys for Defendant
PricewaterhouseCoopers LLP

DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI,

Plaintiff,

vs.

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

Defendants.

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

**PRICEWATERHOUSECOOPERS LLP'S
ANSWER TO COMPLAINT**

Defendant PricewaterhouseCoopers LLP ("PwC") submits its Answer to the Complaint
filed by Plaintiff Michael A. Tricarichi as follows:

ANSWER

INTRODUCTION

1. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 1. To the extent a response is required, PwC denies the allegations.
2. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 2. To the extent a response is required, PwC denies the allegations.
3. In response to Plaintiff's characterization of PwC's services, PwC refers to its website, www.pwc.com, for a description of PwC's professional services and its qualifications to provide such services. PwC admits that Plaintiff retained PwC from April 2003 to August 2003 to provide certain advice regarding Plaintiff's transaction with Fortrend International, LLC (the "Fortrend Transaction"). PwC otherwise denies the allegations in paragraph 3.
4. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 4. To the extent the allegations in paragraph 4 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.
5. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 5. To the extent the allegations in paragraph 5 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.
6. PwC denies the allegations in paragraph 6 as to PwC. PwC is otherwise without information sufficient to form a belief as to the truth of the allegations in paragraph 6. To the extent the allegations in paragraph 6 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.
7. PwC denies the allegations in paragraph 7 as to PwC. PwC refers to the Tax Court Opinion for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the Tax Court Opinion and any factual inferences or

legal conclusions made by Plaintiff based on the Tax Court Opinion. PwC is otherwise without information sufficient to form a belief as to the truth of the allegations in paragraph 7. To the extent the allegations in paragraph 7 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

8. PwC denies the allegations in paragraph 8 as to PwC. PwC is otherwise without information sufficient to form a belief as to the truth of the allegations in paragraph 8 as to the other defendants. To the extent the allegations in paragraph 8 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

PARTIES

9. PwC denies the allegations in paragraph 9.

10. Regarding the allegations contained in paragraph 10:

- a. In response to Plaintiff's characterization of PwC's services, PwC refers to its website, www.pwc.com, for a description of PwC's professional services and its qualifications to provide such services.
- b. PwC admits that it is a limited liability partnership organized and existing under the laws of Delaware.
- c. PwC admits it is registered with the Nevada Secretary of State to do business in the State of Nevada.
- d. PwC admits that it maintains a Nevada CPA License (PART-0663).
- e. PwC admits that it has one office in, and does business in, the City of Las Vegas.
- f. PwC admits that certain PwC partners reside in the State of Nevada.

11. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 11. To the extent the allegations in paragraph 11 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

12. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 12. To the extent the allegations in paragraph 12 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

13. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 13. To the extent the allegations in paragraph 13 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

14. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 14. To the extent the allegations in paragraph 14 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

THIRD PARTIES

15. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 15. To the extent a response is required, PwC denies the allegations.

16. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 16. To the extent a response is required, PwC denies the allegations.

17. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 17. To the extent a response is required, PwC denies the allegations.

18. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 18. To the extent a response is required, PwC denies the allegations.

19. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 19. To the extent a response is required, PwC denies the allegations.

JURISDICTION AND VENUE

20. Paragraph 20 states a legal conclusion to which no response is required.

21. Paragraph 21 states a legal conclusion to which no response is required.

22. Paragraph 22 states a legal conclusion to which no response is required.

23. Paragraph 23 states a legal conclusion to which no response is required.

FACTUAL BACKGROUND**Midco Transactions Generally**

24. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 24. Paragraph 24 states a legal conclusion to which no response is required. PwC refers to IRS Notice 2001-16 for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of IRS Notice 2001-16 and any factual inferences or legal conclusions made by Plaintiff based on IRS Notice 2001-16.
25. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 25. PwC refers to IRS Notice 2001-16 for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of IRS Notice 2001-16 and any factual inferences or legal conclusions made by Plaintiff based on IRS Notice 2001-16.
26. PwC denies the allegations in paragraph 26 as to PwC. PwC is otherwise without information sufficient to form a belief as to the truth of the allegations in paragraph 26 as to the other defendants. To the extent the allegations in paragraph 26 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

The Midco Transaction Into Which Plaintiff Was Drawn

27. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 27. To the extent a response is required, PwC denies the allegations.
28. PwC refers to the referenced legal proceedings and decisions for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the legal decisions and any factual inferences or legal conclusions made by Plaintiff based on the referenced court decisions. PwC is otherwise without information sufficient to form a belief as to the truth of the allegations in paragraph 28. To the extent a response is required, PwC denies the allegations.
29. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 29. To the extent a response is required, PwC denies the allegations.

- 1 30. PwC is without information sufficient to form a belief as to the truth of the allegations in
2 paragraph 30. To the extent a response is required, PwC denies the allegations.
- 3 31. PwC is without information sufficient to form a belief as to the truth of the allegations in
4 paragraph 31. To the extent a response is required, PwC denies the allegations.
- 5 32. PwC is without information sufficient to form a belief as to the truth of the allegations in
6 paragraph 32. To the extent a response is required, PwC denies the allegations.
- 7 33. PwC is without information sufficient to form a belief as to the truth of the allegations in
8 paragraph 33. To the extent a response is required, PwC denies the allegations.
- 9 34. PwC denies the allegations in paragraph 34 as to PwC. PwC is otherwise without
10 information sufficient to form a belief as to the truth of the allegations in paragraph 34.
11 To the extent the allegations in paragraph 34 are addressed to other defendants, PwC
12 states that no response is necessary. To the extent a response is required, PwC denies the
13 allegations.
- 14 35. PwC is without information sufficient to form a belief as to the truth of the allegations in
15 paragraph 35. To the extent a response is required, PwC denies the allegations.
- 16 36. In response to Plaintiff's characterization of PwC's services, PwC refers to its website,
17 www.pwc.com, for a description of PwC's professional services and its qualifications to
18 provide such services. PwC otherwise denies the allegations in paragraph 36 as to PwC.
19 PwC is otherwise without information sufficient to form a belief as to the truth of the
20 allegations in paragraph 36.
- 21 37. PwC admits that on or about April 25, 2003, Plaintiff and PwC entered into an
22 Engagement Agreement. PwC refers to the Engagement Agreement for the true and
23 correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization
24 of the Engagement Agreement and any factual inferences or legal conclusions made by
25 Plaintiff based on the Engagement Agreement. PwC otherwise denies the allegations in
26 paragraph 37.
- 27 38. PwC denies the allegations in paragraph 38. PwC refers to the referenced court
28 proceedings and opinions for the true and correct contents thereof. PwC denies any

1 paraphrasing, summarizing, or characterization of the referenced court proceedings and
2 opinions and any factual inferences or legal conclusions made by Plaintiff based on the
3 court proceedings and opinions.

4 39. PwC admits that PwC was retained by Plaintiff from April 2003 to August 2003 to
5 provide certain advice pursuant to the Engagement Agreement. PwC further admits that
6 the PwC professionals working on the Engagement included Rich Stovsky, Timothy
7 Lohnes and Don Rocen. PwC admits that PwC professionals worked over 150 hours on
8 the engagement with Plaintiff and that Plaintiff paid approximately \$48,000 in fees.

9 40. PwC denies the allegations in paragraph 40.

10 41. PwC admits it reviewed certain terms of drafts of the stock purchase agreement. PwC
11 refers to the Engagement Agreement for the true and correct contents thereof. PwC
12 denies any paraphrasing, summarizing, or characterization of the Engagement
13 Agreement and any factual inferences or legal conclusions made by Plaintiff based on
14 the Engagement Agreement. PwC is otherwise without information sufficient to form a
15 belief as to the truth of the remaining allegations in paragraph 41. To the extent a
16 response is required, PwC denies the allegations.

17 42. PwC refers to the stock purchase agreement for the true and correct contents thereof.
18 PwC denies any paraphrasing, summarizing, or characterization of the stock purchase
19 agreement and any factual inferences or legal conclusions made by Plaintiff based on the
20 stock purchase agreement.

21 43. PwC denies the allegations in paragraph 43 as to PwC. PwC refers to the stock purchase
22 agreement for the true and correct contents thereof. PwC denies any paraphrasing,
23 summarizing, or characterization of the stock purchase agreement and any factual
24 inferences or legal conclusions made by Plaintiff based on the stock purchase agreement.
25 PwC otherwise is without information sufficient to form a belief as to the truth of the
26 allegations in paragraph 43.

27 44. PwC is without information sufficient to form a belief as to the truth of the allegations in
28 paragraph 44. To the extent a response is required, PwC denies the allegations.

- 1 45. PwC is without information sufficient to form a belief as to the truth of the allegations in
2 paragraph 45. To the extent the allegations in paragraph 45 are addressed to other
3 defendants, PwC states that no response is necessary. To the extent a response is
4 required, PwC denies the allegations.
- 5 46. PwC is without information sufficient to form a belief as to the truth of the allegations in
6 paragraph 46. To the extent the allegations in paragraph 4 are addressed to other
7 defendants, PwC states that no response is necessary. To the extent a response is
8 required, PwC denies the allegations.
- 9 47. PwC refers to the Tax Court Opinion for the true and correct contents thereof. PwC
10 denies any paraphrasing, summarizing, or characterization of the Tax Court Opinion and
11 any factual inferences or legal conclusions made by Plaintiff based on the Tax Court
12 Opinion. PwC is without information sufficient to form a belief as to the truth of the
13 allegations in paragraph 47. To the extent the allegations in paragraph 47 are addressed
14 to other defendants, PwC states that no response is necessary. To the extent a response is
15 required, PwC denies the allegations.
- 16 48. PwC is without information sufficient to form a belief as to the truth of the allegations in
17 paragraph 48. To the extent the allegations in paragraph 48 are addressed to other
18 defendants, PwC states that no response is necessary. To the extent a response is
19 required, PwC denies the allegations.
- 20 49. PwC is without information sufficient to form a belief as to the truth of the allegations in
21 paragraph 49. To the extent the allegations in paragraph 49 are addressed to other
22 defendants, PwC states that no response is necessary. To the extent a response is
23 required, PwC denies the allegations.
- 24 50. PwC refers to the relevant publicly available court decisions, referenced in paragraph
25 50, for the true and correct contents thereof. PwC denies any paraphrasing, summarizing,
26 or characterization of the court decisions and any factual inferences or legal conclusions
27 made by Plaintiff based on the referenced court decisions.
28

1 51. PwC is without information sufficient to form a belief as to the truth of the allegations in
2 paragraph 51. To the extent the allegations in paragraph 51 are addressed to other
3 defendants, PwC states that no response is necessary. To the extent a response is
4 required, PwC denies the allegations.

5 52. PwC is without information sufficient to form a belief as to the truth of the allegations in
6 paragraph 52. To the extent the allegations in paragraph 52 are addressed to other
7 defendants, PwC states that no response is necessary. To the extent a response is
8 required, PwC denies the allegations.

9 53. PwC denies the allegations in paragraph 53.

10 54. PwC is without information sufficient to form a belief as to the truth of the allegations in
11 paragraph 54. To the extent the allegations in paragraph 54 are addressed to other
12 defendants, PwC states that no response is necessary. To the extent a response is
13 required, PwC denies the allegations.

14 55. PwC is without information sufficient to form a belief as to the truth of the allegations in
15 paragraph 55. To the extent the allegations in paragraph 55 are addressed to other
16 defendants, PwC states that no response is necessary. To the extent a response is
17 required, PwC denies the allegations.

18 56. PwC denies the allegations in paragraph 56 as to PwC. PwC refers to IRS Notice 2001-
19 16 for the true and correct contents thereof. PwC denies any paraphrasing,
20 summarizing, or characterization of IRS Notice 2001-16 and any factual inferences or
21 legal conclusions made by Plaintiff based on IRS Notice 2001-16. PwC is otherwise
22 without information sufficient to form a belief as to the truth of the allegations in
23 paragraph 56. To the extent the allegations in paragraph 56 are addressed to other
24 defendants, PwC states that no response is necessary. To the extent a response is
25 required, PwC denies the allegations.

26 57. PwC denies the allegations in paragraph 57 as to PwC. PwC is otherwise without
27 information sufficient to form a belief as to the truth of the allegations in paragraph 57.
28 To the extent the allegations in paragraph 57 are addressed to other defendants, PwC

states that no response is necessary. To the extent a response is required, PwC denies the allegations.

58. PwC denies the allegations in paragraph 58 as to PwC. PwC is otherwise without information sufficient to form a belief as to the truth of the remaining allegations in paragraph 58. To the extent the allegations in paragraph 58 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

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

59. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 59. To the extent a response is required, PwC denies the allegations.

60. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 60. To the extent a response is required, PwC denies the allegations..

61. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 61. To the extent the allegations in paragraph 61 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

62. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 62. To the extent the allegations in paragraph 62 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

63. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 63. To the extent a response is required, PwC denies the allegations.

64. PwC refers to the Tax Court Opinion for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the Tax Court Opinion and any factual inferences or legal conclusions made by Plaintiff based on the Tax Court Opinion. PwC is otherwise without information sufficient to form a belief as to the truth of the allegations in paragraph 64. To the extent the allegations in paragraph 64 are

1 addressed to other defendants, PwC states that no response is necessary. To the extent a
2 response is required, PwC denies the allegations.

3 65. PwC is without information sufficient to form a belief as to the truth of the allegations in
4 paragraph 65. To the extent the allegations in paragraph 65 are addressed to other
5 defendants, PwC states that no response is necessary. To the extent a response is
6 required, PwC denies the allegations.

7 66. PwC is without information sufficient to form a belief as to the truth of the allegations in
8 paragraph 66. To the extent the allegations in paragraph 66 are addressed to other
9 defendants, PwC states that no response is necessary. To the extent a response is
10 required, PwC denies the allegations.

11 67. PwC is without information sufficient to form a belief as to the truth of the allegations in
12 paragraph 67. PwC refers to the American Jobs Creation Act of 2004 for the true and
13 correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization
14 of the American Jobs Creation Act of 2004 and any factual inferences or legal
15 conclusions made by Plaintiff based on the American Jobs Creation Act of 2004. To the
16 extent the allegations in paragraph 67 are addressed to other defendants, PwC states that
17 no response is necessary. To the extent a response is required, PwC denies the
18 allegations.

19 68. PwC is without information sufficient to form a belief as to the truth of the allegations in
20 paragraph 68. To the extent the allegations in paragraph 68 are addressed to other
21 defendants, PwC states that no response is necessary. To the extent a response is
22 required, PwC denies the allegations.

23 69. PwC is without information sufficient to form a belief as to the truth of the allegations in
24 paragraph 69. PwC refers to the Tax Court proceeding and Tax Court Opinion for the
25 true and correct contents thereof. PwC denies any paraphrasing, summarizing, or
26 characterization of the Tax Court Opinion and any factual inferences or legal conclusions
27 made by Plaintiff based on the Tax Court Opinion. To the extent the allegations in
28

paragraph 69 are addressed to other defendants, PwC states that no response is necessary.

To the extent a response is required, PwC denies the allegations.

70. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 70. To the extent the allegations in paragraph 70 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

71. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 71. To the extent the allegations in paragraph 71 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

72. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 72. To the extent the allegations in paragraph 72 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

Defendants and Their Co-Conspirators Fraudulently Concealed Their Acts

73. PwC denies the allegations in paragraph 73 as to PwC. PwC is otherwise without information sufficient to form a belief as to the truth of the allegations in paragraph 73. To the extent the allegations in paragraph 73 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

74. PwC denies the allegations in paragraph 74 as to PwC. PwC is otherwise without information sufficient to form a belief as to the truth of the allegations in paragraph 74. To the extent the allegations in paragraph 74 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

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

75. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 75. To the extent a response is required, PwC denies the allegations.

1 76. PwC is without information sufficient to form a belief as to the truth of the allegations in
2 paragraph 76. To the extent a response is required, PwC denies the allegations.

3 77. PwC is without information sufficient to form a belief as to the truth of the allegations in
4 paragraph 77. To the extent a response is required, PwC denies the allegations.

5 78. PwC is without information sufficient to form a belief as to the truth of the allegations in
6 paragraph 78. To the extent a response is required, PwC denies the allegations.

7 79. PwC denies the allegations in paragraph 79 as to PwC. PwC refers to the Tax Court
8 proceeding and Tax Court Opinion for the true and correct contents thereof. PwC denies
9 any paraphrasing, summarizing, or characterization of the Tax Court Opinion and any
10 factual inferences or legal conclusions made by Plaintiff based on the Tax Court
11 Opinion.

12 80. PwC denies the allegations in paragraph 80 as to PwC. PwC is otherwise without
13 information sufficient to form a belief as to the truth of the allegations in paragraph 80.
14 To the extent the allegations in paragraph 80 are addressed to other defendants, PwC
15 states that no response is necessary. To the extent a response is required, PwC denies the
16 allegations.

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

19 81. Paragraph 81 is a characterization of the Complaint to which no response is required. To
20 the extent a response is required, PwC denies the allegations. Furthermore, PwC refers
21 to its answers to paragraphs 1 through 80, inclusive, and incorporates those answers
22 herein by this reference.

23 82. PwC denies the allegations in paragraph 82.

24 83. PwC denies the allegations in paragraph 83.

25 84. PwC denies the allegations in paragraph 84.

26 85. PwC denies the allegations in paragraph 85.

27 86. PwC denies the allegations in paragraph 86.

28

COUNT II
NEGLIGENT MISREPRESENTATION
AS TO PwC

87. Paragraph 87 is a characterization of the Complaint to which no response is required. To the extent a response is required, PwC denies the allegations. Furthermore, PwC refers to its answers to paragraphs 1 through 86, inclusive, and incorporates those answers herein by this reference.

88. PwC denies the allegations in paragraph 88.

89. PwC denies the allegations in paragraph 89.

90. PwC denies the allegations in paragraph 90.

91. PwC denies the allegations in paragraph 91.

92. PwC denies the allegations in paragraph 92.

93. PwC denies the allegations in paragraph 93.

94. PwC denies the allegations in paragraph 94.

95. PwC denies the allegations in paragraph 95.

96. PwC denies the allegations in paragraph 96.

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

97. Paragraph 97 is a characterization of the Complaint to which no response is required. To the extent a response is required, PwC denies the allegations. Furthermore, PwC refers to its answers to paragraphs 1 through 96, inclusive, and incorporates those answers herein by this reference.

98. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 98. Moreover, the allegations in paragraph 98 are addressed to other defendants, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

99. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 99. Moreover, the allegations in paragraph 99 are addressed to other

defendants, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

100. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 100. Moreover, the allegations in paragraph 100 are addressed to other defendants, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

101. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 101. Moreover, the allegations in paragraph 101 are addressed to other defendants, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

102. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 102. Moreover, the allegations in paragraph 102 are addressed to other defendants, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

103. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 103. Moreover, the allegations in paragraph 103 are addressed to other defendants, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

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

104. Paragraph 104 is a characterization of the Complaint to which no response is required. To the extent a response is required, PwC denies the allegations. Furthermore, PwC refers to its answers to paragraphs 1 through 103, inclusive, and incorporates those answers herein by this reference.

105. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 105. Moreover, the allegations in paragraph 105 are addressed to other defendants, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

1 106. PwC is without information sufficient to form a belief as to the truth of the allegations in
2 paragraph 106. Moreover, the allegations in paragraph 106 are addressed to other
3 defendants, and PwC states that no response is necessary. To the extent a response is
4 required, PwC denies the allegations.

5 107. PwC is without information sufficient to form a belief as to the truth of the allegations in
6 paragraph 107. Moreover, the allegations in paragraph 107 are addressed to other
7 defendants, and PwC states that no response is necessary. To the extent a response is
8 required, PwC denies the allegations.

9 108. PwC is without information sufficient to form a belief as to the truth of the allegations in
10 paragraph 108. Moreover, the allegations in paragraph 108 are addressed to other
11 defendants, and PwC states that no response is necessary. To the extent a response is
12 required, PwC denies the allegations.

13 109. PwC is without information sufficient to form a belief as to the truth of the allegations in
14 paragraph 109. Moreover, the allegations in paragraph 109 are addressed to other
15 defendants, and PwC states that no response is necessary. To the extent a response is
16 required, PwC denies the allegations.

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

20 110. Paragraph 110 is a characterization of the Complaint to which no response is required.
21 To the extent a response is required, PwC denies the allegations. Furthermore, PwC
22 refers to its answers to paragraphs 1 through 109, inclusive, and incorporates those
23 answers herein by this reference.

24 111. PwC is without information sufficient to form a belief as to the truth of the allegations in
25 paragraph 111. Moreover, the allegations in paragraph 111 are addressed to other
26 defendants, and PwC states that no response is necessary. To the extent a response is
27 required, PwC denies the allegations.

28 112. PwC is without information sufficient to form a belief as to the truth of the allegations in
paragraph 112. Moreover, the allegations in paragraph 112 are addressed to other

defendants, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

113. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 113. Moreover, the allegations in paragraph 113 are addressed to other defendants, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

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

114. Paragraph 114 is a characterization of the Complaint to which no response is required. To the extent a response is required, PwC denies the allegations. Furthermore, PwC refers to its answers to paragraphs 1 through 113, inclusive, and incorporates those answers herein by this reference.

115. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 115. To the extent a response is required, PwC denies the allegations.

116. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 116. Moreover, the allegations in paragraph 116 are addressed to other defendants, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

117. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 117. Moreover, the allegations in paragraph 117 are addressed to other defendants, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

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

118. Paragraph 118 is a characterization of the Complaint to which no response is required. To the extent a response is required, PwC denies the allegations. Furthermore, PwC refers to its answers to paragraphs 1 through 117, inclusive, and incorporates those answers herein by this reference.

1 119. PwC is without information sufficient to form a belief as to the truth of the allegations in
2 paragraph 119. Moreover, the allegations in paragraph 119 are addressed to other
3 defendants, and PwC states that no response is necessary. To the extent a response is
4 required, PwC denies the allegations.

5 120. PwC is without information sufficient to form a belief as to the truth of the allegations in
6 paragraph 120. Moreover, the allegations in paragraph 120 are addressed to other
7 defendants, and PwC states that no response is necessary. To the extent a response is
8 required, PwC denies the allegations.

9 121. PwC is without information sufficient to form a belief as to the truth of the allegations in
10 paragraph 121. Moreover, the allegations in paragraph 121 are addressed to other
11 defendants, and PwC states that no response is necessary. To the extent a response is
12 required, PwC denies the allegations.

13 **COUNT VIII**
14 **UNJUST ENRICHMENT**
15 **AS TO RABOBANK AND UTRECHT**

16 122. Paragraph 122 is a characterization of the Complaint to which no response is required.
17 To the extent a response is required, PwC denies the allegations. Furthermore, PwC
18 refers to its answers to paragraphs 1 through 121, inclusive, and incorporates those
19 answers herein by this reference.

20 123. PwC is without information sufficient to form a belief as to the truth of the allegations in
21 paragraph 123. Moreover, the allegations in paragraph 123 are addressed to other
22 defendants, and PwC states that no response is necessary. To the extent a response is
23 required, PwC denies the allegations.

- 24 A. PwC denies that Plaintiff is entitled to the requested relief in paragraph A.
25 B. PwC denies that Plaintiff is entitled to the requested relief in paragraph B.
26 C. PwC denies that Plaintiff is entitled to the requested relief in paragraph C.
27 D. PwC denies that Plaintiff is entitled to the requested relief in paragraph D.
28 E. PwC denies that Plaintiff is entitled to the requested relief in paragraph E.
F. PwC denies that Plaintiff is entitled to the requested relief in paragraph F.

G. PwC denies that Plaintiff is entitled to the requested relief in paragraph G.

JURY DEMAND

PwC avers that Plaintiff waived his right to jury trial on his claims against PwC pursuant to the Engagement Agreement.

GENERAL DENIAL AND RESERVATION OF RIGHTS

PwC generally denies any allegation not expressly admitted above. When PwC responded that no response was required, it did so in good faith. If there is any dispute over whether a response should have been provided in such circumstances, then PwC hereby denies the allegations. PwC reserves the right to supplement or amend this answer based on the information revealed in discovery. PwC's responses are all subject to the Affirmative Defenses stated below.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Plaintiff's Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the applicable statutes of limitations and statute of repose.

THIRD AFFIRMATIVE DEFENSE

Plaintiff's claims are barred under the doctrine of laches.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred under the doctrine of waiver.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred under the doctrine of estoppel.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred under the doctrine of unclean hands.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred under the doctrine of *in pari delicto*.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred under the doctrines of collateral estoppel and/or res judicata.

NINTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the doctrine of comparative negligence/fault.

TENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the intervening and superseding negligence or intentional actions of third-parties.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by Plaintiff's breach of the Engagement Agreement.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred because Plaintiff would be unjustly enriched if he were permitted to obtain any recovery in this action.

THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by Plaintiff's failure to join necessary parties.

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiff's damages, if any claims succeed, should be reduced due to Plaintiff's failure to mitigate his own damages.

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiff's damages, if any claims succeed, should be reduced by the doctrines of offset and/or contribution.

SIXTEENTH AFFIRMATIVE DEFENSE

Plaintiff's damages, if any claims succeed, should be limited to the limitation of liability clause in the Engagement Agreement.

RESERVATION OF RIGHT TO ADD AFFIRMATIVE DEFENSES

By alleging the matters set forth below as "Affirmative Defenses," PwC does not thereby allege or admit that it has the burden of proof or the burden of persuasion with respect to any of those matters. PwC presently has insufficient knowledge or information on which to form a belief as to whether it may have additional, as yet unstated, defenses available. Accordingly, PwC hereby gives notice that it intends to rely upon such other and further defenses as may become available or apparent during pre-trial proceedings in this case and hereby reserves its

rights to assert such defenses. PwC further reserves the right to amend its Answer and affirmative defenses accordingly and to delete affirmative defenses that PwC determines are not applicable during the course of this litigation.

WHEREFORE, Defendant PwC prays for relief as follows:

1. Plaintiff takes nothing by way of his Complaint;
2. That the Complaint be dismissed with prejudice;
3. That PwC be awarded its attorneys' fees and costs; and
4. For such other and further relief as the Court may deem just and proper.

Dated: January 17, 2017.

SNELL & WILMER L.L.P.

By: /s/ Sherry Ly

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*Attorneys for Defendant
PricewaterhouseCoopers, LLP*

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On January 17, 2017, I caused to be served a true and correct copy of the foregoing **PRICEWATERHOUSECOOPERS LLP'S ANSWER TO COMPLAINT** upon the following by the method indicated:

☐

BY FAX: by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document(s).

☒

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

☐

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

☐

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

☐

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

☒

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

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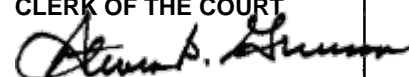
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Co.*

/s/ Patricia Larsen
An Employee of Snell & Wilmer L.L.P.



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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI,

Plaintiff,

v.

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

Defendants.

Case No.: A-16-735910-B

Dept. No.: XV

NOTICE OF APPEAL

///

///

///

///

1 Notice is given that Michael A. Tricarichi, Plaintiff in the above-captioned matter,
2 appeals to the Supreme Court of Nevada from the following orders:

- 3 1. February 8, 2017, order of the district court granting defendants
4 Rabobank and Utrecht's motion to dismiss the complaint for lack
5 of personal jurisdiction;
- 6 2. December 23, 2016, order of the district court granting defendant
7 Seyfarth's motion to dismiss the complaint for lack of personal
8 jurisdiction.

9 On May 1, 2017, the district court entered an order certifying the above-orders as final
10 pursuant to NRCP 54(b).¹

11 DATED this 25 day of May, 2017.

12 HUTCHISON & STEFFEN, LLC

13 
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21 *Attorney for Plaintiff*

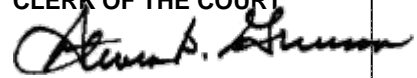
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26
27 ¹Notice of entry of the order of certification was served electronically on May 2, 2017.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Hutchison & Steffen, LLC and that on this 25th day of May, 2017, I caused the document entitled **NOTICE OF APPEAL** to be served on the following by Electronic Service to:

ALL PARTIES ON THE E-SERVICE LIST


An employee of HUTCHISON & STEFFEN, LLC



1 **NTSO**
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2 Todd L. Moody (5430)
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15 *Attorneys for Plaintiff*

16 DISTRICT COURT

17 CLARK COUNTY, NEVADA

18 MICHAEL A. TRICARICHI,

19 Plaintiff,

20 v.

21 PRICEWATERHOUSE COOPERS, LLP,
22 COÖPERATIEVE RABOBANK U.A.,
23 UTRECHT-AMERICA FINANCE CO.,
24 SEYFARTH SHAW LLP and GRAHAM R.
TAYLOR,

25 Defendants.

) CASE NO. A-16-735910-B
) DEPT NO. XV

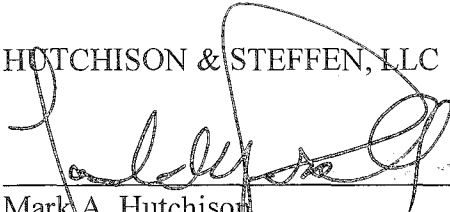
) **NOTICE OF ENTRY OF ORDER**
) **REGARDING DEFENDANT**
) **PRICEWATERHOUSECOOPERS**
) **LLP'S MOTION FOR SUMMARY**
) **JUDGMENT**

1 TO: ALL INTERESTED PARTIES

2 NOTICE IS HEREBY GIVEN that an Order Regarding Defendant Pricewaterhouse-
3 Coopers LLP's Motion for Summary Judgment was entered in the above-entitled action on May
4 31, 2017, a copy of which is attached hereto.

5 DATED this 5th day of June, 2017.

6 HUTCHISON & STEFFEN, LLC

7 
8
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19 Chicago, IL 60603

20 *Attorneys for Plaintiff Michael A. Tricarichi*

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of Hutchison & Steffen, LLC
3
4 and that on this 5th day of June, 2017, I caused the document entitled **NOTICE OF ENTRY**
5 **OF ORDER REGARDING DEFENDANT PRICEWATERHOUSECOOPERS LLP'S**
6 **MOTION FOR SUMMARY JUDGMENT** to be served on the following by Electronic
7 Service to:

8 **ALL PARTIES ON THE E-SERVICE LIST**

9
10 /s/ Madelyn B. Carnate-Peralta
11 An employee of Hutchison & Steffen, LLC
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1 ODM

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15 *Attorneys for Plaintiff*

16 DISTRICT COURT

17 CLARK COUNTY, NEVADA

18 MICHAEL A. TRICARICHI,

19 Plaintiff,

20 v.

21 PRICEWATERHOUSE COOPERS, LLP,
22 COÖPERATIEVE RABOBANK U.A.,
23 UTRECHT-AMERICA FINANCE CO.,
24 SEYFARTH SHAW LLP and GRAHAM R.
TAYLOR,

25 Defendants.

) CASE NO. A-16-735910-B
) DEPT NO. XV

) ORDER REGARDING
) DEFENDANT
) PRICEWATERHOUSECOOPERS
) LLP'S MOTION FOR SUMMARY
) JUDGMENT

AA 000080

MAY 26 2017

1 Defendant PricewaterhouseCoopers LLP's (PwC's) Motion for Summary Judgment
2 came on for hearing before this Court on May 10, 2017. Todd L. Moody and Scott F. Hessel
3 appeared on behalf of Plaintiff Michael A. Tricarichi. Patrick G. Byrne, Peter B. Morrison and
4 Winston P. Hsiao appeared on behalf of Defendant PwC.

5
6 The COURT CANNOT FIND, based on the record presently before it, that genuine
7 issues of material fact exist, regardless of which state's law applies in this case.

8 The COURT NOTES that Mr. Tricarichi affirmatively says in his Affidavit on page 3,
9 lines 10-12, "PwC's work and advice to me about proceeding with the Fortrend transaction
10 extended into August 2003"

11 THE COURT FINDS NRCP 56(f) relief as set forth in paragraph 10 of Mr. Tricarichi's
12 Affidavit is appropriate.

13 Having considered the same and good cause appearing,

14
15 IT IS HEREBY ORDERED that Defendant PwC's Motion for Summary Judgment is
16 DENIED without prejudice solely based on NRCP 56(f).

17 IT IS FURTHER ORDERED that Plaintiff is entitled to limited discovery necessary to
18 oppose PwC's motion for summary judgment as set forth in Paragraph 10 of Mr. Tricarichi's
19 Affidavit, which requested PwC documents and testimony regarding the Bishop and Marshall
20 transactions; PwC's review, promotion or advocacy of, or other advice regarding transactions
21 similar to Mr. Tricarichi's transaction with Fortrend, and the reasons why PwC did not make
22 Mr. Tricarichi aware of those transactions.

23
24 ///

25 ///

26 ///

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28

1 IT IS FURTHER ORDERED that the parties shall meet and confer in good faith
2 regarding the appropriate scope of the limited discovery necessary to oppose summary
3 judgment, and if there is a dispute, the parties may seek a decision from the Court.

4 DATED: May 30, 2017

[Signature]
DISTRICT COURT JUDGE

6
7
8 Submitted by:

9
10 /s/ Todd W. Prall

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23 *Attorneys for Plaintiff*

24 Approved as to form and content by:

25 SNELL & WILMER L.L.P.

26 /s/ Patrick Byrne

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Attorneys for Defendant
PricewaterhouseCoopers LLP

EXHIBIT 1

PricewaterhouseCoopers LLP
BP Tower, 27th Floor
200 Public Square
Cleveland OH 44114-2301
Telephone (216) 875 3000
Facsimile (216) 566 7846

Mr. Michael A. Tricarichi
Westside Cellular, Inc.
23632 Mercantile Drive
Beachwood, OH 44122

April 10, 2003

Dear Mr. Tricarichi:

We appreciate the opportunity to provide tax services to you and Westside Cellular, Inc. (collectively "you"). This engagement letter and the **attached Terms of Engagement to Provide Tax Services** (collectively, this "Agreement") set forth an understanding of the nature and scope of the services to be performed and the fees we will charge for the services, and outline the responsibilities of PricewaterhouseCoopers LLP ("PricewaterhouseCoopers," "we" or "us") and you necessary to ensure that PricewaterhouseCoopers' professional services are performed to achieve mutually agreed upon objectives.

Summary of Services

You have requested that PricewaterhouseCoopers perform tax research and evaluation services.

Timing of Engagement

We will be prepared to begin immediately.

Tax Return Disclosure and Tax Advisor Listing Requirements

Treasury regulations section 1.6011-4 require that taxpayers disclose to the IRS their participation in certain "reportable transactions." You agree to advise us if you determine that any matter covered by this Agreement is a reportable transaction that is required to be disclosed under section 1.6011-4. Similar Treasury regulations issued under Internal Revenue

AA 000085

001

PricewaterhouseCoopers LLP
BP Tower, 27th Floor
200 Public Square
Cleveland OH 44114-2301
Telephone (216) 875 3000
Facsimile (216) 566 7846

Mr. Michael A. Tricarichi
Westside Cellular, Inc.
23632 Mercantile Drive
Beachwood, OH 44122

April 10, 2003

Dear Mr. Tricarichi:

We appreciate the opportunity to provide tax services to you and Westside Cellular, Inc. (collectively "you"). This engagement letter and the **attached Terms of Engagement to Provide Tax Services** (collectively, this "Agreement") set forth an understanding of the nature and scope of the services to be performed and the fees we will charge for the services, and outline the responsibilities of PricewaterhouseCoopers LLP ("PricewaterhouseCoopers," "we" or "us") and you necessary to ensure that PricewaterhouseCoopers' professional services are performed to achieve mutually agreed upon objectives.

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Timing of Engagement

We will be prepared to begin immediately.

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Treasury regulations section 1.6011-4 require that taxpayers disclose to the IRS their participation in certain "reportable transactions." ~~You agree to advise us if you determine that any matter covered by this Agreement is a reportable transaction that is required to be disclosed under section 1.6011-4.~~ Similar Treasury regulations issued under Internal Revenue

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002

PER DISCUSSION W/ M. TRICANICH:

1. HE UNDERSTANDS AND AGREES
THAT THIS IS REQUIRED

2. FEES: PWC AGREES TO
BILL MONTHLY SO THAT TRICANICH
CAN BE UP-TO-DATE ON FEES
INCURRED. HE UNDERSTANDS THE
FEES MAY EXCEED \$20,000.

- DISCUSSED W/ KEN PADGETT

AA 000087

003

Code section 6112 require that we maintain lists of certain client engagements where we are material advisors to clients that have participated in either a reportable transaction or a transaction that is required to be registered with the IRS as a tax shelter. Therefore, if we determine, after consultation with you, that you have participated in either a reportable transaction or one required to be registered under Internal Revenue Code section 6111, we will place your name and other required information on a list. Sometime in the future the IRS may request our lists of reportable or section 6011 transactions, and we may be compelled to provide the IRS with the contents of our lists, including your name. We will advise you if we are ultimately required to provide your name to the IRS in connection with any matter covered by this agreement.

Fees

The fee for services relative to this project as described in the "Summary of Services" section of this Agreement will be based on our standard hourly rates. We will also bill you for our reasonable out-of-pocket expenses and our internal charges for certain support activities. Our internal charges include certain flat-rate amounts that reflect an allocation of estimated costs, including those associated with airline ticketing and general office services, such as computer usage, telephone charges, facsimile transmissions, postage and photocopying. We leverage our size to achieve cost savings for our clients in all areas of expense, including those covered by these internal charges and use this system of allocation to minimize total costs.

Payment of our invoices is due on presentation and expected to be received within 20 days of the invoice date.

We reserve the right to charge interest on any past due balances at a rate of 1% per month or part thereof.

*TOTAL COST OF SERVICES IS NOT TO EXCEED \$20,000 WITHOUT
PRIOR WRITTEN AUTHORIZATION*

* * * * *

We look forward to working with you and your staff during the completion of this important project. If this Agreement is in accordance with your understanding of our engagement, please sign the enclosed copy of this letter and return it to us. Please sign and retain the original for your files. If you have any questions or comments regarding the terms of this Agreement, please do not hesitate to call Mr. Richard P. Stovsky at 216-875-3111.

Yours very truly,

Price Waterhouse Coopers LLP

Enclosure(s): Terms of Engagement to Provide Tax Services

Accepted: Michael A. Tricarichi and Westside Cellular, Inc.

By: 

Date: 4/25/03

Terms of Engagement to Provide Tax Services

1. Entire Agreement

These Terms of Engagement to Provide Tax Services and the engagement letter to which they are attached (collectively, the "Agreement") constitute the entire agreement between the client to whom such engagement letter is addressed and any other legal entities referred to therein ("Client" or "you") and PricewaterhouseCoopers LLP, a Delaware limited liability partnership ("PricewaterhouseCoopers," "we" or "us"), regarding the services described in the engagement letter.

2. Responsibilities of the Client

In circumstances where the Client is a business entity, the Client agrees to identify those individuals authorized to request services from PricewaterhouseCoopers under the terms of this Agreement. Individuals authorized to request services agree to identify the purpose of the services, and identify for whom the services are to be performed (e.g., the corporation, an employee, a director) at the time the services are requested.

A fundamental term of this Agreement is that the Client will provide us with all information relevant to the services to be performed and to provide us with any reasonable assistance as may be required to properly perform the engagement. The Client agrees to bring to our attention any matters that may reasonably be expected to require further consideration to determine the proper treatment of any relevant item. The Client also agrees to bring to our attention any changes in the information as originally presented as soon as such information becomes available. Client consents to the use, by PricewaterhouseCoopers staff visiting or working from the Client site, of the Client's resources, including, but not limited to network, Internet and extranet access, for the purpose of accessing similar PricewaterhouseCoopers resources. Client acknowledges that it retains all management responsibilities related to judgments and decisions regarding the Client's financial, tax or business matters.

Unless otherwise indicated, any tax returns, reports, letters, written opinions, memoranda, etc. delivered to the Client as part of the tax services ("Deliverables") are solely for the Client and are not intended to nor may they be relied upon by any other party ("Third Party").

3. Responsibilities of PricewaterhouseCoopers

We will perform our services on the basis of the information you have provided and in consideration of the applicable federal, foreign, state or local tax laws, regulations and associated interpretations relative to the appropriate jurisdiction as of the date the services are provided. 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. We do not assume responsibility for such changes occurring after the date we have completed our services.

Some of the matters on which we may be asked to advise the Client may have implications to other persons or entities. However, we have no responsibility to these persons or entities unless we are specifically engaged to address these issues to such persons or entities, and we agree to do so in writing.

Tax jurisdictions may impose penalties for certain failures. Relative to the services provided under the terms of this Agreement, we will discuss with Client any tax positions of

which we are aware that we believe may subject the Client to penalties. We will also discuss with Client possible courses of action related to the Client's tax return to avoid the imposition of any penalty (e.g., disclosure). We will use our judgment in resolving questions where the tax law may be unclear, or where there are conflicts between taxing authorities' interpretations of the law and other supportable positions, and discuss them with you. We are not responsible for any penalties imposed for positions that have been discussed with Client where we recommended a course of action to avoid penalties and the Client elected not to pursue such course.

PricewaterhouseCoopers is not responsible for any penalties assessed against the Client as the result of the Client's failure to provide us with all the relevant information relative to the issue under consultation. Furthermore, the Client agrees to reimburse PricewaterhouseCoopers for any penalties imposed on PricewaterhouseCoopers, its partners or staff, as the result of the Client's failure to provide such information.

4. Electronic Communications

In performing services under this Agreement, PricewaterhouseCoopers and/or Client may wish to communicate electronically either via facsimile, electronic mail or similar methods (collectively, "E-mail"). However, the electronic transmission of information cannot be guaranteed to be secure or error free and such information could be intercepted, corrupted, lost, destroyed, arrive late or incomplete or otherwise be adversely affected or unsafe to use. Unless you notify us otherwise, we shall regard your acceptance of this Agreement as including your consent to use E-mail. All risks related to your business and connected with the use of E-mail are borne by you and are not our responsibility.

Both parties will carry out procedures to protect the integrity of data. In particular, it is the recipient's responsibility to carry out a virus check on any attachments before launching or otherwise using any documents, whether received by E-mail or on disk or otherwise.

5. Engagement Limitations

The services performed under this Agreement will not constitute an examination or review in accordance with generally accepted auditing or attestation standards. Except as may be specified in this Agreement, we will not audit or otherwise verify the information supplied to us, from whatever source, in connection with this engagement.

In performing services under this Agreement, we may occasionally discuss financial accounting matters with Client. The services performed under this Agreement, including any such discussions, are not intended to and do not include an engagement or other undertaking to perform an engagement to issue an opinion on the application of financial accounting matters as contemplated under Statement on Auditing Standards (SAS) No. 97. We have no responsibility for such matters unless we are specifically engaged to address these issues pursuant to a specific written engagement agreement.

As you are aware, tax returns and other filings are subject to examination by taxing authorities. We will be available to assist the Client in the event of an audit of any issue for which we have provided services under this Agreement. However, unless otherwise indicated, our fees for these additional

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006

services are not included in our fee for the services covered by this Agreement.

We will not be prevented or restricted by anything in this Agreement from providing services for other clients.

In the course of our engagement, certain communications between Client and PricewaterhouseCoopers may be subject to a confidentiality privilege. Client recognizes that we may be required to disclose such communications to federal, state and international regulatory bodies; a court in criminal or other civil litigation; or to other Third Parties, including Client's independent auditors, as part of our professional responsibilities. In the event that we receive a request from a Third Party (including a subpoena, summons or discovery demand in litigation) calling for the production of information, we will promptly notify you. We agree to cooperate with Client in any effort to assert any privilege with respect to such information, provided Client agrees to hold PricewaterhouseCoopers harmless from and be responsible for any costs and expenses resulting from such assertion.

6. Disassociation or Termination of Engagement
Either party may terminate this Agreement upon written notice to the other party. In the event of termination, Client will be responsible for fees earned and expenses incurred through the date termination notice is received.

7. Limitation of Liability
All services will be rendered by and under the supervision of qualified staff in accordance with the AICPA's Statements on Standards for Tax Services and the terms and conditions set forth in this Agreement. PricewaterhouseCoopers makes no other representation or warranty regarding either the services to be provided or any Deliverables; in particular, and without limitation of the foregoing, any express or implied warranties of fitness for a particular purpose, merchantability, warranties arising by custom or usage in the profession, and warranties arising by operation of law are expressly disclaimed.

IN NO EVENT, UNLESS IT HAS BEEN FINALLY DETERMINED THAT PRICEWATERHOUSECOOPERS WAS GROSSLY NEGLIGENT OR ACTED WILLFULLY OR FRAUDULENTLY, SHALL PRICEWATERHOUSECOOPERS 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. IN NO EVENT SHALL PRICEWATERHOUSECOOPERS BE LIABLE FOR ANY SPECIAL, CONSEQUENTIAL, INDIRECT, EXEMPLARY, PUNITIVE, LOST PROFITS OR SIMILAR DAMAGES, EVEN IF WE HAVE BEEN APPRISED OF THE POSSIBILITY THEREOF.

8. Indemnification
Client agrees to indemnify and hold harmless PricewaterhouseCoopers and its personnel from any and all Third-Party claims, liabilities, costs, and expenses, including reasonable attorneys fees, arising from or relating to the services under this Agreement, except to the extent finally determined to have resulted from the gross negligence, willful misconduct or fraudulent behavior of PricewaterhouseCoopers relating to such services.

9. Resolution of Differences
In the unlikely event that differences concerning this Agreement should arise that are not resolved by mutual

agreement, to facilitate judicial resolution and save time and expense of both parties, PricewaterhouseCoopers and the Client agree not to demand a trial by jury in any action, proceeding or counterclaim arising out of or relating to this Agreement.

10. Other Provisions
Notwithstanding any terms or conditions in this Agreement to the contrary, no conditions of confidentiality within the meaning of IRC §6111(d) or US Treasury regulations §1.6011-4 are intended, and Client (and each employee, representative, or other agent of Client) may disclose to any and all persons, without limitation of any kind, the tax treatment and tax structure of any transaction and all materials of any kind (including opinions or other tax analysis) that are provided to the Client relating to such tax treatment and tax structure. The foregoing sentence is effective as of the commencement of any discussions we may have had with Client regarding any transaction related to any services covered by this Agreement.

Neither party shall be liable to the other for any delay or failure to perform any of the services or obligations set forth in this Agreement due to causes beyond its reasonable control. All terms and conditions of this Agreement that are intended by their nature to survive termination of this Agreement shall survive termination and remain in full force, including but not limited to the terms and conditions concerning payments, warranties, limitations of liability, indemnities, and resolution of differences. If any provision of this Agreement, including the Limitation of Liability clause, is determined to be invalid under any applicable law, such provision will be applied to the maximum extent permitted by applicable law, and shall automatically be deemed amended in a manner consistent with its objectives to the extent necessary to conform to any limitations required under applicable law.

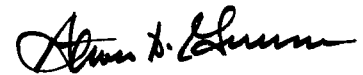
This Agreement will be governed by the laws of the State of New York.

California law requires that we include the following notice in all engagement letters with California entities or individuals:

Engagement Letter Addendum
Notice Pursuant to California Business & Professions Code, Section 5079(a)(5)

PricewaterhouseCoopers LLP is owned by professionals who hold CPA licenses as well as by professionals who are not licensed CPAs. Depending on the nature of the services we provide, non-CPA owners may be involved in providing services to you now or in the future. If you have any questions about this matter, please do not hesitate to ask.

EXHIBIT 2



CLERK OF THE COURT

1 AFFT

2 Mark A. Hutchison (4639)

3 Todd L. Moody (5430)

4 Todd W. Prall (9154)

5 HUTCHISON & STEFFEN, LLC

6 10080 West Alta Drive, Suite 200

7 Las Vegas, NV 89145

8 Tel: (702) 385-2500

9 Fax: (702) 385-2086

10 Email: mhutchison@hutchlegal.com

11 tmooddy@hutchlegal.com

12 tprrall@hutchlegal.com

13 Scott F. Hessell

14 Thomas D. Brooks

15 *Pro Hac Vice*

16 SPERLING & SLATER, P.C.

17 55 West Monroe, Suite 3200

18 Chicago, IL 60603

19 Tel: (312) 641-3200

20 Fax: (312) 641-6492

21 Email: shessell@sperling-law.com

22 tbrooks@sperling-law.com

23 *Attorneys for Plaintiff*

24 DISTRICT COURT

25 CLARK COUNTY, NEVADA

26 MICHAEL A. TRICARICHI,

27 Plaintiff,

28 v.

29 PRICEWATERHOUSE COOPERS, LLP,
30 COÖPERATIEVE RABOBANK U.A.,
31 UTRECHT-AMERICA FINANCE CO.,
32 SEYFARTH SHAW LLP and GRAHAM R.
33 TAYLOR,

34 Defendants.

) CASE NO. A-16-735910-B

) DEPT NO. XV

) AFFIDAVIT OF MICHAEL A.
) TRICARICHI IN SUPPORT OF
) PLAINTIFF'S OPPOSITION TO
) DEFENDANT
) PRICEWATERHOUSE
) COOPERS LLP'S MOTION FOR
) SUMMARY JUDGMENT

) JURY TRIAL DEMANDED

AA 000094

1 I, Michael A. Tricarichi, having first been duly sworn upon oath, hereby depose and
2 state as follows:

3 1. I am over 18 years of age, and otherwise am fully competent to execute this
4 affidavit. I have personal knowledge of all of the facts stated herein.

5 2. I am the Plaintiff in the above-captioned case.

6 3. In April 2003, when I was considering a proposed transaction by Fortrend to
7 purchase my shares in Westside Cellular, I asked Pricewaterhouse Coopers LLP ("PwC"), the
8 defendant in this case, to give me advice regarding the proposed transaction. In connection
9 with this request, PwC sent me an engagement letter and asked me to sign it. A copy of the
10 engagement letter is included in Exhibit 2 to PwC's Motion for Summary Judgment filed
11 March 6, 2017 ("PwC's Motion"). (The second page of that exhibit contains some
12 handwritten notes that are not mine.) There were no other drafts of the engagement letter, or
13 of the rider attached to the letter, exchanged with me.
14

15 4. PwC's Motion refers to a choice-of-law provision on page 2 of the rider to the
16 engagement letter. There were no negotiations or discussions between me and anyone at PwC
17 regarding the choice-of-law provision. In fact, that provision was not even called to my
18 attention. I had no understanding that New York statutes of limitations might apply to any
19 claims that I might need to bring against PwC, particularly to claims such as those I have filed in
20 this case for PwC's gross negligence. PwC's Motion (at page 9) says that I "affirmed [my]
21 understanding and agreement that the choice-of-law clause governed the relationship
22 between the Parties." I did not do so, and did not understand that, by signing the
23 engagement letter, I was agreeing to have the choice-of-law provision, which had not even
24 been discussed or called to my attention, govern as PwC now says.
25

26 5. In addition to federal tax advice regarding the Fortrend transaction, I also sought
27 advice from PwC regarding changing my residence to Nevada. My brother, James Tricarichi,
28

1 initially reached out to PwC about these topics on my behalf. PwC did, in fact, give me advice
2 about changing my residence to Nevada, in addition to giving me other advice about the
3 proposed Fortrend transaction. Exhibit G in the Appendix of Exhibits in Support of Plaintiff's
4 Opposition to Defendant Pricewaterhouse Coopers LLP's Motion for Summary Judgment (the
5 "Appendix") is a copy of documents reflecting that such advice was sought and provided. I
6 understand that the PwC personnel providing the advice, including Mr. Stovsky and Mr.
7 Lohnes, were located in PwC's Cleveland and Washington, D.C. offices. I had no dealings
8 with any PwC personnel from a PwC New York office, and understand that PwC personnel
9 from New York did not participate in advising me. PwC's work and advice to me about
10 proceeding with the Fortrend transaction extended into August 2003, after (as PwC knew) I
11 had moved to Nevada in May 2003.
12

13
14 6. In addition to the foregoing points, I understand that other facts justifying my
15 opposition to PwC's motion are unavailable to me without being able to proceed with discovery
16 in this case. These include PwC documents and testimony regarding the origin and intent of the
17 choice-of-law provision in the PwC rider, and possible admissions from PwC (via testimony,
18 documents or both) that (i) there were no negotiations or discussions with me about the choice-
19 of-law provision, (ii) there were no drafts reflecting such negotiations or discussions, and (iii)
20 PwC's New York office had no involvement in advising me.
21

22 7. Starting in October 2012, after the IRS sent me a notice of transferee liability in
23 June 2012, PwC entered into a series of retroactive tolling agreements with me. Exhibit I in the
24 Appendix consists of copies of those tolling agreements.

25 8. After the Tax Court issued its ruling in my case in October 2015, I learned that,
26 in late 1999, PwC had advocated that a similar transaction structure be used in the purchase of
27 the Bishop Group Ltd. ("Bishop") by PwC's client Midcoast Energy Resources, Inc.; that
28 PwC approached Fortrend to serve as an intermediary in the transaction; and that a Fortrend

1 affiliate in fact served as an intermediary, purchasing the Bishop stock in a "Midco"
2 transaction that PwC helped negotiate. Exhibit J in the Appendix is a copy of the decision in
3 *Enbridge Energy Co., Inc. v. U.S.*, which makes note of these facts. That decision also notes
4 that, as was the case with my Fortrend transaction, Rabobank facilitated the Bishop
5 transaction by loaning Fortrend the purchase price and serving as the conduit through which
6 funds changed hands at closing, in return for a substantial fee. PwC disclosed none of these
7 facts to me in 2003 or at any point thereafter. Had PwC disclosed these facts to me, I would
8 have proceeded differently with respect to the proposed Fortrend transaction. I now also
9 understand that the Bishop transaction was audited by the IRS starting in late 2003 (but before
10 I had reported the Westside stock sale on any tax returns), and found deficient by the IRS in
11 2004. PwC did not tell me about this, either.

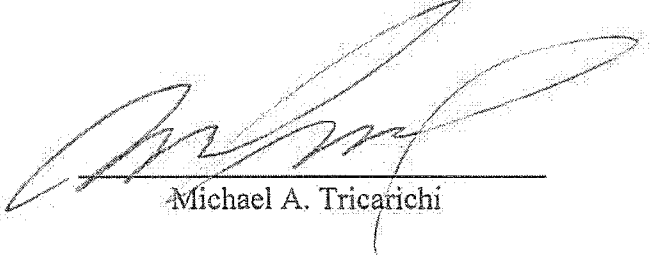
12
13 9. Similarly, PwC did not tell me that, before it gave me contrary advice about the
14 Fortrend transaction, PwC had advised at least one other client *not* to proceed with a similar
15 transaction. I only learned in December 2016 that, in March 2003, before it advised me
16 regarding the proposed Fortrend transaction, PwC had advised another taxpayer, John Marshall,
17 to steer clear of such a transaction. Exhibit K in the Appendix is a copy of the decision in
18 *Estate of Marshall v. Commissioner of Internal Revenue*, which makes note of PwC's
19 conflicting advice. Again, had PwC disclosed these facts to me, I would have proceeded
20 differently with respect to the proposed Fortrend transaction, and not gone ahead with it.

21
22 10. I further understand that there are various facts regarding the foregoing points
23 that are also unavailable to me without discovery in this case. These include PwC documents
24 and testimony regarding the Bishop transaction; the Marshall transaction; PwC's review,
25 promotion or advocacy of, or other advice regarding transactions similar to these and to my own
26 transaction; and the reasons why PwC did not make me aware of same – not to mention
27 information regarding what PwC knew or reasonably should have known about the transaction
28

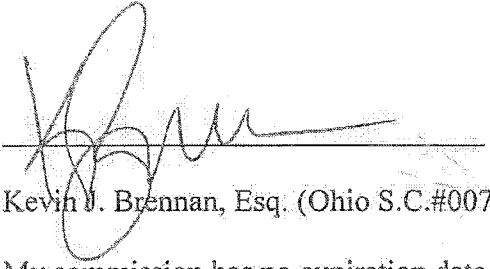
1 (but never disclosed to me) and when PwC knew it; and regarding PwC's review of, advice
2 regarding, and involvement in my transaction with Fortrend.

3 11. It was my understanding when I sought and received PwC's advice about the
4 Fortrend transaction that PwC would continue to be available to assist me should there be
5 subsequent inquiries from the IRS in connection with the transaction. In fact, when I received
6 a notice from the IRS in 2009 that it was looking into the matter, I did reach out and contact
7 PwC.
8

9 Further affiant sayeth not.

10
11 
12 Michael A. Tricarichi

13 Subscribed and sworn to before me
14 this 7th day of April, 2017.

15 
16 Kevin J. Brennan, Esq. (Ohio S.C.#0075699)

17 My commission has no expiration date.

18 O.R.C. §147.03
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EXHIBIT 3

1 TRAN

2 DISTRICT COURT

3 CLARK COUNTY, NEVADA

4 * * * * *

5
6
7 MICHAEL A. TRICARICHI,)

8 Plaintiff,)

9 vs.)

10 PRICEWATERHOUSECOOPERS, LLP,)

11 GRAHAM R. TAYLOR,)

12 Defendants.)

CASE NO.: A-16-735910

DEPT. NO.: XV

Transcript of Proceedings

13
14 BEFORE THE HONORABLE JOE HARDY, DISTRICT COURT JUDGE

15 **PRICEWATERHOUSECOOPERS, LLP'S MOTION FOR SUMMARY JUDGMENT**

16 WEDNESDAY, MAY 10, 2017

17 APPEARANCES:

18 For the Plaintiff: TODD L. MOODY, ESQ.
19 SCOTT F. HESSELL, ESQ.

20 For the Defendants: PATRICK G. BYRNE, ESQ.
21 PETER B. MORRISON, ESQ.
WINSTON P. HSIAO, ESQ.

22 RECORDED BY: MATTHEW YARBROUGH, DISTRICT COURT
23 TRANSCRIBED BY: KRISTEN LUNKWITZ

24 Proceedings recorded by audio-visual recording, transcript
25 produced by transcription service.

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WEDNESDAY, MAY 10, 2017 AT 9:06 A.M.

THE CLERK: A735910, *Michael Tricarichi versus PricewaterhouseCoopers, LLP.*

THE COURT: Whoever wants to go first is fine.

MR. MOODY: Todd Moody, --

THE COURT: Probably --

MR. MOODY: -- bar number 5430, for the plaintiff.

MR. HESSELL: Scott Hessel for Mr. Tricarichi.

MR. BYRNE: Good morning, Your Honor. On behalf of Pricewaterhouse, Pat Byrne at Snell and Wilmer. With me is outside counsel, Peter Morrison and Winston Hsiao from the law firm of Skadden Arps. Also in this morning, Your Honor, is Mari Mazour who is the associate general counsel for Pricewaterhouse and she's sitting right here in the back.

THE COURT: Okay. Welcome. Welcome. Excuse me, if you can't tell, I have a bad cold.

So, PricewaterhouseCoopers' Motion for Summary Judgment, which I have reviewed that, Mr. Tricarichi's Opposition, the Reply, Affidavits, and Appendix, and prior Order on the Motion to Dismiss. So, I'll ask a question to both sides and then welcome argument, beginning with PricewaterhouseCoopers.

What, if anything, has changed since I denied the

1 Motion to Dismiss last November? What discovery, if any,
2 has been conducted in the interim? Having said that, I
3 welcome arguments of counsel.

4 MR. MORRISON: Is it okay if I work from the
5 podium, Your Honor?

6 THE COURT: Yeah. I -- that's a fair question.
7 Either the podium or tables are fine.

8 MR. MORRISON: Thank you.

9 Well, Your Honor, to answer your question off the
10 bat, the parties have exchanged initial disclosures and, of
11 course, the plaintiff has had the benefit of full-blown
12 discovery in connection with the Tax Court proceedings, of
13 which Your Honor is aware from the Motion to Dismiss phase.
14 So, there's been plenty of discovery on their side, number
15 one.

16 Number two, we don't believe that any additional
17 facts, Your Honor, are necessary for the Court to reach the
18 conclusion that this case is barred by the statute of
19 limitations under New York law. And, so, we believe that
20 summary judgment is appropriate for that reason.

21 There is no disputed fact before the Court that
22 would prevent the Court from finding in favor of
23 PricewaterhouseCoopers on summary judgment.

24 And if I can go through our arguments, Your Honor,
25 --

1 THE COURT: Sure.

2 MR. MORRISON: -- but I wanted to address that for
3 you right up front.

4 This is a very narrow, simple legal issue, Your
5 Honor. Narrow and simple. Plaintiff's claims here have
6 been time-barred for nearly a decade. One, there is no
7 dispute, Your Honor, that the parties entered into the 2003
8 Engagement Agreement. Two, there's no dispute that that
9 agreement has a New York choice of law provision. Three,
10 there is no dispute that under New York law there is a
11 three-year statute of limitations that runs from the date
12 that the advice is given. Four, there is no dispute, nor
13 can there be, that PWC provided the advice at issue in this
14 litigation by August of 2003.

15 The Complaint at paragraph 39, Your Honor, says
16 that the advice was given, quote:

17 During the period April to August 2003, end quote.

18 Mr. Tricarichi's affidavit in this case, Your
19 Honor, at paragraph 5 says that:

20 The work and advice to me about proceeding with
21 Fortrend extended into August of 2003.

22 So, there is no dispute of fact, Your Honor, that
23 as of August of 2003 we were done with our advice. Under
24 New York statute of limitations, three years -- these
25 claims were barred by August 2006. You don't need any

1 additional facts to reach the conclusion that these claims
2 are time-barred.

3 And, Your Honor, the *Mardian* case, Supreme Court
4 of Nevada, is directly on point here and I would call that
5 case to the Court's attention. That case --

6 THE COURT: So, I -- just so you know, I reread
7 that one because I read it when you were in front of me
8 before and I reread it again.

9 I'm sorry. You can continue.

10 MR. MORRISON: I will not go through the facts of
11 the case, Your Honor, --

12 THE COURT: No, that's okay. I just -- I was just
13 saying that to let you know. I mean, you're welcome to
14 continue. The good news for all of you, you're the only
15 one arguing this morning. So, I have some time. So, --

16 MR. MORRISON: Well, --

17 THE COURT: -- you're fine.

18 MR. MORRISON: -- I have about 20 minutes of
19 argument but --

20 THE COURT: Okay.

21 MR. MORRISON: -- I'll try to be as brief as I can
22 be. And if the Court, at any time, would like me to move
23 along, I'm happy to do so.

24 THE COURT: Okay.

25 MR. MORRISON: Your Honor, the key about the

1 *Mardian* case, and I appreciate that the Court has read it,
2 is that the choice of law provision in that case is as
3 follows:

4 This guarantee shall be enforceable by lender in
5 accordance with the laws of the state of Nevada and
6 should be construed in accordance therewith.

7 That is ex -- that is remarkably similar to the
8 choice of law provision in the Engagement Agreement.
9 Remarkably similar. The Engagement Agreement says:

10 That it shall be construed in connection with the
11 laws of the state of New York.

12 Very, very similar provisions, Your Honor. And
13 listen to what the Supreme Court of Nevada held. Quote:

14 Because of the choice of law provision -- and
15 that's worth repeating, Your Honor.

16 Because of the choice of law provision, Nevada law
17 particularly Nevada's limitations period, applies in
18 this case.

19 The Supreme Court of Nevada applied Nevada statute
20 of limitations expressly because of the choice of law
21 provision in the agreement and that choice of law provision
22 is extraordinarily similar to the one before the Court in
23 the Engagement Letter.

24 The Court went on, Your Honor, importantly to say:
25 It, quote:

1 Would not have been appropriate for the District
2 Court to apply Arizona's limitations period, end quote.

3 Because, quote: The agreement specifies that it
4 is governed by Nevada law.

5 The agreement specifies. The Nevada Supreme Court
6 didn't apply Nevada statute of limitations because it's the
7 forum state, it applied it because of the -- almost exactly
8 the same choice of law provision in the agreement.

9 Now, Your Honor, we'll -- having read the papers,
10 we'll know that we've also briefed the 187 factors under
11 the Restatement of Conflict of Laws. Now, while *Mardian*
12 doesn't go through 187 analysis, the Supreme Court of
13 Nevada has also adopted the Restatement for Conflicts of
14 Laws.

15 Thereto, Your Honor, section 187 says: The law of
16 the state chosen by the parties to govern their rights
17 and duties will be applied if the particular issue is
18 one which the parties could have resolved by an
19 explicit provision in their agreement direct to that
20 issue.

21 Could have, not did, could have. Clearly the
22 parties could have contracted to include statute of
23 limitations.

24 And the Nevada Courts, adopting 187, will respect
25 the choice of law, provided that three elements are

1 satisfied, Your Honor: Good faith, substantial relation,
2 and the provision is not contrary to Nevada public policy.
3 All three are satisfied here, Your Honor. Good faith,
4 Nevada Courts enforce choice of law provisions where
5 there's no indication that the parties acted anything other
6 than in good faith. Here they did. The Engagement
7 Agreement itself provides that its terms are,
8 quote/unquote:

9 Necessary to, quote, achieve mutually agreed upon
10 objectives.

11 That's what the Agreement says. The Agreement
12 also says -- it contains a provision that signing the
13 Agreement constitutes a representation that, quote:

14 The Agreement is in accordance with your
15 understanding of our engagement.

16 Clearly good faith. He signed the Agreement.
17 There's no dispute about that.

18 And I would direct the Court, Your Honor, to
19 another Nevada Supreme Court case in *Engel versus Ernst*
20 with respect to the good faith claim. *Engel versus Ernst*
21 also dealt with a national accounting firm, Ernst. And
22 here's what the Nevada Supreme Court said:

23 It is understandable, understandable, that the
24 defendant would attempt to choose a set of laws to
25 govern the partnership relationship, otherwise, if

1 defendant were required to satisfy the nuances of
2 various state laws, there would be nonuniform
3 enforcement.

4 The Nevada Supreme Court is expressly blessing the
5 idea that national firms like PWC are entitled to have a
6 single jurisdiction's law apply to all its contractual
7 agreements. We cite the *Rose versus Chase Manhattan* case,
8 Your Honor. Here's a quote from that case:

9 Selecting the law of the state where defendant has
10 its headquarters promotes uniformity and predictability
11 in enforcing the card member [phonetic] agreement.

12 So, there's no question that as a matter of fact
13 in the contract and as a matter of Nevada Supreme Court
14 law, this process is in good faith.

15 Two, New York has a substantial relationship, Your
16 Honor. It's undisputed that New York is
17 PricewaterhouseCoopers' principal place of business and
18 headquarters. That satisfies the substantial relationship
19 factor.

20 Again, *Engel versus Ernst* enforces a Colorado
21 choice of law clause because the defendant accounting firm,
22 quote:

23 Recognized Colorado as its corporate headquarters.

24 [Indiscernible] to 187, Your Honor, says that the
25 substantial relationship requirement is met, quote:

1 Where one of the parties is domiciled or has its
2 principal place of business in the state.

3 That factor is satisfied. Undisputed facts again.

4 Third, it is not against Nevada public policy.
5 Courts hold that enforcing choice of law provisions, quote:

6 Supports Nevada's long recognized public interest
7 in protecting the freedom to contract, end quote.

8 And the broad, quote/unquote: Latitude afforded
9 such provisions under Nevada law.

10 There's no question it's not against Nevada public
11 policy either. In fact, Your Honor, we cite the *Izquierdo*
12 case and I think this is important on the public policy
13 point. The *Izquierdo* case cites to another Nevada Supreme
14 Court case, Your Honor. *The Holcomb Condo Homeowners*
15 *Association* case. There, the Supreme Court of Nevada
16 upheld a contractual agreement to shorten the applicable
17 Nevada statute of limitations based on Nevada's, quote:

18 Public interest in protecting the freedom of
19 persons to contract.

20 So there's no question that this is consistent
21 with the Nevada public policy.

22 So, under the *Mardian* case, Your Honor, and
23 because all three 187 factors are satisfied, based on
24 undisputed facts, there can't be a question that New York
25 law applies here. And when New York law applies, it's a

1 three-year statute of limitations that runs from the time
2 that we issued -- gave our advice and had -- and gave
3 services. That ended in August of 2006. Those facts are
4 undisputed.

5 Now, we think that that is sufficient, Your Honor,
6 to grant summary judgment for PWC and we bring this, Your
7 Honor, because -- notwithstanding that the Court denied our
8 Motion to Dismiss, you did so without prejudice. And we
9 bring this now, Your Honor, because PricewaterhouseCoopers
10 has undisputed facts that show that these plans have been
11 time-barred for a decade. And PricewaterhouseCoopers
12 should not have to go through the expense and time of
13 further litigating this case when there are undisputed
14 dispositive facts before the Court.

15 Now, Your Honor, I'd like to take about 10 more
16 minutes or so, with the Court's approval, of course. I
17 want to leave no doubt in your mind that we are correct as
18 a legal matter here because --

19 THE COURT: Then you have 10 minutes --

20 MR. MORRISON: I will move quickly.

21 THE COURT: No, that's fine.

22 MR. MORRISON: Thank you.

23 I don't want there to be any doubt that all of the
24 arguments that plaintiffs raise are wrong as a matter of
25 law. Not disputed fact, law. Plaintiffs essentially throw

1 the kitchen sink at the Court in their Opposition. Running
2 away from New York law. And, in our Reply brief, we go
3 through every single one of those arguments, Your Honor,
4 and show why they're wrong as a matter of law.

5 First, plaintiff argues that the Engagement
6 Agreement does not cover his tort claims.

7 THE COURT: I wouldn't spend too much time --

8 MR. MORRISON: All right. We'll move on from that
9 one.

10 Next one. Second, plaintiff argues that you
11 always apply the law of the forum state because it's
12 procedural versus substantive. That is also wrong as a
13 matter of law. The *Mardian* case puts that to bed. *Mardian*
14 didn't apply Nevada because it's sitting in Nevada.
15 *Mardian* applied Nevada law because of the choice of law
16 provision. And, in fact, the *Izquierdo* case that we cite,
17 Your Honor, expressly rejects that argument. The *Izquierdo*
18 Court rejects the argument that, quote:

19 Nevada law should apply to contracts' procedural
20 matters such as statutes of limitations as irrelevant
21 because, quote, there is a facially valid contractual
22 provision choosing Delaware law, the governing law.

23 All the other cases that Pricewaterhouse cites
24 that apply the 187 factors reject that very position, Your
25 Honor.

1 In response, plaintiff relies on a case from 1869.
2 That's the best they can do. A case from 1869, the *Wilcox*
3 *versus Williams* case and cases that's cited. Unfortunately
4 for plaintiffs, Your Honor, none of those cases deal with
5 the contractual choice of law provision. Not one. The
6 only case they cite on that score is the *Cantor* decision,
7 Your Honor. *Cantor* was decided two years before *Mardian*.

8 THE COURT: Is that the writ --

9 MR. MORRISON: Correct.

10 THE COURT: -- case?

11 MR. MORRISON: It was decided two years before
12 *Martian*, Your Honor, so it is very questionable whether
13 that remains good law. And, in any event, when you read
14 the decision, there isn't any analysis or discussion of 187
15 factors or the choice of law issue.

16 THE COURT: Isn't that that they treated it like a
17 writ -- it's a writ and you can probably appeal it if you
18 want to?

19 MR. MORRISON: Correct. That's exactly right,
20 Your Honor. You and I are on exactly the same page.

21 All right. Third, Your Honor, they say: Well, if
22 you don't apply the 1 -- the Restatement of Conflict of
23 Laws, you apply section 142, not 187. That is absolutely
24 wrong as a matter of law.

25 187, on its face -- remember, we talked about

1 this. It applies to any issue that the parties could have
2 resolved by an explicit provision. Okay. Here you could
3 have resolved it by stating that statute of limitations was
4 included, therefore, 187 applies. They ask you to provide
5 142 because 142 [indiscernible] states that:

6 The validity of a contractual provision limiting
7 the time in which an action may be brought under the
8 contract is determined by application of the rules of
9 187 and 88.

10 And, so, based on that, he says: Well, because
11 the choice of law provision in the agreement does not
12 expressly reference statute of limitations, you should
13 therefore apply 142 and not 187.

14 There is not a single case, Your Honor, that they
15 cite in any of their papers that supports that proposition,
16 that addresses 142 and 187. And there's good reason for
17 that. The *Izquierdo* case rejects that very proposition.
18 *Izquierdo* says, under 187:

19 The parties choice of law encompasses any issue
20 the parties could have resolved by explicit provision
21 in their agreement directed to that issue.

22 And here's the operative portion. Thus, quote: --

23 THE COURT: Wait. Bear with me. Where are you?

24 MR. MORRISON: Yeah. I'm sorry.

25 THE COURT: That's okay.

1 MR. MORRISON: I'm at *Izquierdo*. I'm at asterisks
2 3 in *Izquierdo*. And if you see, there's a sentence that
3 says:

4 Restatement 142 is inapplicable.

5 Paraphrase: When there is a facially valid
6 contractual provision.

7 THE COURT: Where a contract includes a choice of
8 law provision?

9 MR. MORRISON: Correct.

10 THE COURT: Okay.

11 MR. MORRISON: So, *Izquierdo* rejects the idea that
12 142 applies and applies 187. Rejects their precise
13 argument, Your Honor.

14 And to leave no doubt, let me be very clear. For
15 that reason, court after court employs Restatement 187, not
16 142, even when the provision does not expressly include the
17 statute of limitations. Your Honor, we cite no fewer than
18 13 cases that apply 187 where the provision at issue does
19 not explicitly reference statute of limitations. Thirteen.
20 All of those cases would have analyzed completely
21 differently if we were wrong and the plaintiffs were right.

22 So, not only is it *Izquierdo*, it's 13 cases. They
23 cite zero cases that apply 142 in the face of a choice of
24 law provision that did not include a statute of limitations
25 explicitly.

1 Next, Your Honor, they say -- they ask you or
2 suggest that the choice of law -- the conflict of law rules
3 of New York should apply since we want New York law to
4 apply. That's just not the law. Nevada applies the Nevada
5 choice of law rules and then decides what jurisdiction's
6 law to ultimately apply.

7 Reply brief at 10, Your Honor, we cite you four --
8 no fewer than four Nevada Supreme Court cases that apply
9 Nevada choice of law principles and then hold that some
10 other state's law applies to the case. *Constanzo*
11 [phonetic], *Progressive*, *Ferdie*, *Pintax* [phonetic]. All
12 Nevada Supreme Court.

13 And then, finally, Your Honor, on this score,
14 plaintiffs say: Well, if the 187 factors apply, we don't
15 satisfy them. Now, that doesn't deal with the *Mardian*
16 issue, which is dispositive, Supreme Court of Nevada law,
17 but let me just walk through that briefly.

18 With respect to good faith, they say: Well, the
19 parties didn't specifically negotiate the choice of law
20 provision and, therefore, we can argue that it wasn't in
21 good faith. And then he also says: I didn't understand
22 that I was going to be subject to New York law. That's
23 legally irrelevant. Legally irrelevant, Your Honor, and
24 here's why.

25 Contrary to that argument, it is, quote: *Hornbook*

1 contract law, end quote, that, quote, one who enters
2 into a contract is on notice of the provisions of the
3 contract, end quote.

4 That's the *Wynn Las Vegas case versus Segaro*
5 [phonetic] applying Nevada law. The Supreme Court of
6 Nevada itself has held, quote:

7 The mere statement of plaintiff that he did not
8 know what he was signing when he signed the agreement
9 is no excuse in the law, end quote.

10 That's the *Gaidy versus Phillips* [phonetic] case.

11 Plaintiffs, quote/unquote: Failure to read the
12 choice of law, quote, does not create a genuine issue
13 of material fact, end quote, as to the validity of the
14 choice of law provision because, quote, parties may be
15 held to contracts which they did not read.

16 The *Pentax* decision, *Wynn Las Vegas*, the *Urington*
17 *Ford* [phonetic] case, Your Honor, all at Reply at 16.

18 All five arguments -- number two, Your Honor, they
19 again say: Well, a reasonably jury can find that this was
20 bad faith because it's a one sentence New York choice of
21 law clause in a multi-page boilerplate engagement document.
22 That's their very argument, Your Honor, that the -- or the
23 *Engel versus Ernst* Court, Nevada Supreme Court, rejected.

24 We're entitled to have uniformity of application
25 of law and it is not bad faith on PWC's part to want that

1 uniformity. That's exactly what the Supreme Court of
2 Nevada said.

3 And, by the way, on that front, Your Honor,
4 plaintiff's argument that New York -- choice of New York
5 law is somehow in bad faith is disingenuous. He -- they
6 reference a series of tolling agreements in their papers
7 which don't apply here because the claims were time-barred
8 long before we entered into any tolling agreement, but
9 every single tolling agreement itself has a New York choice
10 of law provision, which he signed repeatedly from New York.

11 Substantial relationship, he says: Well, Nevada
12 has a more substantial relationship to the dispute than New
13 York. That's not the test. It's not relative. It's
14 whether you have substantial relationship or not. We cite
15 the *Nevada Power Company* case, Reply at 19. Again, rejects
16 that very argument.

17 Quote: The test is not which state has a more
18 significant relationship to the transaction, but
19 whether the chosen applicable law has a substantial
20 relationship to the transaction.

21 Here it does. We're headquartered in New York.

22 And then Nevada public policy. They say:
23 Plaintiffs should not be foreclosed from judicial remedies
24 before they know they have been injured. Your Honor, that
25 argument is contrary to Nevada's own statute of

1 limitations. The statute of limitations in Nevada, Your
2 Honor, is four years from the date the services are given
3 by an accountant. Not even the state of Nevada, Your
4 Honor, has any type of discovery rule or injury rule. The
5 Legislature has already made a policy choice in Nevada that
6 you don't need to have an injury before the statute runs.

7 THE COURT: So how do you address their argument
8 on that one? They say -- subsection 1 of 11.2075 says:

9 An action against an accountant or accounting firm
10 -- and here's their -- you know, their point of emphasis:

11 To recover damages for malpractice must be
12 commenced within --

13 And then it goes through: A, two years after it's
14 discovered or should have been discovered. B, four
15 years, etcetera.

16 But they argue that: To recover damages, if there
17 aren't any damages, then the statute of limitations there
18 doesn't even commence because there aren't damages.

19 MR. MORRISON: Well, a couple of different ways.
20 First, New York law applies and not Nevada law, Your Honor.
21 So, you never have to reach that question. That's the
22 easiest answer.

23 The second easy answer is: The Nevada statute has
24 three prongs. Right? The middle prong is four years from
25 the time the services are offered. Right? Doesn't say

1 anything about damages or injury. And, in fact, Your
2 Honor, the other malpractice statutes, if you look at
3 medical malpractice or legal malpractice, veterinary
4 malpractice, all of which we cite in our papers, they all
5 explicitly reference the statute running from the time they
6 suffered damage or had an injury. The accounting
7 provisions don't run from the time you suffered injury.
8 So, they're wrong as a matter of law.

9 And, in fact, Your Honor, -- and we had this in a
10 footnote in our papers, in our Reply brief. If you look at
11 the history of the statute on accounting malpractice, it
12 used to be, Your Honor, that accounting malpractice and
13 veterinary malpractice and legal malpractice were all one.
14 And what happened was the Legislature made a policy choice
15 to divide them up. And when they divided them, they set
16 aside the accounting piece and they kept the medical
17 malpractice and the veterinary malpractice. In the medical
18 and veterinary malpractice, they kept a damages and injury
19 piece. In the accounting portion of it, they did not. By
20 definition, the Legislature has stated that there is no
21 injury or damages requirement for the statute to begin to
22 run.

23 The Nevada statute and the New York statute are
24 exactly the same in that respect, just that Nevada is three
25 years and New York is three. So, Your Honor, all five

1 arguments that they make, all five about why New York law
2 doesn't apply, fail as a legal matter.

3 Now, they make three last additionally arguments.
4 And I will try to wrap up. I appreciate the Court's
5 patience. Thank you.

6 Finally, they say: Well, even if New York law
7 applies, our claims are still not barred. And they make
8 three points. First, they reference the tolling
9 agreements. They don't actually argue that the claims are
10 saved by the tolling agreements because the claims were
11 barred in 2006 and the tolling agreements don't apply until
12 2011. So that's irrelevant.

13 Then they say: Well, fraudulent concealment. The
14 issue there is there is no fraudulent concealment tolling
15 under New York law, Your Honor. We cite the *Arnold versus*
16 *KPMG* case:

17 Under New York law, a claim for malpractice is not
18 tolled by fraudulent concealment.

19 We also cite the *Fisher*, excuse me, *versus Wright*
20 [phonetic] case, Your Honor, both Reply at 22. And,
21 finally, they say: Well, there's been continuing
22 representation and, under New York law, this continuing
23 representation, the statute is tolled.

24 There is zero evidence in the record that we
25 represented them after 2003 August. Zero. The -- and the

1 law is clear. The mere possibility that continuous
2 representation could have occurred is not enough when, in
3 fact, it has not. And, remember, Complaint at 39, they
4 themselves allege that the advice was April to August 2003
5 and Mr. Tricarichi's affidavit at 5: August 2003. The
6 only thing he says really in response is: Well, the
7 Engagement Agreement stated that PWC would, quote:

8 Be available to assist the client in the event of
9 an audit.

10 But, again, the mere possibility is not enough
11 and, in fact, Your Honor, I would direct you to the *Johnson*
12 *versus Parker Proskower Rose* [phonetic] case, which we cite
13 at Reply at 23. That case rejects that very argument. The
14 Court there rejected plaintiff's reference to a retainer
15 agreement that stated that there was a, quote/unquote:

16 Ongoing representation.

17 The Court held that, quote: Any alleged general
18 understanding of a standby, ongoing representation in the
19 event that the IRS inquiries arose, did not amount to
20 continuous representation.

21 And, by the way, that's case -- extremely similar
22 to this one. It involved a purported tax shelter and a
23 more likely than not opinion, just like here --

24 THE COURT: I read that one.

25 MR. MORRISON: Hey, thank you. I will not go into

1 that further then, Your Honor.

2 So, Your Honor, for all of those reasons, there
3 are undisputed simple facts. There's no question that the
4 arguments that they make why New York law doesn't apply,
5 fail. And the arguments they make for why there's two
6 types of tolling under New York law doesn't work. And
7 based on the *Mardian* decision and the satisfaction of the
8 187 factors, there's no reason why the Court shouldn't
9 grant summary judgment in favor of PricewaterhouseCoopers
10 now.

11 And I will say one last thing, Your Honor. To the
12 extent that the Court decides Nevada law applies, and it
13 absolutely should not, we don't believe that there's call
14 for that, but to give the Court further comfort, even under
15 Nevada law, these claims are barred because it's the same
16 statute. It's four years instead of three. So, they would
17 have been barred in 2007, not 2006.

18 And, again, Your Honor, and we've gone through
19 this already, there is no discovery rule or injury
20 requirement under that law.

21 And, with that, Your Honor, I would ask that the
22 Court enter summary judgment in favor of
23 PricewaterhouseCoopers and I'd like to reserve a little bit
24 of time for rebuttal.

25 THE COURT: Oh, you certainly can.

1 MR. MORRISON: Thank you very much, Your Honor.

2 THE COURT: Thank you.

3 MR. HESSELL: Good morning, Your Honor.

4 THE COURT: Good morning.

5 MR. HESSELL: Counsel. My name is Scott Hessell.

6 I represent Mr. Tricarichi.

7 Having a little bit of a déjà vu moment here, even
8 though the courtroom has changed. It is a lot nicer, so
9 I'm sure you appreciate that. The déjà vu moment is that
10 five months ago we had all of these same arguments, all of
11 this same case law, all of the same positions by the
12 defendant. And we responded to those arguments on
13 voluminous Motions to Dismiss briefing. And, yet,
14 following the Court's Order on the Motion to Dismiss, which
15 at -- most significantly, at page 53 of the transcript, the
16 Court found:

17 Whether Nevada law applies -- this is a quote:

18 Whether Nevada law applies on the statute of
19 limitations or New York law applies, I don't believe
20 it's appropriate to dismiss under the Motion to Dismiss
21 standard.

22 You asked the question of counsel to both sides:
23 What has changed? And the answer you got or you didn't get
24 an answer actually to that question from Mr. Morrison, but
25 I will answer the question, which is: Nothing has changed,

1 except that the parties have begun to engage in the
2 discovery that was contemplated.

3 THE COURT: Didn't he kind of -- I thought he said
4 something similar to what you just said.

5 MR. HESSELL: That discovery has begun, but
6 there's no -- there is yet to be a fulsome exchange of
7 document requests or interrogatories on either the issues
8 that are raised by the Motion -- by the statute of
9 limitations defense, nor has there been full merits-based
10 discovery yet.

11 He suggested that as a result of the Tax Court
12 case we've somehow already gotten full-blown discovery,
13 which is not correct. We did not ourselves obtain any
14 discovery from PWC. The IRS obtained discovery from PWC --
15 some discovery from PWC and then, in turn, produced it to
16 us. But, the scope of that discovery is far more limited
17 than in a direct action case where you're bringing claims
18 for malpractice like this and I think it's a substantial
19 overstatement to say that we've gotten everything that
20 there is on this topic.

21 The reason, I believe, that Your Honor denied the
22 Motion to Dismiss last time was to allow for that discovery
23 to go forward before we have to respond to a Motion for
24 Summary Judgment. There's nothing that bars them from
25 bringing a summary judgment motion sooner, but the fact of

1 the matter is, is that it's actually just a Motion for
2 Reconsideration dressed as a Motion for Summary Judgment.

3 The last time we were before you, we made the
4 arguments about why, in our view, Nevada law is quite clear
5 about the forum dictates whether the statute of limitations
6 applies. The -- but, before you get to that whole analysis
7 about forum and the *Mardian* case, which I will talk about,
8 such as it is, you have to get to --

9 THE COURT: That was --

10 MR. HESSELL: You have to get to --

11 THE COURT: That was pretty funny.

12 MR. HESSELL: You have to get to -- because, I
13 mean, charitably, *Mardian* does not discuss any of this.

14 THE COURT: I mean, am I mistaken when -- since we
15 are on *Mardian*, I mean, it seems that the first District
16 Court Judge indicated, quote:

17 Neither Arizona's nor Nevada's limitations' period
18 apply.

19 MR. HESSELL: Yeah.

20 THE COURT: That would be why the second District
21 Court Judge struggled with that issue.

22 MR. HESSELL: I think that -- you know, I've
23 looked at this issue closely and as was -- it was actually
24 a surprise to me before I got here for argument, I noticed
25 that my co-counsel --

1 THE COURT: I --

2 MR. HESSELL: You saw that?

3 THE COURT: I noticed that as well.

4 MR. HESSELL: Was --

5 THE COURT: Yes.

6 MR. HESSELL: -- actually counsel of record for
7 the guarantor, the party who was being sued on a guarantee.
8 And I was like: Did this -- did these issues about forum
9 law, Wilcox, statute of limitations, procedure versus
10 substance, did any of that come up in the briefing in this
11 case? And the answer is: No. It did not, because it is
12 not a statute of limitations case. It is not a substance
13 versus procedure case and it doesn't overturn 150 years of
14 existing, Nevada Supreme Court precedent that says
15 [indiscernible], the statute of limitations is governed
16 like procedures -- like other procedures --

17 THE COURT: Well, isn't --

18 MR. HESSELL: -- by the forum law.

19 THE COURT: So, that's, I think, perhaps the
20 general rule, but is that overcome, so to speak, or doesn't
21 apply when you have a choice of law provision in your
22 contract itself?

23 MR. HESSELL: Right. And I think that is the nub
24 of the issue. In -- with respect to *Mardian*, and I want to
25 deal with that first, since it's 2015, it's a Nevada Court

1 with a Nevada resident and two parties arguing for Nevada
2 law, not -- applying the Nevada deficiency statute.
3 Really, that's what was at issue in *Mardian*. Whether the
4 Nevada Court should apply the Nevada foreclosure deficiency
5 statute, which is its own unique statutory scheme and which
6 wraps into the substantive claim this limitations period
7 that says you have to bring within a certain period of time
8 after you get a deficiency. They're looking at: Well, the
9 law -- the land is in Arizona and has there been a
10 deficiency judgment yet? And, under those circumstances,
11 should we apply the Nevada deficiency statute?

12 What they're not looking at is saying: Well,
13 because the forum is Nevada, they don't have before it the
14 issue of: Well, what if the choice of law provision
15 selected some other state? Should we apply that other
16 state's choice of law as well as the statute of limitations
17 with it? It just didn't have that issue and that's why it
18 didn't look at any of those other cases.

19 The -- to answer your question, I -- this is where
20 I was going to begin with and why I think the argument ends
21 at the choice of law provision that they selected and stuck
22 into their generic, boiler plate terms attached to the PWC
23 Engagement Agreement says, in full, that the agreement
24 should be governed by New York law.

25 At the time that the parties entered into that

1 agreement, New York law says: If you want to dictate what
2 the statute of limitations is that should apply to a
3 contract where you're choosing a choice of law provision,
4 you have to expressly state so. You cannot just rely on
5 the generic language, it's governed by New York law. That
6 simply requires that the parties, as a matter of the
7 substance of the law that is at issue, apply New York law.
8 It doesn't necessarily incorporate New York statutes of
9 limitations. That was the operating law that they were
10 dealing with at the time that they entered into the
11 contract.

12 All of the law that they cite to about the
13 Restatement, and the public interest, and parties being
14 allowed to contract, all of that gets flipped on its head
15 in light of the background legal assumptions that they were
16 operating against. And that's not just New York law.
17 That's Delaware law, which is what *Cantor* cites to, that in
18 Delaware, if you have a generic choice of law provision and
19 the parties intend to include the statute of limitations,
20 you have to expressly state so. It's not that PWC didn't
21 know how to draft that. It's not that they couldn't have
22 also, by the way, included a specific provision that said
23 that New York statute of limitations should be used; New
24 York jurisdiction -- exclusive New York jurisdiction. All
25 of that would have achieved the objective that they're now

1 trying to achieve after the fact.

2 But, since Nevada law, as well as New York law, as
3 well as Delaware law and many other states' law say that
4 when you have a generic choice of law provision and it
5 doesn't expressly state that the statute of limitations
6 applies, you then go back to the default rule, which is:
7 Forum law dictates statute of limitations. There is no
8 contracting principle here that said the parties thought
9 about this and negotiated for New York statute of
10 limitations. That just didn't happen here and that's -- I
11 mean, at the end of the day, there's lots of other
12 arguments about why the Motion should be denied on the fact
13 questions regarding the 187 statements -- Restatement, but
14 the question of whether New York or Nevada law ends in that
15 New York law, 100 percent clear, that this provision does
16 not include New York statute of limitations. That was
17 *Portfolio Recovery Associates*, 2010, New York case, and the
18 quote from it is:

19 There being no express intention to -- in the
20 agreement that Delaware statute of limitations was to
21 apply to this dispute, the Delaware choice of law
22 provision cannot be read to encompass Delaware statute
23 of limitations.

24 What did they say in response? Like, oh, no, when
25 we said we want New York procedures to apply, we just

1 didn't mean all of the New York law that goes with it. We
2 only meant the statute of limitations and the substantive
3 law. We want you to go back to Nevada generic choice of
4 law to evaluate whether or not this provision covers the
5 statute of limitations. No. It doesn't work like that.
6 They don't get to just pick and choose which parts of the
7 procedures they want to use where it suits their needs.

8 The law that I'm citing to about what is the
9 meaning of the choice of law provision is interpreting,
10 under New York law, what is the scope of a choice of law
11 provision? It's not: A choice of law generic proposition.
12 It's saying: When you look to a provision that says New
13 York law governs, what does that mean? What do the parties
14 understand that provision to mean? And no one denies that
15 if we had filed this case in New York and a New York Court
16 looked at this choice of law provision, they would say that
17 the statute of limitations is not automatically governed by
18 New York law because that's the law in New York and that's
19 also -- at least according to *Cantor*, the law in Nevada,
20 and Delaware, and other places.

21 Even if you get to the question of, well what does
22 the provision then mean, that you go -- from my perspective
23 -- and there isn't -- candidly, there's not a Nevada
24 Supreme Court case that deals with a choice of law
25 provision to another state and a Nevada filed case by a

1 Nevada resident involving transactions that were definitely
2 connected to this state, but I would note that Nevada's
3 Legislature has already weighed in on this issue by
4 creating a borrowing statute.

5 In order -- because the background rule is the
6 forum dictates the statute of limitations that applies,
7 and, by the way, the only one -- Nevada Legislature is the
8 only Legislature who has an interest in deciding what cases
9 should be allowed to go forward in Nevada Courts. New
10 York's Legislature doesn't speak to that. The New York
11 statute of limitations isn't trying to protect Nevada
12 Courts from people forum shopping there. Nevada's
13 Legislature passes a borrowing statute that says: If the
14 claims don't arise in Nevada or there's no connection to
15 Nevada, then we'll borrow another state's statute of
16 limitations that does more substantially connect here.
17 There's no argument by PWC that the borrowing statute
18 applies here and there's no reason why you should interject
19 into that 150 years of background law an exception where a
20 provision looks like the one that we have before you.

21 So, I mean, I could -- the cases that we cite in
22 the brief about forum law dictating, some of them don't
23 include choice of law provisions but some of them do. And
24 that would be the *Asian American Entertainment* 2009, Ninth
25 Circuit decision, holding that Nevada's choice of law rule

1 is [indiscernible] statute of limitations, foreign forum
2 governs the remedy as opposed to the right. When you're
3 dealing with a question of, what is the right, that's the
4 substantive law of -- that is chosen by the parties.

5 And, also, a 2000 -- an April 2017 *In Re: Sterba*
6 [phonetic], Ninth Circuit decision, which reaffirms the
7 standard choice of law provisions don't include statutes of
8 limitation absent exceptional circumstances, as well as
9 other District Court cases that do deal with choice of law
10 clauses and how it interacts with statute of limitations.

11 The -- so, I've already commented on *Mardian*. I
12 did want to make the additional point that it's hard to
13 believe that the Nevada Supreme Court reversed *Wilcox*
14 without even referencing it or without the parties citing
15 to it. It's further hard to believe that *Izquierdo*, which
16 is a Federal District Court case where, again, oddly
17 enough, *Easy Loans*, who was the plaintiff there, offered no
18 explanation or argument why Nevada law should apply.

19 The cases that they cite to you are essentially
20 circumstances for one reason or another where the plaintiff
21 did not cite to you the same cases that I'm citing. He
22 didn't cite it to the Court. He didn't argue for the
23 application of Nevada choice of law. The parties
24 essentially conceded on that point and the question --
25 those points and the question is: How to apply it?

1 *Izquierdo*, again, a foreclosure case where it
2 appears that the Bank forum shopped to file in Nevada to
3 avoid Delaware's shorter statute of limitations, the actual
4 choice of law provision that was at issue there, which is
5 on page 1 of the decision, is a lot broader than the one
6 here. It says:

7 The terms and enforcement an agreement are
8 governed and interpreted in accordance with federal
9 law. And, to the extent state law applies, the law of
10 Delaware, without regard to conflict of law principles,
11 the law of Delaware where we and your account are
12 located will apply no matter where you live or use the
13 account.

14 That's not the provision here. In all events, I
15 mean, if I had been the counsel in *Izquierdo*, I still would
16 have argued that the existing precedent should apply. And
17 *Izquierdo* is not suggesting that he's going contrary to
18 that nor does he address any of the arguments that I raised
19 here about what is the scope of a Delaware choice of law
20 provision and the background against which the parties are
21 operating.

22 Okay. So, unless there are any specific
23 questions, I just really want to address the issue of
24 Nevada -- to the extent either Nevada or New York law
25 applies, both of them have a concept of fraudulent

1 concealment that are wrapped into them. Nevada's is
2 express in the statute. It says: Even if they're right
3 about the injury and damage issue, the account and
4 malpractice statute says:

5 For any period during which the accountant or
6 accounting firm conceals the act, error, or omission
7 upon which the action is founded and which is known
8 through the use of diligence, should have been known to
9 the accountant or the firm.

10 That's what we cited to you before also. It
11 argues that even if they're right about the injury point,
12 we're entitled to discovery on whether they did conceal the
13 acts, errors, and omission. The contrary cases that they
14 cite to you are summary judgment after full discovery.
15 None of them are Motions to Dismiss.

16 And, in all events, we directed you before and, I
17 guess, we'd direct you again, to the allegations that we
18 make of fraudulent concealment are more than enough to put
19 them on notice of what the basis for our claims are. Same
20 goes for New York law. The continuous representation and
21 fraudulent concealment principles allow, at the very least,
22 for us to proceed with discovery on that point. If they're
23 right that those -- that that fact doesn't convince you
24 that there's a material issue of fact for a jury to decide,
25 they can bring their Motion for Summary Judgment after

1 discovery is completed and make arguments about why those
2 facts are not sufficient.

3 All they're doing now is hypothesizing what the
4 record will show based on what we have now and saying
5 that's not legally sufficient. But that's not the standard
6 that one is judged for at this stage.

7 You asked the question, and I want to follow-up on
8 it, on the Nevada statute of limitations and what does it
9 mean. We -- I don't know that there was a very good
10 argument to the point that the Nevada Legislature did not -
11 - without any legislative history or direction at all
12 decide to just change what the governing principles were
13 when it separated out accounting malpractice from
14 veterinary and legal malpractice. And the fact that the
15 statute specifically references a claim for damages before
16 it gets into what is necessary is what we argue was the
17 Legislature's not abandoning that precedent that existed at
18 the time, which is also sometimes referred to as case
19 within the case doctrine, the idea that somebody doesn't
20 have to bring a malpractice case until the underlying case
21 in which they are litigating over is concluded so that we
22 can avoid the possibility of bringing cases prematurely.

23 Here, we entered into a tolling agreement with PWC
24 as soon as we received a Notice of Transferee Liability
25 from the IRS. As soon as the IRS said, we're going to hold

1 you, Mr. Tricarichi, personally liable, we ask for a
2 tolling agreement from PWC. We had it in place until we
3 lost the Tax Court case.

4 In addition to the language about damages, there's
5 the language that's in NRS 11.01, which was -- which has
6 been the -- which is the first subsection of the statute of
7 limitations in Nevada, has been on the books since 1911 and
8 it says:

9 Civil actions can only be commenced within the
10 periods prescribed in this chapter after the cause of
11 action shall have accrued, except where a different
12 limitation is prescribed by statute.

13 The --

14 THE COURT: Isn't that --

15 MR. HESSELL: Well, so, the question is that the -
16 - after the cause of action shall have accrued, except
17 where a different limitation is prescribed by statute, the
18 different limitation period is not about what is the
19 triggering event that has to start the running of the
20 statute of limitations. The periods that are in the
21 accountant malpractice may govern, but the question is:
22 What do you do in the scenario where the plaintiff doesn't
23 have damages yet?

24 PWC's interpretation of these statutes would
25 suggest that Mr. Tricarichi was barred by O101 -- or O10

1 because he did not yet have a claim for damages, nor did he
2 have an injury which had accrued. And also barred because
3 that event didn't happen until such time as it was beyond
4 four years from when the accountants provided their
5 services and that may -- one could say: Well, that's what
6 the Legislature intended. They intended to cut off
7 plaintiffs under these circumstances, but there's nothing
8 to suggest that. There's nothing in the legislative
9 history to say that the reason what -- excuse me.

10 There's nothing to suggest in the legislative
11 history or in the separation of accountants from vegetarian
12 -- of veterinarians and lawyers that they intended to
13 change the entire rubric against which they were
14 legislated. They just changed the triggering events, not
15 the background assumption that you have to suffer injury
16 first.

17 In all events, I think, at the end of the day, the
18 point is that there -- no matter whether it's New York or
19 Nevada, and I made this same point last time also, you have
20 exceptions, which we are allowed and should be allowed to
21 move forward with discovery on. There's nothing that
22 they've raised here that's any different than what was said
23 before and, you know, frankly, I don't think this is what
24 you had in mind when you denied the Motion to Dismiss, to
25 come back in three months or five months and reargue it.

1 So, unless you have any other --

2 THE COURT: So, yeah. Just one. You didn't
3 really talk about the *Engel versus Ernst* case. How do you
4 distinguish that where the Nevada Supreme Court appears to
5 say: Look, it makes sense for a national entity to say its
6 contracts -- you know, whether it's Nevada or New York or
7 Colorado law to apply and it makes sense because they're
8 national and they want certainty to know what law applies
9 in everything they do.

10 MR. HESSELL: Yeah. I think that is a -- that
11 runs headlong into the cases that we've cited to the Court
12 about how you should interpret a generic New York choice of
13 law provision in the face of New York law that says: If
14 you want to expressly incorporate -- if you want the
15 certainty that they claim that PWC wanted at the time that
16 it was contracting with our client, they had to expressly
17 state in the choice of law provision that New York statutes
18 of limitations apply.

19 They could have also got it about -- gone about it
20 in any number of other different ways and it is their
21 boiler plate terms and conditions of agreement. They could
22 have also required that we litigate in New York -- in a New
23 York forum only, in which case, they would also have
24 dictated the statute of limitations. And they also could
25 have made the provision broader such that it would alert

1 our client to the fact that when he was agreeing to a New
2 York choice of law provision, he was not only agreeing that
3 the substantive law of New York would govern, but also
4 agreeing that New York statute of limitations apply.

5 And there's just no way to look at this factual
6 record on the posture it is now before you and say that
7 these parties knew and understand in the course of a good
8 faith negotiation that that's what they were agreeing to.
9 A one-line choice of law provision in a turn -- in terms
10 and conditions addendum that is pretty small and agreed to
11 all this other stuff that they're now arguing for. It's
12 just -- that's just not what the facts will reveal, I
13 suspect, and it's -- the question, I think, should be put
14 back to PWC, which is: If that is the uniformity that you
15 were so desiring, why did you put a one-line choice of law
16 provision when you knew, or should have known, that New
17 York law does not allow the interpretation of that kind of
18 provision to mean New York statute of limitations?

19 Plus, they get predictability as to the
20 substantive elements of the claim. The issue here is: Did
21 they also somehow negotiate for or get our client to agree
22 that New York statute of limitations should apply no matter
23 where he files the case?

24 So, with that, I'll sit down.

25 THE COURT: Thank you very much.

1 MR. HESSELL: Thank you.

2 MR. MORRISON: If I can take a couple minutes,
3 Your Honor?

4 THE COURT: Sure.

5 MR. MORRISON: Thank you.

6 THE COURT: You can have five if you want.

7 MR. MORRISON: Thank you very much.

8 First, Motion to Dismiss versus Summary Judgment.
9 Right? He read the quote into the record. You denied
10 without prejudice under -- quote:

11 Under the Motion to Dismiss standard.

12 Summary judgment is a different standard, number
13 one. Number two, he himself conceded there's nothing
14 prohibiting us from filing an early summary judgment
15 motion. In fact, Your Honor, there are procedures to deal
16 with that. It's called a 56(f) Motion. If he believes
17 that he needed discovery to oppose this Motion, he can ask
18 for a narrow -- he can ask for narrow discovery and justify
19 why he needs it to oppose our Motion. They made a half-
20 hearted, two-page -- one and a half-page effort to say:
21 Hey, we need some discovery. None of which is relevant to
22 the issues here, Your Honor.

23 So, the idea that you should deny this simply
24 because we haven't had full-blown discovery is wrong as a
25 matter of procedure. They're entitled to make a full-blown

1 56(f) Motion, which they really didn't do. So, that
2 doesn't win the day for them, Your Honor, at all.

3 Opposing counsel then spent a lot of time talking
4 to you about New York law and how New York law requires a
5 contract to expressly reference the statute of limitations
6 in the choice of law provision. That's what I covered with
7 you in my opening statements, Your Honor. Those are choice
8 of law rules. You do not apply New York's choice of law
9 rules. Right? The law is you apply Nevada's choice of law
10 rules, which does not require you -- the contract to
11 expressly reference statute of limitations. Once you apply
12 Nevada's rules, then you can go to New York. We cited no
13 fewer than four Nevada Supreme Court cases on that point,
14 Your Honor.

15 And, in fact, Motion at 8 note 2 and our Reply at
16 12 to 13 note 6:

17 That argument ignores all the cases that we cite
18 in which a court applied New York's statute of
19 limitations pursuant to the provision, even when the
20 provision did not explicitly include statutes of
21 limitations.

22 If he were correct, and it had to include an
23 express statute of limitations clause, all the cases we
24 cite, all five, would have been wrong.

25 Your Honor, I submit to you opposing counsel makes

1 a nice rhetorical argument and tries to distinguish our
2 cases. Did you hear him talk about any cases affirmatively
3 supporting the points he's making? None. Because there
4 aren't any.

5 Now, let's talk about *Izquierdo* for a second
6 because I kind of chuckled. First thing he said to
7 *Izquierdo* is:

8 Nobody argued for Nevada law in that case.

9 And the transcript will show that that's a quote.
10 Let me read this into the record. Quote:

11 Easy Loans contends that Nevada law should apply
12 to the contract's procedural matters.

13 So, that's wrong.

14 Then he says: No case rejects the proposition
15 about the borrowing statute and how the borrowing
16 statute should apply.

17 He -- remember, he talked about the borrowing
18 statute. *Izquierdo* rejects that very argument too. Quote:

19 Easy Loans points to Nevada's borrowing statute as
20 legislative convocation of its policy.

21 These -- this argument is flawed for several
22 reasons. It rejects the very argument that he made and he
23 -- and which he claimed that no one's ever dealt with or
24 argued about.

25 First, *Izquierdo* says: It hinges on the

1 applicability of the Restatement 142, which, as
2 discussed above, is irrelevant in light of the
3 contractual choice of law provision. Rather,
4 Restatement 187 controls and demands the conclusion
5 that Delaware law, not Nevada law, applies to the
6 statute of limitations issue.

7 Over and over and over again, Your Honor, he's
8 wrong as a matter of law and he's telling you otherwise.

9 Now, with respect to fraudulent concealment, Your
10 Honor, -- let's talk about fraudulent concealment for a
11 second. First, he relied on his allegations. Do you
12 recall that? Insufficient at the summary judgment stage,
13 Your Honor. Number one.

14 Number two, with respect to fraudulent
15 concealment, let's talk about what the law is in Nevada.
16 Now, we don't believe Nevada applies. We believe New York
17 applies. There is no fraudulent concealment under New York
18 law. But, under Nevada, they must make two showings.
19 First, they have to prove, quote/unquote:

20 Affirmative conduct that they fraudulently
21 concealed the information.

22 And the law is, quote: Mere silence or passive
23 conduct, end quote, is insufficient.

24 Second, they must show that the concealed
25 information was, quote:

1 Material, meaning that the information would have
2 objectively hindered a reasonably diligent plan of --
3 from timely filing suit.

4 He fails both prongs of fraudulent concealment
5 even if Nevada law applies. Doesn't rescue his claim.
6 First, all he says is that PWC failed to disclose to them
7 two other transactions that PWC was purportedly working on:
8 Bishop and Marshal. And his affidavit says, at 8 and 9:

9 PWC failed to, quote, disclose these facts to me,
10 quote, and, quote, did not tell me, end quote, about
11 his other transactions.

12 But, Your Honor, mere silence is not enough.
13 There has to be active, affirmative action on concealment.
14 That doesn't work as a legal matter in Nevada.

15 Second: The concealed information must
16 objectively hinder a reasonable and diligent plaintiff
17 from timely filing suit.

18 That fails, too. And this takes a minute to get
19 through, but it's a logical point that I think is important
20 because plaintiff has contradicted himself with respect to
21 the positions he's taken before Your Honor.

22 Plaintiff argues that he would have been alerted
23 to PWC's alleged malpractice if he had known in late 2003
24 that the IRS began auditing and challenging the corporate
25 tax returns sold in connection with Bishop and Marshal.

1 But, Your Honor, during these Tax Court proceedings,
2 plaintiff testified that he was deposed in November of 2007
3 by the IRS. During IRS's audit of Westside, which is the
4 corporation here, Your Honor, and this is what he testified
5 to:

6 Thus, quote, learned that there might be a problem
7 with Westside's unpaid federal income tax.

8 That was 2007, Your Honor. Based on that
9 testimony, we argued, as Your Honor might recall, that
10 plaintiff was on notice of any possible malpractice claims,
11 no later than November of 2007 because of that statement in
12 his testimony. And, under Nevada law, two years after you
13 knew or should have known, the statute of limitations runs.

14 But to avoid that result, the plaintiff asserted
15 that learning of Westside's possible corporate tax
16 liability did not put them on notice in his own possible
17 liability and thus did not put him on notice of any
18 personal, individual claims he might have had against PWC.
19 He wasn't put on notice, according to the plaintiff, of his
20 possible claims until he learned of his own possible
21 transferee liability.

22 But, Your Honor, the 2003 IRS challenges to Bishop
23 and Marshal only concern corporate tax liability, not
24 individual transferee liability. There was never an issue
25 of transferee liability in Bishop and the issue in Marshal

1 didn't come down until 2003, years after plaintiff would
2 have already learned of his own transferee liability. If
3 being aware of Westside's potential corporate tax liability
4 in November of 2007 was not enough to put him on notice of
5 his potential claims against PWC over his personal
6 liability, then learning about the corporate tax liability
7 in Marshal and Bishop would not have put him on notice of
8 any individual claims either. If the situation was
9 reversed, if knowing about corporate issues would have put
10 them on notice of individual issues, then his claims are
11 barred by 2009 because he would have been on notice in
12 2007. So, by his own positions that he's taken in this
13 Court, he's conceded that there's been no fraudulent
14 concealment, Your Honor.

15 Now, last couple points, Your Honor, and then I'll
16 sit down. He argues that: Well, the provision could have
17 been written differently and I didn't understand what I was
18 signing. I've covered that, Your Honor.

19 THE COURT: You have.

20 MR. MORRISON: Thank you.

21 He says: The history of the statute -- by
22 breaking out the statute in Nevada differently, it didn't
23 say anything about the Legislature's intent. That also is
24 contrary to law, Your Honor. In *McKay versus Board*
25 *Supervisors Across the City* [phonetic], our Reply brief at

1 26, note 11:

2 Where a statute is amended, provisions of the
3 former statute omitted from the amendment statute are
4 repealed and it is presumed, the Legislature, by the
5 [indiscernible] express portion of a law intended a
6 substantial change in the law.

7 So, the argument he's making to you, Your Honor,
8 doesn't work as a matter of law.

9 Now, finally, I just want to talk about policy for
10 a second, Your Honor, because plaintiff has made a big deal
11 about he hasn't had discovery, and he's going to get kicked
12 out of court, and you should let this case continue. First
13 I'd like to note he's accused PWC of negligence-based
14 claims. Granting summary judgment for PWC here, which we
15 believe you should, he still has his fraud-based claims
16 against the intentional wrongdoers here. All the banks
17 that put him into this, now that's up on appeal on personal
18 jurisdiction grounds, as you remember, Your Honor.

19 THE COURT: I was going to say, didn't I dismiss -
20 - anyway.

21 MR. MORRISON: You did -- Your Honor, you did
22 dismiss them but he can go sue them --

23 THE COURT: [Indiscernible].

24 MR. MORRISON: -- in jurisdiction where there's
25 personal jurisdiction. He's not -- it's not as if they

1 don't have redress. He can go sue the people he's accused
2 of fraud. They haven't accused us of fraud.

3 Second, Your Honor, --

4 THE COURT: Second and final?

5 MR. MORRISON: Yes.

6 THE COURT: Okay.

7 MR. MORRISON: Third to --

8 THE COURT: You can skip two or go to three --

9 MR. MORRISON: All right. I'll go to three. Last
10 point. Last point, Your Honor.

11 Know this, all the policy and equitable arguments
12 that the plaintiff has made here, Your Honor, there are
13 equitable and policy arguments on PWC's side also. The
14 Legislature by saying --

15 THE COURT: Like freedom to contract?

16 MR. MORRISON: What? I'm sorry.

17 THE COURT: Freedom to contract --

18 MR. MORRISON: But not only that. Freedom to
19 contract, number one, but, not only that, Your Honor, let's
20 not forget. Legislatures make policy choices when they
21 assigns statutes of limitations. Nevada, four years; New
22 York, three years. The Legislature has said: After that
23 period of time, claims against accounting firms are stale.
24 And the reason for that is we shouldn't be put in the
25 position of having to defend ourselves where evidence is

1 stale, witnesses have died. We are put in a compromised
2 position to defend claims that we believe did not have any
3 merit.

4 Let's not forget, this happened in 2003. We're
5 sitting here in 2017. The Legislature has said that we
6 shouldn't be put in that compromised position. So it's not
7 just the equities on their side, it's the equities on ours,
8 which means, Your Honor, this isn't an equitable issue.
9 It's an issue of statute. And if you dispassionately apply
10 the law, Your Honor, you can only come to two conclusions.
11 One, New York applies. And, two, these claims have bene
12 time barred for more than a decade and I appreciate you
13 giving me all the time, Your Honor. Thank you.

14 THE COURT: Thank you both.

15 So, I'll give you my ruling and give you the
16 reasons why because they are very important here. I'm
17 going to deny without prejudice PricewaterhouseCoopers,
18 LLP's Motion for Summary Judgment based solely -- Mr.
19 Hessell, you'll prepare the Order because I'm denying it.
20 So, when you prepare it, put these reasons in there.

21 Based solely on the NRCP 56(f) relief. The record
22 before me now, I cannot even find that genuine issues of
23 material fact exist based on the record in front of me.
24 So, it's not -- and put this in there. It's not denied on
25 that basis, it's only on the 56(f) requested and I cannot,

1 on the record in front of me -- so, put this in there. I
2 cannot find that genuine issues of material fact exist
3 regardless of which state's law applies in this case.
4 And, so, I'm going to grant the 56(f) relief and I will
5 note -- please include this in the Order. I will note that
6 Mr. Tricarichi affirmatively says in his affidavit on page
7 3, lines 10 through 12:

8 PWC's [indiscernible] advice to me about
9 proceeding with the Fortrend transaction extended into
10 August 2003.

11 I think that's a very key fact.

12 The 56(f) relief, the discovery sought, as set
13 forth in paragraph 10 of his affidavit. And, so, limited
14 discovery and if there are -- you know, I agree paragraph
15 10 is not necessarily super clear. So, if there are
16 disputes, first you would need to meet and confer after
17 this in terms of the scope of discovery and, if you
18 encounter disagreements or disputes after your good faith
19 meet and confer efforts -- this is a Business Court case
20 and I'm doing your discovery. But that's my order.

21 MR. BYRNE: Your Honor, one question. There is
22 more -- much broader discovery requests that have been
23 propounded on the defendant here.

24 THE COURT: That's kind of why I said limited
25 discovery.

1 MR. BYRNE: So this is to -- we are now inclined
2 here to limit our discovery to address the 56(f) issues?

3 THE COURT: Yes.

4 MR. BYRNE: Thank you, Your Honor.

5 THE COURT: Yeah. And that -- you can put this in
6 the Order. You know, that is because I -- the record in
7 front of me, I cannot find that a genuine issue of material
8 fact exists that would cause me to deny summary judgment,
9 but, at the same time, I think that 56(f) relief is
10 appropriate as set forth in Mr. Tricarichi's affidavit.

11 So, Mr. Hessel, prepare the Order and submit it
12 to everyone, I guess -- everyone here in the courtroom for
13 review and approval.

14 MR. HESSELL: All right.

15 MR. BYRNE: Thank you, Your Honor.

16 MR. HESSELL: Thank you, Your Honor.

17

18 PROCEEDING CONCLUDED AT 10:15 A.M.

19 * * * * *

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1 **CERTIFICATION**

2

3

4 I certify that the foregoing is a correct transcript from

5 the audio-visual recording of the proceedings in the

6 above-entitled matter.

7

8 **AFFIRMATION**

9

10 I affirm that this transcript does not contain the social

11 security or tax identification number of any person or

12 entity.

13

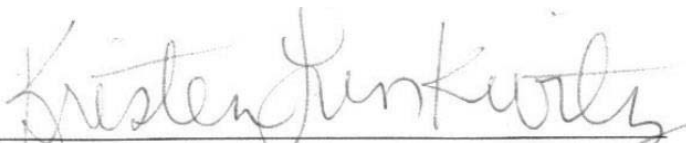
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21 KRISTEN LUNKWITZ

22 INDEPENDENT TRANSCRIBER

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EXHIBIT 4



Randy J. Hart

Direct Phone: 216.274.2410

Direct Fax: 216.274.2511

Email: rjhart@hahnlaw.com

February 21, 2008

**BY FACSIMILE AND
REGULAR U.S. MAIL**

Denise McCaskill
Revenue Agent
Internal Revenue Service
5450 Stratum Drive, Suite 150
Fort Worth, Texas 76137

Re: Michael A. Tricarichi Information Document Request

Dear Ms. McCaskill:

This letter is in response to your "Information Document Request" of my client, Michael Tricarichi, in which you requested information in connection with a "transferee liability" issue that you are investigating. Below, I list your request and my client's response:

Request No. 1:

"A list of assets, including cash and notes, transferred to you by West Side Cellular from 1/1/2003 to 12/31/2003. On this list, please indicate the fair market value of the assets you received and whether you made any transfers to West Side Cellular as consideration for the assets you received."

Response to Request No. 1:

Michael Tricarichi did not receive any assets from West Side Cellular during the time frame in the request. In a telephone call on February 1, 2008, you and I discussed whether you meant to inquire of transfers from Nob Hill Holdings, and not West Side Cellular. To the extent that you meant Nob Hill Holdings, my client did receive cash from Nob Hill Holdings in September, 2003 in the amount of \$34,621,594.06 in consideration for Mr. Tricarichi's stock in West Side Cellular.

CLE - 1054845.1

Hahn Loeser • Parks

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Hahn Loeser • Parks

Denise McCaskill
February 21, 2008
Page 2

Request No. 2:

"All documents that evidence the transfers identified in your answer to item 1 above, including but not limited to bank statements and wire transfer records. Note: This should include, but not limited to, copies of bank statements showing receipt of cash on September 9, 2003 in to the following accounts:

- a. Tricarichi Escrow account #21595 at Rabobank
- b. Michael Tricarichi account #310091918 at Pershing"

Response to Request No. 2:

Documents responsive to this request are being provided with this response.

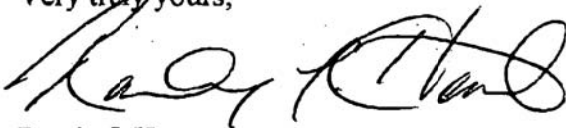
Request No. 3:

"Any other documents you wish to provide in regards to the potential transferee liability matter."

Response to Request No. 3:

Mr. Tricarichi and Hahn Loeser & Parks LLP have already provided numerous documents to you in connection with this matter. To the extent that any of the previously provided documents are pertinent to this matter, Mr. Tricarichi incorporates them by reference. Moreover, the "transferee liability" investigation has not, to our knowledge, been completed. Thus, it is unknown at this time what documents, if any, would bear on issues that might be raised in the future. Mr. Tricarichi reserves his right to present any document in the future which might be relevant to issues that could be raised during your investigation.

Very truly yours,



Randy J. Hart

slh

Enclosures

EXHIBIT 5

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IN THE UNITED STATES TAX COURT

In the Matter of:

MICHAEL A. TRICARICHI, TRANSFEREE,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No: 23630-12

RECEIVED
UNITED STATES TAX COURT
INTAKE #5
2014 JUL 10 PM 3:50

Volume: 2

Pages: 101 through 201

Place: Washington, DC

Date: June 9, 2014

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IN THE UNITED STATES TAX COURT

In the Matter of:

MICHAEL A. TRICARICHI, *TRANSFeree*,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No: 23630-12

U.S. Tax Court
400 Second Street NW
Washington, DC 20217

June 9, 2014

The above-entitled matter came on for
trial, pursuant to notice at 10:00 a.m.

BEFORE: HONORABLE ALBERT LAUBER
JUDGE

APPEARANCES:

For the Petitioner:
MICHAEL DESMOND, ESQUIRE
Law Offices of Michael J. Desmond
233 E. Carrillo, Suite A
Santa Barbara, California 93101
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CRAIG DENNIS BELL, ESQUIRE
McGuire Woods, LLP
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Richmond, Virginia 23219
(804) 775-1000

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APPEARANCES Cont.

2

For the Respondent:

3

HEATHER LAMPERT, ESQUIRE

4

JULIE GASPER, ESQUIRE

5

KATELYNN WINKLER, ESQUIRE

6

CANDACE WILLIAMS, ESQUIRE

7

ROBERT MORRISON, ESQUIRE

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Office of General Counsel

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455 Massachusetts Avenue, NW

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Washington, DC 20001

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1	C O N T E N T S				
2	WITNESSES:	DIRECT	CROSS	REDIRECT	RECROSS
3	FOR THE PETITIONER:				
4	Michael Tricarichi	105	143	180	184
5	FOR THE RESPONDENT:				
6	(None)				

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E X H I B I T S

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EXHIBITS:

IDENTIFIED

RECEIVE

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(None)

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1 P R O C E E D I N G S

2 (Direct examination continued from Volume I.)

3 BY MR. DESMOND:

4 Q And how did Pricewaterhouse come to you?

5 A My brother Jim is friends with a guy by the
6 name of Rich Stovsky, who was a senior partner in
7 Cleveland at Pricewaterhouse. I couldn't have my
8 brother Tony's firm do it, which would have been my
9 preference, so that was the next best thing.

10 Q Okay. And so PWC was not suggested to you
11 by Midcoast or Fortrend, then?

12 A No. They came in totally independently
13 through Jim through his relationship.

14 Q Were you aware at the time of any
15 relationship between PWC and Midcoast and Fortrend?

16 A No.

17 Q Do you know if Mr. Stovsky had ever worked
18 with Midcoast or Fortrend at the time?

19 A No, he didn't. I do know that he did not.

20 Q You've mentioned a couple of times your
21 brother Jim Tricarichi. What's -- what's his
22 background?

23 A He's an accountant. He's primarily an M
24 and A guy. He does business planning and things like
25 that. He's not a CPA. He has done work for

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1 Westside. He's done Westside's -- some of Westside's
2 tax returns. He's done balance sheets, financial
3 reporting, stuff like that.

4 Q Okay. If I can have you look at what's
5 been marked as Exhibit 24-J in your binder and tell
6 me if you recognize that document.

7 A This is the retention agreement with
8 PricewaterhouseCoopers.

9 Q Is that your signature back on page 4 of 5?

10 A I believe so.

11 Q Hopefully those pages are in better order.
12 The document's on your screen there, as well, Mr.
13 Tricarichi.

14 A Oh, yeah. That is my signature. Sorry.

15 Q And this document's dated, I think on the
16 first page, April 10th. Do you see that?

17 A Right. That was be- -- as I said, that was
18 before Midcoast dropped out.

19 Q Okay. And several months before this offer
20 letter we just looked at, 26-J?

21 A Yes.

22 Q How much money were you going to pay
23 PricewaterhouseCoopers to do this work for you?

24 A We asked Mr. Stovsky how much he thought it
25 would cost to look into this particular transaction.

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1 He gave us an initial price of about 20,000. So I
2 wrote on here that if he was going to go over 20,000
3 to call me basically to get my authorization before
4 he went over 20,000.

5 Q And were Mr. Stovsky's fees or PWC's fees
6 fixed or contingent? How was the fee structure?

7 A It was just whatever they needed to do.

8 Q Do you recall how much you ended up paying
9 PWC?

10 A I do not remember, but I think it was more
11 than 20,000.

12 Q Okay. What specifically did you ask PWC to
13 do, then? Why did you bring them in?

14 A Well, we didn't know that much about this
15 type of transaction so we basically said, Hey, we
16 have two companies that are looking to buy the stock
17 of Westside. They're looking to buy it for more than
18 what we would have realized had we just had Westside
19 pay the straight up tax out of the -- out of the
20 company and we want to make sure that that's okay.
21 You know, that there's no problem with doing that.

22 Q Who was dealing with PWC? Were you dealing
23 with them personally on a regular basis?

24 A No. My brother Jim was the conduit between
25 me and Stovsky.

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1 Q Okay. And you have talked this morning,
2 almost this afternoon a lot about --

3 THE COURT: Counsel, are you through with
4 this document now?

5 MR. DESMOND: Yes, sir. I'm through with
6 this document.

7 THE COURT: Yeah. I have one question
8 about it.

9 MR. DESMOND: Sure.

10 THE COURT: I see there are two different
11 versions of page 1 of the letter. And there's a
12 sentence in the original letter that says: You agree
13 to advise us if you determine that any matter covered
14 by this agreement is a reportable transaction that is
15 required to be disclosed under Section 16011-4.

16 Then I see that's crossed out.

17 MR. DESMOND: Yeah.

18 THE COURT: And why is that?

19 THE WITNESS: Well, initially we -- I
20 crossed it out.

21 THE COURT: Did you write no in the line --
22 line there in the corner?

23 THE WITNESS: I'm sorry?

24 THE COURT: Who wrote no?

25 THE WITNESS: Those were -- no? I don't

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1 see no.

2 THE COURT: If you look at the next page,
3 you'll see that sentence is crossed out and no is
4 written in the --

5 MR. DESMOND: I think those might be Mr.
6 Tricarichi's initials.

7 THE WITNESS: I -- that's my initials,
8 M.A.T.

9 THE COURT: Okay.

10 THE WITNESS: Those are my initials there.
11 Why is it crossed out?

12 THE COURT: You initialed crossing out this
13 sentence.

14 THE WITNESS: Yeah. Because that was
15 something that Hahn Loesure was going to do. But
16 ultimately we decided to leave it in, and I guess
17 that's the reason why there's two different versions
18 of this.

19 MR. DESMOND: There'll be some more
20 explanation of that, Your Honor.

21 BY MR. DESMOND:

22 Q So we were shifting gears a little bit to
23 talk again about Hahn Loesure, their role. We talked
24 earlier about their role in the provider litigation.
25 Were they working with you at all in connection --

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DIRECT - MICHAEL TRICARICHI

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1 how were they working with you in connection with
2 these -- the two offers that you were considering?

3 A I'm sorry. Can you ask that question
4 again?

5 Q Sure. Hahn Loesure, what was their role,
6 if any, in considering the stock -- the offers to
7 purchase your stock?

8 A Their offers were legal ramification -- or
9 their role was to define any legal ramifications of
10 doing the deals.

11 Q Okay. And who specifically at Hahn Loesure
12 were you --

13 A Jeff Folkman.

14 Q Was Randy Hart involved in that?

15 A Randy Hart was not involved. He was
16 peripherally involved, but he -- he's not a tax guy
17 so he knew nothing about the --

18 Q Okay.

19 A -- underlying allegations.

20 Q Moving forward, then, we talked about the
21 letter of intent that came into play in Exhibit 26-J
22 back in later in July of 2003. And I don't have any
23 specific questions on that.

24 But how did the negotiations move forward,
25 then, with Fortrend? What did you do --

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1 A Well, I don't know when I got the go ahead
2 or the lack of don't go ahead from Pricewaterhouse
3 and Hahn Loesure, but I did get that at some point.
4 And that's when we decided to go forward with the
5 transaction with Fortrend.

6 So we had negotiated back and forth.
7 They -- Jeff Folkman was still negotiating terms of
8 the stock purchase agreement pretty much up to the
9 day we signed it.

10 Q Okay. And as that is going on, that
11 process is going on, what are you thinking about?
12 What are your concerns, if any, with respect to the
13 stock?

14 A Well, my concerns, number one, were how am
15 I going to get paid; how am I going to get paid?
16 They're offering to pay me \$35 million roughly. Do
17 they have the money to pay? Okay. That was concern
18 number one.

19 Concern number two was were there any
20 problems with this deal? Any kind of bounce back at
21 all? Any kind of -- any kind of problems with the
22 IRS, any kind of problems with anyone as far as doing
23 this deal? Will this deal implode?

24 Q And did you talk to your advisers about
25 those concerns?

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1 A Correct, yes. That's why I hired them in
2 the first place was I didn't -- I would not have done
3 this deal straight up. I had to get opinions from
4 people as far as whether this deal was a good deal or
5 a bad deal.

6 Q And you talked earlier this morning about
7 the \$65 million and your knowledge of the tax issues,
8 potential tax issues on that. How were those being
9 considered by you at the time this stock purchase
10 offer is being negotiated?

11 A How were the tax?

12 Q Yeah. What did you -- what did you talk to
13 your advisers about in connection with the taxes?

14 A Well, we obviously were looking for ways to
15 pay less tax than what the straight up, you know, 35
16 percent or whatever the corporate tax rate was.
17 That's what we charged them to do.

18 And, like I said, ultimately, if this deal
19 hadn't come along, we would have left the money in
20 Westside and we would have just bought the real
21 estate under Westside.

22 Q Was the tax issue disclosed to Fortrend as
23 a potential buyer; do you know?

24 A Oh, absolutely. Absolutely. As a matter
25 of fact, it's highlighted in the stock purchase

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1 agreement. They knew exactly what the tax
2 obligations of Westside were when they decided to go
3 ahead and buy the stock.

4 Q And I have a few questions for you on that.
5 If you can just turn back to Exhibit 1-J and just
6 tell us if you recognize that document.

7 A Yeah. That's the stock purchase agreement.

8 Q Okay. The final stock purchase agreement?

9 A Yeah.

10 Q Dated September 9th you see there --

11 A September 9th.

12 Q -- on page 1?

13 A Right.

14 Q And I'll come back to that in just a
15 minute. Let me shift gears, though, and go back to
16 Westside. So we've got the negotiations going on.
17 And you talked earlier about the customer base at
18 Westside trying to be sure that that's addressed.

19 Was there anything else in terms of
20 housekeeping issues at Westside that had to be taken
21 care of in anticipation of the stock sale?

22 A Not really. I mean, we paid our debts, you
23 know, whatever we owed. Part of the -- part of the
24 settlement agreement was that we were going to pay
25 the carriers the money that we owed them for service.

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1 So we basically paid whatever we owed to
2 whoever we owed it to.

3 Q Okay. Were there any issues of excise
4 taxes Westside --

5 A Yeah. There was a continuing question mark
6 on excise taxes. They're -- initially we were told
7 that we had to collect and remit excise taxes. And
8 then at some point, our attorneys told us that we
9 didn't have to do that, that there were some cases
10 out there that didn't require excise tax to be
11 charged on cellular service.

12 And so we collected some of it, but we
13 didn't pay it. We kept -- we held the money. And I
14 got an opinion from Randy who basically said you
15 don't have to pay it. That there's -- there's enough
16 case law out there that says that it's not legal to
17 collect excise tax from -- on cellular service. So
18 we -- so he said don't pay it.

19 When we did the stock purchase agreement,
20 one of the terms of the stock purchase agreement was
21 I was personally responsible for anything -- any
22 taxes or anything owed prior to January 1st, of 2003.
23 And the excise tax issue would have been prior to
24 January 1st, of 2003.

25 So I decided that it was to err on the side

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1 of caution and pay the tax rather than leave it out
2 there and then have it come up once Fortrend owned
3 the company and then they were going to come back to
4 me and say, Hey, what's this?

5 So we paid the tax. I paid the tax, and I
6 also paid the interest on whatever when we filed the
7 returns. I paid the interest and the tax at the same
8 time.

9 Q And you say I. Is that you, personally?

10 A No. Westside paid it before we sold it.
11 Westside owed the money. I didn't pay -- I didn't.

12 Q How much was that; do you recall?

13 A It was about \$3.1 million excise tax plus
14 interest.

15 Q And do you recall had Westside previously
16 filed excise tax returns and not paid the tax or
17 didn't have to file the returns --

18 A No. We didn't file -- we did not file the
19 returns.

20 Q Were they ultimately filed?

21 A They were filed when we made the payment.

22 Q And when was that payment made, that \$3
23 million eventually?

24 A It was made twice actually. It was paid
25 once in August of 2003. We actually hired a guy who

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1 was a tax guy who was computing interest and he's the
2 one who did the interest calculations for us. And
3 then he told us how much interest to pay.

4 He did the returns and then we sent all the
5 returns and a check to the IRS in August of 2003.

6 Q Okay. And you mentioned you paid it twice.
7 What's that about?

8 A Well, the IRS lost it. They never cashed
9 the check. They never acknowledged receiving the tax
10 returns. They basically did nothing.

11 So the money was still sitting in the
12 Westside account, and it was sitting in the Westside
13 account even after the Fortrend transaction had taken
14 place.

15 So we're sitting now with a 3.1 something
16 million dollar balance in a Westside bank account.
17 So I said, Let's contact them.

18 We contacted them. They said they had no
19 record of receiving anything.

20 I said, Okay. Fine. Let's send it to them
21 again. So we wrote a new check for the same amount
22 and sent them the tax returns a second time. And
23 that would have been in November of 2003.

24 Q So if you can look at what's been marked as
25 Exhibit 88-J toward the end of your binder there and

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1 tell us if you recognize that document.

2 A Yeah. 88-J is the check that Cellnet
3 wrote -- Westside wrote to the IRS on November 18th,
4 of 2003 --

5 Q So that's --

6 A -- for \$3.1 million.

7 Q -- the second payment you wrote?

8 A The second time we paid it. It's the same
9 payment, but we stopped payment on the first check
10 and sent them this one.

11 Q Fair enough. Okay.

12 A Okay.

13 Q And I'll come back with a couple of
14 questions on that. But let me just go back and still
15 talk about kind of housekeeping at Westside as you're
16 getting ready for the stock sale.

17 Did Westside have any receivables on its
18 balance sheet during this kind of summer of '03 time
19 period?

20 A It did have receivables, yes.

21 Q What happened to those?

22 A Well, initially Fortrend was interested in
23 buying the receivables as well as the company as well
24 as the stock. And at some point, they decided that
25 they really didn't want to pay us anything for the

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1 receivables, anything, you know, substantial for the
2 receivables.

3 So we decided when we formed LXV -- decided
4 to put the receivables into LXV.

5 Q And what was -- what were they offering to
6 pay you? Why didn't you want to take that?

7 A Nothing. Like a penny, a penny a dollar or
8 something like that, or half a penny a dollar or
9 something like that.

10 Q And you thought they were worth more than
11 that?

12 A Oh, yeah. We actually collected a lot more
13 than that.

14 Q We being?

15 A We being LXV.

16 Q Okay. But there were discussions with
17 Fortrend about that issue?

18 A Yeah. That's when we first started with
19 that.

20 Q And did those discussions tell you or
21 inform you in any way about Fortrend and its
22 business?

23 A No. I mean, other than they were in the
24 business of buying receivables cheap. That -- that
25 didn't tell me anything else.

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DIRECT - MICHAEL TRICARICHI

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1 Q Okay. So you had some understanding they
2 knew what they were talking about when they were
3 talking to you about buying --

4 A Oh, yeah. Absolutely.

5 MR. DESMOND: How are we doing on time,
6 Your Honor? I'm fine to keep going through.

7 THE COURT: I thought we might break for
8 lunch maybe 12:30, quarter of 1. Whenever would be a
9 good breaking point for you.

10 MR. DESMOND: Okay. I may even be done
11 with Mr. Tricarichi by then so.

12 THE COURT: Ms. Lampert, would it be okay
13 to --

14 MS. LAMPERT: Yes, Your Honor.

15 THE COURT: -- run a little bit late and
16 then try to finish up before lunch?

17 MS. LAMPERT: To finish up his direct and
18 then --

19 THE COURT: Yeah.

20 MS. LAMPERT: -- do cross after lunch, Your
21 Honor?

22 THE COURT: Yeah.

23 MS. LAMPERT: That would work for us.

24 THE COURT: Okay. Well, let's shoot for
25 that.

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1 MR. DESMOND: Okay.

2 BY MR. DESMOND:

3 Q Going back, then, to the Fortrend offer,
4 Mr. Tricarichi, we've talked about the \$65 million
5 and the tax consequences surrounding that
6 consideration between PWC.

7 Did you have any understanding as to what
8 was going to happen to the taxes, whatever that
9 amount might be, that Westside might owe?

10 A Fortrend was going to make sure that the
11 taxes got satisfied.

12 Q Do you know how they were going to make
13 sure the taxes got satisfied?

14 A No. That was why I hired the outside
15 experts.

16 Q Okay. Did your advisers look into that for
17 you?

18 A I believe they did. To some -- to some
19 degree I think PWC did.

20 Q Okay. And you mentioned earlier this --
21 well, let me come back to that in just a second. But
22 were the specific terms in Exhibit 1-J, the stock
23 purchase agreement, that addressed the taxes that you
24 recall?

25 A The only term that addressed the taxes was

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DIRECT - MICHAEL TRICARICHI

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1 that they were taking -- they took the tax obligation
2 for anything -- any income that came in after the 1st
3 of January of 2003.

4 Q Okay. And if I could have you look at page
5 23 of Exhibit 1-J. And in particular I'm looking at
6 Section 5.2. Are you familiar with that
7 particular --

8 A Yes.

9 Q -- agreement? And what is Section 5.2?
10 It's got two subparts. But starting with Subpart A,
11 what does that provision tell us?

12 A Subpart A is basically what I just said.
13 That they, being Fortrend, were responsible for
14 preparing -- I'm sorry.

15 We were responsible for preparing a pre --
16 a pretax whatever you want to call it and they were
17 responsible for anything -- here. I'll read the
18 line.

19 It says: Subject to Section such and such,
20 buyer shall cause company to prepare and file timely
21 at their own cost and expense all returns for taxes
22 required to be filed by a company in respect to
23 periods ending after closing date. Buyer shall cause
24 company to satisfy all United States federal, state,
25 local, and franchise taxes, penalties, and interest

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1 required to be paid by a company attributable to
2 income earned during the tax year January 1st, 2003,
3 and for all tax years thereafter.

4 So Fortrend was committing to us that they
5 were responsible for making sure that anything -- any
6 income that was triggered from January 1st, 2003,
7 forward, they were going to take care of the tax on
8 that.

9 Q Does this agreement say anywhere how
10 they're going to do that?

11 A No, it doesn't.

12 Q Does it say anywhere that they have to take
13 some specific steps or any transactions? Does it
14 tell them --

15 A Like a specific strategy or something?

16 Q Correct.

17 A No. There's nothing like that.

18 Q Okay. So as far as you knew, they could
19 have cut a check to pay for the tax?

20 A If that was what they wanted to do, sure.

21 Q Okay. But it's their responsibility?

22 A Either way this agreement provided that
23 they would satisfy whatever taxes were due.

24 Q And read it if you want to, but
25 Subparagraph (b) of that Section 5.2, what does that

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123

1 tell us?

2 A That says that they agree to stay in
3 business for at least five years following the
4 transaction and have a minimum net worth -- they
5 being Westside Cellular. Stay in business at least
6 five years after the transaction and maintain a net
7 worth -- minimum net worth of no less than \$1
8 million.

9 Q And do you know, are those terms in there?

10 A Jeff Folkman put those in there.

11 Q Do you know why?

12 A Off the top of my head, no.

13 Q Okay. Do you know if Westside stuck around
14 for another five years? Do you know now, sitting
15 here today?

16 A I know at that time and now that they were
17 around for five years.

18 Q Do you know now if they maintained that
19 covenant there about maintaining a net worth of \$1
20 million?

21 A I'm pretty sure they did.

22 Q And what about the covenant above that,
23 they shall satisfy fully all your in-state and
24 federal taxes, did they meet that contractual
25 obligation?

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1 A I don't think they did. If they did, we
2 wouldn't be sitting there.

3 Q We wouldn't be here.

4 A No.

5 Q Fair enough. Fair enough. Okay. You'd
6 mentioned a little bit earlier you were concerned
7 about getting paid. You were selling your stock for
8 a significant amount of cash, and you were concerned
9 about getting paid.

10 What was done by you or your advisers to
11 make sure that you got paid?

12 A Well, that's when we were introduced to
13 Rabobank. And Rabobank was the company that they
14 had, they being Fortrend, had brought to the table to
15 basically pay us the money.

16 Q So in terms of getting paid, were you
17 concerned about Fortrend paying you or who was going
18 to pay you?

19 A Rabobank was going to pay us. The
20 Fortrend -- my understanding of the situation was
21 that Fortrend was borrowing money from Rabobank.
22 They had put up some of their own money, and they
23 were borrowing money from Rabobank. And that that
24 money, they were going to pay us that money and it
25 was going to be deposited into our bank account by

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1 Rabobank.

2 Q And did you have a prior banking
3 relationship with Rabobank?

4 A No.

5 Q Do you know if Fortrend did?

6 A I believe Fortrend did, but I don't have
7 direct knowledge of that.

8 Q Okay. And in terms of getting comfortable
9 that you were going to get paid, how did the whole
10 control situation work? Westside's got a bunch of
11 cash in the bank account.

12 A Well, Fortrend -- Fortrend wanted the
13 officers of Westside to resign. And we said that we
14 wouldn't allow the officers to resign until such time
15 as we got paid.

16 So one thing we didn't want was we didn't
17 want the money to get away from us. So Rabobank
18 acted as the escrow agent. We signed a bunch of
19 resignations, gave them to Rabobank to hold until
20 such time as Rabobank funded this transaction.

21 And then once Rabobank funded the
22 transaction, they were free to invoke the
23 resignations, give them to Fortrend.

24 Q And take control of the company?

25 A And take control of the company, correct.

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1 Q If you can turn to what's been marked as
2 Exhibit 87-J and take a look at that document -- I'm
3 sorry, it's 49-J. I apologize. Tell me what that
4 document is if you know.

5 A 49-J is my letter to Chris Kortlandt at
6 Rabobank saying that we were giving them the
7 resignations, but they were not to be relied on until
8 such time as they deposited \$34 million into my bank
9 account.

10 Q Did Rabobank have any problem with this
11 resignation -- with this mechanism that's referred
12 here?

13 A No.

14 Q Did Fortrend have any problem with it?

15 A I don't think so.

16 Q Did you ever open an account at Rabobank?

17 A I opened two accounts. I opened one
18 personally, which is what this letter speaks to, and
19 we opened one corporate one.

20 Q And why did you do that?

21 A That was part of the Rabobank escrow
22 situation.

23 Q I'm going to have you look at Exhibits 29-J
24 and 31-J briefly and just tell me if you recognize
25 those.

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1 A 29-J is the signature card signed by me.

2 This is my personal escrow account at Rabobank. And

3 31-J is Westside's account at Rabobank, Westside's

4 escrow account at Rabobank.

5 Q So we've talked about the financing and the

6 role of Rabobank. What was the date, I think it's in

7 these documents, the date the transaction actually

8 closed?

9 A I can't tell you that.

10 Q It may not -- it's not on these documents.

11 If you look back at Exhibit 1-J.

12 A I think it was September 9th, but I'm not

13 sure.

14 Q And that's on page 1 of Exhibit 1-J there.

15 A Well, that's the date of the document.

16 Q Right. Of the -- of the stock --

17 A Of 1-J.

18 Q -- stock purchase agreement.

19 A September 9th, yeah.

20 Q Okay. What was the final purchase price

21 for your stock in Westside?

22 A It was 34-plus million dollars. It's

23 whatever that amount was on the letter to Kortlandt.

24 Q And how was that price determined, do you

25 know? How did Fortrend come up with that number?

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1 A We negotiated that number.

2 Q Could you look on that Exhibit 1-J, let's
3 just kind of look at the finances of the company at
4 the time this end of August, beginning of September.

5 Exhibit 1-J, page 40, 41. Tell me when you
6 have those.

7 A Page 41?

8 Q 40 and 41, yeah.

9 A Yeah. I got it.

10 Q And I think you told us you don't have any
11 formal training in accounting, right?

12 A I do not.

13 Q Okay. But you're familiar with a balance
14 sheet and income statement?

15 A Yes.

16 Q So you do recognize these documents, then,
17 pages 40 and 41?

18 A Yeah. These were pro forma balance sheet
19 and income statements that were prepared.

20 Q And what does pro forma mean in your
21 understanding?

22 A It means they weren't real. They were just
23 from information.

24 Q Okay. And if you can turn -- well, first
25 of all, do you see the -- we talked about taxes. The

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1 tax that you've referred to a couple of times or
2 potential tax for Westside, how much was that?

3 A The federal tax was about 14 million and
4 then there was about 2 million in state and local.

5 Q And do you see that number or those numbers
6 on the balance sheets or income statement on 40 or
7 41?

8 A Not on this one, no.

9 Q And do you know why those aren't on there?

10 A I don't know.

11 Q If you can turn to page 42. Tell us what
12 you recognize with that -- that page of the stock
13 purchase agreement is.

14 A 42 is an analysis of looks like a -- looks
15 like an income statement with \$16.8 million worth of
16 tax on it. It also has the Fortrend deal factored in
17 here.

18 Q And Fortrend deal, is it referenced in the
19 bottom left-hand column the Fortrend premium; do you
20 see that?

21 A Yes.

22 Q What is that in your understanding?

23 A That was the way they took the difference
24 between what we were paid and what was in the bank at
25 the company at the time. So the company had \$41

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1 million in it; they were paying us 5.3 -- or, I'm
2 sorry, they were paying us 35-something. So that's
3 the difference between the numbers.

4 Q Does that have anything to do with this \$15
5 million in tax that you mentioned a moment ago --

6 A No.

7 Q -- in your understanding? Okay.

8 A It doesn't have anything to do with the tax
9 as far as I'm concerned -- as far as I know.

10 Q Okay. But this -- you understood this to
11 be?

12 A The difference between the cash in the
13 company and what they were willing to pay for the
14 company assuming the tax liability.

15 Q With their assumption of the tax liability?

16 A Correct.

17 Q Okay. When we first started talking this
18 morning, you mentioned you moved to Las Vegas at some
19 point. Now I want to come back to a discreet point
20 on that.

21 Did you buy a house when you moved to Las
22 Vegas in 2003?

23 A Yes.

24 Q And how was that financed?

25 A I borrowed 570-some-thousand dollars from

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1 Westside in May of 2003.

2 Q If you can look at Exhibit 13-J in your
3 binder and tell me if you recognize that.

4 A That's the -- that's a promissory note for
5 \$500,000 that I signed with Westside.

6 Q Whatever happened to that promissory note?

7 A I paid it back.

8 Q When and how?

9 A There was a check that was given to me that
10 I endorsed back to Westside.

11 Q And at what time? When was that?

12 A I don't know exactly. It was right around
13 the time we did the Fortrend deal.

14 Q So in connection with the Fortrend deal,
15 that issue was addressed?

16 A Correct.

17 Q Okay. Fair enough. Shifting gears, then,
18 to your own, personal, tax situation. This -- well,
19 just an introductory question. Were you actually
20 paid the \$35 million for your stock in Westside?

21 A Yes.

22 Q Did you report that on your personal income
23 tax return?

24 A Yes.

25 Q You can turn to Exhibit 97-J and tell me if

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1 you recognize that document.

2 A 97-J is my personal tax return for 2003.

3 Q Okay. Toward the bottom of the second
4 page, is that your signature there?

5 A It is.

6 Q Okay. And is that your wife's signature,
7 as well?

8 A Yes.

9 Q If you can look toward the middle of that
10 page, does this show how much you paid in tax in
11 2003?

12 A Yeah. \$5.3 million.

13 Q If you can look back to -- I'm going to ask
14 you what's that about -- Schedule D of this tax
15 return. And I know you're not a tax guy.

16 Schedule D is, I believe, page 9 of 19.

17 A I got it.

18 Q Okay. Do you see the Westside sale there?

19 A Yeah. That's showing the \$35 million that
20 we got for the sale -- that I got for the sale of
21 Westside stock.

22 Q Was your personal income tax return from
23 2005 ever audited?

24 A No.

25 Q I want to talk a little bit more about the

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1 excise tax issue that you told us about and the \$3
2 million that was also paid in November of 2003. I
3 think that was Exhibit 88-J, that check we looked at.
4 Do you recall that?

5 A Yes.

6 Q Okay. Was that the last you heard from the
7 IRS and with the IRS on the excise tax issue?

8 A No.

9 Q What else did you hear from the IRS on
10 excise taxes?

11 A Sometime about a year later they came
12 knocking on the door looking for \$1.1 million in
13 penalties.

14 Q What was that all about? Penalties for
15 what?

16 A Penalties for not remitting the excise tax.

17 Q And whose responsibility was that?

18 A That would have been my responsibility
19 under the stock purchase agreement because it was
20 after the transaction.

21 Q So coming to Westside but it's your
22 contractual responsibility?

23 A That would have been my contractual
24 obligation. It was incurred prior to January 1st of
25 2003.

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1 Q Did you pay the million dollars to the IRS
2 in penalties?

3 A No. I hired a law firm; I think it was
4 Swidler Berlin. And they went to the IRS and
5 basically filed a protest against the penalties
6 because --

7 Q Was that on your behalf personally?

8 A On behalf of -- well, that's a good
9 question. I think they did it on behalf of Westside,
10 but I paid them to do it.

11 Q Okay. If you can look at what's been
12 marked as Exhibit 89-J and tell us if you recognize
13 that document.

14 A Yeah. This is the protest that Swidler
15 filed on the penalties on the excise tax.

16 Q And on page 10 of that document, do you see
17 your signature there, penalties of perjury statement?

18 A Yeah. Let me get there. Yeah. That's my
19 signature.

20 Q And going back to page 1, does this refresh
21 your recollection at all about who this was filed on
22 behalf of?

23 A Yeah. It was filed on behalf of Westside
24 Cellular.

25 Q And during this -- this is what's it -- the

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1 day now, September 30th, of 2004, you'd sold your
2 stock in Westside at this time?

3 A I had, yes.

4 Q Did you tell the IRS when you filed this
5 that you'd sold your stock in Westside?

6 A Absolutely.

7 Q If you can turn to page 2, and you don't
8 need to read this whole page or this paragraph. But
9 that second full paragraph there, do you see that?

10 A Yes.

11 Q Do you see there where you've told the IRS
12 that you'd sold your stock in Westside?

13 A Correct.

14 Q Did IRS ever question the fact that you'd
15 sold your stock and that your signature's on this
16 document?

17 A No.

18 Q What ever happened with this protest? What
19 was the consequence of --

20 A They abated the penalties.

21 Q How long did that take?

22 A I want to say probably another year.

23 Q And is that the last word on excise taxes
24 with Westside Cellular?

25 A No.

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1 Q What else happened with the IRS?

2 A Well, sometime after this, I told you
3 before that it was a hit and miss as far as the
4 outcomes of various different suits against the
5 government for excise -- excise tax.

6 Well, I believe the Service gave up on
7 trying to collect the excise tax sometime in late
8 '04, early '05.

9 And so when they did that, we went back --
10 I and Randy Hart went back to Westside and said, Hey,
11 this excise tax, you know we paid over \$3 million in
12 excise tax on behalf of Westside. The Service has
13 now said that it's not required to be paid. We think
14 you've got a refund case there.

15 And Randy talked to, I believe, Tim Conn
16 who was running Westside at the time and got
17 permission to do a contingent fee refund case.

18 Q Was that --

19 A To try to get the \$3 million back.

20 Q Okay. Working for who?

21 A Working for Westside.

22 Q Okay. Did you have any communications with
23 Mr. Conn at the time?

24 A I never had any communications with Mr.
25 Conn.

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1 Q If I can ask you to look at what's been
2 marked as Exhibit 93-J and tell us if you recognize
3 that document.

4 A 93 is the complaint that was filed by
5 Westside again, well, the United States of America.
6 This is the excise tax complaint.

7 Q And when was that filed, do you recall?
8 There's a date at the very top if that refreshes your
9 recollection.

10 A It was filed in September of '06, 9/18 of
11 '06.

12 Q Whatever happened with this complaint; do
13 you know?

14 A Ultimately it was dismissed; we lost on
15 summary judgment.

16 Q Do you know why?

17 A I don't. Off the top of my head I don't.

18 Q Okay. So there was never any payment of
19 re- -- of excise --

20 A I know the IRS never refunded the money.

21 Q Okay. What was the amount if you can maybe
22 say or how much was at issue --

23 A It was \$3.1 million.

24 Q So we talked a moment ago about around \$1
25 million in potential penalties and this potential

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1 claim for \$3.1 million in refund.

2 Going back to Exhibit 1-J, and talked about
3 page 40 of that, that balance sheet.

4 A I'm sorry, 1-J, which page?

5 Q Page 40 of 209. Just looking at those
6 numbers at the bottom.

7 A Got it.

8 Q Do you see that million dollar penalty,
9 potential penalty I should say, referenced anywhere
10 on that balance sheet?

11 A No. .

12 Q And what about the \$3 million of potential
13 refund claim, whatever you want to call it; is that
14 referenced anywhere there?

15 A It is not. .

16 Q The -- just briefly on this -- the audit
17 that we're here as far as the case we're a part of,
18 when did you first learn that Westside hadn't paid
19 its income taxes for 2003?

20 A In November of 2007.

21 Q How did you learn that?

22 A I believe Ms. McCaskill told me that.

23 Q In what context? Where did you have an
24 occasion to meet Ms. McCaskill?

25 A I was subpoenaed for deposition in Las

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1 Vegas by Ms. McCaskill.

2 Q And was that in your own -- I think you
3 said you'd never been audited. So what's the context
4 for that? Why were you being -- what were they
5 asking you --

6 A They were asking me questions about
7 Westside and about Fortrend.

8 Q Did -- we talked a moment ago about the
9 telephone excise tax refund claim. Did that come up
10 at all in that interview, that discussion?

11 A It did.

12 Q In what context?

13 A They asked -- I think they asked if there
14 was any litigation pending against Westside, if I
15 knew of any litigation pending. I don't know if it
16 was against or with or whatever, but the question
17 came up.

18 And I answered the question that yes, there
19 was this \$3 million federal excise tax case that was
20 probably going to be filed or was going to be filed
21 or had been filed. It had been filed at that time.

22 Q Okay. Did you ever hear anything more
23 about that from Ms. McCaskill or anyone in that about
24 that excise tax refund claim?

25 A No.

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1 Q One other topic I should have covered a
2 moment ago, but when you talked about the Rabobank
3 loan, the finances for the stock purchase, do you
4 recall that discussion?

5 A I do.

6 Q Okay. Your understanding, so prior to the
7 stock sale you owned the company, right?

8 A Correct.

9 Q And while you owned the company, you were
10 the officer and director; did you ever give Rabobank
11 any kind of security interest? Did you ever sign
12 anything over to Rabobank on behalf of Westside?

13 A No.

14 Q Did you ever give them a pledge of any
15 kind, if you know what that means, of Westside's
16 assets?

17 A No. I signed no -- the only paperwork that
18 I ever signed with Rabobank were those two -- those
19 two signature cards that we saw and the letter that I
20 wrote to them.

21 Q I'll just find those quickly and make sure
22 I'm on the same page as you. Well, that's fine.

23 So the account opening documents we looked
24 at earlier, that's the only paper you signed with
25 Rabobank?

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1 A That's correct.

2 Q Okay. Did anybody else on behalf of
3 Westside sign any pledge while you were with the
4 company, while you owned the company, pledge security
5 agreement of any kind?

6 A No. No one was authorized to do that other
7 than me.

8 Q It would have been only you?

9 A It would have been only me.

10 MR. DESMOND: I think that's all the
11 questions I have for Mr. Tricarichi.

12 THE COURT: Okay. So we will then take 45
13 minutes for lunch. Will that -- when do you expect
14 we will want to finish today?

15 MS. LAMPERT: Your Honor, can we take an
16 hour --

17 THE COURT: Okay.

18 MS. LAMPERT: -- for lunch and then come
19 back and begin our cross-examination? And then it's
20 my understanding from The Court's information systems
21 gentleman that we need to actually make the
22 connection around 3:15 for Mr. Bittner this
23 afternoon.

24 THE COURT: Right.

25 MS. LAMPERT: So maybe if we could do our

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1 cross when we get back until three o'clock and take a
2 brief break and then make the connection for Mr.
3 Bittner. Would that work for Your Honor?

4 THE COURT: And then will he take the rest
5 of the day or --

6 MS. LAMPERT: I anticipate that he
7 should -- that he should take approximately an hour
8 to an hour and a half, possibly two hours.

9 THE COURT: And then maybe resume cross of
10 Mr. Tricarichi if you're still --

11 MS. LAMPERT: Yes, Your Honor.

12 THE COURT: -- at that point? Okay. Let's
13 break for one hour. And I think we'll probably plan
14 to finish at 5:30 or six today. Plan on that, okay?

15 Very good.

16 MR. DESMOND: Thank you, Your Honor.

17 THE CLERK: All rise.

18 (Whereupon, at 12:29 p.m., The Court was in
19 recess until 1:37 p.m.)

20 THE COURT: Ms. Lampert?

21 MS. LAMPERT: Good afternoon, Your Honor.
22 If Mr. Desmond has no further questions on direct for
23 Mr. Tricarichi, we're prepared to start our cross-
24 examination.

25 MR. DESMOND: Nothing further from

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1 Petitioner, Your Honor.

2 THE COURT: Okay. Thank you. Please
3 proceed.

4 CROSS-EXAMINATION

5 BY MS. LAMPERT:

6 Q Mr. Tricarichi, can you hear me from where
7 I'm seated today?

8 A Yes.

9 Q Is it okay if I do your questioning from
10 this position?

11 A I can hear you fine.

12 Q Great. Thank you. And please bear with me
13 a little bit. I'm going to probably be jumping
14 around a little bit. I have some questions for you
15 about some of the testimony that you've just recently
16 given to The Court.

17 Numerous times during your testimony you
18 referred to your relationships with Hahn Loesure, the
19 attorneys at Hahn Loesure, and other advisers. And
20 through what form of communication did you -- did you
21 speak with Hahn Loesure or your PWC advisers or any
22 other advisers?

23 A Well, I spoke more to Hahn Loesure than I
24 did to PWC. I don't think I spoke to PWC that much.
25 I think I spoke mostly to PWC through my brother Jim

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1 who had the relationship with Rich Stovsky.

2 Hahn Loesure, I talked to Randy Hart and I
3 talked to Jeff Folkman. But, again, I didn't have
4 that much contact with them.

5 Q And did you speak directly with them? Did
6 you -- did you speak directly with Mr. Hart and Mr.
7 Folkman?

8 A I would have spoken directly with them,
9 yes.

10 Q And did you ever communicate via e-mail?

11 A I -- it wasn't my practice to communicate
12 with them via e-mail.

13 Q So you didn't send e-mails or receive
14 e-mails?

15 A There might have been -- I might have been
16 copied on some e-mails; I might have sent an e-mail.
17 I don't know. But my general practice was, with Hahn
18 Loesure anyway, to speak face to face.

19 Q Okay. And the e-mail addresses that you
20 used during 2003, do you remember which e-mail
21 address you used during 2003?

22 A Yeah. I think I used Tricarichi@aol.com.

23 Q Did you use any other e-mail address during
24 2003?

25 A During 2003, no.

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1 Q Do you recognize the e-mail address
2 MTricarichi@cellnetohio.com?

3 A Yeah. That would have been one of my
4 e-mails.

5 Q That would have been one of --

6 A Yeah. That was a Cellnet e-mail address.
7 The other one was my personal e-mail address.

8 Q Did Westside make estimated tax payments
9 during 2003 when you were a shareholder of Westside?

10 A I -- honestly, I don't know.

11 Q And you stated that all debts of Westside
12 had been paid, correct?

13 A To the best of my knowledge had been paid
14 at some point, yeah.

15 Q But that didn't include the corporate-level
16 income tax, correct?

17 A It did not include the corporate-level
18 income tax because not -- well, first of all, when we
19 sold Westside, the tax wasn't due yet. And Fortrend
20 made the promise in the document to pay it, so it was
21 their obligation to pay it.

22 Q Earlier you stated -- you testified that
23 VCI Communications was an entity that you owned; is
24 that correct?

25 A Yes.

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1 Q And that initially when the litigation
2 started with the cellular wholesale providers that
3 VCI Communications was the entity that initially
4 started that litigation; is that correct?

5 A Honestly, I don't remember that either. I
6 think VCI for sure intervened in the PUC case that
7 got us the resale deal.

8 Q Okay.

9 A I don't know whether it was Westside or
10 whether it was -- I'm sure it was Westside that sued
11 the carriers in 2000- -- or, I'm sorry, 1993.

12 Q And VCI Communications you said -- you
13 testified that they initially hired Hahn Loesure to
14 assist -- to represent VCI; is that correct?

15 A That's my recollection.

16 Q I'm sorry?

17 A That's my recollection, yes.

18 Q So the Hahn Loesure billing statements that
19 were made to -- addressed to you care of VCI
20 Communications, that would have included any -- any
21 services performed on behalf of you or Westside as
22 well; is that correct?

23 A That's most likely correct, yes. I can't
24 speak to their billing, but I think that's right.

25 Q There are on Exhibit -- give me just one

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1 minute. I'll come back to that.

2 Can you turn to Exhibit 102-J? It would be
3 in the second volume of the witness binders.

4 MS. LAMPERT: Your Honor, may I approach
5 the witness to hand him --

6 THE COURT: Yes, you may.

7 THE WITNESS: Thank you.

8 MS. LAMPERT: You're welcome.

9 THE WITNESS: Your Honor, my knees are not
10 the greatest so if I could avoid going up and down
11 these stairs --

12 THE COURT: Okay.

13 THE WITNESS: -- as much as possible, that
14 would be great. That'd be great.

15 BY MS. LAMPERT:

16 Q Could you please turn to Exhibit 104-J --
17 I'm sorry, 102-J. And these are the billing
18 statements for Hahn Loesure. Have you turned to
19 102-J?

20 A I'm there.

21 Q Okay. Can you see that it says Michael A.
22 Tricarichi, VCI Communications?

23 A I do.

24 Q I just want to confirm that these are the
25 services that were provided either to Westside or to

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1 yourself from Hahn Loesure even though it's says VCI?

2 A Well, I can look at the bills. But yeah,
3 I'm sure they are.

4 Q Could you look through the bills?

5 A Yeah. These are -- that's what this is.

6 Q Okay. Thank you. So you testified earlier
7 that you negotiated the purchase price for the sale
8 of your Westside stock for Fortrend; is that correct?

9 A That's correct.

10 Q And can you -- I'd like to talk about the
11 negotiation process. Initially, you said that in the
12 initial Fortrend meeting that you were there, your
13 brother Jim Tricarichi was there, that Scott Ginsburg
14 was there.

15 Who else was at that meeting?

16 A I think Larry was there, too, Larry Dubin
17 was there.

18 Q Okay. Was Jeff Folkman there?

19 A I don't believe so.

20 Q And --

21 A And I don't think -- go ahead.

22 Q Sorry.

23 A I said I don't believe so.

24 Q And Randy Hart was not there either?

25 A I don't believe so, no.

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1 Q Did you have any other meetings with
2 Fortrend?

3 A That's the only one that I can remember
4 that I was personally involved in other than the one
5 where we did the signing of the deal in San
6 Francisco.

7 Q So who was there on behalf of Fortrend?

8 A I think Gary Zwick was there. He's the
9 lawyer that I told you was a friend of the accountant
10 that my brother knew that brought them in. And there
11 was another guy there, too, and I'm trying to
12 remember what his name was. He was another attorney.
13 Block maybe, Steven Block.

14 Q And what was discussed at that initial
15 meeting with Fortrend?

16 A Just what they did.

17 Q And what did they -- what was your
18 impression of what they did?

19 A They did the same thing as what we were
20 told Midcoast did. They bought companies that had
21 tax liabilities.

22 Q Did you ask them why?

23 A No. That was their business.

24 Q And you said you didn't have any other
25 face-to-face meeting with Fortrend; is that correct?

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1 A Not that I can recall.

2 Q Did you have any conference calls with
3 Fortrend?

4 A There might have been.

5 Q There might have been. And who -- who did
6 you have conference calls with?

7 A I would have -- it was 11 years ago, 12
8 years ago. I have no idea. You'd have to give me
9 some --

10 Q So --

11 A -- give me some stuff to look at.

12 Q So I'm trying to figure out how you
13 negotiated the purchase price with Fortrend. Was the
14 negotiation of the purchase price done during the
15 initial meeting with Fortrend?

16 A No. I don't think we discussed price
17 initially at the initial meeting.

18 Q So when did you start discussing price with
19 Fortrend?

20 A I think we told them to make us an offer.

21 Q So they made you an offer. Did you
22 counteroffer?

23 A I don't remember exactly. I think that we
24 had an offer from Midcoast at that time and I think
25 we said, Look, we've got this offer from Midcoast.

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1 You'll have to do better than what your offer is.

2 Q So they just did better than Midcoast and
3 you didn't counter?

4 A I don't think I ever gave them a specific
5 number. I think that we always relied on their
6 number, but we got them to reduce their number.

7 Q Okay. I guess I'm a little bit confused.
8 You relied on their number, but you got them to
9 reduce their number? What --

10 A If they gave me a number and I said, I have
11 a competing bid from someone else that's more, you
12 have to come up to that number, that -- and they come
13 up to that number or they come up above that number,
14 that's on them. That's not on me. I didn't give
15 them the number. I gave them the number of the
16 competitor.

17 Q So you gave them the number that Midcoast
18 gave you?

19 A That's my recollection.

20 Q Okay. And then they came back with an
21 offer?

22 A Correct.

23 Q And that offer was higher than the Midcoast
24 offer and there was no further negotiation?

25 A I don't recollect there being any further

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1 negotiation.

2 Q Were you the only person involved in the
3 negotiation of the purchase price?

4 A No. I think Folkman was involved in it,
5 too.

6 Q So Mr. Folkman was also involved --

7 A I think so.

8 Q -- in the negotiation of the purchase
9 price?

10 A I believe so.

11 Q Was anyone else involved in the negotiation
12 of the purchase price?

13 A Possibly Scott and possibly my brother, but
14 I don't -- I don't know for sure.

15 Q To your knowledge did any of the three
16 gentlemen that you've just talked about -- Mr.
17 Folkman, your brother Jim Tricarichi, or Scott -- I'm
18 assuming that means Mr. Ginsburg?

19 A Correct.

20 Q Did any of those three gentlemen provide
21 Fortrend with a counteroffer?

22 A I don't believe so, no. I mean, we may --
23 we probably discussed offers amongst ourselves. But,
24 again, how we got to that number I can't tell you.

25 Q So you don't -- you don't remember?

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1 A Eleven years ago, no. I don't remember how
2 we got to that number.

3 Q And when you -- and you said that at the
4 initial meeting -- you testified that at the initial
5 meeting with Fortrend there was a gentleman Gary
6 Zwick and then maybe Steve Block, is that --

7 A I know there was a guy named Block. I may
8 have the -- I might have the first name wrong.

9 Q Mr. Block? Okay.

10 A Mr. Block --

11 Q Mr. Block.

12 A -- we'll call him.

13 Q And did you talk with either one of those
14 gentlemen after the initial meeting?

15 A Possibly. I don't have a direct
16 recollection of that. I know that -- I know that the
17 first guy that I mentioned I didn't have any further
18 contact with. And I don't think I had any contact
19 with Block either.

20 I think the only person that I ever talked
21 to from Fortrend was Charles Klink.

22 Q Charles Klink?

23 A Yeah.

24 Q And who was Mr. Klink?

25 A He was representing them in some way.

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1 Q Did you participate in negotiations with
2 Mr. Klink on the purchase price?

3 A I may have. I don't really recollect.

4 Q Did you take any notes or anything with
5 respect to any negotiations that you did with respect
6 to the purchase price?

7 A No.

8 Q Let's talk a little bit about the Fortrend
9 premium. Did you negotiate the Fortrend premium with
10 Fortrend?

11 A Well, again, my recollection of the
12 Fortrend premium is it's the difference between the
13 cash that Westside had and what Fortrend was offering
14 for the stock.

15 So to say did I negotiate that, I -- I
16 negotiated the final stock price. Whatever -- and
17 whatever it took to do that --

18 Q Okay.

19 A -- I wanted that difference to be as small
20 as possible.

21 Q Okay. So you negotiated the purchase
22 price. The Fortrend premium was a function of the
23 amount of cash that Westside had minus the amount of
24 cash that was paid to you for the purchase of your
25 stock; is that correct?

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1 A That's my understanding of what it was.

2 Q And do you know why that was called the
3 Fortrend premium?

4 A That's what they called it.

5 Q And when you say they, you mean Fortrend?

6 A Fortrend.

7 Q Mr. Klink, Mr. --

8 A Fortrend.

9 Q Okay. And your primary contact with
10 Fortrend was Mr. Klink?

11 A He was the guy that I remember talking to
12 at Fortrend. I don't know if he was the primary
13 contact or not.

14 Q Isn't it true that Fortrend's premium was
15 based on a tax liability that was going to be not
16 paid?

17 A That was not my understanding.

18 Q Okay. Let's turn to Exhibit 23-J.

19 MS. LAMPERT: Your Honor, may I approach
20 the witness and hand him --

21 THE COURT: Yes, you may.

22 THE WITNESS: I'll give you that one for
23 this one. 23-J, got it.

24 BY MS. LAMPERT:

25 Q I'm sorry?

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1 A I'm here.

2 Q 23-J. If you can look at page 2.

3 A Got it.

4 Q This looks substantially similar to the
5 exhibit that Mr. Desmond put on the screen earlier
6 when you were testifying; is that correct?

7 A Yeah.

8 Q The exhibit that was contained in the
9 closing binder for the stock purchase agreement?

10 A If you say so.

11 Q Okay. So can you look over at the right-
12 hand side of this document where it says 16 million
13 original tax calc, 5.1 million Fortrend premium, and
14 31.88 percent Fortrend premium.

15 A Got it.

16 Q That 31.88 percent, it looks like to me
17 that the net taxes of 16.8 million approximately,
18 that the Fortrend premium of 5.3 million is 31.88
19 percent of the net taxes. Is that your
20 understanding?

21 A If I -- you give me the calculator I'll be
22 happy to do the math. It looks close to that.

23 Q Did you discuss that with Mr. Klink or
24 anyone else from Fortrend?

25 A No. That's a pretty odd percentage, 31.88.

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1 I mean, that would -- that would lead me to believe
2 that the way I said it was more correct than the way
3 you said it.

4 Q The way that you negotiated the purchase
5 price --

6 A Correct.

7 Q -- of the stock?

8 A Yeah. I mean, if it -- if they would have
9 said it's 33 percent, you know, we're going to charge
10 you 33 percent of the tax, then it would have been 33
11 percent. It wouldn't have been 31.88. Do you
12 understand what I'm saying?

13 Q And so the back-and-forth negotiations
14 that -- there were no back-and-forth negotiations,
15 correct? It was that they came to you with an offer;
16 is that correct?

17 A They came to us with a couple of offers.

18 Q Couple of offers?

19 A Yes.

20 Q Okay. Yeah. Which offer did they come to
21 you with first?

22 A I don't recollect. It wasn't this one.

23 Q It wasn't this one?

24 A No. It was a higher -- it was a lower
25 payout to us.

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1 Q A lower payout to you and a higher --

2 A Premium.

3 Q -- premium for them?

4 A Whatever you want to call it, yeah.

5 Q Okay. So was the purchase price

6 actually -- was it actually that the Fortrend premium
7 was being negotiated? Isn't that what was happening
8 is that you were negotiating what Fortrend would
9 receive and then actually what the balance is what
10 you received? The balance of the cash from Westside
11 was what you received for your purchase price?

12 A No.

13 Q Let's talk for a minute about the excise
14 tax that you were talking about earlier, the \$3.1
15 million approximately that you paid to the
16 Service -- the IRS.

17 A That Westside paid.

18 Q It was separate?

19 A Right.

20 Q Okay. And I want to make sure that I have
21 my facts straight here. I want to make sure that I'm
22 clear. You stated that in August of 2003 that you
23 filed excise tax returns along with a check for
24 approximately \$3.1 million, correct?

25 A Yeah. Before the Fortrend deal closed.

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1 Q Okay. And the IRS did nothing with that.
2 There was no acknowledgement of that. So then in
3 November of 2003, you refiled the tax returns and you
4 reissued a new check for \$3.1 million; is that
5 correct?

6 A Yes, that's correct.

7 Q Okay. Which account did the \$3.1 million
8 that you initially wrote the check for, the August
9 2003 check, which account from Westside did that \$3.1
10 million come from?

11 A The same account the second check came
12 from. You have a picture of the second check there.

13 Q Okay. So Exhibit 88-J, can you turn to
14 Exhibit 88-J? And I'm not sure that they --

15 A I don't have that in front of me. But
16 I'll -- if that's a picture of the second check from
17 November of '03, then I think it was on our Key Bank
18 account. I think it was on Westside's Key Bank
19 account.

20 Q It is.

21 MS. LAMPERT: Your Honor, may I approach?

22 THE COURT: Yes, you may.

23 MS. LAMPERT: Just to make sure we don't
24 have any ambiguity.

25 THE WITNESS: I don't know that I have --

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1 oh, you have another book. Okay. Which one aren't
2 you going to be using? 88. Yeah. That's the --
3 that's the Cellnet ACH account.

4 THE COURT: Counsel, what exhibit are you
5 looking at now?

6 MS. LAMPERT: I'm sorry?

7 THE COURT: What exhibit are we looking at?

8 MS. LAMPERT: 88-J.

9 THE COURT: 88-J. And it's a Cellnet
10 account on which bank?

11 MS. LAMPERT: Cellnet account on Key Bank.

12 THE COURT: Key Bank.

13 MS. LAMPERT: In Ohio.

14 BY MS. LAMPERT:

15 Q And it's your testimony that this check for
16 the November 2003 check actually came out of the same
17 account that you wrote the August 2003 account from;
18 is that correct?

19 A Yeah. We stopped payment on the August
20 check --

21 Q Okay.

22 A -- and then reissued this check in
23 November.

24 Q And were there any other funds in the Key
25 Bank account for Westside?

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1 A Other than this?

2 Q Other than this?

3 A Not that I recollect.

4 Q Is that because all of the -- the remainder
5 of the cash for Westside had been transferred to the
6 Rabobank account for Westside?

7 A By November of -- by November of 2003,
8 that's correct.

9 Q Okay. So at the time that the stock
10 purchase closed -- okay, so on September 9th -- there
11 was \$3.1 million in the Key Bank account, correct,
12 and then 39.9 million in the Westside bank account at
13 Rabobank, correct?

14 A Well, that's the practicality of it. We
15 didn't know that at the time because we assumed the
16 IRS was going to cash the check and there wouldn't be
17 any money in the Key account.

18 Q Okay. Okay. But in practicality that's
19 what happened?

20 A In practicality, that's correct.

21 Q All right. And did -- and this account
22 obviously remained open after the stock purchase,
23 correct?

24 A It remained open because it had \$3.1
25 million in it and an outstanding check on it.

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162

1 Q And you remained the authorized
2 signature -- signatory on that account; is that
3 correct?

4 A Well, there were a couple of authorized
5 signatories. But that was --

6 Q Okay.

7 A -- I was one of them. But I didn't sign
8 this check. I think that's Scott Ginsburg's
9 signature.

10 Q Oh, okay. I'm sorry, Scott Ginsburg you
11 said?

12 A Yeah.

13 Q Okay. You testified earlier that Randy
14 Hart has represented you for a number of years; is
15 that correct?

16 A Since '89.

17 Q That is a number of years. And he has
18 represented you in matters other than just the
19 wholesale provider litigation and this matter; is
20 that correct?

21 And by this matter, I mean your sale of
22 stock from Westside.

23 A Give me a time period.

24 Q In the time period that you have known Mr.
25 Hart, since 1989 --

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163

1 A Starting in '89 and ending today?

2 Q Yes.

3 A Yes. He's represented me in several
4 matters.

5 Q Okay. And, in fact, you and Mr. Hart have
6 been business partners in at least one transaction;
7 is that correct?

8 A We own a building in Cleveland together.

9 Q When did you first meet Jeff Folkman?

10 A Sometime in early 2003 or late 2002.

11 Q And did you meet him in connection with the
12 receipt of settlement proceeds or do you -- did you
13 meet him in connection with another matter?

14 A My recollection is that Jeff approached
15 Randy and said I see that you're probably -- I think
16 it was right after the Supreme Court decision came
17 in. And Jeff approached Randy and said, I see you
18 guys are going to be getting some money. We should
19 talk about tax consequences.

20 And then he -- Randy approached me with
21 that and we set up a meeting with Jeff.

22 Q Okay. Since Mr. Folkman's representation
23 of you with respect to the sale of your Westside
24 stock, has he represented you in any other matters?

25 A No. This is the only representation that

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1 Jeff Folkman ever did.

2 Q And I apologize, I do not recall your
3 testimony on this. So if it's already been asked,
4 I'm just wanting to make sure that I understood.

5 Did you have a previous relationship with
6 PricewaterhouseCoopers before you hired them to
7 assist you with the sale of your stock?

8 A No. My brother Jim had a relationship with
9 Rich Stovsky who was a partner at
10 PricewaterhouseCoopers. But I personally did not
11 have a relationship with anybody over there and
12 Westside did not have a relationship with anybody
13 over there.

14 Q And have you had any ongoing relationship
15 with PricewaterhouseCoopers after the sale of your
16 stock?

17 A I don't think so.

18 Q I don't think so? Is there --

19 A It's possible we may have used them for
20 something -- for something else, but I can't think of
21 it off the top of my head.

22 Q Okay. Did -- do you recall if you've had
23 any additional dealings with Mr. Stovsky or Mr.
24 Loenes from Pricewaterhouse?

25 A I didn't know who Tim Loenes was until this

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1 case.

2 Q Okay.

3 A So I can tell you I didn't have any
4 dealings with him.

5 Q Okay. So --

6 A If I had dealings with PWC, they would
7 probably have been through Rich Stovsky at some
8 point.

9 Q And you testified that your brother Jim
10 Tricarichi introduced you to Fortrend through a third
11 party, Gary Zwick; is that correct?

12 A That's my understanding, that's my
13 recollection, yes.

14 Q And did your brother Jim Tricarichi assist
15 you with this transaction in any way?

16 A He was kind of like a conduit, a
17 go-between. He was doing some accounting work for
18 Westside. I don't think he was employed at the time
19 and he was doing some accounting work for Westside
20 and he was doing financial statements and things like
21 that.

22 And he was in contact with Stovsky so he
23 was for sure our conduit to Stovsky. And I believe
24 that he was supplying documents to Fortrend in terms
25 of financial statements and things that they were

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1 asking for.

2 Q Now, when your brother, Jim Tricarichi --
3 I'm sorry, I'm going to use his name so that we can
4 make sure --

5 A Say Jim if you want. That's fine.

6 Q -- we're clear on which brother I'm talking
7 about.

8 A Okay.

9 Q When your brother, Jim Tricarichi, provided
10 documents to Fortrend, do you know who he dealt with
11 at Fortrend?

12 A I don't.

13 Q When he gave Fortrend documents, did he run
14 them by you before he gave them to Fortrend?

15 A Usually not.

16 Q Did he ever come to you and say Fortrend
17 has asked for a document of some sort and asked for
18 your permission before he gave it to Fortrend?

19 A Occasionally.

20 Q So if Fortrend asked for information, he
21 would come to you for permission before he would give
22 it to Fortrend; is that correct?

23 A That's my recollection. He didn't always
24 do that if it was something minor. If it was
25 something major that had like confidential

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1 information or something like that, he would
2 generally ask me beforehand.

3 Q And whose discretion would it be whether or
4 not the document was major or minor?

5 A His.

6 Q His. But he -- you said that he had an
7 ongoing relationship with Westside and he was an
8 employee of Westside. So he --

9 A He was a consultant to Westside. He wasn't
10 a W-2 employee.

11 Q A consultant to Westside. And in his
12 capacity as a consultant to Westside, did you and
13 your brother Jim Tricarichi work closely together;
14 did you regularly discuss the business matters of
15 Westside?

16 A No. We discussed whatever he was doing,
17 whatever we had him doing.

18 Q And what -- what did you have him do?

19 A Various different things depending on
20 timeframe. I know that we were implementing a new
21 billing system so we were running what we call
22 parallels.

23 Which meant we would run the same billing
24 period on the old system and then the new system and
25 then we'd have to reconcile them together to figure

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1 out whether the new billing system was billing the
2 same as the old billing system or more or less.

3 And then if we found out it was picking up
4 things the old billing system didn't pick up, then he
5 would investigate as to why that was. I know that
6 was one thing he was doing. Go ahead.

7 Q I didn't mean to interrupt you.

8 A That's all right. Go ahead.

9 Q So as a consultant to Westside, did he get
10 paid for his services that he rendered?

11 A Sometimes he did and sometimes he didn't.

12 Q So what -- where was the line of
13 demarcation from when he did get paid for his
14 services as opposed to when he did not get paid?

15 A When he asked.

16 Q So when he asked for payment --

17 A We'd give it to him.

18 Q -- you would give it to him?

19 A Correct.

20 Q If -- but he would render services
21 sometimes without asking for payment?

22 A Yeah. He was my brother. I mean, I would
23 give him services without asking him for payment. I
24 don't think he ever paid for his cell phone.

25 Q Okay. So he got free cell phone service?

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1 A Well, like I said, I don't think he ever --
2 let me put it this way, I don't think he ever paid
3 for it.

4 Q Did you talk to your brother Jim Tricarichi
5 about the negotiation of the purchase price of
6 Fortrend?

7 A I think he -- he -- I think that sheet that
8 you showed me he did, that spreadsheet that you
9 showed me. So I'm sure we discussed it.

10 Q So he prepared that sheet, the spreadsheet?

11 A I think he did. I'm not 100 percent sure,
12 but I think he did.

13 Q And so --

14 THE COURT: Counsel, will you clarify what
15 spreadsheet we're discussing here?

16 MS. LAMPERT: 40 --

17 THE COURT: The one attached to the e-mail;
18 is that correct?

19 MS. LAMPERT: Yes, Your Honor.

20 THE COURT: Which one was that?

21 MS. LAMPERT: 23-J, Your Honor. Page --

22 THE COURT: So am I right in understanding
23 that the spreadsheet as page 2 of that exhibit was an
24 attachment to this e-mail?

25 BY MS. LAMPERT:

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1 Q Mr. Tricarichi, is it your understanding
2 that page 2 of this -- we're at 23-J. Do you have
3 that in front of you?

4 A Honestly, I couldn't tell you. This is a
5 Hahn Loesure document. It's got a Hahn Loesure stamp
6 on it, and I don't know who Margaret Johnson is. So
7 I don't honestly know.

8 I don't know if this was an original
9 attachment to this particular -- to this particular
10 e-mail or not. I have no way of knowing.

11 Q Okay. Mr. Tricarichi, could you turn to
12 Exhibit 1-J, page 42? This is the document that Mr.
13 Desmond referred to you to earlier, I believe.

14 A 42?

15 Q Yes.

16 A Got it.

17 Q This is a substantially similar calculation
18 to what we just saw that was attached to that e-mail.

19 A It doesn't have any of the stuff on the
20 right-hand side of the page that the other one did.

21 Q Correct. But other than that, the types
22 of --

23 A It looks similar. It's a similar document,
24 yeah.

25 Q Is it your recollection that your brother

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171

1 Jim Tricarichi prepared this calculation?

2 A I'm pretty sure he did; although, I'm not
3 100 percent sure.

4 Q Okay. Earlier you were testifying
5 regarding the claim for refund for the excise taxes;
6 is that correct?

7 A That's correct.

8 Q And I believe there was some testimony on
9 this point. Again, I wasn't clear on what your
10 answer was.

11 So who -- who paid the attorney who
12 prepared and filed the claim for refund for the
13 excise taxes for Westside?

14 A I don't believe anybody did. I think it
15 was a contingent -- let's -- which one are we talking
16 about? Let's go back.

17 Q The claim for refund.

18 A You're talking about the case that was
19 filed against the --

20 Q Yes.

21 A -- Government?

22 Q Yes.

23 A My understanding of that was that it was a
24 contingent fee case that Mr. Hart brought on behalf
25 of Westside. And I don't think since there was no

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1 recovery, I don't think anybody paid for the filing
2 of it.

3 Q And so if Westside had been successful in
4 that litigation, what was your understanding would
5 happen to the refund that was received by Westside?

6 A Excellent question. Honestly, I don't
7 know. What we -- what we thought was going to happen
8 was that since we -- we being me -- was responsible
9 for the -- was responsible for the paying of taxes
10 before 2003, I should have gotten any refunds that
11 were due for the period before 2003.

12 But, unfortunately, in our infinite wisdom,
13 the stock purchase agreement didn't speak to that.
14 So the conversation I think -- Randy had a couple of
15 conversations with Tim Conn and I think what we
16 agreed to do was just see if we got the money first.
17 And if we got the money, then we would try to figure
18 out who got what.

19 Q And it was your position that the money
20 should be delivered to you?

21 A That was my position, yeah. But that
22 wasn't -- that wasn't necessarily Westside's
23 position.

24 Q Okay. You testified earlier that it was
25 your understanding that Fortrend was going to pay

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1 Westside's corporate income tax liability; is that
2 correct?

3 A That's correct. That's contractual in the
4 purchase agreement.

5 Q But according to the various sales
6 calculations spreadsheets that we've been looking at,
7 the one in Exhibit J (sic), page 42, and the one on
8 Exhibit 23-J, the Fortrend premium, the amount of
9 cash that Fortrend received was approximately \$5.3
10 million, correct?

11 A The amount of cash they received was
12 approximately \$40 million. If you're trying to net
13 that out, I don't -- I'm not following you.

14 Q They received -- okay. So there was \$40
15 million is what you're saying and then they paid back
16 Rabobank, correct, for 29 --

17 A I can't speak to that. I don't -- I'm not
18 privy to whether they paid back Rabobank or not. I
19 think they did, but that wasn't my respon- -- I was
20 out of the -- I was out of the deal by the time that
21 that happened.

22 Q How did you think was -- how did you think
23 Fortrend was going to pay for the taxes of Westside?

24 A Well, my understanding was they had some
25 tax reduction process that they were going to do.

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1 Q A tax reduction process?

2 A Yeah. They were -- that was their thing.
3 They were going to reduce the tax to the point where
4 they would pay it.

5 Q That was -- when you say that was their
6 thing, what do you --

7 A It was never my understanding that they
8 were going to pay \$16 million in tax. It was my
9 understanding that they were going to pay some number
10 between \$5 million or less in tax.

11 But how they got to that point, I had no
12 understanding of how they were getting to that point.
13 Their business was bad debt. And my understanding
14 was that they were going to somehow use bad debt to
15 lower the tax obligation. And that's the extent of
16 my knowledge as to how they did whatever they did.

17 That's why I hired Hahn Loesure and that's
18 why I hired PWC was to figure that out, to look into
19 that and figure it out.

20 Q Okay. And did you talk to Hahn Loesure and
21 PWC, the advisers that you had at Hahn Loesure and
22 PWC, about what they thought about the plan that
23 Fortrend had to minimize the tax?

24 A Yes.

25 Q And what did they say?

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1 A Well, part of it was proprietary. They
2 weren't telling us what they were going to do as far
3 as minimizing the tax goes. They had a couple of
4 options. I think -- I think PWC looked at one of
5 them.

6 But we had nothing in the purchase
7 agreement that spoke to a specific thing that they
8 were going to do after they purchased the company.
9 There was nothing -- all -- the only thing we had in
10 the agreement was they were going to satisfy the tax
11 obligation of Westside.

12 Q Okay.

13 A Okay. They didn't say how they were going
14 to do it. They just said they were going to do it.
15 And we had a lot of reps and warrants to that effect.

16 Q Thank you. Can you turn to Exhibit 26-J,
17 please?

18 A 26-J, got it.

19 Q This is the letter of intent from Nob Hill
20 Holdings to you.

21 A Yes.

22 Q And Nob Hill Holdings is the acquisition
23 company that Fortrend used; is that correct?

24 A That's my understanding.

25 Q And if you'll turn to -- let's first turn

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1 to page 3 of that exhibit, please.

2 A Okay.

3 Q And if you'll look down at Paragraph 5, it
4 says: Purchaser will have secured financing for the
5 stock purchase price.

6 What was your understanding of that
7 condition precedent?

8 A They were borrowing money.

9 Q And when you say they were borrowing money,
10 who are you referring to?

11 A Well, whoever the purchaser was. If it was
12 Fortrend or if was Nob Hill --

13 Q Okay.

14 A -- whoever it was was borrowing the money,
15 securing the financing to be able to pay me the money
16 for my stock.

17 Q Okay. So Fortrend was securing the money
18 for financing?

19 A That's what Paragraph 5 says, yeah.

20 Q Okay. And can you turn to page 4 of the
21 letter of intent where it says Indemnifications?

22 A Yeah.

23 Q This paragraph talks about different
24 indemnifications that will be given, but it
25 specifically excludes the tax liability for the

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1 current fiscal year or the taxes due for the current
2 fiscal year.

3 Did you have any concern that there was no
4 indemnification provisions for the corporate tax
5 liability?

6 A I think you're reading that paragraph
7 wrong.

8 Q Okay. Earlier you testified that Fortrend
9 used some of the -- the loan that it received from
10 Rabobank, correct, to purchase your stock in Westside
11 but that they also used some of their own money. Is
12 that what you testified to?

13 A That's my understanding based on what I
14 know from gleaning it in this case.

15 Q Okay.

16 A My understanding originally was they were
17 going to borrow all the money.

18 Q Okay.

19 A My understanding in 2003 was they were
20 borrowing all the money.

21 Q Okay.

22 A My understanding from reading documents in
23 this case was that they didn't borrow all the money.
24 They put up \$5 million of their own money and they
25 borrowed the rest of it.

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1 Q Okay. So when you're talking about the \$5
2 million of your own money, you're talking about the
3 \$5 million from moffit (phonetic), is that what
4 you're referring to?

5 A That's what I'm talking about.

6 Q Okay. Earlier you said that -- I believe
7 that you testified that if you hadn't sold the stock
8 in Westside that it was your intention to use the
9 money that Westside received to purchase real estate
10 since you could no longer be in the cellular service;
11 is that correct?

12 A Yes.

13 Q And you were going to do that after you
14 paid the corporate-level income tax; is that correct?

15 A That's correct. Well, whether we did it
16 before or after, it didn't matter. The tax wasn't
17 due on the day -- on the day we got the money. So
18 whenever the tax would have been due we would have
19 paid it. Whether we would have bought in real estate
20 tax before the tax was due or after the tax was due,
21 I can't speak to that. But at some point, yeah.

22 Q You would have paid the corporate-level
23 income tax --

24 A When it was due.

25 Q Okay. And so how would that have been

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1 different than a liquidation of Westside?

2 A How would paying the corporate tax be
3 different than a liquidation?

4 Q Well, earlier --

5 A It would be like night and day.

6 Q Okay. Will you please explain?

7 A A liquidation of Westside means Westside
8 doesn't exist anymore. Westside paying its corporate
9 tax means that it does exist. I don't under- -- I
10 guess I don't understand your question.

11 Q Okay. You were saying earlier that you
12 didn't want to liquidate because then you would have
13 to pay double taxation, correct?

14 A Only if I took the money out myself.

15 Q Okay.

16 A If I didn't take the money out myself,
17 meaning Mike Tricarichi, and the money was all left
18 in Westside and Westside was the acquirer of the real
19 estate, there would be no double-tax situation.

20 Q Okay. So --

21 A Westside would own the real estate.

22 Q Okay. Okay. Earlier also you testified
23 about the accounts at Rabobank, correct, the various
24 accounts that you opened up for yourself and for
25 Westside?

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1 A Two.

2 Q Correct. Who -- whose requirement was that
3 that you and Westside open accounts at Rabobank?

4 A That was Rabobank's requirement because
5 they did the escrow on the deal. So that's how they
6 accomplished the escrow on the deal.

7 MS. LAMPERT: Your Honor, may I have a
8 moment?

9 THE COURT: Yes, you may.

10 (Brief pause.)

11 MS. LAMPERT: No further questions for this
12 witness at this time, Your Honor.

13 THE COURT: Okay. Why don't we -- let's
14 take a five-minute break before we do the redirect,
15 okay?

16 MS. LAMPERT: Thank you, Your Honor.

17 THE CLERK: All rise.

18 (Whereupon, a brief recess was taken.)

19 THE COURT: Be seated.

20 MR. DESMOND: May I proceed, Your Honor?

21 THE COURT: Yes, you may.

22 REDIRECT EXAMINATION

23 BY MR. DESMOND:

24 Q Good afternoon, Mr. Tricarichi. I put the
25 binder back in front of you. I just have a couple

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REDIRECT - MICHAEL TRICARICHI

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1 quick follow-up questions for you.

2 You were asked during cross-examination
3 about the excise tax refund claim that came after the
4 stock sale. Do you recall that testimony?

5 A Yes.

6 Q If you could turn to Exhibit -- we talked
7 about this this morning -- 93-J in the binder in
8 front of you.

9 A I'm there.

10 Q And that refund complaint.

11 A Yes.

12 Q This says at the top there, do you see it
13 was filed on September 18th, of 2006?

14 A That's correct.

15 Q Remind me again or if you can tell us
16 again, when did you learn that there might be a
17 problem with Westside's unpaid federal income tax for
18 2003?

19 A In November of '07.

20 Q So more than a year after this complaint
21 was filed?

22 A That's correct.

23 Q Okay. And when this complaint was filed,
24 did you have any idea that Westside owed unpaid
25 income taxes?

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REDIRECT - MICHAEL TRICARICHI

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1 A None whatsoever.

2 Q Okay. And did you have an understanding as
3 to what would have happened if you'd gotten \$3
4 million back and Westside owed income taxes?

5 A My guess is the Government would have
6 probably applied the money toward the tax that was
7 owed.

8 Q Is that an issue you thought about back in
9 2006?

10 A No.

11 Q And, again, did you have any idea that
12 there was a problem with Westside's unpaid taxes?

13 A No idea at all.

14 Q Just one other question, Mr. Tricarichi.
15 You were asked about indemnification on cross-
16 examination. You recall that testimony?

17 A Yes.

18 Q I think we looked at Exhibit 26-J. You
19 don't need to look at it now.

20 A Okay.

21 Q The letter of intent?

22 A Yes.

23 Q The ultimate agreement that you signed with
24 Fortrend and Nob Hill, did that have any
25 indemnification provisions in it?

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REDIRECT - MICHAEL TRICARICHI

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1 A It did.

2 Q Okay. And your general understanding what
3 did it cover?

4 A Well, we were indemnified against basically
5 anything that happened after the stock sale and any
6 taxes that were due on revenue received from January
7 1st, of 2003, forward.

8 Q Okay. And then Exhibit 26-J we looked at,
9 you can go ahead if you want to, that was not the
10 final agreement. That wasn't the last word on
11 indemnification, was it?

12 A No.

13 Q Okay.

14 A The stock purchase agreement was.

15 Q The stock purchase, Exhibit 1-J?

16 A Correct.

17 MR. DESMOND: Thank you. I have no further
18 questions, Your Honor.

19 THE COURT: Recross, Ms. Lampert?

20 MS. LAMPERT: Your Honor, may I have one
21 moment?

22 THE COURT: Yes, you may.

23 (Brief pause.)

24 RECROSS-EXAMINATION

25 BY MS. LAMPERT:

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RECROSS - MICHAEL TRICARICHI

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1 Q Just to clarify some testimony that you
2 gave earlier. We talked about the Key Bank account
3 that was -- that Westside had that was opened after
4 the stock closing.

5 A Never said that.

6 Q You said -- you testified that there was a
7 check that was written for \$3.1 million in November
8 of 2003 to the Government for excise taxes; is that
9 correct?

10 A Yeah. But that's not what you just said.

11 Q But was that account not still open after
12 the stock closing?

13 A Okay. You just asked me if we opened a Key
14 Bank account after the stock sale and that's not
15 true.

16 Q Okay. I apologize.

17 A The Key Bank account that that check was
18 written on was Westside's Key Bank account for years
19 prior to the stock sale.

20 Q I apologize. I misspoke. The Key Bank
21 account that you wrote the August 2003 check for \$3.1
22 million from and the same one that you wrote the \$3.1
23 million check from in November 2003, that was a Key
24 Bank account that Westside had; is that correct?

25 A That's correct.

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RECROSS - MICHAEL TRICARICHI

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1 Q And it remained open after the stock
2 closing; is that correct?

3 A It remained opened -- it would have self-
4 closed as soon as the IRS check was cashed.

5 Q Okay.

6 A But since the IRS check wasn't cashed, it
7 remained open until the funds in it was exhausted.
8 It was set to self-close when the IRS cashed the
9 check.

10 Q Okay.

11 A Which they didn't do.

12 Q Were there any other Westside bank accounts
13 that were opened after the stock purchase happened
14 other than the Rabobank account that Westside had?

15 A I don't believe there were, but that would
16 be a question for Mr. Ginsburg. I don't -- I don't
17 know the answer to that.

18 Q I'm sorry, that would be a question for?

19 A I said that would be a question for Mr.
20 Ginsburg. I don't know the answer to that question.

21 Q To your knowledge there were no other
22 accounts?

23 A Well, there was probably one account, which
24 would have been the account that the ACH went into.
25 The check was written on an ACH account. And an ACH

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RECROSS - MICHAEL TRICARICHI

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1 account is an automatic clearing account that
2 basically lets you see the checks before they get
3 cashed.

4 So there's two bank accounts associated
5 with an ACH account. There's a primary account and a
6 secondary account. I don't know what happened to the
7 secondary account, but usually the secondary account
8 doesn't have any money in it.

9 Q Okay. So to your knowledge, there was no
10 money in that secondary account?

11 A I don't think there was, no.

12 Q Okay.

13 A But I can't swear to it.

14 MS. LAMPERT: May I have a moment, Your
15 Honor?

16 THE COURT: Yes.

17 MS. LAMPERT: Your Honor, we have no
18 further questions for this witness at this time.

19 THE COURT: Okay. I have a few questions
20 if you have a minute.

21 And my rules on this are counsel can object
22 to any of my questions. I take -- I mean that
23 seriously and I will rule as objectively as I can.
24 And I will give you both an opportunity to follow up
25 after the witness answers my questions.

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1 So, Mr. Tricarichi, the first thing I
2 wanted to ask about was the formation of LXV
3 corporation.

4 THE WITNESS: Okay.

5 THE COURT: Now I think you said that you
6 formed LXV and it was owned one quarter by you and a
7 quarter each by the three key employees; is that
8 correct?

9 THE WITNESS: So I said.

10 THE COURT: So you continued to service
11 your customers?

12 THE WITNESS: Out of that account. Out of
13 that business, yes.

14 THE COURT: Right. So what does that mean
15 exactly? because I thought that you couldn't
16 continue to offer self-service because of the
17 settlement deal.

18 THE WITNESS: We didn't.

19 THE COURT: So how were you going to
20 service your customers through LXV?

21 THE WITNESS: The way we were doing it was
22 Cellnet provided its own billing and its own customer
23 service to the customers.

24 What we did was initially we sold the
25 customer base for a recurring revenue stream to

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1 Cellnet in Michigan. They weren't originally
2 equipped to deal with the customers because they
3 would have had to convert our billing system to their
4 billing system and there would have been a lot of
5 internal things that they needed to happen in order
6 to continue to service the customer base.

7 So what we did was we provided the billing
8 services, LXV provided the billing services to
9 Cellnet in Michigan. And we also provided local
10 customer service -- because they were in Michigan, we
11 provided local customer service to the customers.

12 And since we provided the billing services,
13 we also collected the money -- actually, did we
14 collect the money? No. I think they collected the
15 money. I think the money went to them because I
16 think we put their address -- their lockbox address
17 on the bill.

18 So what LXV -- LXV basically did was it
19 serviced the customers by providing the billing
20 services. We would get the tapes from Cellular One,
21 convert them into bills, and send them out on behalf
22 of Cellnet of Michigan.

23 And then Cellnet of Michigan would remit a
24 revenue stream back to LXV, which was partly for the
25 service that LXV provided and partly for the payment

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1 for the customer base. Does that make sense?

2 THE COURT: Yeah. Okay. I see. At the
3 time you transferred the customer list, you
4 transferred all the other operating assets of
5 Westside to LXV, right?

6 THE WITNESS: We transferred disks and
7 things that were needed to continue to support the
8 business.

9 THE COURT: And I think trade names,
10 trademarks?

11 THE WITNESS: The trade name -- the
12 trademark, the trade name, yeah. Because that was
13 stuff that was still being used at that point by
14 Cellnet of Michigan.

15 THE COURT: Now, you first met with the
16 Fortrend people when?

17 THE WITNESS: Sometime -- it was after
18 Midcoast definitely, so it would have been sometime
19 probably in spring of 2003.

20 THE COURT: Now, the stock purchase
21 agreement states as a condition that there was
22 supposed to be nothing left in Westside at the time
23 of closing except cash and tax liabilities.

24 THE WITNESS: Okay.

25 THE COURT: So did that have anything to do

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1 with why you transferred all the operating assets out
2 of Westside prior to the --

3 THE WITNESS: No.

4 THE COURT: No?

5 THE WITNESS: No. The only thing -- the
6 only thing when we transferred the stuff into LXV, it
7 was stuff that LXV needed in order to continue to do
8 business. That's what we transferred, okay.

9 The lease and that kind of stuff, I think,
10 stayed in the name of Westside. I'm pretty sure it
11 did.

12 THE COURT: The what now?

13 THE WITNESS: The lease on the building.

14 THE COURT: No. I don't know about that.
15 Maybe there'll be evidence about that.

16 But you're saying you met with Fortrend in,
17 say, February or March 2003?

18 THE WITNESS: Something like that, yeah.

19 THE COURT: And you did the transfer to LXV
20 in May of 2003?

21 THE WITNESS: I believe that's true.

22 THE COURT: You're saying that's not
23 because Fortrend had told you that they wanted only
24 to buy the cash and the tax liability?

25 THE WITNESS: No. Because we hadn't made a

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1 deal with Fortrend by that time. We would have had
2 nothing -- we would have had no reason to do anything
3 with Westside prior to the Fortrend purchase
4 agreement, which wasn't done until September of 2003.

5 THE COURT: Okay. Now, I'd like to look at
6 the -- at the PWC engagement letter that's 24-J. And
7 I mentioned to you before --

8 THE WITNESS: Right.

9 THE COURT: -- that there was a sentence in
10 here which talks about treasury regulations,
11 requiring that taxpayers disclose to the IRS their
12 participation in reportable transactions.

13 THE WITNESS: Right.

14 THE COURT: And the following sentence in
15 the original version of the letter it says: You
16 agree to advise us if you determine that any matter
17 covered by this agreement is a reportable transaction
18 that is required to be disclosed under treasury
19 regulations.

20 And that was struck out.

21 THE WITNESS: Right.

22 THE COURT: And you said before that those
23 are your initials next to the strike-out line?

24 THE WITNESS: They are my initials.

25 THE COURT: Okay. And why do you

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1 understand that was struck out?

2 THE WITNESS: Well, partly because I
3 wasn't -- Hahn Loesure was looking into that issue
4 for us as far as whether this transaction would be a
5 reportable transaction.

6 And what I didn't want to have happen is I
7 didn't want finger-pointing going back and forth as
8 far as if something happened later on that somebody
9 should have known that it was a reportable
10 transaction.

11 I didn't want PWC to be able to rely on
12 this and say, Oh, you should have told us that it was
13 a reportable transaction. I wanted PWC to make its
14 own determination as to whether it was a reportable
15 transaction or not so that's why I struck this.

16 I struck it, A, because Hahn Loesure was
17 looking at it and, B, because I wanted a second --
18 the whole purpose of me getting PWC was to get a
19 second opinion on Hahn Loesure. So I didn't want to
20 strike anything out of PWC and just leave it for Hahn
21 Loesure to determine. Does that make sense?

22 THE COURT: Yeah. Now, do you know what
23 reportable transaction referred to?

24 THE WITNESS: That was what Folkman told
25 me. It referred to some section of the IRS Code, but

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1 other than that I don't know.

2 THE COURT: You mean before having that
3 struck out you didn't ask?

4 THE WITNESS: What I asked -- the question
5 I asked Folkman was what -- what's a reportable
6 transaction?

7 And he said there are certain types of
8 transactions that have to be reported to the
9 Government when you file your tax return. He said
10 this isn't one of them.

11 And I said, Okay. Fine. And then when I
12 saw this on the PWC engagement letter, basically,
13 what I said to PWC is, I want you to make that
14 determination as to whether this is a reportable
15 transaction. But they did as well and they said it
16 wasn't a reportable transaction, too. So I don't
17 think anybody has yet said that it was a reportable
18 transaction, even them.

19 THE COURT: Okay. I believe that at some
20 point, and I guess this is -- is it true that at some
21 point a fee of a million dollars was paid to Midcoast
22 even though you turned down their offer?

23 THE WITNESS: Yeah. We found that out -- I
24 don't know if Ms. McCaskill told us that or Candace
25 over there told us that. But when they interviewed