IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL TRICARICHI, Appellant, v. PRICEWATERHOUSECOOPERS, LLP, Respondent.	Electronically Filed Apr 08 2024 10:38 PM Elizabeth A. Brown Clerk of Supreme Court Supreme Court No: 86317 87375 87835

Appeal from the District Court of Clark County, Nevada

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

APPELLANT'S APPENDIX TO OPENING BRIEF

VOLUME 7 of 8

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CHRONOLOGICAL INDEX

Document	Date Filed	Vol.	Page
Complaint	4/29/2016	1	AA 1 – AA 41
Acceptance of Service	7/28/2016	1	AA 42 – AA 43
Notice of Entry of Order Regarding PwC's Motion to Dismiss	12/13/2016	1	AA 44 – AA 50
Answer to Complaint	1/17/2017	1	AA 51 – AA 73
Notice of Appeal	5/25/2017	1	AA 74 – AA 76
Notice of Entry of Order Regarding PwC's Motion for Summary Judgment	6/5/2017	1	AA 77 – AA 83
Exhibits to PwC's Motion for Summary Judgment	6/14/2018	1-2	AA 84 – AA 366
Exhibits to Plaintiff's Opposition to PwC's Motion for Summary Judgment	8/1/2018	2-4	AA 367 – AA 863
Transcript of Hearing on PwC's Motion for Summary Judgment	9/24/2018	4	AA 864 – AA 884
Notice of Entry of Order Granting PwC's Motion for Summary Judgment	10/24/2018	4	AA 885 – AA 891
Notice of Entry of Order Granting Motion for Leave to File Amended Complaint	3/27/2019	4	AA 892 – AA 897
Amended Complaint	4/1/2019	4	AA 898 – AA 944
Notice of Entry of Order Denying PwC's Motion to Dismiss	7/31/2019	4	AA 945 – AA 950
Answer to Amended Complaint	8/12/2019	4	AA 951 – AA 981
Notice of Entry of Order Regarding Motions in Limine	12/30/2020	4	AA 982 – AA 987
Notice of Entry of Order Denying PwC's Motion for Summary	01/20/2021	4	AA 988 – AA 992

Judgment and Motion to Strike Jury Demand			
Notice of Entry of Order Denying PwC's Motion for Summary Judgment and Motion to Limit Damages	4/14/2022	4	AA 993 – AA 1000
Notice of Entry of Order Granting PwC's Motion to Strike Jury Demand	4/29/2022	5	AA 1001 – AA 1012
Notice of Entry of Order Denying PwC's Renewed Motion for Partial Summary Judgment	6/16/2022	5	AA 1013 – AA 1022
Notice of Entry of Judgment	2/22/2023	5	AA 1023 – AA 1067
PwC's Appendix to Its Motion for Attorneys' Fees and Costs – Publicly Filed Version	3/15/2023	5	AA 1068 – AA 1207
PwC's Appendix to Its Motion for Attorneys' Fees and Costs – Intentionally Omitted Filed Under Seal	3/15/2023	n/a	AA 1208 – AA 1271
Notice of Appeal	3/23/2023	5	AA 1272 – AA 1274
Amended Notice of Appeal	3/24/2023	5	AA 1275 – AA 1277
Transcript of Hearing on PwC's Motion for Attorneys' Fees and Costs	5/30/2023	6	AA 1278 – AA 1357
Plaintiff's NRCP 60(b) Motion	8/21/2023	6	AA 1358 – AA 1473
Notice of Entry of Order on PwC's Motion for Attorneys' Fees and Costs	8/28/2023	6	AA 1474 – AA 1523
PwC's Opposition to Plaintiff's NRCP 60(b) Motion	9/20/2023	7	AA 1524 – AA 1634
Notice of Appeal	9/26/2023	7	AA 1635 – AA 1636
Plaintiff's Reply Supporting His NRCP 60(b) Motion	10/25/2023	7	AA 1637 – AA 1709

Transcript of Hearing on Plaintiff's NRCP 60(b) Motion	11/2/2023	7	AA 1710 – AA 1759
Notice of Entry of Order Denying Plaintiff's NRCP 60(b) Motion	11/28/2023	7	AA 1760 – AA 1772
Notice of Entry of Order Denying in Part and Deferring in Part Plaintiff's Motion for Stay of Execution Without Supersedeas Bond	12/4/2023	8	AA 1773 – AA 1780
Notice of Appeal	12/22/2023	8	AA 1781 – AA 1783
Notice of Entry of Order Denying: (1) Plaintiff's Motion for Stay of Execution Without Supersedeas Bond and (2) Plaintiff's Oral Motion to Stay Execution for Thirty Days	3/13/2024	8	AA 1784 – AA 1795
Exhibit H to Opposition to PwC's Motion for Summary Judgment	04/17/2017	8	AA 1796 – AA 1797
Notice of Entry of Order Granting Discovery Sanctions	12/08/2022	8	AA 1798 – AA 1811
Exhibit 51 to Plaintiff's Appendix to Opposition to PwC's Renewed Motion for Partial Summary Judgment	05/19/2022	8	AA 1812 – AA 1822
Exhibit 3 to Plaintiff's Appendix in Opposition to PwC's Renewed Motion for Partial Summary Judgment	05/19/2022	8	AA 1823 – AA 1826
Exhibit 4 to Plaintiff's Appendix in Opposition to PwC's Renewed Motion for Partial Summary Judgment	05/19/2022	8	AA 1827 – AA 1829

ALPHABETICAL INDEX

Document	Date Filed	Vol.	Page
Acceptance of Service	7/28/2016	1	AA 42 – AA 43
Amended Complaint	4/1/2019	4	AA 898 – AA 944

Amended Notice of Appeal	3/24/2023	5	AA 1275 – AA 1277
Answer to Amended Complaint	8/12/2019	4	AA 951 – AA 981
Answer to Complaint	1/17/2017	1	AA 51 – AA 73
Complaint	4/29/2016	1	AA 1 – AA 41
Exhibit 3 to Plaintiff's Appendix in Opposition to PwC's Renewed Motion for Partial Summary Judgment	05/19/2022	8	AA 1823 – AA 1826
Exhibit 4 to Plaintiff's Appendix in Opposition to PwC's Renewed Motion for Partial Summary Judgment	05/19/2022	8	AA 1827 – AA 1829
Exhibit 51 to Plaintiff's Appendix to Opposition to PwC's Renewed Motion for Partial Summary Judgment	05/19/2022	8	AA 1812 – AA 1822
Exhibit H to Opposition to PwC's Motion for Summary Judgment	04/17/2017	8	AA 1796 – AA 1797
Exhibits to Plaintiff's Opposition to PwC's Motion for Summary Judgment	8/1/2018	2-4	AA 367 – AA 863
Exhibits to PwC's Motion for Summary Judgment	6/14/2018	1-2	AA 84 – AA 366
Notice of Appeal	5/25/2017	1	AA 74 – AA 76
Notice of Appeal	3/23/2023	5	AA 1272 – AA 1274
Notice of Appeal	9/26/2023	7	AA 1635 – AA 1636
Notice of Appeal	12/22/2023	8	AA 1781 – AA 1783
Notice of Entry of Judgment	2/22/2023	5	AA 1023 – AA 1067
Notice of Entry of Order Denying in Part and Deferring in Part Plaintiff's	12/4/2023	8	AA 1773 – AA 1780

Motion for Stay of Execution Without Supersedeas Bond			
Notice of Entry of Order Denying Plaintiff's NRCP 60(b) Motion	11/28/2023	7	AA 1760 – AA 1772
Notice of Entry of Order Denying PwC's Motion for Summary Judgment and Motion to Strike Jury Demand	01/20/2021	4	AA 988 – AA 992
Notice of Entry of Order Denying PwC's Motion for Summary Judgment and Motion to Limit Damages	4/14/2022	4	AA 993 – AA 1000
Notice of Entry of Order Denying PwC's Motion to Dismiss	7/31/2019	4	AA 945 – AA 950
Notice of Entry of Order Denying PwC's Renewed Motion for Partial Summary Judgment	6/16/2022	5	AA 1013 – AA 1022
Notice of Entry of Order Denying: (1) Plaintiff's Motion for Stay of Execution Without Supersedeas Bond and (2) Plaintiff's Oral Motion to Stay Execution for Thirty Days	3/13/2024	8	AA 1784 – AA 1795
Notice of Entry of Order Granting Discovery Sanctions	12/08/2022	8	AA 1798 – AA 1811
Notice of Entry of Order Granting Motion for Leave to File Amended Complaint	3/27/2019	4	AA 892 – AA 897
Notice of Entry of Order Granting PwC's Motion for Summary Judgment	10/24/2018	4	AA 885 – AA 891
Notice of Entry of Order Granting PwC's Motion to Strike Jury Demand	4/29/2022	5	AA 1001 – AA 1012
Notice of Entry of Order on PwC's Motion for Attorneys' Fees and Costs	8/28/2023	6	AA 1474 – AA 1523
Notice of Entry of Order Regarding Motions in Limine	12/30/2020	4	AA 982 – AA 987

Notice of Entry of Order Regarding PwC's Motion for Summary Judgment	6/5/2017	1	AA 77 – AA 83
Notice of Entry of Order Regarding PwC's Motion to Dismiss	12/13/2016	1	AA 44 – AA 50
Plaintiff's NRCP 60(b) Motion	8/21/2023	6	AA 1358 – AA 1473
Plaintiff's Reply Supporting His NRCP 60(b) Motion	10/25/2023	7	AA 1637 – AA 1709
PwC's Appendix to Its Motion for Attorneys' Fees and Costs – Intentionally Omitted Filed Under Seal	3/15/2023	n/a	AA 1208 – AA 1271
PwC's Appendix to Its Motion for Attorneys' Fees and Costs – Publicly Filed Version	3/15/2023	5	AA 1068 – AA 1207
PwC's Opposition to Plaintiff's NRCP 60(b) Motion	9/20/2023	7	AA 1524 – AA 1634
Transcript of Hearing on Plaintiff's NRCP 60(b) Motion	11/2/2023	7	AA 1710 – AA 1759
Transcript of Hearing on PwC's Motion for Attorneys' Fees and Costs	5/30/2023	6	AA 1278 – AA 1357
Transcript of Hearing on PwC's Motion for Summary Judgment	9/24/2018	4	AA 864 – AA 884

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:

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MICHAEL A. TRICARICHI, Plaintiff, vs. PRICEWATERHOUSECOOPERS LLP, Defendant.	CASE NO.: A-16-735910-B DEPT. NO.: XXXI **PRICEWATERHOUSECOOPERS LLP'S OPPOSITION TO PLAINTIFF'S NRCP 60(b) MOTION FOR RECONSIDERATION**

Defendant PricewaterhouseCoopers LLP ("PwC"), by and through its counsel of record, files its Opposition to Plaintiff's NRCP 60(b) Motion for Reconsideration. This Opposition is based on the referenced pleadings and papers on file, the following Memorandum of Points and Authorities, and any argument the Court may entertain on behalf of PwC.

Dated: September 19, 2023

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MEMORANDUM OF POINTS AND AUTHORITIES

After more than six years of litigation and a nine-day bench trial, the Court issued Findings of Fact and Conclusions of Law that spanned 161 paragraphs and found in favor of PwC and against Plaintiff Michael Tricarichi on multiple, independent grounds. Based on these findings and conclusions, the Court entered judgment for PwC.

Tricarichi now asks the Court to undo all the time and effort it has invested in this case and set aside the judgment under NRCP 60(b). Tricarichi's sole justification for this extraordinary request are two documents PwC produced in another case in Oregon state court involving an entirely different transaction, *Marshall v. PwC*. PwC was not required to produce either of the documents in its limited Rule 56(f) discovery in this case in 2017 and 2018. The so-called Wow! email—a February 2003 email thread regarding the Marshall transaction that has nothing to do with the Tricarichi transaction—was not in the files of any agreed-on custodians and so was not collected from them. PwC had no obligation beyond the scope of the parties' agreement. The second document, a 2002 booklet titled "US Tax Quality & Risk Management," has no relevance to Tricarichi's claim and did not fall within what PwC's counsel agreed to produce as part of Rule 56(f) discovery in 2017 and 2018. Tricarichi's Rule 60(b) motion fails for multiple reasons.

First, the motion is untimely. PwC produced the two documents in the *Marshall* case more than seven months ago, before the Court issued its Findings of Fact and Conclusions of Law in this case. Mr. Tricarichi's lead attorney, Scott Hessell, also represents the Marshalls and was aware of the two documents well before the deadline for seeking a new trial under Rule 59. Mr. Hessell took no steps to attempt to secure permission to present the documents in support of a Rule 59 motion—he did not ask PwC, nor did he move the Oregon court. This lack of diligence means the two documents do not constitute newly discovered evidence and do not provide a basis for relief under Rule 60(b)(2). *See* NRCP 60(b)(2) (only evidence that "could not have been discovered in time to move for a new trial under Rule 59(b)" qualifies as "newly discovered evidence").

Second, PwC did not commit any discovery violations with respect to these two documents. The Marshall Wow! email was not in the custodial files of any of the custodians PwC agreed to search as part of Rule 56(f) discovery; was not in any other custodian's file; and was not

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collected, reviewed, and put on a privilege log in the Marshall litigation until 2019. Although two of the agreed-on custodians were recipients of the email, it is unsurprising that those custodians no longer had a copy of a 2003 email more than seven years later when they were put on a litigation hold. Further, the Q&RM Booklet is not a PwC policy regarding ongoing communication with a client after an engagement has ended. PwC's prior counsel's representations regarding the scope of PwC's document production were not misleading or false.

Finally and most importantly, the two documents come nowhere near justifiying setting aside the judgment because they would not have made any difference to the outcome of the case. The Marshall Wow! email is solely about the Marshall transaction—which this Court found was "substantially distinct" from Tricarichi's Westside transaction. Dkt. 416, Findings of Fact and Conclusions of Law ("FOFCOL") ¶ 135. Neither the Marshall Wow! email nor the Q&RM Booklet would have altered the Court's 2018 order entering summary judgment for PwC on Tricarichi's claims regarding PwC's 2003 advice, nor would they have affected any of the numerous grounds on which the Court ruled for PwC on Tricarichi's 2008 claim following the bench trial.

Tricarichi's Rule 60(b) motion should be denied.

FACTUAL BACKGROUND

A. Rule 56(f) Discovery in This Case

In 2017, PwC moved for summary judgment on Tricarichi's original claims regarding PwC's 2003 advice on the ground that they were barred under the applicable statute of limitations. Tricarichi submitted an affidavit as part of his opposition to PwC's motion. The affidavit referred to and attached a copy of the Tax Court's opinion in *Estate of Marshall v. Commissioner of Internal Revenue*, which, as Tricarichi stated in his affidavit, "makes note of PwC's conflicting advice," and further stated that "had PwC disclosed these facts to me, I would have proceeded differently with respect to the proposed Fortrend transaction, and not gone ahead with it." The affidavit also set out various topics on which Tricarichi said he wanted discovery, including "PwC documents and testimony regarding the Bishop transaction; the Marshall transaction; PwC's review, promotion or

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advocacy of, or other advice regarding transactions similar to these and to my own transaction; and the reasons why PwC did not make me aware of the same." Dkt. 88, Tricarichi Aff. at ¶¶ 9–10.

On May 31, 2017, the Court granted Tricarichi's request for Rule 56(f) discovery and ordered the limited discovery Tricarichi requested in paragraph 10 of his affidavit, including "PwC documents and testimony regarding the Bishop and Marshall transactions; PwC's review, promotion or advocacy of, or other advice regarding transactions similar to Mr. Tricarichi's transaction with Fortrend, and the reasons why PwC did not make Mr. Tricarichi aware of those transactions." Dkt. 100, Order.

The parties then engaged in several conferrals before PwC made its initial Rule 56(f) document production on August 24, 2017 based on certain agreed parameters. PwC's transmittal email set out various categories of documents produced, including "documents related to any internal policies or guidelines regarding on-going communication with a client after PwC's services/advice has been rendered concerning the client's engagement" and "documents collected from a custodial search" with search parameters agreed to by the parties: a date range of 1/1/1999 through 12/31/2012; a list of custodians, including Gary Cesnik and Michael Weber; and a list of search terms, including "Fortrend." Hessell Decl. Ex. 4 at 30. PwC produced 2,158 documents (totaling 30,648 pages) based on these parameters. Ex. 1 at 2. (Jan. 17, 2018 Ltr. from Hsaio to Brooks).

On December 21, 2017, PwC informed Tricarichi that it intended to renew its motion for summary judgment and considered Rule 56(f) discovery closed, as approximately four months had passed since PwC's production and "Plaintiff ha[d] not requested any further discovery." Ex. 2. When Tricarichi followed up with a request for additional documents relating to the Marshall transaction, PwC replied in a January 17, 2018 letter that PwC had "produced documents from an agreed-upon list of custodians, which includes an individual who worked on the Marshall Transaction" and that PwC "expect[ed] Plaintiff to abide by his prior agreement." PwC also noted that Tricarichi's counsel, Mr. Hessell, stated during a meet and confer that "in respect to the Marshall Transaction, [his] firm is now counsel for the Marshalls and therefore ***do not need documents from PwC concerning the Marshall Transaction*** and corresponding Tax Court

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proceeding." Ex. 1 at pp. 2–3 (emphasis added). In any event, the Wow! email was not in the universe of documents collected for the Tricarichi litigation. PwC did not collect it, review it, and make a privilege determination regarding the contents of the email thread until over a year later, and that was only in the context of the Marshall litigation (which is unsurprising since the Wow! email relates exclusively to the Marshall transaction).

The parties subsequently reached an agreement on six additional custodians (Corina Trainer; Gary Wilcox; Patricia Pellervo; Bob Whitten; Dennis McErlean; and Thomas Palmisano) and PwC produced additional documents on March 31, 2018, which "conclude[d] PwC's Rule 56(f) production." Ex. 3 (Mar. 31, 2018 email from Hsiao to Brooks); Dkt. 220, PwC's Opp'n to Pl.'s Mot. Compel, Perry Decl. at ¶ 4 (setting out custodial searches performed between May 30, 2017 and May 15, 2018 with complete list of agreed-to custodians).

PwC renewed its motion for summary judgment on June 14, 2018. *See* Dkt. 107, PwC's Renewed Mot. Summ. J. Tricarichi filed a fulsome response in opposition with 32 exhibits, many of which were documents produced as part of PwC's Rule 56(f) efforts. Even without the Marshall Wow! email, Tricarichi was well aware of the issue to which it relates—that PwC advised the Marshalls that the transaction they were contemplating was similar to a listed Notice 2001-16 transaction and not to go forward with the deal. Tricarichi's response emphasized this point: that PwC failed to disclose the Marshall transaction to him in 2003. Tricarichi argued that he "was entitled to know [at the time of the transaction] and certainly before litigation with the IRS that PwC advised at least one other taxpayer to *avoid* the very transaction that PwC was advising Plaintiff to proceed with," and that PwC's failure to disclose to him its conclusion on the Marshall transaction amounted to fraudulent concealment that tolled the statute of limitations. Dkt. 113, Pl.'s Resp. Opp'n at 20, 30.

This Court rejected Tricarichi's fraudulent concealment argument and held that "regardless of whether New York's or Nevada's statute of limitations applies, Plaintiff's claims are time-barred" because "[i]n the best-case scenario for Plaintiff . . . Plaintiff discovered, or as a matter of law, should have discovered the alleged act, error or omission no later than ***when he received the IDR [Information Document Request] from the IRS***" on February 21, 2008. Dkt. 119, Order at ¶¶ 17–

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18 (emphasis added). In other words, the IRS put Tricarichi on notice of his negligence claim—he was not relying on PwC to do so. As a result, the Court held that Tricarichi's negligence claim arising from PwC's 2003 services were time-barred no later than February 21, 2010—"nearly a year before the parties entered into a tolling agreement in January 2011." *Id.* at ¶ 19. The Court therefore entered summary judgment "in favor of PwC regarding any and all claims arising from the services PwC provided Plaintiff in 2003." *Id.* at 3.

Tricarichi now says that PwC should have produced the Marshall Wow! email and the Q&RM Booklet as part of its Rule 56(f) production back in 2017. Tricarichi is incorrect, and a description of each document shows why.

B. Michael Weber's February 14, 2003 Email

The primary document that Tricarichi relies on in support of his Rule 60(b)(2) motion is a February 14, 2003 email thread regarding the Marshall transaction. Hessell Decl. Ex. 2. The email thread is between the engagement team in PwC's Portland office and members of PwC's Washington National Office and Quality & Risk Management (Q&RM) group. None of the individuals on the email thread ever worked on Tricarichi's matter. The Portland engagement team consulted with the Washington National Office and Q&RM, which concluded—based on the specific provisions in the proposed stock purchase agreement—that the Marshalls' deal was substantially similar to a Notice 2001-16 listed intermediary transaction. As a result, PwC's Q&RM group determined that the firm should not play any advisory role in the transaction. The National Office informed the Portland engagement team that the transaction would need to be disclosed on the Marshalls' tax returns if they went through with the deal. *See generally Estate of Marshall v. Comm'r of Internal Revenue*, T.C. Memo. 2016-119, 2016 WL 3460226, at *4–6 (T.C. June 20, 2016).

The February 14, 2003 email thread reflects this Marshall-specific advice. Mr. Dempsey's initial email indicated that he had highlighted certain provisions, including confidentiality and disclosure provisions, that he thought would make the transaction reportable to the IRS. Hessell Decl. Ex. 2, at 5. Dan Mendelson responded that they were "very uncomfortable taking any advisory role" in the deal—and observed that the "57 page stock purchase agreement alone suggests

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that this is way too difficult." *Id.* at 4. Mr. Mendelson also set out a course of action for PwC to take as tax return preparers in the event that the Marshalls' law firm continued to advise the taxpayers to go forward with the sale. *Id.* at 4–5. Mr. Dempsey looped in Michael Weber, the engagement partner for the Marshall matter in Portland, that same day, and Mr. Weber responded with an off-the-cuff reaction to the emails earlier in the thread. *Id.* at 4.

Tricarichi blatantly mischaracterizes the Marshall Wow! email. Tricarichi contends the email shows that ***PwC as a whole*** concluded that *any* transaction involving Fortrend was risky and "probably" would blow up at the IRS, and that "*any* client participating in such a transaction may get 'sued for aiding and abetting a transaction the sole purpose of which was to evade income tax.'" *See* Mot. at 2 (emphasis added). In context, however, it is clear that the February 14, 2003 email is a knee-jerk reaction from ***one PwC partner in Portland***—a non-lawyer with no experience in listed transactions or transferee liability—to feedback from PwC's Washington National Office and Q&RM about the specific 57-page stock purchase agreement in the Marshalls' transaction. Tricarichi's statement that PwC knew that his transaction "could get Tricarichi sued for aiding and abetting Fortrend's fraud" (Mot. at 10) is a false statement of fact to this Court.

None of the PwC professionals on the Marshall February 14, 2003 email thread worked on Tricarichi's transaction, which involved an engagement team in Cleveland, Ohio and different practitioners in the Washington National Office. And PwC's conclusions that the Marshall deal was substantially similar to a Notice 2001-16 intermediary transaction and that, as a result, the engagement team should not be involved in advising on the transaction have no bearing on the soundness of the "more-likely-than-not" opinion that PwC delivered to Tricarichi regarding the Westside Cellular transaction. As this Court found in its February 2023 Findings of Fact and Conclusions of Law, there are "numerous differences between the Marshall matter and the instant case" and, given those differences, PwC was not liable to Tricarichi for "failing to disclose or take into account the advice given in [the Marshall] transaction" when forming its opinion on Tricarichi's subsequent stock sale. Dkt. 416, FOFCOL ¶ 39. Even more, the Court concluded as a matter of law that "there is no reason to believe that PwC's work in [the Marshall and Enbridge] matters rendered [its] advice to Tricarichi any more or less correct." *Id.* at ¶ 135.

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In sum, an email between a completely different team of PwC professionals about a materially different transaction does not suggest—let alone "clearly show[]—that "before Tricarichi even engaged PwC, PwC knew the transaction was risky, would blow up at the IRS and could get ***Tricarichi*** sued for aiding and abetting Fortrend's tax fraud." Mot. at 10 (emphasis added); *see also id.* at 6. To the contrary. PwC closely analyzed the Westside Cellular transaction as a potential Notice 2001-16 transaction; concluded at a more likely than not level of confidence that the transaction did not need to be reported to the IRS as such; and ***internally stood by that opinion*** five years later after the IRS issued Notice 2008-111, which clarified the bounds of the "intermediary" transaction described in Notice 2001-16. Trial Ex. 45 (Lohnes's December 2, 2008 email to Stovsky that he "read through the Notice" and "agree[d] with [Stovsky's] assessment that it shouldn't change any of our prior analysis").

Tricarichi has known for many years that PwC reached a different conclusion on the facts presented in the Marshall transaction; the Tax Court expressly found as much in its 2016 opinion holding the Marshalls liable as transferees. *See Estate of Marshall*, 2016 WL 3460226, at *5 ("PwC concluded that the stock sale proposed by Essex [the Fortrend entity] was similar to a listed transaction and that it could not consult or advise on the proposed stock sale any further."). Tricarichi's negligence theory incorporated PwC's involvement in the Marshall matter in two different (but related) ways: (1) that PwC's contrary advice to the Marshalls "demonstrated that it knew or had reason to know that the advice it provided to Tricarichi was inaccurate or inconsistent"; and (2) that PwC's failure to disclose its advice to the Marshalls to him in either 2003 or 2008 was itself a negligent omission. *See, e.g.*, Dkt. 416, FOFCOL ¶¶ 32, 38, 133. The Wow! email thread, which does nothing more than provide a paper trial corroborating the Tax Court's findings about PwC's advice to the Marshalls, changes nothing about the Court's assessments of the timeliness and merits of Tricarichi's claims.

C. PwC's 2003 Q&RM Booklet

Tricarichi's motion also relies on a 2003 booklet published by PwC's Q&RM group. Hessell Decl. Ex. 3. The booklet is not itself a policy document. Instead, the booklet serves as a risk management educational tool to "highlight[] some of the key policies comprising standards of

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conduct" for practitioners in PwC's tax practice. *Id.* at 10. As the booklet makes clear, the policies themselves "reside in ARMOR"—a PwC database that is the "principal repository for quality and risk management policies, procedures and practice aids." *Id.* at 10–11.

The portion of the booklet that Tricarichi argues is relevant here summarizes detailed guidance available to PwC tax practitioners in ARMOR in a policy called "US Policy & Guidance – Claims against PwC." On page 17, the Q&RM Booklet defines "Troublesome Practice Matters" and provides both general examples (such as formal, informal, or threatened claims by clients against PwC "for damages, costs, or compensation") and tax-specific examples, including rendering a final opinion that differs from an opinion "upon which the client based its decision to implement a transaction" or detecting a "technical error in services provided to a client." *Id.* at 26.

The Troublesome Practice Matter page includes several do's and don't's. In the "do" column, Q&RM encourages practitioners to "get assistance early" and "report" potential issues "promptly." In the "don't" column, Q&RM warns tax professionals against "try[ing] to keep the problem to yourself"; "offer[ing] a settlement or commit[ing] the Firm"; or unilaterally "admit[ting] liability, shortcomings, or defects in [the firm's] services" before appropriate consultation with Q&RM and the Office of General Counsel, if necessary. *Id.*

Tricarichi makes the unsupported accusation that PwC "concealed the Wow! email conclusions ***from Tricarichi***" because of the Q&RM Booklet, which explains that practitioners should not unilaterally "admit liability, shortcomings, or defects in our services" to a client contemplating a claim against PwC before consulting with the appropriate Q&RM or OGC employees. Mot. at 2 (emphasis added). That argument is wholly unsupported by the record. As the Court found in its February 2023 Findings of Fact and Conclusions of Law, the evidence at the parties' bench trial on Tricarichi's 2008 negligence claim "showed that PwC would not have been able to disclose the specific details of [the Enbridge and Marshall] engagements with Tricarichi because of its confidentiality obligations." Dkt. 416, FOFCOL ¶ 136 (citing the testimony of Tim Lohnes, Ken Harris, and Tricarichi's expert, Craig Greene). That prohibition would certainly extend to sharing emails regarding the specifics of one client's proposed transaction with an entirely different client contemplating a different transaction. Casting an inapplicable Q&RM policy as the

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rationale for not sharing client-specific emails across engagements is nothing more than a last ditch attempt to upend the finality of this Court's judgment.

D. Production of Documents in *Marshall* Litigation

PwC produced both of these documents early this year in the Marshall case in Multnomah County, Oregon. The Marshall plaintiffs are represented by Mr. Hessell, Tricarichi's counsel in this case.

The bulk of the parties' discovery in the Marshall litigation took place in 2019. At that time, PwC's prior counsel collected Bill Galanis's electronic files, reviewed the Wow! email thread, and determined it was protected by attorney-client privilege—an understandable call in light of the fact that a PwC in-house attorney, Alan Fox, is a receipient of two of the emails in the thread and the email subject line reads "Privileged and Confidential." PwC put the entire Wow! email thread on a privilege log that was served to the Marshalls' counsel, including Mr. Hessell, in June 2019. The Oregon trial court entered summary judgment for PwC shortly thereafter, and the Marshalls appealed.

The Oregon Court of Appeals reversed the trial court's entry of summary judgment and remanded the case for further proceedings in late December 2021. When discovery resumed in December 2022 (nearly a year after the case was remanded), the Marshalls' counsel asked PwC's new counsel to revisit a number of prior counsel's privilege determinations from its 2019 privilege logs. PwC's new counsel did so and also reviewed for the first time other withheld documents that the Marshalls did not challenge, including the Wow! email. PwC's new counsel concluded that the Wow! email should be produced in redacted form and promptly did so on February 3, 2023. *See* Hessell Decl. ¶ 4. On the Marshalls' motion to compel, and after *in camera* review, the Oregon trial court upheld PwC's attorney-client privilege redaction on the top email (to in-house attorney Alan Fox) in the string that caused the document to be on the privilege log. Ex. 4 (July 12, 2023 Order Denying Pls.' Mot. to Compel).

Around the same time (December 2022), the Marshalls' counsel also requested that PwC produce documents regarding when the Firm's advice or tax opinions should be rendered in writing. That request led to the collection and production of the Q&RM Booklet in January 2023, because

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page 15 of the Q&RM Booklet references PwC's policy on documenting conclusions reached on an engagement. *See* Hessell Decl. ¶ 5, Ex. 3 at 24.

LEGAL STANDARD

Tricarichi filed his motion under Nevada Rule of Civil Procedure 60(b)(2), which provides that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." NRCP 60(b)(2).

While there is relatively little Nevada caselaw interpreting NRCP 60(b)(2), Nevada courts look to how federal courts interpret FRCP 60(b)(2), which is nearly identical. *See Foster v. Dingwall*, 126 Nev. 49, 54, 228 P.3d 453 (2010) (explaining that "federal decisions involving the Federal Rules of Civil Procedure provide persuasive authority when this court examines its rules," and in particular following federal decisions regarding FRCP 60(b) because "NRCP 60(b) largely replicates Fed. R. Civ. P. 60(b)") (citation omitted); *see also* NRCP 60, Adv. Cmte. Notes to 2019 Amendment (explaining that the "amendments generally conform Rule 60 to FRCP 60"); *Bonnell v. Lawrence*, 128 Nev. 394, 398 282 P.3d 712, 714 (2012) ("Rule 60(b) of the Nevada Rules of Civil Procedure is modeled on Rule 60(b) of the Federal Rules of Civil Procedure").

To obtain relief under FRCP 60(b)(2), the Ninth Circuit requires that "(1) the moving party [] show that the evidence relied on in fact constitutes 'newly discovered evidence' within the meaning of Rule 60(b); (2) the moving party exercised due diligence to discover this evidence; and (3) the new evidence must be 'of such magnitude that it would have been likely to change the disposition of the case.'" *Feature Realty, Inc. v. City of Spokane*, 331 F.3d 1082, 1093 (9th Cir. 2003) (citation omitted). The moving party is required to satisfy all three elements. *See id.* Tricarichi cannot satisfy any of the three required elements; accordingly, his claim fails.

ARGUMENT

I. The Motion Is Untimely

The two documents on which Tricarichi bases his motion—the Marshall Wow! email and the Q&RM Booklet—are not newly discovered evidence within the requirements of NRCP

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60(b)(2). That rule applies to "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." NRCP 60(b)(2). Rule 59(b), in turn, says that a "motion for a new trial must be filed no later than 28 days after service of written notice of entry of judgment." NRCP 59(b).

In this case, PwC served written notice of entry of the Court's Findings of Fact and Conclusions of Law and Judgment on February 22, 2023. Dkt. 420. Accordingly, Tricarichi had until March 22, 2023 (28 days later) to move for a new trial under Rule 59. Tricarichi's counsel had both the Marshall Wow! email and the Q&RM Booklet in his possession well in advance of that deadline. According to the Hessell declaration, the Q&RM Booklet was produced in the Marshall case on or about January 20, 2023, and the Marshall Wow! email was produced in the Marshall case on February 3, 2023. Hessell Decl. ¶¶ 4–5. Tricarichi's lead counsel in this case, Scott Hessell, was also counsel for the plaintiffs in the Marshall case. Mr. Hessell knew about both the Marshall Wow! email and the Q&RM Booklet at the time they were produced in the Marshall case and used them in numerous depositions and in briefing in the Marshall litigation from that point onward. *See Feature Realty*, 331 F.3d at 1093 (holding that evidence was not newly discovered where party's attorney knew about it because attorney's "knowledge is properly attributable to" client under agency principles).

Both documents were stamped with a "Confidential" designation when they were produced in the Marshall case, and the Protective Order in the Marshall case restricts how documents with that designation can be used. *See* Ex. 5, Marshall Protective Order. However, Rule 60(b)(2) requires "reasonable diligence," and Mr. Hessell could have taken any number of different steps to attempt to secure the ability to present the Marshall Wow! email and the Q&RM Booklet in support of a motion for new trial under Rule 59 before the March 22, 2023 deadline. Mr. Hessell could have simply asked PwC for permission to use the documents in support of a Rule 59 motion in this case. He did not. Mr. Hessell could have challenged the confidentiality designation applied to one or both of the documents under paragraph 9 of the Marshall protective order. He did not. Mr. Hessell could have petitioned the Marshall court under paragraph 12 of the Marshall protective order for the ability to present the documents in support of a Rule 59 motion

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in this case. *See id.*, ¶ 12 (allows a party to "ask the Court . . . to modify or grant relief from any provision of this Stipulated Protective Order"). He did not. He could have filed a motion with this Court seeking to extend the Rule 59(b) deadline until the confidentiality issue was resolved. He did not.

Instead, Mr. Hessell waited until after he used the documents as exhibits in open court during the Marshall trial in August 2023,[1] and then filed his Rule 60(b) motion on the day before the six-month deadline in NRCP 60(c)(1) lapsed. That simply does not amount to "reasonable diligence." *See, e.g.*, *Stoecklein v. Johnson Elec., Inc.*, 109 Nev. 268, 272, 849 P.2d 305, 308 (1993) (explaining the "sixth-month period represents the extreme limit of reasonableness") (citation omitted); *Helfstein v. Eighth Jud. Dist. Ct.*, 131 Nev. 909, 914, 362 P.3d 91, 95 (2015) (same).

II. PwC Did Not Improperly Conceal the Two Documents At Issue

Tricarichi's Rule 60(b) motion is premised on the argument that PwC should have produced the Marshall Wow! email and the Q&RM Booklet as part of Rule 56(f) discovery in this case. *See* Mot. at 7, 9 (arguing that PwC "faile[d] to produce the Wow! email and Risk Management Policy in this case despite an express agreement and obligation to do so"). PwC had no such obligation. As part of the limited Rule 56(f) discovery ordered by the Court, the parties reached an agreement regarding the various categories of documents that would be produced and the different custodians whose documents would be searched for responsive documents. Neither the February 2003 Wow! email nor the PwC Q&RM Booklet fell within the agreed-on scope of that discovery. Moreover, even if Tricarichi can establish that PwC committed a discovery

[1] On June 20, 2023, the Marshalls moved the Oregon trial court to continue the parties' July 31, 2023 trial date until the Oregon Supreme Court rendered a decision in a related pending appeal by the Marshalls' law firm. *See* Ex. 6. The plaintiffs acknowledged that this could result in a months-long delay. *Id.* If the plaintiffs had successfully continued the trial date, the Wow! email and Q&RM Booklet would not have been used publicly at trial before the six-month deadline applicable here under NRCP 60(c)(1). Tricarichi's ability to seek Rule 60(b) relief cannot turn on the timing of a trial in different litigation. Mr. Hessell had an obligation to take reasonable steps to pursue Tricarichi's Rule 60(b) motion in a timely manner, including asking the Oregon court for relief from the protective order if necessary, and waiting until the eleventh hour to file a Rule 60(b) motion when the "newly discovered" evidence was available before the judgment was entered was not reasonable.

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violation, he cannot establish by clear and convincing evidence that PwC perpetrated a fraud on the court warranting relief under NRCP 60(b)(3).

A. None of the Agreed Custodians Had the 2003 Wow! Email in Their Custodial Files

First, PwC's non-production of the email during Rule 56(f) discovery in 2017 and 2018 is not attributable to PwC withholding a responsive, non-privileged document collected in the Tricarichi litigation. PwC's custodial search of Michael Weber's and Gary Cesnik's files for the range January 1, 1999 through December 31, 2012 as part of the limited Rule 56(f) discovery *did not* return the Wow! email. Neither custodian—nor any other custodian collected as part of the Tricarichi litigation—had a copy of the email in their files. PwC's counsel was not aware of the Wow! email thread until it was collected from Bill Galanis's files, reviewed, and placed on a privilege log in the Marshall litigation in 2019—and Bill Galanis was not one of the custodians whose records were collected in this case, because Mr. Galanis did not work on Tricarichi's transaction. *See* Ex. 11, Genord Decl. ¶¶ 15–18.

That neither Mr. Cesnik nor Mr. Weber had a copy of this email in their electronic files when they were placed on litigation hold nearly eight years ***after*** the email was sent is unsurprising. *See* Ex. 11, Genord Decl. ¶¶ 19–20. Gary Cesnik, a member of PwC's national Q&RM team, had no other involvement in the Marshall transaction, and Michael Weber's testimony in the Marshall litigation was that he routinely deleted emails from his inbox on the same day if they did not contain an outstanding action item requiring his attention. Ex. 7 at Tr. 946–48. This practice was consistent with PwC's 2003 document retention policy, which instructed its tax professionals to retain only those documents that "record, support or otherwise form the basis of the Firm's professional work product or administrative functions." Ex. 8. The policy explained that "documents such as electronic mail, correspondence or draft documents that are not necessary to record or support the Firm's work should not be retained beyond the end of the engagement to which they relate." *Id.* at 2. Neither Mr. Cesnik nor Mr. Weber were under any duty to preserve the email in their electronic records in February 2003—and certainly not under a duty to preserve an email that related solely to the Marshall transaction based on the possibility

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that Tricarichi (who they did not know at all) would sue PwC for negligent work on a transaction on which PwC had not yet been engaged and which did not close until months after the email in question was sent. *See, e.g.*, *Bass-Davis v. Davis*, 122 Nev. 442, 450, 134 P.3d 103, 108 (2006) ("[T]he prelitigation duty to preserve evidence is imposed once a party is on 'notice' of of a potential legal claim."); *see also Kerr v. Bd. of Psychologist Examiners*, 304 Or. App. 95, 111–12, 467 P.3d 754, 765 (Or. Ct. App. 2020) (describing a litigation hold as a "matter of prudent *practice*, not a mandate expressed in law like a statute, administrative rule, or Oregon court rule"); *Markstrom v. Guard Publishing Co.*, 315 Or. App. 309, 315, 501 P.3d 71, 74–75 (Or. Ct. App. 2021) (Oregon Rule of Civil Procedure 46 D did not authorize sanctions for party's prelitigation failure to preserve evidence).

PwC carried out its Rule 56(f) discovery efforts based on the parties' agreement regarding cutodians, date range, and search terms exactly as PwC's prior counsel represented to opposing counsel and to the Court. None of the custodians had a copy of the February 2003 email thread, and it was not otherwise collected in the Tricarichi litigation. PwC was not obligated to go beyond the parties' agreement to track down documents from every conceivable custodian at the Firm—particularly where, based on the parties' January 2018 discovery correspondence, Mr. Hessell represented to PwC's counsel that his "firm is now counsel for the Marshalls and therefore d[id] not need documents from PwC concerning the Marshall Transaction and corresponding Tax Court proceeding." Ex. 1 at 3.

B. The Q&RM Booklet Is Not An "Internal Polic[y] or Guideline Regarding On-Going Communication With A Client" After PwC's Services Are Complete

The limited scope of PwC's Rule 56(f) production obligation did not include the Q&RM Booklet either. When the Court ordered limited Rule 56(f) discovery in May 2017, it instructed that Tricarichi was entitled to the "limited discovery necessary to oppose PwC's motion for summary judgment as set forth in Paragraph 10 of Mr. Tricarichi's affidavit," including "PwC documents and testimony regarding the Bishop and Marshall transactions . . . and the reasons why PwC did not make Mr. Tricarichi aware of those transactions." Dkt. 100, Order. But Tricarichi's discovery requests promulgated as part of the Rule 56(f) discovery process swept far broader than

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what he set out in paragraph 10 of his affidavit. In the months that followed, Tricarichi designed interrogatories and document requests that he thought would lend support to his alternative argument that the statute of limitations on his 2003 negligence claim was tolled because PwC provided continuing representation beyond the closing of the Westside Cellular transaction in fall 2003.

Tricarichi's affidavit, interrogatories, and document requests add helpful color and context to what PwC agreed to produce as part of the Rule 56(f) discovery. In paragraph 11 of his affidavit, for example, Tricarichi expressed his "understanding" that when he "sought and received PwC's advice about the Fortrend transaction," "PwC would continue to be available to assist me should there be subsequent inquiries from the IRS in connection with the transaction." Dkt. 88, Tricarichi Aff. at ¶ 11. One of the interrogatories Tricarichi propounded asked whether PwC had "complied with AICPA Statement on Standards for Tax Services No. 6, with respect to the Fortrend Transaction," identifying the SSTS that sets out the standard of conduct for CPAs who discover an error on a client's tax return, and one of Tricarichi's requests for production served nearly simultaneously with the Court's order granting Rule 56(f) discovery included "[a]ll documents relating to AICPA Statement on Standards for Tax Services No. 6." *See* Ex. 9 (Interrogatory No. 10); Ex. 10 (Request For Production No. 5). Similarly, the agreed-on custodial searches included the search terms ["10.21" w/10 "230"] (for Circular 230) and ["AICPA Statement on Standards" w/10 "6"]. Hessell Decl. Ex. 4.

As with the custodial search described above, the parties met and conferred with respect to Tricarichi's requests for production and interrogatories issued as part of the limited Rule 56(f) discovery. Mr. Tricarichi argues that the booklet falls within the first category of documents that PwC's counsel represented PwC produced in August 2017: "documents related to any internal policies or guidelines regarding on-going communication with a client after PwC's services/advice has been rendered concerning the client's engagement." But against the relevant backdrop of Mr. Tricarichi's earlier statute of limitations arguments and own discovery requests, this category was designed to identify documents that could bolster Mr. Tricarichi's continuing representation argument—not his far-fetched allegations that PwC began to "fraudulently conceal" its supposed

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negligence on the Tricarichi transaction before PwC had even reached a final opinion on the reportability of the transaction and the deal closed. *See* Mot. at 6 (alleging that "PwC knew its advice to Tricarichi was wrong before they were even engaged").

The Q&RM Booklet produced in Marshall cannot be shoehorned into this wholly distinct category of documents that Tricarichi sought on a different statute of limitations theory than that set out in the Rule 60(b) motion. As stated above, the Q&RM Booklet is not itself a policy, but instead a risk management tool that pointed PwC practitioners to ARMOR, the Firm's policy repository, and specifically to a policy called "US Policy & Guidance – Claims against PwC" for "detailed guidance on TPMs" (or "troublesome practice matters"). The Q&RM Booklet provides practitioners with a high-level overview of the steps they should follow if a client brings (or threatens) a claim against the Firm for deficiencies in its services. Even if the booklet were itself a policy (which it is not), it does *not* speak to the agreed-upon category for production: the scope of PwC's obligations to, or expected communications with, a former client after an engagement has concluded (issues that would be relevant to whether PwC's representation could be considered "ongoing" even after its engagement as described in an engagement letter had formally ended).

In sum, by stripping PwC's production communications of their context, Tricarichi misrepresents the type of documents he was seeking and that PwC agreed to search for and produce: Firm policies and guidance relating to ongoing obligations to a client after an engagement has concluded, whether under AICPA SSTS 6 or as contemplated by the parties' engagement letter, which stated PwC would be available to work with Tricarichi, if requested, in the event of an IRS investigation. Tricarichi in fact used several of those policy and guidance documents in his opposition to PwC's renewed summary judgment motion on his 2003 claim. *See, e.g.*, Dkt. 112.17, Ex. 17 to Tricarichi's Resp. Opp'n (PwC Q&RM "tip" on AICPA SSTS 6); Dkt. 112.18, Ex. 18 to Tricarichi's Resp. Opp'n (PwC TaxSource document on SSTS 6); Dkt. 112.19, Ex. 19 to Tricarichi's Resp. Opp'n (PwC document "Guidance to Practitioners Regarding Professional Obligations Under Treasury Circular No. 230," which covers advising a client of an error discovered in a tax return). The Q&RM Booklet, which provides a high-level summary of a policy dealing with claims brought or threatened against PwC, does not fall into that category, and

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PwC did not breach an obligation to the Court or its agreement with Tricarichi's counsel by not producing it as part of the Rule 56(f) discovery in 2017 and 2018.

C. PwC's Non-Production of These Two Documents Is Not "Fraud on the Court"

Tricarichi suggests in his motion that PwC's failure to produce the two documents described above during Rule 56(f) discovery amounts to "fraud on the court" and justifies relief under Rule 60(b)(3). Mot. at 9. Even if this Court concludes that one or both of the documents at issue should have been collected and produced as part of PwC's limited Rule 56(f) discovery, an inadvertent discovery violation does not come close to fraud on the court under Rule 60(b)(3). To grant relief under Rule 60(b)(3), the court must find that fraud has been established by clear and convincing evidence. *NC-DSH, Inc. v. Garner*, 125 Nev. 647, 657, 218 P.3d 853, 860–61 (2009) ("A party seeking to vacate a final judgment based on fraud upon the court bears a heavy burden.").

Courts set a high threshold for fraud under NRCP 60(b)(3). "[F]raud upon the court" goes beyond mere "conduct of a party or lawyer of which the court disapproves"—instead, NRCP 60(b)(3) "embraces only that species of fraud which does, or attempts to, subvert the integrity of the court itself" or makes it such that "the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases." *Id.* at 654 (quoting *Demjanjuk v. Petrovsky*, 10 F.3d 338, 352 (6th Cir. 1994)). The Nevada Supreme Court has further explained that "true fraud on the court is rare and requires 'egregious misconduct.'" *Id.* at 650 (quoting *Occhiuto v. Occhiuto*, 97 Nev. 143, 146 n.2, 629 P.2d 568, 570 n.2 (1981). *See also Appling v. State Farm Mut. Auto. Ins. Co.*, 340 F.3d 769, 780 (9th Cir. 2003) ("Non-disclosure, or perjury by a party or witness, does not, by itself, amount to fraud on the court.").*Cf. Nuri v. Jarso*, 529 P.3d 168, 2023 WL 3440457, at *1 (Nev. May 12, 2023) (plaintiff committed fraud on the court warranting Rule 60(b)(3) relief where plaintiff failed to serve defendant with the complaint and resulting divorce decree, knew that the defendant was outside of the state and when she would return, but nonetheless "represented to the district court that he did not know where [defendant] could be found" to secure an order allowing service by publication) (unpublished disposition).

Nothing in Tricarichi's motion would support a finding, by clear and convincing evidence, that PwC's counsel perpetrated a fraud on the court, such that PwC "subvert[ed] the integrity of

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the court itself" or prevented the judicial machinery from performing in its usual manner. *NC-DSH, Inc.*, 125 Nev. at 654; *see also Trendsettah USA, Inc. v Swisher Int'l, Inc.*, 31 F.4th 1124, 1132–33 (9th Cir. 2022) ("Under the high standard for a Rule 60(d)(3) motion, a mere discovery violation or non-disclosure does not rise to the level of fraud on the court.") (quotation marks and citation omitted); *Aulmann v. Aulmann*, 25 F. App'x 555, 557 (9th Cir. 2001) (generally "a witness' perjury or failure to disclose a material fact is not fraud on the court" regardless of "whether the perjury or non-disclosure occurs during discovery or at trial"). The relief Tricarichi seeks is therefore not warranted under Rule 60(b)(3).

III. The Two Documents Do Not Meet the High Bar Required for Rule 60(b)(2) Relief

Finally, even if the Court reaches the merits of Tricarichi's motion—which it should not because the motion is untimely and PwC did nothing wrong during discovery—the two documents would have made no difference in this Court's decisions, which dismissed Tricarichi's claims on multiple independent grounds.

Tricarichi's motion does not come close to meeting the high bar required for relief under Rule 60(b)(2). In order to justify setting aside the judgment in this case and undoing the significant amount of time, energy, and resources the Court and the parties have invested in reaching final resolution, the newly discovered evidence "must be of such magnitude that production of it earlier would have been likely to ***change the disposition of the case***." *Feature Realty*, 331 F.3d at 1093 (quotation marks and citation omitted) (emphasis added);[2] *see also Renteria v. Canepa*, No. 3:11-CV-00534-RCJ, 2013 WL 837127, at *3 (D. Nev. Mar. 5, 2013) (denying Rule 60(b)(2) motion because "[t]he allegedly new evidence does not support a finding that the Court would have decided otherwise had that evidence been before the Court prior to the judgment"); *Abet Just., L.L.C. v. Am. First Credit Union*, No. 2:13-CV-02082-MMD-PAL, 2015 WL 4110800, at *2 (D. Nev. July 7, 2015) (stating that "the Court would still deny Plaintiffs' [Rule 60(b)(2)] Motion even

[2] In the Motion, Tricarichi cites a 43-year-old case from the Seventh Circuit for the standard for granting relief under Rule 60(b)(2). Motion 10–11 (citing *United States v. Walus*, 616 F.2d 283, 287-88 (7th Cir. 1980)). Although the more recent *Featury Royalty* standard from the Ninth Circuit should be more persuasive, in reality there does not appear to be much daylight between the two since *Walus* requires that the newly discovered evidence be "such that a new trial would probably produce a new result." *Walus*, 616 F.2d at 288.

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if it were timely because the newly discovered evidence would not have changed the outcome of the case")(citation omitted).

Tricarichi's motion fails to show that either the Marhsall Wow! email or the Q&RM Booklet would likely have changed the summary judgment on the 2003 claim, the Court's decision on the 2008 claim, or anything else about this case.

A. The Documents Would Not Have Changed the Court's Holding That Tricarichi's 2003 Claim is Time-Barred

Tricarichi's primary argument is that the Marshall Wow! email and the Q&RM Booklet would have enabled him to defeat the Court's 2018 grant of summary judgment to PwC on Tricarichi's claims regarding PwC's 2003 advice based on the statute of limitations. Tricarichi is indisputably wrong. The Court found that the IRS itself put Tricarichi on notice of his potential claims—not PwC. Yet Tricarichi argues that these two documents "call[] into doubt the Court's 2018 dismissal of Tricarichi's 2003-based malpractice claims because these documents, at least, create questions of fact regarding when Tricarichi knew or should have known of his claim." Mot. at 2. Specifically, Tricarichi argues that these two documents would have allowed him "to establish PwC's fraudulent concealment," and thereby defeat the grant of summary judgment. *Id.* at 3. This argument does not withstand basic scrutiny.

On October 22, 2018, the Court entered its order granting PwC summary judgment "regarding any and all claims arising from the services PwC provided [Tricarichi] in 2003." Dkt. 119 at 3. The Court's reasoning was straightforward: The Court held that Tricarichi should have discovered PwC's alleged negligence regarding its 2003 advice no later than when Tricarichi received and responded to an IDR from the IRS regarding potential transferee liability arising out of the Westside transaction. *Id.* ¶¶ 6, 18. Tricarichi responded to the IDR by producing documents on February 21, 2008. *Id.* ¶ 19. Applying the most generous statute of limitations that could apply—the two-year statute set forth in Nev. Rev. Stat. § 11.2075(1)(a)[3]—the Court held that

[3] The Court recognized that there was a dispute over which statute of limitations applied—Nevada's, or a shorter New York statute. However, the Court did not decide which limitations period governed because it held that Tricarichi's claims were time-barred even assuming the longer Nevada limitations period applied. Dkt. 119 ¶ 17.

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Tricarichi's claims became time-barred "no later than February 21, 2010," which was "nearly a year before the parties entered into a tolling agreement in January 2011." *Id.* ¶¶ 18–19.

Simply put, the Marshall Wow! email and the Q&RM Booklet have ***nothing*** to do with the key facts that formed the basis for the Court's 2018 summary judgment order. The Court entered summary judgment for PwC regarding its 2003 advice because communications Tricarichi received directly from the IRS in 2008 should have led him to discover any alleged problems with PwC's advice. Even if PwC had produced the Wow! email and the Q&RM Booklet in 2017 (when Triciarchi says they should have been produced), those documents (and Tricarichi's argument about PwC's concealment of a potential negligence claim from 2003 on) have no bearing whatsoever on what Tricarichi knew or should have known in 2008 when he received the IDR from the IRS asking for documents related to potential transferee liability.

Recognizing that the two documents have nothing to do with the grounds for the Court's summary judgment decision, Tricarichi pivots and argues that "PwC's failure to produce" the documents "deprived the Court and Plaintiff of the ability to argue that they create questions of fact about whether PwC fraudulent [sic] concealed its negligence." Mot. at 11. But Tricarichi made an extensive fraudulent-concealment argument in the briefing on PwC's renewed motion for summary judgment back in 2018. *See* Dkt. 113, Pl.'s Resp. Opp'n. at 18–20, 30. Indeed, one of the items Tricarichi argued PwC fraudulently concealed from him was the fact that PwC told the Marshalls not to do their proposed deal with Fortrend. *See id.* at 20 ("PwC never said a word to Mr. Tricarichi about this contradictory advice to another taxpayer . . . ."). That argument did not sway the Court in 2018. There is zero chance that producing a single email from the Marshall transaction, which was consistent with the Tax Court's 2016 finding that PwC discouraged the Marshalls from engaging in the transaction, would have made any difference in the Court's evaluation of Tricarichi's fraudulent-concealment argument.

The Q&RM Booklet likewise would not have advanced Tricarichi's fraudulent concealment argument. Tricarichi tries to put a nefarious spin on the Q&RM Booklet's commonsense admonition that PwC practioners should not unilaterally "admit liability, shortcomings, or defects in [their] services" but rather should consult with other PwC departments,

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including Q&RM and the Office of General Counsel, about "Troublesome Practice Matters." Hessell Decl. Ex. 3, at 26. This practice reminder is commonsense: whether for accountants, lawyers, or any other professional service provider. Professionals should consult with neutral colleagues before admitting fault. But more fundamentally, there is no evidence that anyone at PwC considered the advice PwC gave to Tricarichi in 2003 to have been incorrect, either in 2003 or in 2008. As this Court found in its Findings of Fact and Conclusions of Law: "it is undisputed that PwC was not aware of any error on a previously filed tax return as a result of Notice 2008-111." Dkt. 416, FOFCOL ¶ 118. Thus, the Q&RM Booklet could not have led anyone at PwC to conceal any defect in the 2003 Tricarichi advice because there was no evidence that anyone at PwC believed such a defect existed.

B. The Documents Would Not Have Changed the Court's Disposition of Tricarichi's 2008 Claim and Entry of Final Judgment in Favor of PwC

The Marshall Wow! email and the Q&RM Booklet would not have changed the outcome of the bench trial on Tricarichi's 2008 claim, either, because Tricarichi's claim failed on multiple independent grounds completely unrelated to these documents.

The Court specifically ruled, more than two years before trial, that documents related to the Marshall transaction were not relevant to Tricarichi's 2008 claim. In April 2020, Tricarichi moved to compel PwC to produce documents regarding other alleged midco transactions for which PwC advised, including the Marshall transaction. *See* Dkt. 213, 4/29/20 Tricarichi's Mot. to Compel at 6–7. The Court denied the motion to compel, holding that "the additional client-specific documents Tricarichi seeks are ***not relevant*** or proportional to Tricarichi's remaining claim in this case, which focuses on PwC's alleged failure to disclose IRS Notice 2008-111 to him." Dkt. 234, 6/16/20 Order Denying Mot. to Compel at 4 (emphasis added). The Court specifically mentioned the Marshall transaction in its ruling, explaining that the "Marshall transaction . . . took place in March 2003, before PwC's engagement with Tricarichi," and therefore "[a]ny claim related to the Marshall transaction would be barred by the Court's October 22, 2018 Summary Judgment Order." *Id.*

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The Court held a nine-day bench trial on Tricarichi's 2008 claim from October 31 to November 10, 2022. The Court heard testimony from 14 different witnesses, and received 112 exhibits into evidence. Following trial, the Court issued extensive findings of fact and conclusions of law that rejected Tricarichi's claim on multiple, independent grounds. *See* Dkt. 416, FOFCOL. Tricarichi has not identified any reason to believe that the Marshall Wow! email and the Q&RM Booklet, if they had been added to the evidence pile, would have changed a single aspect of the Court's findings of fact and conclusions of law, much less that those two documents would have led to an entirely different bottom-line ruling in Tricarichi's favor.

The Court held that Tricarichi failed to meet his burden of proof on critical elements of his negligence claim. *Id.* ¶¶ 102–103. First, the Court held that PwC did not owe any duty to Tricarichi to update its advice in 2008 since Tricarichi ceased being a client in 2003. *Id.* ¶ 104. The Marshall Wow! email and the Q&RM Booklet could not have altered this finding. Second, the Court held that PwC did not breach any duty by failing to disclose Notice 2008-111 to Tricarichi because, among other reasons, the Notice did not render PwC's prior advice to Tricarichi erroneous. *Id.* ¶¶ 117–130. The Marshall Wow! email and the Q&RM Booklet could not have altered this finding. Third, the Court held that Tricarichi did not prove causation for multiple "independent reasons," including that Tricarichi and his tax lawyers were already aware of Notice 2008-111; advising Tricarichi of the Notice could not have prevented the IRS audit and ultimate liability determination; and Tricarichi did not prove that he would have settled with the IRS in December 2008 if he had been told about Notice 2008-111. *Id.* ¶¶ 140–149. The Marshall Wow! email and the Q&RM Booklet could not have altered any of these findings.

Beyond his failure to prove the central elements of his claim, the Court also found that Tricarichi's claim was time-barred. *Id.* ¶¶ 152–161. The Court held that Tricarichi's claim was untimely under both New York and Nevada law because the limitations period expired in January 2013 at the latest, and Tricarichi did not file his lawsuit until April 2016. *Id.* ¶¶ 155–158. The Court also held that Tricarichi could not claim the benefit of any tolling agreement because he decided not to introduce the tolling agreement into evidence. *Id.* ¶¶ 159–160. Again, the Marshall Wow! email and the Q&RM Booklet could not have altered this finding.

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Tricarichi argues that, by not producing the Marshall Wow! email and the Q&RM Booklet, PwC "deprived Plaintiff of the ability to argue at the bench trial in this matter that PwC, as an institution, knew well before 2003 and certainly by 2008 that this transaction was dangerous and Tricarichi should get away as soon as possible, none of which it did." Mot. at 11–12. But of course Tricarichi did make an argument at trial based on the Marshall transaction, and the Court rejected that argument based on the "numerous differences" the Court found "between the Marshall matter and the instant case." Dkt. 416, FOFCOL ¶ 39. As the Court explained, "[t]he Marshalls undertook an integrated transaction with significant non-cash built-in gain assets (as opposed to none in the Westside Transaction), and the nature of this transaction presented greater risks of transferee liability than the Westside Transaction." *Id.* "Given the differences in the matters," the Court found that "Tricarichi did not meet his burden to show that PwC has liability to him for failing to disclose or take into account the advice given in [the Marshall] transaction." *Id.*; *see also id.* ¶ 135 ("[B]oth the Enbridge and Marshall transactions were substantially distinct from the Westside Transaction, and there is no reason to believe that PwC's work in those two matters rendered their advice to Tricarichi any more or less correct."). One additional email about the Marshall case that simply gave more color about why PwC recommended against that deal would not have altered the Court's conclusion.

/ / /

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CONCLUSION

For the foregoing reasons, PwC respectfully requests that the Court deny Tricarichi's Rule 60(b) Motion.

DATED this 19th day of September, 2023.

SNELL & WILMER L.L.P.

By: /s/ *Bradley Austin*

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On September 19, 2023, I caused to be served a true and correct copy of the foregoing **PRICEWATERHOUSECOOPERS LLP'S OPPOSITION TO PLAINTIFF'S NRCP 60(B) MOTION FOR RECONSIDERATION** 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 service upon the Court's Service List for the above-referenced case.

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/s/ *Lyndsey Luxford*
An Employee of Snell & Wilmer L.L.P.

EXHIBIT 1

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TOKYO
TORONTO

January 17, 2018

VIA EMAIL
Thomas D. Brooks, Esq.
Sperling & Slater
55 West Monroe Street, Suite 3200
Chicago, IL 60603
tdbrooks@sperling-law.com

RE: *Tricarichi v. PricewaterhouseCoopers LLP, et al.*,
A-16-735910-B

Tom:

I write in response to your letter dated December 22, 2017 (the "December 22 Letter").

As an initial matter, we are compelled to respond to Plaintiff's complaint that "PwC's initial document production and interrogatory responses were not provided until about three months after such discovery commenced." (*See* December 22 Letter at 1.) As you know, Plaintiff served PwC with document requests and interrogatories on May 30, 2017. PwC served written responses and objections to Plaintiff's requests on July 3, 2017, in compliance with the Nevada Rules of Civil Procedure. Plaintiff's discovery requests were patently overbroad; therefore, we met and conferred on an agreeable scope of production and interrogatory responses. PwC subsequently provided amended interrogatory responses and produced documents on August 23, 2017. Plaintiff was then silent for the next *four months* with *zero* activity in the case. Accordingly, PwC presumed Plaintiff had received the discovery necessary in connection with his 56(f) motion and stated this position in our December 21, 2017 letter. Only after receiving our letter did Plaintiff belatedly contend for the first time that our production was incomplete and that you intend to pursue further discovery.

Moreover, many of Plaintiff's objections and demands in your December 22 Letter are not well-taken, particularly those objections and demands that are inconsistent with the agreement the parties previously reached concerning PwC's production of materials, as reflected in the attached **Exhibit 1**. Our prior agreement stated that the scope of the production would be

as follows:

- Documents related to any internal policies or guidelines regarding on-going communication with a client after PwC's services had been rendered concerning the client's engagement;

- Documents related to any internal policies or guidelines regarding the enforcement of AICPA Statement on Standards for Tax Services No. 6 or Section 10.21 of Treasury Circular No. 230;

- Correspondence with and submissions to the IRS concerning Midco transactions; and

- Documents responsive to the Request for Documents collected from a custodial search using the following parameters:

    - Date Range: 1/1/1999 through 12/31/2012

    - Custodians: (1) Elaine Church; (2) Marissa Nelson; (3) Mark Boyer; (4) Richard Stovsky; (5) Tim Lohnes; (6) Rochelle Hodes; (7) Stephen Anderson; (8) Gary Cesnik; (9) Michael Weber.

    - Search Terms: (1) Tricarichi; (2) Fortrend; (3) Midco; (4) Midcoast; (5) Notice 2001-16; (6) Notice 2008-20; (7) Notice 2008-111; (8) "10.21" /10 "230"; (9) "AICPA Statement on Standards" w/10 "6"; and (10) Intermediary transaction.

PwC produced 2,158 documents totaling 30,648 pages, pursuant to these agreed-upon parameters. We are concerned that Plaintiff now seeks to renege on the agreement to seek discovery from new custodians simply because the 30,000-plus pages do not provide any support for Plaintiff's fraudulent concealment theory. We expect Plaintiff to abide by the agreement previously reached in connection with the scope of 56(f) discovery.

PwC further responds to the specific objections and requests ("Bullet Point") articulated in your December 22 Letter, as follows:

- With regard to **Bullet Point 1**, Plaintiff seeks documents from additional custodians, including PwC individuals who worked on the Bishop and Marshall Transactions. PwC produced documents from an agreed-upon list of custodians, which includes an individual who worked on the Marshall Transaction. PwC expects Plaintiff to abide by his prior agreement.

- With regard to **Bullet Points 2 and 3**, Plaintiff's Requests for Production Nos. 1, 2 and 14 seek documents concerning the Bishop and Marshall Transactions, and corresponding court proceedings. As we have discussed during the meet and confer process, such documents contain confidential client information that PwC

cannot produce absent client authorization. In response, your colleague, Mr. Hessell, stated: (1) in respect to the Marshall Transaction, your firm is now counsel for the Marshalls and therefore do not need documents from PwC concerning the Marshall Transaction and corresponding Tax Court proceeding; and (2) in respect to the Bishop Transaction, he was attempting to obtain authorization from the appropriate individuals or entities. However, neither you nor Mr. Hessell ever informed PwC whether you obtained authorization regarding the Bishop Transaction, or even provided an update on your efforts to obtain such authorization.

- With regard to **Bullet Point 4**, pursuant to the parties' agreed-upon search parameters, PwC has produced all non-privileged and non-client confidential documents responsive to Request for Production No. 12.

- With regard to **Bullet Point 5**, PwC believes its amended responses to Interrogatories No. 10 and 11 are sufficient under Nevada law.

- With regard to **Bullet Point 6**, PwC states that after a reasonable and diligent search, PwC has not located any documents responsive to Request for Production No. 4.

- With regard to **Bullet Point 7**, pursuant to the parties' agreed-upon search parameters, PwC has produced all non-privileged and non-client confidential documents responsive to Request for Production Nos. 15 and 16.

- With regard to **Bullet Point 8**, as stated above, PwC collected, searched, and produced documents pursuant to agreed-upon parameters. PwC expects Plaintiff to honor the parties' agreement.

- With regard to **Bullet Point 9**, PwC will provide a privilege log at a mutually agreeable time.

PwC is willing to meet and confer on the issues discussed above, as well as any proposed amendments to the case schedule.

Sincerely,

Winston P. Hsiao

CC: Scott F. Hessell, Esq.
Todd L. Moody, Esq.
Patrick G. Byrne, Esq.
Peter B. Morrison, Esq.

EXHIBIT 1

From: Hsiao, Winston P (LAC)
Sent: Wednesday, August 23, 2017 6:40 PM
To: 'Scott F. Hessell'
Cc: Todd Prall (TPrall@hutchlegal.com); Tom Brooks
Subject: RE: [Ext] Re: Tricarichi v PwC: Discovery Responses
Attachments: PwC - Amended Responses to Interrogatories.pdf

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

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

As we have discussed before, the document production contains:

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

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

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

Thanks.

Winston P. Hsiao
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winston.hsiao@skadden.com

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

Winston

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

Scott

Scott F. Hessell

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F: (312) 641-6492

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

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

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

That's fine. Let me know.

Scott F. Hessell

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

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

Thanks
Winston

Sent from my BlackBerry 10 smartphone.

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

Winston

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

Scott

Scott F. Hessell

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

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

Have a good weekend.

Winston

Winston P. Hsiao
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winston.hsiao@skadden.com

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

Winston

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

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

Scott

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

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

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

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EXHIBIT 2

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
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SHANGHAI
SINGAPORE
TOKYO
TORONTO

December 21, 2017

VIA EMAIL
Scott F. Hessell, Esq.
Sperling & Slater
55 West Monroe Street, Suite 3200
Chicago, IL 60603
shessell@sperling-law.com

RE: *Tricarichi v. PricewaterhouseCoopers LLP, et al.*,
A-16-735910-B

Scott:

I write on behalf of Defendant PricewaterhouseCoopers LLP ("PwC") in regards to the above-captioned action. As you know, on May 30, 2017, pursuant to Nevada Rule of Civil Procedure 56(f), the Court granted Plaintiff Michael. A. Tricarichi limited discovery as set forth in Paragraph 10 of Plaintiff's April 10, 2017 affidavit in opposition to PwC's motion for summary judgment (the "Order"). On August 23, 2017, after several meet and confers with you, PwC served discovery responses and produced documents in compliance with the Court's order.

Roughly four months have now passed and Plaintiff has not requested any further discovery. Accordingly, given the passage of time and Plaintiff's inactivity, PwC intends to renew its motion for summary judgment and considers Rule 56(f) discovery closed. PwC will move the Court for a Rule 16 status conference in connection with these matters. Please provide Plaintiff's position, if any, by Friday, January 5, 2018.

Sincerely,

Peter B. M /WPH

Peter Morrison

CC: Thomas D. Brooks, Esq.
Todd L. Moody, Esq.
Patrick G. Byrne, Esq.

EXHIBIT 3

From:	Hsiao, Winston P (LAC)
To:	"Tom Brooks"
Bcc:	Berglund, Nandi L (LAC); Faigen, Zachary (LAC); "Austin, Bradley"; Lee, Ki (LAC)
Subject:	Tricarichi v PwC
Date:	Friday, March 30, 2018 9:24:22 PM
Attachments:	Tricarich v PwC - March 30 2018 Amended Interrogatories.pdf

Tom,

Pursuant to the parties' agreement on the scope of additional Rule 56(f) discovery, please find the following:

- Amended responses and objections to Interrogatories 10 and 11.
- Responsive, non-privileged documents pursuant to the agreed-upon search terms (the original set of terms plus the additional term "conceal!") from the agreed-upon additional custodians from whom we were able to collect documents. To clarify, we also ran the search "conceal!" across the original list of custodians, and the production contains any responsive non privileged documents yielded from that search if any. The production is on the below FTP site:

Site: https://secureftp.skadden.com
Username: sk1323356
Site Password: vT3BX99e (this is case sensitive)
File Password: ~Rx6+#M@Hx&(s&m;

Pursuant to the parties' agreement, this concludes PwC's Rule 56(f) production.

Have a good weekend,

Winston

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

EXHIBIT 4

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR MULTNOMAH COUNTY

JOHN M. MARSHALL and KAREN M. MARSHALL, individuals; PATSY L. MARSHALL, an individual; PATSY L. MARSHALL, as personal representative of the ESTATE OF RICHARD L. MARSHALL, deceased; and MARSHALL ASSOCIATED, LLC, an Oregon limited liability corporation, Plaintiffs, vs. PRICEWATERHOUSECOOPERS, LLP, a limited liability partnership, Defendant.	Case No. 17CV11907 ORDER DENYING PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS WITHHELD BY PWC ON PRIVILEGE GROUNDS, OR IN THE ALTERNATIVE, FOR *IN CAMERA* REVIEW

Plaintiffs' Motion to Compel Production of Documents Withheld by PwC on Privilege Grounds was heard on Friday, June 30, 2023. At that hearing, Plaintiffs were represented by Scott Hessell and Jeff Pitzer; Defendant was represented by Christopher Landgraff and Katharine Roin. Rather than proceed to the contested hearing, the parties agreed that Defendant would submit the documents at issue in the privilege log to the Court for *in camera* review.

The Court finds that the disputed documents have indeed been properly withheld by Defendant for reasons of attorney-client privilege or work product, or both. After reviewing the documents and considering the written memoranda of the parties outlining their respective

positions, Plaintiffs' Motion to Compel Production of Documents Withheld by PwC on Privilege Grounds is DENIED.

IT IS SO ORDERED.

DATED this 12th day of July, 2023.

Katharine von Ter Stegge
Multnomah County Circuit Court Judge

Original: Court File

cc: Jeff Pitzer and Peter Grabiel, Counsel for Plaintiffs
Bruce Cahn, Christopher Landgraff, and Katharine Roin, Counsel for Defendant PricewaterhouseCoopers

EXHIBIT 5

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

JOHN M. MARSHALL and KAREN M. MARSHALL, individuals; PATSY L. MARSHALL, an individual; PATSY L. MARSHALL, as personal representative of the ESTATE OF RICHARD L. MARSHALL, deceased; and MARSHALL ASSOCIATED, LLC, an Oregon limited liability corporation, Plaintiffs, vs. PRICEWATERHOUSE COOPERS, LLP, a limited liability partnership; and SCHWABE WILLIAMSON & WYATT, P.C., an Oregon professional corporation, Defendants.	Case No. 17CV11907 STIPULATED PROTECTIVE ORDER HON. JERRY B. HODSON

Pursuant to the stipulation of Plaintiffs John M. Marshall, Karen M. Marshall, Patsy L. Marshall, the Estate of Richard L. Marshall, and Marshall Associated, LLC, through attorneys Pitzer Law, and Defendant PricewaterhouseCoopers LLP ("PwC"), through attorneys Lane Powell PC, (collectively, the "Parties"), IT IS HEREBY ORDERED as follows:

1. In this Protective Order, the words set forth below shall have the following meanings:

a. "Court" means the Hon. Jerry B. Hodson, or any other judge to which this Proceeding may be assigned, including Court staff participating in such proceedings.

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b. "Disclose" or "Disclosed" or "Disclosure" means to reveal, divulge, give, or make available documents, testimony, or information.

c. "Documents" means any "electronically stored information, writings, drawings, graphs, charts, photographs, sound recordings, images, and other date or data compilations from which information can be obtained and translated, if necessary, . . . through detection devices or software into a reasonably usable form," ORS § 40.550, whether prepared by you or another person that is in your possession, custody, or control.

d. "Testimony" means all depositions, declarations, or other testimony taken or used in this proceeding.

e. "Information" means the content of Documents or Testimony.

f. "Proceeding" means the above-captioned action: Marshall, et al. v. PricewaterhouseCoopers, LLP, at al., Case No. 17CV11907.

g. "Marking Party" means the producing party or non-party making a "CONFIDENTIAL" designation.

h. "Confidential Materials" means any Documents, Testimony, or Information designated as "CONFIDENTIAL," as defined below, pursuant to the provisions of this Stipulated Protective Order.

2. This Protective Order governs the discovery and use of Documents, Testimony, and Information provided, produced, or obtained, whether formally or informally, in the course of discovery in this action, including, without limitation, Information provided, produced or obtained as required under Oregon Rules of Civil Procedure, or pursuant to any deposition, subpoena, response to a request for admission, or request for production.

3. Any party or non-party providing Information in the course of discovery in this action shall have the right to designate as "CONFIDENTIAL" any Documents, Information or Testimony that the producing party or non-party in good faith believes contains proprietary

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Information, sensitive financial Information, a trade secret, business procedures and/or policies that the Parties desire to remain confidential, or other confidential research, development, or commercial Information within the meaning of ORCP 36(C), or which could be considered confidential under other applicable law. Confidential Information includes, without limitation, the names, addresses, telephone numbers, social security numbers and other personal identifying Information of persons who are not named parties in this action.

4. The Marking Party shall have the right to designate a Document as "CONFIDENTIAL" before it is Disclosed or produced by clearly marking each page of the Document containing confidential Information with the words "CONFIDENTIAL" or "CONFIDENTIAL—SUBJECT TO PROTECTIVE ORDER." The Marking Party shall make such designation without obscuring any text or interfering with the legibility of the Information.

5. With respect to electronically stored Information ("ESI"), if the ESI is produced in whole or in part in the form of an image file (such as TIFF or PDF), then the Marking Party shall designate the ESI as "CONFIDENTIAL" before it is Disclosed or produced by clearly marking each page of the image file containing confidential Information with the words "CONFIDENTIAL" or "CONFIDENTIAL—SUBJECT TO PROTECTIVE ORDER." Such designation shall apply to any underlying native file as well as the image file. For any ESI produced only in native format, the Marking Party shall designate the ESI as "CONFIDENTIAL" by including the word "CONFIDENTIAL" in the electronic file name. The Marking Party shall make such designation without obscuring any text or interfering with the legibility of the Information.

6. A Marking Party shall have the right to designate deposition Testimony as "CONFIDENTIAL" by any of the following methods:

a. identifying on the record, before the close of the deposition, all "CONFIDENTIAL" Testimony, by specifying all portions of the Testimony that qualify as "CONFIDENTIAL";

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b. provisionally designating the entirety of the Testimony at the deposition as "CONFIDENTIAL" (before the deposition is concluded), provided that the provisional designation will expire 21 days after receipt of the final deposition transcript and the Marking Party, within 21 days of receiving the final deposition transcript, must identify in writing, by page and line number, the portions of the deposition transcript containing confidential Information. The court reporter shall thereafter mark each page of the transcript containing the designated portions with the words "CONFIDENTIAL" or "CONFIDENTIAL—SUBJECT TO PROTECTIVE ORDER."

In circumstances where portions of the deposition Testimony are designated for protection, the transcript pages containing "CONFIDENTIAL" Information may be separately bound by the court reporter, who must affix to the top of each page the words "CONFIDENTIAL" or "CONFIDENTIAL—SUBJECT TO PROTECTIVE ORDER" as instructed by the Marking Party.

7. For Information produced in some form other than Documents, and for any other tangible items, including, without limitation, compact discs or DVDs, the Marking Party must affix in a prominent place on the exterior of the container or containers in which the Information or item is stored with the words "CONFIDENTIAL" or "CONFIDENTIAL—SUBJECT TO PROTECTIVE ORDER." If only portions of the Information or item warrant protection, the Marking Party, to the extent practicable, shall identify the "CONFIDENTIAL" portions.

8. An inadvertent failure to designate Information as "CONFIDENTIAL" shall be without prejudice to any claim that such item is "CONFIDENTIAL", and such party shall not be held to have waived any rights by such inadvertent production. If a party or non-party producing Information in this action inadvertently produces confidential Information without marking or otherwise designating it as such in accordance with the provisions of this Protective Order, such

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party or non-party may give written notice (the "Inadvertent Production Notice") within twenty (20) days of discovery of the inadvertent production, to the receiving parties that the Information is deemed "CONFIDENTIAL" and should be treated as such in accordance with the provisions of this Protective Order. The receiving parties must treat such Information as "CONFIDENTIAL" from the date the Inadvertent Production Notice is received. Disclosure prior to the receipt of the Inadvertent Production Notice to persons not authorized to receive "CONFIDENTIAL" Information shall not be deemed a violation of this Protective Order. This provision is not intended to apply to any inadvertent production of any Information protected by attorney-client or work product privileges. In the event that this provision conflicts with any applicable law regarding waiver of confidentiality through the inadvertent production of Documents, Testimony or Information, such law shall govern.

9. A receiving party shall not be obligated to challenge the propriety of any "CONFIDENTIAL" designation at the time it is made, and the failure to do so shall not preclude a subsequent challenge. If a receiving party challenges such a designation, it shall send or give written notice to the Marking Party of such challenge and clearly state the specific Documents, Testimony, or Information to which each objection pertains, and the specific reasons and support for such objections. The parties shall thereafter meet and confer in good faith to resolve the dispute within seven (7) days of the request. If the challenge cannot be resolved within seven (7) days following the meet and confer, the objecting party has the right to immediately move the Court for an order that the Information at issue is not to be considered and treated as "CONFIDENTIAL" within the meaning of this Order. In the event that the objecting party fails to timely make such motion, such Documents, Testimony, or Information shall remain "CONFIDENTIAL". The Documents, Testimony or Information at issue shall continue to be treated as "CONFIDENTIAL" pursuant to the terms of this Protective Order until the challenge has been resolved by an agreement of the Parties or Court order. The Marking Party shall have

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the burden on any such motion of establishing the applicability of its "CONFIDENTIAL" designation.

10. A receiving party may use Information designated "CONFIDENTIAL" only for purposes of this litigation, and may Disclose such Information only to the following persons:

a. the Parties and those officers, directors, partners, members, employees, and agents of all non-Marking Party, on whose behalf an attorney of record in this proceeding has signed this Stipulated Protective Order deems necessary to aid counsel in the prosecution and defense of this Proceeding;

b. both outside counsel and in-house counsel for the Parties to this action, including paralegals, clerical staff, secretarial staff, and other support staff at their respective law firms and organizations as well as third-party vendors hired for litigation support services (e.g., copying services or e-discovery vendors). Each non-lawyer given access to Confidential Materials shall be advised that such materials are being Disclosed pursuant to, and are subject to, the terms of this Stipulated Protective Order and may not be Disclosed other than pursuant to its terms;

c. any outside consultant or expert (testifying or non-testifying) and their secretarial, technical and clerical employees (including but not limited to photocopy service personnel and document management vendors) retained by the Parties for purposes of this litigation and to whom it is necessary to Disclose the "CONFIDENTIAL" Information, provided that prior to Disclosure, counsel for the non-Marking Party making the Disclosure delivers a copy of this Stipulated Protective Order to such person, explains its terms to such person, and secures the signature of such person on a statement in the form attached hereto as Exhibit A. It shall be the

obligation of the non-Marking Party, upon learning of any breach or threatened breach of this Stipulated Protective Order by any expert or expert consultant, to promptly notify counsel for the Marking Party of such breach or threatened breach;

d. any actual deposition or trial witnesses or witnesses whose Testimony is (in the good faith belief of a party's counsel) reasonably likely to be taken in the case, provided that such witness is advised that such materials are being Disclosed pursuant to, and are subject to, the terms of this Stipulated Protective Order, that they may not be Disclosed other than pursuant to its terms, and that they sign a certification in the form attached hereto as Exhibit A;

e. the Court and any members of its staff to whom it is necessary to Disclose the Information for the purpose of assisting the Court in this proceeding;

f. any stenographers or court reporters in this Proceeding (whether at depositions, hearings, or any other proceeding); and

g. any person indicated on the face of a Document or accompanying covering letter, email, or other communication to be the author, addressee, or an actual or intended recipient of a Document designated as "CONFIDENTIAL" prior to the entry of this order, provided that such witness is advised that such materials are being Disclosed pursuant to, and are subject to, the terms of this Stipulated Protective Order, that they may not be Disclosed other than pursuant to its terms, and that they sign a certification in the form attached hereto as Exhibit A.

h. mock jury participants, provided that counsel for the party making the Disclosure advise such mock jury participants that such materials are being Disclosed pursuant to, and are subject to, the terms of this Stipulated

Protective Order, that they may not be Disclosed other than pursuant to its terms, and that they sign a certification in the form attached hereto as Exhibit A.

i. any mediator or arbitrator that may be used in this Proceeding; and

j. any other person that the Marking Party agrees to in writing or by statement on the record, or any other person upon order of the Court entered upon notice to the Parties.

11. "CONFIDENTIAL" materials shall be used by the persons receiving them only for the purposes of preparing for, conducting, participating in the conduct of, and/or prosecuting and/or defending the Proceeding, and not for any business or other purpose whatsoever.

12. Any of the Parties (or other person subject to the terms of this Stipulated Protective Order) may ask the Court, after appropriate notice to the other Parties, to modify or grant relief from any provision of this Stipulated Protective Order.

13. Entering into, agreeing to, and/or complying with the terms of this Stipulated Protective Order shall not:

a. operate as an admission by any person that any particular Document, Testimony, or Information marked "CONFIDENTIAL" contains or reflects trade secrets, proprietary, confidential, or competitively sensitive business, commercial, financial, or personal Information; or

b. prejudice in any way the right of any party to the Proceeding (or any other person subject to the terms of this Stipulated Protective Order):

i. to seek a determination by the Court of whether any particular Confidential material should be subject to protection as "CONFIDENTIAL" under the terms of this Stipulated Protective Order; or

ii. to seek relief from the Court on appropriate notice to all other parties to the Proceeding from any provision(s) of this Stipulated Protective Order, either generally or as to any particular Document, Material, or Information.

14. Any party to the Proceeding who has not executed this Stipulated Protective Order as of the time it is presented to the Court for signature may thereafter become a signatory party to this Order by the party or its counsel signing and dating a copy thereof and filing the same with the Court, and serving copies of such signed and dated copy upon the other Parties to this Stipulated Protective Order.

15. Any Information that may be produced during discovery by a non-party to the Proceeding, pursuant to subpoena or otherwise, may be designated by such non-party as "CONFIDENTIAL" under the terms of this Stipulated Protective Order, and any such designation by a non-party shall have the same force and effect, and create the same duties and obligations, as if made by one of the Parties. Any such designation shall also function as a consent by such producing party to the authority of the Court in the Proceeding to resolve and conclusively determine any motion or other application made by any person or party with respect to such designation, or any other matter otherwise arising under this Stipulated Protective Order. Additionally, consistent with paragraph 3, one of the Parties may designate as "CONFIDENTIAL" any Information or discovery materials produced by another one of the Parties, another party to the Proceeding or a non-party to the Proceeding by providing written notice to all parties of the relevant document numbers or other identification within thirty (30) days after receiving such Documents or discovery materials. Until such thirty (30) days has expired, all non-party discovery materials shall be treated as confidential. Nothing in this Order shall restrict in any way a party's or non-party's use or disclosure of its own confidential Information.

16. If any person subject to this Stipulated Protective Order who has custody of any "CONFIDENTIAL" materials receives a subpoena, demand, or other legal process in another proceeding seeking Information designated "CONFIDENTIAL," the receiving party shall give prompt notice thereof by electronic mail transmission, followed by either express mail or overnight delivery to counsel of record for the Marking Party (including a copy of the subpoena, demand, or legal process) to the Marking Party in order to permit the Marking Party to seek appropriate relief in the other proceeding. Absent such relief, however, this Stipulated Protective Order does not prohibit a receiving party from complying with any legal obligation to produce Information in any other proceeding. The person receiving the discovery request or subpoena shall in the interim take all necessary steps to protect the potentially confidential Information and shall not produce any Documents, Testimony, or Information pursuant to the Subpoena prior to the date specified for production on the Subpoena.

17. A receiving party intending to file with the Court any Information designated "CONFIDENTIAL" by another person shall provide the Marking Party with at least three judicial days' notice before doing so, identifying with a reasonable description (e.g., by Bates number or deposition transcript page and line number) the designated Information to be included in the filing. The filing party may ask the Marking Party if it would remove the CONFIDENTIAL designation and permit a public filing of the documents. If the Marking Party does not respond to the request within three judicial days, the filing party may file the documents publicly. If the Marking Party declines to remove the CONFIDENTIAL designation, the filing party will proceed to file the documents under seal pursuant to state and local procedural rules, including UTCR 5.160. and SLR 5.165 If the Court grants the motion to seal, the receiving party shall make its filing under seal in accordance with the Court's order and applicable court procedures.

Signed: 1/8/2019 11:33 AM

18. Nothing in this Stipulated Protective Order shall be construed to preclude any of the Parties from asserting in good faith that certain Confidential Materials require additional protection (*e.g.*, that certain Confidential Materials should be limited to disclosure to Parties'

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"Attorneys' Eyes Only"). The Parties shall meet and confer to agree upon the terms of such additional protection.

19. After execution of this Stipulated Protective Order, any of the Parties, or non-Parties properly in possession of Confidential Materials pursuant to the terms of this Stipulated Protective Order, who discloses Confidential Materials to persons other than those authorized to receive Confidential Materials under this Stipulated Protective Order, including the filing or use of any Confidential Materials in another legal proceeding, shall report such Disclosure to the Marking Party. In that event, the non-Marking Party responsible for the unauthorized Disclosure shall make all reasonable efforts to retrieve the Confidential Materials or to obtain the agreement of persons to whom inadvertent Disclosure was made to destroy the improperly Disclosed Confidential Materials and all copies thereof.

20. The parties to the Proceedings shall meet and confer regarding the procedures for use of Confidential Materials at a hearing or trial and shall move the Court for entry of an appropriate order.

21. Nothing in this Stipulated Protective Order shall affect the admissibility into evidence of Confidential Materials, or abridge the rights of any person to seek judicial review or to pursue other appropriate judicial action with respect to any ruling made by the Court concerning the issue of the status of Protected Material.

22. Within sixty (60) days after the conclusion of this action (including any appeals), and unless otherwise agreed to in writing by counsel, each receiving party shall either return the original and all copies of "CONFIDENTIAL" Information to the Marking Party, or agree with counsel for the Marking Party upon appropriate methods and certification of destruction or other disposition of such Confidential Materials and certify in writing that the original and all copies of the "CONFIDENTIAL" Information have been destroyed. Notwithstanding the foregoing, the attorneys of record for each party may retain in their files one copy of all Documents and ESI produced and testimonial transcripts made in this action that reflect "CONFIDENTIAL"

Information, as well as one copy of each pleading, brief, memorandum, motion, communication, and other Documents containing their work product that refer to or incorporate "CONFIDENTIAL" Information provided counsel continues to be bound by the terms of this Protective Order with respect to all such retained Information, or as to any Documents, Testimony, or other Information not otherwise addressed by the above, file a motion seeking a Court order regarding proper preservation of such Materials.

23. The entry of this Stipulated Protective Order does not alter, waive, modify, or abridge any right, privilege, or protection otherwise available to the Parties with respect to the discovery of matters, including, but not limited to, any of the Parties' rights to assert the attorney-client privilege, the attorney work product doctrine, , or other privileges, or any of the Parties' rights to contest any such assertion.

24. The inadvertent production of Information protected from Disclosure by the attorney-client privilege, the work product doctrine, and/or any other applicable privilege or immunity ("Privileged Information") is not a waiver of the privilege or protection from discovery in this case and shall not render discoverable Information that was previously immune from discovery or Disclosure. If any party receives Information that it has reason to believe was produced or Disclosed inadvertently, the receiving party shall promptly notify the producing party of the inadvertent Disclosure. At the request of the producing party, the receiving party shall not further read or review the inadvertently produced Information, and shall make a reasonable effort to return to the producing party or destroy or delete any copies of the inadvertently Disclosed Information. Nothing in this paragraph shall preclude the receiving party from contesting the receiving party's claim that the inadvertently Disclosed Information constitutes Privileged Information or shall limit the right of any party to request that the Court conduct an *in camera* review of the allegedly Privileged Information.

25. The terms of this Stipulated Protective Order shall continue to be binding after the termination of this action and all subsequent proceedings arising from this Proceeding, except

that a party may seek the written permission of the Marking Party or may move the Court for relief from the provisions of this Stipulated Protective Order. To the extent permitted by law, the Court shall retain jurisdiction to enforce, modify, or reconsider this Stipulated Protective Order, even after the Proceeding is terminated.

26. After this Stipulated Protective Order has been signed by counsel for the Parties, it shall be presented to the Court for entry. Counsel agree to be bound by the terms set forth herein with regard to any Confidential Materials that have been produced before the Court signs this Stipulated Protective Order.

27. The Parties and all signatories to the Certification, attached hereto as Exhibit A, agree to be bound by this Stipulated Protective Order pending its approval and entry by the Court. In the event that the Court modifies this Stipulated Protective Order, or in the event that the Court enters a different Protective Order, the Parties agree to be bound by this Stipulated Protective Order until such time as the Court may enter such a different Order. It is the Parties' intent to be bound by the terms of this Stipulated Protective Order pending its entry so as to allow for immediate production of Confidential Materials under the terms herein.

IT IS SO ORDERED.

Signed: 1/8/2019 11:33 AM

Circuit Court Judge Jerry B. Hodson

IT IS SO STIPULATED:

LANE POWELL PC

By */s/ Milo Petranovich*
Milo Petranovich, OSB No. 813376
Peter D. Hawkes, OSB No. 071986
docketing-pdx@lanepowell.com
Telephone: 503.778.2100
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Attorneys for Defendant PricewaterhouseCoopers LLP

PITZER LAW

By */s/ Jeff Pitzer*
Jeff S. Pitzer, OSB No. 020846
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Attorneys for Plaintiffs

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

By */s/ Peter B. Morrison*
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Attorneys for PricewaterhouseCoopers LLP

SPERLING & SLATER, PC

By */s/ Scott Hessell*
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Attorneys for Plaintiffs

Submitted by:
Peter D. Hawkes, OSB No. 071986
Lane Powell PC
Attorneys for Defendant PricewaterhouseCoopers LLP

EXHIBIT A – CONFIDENTIALITY ACKNOWLEDGMENT

1. I have read and understand the attached Stipulated Protective Order that has been entered in *Marshall, et al. v. PricewaterhouseCoopers, LLP, et al.*, Case No. 17CV11907 in the Circuit Court for the State of Oregon for the County of Multnomah.

2. I understand that I may be given access to confidential information, and in consideration of that access, I agree that I shall be bound by all the terms of the Stipulated Protective Order.

3. I understand that I am subject to the jurisdiction of the Multnomah County Circuit Court for any proceedings involving my alleged improper use or disclosure of the confidential information.

4. I understand that I am to retain all originals and copies of the confidential information in my possession in a secure manner and that all copies shall be destroyed or returned to the party producing such documents when the action is concluded.

Signature:_____
Name:_____
Business Address:_____
Position:_____
Date:_____

CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2019, I caused to be served a copy of the foregoing STIPULATED PROTECTIVE ORDER on the following person(s) in the manner indicated below at the following address(es):

Jeff S. Pitzer, Esq.
Pitzer Law
101 SW Main St., Suite 805
Portland, OR 97204
E-Mail: jpitzer@pitzerlaw.net

Scott Hessell, Esq.
Sperling & Slater, PC
55 West Monroe Street, Suite 3200
Chicago, IL 60603
E-Mail: shessell@sperling-law.com

Attorneys for Plaintiffs

- ☑ **by CM/ECF**
- ☐ **by Electronic Mail (courtesy copy)**
- ☑ **by Electronic Mail (e-mail agreement in place)**
- ☐ **by Facsimile Transmission**
- ☐ **by First Class Mail**
- ☐ **by Hand Delivery**
- ☐ **by Overnight Delivery**

s/ Peter D. Hawkes
Peter D. Hawkes

CERTIFICATE OF READINESS
(UTCR 5.100)

This proposed order or judgment is ready for judicial signature because:

☐ Each opposing party affected by this order or judgment has stipulated to the order or judgment, as shown by each opposing party's signature on the document being submitted.

☑ Each opposing party affected by this order or judgment has approved the order or judgment, as shown by signature on the document being submitted or by written confirmation of approval sent to me.

☐ I have served a copy of this order or judgment on all parties entitled to service, and:

- ☐ No objection has been served on me.
- ☐ I received objections that I could not resolve with the opposing party despite reasonable efforts to do so. I have filed a copy of the objections I received and indicated which objections remain unresolved.
- ☐ After conferring about objections, [role and name of opposing party] agreed to independently file any remaining objection.

☐ The relief sought is against an opposing party who has been found in default.

☐ An order of default is being requested with this proposed judgment.

☐ Service is not required pursuant to subsection (3) of this rule, or by statute, rule, or otherwise.

☐ This is a proposed judgment that includes an award of punitive damages and notice has been served on the Director of the Crime Victims' Assistance Section as required by subsection (4) of this rule.

DATED: January 7, 2019

s/Peter D. Hawkes
Peter D. Hawkes

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH
1021 SW Fourth Avenue Portland Oregon 97204
503-988-3022, option 3 http://courts.oregon.gov/multnomah

January 10, 2019

PETER HAWKES
LANE POWELL PC
601 SW 2ND AVE STE 2100
PORTLAND OR 97204

Re: Karen M. Marshall, Patsy L. Marshall, Estate of Richard L. Marshall, Marshall Associated, LLC, John M Marshall vs PricewaterhouseCoopers, LLP, Schwabe Williamson & Wyatt, PC
Case #: 17CV11907 Tort - General

NOTICE OF SIGNED DOCUMENT

A case event that includes a signed document has been added to the Register of Actions for this case.

For further information, log into the Oregon eCourt Case Information (OECI) system or go to a public access kiosk at the courthouse.

Note: Documents may not be attached to events depending on local court business processes.

Hunt, Christine A.

From: Court_Notification@ojd.state.or.us
Sent: Thursday, January 10, 2019 1:52 PM
To: Hawkes, Peter
Subject: Court Notification

You have received a court notification regarding:

Karen M. Marshall, Patsy L. Marshall, Estate of Richard L. Marshall, Marshall Associated, LLC, John M Marshall vs PricewaterhouseCoopers, LLP, Schwabe Williamson & Wyatt, PC, Case #: 17CV11907

Click the link below to view the notification.

https://publicaccess.courts.oregon.gov/Notifications/d738e194810e430dacb47f7faa246466

NOTE: **This email is NOT monitored**. DO NOT reply to this email. If you need to contact the court, use the contact information provided on the enclosed notification.

EXHIBIT 6

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

JOHN M. MARSHALL and KAREN M. MARSHALL, individuals; PATSY L. MARSHALL, an individual; PATSY L. MARSHALL, as personal representative of the ESTATE OF RICHARD L. MARSHALL, deceased; and MARSHALL ASSOCIATED, LLC, an Oregon limited liability corporation, Plaintiffs, v. PRICEWATERHOUSECOOPERS, LLP, a limited liability partnership, Defendant.	Case No. 17CV11907 **PLAINTIFFS' UTCR 6.030 MOTION TO CONTINUE TRIAL DATE PENDING SUPREME COURT DECISION ON SCHWABE APPEAL** **Expedited Consideration Requested**

UTCR 5.010 CERTIFICATION

Pursuant to UTCR 5.010, counsel for the Marshalls conferred in good faith with counsel for PwC regarding the subject matter of this motion. PwC objects to the relief sought by this motion, and also does not agree to expedited consideration.

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UTCR 5.050 CERTIFICATION

Plaintiffs are requesting oral argument on this motion, and estimate that 20 minutes should be sufficient. Official court reporting services are not requested.

UTCR 6.030 MOTION TO POSTPONE TRIAL DATE

Defendant PricewaterhouseCoopers, LLP ("PwC") sought leave to file an amended affirmative defense seeking to allocate fault for Plaintiffs' injuries to former co-defendant Schwabe, Williamson & Wyatt, P.C. ("Schwabe"). Plaintiffs opposed the motion, citing, *inter alia*, O.R.S. 31.600's explicit bar that "there shall be no comparison of fault with any person . . . [w]ho is not subject to action because the claim is barred by a statute of limitation or statute of ultimate repose." ORS § 31.600(2)(c).

On March 21, the Court denied in part and deferred in part PwC's Motion for Leave to File Amended Answer and Affirmative Defenses. *See 3/21/23 Order* at 1. Because the viability of PwC's proposed amended affirmative defense relating to former co-defendant Schwabe's comparative fault will be conclusively determined by the Oregon Supreme Court's pending ruling on whether the statute of ultimate repose applies to Plaintiffs' direct claims against Schwabe, this Court deferred its ruling relating to that proposed amendment "until that opinion is issued." *Id*. at 2. As ordered, the Parties have conducted the discovery necessary to fully litigate the proposed defense, and have been preparing to start the trial on July 31, 2023, as currently scheduled. This motion is not sought for purposes of delay.

In fact, over the course of the last three months, the parties have taken and/or defended approximately 18 depositions, many involving significant travel to

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places like New York, Arizona, Washington D.C., Houston, Texas and Palm Springs, California. The parties have also exchanged exhibit lists, deposition designations, and have conferred on motions *in limine*. Neither side has been sitting on its hands. To the contrary, we have been working hard while hoping that by now a ruling would have come down from the Supreme Court.

Unfortunately, as of the date of this filing, the Oregon Supreme Court has not yet issued an opinion in the Schwabe appeal. The oral argument in the Schwabe case took place on November 29, 2022. The Supreme Court also has not issued an opinion in any of the three other cases argued on the same day.[1] There are at least six additional cases awaiting opinions from the Supreme Court that were argued before November 29, 2022, including at least one argued on June 8, 2022 (*State v. John Olaf Halvorson*, S069142).[2] The two most recent Supreme Court opinions were in cases that were argued in May 2022 (*State v. Turay*, S068894) and September 2022 (*State v. A.R.H.*, S069077). It is thus difficult to predict when an opinion might issue, but the pace of decisions suggests that it could be several more months. Because we are now nearly 30 days from the start of the trial, and firm commitments on lodging, travel, experts and other expenses

[1] The other cases argued on November 29, 2022 were: *Trebelhorn v. Prime Wimbeldon SPE, LLC*, S069417, *Susan Clark v Eddie Bauer, LLC*, S069438, and *Walton v. Neskowin Regional Sanitary Authority*, S069004.

[2] The five other cases awaiting decisions from earlier oral argument sessions are *State v. Brian G. Hubbell*, S069092 (argued 9/23/2022), *Haas v. Carter*, S069255 (argued 9/30/2022), *Ingle v. Matteucci*, S069222 (argued 9/30/2022), M*oody v. Oregon Community Credit Union*, S069409 (argued 11/17/2022), and *PNW Metal Recycling Inc. v. Oregon Dep't of Envtl Quality*, S09412 (argued 11/17/2022).

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are imminent, Plaintiffs respectfully request that the Court continue the existing trial date until after the Supreme Court issues its decision in the Schwabe appeal.

To proceed to trial on the current schedule, the Court would need to rule on PwC's motion without the Supreme Court's conclusive resolution of Schwabe's status as a party to this case and, in doing so, introduce a potential appeal issue regardless of how the Court rules.

Further, pretrial issues, such as motions *in limine*, the scope of expert testimony, jury instructions, and the verdict form, will be substantially impacted by whether Schwabe is part of the trial. The Court's adjudication of those issues between now and trial could be wasted effort by the parties and the Court until the status of Schwabe as a party is known. If the Supreme Court ultimately revives Plaintiffs' claims against Schwabe, there's no question that a single trial on all claims against both defendants is best for the Court, the parties and the witnesses. A single trial would also avoid potentially inconsistent results. In addition, the undersigned have particular concern about the potential burden of two trials given that both Karen and Patsy Marshall are widows in their 80's, and if we go forward on July 31 against PwC, there is a possibility we could have to try the case a second time against Schwabe. This would impose a significant and unnecessary hardship on the Plaintiffs.

CONCLUSION

For the reasons set forth above, which establish good cause shown, Plaintiffs move that the Court vacate the existing July 31, 2023 trial date and set the case for a status/scheduling conference 30 days after the Supreme Court issues a decision in

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the Schwabe appeal. The trial date was postponed previously on one occasion from April 10, 2023 to the existing date of July 31, 2023.

UTCR 6.030(2) CERTIFICATION

By signing below, pursuant to UTCR 6.030(2) the undersigned certify that they have consulted with and advised their clients on the postponement sought by this motion and Plaintiffs support this request.

DATED this 20th day of June, 2023.

Respectfully submitted,

PITZER LAW

/s/ Jeff S. Pitzer
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Attorney for Plaintiffs (Admitted *Pro Hac Vice*)

CERTIFICATE OF SERVICE

Jeff S. Pitzer, an attorney, hereby certifies that on June 20, 2023, he caused a copy of the foregoing **PLAINTIFFS' UTCR 6.030 MOTION TO CONTINUE TRIAL DATE PENDING SUPREME COURT DECISION ON SCHWABE APPEAL** to be served on the following parties via email pursuant to an email service agreement:

Bruce H. Cahn Mohammed Workicho Kamille Simons Mary Perry LANE POWELL PC 601 SW 2nd Ave. Ste. 2100 Portland, OR 97204 Phone: 503-778-2114 Email: cahnb@lanepowell.com Email: WorkichoM@LanePowell.com Email: SimonsK@LanePowell.com Email: PerryM@LanePowell.com **Attorneys for Defendant PricewaterhouseCoopers LLP**	Christopher Landgraff Daniel C. Taylor Jameson Jones Katharine A. Roin Mark L. Levine Alexandra Genord BARTLIT BECK Courthouse Place 54 West Hubbard Street Chicago, IL 60654 Phone: 312-494-4400 Email: chris.landgraff@bartlitbeck.com Email: daniel.taylor@bartlitbeck.com Email: jameson.jones@bartlitbeck.com Email: kate.roin@bartlitbeck.com Email: mark.levine@bartlitbeck.com Email: alexandra.genord@bartlitbeck.com **Attorneys for Defendant PricewaterhouseCoopers LLP**

/s/ Jeff Pitzer
Jeff Pitzer, OSB No. 020846

EXHIBIT 7

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

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

Plaintiffs,

v. Case No. 17CV11907

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

Defendants.

TRANSCRIPT OF PROCEEDINGS
VOLUME 4
August 3, 2023

BE IT REMEMBERED THAT the above-entitled Court and Cause came regularly on for trial before the Honorable Katharine von Ter Stegge, said trial was reported by Julie A. Walter, Certified Shorthand Reporter and Registered Professional Reporter, on August 3, 2023, commencing at the hour of 8:39 a.m., the proceedings held at the Multnomah County Courthouse, 1200 SW First Avenue, Portland, Oregon

* * *

APPEARANCES

PITZER LAW
Mr. Jeff Pitzer
Mr. Peter Gabriel
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Portland, Oregon 97204
and
SPERLING & SLATER, PC
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APPEARANCES CONTINUED:

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Mr. Christopher Landgraff
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Counsel for Defendant PricewaterhouseCoopers
and
LANE POWELL PC
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Portland, Oregon 97204
Counsel for Defendant PricewaterhouseCoopers

INDEX

THURSDAY, AUGUST 3, 2023

THE COURT: So we are here for day four of trial in Marshall, et al., versus PricewaterhouseCoopers LLC, 17CV11907. We have all of the same lawyers present except for Jeff Pitzer. Are we missing anybody else.

MR. HESSELL: No. Oh, yeah, his partner, Mr. Grabiel.

THE COURT: Okay. So is it Pete Grabiel?

MR. HESSELL: Pete, yes.

THE COURT: Other than that, we've got everybody. Are we ready to go with the jury?

MR. HESSELL: Yes, we're ready to go.

MR. LEVINE: I think there will be some issues with Mr. Weber when he is called live after the video, but Mr. Pitzer is not here, so evidently, we will have to argue it after the break.

THE COURT: How long is the video?

MR. HESSELL: Two and a half hours.

MR. CHEIFETZ: But it's tax stuff. That's great.

THE COURT: Who is the witness?

MR. HESSELL: Mendelson.

(Pause in proceedings)

(The following proceedings were held in the presence of the jury.)

THE COURT: Welcome back. So we will begin with prerecorded testimony by video. This one is two and a half hours long. We will take a break around 10:00.

MR. HESSELL: Plaintiffs call Dan Mendelson.

DAN MENDELSON

was thereupon produced as a witness and, after having been duly sworn on oath, was examined and testified as via videotape:

(Video played)

DIRECT EXAMINATION

BY MR. HESSELL:

"QUESTION: You are a lawyer and CPA. Correct?

"ANSWER: Yes, I am.

"QUESTION: And you are currently active as both a lawyer and CPA?

"ANSWER: No. I am inactive with the bar, with the D.C. bar. I am a licensed CPA in Maryland.

"QUESTION: You went to Georgetown law school. Correct?

"ANSWER: I did.

"QUESTION: And you received a JD and LLM at Georgetown?

"ANSWER: Correct.

"QUESTION: Right. Fair enough. The LLM you received was an advanced legal degree specific to taxation. Correct?

"ANSWER: Correct.

"QUESTION: You have also been an adjunct professor at Georgetown University Law School for nearly 20 years. Correct?

"ANSWER: That's correct.

"QUESTION: You taught at Georgetown law school tax lawyering and professional responsibilities in federal tax practice. Correct?

"ANSWER: That's correct.

"QUESTION: But you taught that class for 20 years at Georgetown law school. Correct?

"ANSWER: 19 years.

"QUESTION: In connection with your job as national director for tax professional responsibility at Deloitte, you developed and communicated guidance to accountants on the standards under applicable laws and regulations. Correct?

"ANSWER: That's accurate.

"QUESTION: And you continued in those sorts of responsibilities when you moved from Deloitte to PwC. Correct?

"ANSWER: Correct.

"QUESTION: You were a national partner at PwC in PwC's tax quality and risk management group for six years. Correct?

"ANSWER: Yes.

"QUESTION: And you worked at PwC from 1995 -- 1999 through 2005 all in its quality and risk management group. Correct?

"ANSWER: That's right.

"QUESTION: And that group is sometimes referred to as tax QRM at PwC. Correct?

"ANSWER: Correct.

"QUESTION: What was the purpose of the tax QRM group at PwC?

"ANSWER: To provide advice and assistance to our partners, managers and staff as needed, primarily in the area of compliance with professional standards. We would also provide practice aides and tools for their practice. We performed practice reviews. We maintained databases and guidance as well as policies.

"QUESTION: Continuing with the subject

the situation, but what I want to refer to is where it got forwarded in the top part of the document. And it got forwarded to a group of people, Bill Galanis, and you know who he is?
A. I do, sure.
Q. He is a high-level guy in the Washington office. And then you see Alan Fox's name?
A. I do.
Q. And he's in the office of general counsel? Do you see that?
A. It says OGC, yes.
Q. And do you ever have any -- and I don't want to ask anything about any discussions you had with him or communications, but did you -- did you know who he was? Had you ever had any contact with him in the past on prior deals?
A. Oh, I talked to the OGC before. I knew who Alan Fox was.
Q. Okay. Now, your "Wow" email gets forwarded to Alan Fox the same day. Correct?
A. It appears so.
Q. And are you aware of any other correspondence relating to your "Wow" email and the explosive topics that you brought up in that email -- that, you know, subsequent to February 14? Was there any

follow up on it at all to your knowledge?
A. No.
Q. It just sort of -- because we haven't seen a single document, a single email, a single anything. It's like it just fell off the face of the earth. You don't remember -- you're not aware of any further communications?
A. Correct.
Q. And you never spoke to anybody again about it. Is that your testimony?
A. Well, other than Galanis on a technical aspect. I don't remember ever talking to -- I mean, we talked to Mendelson a lot regarding the disclosure, okay, but I don't remember ever talking to Alan Fox on this client, no.
Q. Did you -- did you maintain your own, I mean, records on the Marshall transaction back in your office in Portland on your computer system?
A. No.
Q. Why not?
A. Because everything up -- that I have seen up until now was Dempsey's handwritten notes and the actual hard file.
Q. I mean, for example, did you have a policy of just deleting emails?

A. Oh, we've been over that. Yeah, I did if it was no longer relevant.
Q. You would just delete emails?
A. If it was no longer relevant. I lived by my emails.
MR. PITZER: Let's play Clip 34, if we could, Marco.
(Video played).
"QUESTION: The question is do you know whether there were further email communications that followed your "Wow" email?
"ANSWER: Well, that "Wow" email, if you will, was kind of the end of it for me and D.C. I think they were trying to communicate the urgency and seriousness of this matter, which they did, and I think my email says I get it. That was not in our Portland office stack of work papers that talk about this transaction. However, I think other things in our stack of work papers indicate the same thing, largely because of listed transaction. The term listed transaction would have been as concerning to a tax professional as my email was.
"QUESTION: What happened to this email?
"ANSWER: Well, I deleted all my emails. I think you know that.
"QUESTION: No, I don't. I didn't know

that.
"ANSWER: My practice -- I had a very busy practice with over 100 clients. And my -- I worked 12 hours a day. I couldn't keep everything straight in my mind. So my emails became a to-do list for me. So I did not delete them if there was something more for me to do. It's as simple as that. That's how I ran my practice my entire career.
"QUESTION: And otherwise you did delete them if they --
"ANSWER: If it wasn't a to-do item, yes.
"QUESTION: And so it could be, you know, file someone's tax return, and once that was filed, you would delete that email?
"ANSWER: That's how I operated.
"QUESTION: And how is that consistent with this policy that we marked as Weber 37?"
MR. LEVINE: Objection, Your Honor.
THE COURT: What's the basis of the objection?
MR. PITZER: If you can maybe pause it.
MR. LEVINE: For one thing, the document is in, the other is -- can we have sidebar?
THE COURT: Yes.
(Sidebar not reported.)

(Video played.)
"QUESTION: A clear and detailed record of facts on which verbal advice was given and all of that. How is that consistent when you're deleting every email?
"ANSWER: It would have been normal for me, if I thought my specific email was critical to a position we took with a client, to have put that in the hard copy in the office. That would have been critical. So if you could have looked at all my client files back then, you would have seen my emails that I made the decision was critical or somebody else on my staff thought was critical and they would have hard-copied that into the paper file.
"QUESTION: Did you also have a practice of deleting sent emails?
"ANSWER: Oh, all emails.
"QUESTION: So you would go in your inbox; if something wasn't of use any longer, you would delete that?
"ANSWER: Um-hum (affirmative response).
"QUESTION: You would go into your sent email box and delete stuff there as well on a regular basis?

"ANSWER: To be honest, my recollection is we didn't have a sent folder back then like your Apple iPhone does today. We had one repository. It was emails. They went out as sent or they came to you as received. There was one place.
"QUESTION: And did you talk to anybody inside Pricewaterhouse about the propriety of that personal practice of your own, of deleting emails on a regular basis?
"ANSWER: Not that I can think of, Jeff. I know there was no policy inside PwC to not delete emails. There was not that policy. There was this policy to keep things to support what we did, which I think our file does.
"QUESTION: But maybe the most critical email at least that survives that we have seen, which is your "Wow" email, you apparently deleted that one?
"ANSWER: I agree. Apparently I did."
(End of video)
Q. BY MR. PITZER: I think I heard that last answer. I was saying something to Mr. Grabiel, but the "Wow" email we've been talking about that you deleted from your system, is that right?
That's a yes?

A. Yes.
Q. And when did you do that?
A. I have no recollection.
Q. And do you recall that -- you were still working at Pricewaterhouse in 2007, right?
A. I was.
Q. And do you recall that you received, I guess it came to you, but it was directed to Pricewaterhouse, a summons from the IRS, seeking documents about the MAC, you know, the Marshall MAC transaction?
A. I do, I do.
MR. PITZER: And why don't we look at 177. Let's not put it up yet. You have no objection.
MR. LEVINE: No objection.
MR. PITZER: No objection. We will move for the admission of 177, Plaintiffs' 177.
THE COURT: 177 is admitted.
MR. PITZER: If you can sort of zoom in Marco on the top address.
Q. BY MR. PITZER: So this is directed at Pricewaterhouse in care of John Weber. I assume that's -- obviously that's a typo unless your first name is actually John. It's not John?
A. It is not.
Q. Okay. Maybe they mixed up you and John Dempsey

but -- so this comes from the -- if you go up to the top legend, it comes from the Department of Treasury Internal Revenue Service, Large and Mid-Size Business Division. Is that correct?
A. Yes.
Q. And it's directed to Pricewaterhouse, and it comes to -- obviously that's you that it's referring to. John Dempsey, I think, no longer worked there at that time?
A. I don't recall.
Q. And it's attaching a summons regarding First Associated Contractors. Correct?
A. Correct.
Q. For the period April 1 of '02 through March 31 of '03, right?
A. Correct.
Q. And that's the precise sort of span of time during which you and Mr. Dempsey and Pricewaterhouse were advising the Marshalls on the ultimate sale of their company MAC to Fortrend. Is that correct?
A. Agreed.
Q. And then attached to this letter from the IRS is a summons from the IRS. And do you see that at the top, and it says in the matter of First Associated Contractors, formerly known as Marshall Associated

THE COURT: So I said no to 12 through 20.
MR. LANDGRAFF: Correct.
THE COURT: But 3 through 11 was not resolved.
MR. LANDGRAFF: Okay.
THE COURT: I mean, I don't think -- I don't think the findings in the opinion touched this.
MR. LANDGRAFF: We will confirm that and confer with counsel.
THE COURT: Okay. But otherwise it can be played unless you find something persuasive.
MR. RICE: Thank you, Your Honor.
THE COURT: Did we talk about everything?
MR. RICE: Thank you very much for staying.
MR. LANDGRAFF: Thank you, Julie.
THE COURT: Thank you, Julie. Thank you, Andrew.
(Proceedings adjourned at 5:22)

C E R T I F I C A T E

I, Julie A. Walter, CSR No. 90-0173, do hereby certify that, the hearing before Judge von Ter Stegge, was reported by me at the time and place mentioned in the caption herein; that said hearing, was taken down by me in stenotype and thereafter reduced to typewriting; and, that the foregoing transcript, Pages 699 to 995, both inclusive, constitutes a full, true and accurate record of said hearing, and of all other proceedings had during the taking of said hearing, and of the whole thereof, to the best of my ability.
Witness my hand at Portland, Oregon, this 3rd day of August, 2023.

Julie A. Walter
CSR No. 90-0173

EXHIBIT 8

PricewaterhouseCoopers LLP Policy for Retention of Firm Documents

1. *Policy.* All documents (including those kept in an electronic medium) created, sent or received by the Firm that are necessary or appropriate to record, support or otherwise form the basis of the Firm's professional work product or administrative functions (hereinafter "Professional and Administrative Records") and other documents required to be retained in accordance with the particular guidance set forth below shall be retained during the assigned period for retention ("Retention Period") for such records. Documents not required to be retained under this policy should be retained only for so long as they are necessary. Except as otherwise specifically stated below or as set forth in guidance applicable to particular lines of service, the Retention Period for all Professional Records is the Current Period (as defined below) plus seven years. The Retention Period for Administrative Records shall be as described in Section 3 of this policy. After the expiration of the Retention Period, Professional and Administrative Records shall not be retained. Business Unit Leaders and Office Managing Partners are responsible for overseeing compliance with this Policy.

Notwithstanding the general policy statement described above and the specific rules, definitions and examples set forth below and in LOS-specific guidance, the firm must retain all documents (not just working papers) relating to work that is the subject of a pending or threatened lawsuit, government investigation or subpoena, or is reasonably anticipated to become the subject of a lawsuit, investigation or subpoena. In such situations, all documents (including notes, drafts and e-mails) that relate to the subject matter of the proceeding/anticipated proceeding that were in existence at the time the firm became aware of the proceeding and/or reasonably anticipated such a proceeding, should be preserved unaltered (and thus, in the case of electronic audit files, not wrapped up or otherwise altered) until such time as OGC instructs otherwise. **It is the responsibility of each individual at the firm to preserve his or her documents in such situations until OGC instructs otherwise**. Firm personnel should consult OGC prior to revising and/or discarding any documents where there is any question about whether the documents in question should be preserved. Firm personnel should also consult OGC as to what document retention procedures should be followed with respect to documents created after the firm becomes aware of a lawsuit, government investigation or subpoena or after the firm reasonably anticipates such proceedings. OGC will notify the appropriate Records Center and Risk Management of any files that must be retained beyond their assigned retention date due to pending litigation or other reasons. At that time, the files will be retained indefinitely, and discarding will require specific approval of OGC.

The following are examples of the types of circumstances that may give rise to the suspension of normal document retention procedures, the need to preserve documents unaltered, and the suspension of normal wrapping up policies and procedures (to the extent applicable) until OGC instructs otherwise:

- A significant question arises as to the appropriateness or accuracy of prior completed work, such as a question as to whether the accounting for a particular significant item or transaction was correct arising after an audit report is issued, or a question as to whether certain significant tax planning advice previously given was appropriate.
- A restatement of an audit client's financial statements.
- Knowledge of an informal government-directed inquiry of a client where the firm's work relates to the subject of the investigation.
- Knowledge of a subpoena directed to an audit client relating to the client's financial reporting or accounting, or knowledge of a subpoena directed to any client where the subpoenaed records relate to work that the firm performed for the client.
- Informal government-directed inquiry of the firm.
- Subpoena directed to the firm in connection with client litigation and/or a government investigation of the client or

with respect to the firm.

- Threatened litigation against the firm.
- Subpoena and/or claim/litigation directed at the firm regarding the firm's work or regarding the firm.

This policy applies to all lines of service of PricewaterhouseCoopers LLP and all internal firm services matters.

2. *Definitions/Examples.*

(a) *Current Period.*

(i) Definition. "Current Period" means, in most cases, the calendar year during which the document was created, revised or received. In some cases, Current Period means the effective life of the document. Examples of documents falling into the latter category are office leases, personnel files, contracts to which the Firm is a party, engagement letters relating to continuing client engagements, tax planning files and the "permanent file" of a continuing client.

As a general rule, choice of the appropriate Current Period and corresponding date of record retention termination should be made by the person who created or received the document in question, and not by the Records Center. Questions arising in connection with the choice of an appropriate Current Period should be directed to the appropriate Unit, Line of Business or Office Managing Partner, or the Office of General Counsel.

Note that in some situations, the Retention Period will have to be extended on a year-to-year basis, as when the IRS has not closed a particular tax year of a client within the Retention Period.

(ii) *Examples of Measurement of the Retention Period:*

- Audit files relating to the Firm's report, dated March 13, 1997, on the financial statements of Universal Widgets as of December 31, 1996: Terminate retention after December 31, 2004.
- Lease dated November 1, 1993 covering a lease term of February 1, 1994 through January 31, 1995: Terminate retention after December 31, 2002.
- Letter dated August 19, 1996: Terminate retention after December 31, 2003.
- Permanent files deemed superseded on September 30, 1998: Terminate retention after December 31, 2005.
- Tax planning or project file created July 1995 covering a transaction that will affect the tax return for 1995: Terminate retention after the calendar year that is seven years after the year in which the period for tax assessment expires for the 1995 tax return.

(b) "Record, support or otherwise form the basis of the Firm's professional work product or administrative functions."

(i) What it means for documents "to record, support or otherwise form the basis of":
Records "recording, supporting or otherwise forming the basis" of the firm's professional work product and administrative functions are records that are retained in sufficient detail to support the conclusions reached by the firm in its professional work and administrative functions. Not all documents record, support, or otherwise form the basis of the firm's professional work product or administrative functions. Documents such as electronic mail and correspondence, if the communication is necessary to record or support PricewaterhouseCoopers' work, should be included in the engagement files, either electronically or in paper form. By contrast, documents such as electronic mail, correspondence or draft documents that are not necessary to record or support the Firm's work should not be retained beyond the end of the engagement to which they relate unless there is a specific LOS requirement for the retention of such

additional materials. There are specific LOS policies that do require the retention of certain such documents under certain circumstances. All personnel therefore must consult their LOS specific policies to determine the particular retention requirements applicable to their LOS.

- For specific guidance and additional requirements as to the retention of audit and review documents and records, see PwC Audit US Section 9400 "Retention of Assurance Engagement Documents."
- For specific guidance as to the retention of tax documents and records, see Tax Policy 14.5.5 – "Methodologies – Record Retention – Retention of firm documents and files"
- For specific guidance as to the retention of records relating to the Financial Advisory Services practice, see FAS DA&I Document Retention Policy.

(ii) What it means to "record, support, or otherwise form the basis of administrative functions": A record "records or supports administrative functions" under the meaning of paragraph 1 of this policy if it constitutes substantive communication with a third person on a significant issue in a firm business matter, constitutes an agreement between the firm and third parties (including firm personnel) regarding procurement of services for the firm or other administrative matters, records personnel or Human Resources information, or records or supports other firm business administrative information (such as financial information, office administration information, etc.).

3. *Retention Period For Administrative Records*:

(a) Documents pertaining to Firm governance and regulatory matters: permanent*.

(b) Final negotiated agreements and related documents pertaining to mergers or acquisitions by the Firm, as designated by OGC: permanent*.

(c) Minutes of meetings of the Firm's Board of Partners and Principals and the Board's Committees, as well as other Firm Committees designated by the Firm's Senior Partner: (permanent*).

(d) Certain legal or historical files designated by the General Counsel: discretion of OGC.

(e) Firm Policy Releases: until superseded. The partner or director leading the group issuing the policy should ensure that one full historical set of the Releases or Statements issued by it is retained permanently.

(f) Financial records, including tax returns, of the Firm: permanent*.

(g) Quality review documents and PwC Feedback Program documents, including reports, correspondence, questionnaires, and supporting work papers that identify or relate to findings or evaluations of specified offices or individuals: 12 months from date of creation for non-ECLIPSE documents, 24 months from month of creation for ECLIPSE documents, except where such documents relate specifically to work that is the subject of a pending, threatened or reasonably anticipated lawsuit, government investigation or subpoena, in which case such documents must be preserved until such time as OGC instructs otherwise. Quality review documents that do not relate

specifically to work that is the subject of a pending, threatened or reasonably anticipated lawsuit, government investigation or subpoena may be retained for a shorter period than the period described above when it is determined by the Lead Partner or Director of Quality for the respective Line of Service that they have served their intended purpose.

(h) Personnel records of former employees: Current Period plus ten years.

(i) Internal administrative documents, such as office financial information or LOS specific administrative reports: discretion of appropriate Unit Leader, Line of Business Leader or Office Managing Partner. Administrative Assurance Management Reports should be retained for a period determined at the discretion of the U.S. Assurance Risk Management Leader or U.S. Assurance Operations Leader.

(j) All other Administrative Records: Current Period plus seven years.

(k) Exceptions to the Current period plus seven years retention period for other Administrative Records: Any person who creates or receives a document or class of documents that he or she believes should be the subject of an exception should refer the matter to OGC.

4. *Exceptions to the Current + seven years policy for Professional Records:*

There are exceptions to the current plus seven years retention period for Professional Records described above. The following retention periods apply for the following types of records:

(a) Exceptions to the current period plus seven year retention period for engagement related files:

Assurance Files	**Tax Files**
• Permanent/Carry-Forward – "No date" until superseded, Current + seven years from the "superseded date."	• Permanent/Carry Forward – "No date" until superseded, Current + seven years from the "superseded date." • Planning/Project – "No date" while active or until superseded. Current + seven years from the "superseded date" or date on which it becomes no longer active. • Tax Return and related work papers – 15 years • Tax IAS – 15 years (Tax Return and related workpapers)
FAS Files • As indicated in U.S. FAS DA&I document retention policy	

(b) Other Exceptions to the Current period plus seven years retention period for Professional Records: Any

* For permanent retention, consider microfilming or other less bulky storage systems.

person who creates or receives a document or class of documents that he or she believes should be the subject of an exception should refer the matter to OGC.

5. *Organization and Timing of Discarding:*

Persons responsible for maintenance of Firm files should conduct a review of all files during each December to identify those files that should be discarded promptly after December 31 of that year. Thereafter, during January of the following year, such documents should be discarded only upon formal authorization from the designated partner.

6. *Other Related Policies*

Other firm policies contain document retention requirements. Specifically, as of the date of the release of this policy, the following are the firm's policies addressing document retention:

- PwC Audit US Section 9400 - RETENTION OF ASSURANCE ENGAGEMENT DOCUMENTS
- PwC Audit US Section 6900 - ARCHIVING AND UNARCHIVING AUDIT FILES
- PwC Audit US Section 2400 - DOCUMENTATION OF AUDIT WORK
- Policies implementing state regulations. As of the date of this release, such policies relate solely to document retention requirements in the state of New York.
- TAX Policy 14.5.5 Methodologies – Record Retention – Retention of firm documents and files
- FAS US – DA&I Record Retention Policy
- Guidelines for Maintenance of Personnel Records
- PwC Feedback Program Policy

EXHIBIT 9

INTG

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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 **PLAINTIFF'S FIRST SET OF INTERROGATORIES TO DEFENDANT PRICEWATERHOUSE COOPERS LLP** JURY TRIAL DEMANDED

Pursuant to the Nevada Rules of Civil Procedure, Plaintiff Michael A. Tricarichi hereby requests that you respond under oath within 30 days to each of the interrogatories set forth below in accordance with the Nevada rules and the Definitions and Instructions also set forth below.

DEFINITIONS

A. "You," "Your," or "PwC" means Pricewaterhouse Coopers LLP and each of its current and former employees, owners, and any predecessors, successors, or affiliates, and any other persons or attorneys acting on its, his, her or their behalf, including Richard Stovsky and Timothy Lohnes.

B. "Plaintiff" means Michael A. Tricarichi and each of his current and former employees, owners, and any predecessors, successors, or affiliates, and any other persons or attorneys acting on its, his, her or their behalf.

C. "Seyfarth Shaw" means Seyfarth Shaw LLP and each of its current and former employees, owners, and any predecessors, successors, or affiliates, and any other persons or attorneys acting on its, his, her or their behalf, including Graham R. Taylor and John E. Rogers.

D. "Rabobank" means Coöperatieve Rabobank U.A. and each of its current and former employees, owners, and any predecessors, successors, or affiliates, and any other persons or attorneys acting on its, his, her or their behalf.

E. "Utrecht" means Utrecht-America Finance Co. and each of its current and former employees, owners, and any predecessors, successors, or affiliates, and any other persons or attorneys acting on its, his, her or their behalf.

F. "Taylor" means Graham R. Taylor and each of his current and former employees, owners, and any predecessors, successors, or affiliates, and any other persons or attorneys acting on its, his, her or their behalf.

G. "Fortrend" means Fortrend International LLC and each of its current and former employees, owners, and any predecessors, successors, or affiliates, and any other persons or attorneys acting on its, his, her or their behalf, including John P. McNabola and Timothy H. Vu (f/k/a Timothy H. Conn, a/k/a Timothy Conn Vu) ("Conn Vu").

H. "Midcoast" means Midcoast Credit Corp. and each of its current and former employees, owners, and any predecessors, successors, or affiliates, and any other persons or attorneys acting on its, his, her or their behalf.

I. "Communication" means any exchange, transfer, or dissemination of facts or information, regardless of the means by which it is accomplished.

H. "Document" means any written, recorded, or graphic material, whether prepared by you or by another person that is in your possession, custody, or control. The term includes memoranda; reports; letters; telegrams; electronic correspondence; electronic mail *(i.e., e-mail);* any communications recorded in any form or medium; notes; minutes; and transcripts of conferences, meetings, and telephone or other communications; contracts and other agreements, statements, ledgers, and other records of financial matters or commercial transactions; notebooks, calendars, and diaries; diagrams, graphs, charts, blueprints, and other drawings; plans and specifications; publications and published or unpublished speeches or articles; photographs, photocopies, microfilm, microfiche, and other copies or reproductions; tape, disk, and other electronic recordings; and computer printouts. The term "document" also includes electronically-stored data from which information can be obtained either directly or by translation through detection devices or readers; any such document is to be produced in a reasonably legible and usable form. The

term "document" includes the original document (or a copy thereof if the original is not available), all drafts, whether or not they resulted in a final document, and all copies which differ in any respect from the original, including any notation, underlining, marking, or information not on the original.

I. "Identify" means:

1. with respect to a person, to state, as applicable, that person's full name, home and business address, phone number, occupation, job title or job description, and present or last-known employer; and

2. with respect to a document or tangible item, to state its type, its name or title, its author, its date of creation, its recipients, its current format or location, its custodian, and to describe with particularity its subject matter.

J. "Describe" means to state with particularity, including but not limited to stating each date, fact, event, occurrence, and identify (pursuant to the term identify) each document, and to identify each individual who can testify as to the alleged dates, facts, events, and occurrences.

K. "Relate to" or "relating to" or their forms mean discuss, describe, refer to, forecast, reflect, contain, analyze, study, report on, comment on, evidence, constitute, set forth, consider, recommend, concern, or pertain to, in whole or in part.

L. "IRS Notice 2001-16" means the notice issued by the IRS on January 18, 2001.

M. "IRS Notice 2008-20" means the notice issued by the IRS on February 11, 2008.

N. "IRS Notice 2008-111" means the notice issued by the IRS on December 2, 2008.

O. "IRS Announcement 2002-2" means the announcement issued by the IRS on January 14, 2002.

P. "Midco" means the concept, strategy, or use of an intermediary entity to facilitate a business transaction and/or to reduce the tax implications of the transaction to the buyer and/or seller, by which an intermediary entity acquires stock from the selling party and subsequently transfers assets to the buying party.

O. "Midco Transaction" means a transaction employing or consistent with the Midco concept or strategy, or consistent with or substantially similar to the transaction(s) described in IRS Notice 2001-16, IRS Notice 2008-20 or IRS Notice 2008-111.

P. "Fortrend Transaction" means a Midco Transaction or the transaction in which the Plaintiff participated, as described in Plaintiff's Complaint, which was found to be a Midco Transaction.

J. A "Listed Transaction" is a transaction that is the same as or substantially similar to one of the types of transactions previously or subsequently determined by the IRS to be a tax avoidance transaction by being identified as such by notice, regulation, or other form of published guidance.

K. To "State the Basis" means to provide the complete factual summary of each element of the claim, contention, allegation or denial. The summary should chronologically describe each and every fact, action and/or occurrence that relates to the particular claim, contention, allegation or denial. In describing each such fact, action and/or occurrence, (i) do so in accordance with these definitions and instructions; (ii) identify each individual and entity claimed to be involved therein; and (iii) in each instance, identify the source from which the information set forth in your response was obtained.

INSTRUCTIONS

A. Respond separately and completely to each request.

B. If you cannot respond fully to any request, please respond to the fullest extent possible and explain the reasons for your inability to respond fully, the efforts you have made to obtain the information or documents requested, and the source from which all responsive information and documents may be obtained to the best of your knowledge or belief.

C. Please construe all singular terms as including the plural, and all plural terms as including the singular.

D. Please construe the connectives "and" and "or" either disjunctively or conjunctively as necessary to bring within the scope of the request all material that might otherwise be construed to be outside its scope.

E. Please construe the terms "all," "any," and "each" as "all, any, and each."

F. Unless otherwise indicated, these requests seek responsive documents and information for the period January 1, 1999 to the present.

INTERROGATORIES

1. For the period between September 9, 2003, and the present, identify and describe all communications You have had with or regarding Plaintiff, or regarding the Fortrend Transaction, including communications with the IRS.

2. Identify and describe any Midco Transaction regarding which you provided advice or otherwise participated, with respect to which a taxpayer was later determined, by the IRS or Tax Court, to have transferee or other tax liability. Please include in Your response the date(s) of the transaction(s) and of the determination(s) of liability; a description of Your role in the transaction(s); and the identity of the other participants in the transaction(s).

3. Identify and describe any Midco Transaction regarding which you provided advice or otherwise participated, with respect to which a taxpayer was later investigated or audited by the IRS. Please include in Your response the date of the transaction(s) and of the investigation or audit; a description of Your role in the transaction(s); and the identity of the other participants in the transaction(s).

4. Identify all PwC personnel who performed any work in connection with any Midco strategy or Midco Transaction identified in response to interogatory no. 2 or no. 3 above, or in connection with the Bishop Midco Transaction or the Marshall Midco Transaction, and provide a brief description of their role(s) in connection with such transaction(s), when their work took place, and what transaction(s) their work was in connection with.

5. Identify all current or former employees of PwC who have been interviewed or deposed or testified at trial, in a hearing, or before a grand jury, in which the Midco strategy or a Midco Tranaction was mentioned, referred to, described, or inquired about. Please include the name of each witness, each date they testified, and the nature of each proceeding.

6. Identify all employees of PwC who personally participated in a Midco Transaction and who attempted to or in fact participated in an Internal Revenue Service amnesty program, such as that described in IRS Announcement 2002-2, or amended their returns to abandon the tax implications of the Midco Transaction on those returns.

7. Identify all persons or entities (including governmental entities) to whom You have produced documents concerning the Midco concept or strategy, Midco Transaction(s) or the Fortrend Transaction, or to whom You otherwise responded to requests for information, summons, subpoenas, or regulatory inquiries concerning same.

8. Identify and describe any governmental investigation or inquiries of any kind into Your use of, promotion of, advice regarding, or role in any Midco Transaction.

9. Identify and describe any communications with the IRS or any other agency relating to Your use of, promotion of, advice regarding, or role in any Midco Transaction.

10. Have You complied with AICPA Statement on Standards for Tax Services No. 6, with respect to the Fortrend Transaction? State the basis for Your answer.

11. Have You complied with Section 10.21 of Treasury Circular No. 230, with respect to the Fortrend Transaction? State the basis for Your answer.

Dated: May 30, 2017

SPERLING & SLATER, P.C.

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Attorneys for Plaintiff Michael A. Tricarichi

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of May, 2017, I caused to be emailed and mailed to the counsel of record listed below a copy of the foregoing Plaintiff's First Set of Interrogatories to Defendant Pricewaterhouse Coopers LLP.

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EXHIBIT 10

REQT

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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 **PLAINTIFF'S AMENDED FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS TO DEFENDANT PRICEWATERHOUSE COOPERS LLP** JURY TRIAL DEMANDED

Pursuant to the Nevada Rules of Civil Procedure, Plaintiff Michael A. Tricarichi hereby requests that, by June 12, 2017, you respond to the requests set forth below in accordance with the Nevada rules and the Definitions and Instructions also set forth below.

DEFINITIONS

A. "You," "Your," or "PwC" means Pricewaterhouse Coopers LLP and each of its current and former employees, owners, and any predecessors, successors, or affiliates, and any other persons or attorneys acting on its, his, her or their behalf, including Richard Stovsky and Timothy Lohnes.

B. "Plaintiff" means Michael A. Tricarichi and each of his current and former employees, owners, and any predecessors, successors, or affiliates, and any other persons or attorneys acting on its, his, her or their behalf.

C. "Seyfarth Shaw" means Seyfarth Shaw LLP and each of its current and former employees, owners, and any predecessors, successors, or affiliates, and any other persons or attorneys acting on its, his, her or their behalf, including Graham R. Taylor and John E. Rogers.

D. "Rabobank" means Coöperatieve Rabobank U.A. and each of its current and former employees, owners, and any predecessors, successors, or affiliates, and any other persons or attorneys acting on its, his, her or their behalf.

E. "Utrecht" means Utrecht-America Finance Co. and each of its current and former employees, owners, and any predecessors, successors, or affiliates, and any other persons or attorneys acting on its, his, her or their behalf.

F. "Taylor" means Graham R. Taylor and each of his current and former employees, owners, and any predecessors, successors, or affiliates, and any other persons or attorneys acting on its, his, her or their behalf.

G. "Fortrend" means Fortrend International LLC and each of its current and former employees, owners, and any predecessors, successors, or affiliates, and any other persons or attorneys acting on its, his, her or their behalf, including John P. McNabola and Timothy H. Vu (f/k/a Timothy H. Conn, a/k/a Timothy Conn Vu) ("Conn Vu").

H. "Midcoast" means Midcoast Credit Corp. and each of its current and former employees, owners, and any predecessors, successors, or affiliates, and any other persons or attorneys acting on its, his, her or their behalf.

I. "Communication" means any exchange, transfer, or dissemination of facts or information, regardless of the means by which it is accomplished.

H. "Document" means any written, recorded, or graphic material, whether prepared by you or by another person that is in your possession, custody, or control. The term includes memoranda; reports; letters; telegrams; electronic correspondence; electronic mail *(i.e., e-mail);* any communications recorded in any form or medium; notes; minutes; and transcripts of conferences, meetings, and telephone or other communications; contracts and other agreements, statements, ledgers, and other records of financial matters or commercial transactions; notebooks, calendars, and diaries; diagrams, graphs, charts, blueprints, and other drawings; plans and specifications; publications and published or unpublished speeches or articles; photographs, photocopies, microfilm, microfiche, and other copies or reproductions; tape, disk, and other electronic recordings; and computer printouts. The term "document" also includes electronically-stored data from which information can be obtained either directly or by translation through detection devices or readers; any such document is to be produced in a reasonably legible and usable form. The term "document" includes the original document (or a copy thereof if the original is not available), all drafts, whether or not they resulted in a final document, and all copies which

differ in any respect from the original, including any notation, underlining, marking, or information not on the original.

I. "Identify" means:

1. with respect to a person, to state, as applicable, that person's full name, home and business address, phone number, occupation, job title or job description, and present or last-known employer; and

2. with respect to a document or tangible item, to state its type, its name or title, its author, its date of creation, its recipients, its current format or location, its custodian, and to describe with particularity its subject matter.

J. "Describe" means to state with particularity, including but not limited to stating each date, fact, event, occurrence, and identify (pursuant to the term identify) each document, and to identify each individual who can testify as to the alleged dates, facts, events, and occurrences.

K. "Relate to" or "relating to" or their forms mean discuss, describe, refer to, forecast, reflect, contain, analyze, study, report on, comment on, evidence, constitute, set forth, consider, recommend, concern, or pertain to, in whole or in part.

L. "IRS Notice 2001-16" means the notice issued by the IRS on January 18, 2001.

M. "IRS Announcement 2002-2" means the announcement issued by the IRS on January 14, 2002.

N. "IRS Notice 2008-20" means the notice issued by the IRS on February 11, 2008.

O. "IRS Notice 2008-111" means the notice issued by the IRS on December 2, 2008.

P. "Midco" means the concept, strategy, or use of an intermediary entity to facilitate a business transaction and/or to reduce the tax implications of the transaction to the buyer and/or seller, by which an intermediary entity acquires stock from the selling party and subsequently transfers assets to the buying party.

O. "Midco Transaction" means a transaction employing or consistent with the Midco concept or strategy, or consistent with or substantially similar to the transaction(s) described in IRS Notice 2001-16, IRS Notice 2008-20 or IRS Notice 2008-111.

P. "Fortrend Transaction" means a Midco Transaction or the transaction in which the Plaintiff participated, as described in Plaintiff's Complaint, which was found to be a Midco Transaction.

J. A "Listed Transaction" is a transaction that is the same as or substantially similar to one of the types of transactions previously or subsequently determined by the IRS to be a tax avoidance transaction by being identified as such by notice, regulation, or other form of published guidance.

INSTRUCTIONS

A. Respond separately and completely to each request.

B. If you cannot respond fully to any request, please respond to the fullest extent possible and explain the reasons for your inability to respond fully, the efforts you have made to obtain the information or documents requested, and the source from which all responsive information and documents may be obtained to the best of your knowledge or belief.

C. If any document or tangible thing for which production is requested was formerly in existence or in your possession but no longer exists, or no longer is within your

possession, custody, or control, your response should include, for each such document or thing:

1. an identification of the document or thing, and if a document, its author and addressee;
2. the date and circumstances of such loss or destruction; and
3. the reason or justification for such loss or destruction.

D. These document requests seek documents in your possession, custody, or control, even if in the actual possession of a third party, and include documents of your agents, representatives, and your attorneys.

E. If any portion of any document is responsive to a document request, then the entire document must be produced (with appropriate redactions only as authorized by law).

F. Documents produced pursuant to these document requests shall be produced in the order in which they appear in your files and shall not be shuffled or otherwise rearranged without the agreement of the parties serving these requests.

G. Please construe all singular terms as including the plural, and all plural terms as including the singular.

H. Please construe the connectives "and" and "or" either disjunctively or conjunctively as necessary to bring within the scope of the request all material that might otherwise be construed to be outside its scope.

I. Please construe the terms "all," "any," and "each" as "all, any, and each."

J. Unless otherwise indicated, these requests seek responsive documents and information for the period January 1, 1999 to the present.

DOCUMENT REQUESTS

REQUEST NO. 1 All documents concerning, referring or relating to the Bishop Midco Transaction in which PwC participated, which is discussed in *Enbridge Energy Co., Inc. v. U.S.*, 553 F.Supp.2d 716 (S.D.Tex. 2008).

REQUEST NO. 2 All documents concerning, referring or relating to the Marshall Midco Transaction in which PwC participated, which is discussed in *Estate of Marshall v. Commissioner of Internal Revenue*, T.C. Memo 2016-119 (2016).

REQUEST NO. 3 Any policies, procedures, internal guidance, and/or directives in effect on or after September 9, 2003, with respect to communications with clients who previously participated in a Midco Transaction or other Listed Transaction.

REQUEST NO. 4 Documents which contend, conclude or allege that You concealed, hid, or covered up Your involvement in the design, marketing, and implementation of the Midco strategy or Midco Transactions, including the Fortrend Transaction.

REQUEST NO. 5 All documents relating to AICPA Statement on Standards for Tax Services No. 6, with respect to Midco Transaction(s).

REQUEST NO. 6 All documents relating to Section 10.21 of Treasury Circular No. 230, with respect to Midco Transaction(s).

REQUEST NO. 7 All documents relating to any aspect of any IRS amnesty offered in connection with Midco strategies or Midco Transactions, or documents relating to the filing of amended tax returns in connection with a Midco strategy or Midco Transaction, including but not limited to the filing of amended returns by PwC clients or PwC personnel.

REQUEST NO. 8 All court or arbitral rulings, awards, findings of fact, opinions, or decisions relating to Midco strategies or Midco Transactions involving You.

REQUEST NO. 9 All documents You have produced in any other litigation involving Midco strategies or Midco Transactions.

REQUEST NO. 10 For the period on or after April 1, 2003, documents relating to the applicability of any part of the Internal Revenue Code, published court decisions, IRS pronouncements, notices, rules, statements, regulations or other tax laws as they relate to the Fortrend Transaction, including but not limited to Notice 2008-20 or Notice 2008-111.

REQUEST NO. 11 For the period April 1, 2003, to the present, documents concerning, referring or relating to the Fortrend Transaction.

REQUEST NO. 12 Documents produced by You to the Internal Revenue Service or to any other governmental committee, government agency, federal or state prosecutor, or private litigant, relating or referring to the Fortrend Transaction.

REQUEST NO. 13 Transcripts or recordings of, or documents otherwise referring to or reflecting, any testimony, statement or interview given by You referring or relating to the Fortrend Transaction, and any exhibits used during same or referenced in the transcripts.

REQUEST NO. 14 Transcripts or recordings of, or documents otherwise referring to or reflecting, any testimony, statement or interview given by Mr. Stovsky, Mr. Lohnes or any other PwC personnel relating to any Midco Transaction(s), and any exhibits used during that testimony or referenced in the transcripts.

REQUEST NO. 15 Communications with the Internal Revenue Service or any other governmental committee, government agency, or federal or state prosecutor, referring or relating to the Fortrend Transaction, including closing agreements and communications referring or relating to a promoter penalty audit or investigation.

REQUEST NO. 16 Any presentations to or by PwC to or by the Internal Revenue Service, U.S. Department of Justice or other governmental or investigative agency referring or relating to the Fortrend Transaction.

REQUEST NO. 17 Documents constituting, referring or relating to any internal PwC communications regarding, or internal investigation or audit by You relating to the Fortrend Transaction, including any internal audit report.

REQUEST NO. 18 For the period April 1, 2003, to the present, communications between PwC and any third party (including Fortrend, Midcoast, Seyfarth, Taylor, Rabobank and Utrecht) referring or relating to the Fortrend Transaction.

REQUEST NO. 19 For the period April 1, 2003, to the present, documents referring or relating to IRS Notice 2001-16, IRS Notice 2008-20 or IRS Notice 2008-111.

REQUEST NO. 20 For the period April 1, 2003, to the present, documents referring or relating to the compliance, or lack thereof, of the Fortrend Transction with the Internal Revenue Code, IRS regulations or other IRS pronouncements or notices.

REQUEST NO. 21 For the period April 1, 2003, to the present, documents containing or concerning any written or oral communications where any PwC employee, including Stovsky or Lohnes, ever told, or considered telling, Plaintiff (a) that the tax opinion(s) provided by PwC with respect to the Fortrend Transaction were erroneous; (b) that the conduct of any Defendant in this case with respect to the Fortrend Transaction was unlawful, illegal, or criminal; or (c) that Plaintiff should participate in any IRS disclosure or settlement initiative or otherwise settle with the IRS.

REQUEST NO. 22 For the period April 1, 2003, to the present, documents referring to, relating to or concerning the possibility that the Fortrend Transaction might lead to:

a. An IRS audit of one of Your clients;

b. An IRS assertion of transferee liability against one of Your clients;

c. An IRS assertion that the transaction should be recharacterized for tax purposes;

d. An IRS notice of deficiency or notice of liability being sent to one of Your clients;

e. An IRS assertion that You may be subject to promoter penalties;

f. Any other liability for one of Your clients; or

g. Any other liability for You.

REQUEST NO. 23 Documents that support, contradict or concern Your answer to paragraphs 73 and 74 of the Complaint.

REQUEST NO. 24 Documents that support, contradict or concern Your Second Affirmative Defense to the Complaint.

REQUEST NO. 25 For the period April 1, 2003, to the present, documents regarding, referring to or reflecting any minutes, reports, or notes of meetings of Your Board of Directors (or similar governing body) and/or any sub-committees or sections thereof, concerning the Midco concept or strategy or Midco Transaction(s).

Dated: May 30, 2017

SPERLING & SLATER, P.C.

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Attorneys for Plaintiff Michael A. Tricarichi

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of May, 2017, I caused to be emailed and mailed to the counsel of record listed below a copy of the foregoing Plaintiff's Amended First Set of Requests for Production of Documents to Defendant Pricewaterhouse Coopers LLP.

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EXHIBIT 11

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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI, Plaintiff, vs. PRICEWATERHOUSECOOPERS LLP, Defendant.	CASE NO.: A-16-735910-B DEPT. NO.: XXXI **DECLARATION OF ALEXANDRA GENORD, ESQ. IN SUPPORT OF PRICEWATERHOUSECOOPERS LLP'S OPPOSITION TO MICHAEL TRICARICHI'S NRCP 60(B) MOTION FOR RECONSIDERATION**

DECLARATION OF ALEXANDRA GENORD, ESQ. IN SUPPORT OF PRICEWATERHOUSECOOPERS LLP'S OPPOSITION TO MICHAEL TRICARICHI'S NRCP 60(B) MOTION FOR RECONSIDERATION

STATE OF ILLINOIS)
) ss.
COOK COUNTY)

Alexandra Genord, Esq., the declarant, deposes and says as follows:

1. I am an attorney with the law firm Bartlit Beck LLP, counsel for PwC in this lawsuit. I have personal knowledge of all the matters stated below and would competently be able to testify to them if required to do so.

2. I make this declaration in support of PwC's Opposition to Michael Tricarichi's NRCP 60(b) Motion for Reconsideration.

3. This Opposition is made in good faith.

4. Attached as **Exhibit 1** to the Opposition is a true and correct copy of a January 17, 2018 letter regarding discovery in this case from Winston Hsiao, prior counsel for PwC, to Thomas Brooks, counsel for Michael Tricarichi.

5. Attached as **Exhibit 2** to the Opposition is a true and correct copy of a December 21, 2017 letter regarding discovery in this case from Peter Morrison, prior counsel for PwC, to Scott Hessell, counsel for Michael Tricarichi.

6. Attached as **Exhibit 3** to the Opposition is a true and correct copy of a March 31, 2018 production email from Winston Hsiao, prior counsel for PwC, to Thomas Brooks, counsel for Michael Tricarichi.

7. Attached as **Exhibit 4** to the Opposition is a true and correct copy of the July 12, 2023 Order Denying Plainitffs' Motion to Compel Production of Documents Withheld by PwC on Privilege Grounds, Or In the Alternative, For *In Camera* Review, in *Marshall v. PricewaterhouseCoopers LLP*, Case No. 17CV11907, in Multnomah County Circuit Court.

8. Attached as **Exhibit 5** to the Opposition is a true and correct copy of the January 8, 2019 Stipulated Protective Order in *Marshall v. PricewaterhouseCoopers LLP*, Case No. 17CV11907, in Multnomah County Circuit Court.

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9. Attached as **Exhibit 6** to the Opposition is a true and correct copy of the Plaintiffs' June 20, 2023 UTCR 6.030 Motion to Continue Trial Date Pending Supreme Court Decision on Schwabe Appeal in *Marshall v. PricewaterhouseCoopers LLP*, Case No. 17CV11907, in Multnomah County Circuit Court.

10. Attached as **Exhibit 7** to the Opposition is an excerpt of Michael Weber's August 3, 2023 trial testimony in *Marshall v. PricewaterhouseCoopers LLP*, Case No. 17CV11907, in Multnomah County Circuit Court.

11. Attached as **Exhibit 8** to the Opposition is a true and correct copy of PricewaterhouseCoopers LLP Policy for Retention of Firm Documents effective December 2003.

12. Attached as **Exhibit 9** to the Opposition is a true and correct copy of the Plaintiff's First Set of Interrogatories to Defendant PricewaterhouseCoopers LLP, served in this case on May 30, 2017.

13. Attached as **Exhibit 10** to the Opposition is a true and correct copy of the Plaintiff's Amended First Set of Requests For Production of Documents to Defendant PricewaterhouseCoopers LLP, served in this case on May 30, 2017.

14. After plaintiff Michael Tricarichi filed the instant Rule 60(b) motion, PwC brought its Relativity database back online.

15. I reviewed the Relativity database and determined that PwC collected a total of 248,567 documents from Michael Weber and Gary Cesnik, collectively, for purposes of this litigation. I searched those files by date and with certain search terms and phrases that appear in the Wow! email thread. Neither custodian had a copy of the Wow! email in their files.

16. As such, PwC's search based on the parties' agreed-on custodial search parameters (described in Winston Hsiao's August 23, 2017 production transmittal email) could not have located a copy of the document to be reviewed for production.

17. Additionally, I confirmed through various searches that the February 14, 2003 Wow! email thread was not collected from any of the other Tricarichi custodians in the Relativity database.

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18. In the Marshall litigation, the February 14, 2003 Wow! email thread was collected from Bill Galanis's files. It was first processed in the Marshall litigation in March 2019, coded and placed on PwC's privilege log in June 2019, and produced by PwC's current counsel in redacted form on February 3, 2023.

19. PwC put a litigation hold in place on February 1, 2011, for documents relating to Michael Tricarichi's 2003 sale of Westside Cellular.

20. PwC put a litigation hold in place on December 22, 2010 for documents relating to the Marshalls' 2003 sale of Marshall Associated Contractors, Inc. Gary Cesnik and Michael Weber were subject to the litigation hold relating to the Marshalls' MAC stock sale.

Pursuant to N.R.S. 53.045, I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Executed on September 19, 2023

In Cook County, Illinois

/s/*Alexandra Genord*

Alexandra Genord

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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI, Plaintiff, v. PRICEWATERHOUSECOOPERS LLP, Defendant.	CASE NO. A-16-735910-B DEPT NO. XXXI **PLAINTIFF'S NOTICE OF APPEAL**

Notice is hereby given that Plaintiff Michael Tricarichi hereby appeals to the Supreme Court of Nevada from the special order after final judgment, awarding attorney's fees and costs, entered in this action on August 25, 2023, and all other orders rendered appealable by the foregoing.

Dated: September 26, 2023

HUTCHISON & STEFFEN, PLLC

By: */s/ Ariel C. Johnson*
Ariel C. Johnson (13357)
Attorneys for Plaintiff Michael A. Tricarichi

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Hutchison & Steffen, PLLC and that on this 26th day of September, 2023, I caused the above and foregoing documents entitled **PLAINTIFF'S NOTICE OF APPEAL** to be served through the Court's mandatory electronic service system, per EDCR 8.02, upon the following:

ALL PARTIES ON THE E-SERVICE LIST

/s/ Kaylee Conradi
An employee of Hutchison & Steffen, LLC

RPLY
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DISTRICT COURT

CLARK COUNTY, NEVADA

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

The previously undiscovered and improperly withheld "Wow! email" and Risk Management Policy are "smoking gun" documents in every sense. It is shocking to anyone who reads them that a preeminent global accounting firm let its clients get anywhere near Midco transactions, or that it would have an explicit policy to never admit mistakes. Because PwC knew how incriminating the documents would be, it concealed them for years—including by (i) allowing deletion of the Wow! email in violation of PwC's document-retention policies; (ii)

failing to produce the documents despite summonses from the IRS, discovery obligations, and court orders; and (iii) in the *Marshall* litigation, hiding the Wow! email on PwC's privilege log and, after being compelled to produce it, firing Skadden and leaving it to Bartlit Beck earlier this year to produce the email and Risk Management Policy just five months before the *Marshall* trial. Those two documents played a central role in the *Marshall* trial, which resulted in a jury verdict for the Marshalls and judgment against PwC for more than $60 million. Thus, while Tricarichi acknowledges the heavy burden for Rule 60(b) relief, it is necessary here because of PwC's improper (but long-successful) efforts to conceal highly incriminating evidence. Otherwise PwC will be rewarded for its discovery evasions with a $2 million-plus judgment.

Six years ago, the Court denied PwC's motion for summary judgment on Tricarichi's 2003-based negligence claims expressly because Tricarichi was entitled to NRCP 56(f) discovery regarding "PwC's review, promotion or advocacy of, or other advice regarding transactions similar to Mr. Tricarichi's transaction with Fortrend, and the reasons why PwC did not make Mr. Tricarichi aware of those transactions." (Dkt. 100, 5/31/2017 MSJ Order, at 1.) Pursuant to that discovery, PwC should have produced the Wow! email and PwC's Risk Management Policy, both of which fall squarely within the scope of the Court's order and Tricarichi's document requests. But PwC did not produce those documents, and at the hearing on PwC's renewed motion for summary judgment, PwC capitalized on their absence. When the Court asked "[w]hy would there not be factual issues as to the extent of the notice" provided by the IRS document requests to Tricarichi, counsel for PwC responded: "Your Honor, I would say first off this is as good as it gets, because they've had 56(f) discovery on this issue, and it's closed." (Dkt. 116, 9/24/2018 MSJ Tr. at 18:2–9.)

That assertion was false. PwC failed to produce the Wow! email and Risk Management Policy, and those documents go to the heart of the ordered 56(f) discovery. The Wow! email shows that, even before Tricarichi hired PwC to advise on the Midco transaction with Fortrend,

PwC knew the "basic" Midco transaction was so "risky" that it "probably" would "blow[] up at the IRS" and expose clients engaging in such transactions to substantial liability for Fortrend's "tax evasion." (Mot. Ex. 2.) PwC concealed that knowledge from Tricarichi and advised—contrary to what it knew—that the proposed transaction would be respected for tax purposes and that Tricarichi would not be subject to personal liability for Westside's taxes. (Ex. 1, Hessell Reply Decl. ¶ 3.)

PwC obstructed the discovery process and deprived Tricarichi—and every level of the Nevada courts—of critical evidence of what PwC's national office knew but concealed. At minimum, the evidence was sufficient to raise material questions of fact precluding summary judgment on Tricarichi's 2003 claims. It also would have allowed Tricarichi to refute the jury waiver/damage limitation clause as fraudulently induced. It goes to the core of PwC's "we did not know our advice was wrong" defense to Tricarichi's 2008 claims. And it destroys any basis for PwC to argue, with respect to its request for attorney's fees and costs, that it was acting in "good faith," because its $50,000 offer of judgment was made while PwC continued to conceal highly relevant evidence.

PwC seeks to minimize the Wow! email as an off-the-cuff communication about a different Midco transaction. (PwC Br. at 7.) And PwC argues that it "did not commit any discovery violations with respect to these two documents" and that the documents would not have affected the Court's ruling. (*Id.* at 2–3, 13–24.) Alternatively, PwC argues that the Court should ignore the wrongfully withheld documents on the ground that Tricarichi's Rule 60(b) motion is untimely. (*Id.* at 2, 11–13.)

None of PwC's arguments has merit. The unfiltered nature of the Wow! email makes the email *more reliable*, not less, and another court already found that PwC committed discovery violations with respect to the two documents PwC wrongly withheld—sanctioning PwC at trial by instructing the jury that the Wow! email's author, Michael Weber, violated PwC's retention

policies by regularly and improperly deleting his sent and received emails. In this case, PwC represents to the Court that it performed agreed searches on the files of Weber and a recipient of the Wow! email. (PwC's Br. at 2–5, 13–15.) Yet even now, neither PwC nor its current counsel verifies that reasonable searches would not have located or recovered the Wow! email or other related communications. Those documents (which should have been produced in this case in 2017) at least raise questions of fact that could not have been resolved at summary judgment. Nor can PwC avoid Tricarichi's request for relief under Rule 60(b) by arguing that Tricarichi should have filed his motion sooner. Notably, PwC did not produce the documents even in the *Marshall* case until three months after the bench trial and the week before this Court issued its findings of fact. Tricarichi's motion—filed two weeks after the documents were finally made available to him—is timely.

Tricarichi respectfully asks the Court to grant his motion for relief under Rule 60(b).

I. Relief under NRCP 60(b)(2) is warranted because the two PwC documents show what PwC knew and concealed from Tricarichi.

PwC argues that the two documents it failed to produce are not as damning as they seem. (PwC's Br. at 6–10, 19–24.) But on summary judgment the Court would not have accepted PwC's nothing-to-see-here characterization of the documents. Rather, the Court would have drawn all reasonable inferences in Tricarichi's favor. *See Price v. Blaine Kern Artista, Inc.*, 111 Nev. 515, 518 (1995) (explaining that record is viewed "in a light most favorable to the nonmoving party"). And PwC's characterization is objectively baseless in any event, particularly in the face of the Marshalls' $60 million jury verdict against PwC in a case that centered on the two very same documents that PwC improperly withheld here. While PwC dismisses the Wow! email as an irrelevant "off-the-cuff reaction" about a different transaction (PwC's Br. at 7), a straightforward reading of the Wow! email strongly supports a contrary inference—i.e., the email not only is

relevant, but its "off-the-cuff," panicked quality from a senior, buttoned-down PwC partner makes it especially reliable evidence of what PwC knew about Midco transactions.

The Wow! email was written by Michael Weber, who was the co-head of PwC's Portland office that advised on the *Marshall* Midco transaction in late 2002 and early 2003. As the email makes clear, Weber and his Portland colleague were not experts with respect to Midco transactions, but they had been advising the Marshalls based on the premise that PwC did Midco transactions "all the time" and that the basic transaction was not risky to transferee taxpayers. (Mot. Ex. 2.) As the *Marshall* transaction approached closing in March 2003, Weber's Portland colleague belatedly sought feedback from PwC's National Office. **Eleven minutes** after PwC's National Office received the draft 57-page stock-purchase agreement, National Risk Management lead partner Dan Mendelson, after conferring with his National Office colleagues, balked at the Midco transaction itself and made clear that PwC should not advise on such transactions because "the basic transaction was risky." (Mot. Ex. 2.) And after receiving Weber's unfiltered response, Mendelson realized that PwC's Office of General Counsel needed to be involved and forwarded the email chain to the senior tax attorney in PwC's Office of General Counsel. (*Id.*)

After the Wow! email chain was forwarded, there is not a single written communication pertaining to the issues addressed in the email chain (or, at least, none was ever produced). The National Office apparently attempted to be discreet about what they put into writing because, as we now know from the Risk Management Policy that PwC also improperly withheld, PwC had a policy that flatly prohibited "admit[ting] liability, shortcomings, or defects in [its] services." (Mot. Ex. 3.) But Weber's panicked, unfiltered "Wow!" response put into writing what PwC actually knew: the basic Midco transaction posed a substantial risk to PwC's clients. (Mot. Ex. 2.) This evidence is more than sufficient to raise a question of fact that would have precluded summary judgment.

PwC cannot get around this factual question by arguing that the Court already accounted for PwC giving different advice to Tricarichi than it gave to the Marshalls. (PwC's Br. at 21.) The Court *did not know* PwC concealed (from Tricarichi and from the Marshalls) that the basic Midco transaction was not just reportable but would be, practically speaking, financially ruinous. Without the benefit of that concealed evidence, the Court concluded that there were enough differences between the particular Midco transactions to potentially permit different advice from PwC with respect to those transactions. (Dkt. 416, 2/9/2023 Findings of Fact and Conclusions of Law and Judgment, ¶ 39.) But the Wow! email cuts through any differences between the Midco transactions and shows that PwC's National Office experts knew, just eleven minutes after receiving the draft stock-purchase agreement, that the "basic transaction" posed substantial risk to its transferee clients—so much so that Weber immediately documented his concerns.

PwC can no longer argue, as it did at summary judgment, that the IRS document requests in 2008 put Tricarichi on notice about PwC's malpractice. (PwC's Br. at 20–21.) Again, the documents improperly withheld by PwC provide critical context that previously was unknown to Tricarichi and the Court. At summary judgment, when the Court questioned "[w]hy would there not be factual issues as to the extent of the notice" provided by the IRS document requests, PwC's first response was to emphasize that Tricarichi already "had 56(f) discovery on this issue, and it's closed." (Dkt. 116, at 18:2–9.) But we now know what PwC concealed. PwC knew from the beginning that the basic transaction was risky, that it probably would blow up at the IRS, and that Fortrend would engage in "tax evasion" rendering Tricarichi liable for Westside's unpaid taxes. PwC concealed that knowledge from Tricarichi—both by failing to tell him what it knew and by advising him, contrary to what it knew, that he should do the transaction. (Ex. 2, Hessell Reply Decl. ¶ 4, at 9.)

Thus, when Tricarichi received document requests from the IRS in 2008, those requests did not reasonably notify him that PwC's advice was wrong. The IRS investigation and audit of

Westside was consistent with how PwC advised Tricarichi—i.e., while the Westside transaction entailed "some risk," Tricarichi ultimately "should have no successor/transferee liability for any corporate level tax" and the downside is "still better than not doing deal." (Ex. 1 at 3.) In other words, Tricarichi did not need to worry if the IRS investigated the transaction, because any issues would not be Tricarichi's problem (but Fortrend's) and PwC "would still do the transaction 10 times out of 10." (Ex. 2 at 9.) The bottom line is that Tricarichi had no idea PwC concealed its knowledge about the transaction's risk and provided advice that PwC knew was wrong. Nothing in the IRS document requests reasonably suggested that PwC had done so.

PwC argues that the firm "as a whole" did not know the Westside transaction was risky because that transaction involved "a completely different team of PwC professionals" who "closely analyzed" the transaction and "concluded at a more likely than not level of confidence that the transaction did not need to be reported to the IRS." (PwC's Br. at 8.) But PwC cannot dodge liability on grounds that the professionals it assigned to Westside were ignorant about what PwC's National Office knew. It was PwC's responsibility to ensure that its Westside team had the knowledge necessary to competently advise Tricarichi, and at summary judgment, PwC maintained that its Westside team had the requisite knowledge. Indeed, the Court credited PwC's assertion that one of the Westside team members, Timothy Lohnes, had the same expertise as the subject matter experts in the national office. (Dkt. 416 ¶ 126.)

Not only did Lohnes purportedly have the requisite expertise, but he was in the same office (just down the hall from) the members of the National Office who received the Wow! email—including Dan Mendelson (the risk management partner who triggered the Wow! email when he balked at the *Marshall* transaction) and Bill Galanis (a partner with whom Mendelson consulted before balking at the *Marshall* transaction). Although Mendelson was the partner specifically designated within PwC to handle questions regarding listed transactions, nothing in the files PwC produced suggests that he was ever consulted about the Westside transaction. Likewise, while it

appears that Bill Galanis was consulted (Ex. 2 at 7), PwC did not produce any records reflecting the substance of work (if any) that Galanis performed.

II. PwC cannot foreclose relief under NRCP 60(b) by arguing that it did not commit any discovery violations.

PwC asserts that it "did not commit any discovery violations with respect to these two documents." (PwC's Br. at 2.) But that assertion is both irrelevant and false, and none of PwC's attempts to excuse its misconduct has merit.

A. Relief under NRCP 60(b) is warranted regardless of PwC's denial that it committed any misconduct.

PwC did not produce the Wow! email or the Risk Management Policy, even though both documents were clearly encompassed by Tricarichi's discovery requests. Tricarichi obtained those documents in August of this year when they were made public in the *Marshall* trial against PwC, and he promptly moved for relief under NRCP 60(b) two weeks later. PwC's assertion that it did not commit any discovery violations does not affect Tricarichi's entitlement to relief.

B. PwC's denial of any misconduct is demonstrably false and already has led a court to sanction PwC.

There is no question PwC committed discovery violations. As the court in the *Marshall* litigation explained with respect to the Wow! email, "these key emails … were in fact being improperly withheld" and the Marshalls "didn't have those [emails] at critical procedural points in this litigation." (Mot. Ex. 5 at 2584:16–21.) The court found that "the failure to produce [the Wow! email and related email chain] was in fact ***a violation*** of [the court's] order to compel from April of 2019." (*Id*. at 2584:24–2585:1 (emphasis added).) Because of PwC's violation, the Court sanctioned PwC by instructing the jury about PwC's discovery misconduct.

PwC cannot pretend the *Marshall* court's finding and sanction never happened, particularly since PwC's conduct in this case is intertwined with its violations in the *Marshall* litigation (and its lawyers managing the discovery process in both cases were the same). Although

Weber wrote down what PwC knew—and candidly admitted that PwC may have given its clients the wrong advice—no further communications on the subject were ever produced by PwC. Nor was the Wow! email or its substance ever communicated to the Marshalls or the Marshalls' attorneys at the time of the transaction, even though Weber himself wrote that PwC needed to convey the National Office's advice to the Marshalls' attorneys. (Mot. Ex. 2.)

Rather than conveying the substance of Wow! email to its clients or its clients' lawyers, PwC concealed it and took steps to prevent the Wow! email from ever being discovered. Most copies of Wow! email were apparently deleted from PwC's servers, including from the files of Weber himself and of several other key recipients. That spoliation violated PwC's own document-retention policies, which in the ordinary course required preserving the Wow! email until at least 2010. (PwC Br. Ex. 8 ¶ 1 (specifying that general retention period for "all Professional Records is the Current Period … plus seven years").) And because PwC knew the transaction would "probably" blow up at the IRS, PwC's retention policies required a litigation hold to preserve the Wow! email indefinitely. (*Id.*)

As for the one copy of the Wow! email that we know survived, PwC failed to produce it until February 2023, when it finally was produced under the *Marshall* protective order. PwC's failure to produce the email violated PwC's discovery obligations in at least four cases:

1. In 2007, the IRS sent a summons to PwC for, among other things, "[a]ll documents that discuss, describe, effectuate or otherwise relate to" the *Marshall* transaction. (Ex. 3, Hessell Reply Decl. ¶ 5, Request 1.) The IRS explicitly directed that, to the extent PwC did not produce a responsive document on account of spoliation or privilege, PwC was obligated to identify the document not produced. (Ex. 3, Instructions.) But PwC neither produced the Wow! email nor complied with the directive to identify unproduced documents or put it on a privilege log. Instead, on the eve of the Marshalls' first tax trial, PwC submitted a false (or at least deceptive) declaration,

under penalty of perjury, that all of the Marshalls' files had been produced. (Ex. 4, Hessell Reply Decl. ¶ 6.)

2. In 2008, as part of the Westside audit, the IRS sent a summons to PwC for, among other things, "[a]ll documents and communications by, among, or pertaining to the Relevant Parties, that plan, debate, analyze, discuss, describe, effectuate or otherwise relate to [defined] transactions and/or activities." (Ex. 5, Hessell Reply Decl. ¶ 7, Request 4.) The IRS defined "Relevant Parties" to include Fortrend (Ex. 5, Definition 3)—a name that appears in the subject of the Wow! email. The IRS also defined the "transactions and/or activities" to include the Westside transaction and "all similar transactions," meaning "each and every transaction that has some, though not all, features in common with the described transaction." (Ex. 5, Definition 9.) And, again, the IRS explicitly directed that, to the extent PwC did not produce a responsive document on account of spoliation or privilege, PwC was obligated to identify the document not produced. (Ex. 5, Instructions.) But PwC neither produced the Wow! email nor complied with the directive to identify unproduced documents.

Notably, in 2009 (at Tricarichi's request), Stovsky purported to send to Tricarichi all documents responsive to the IRS summons. (Ex. 6, Hessell Reply Decl. ¶ 8.)

3. In 2017, Tricarichi served NRCP 56(f) document requests to PwC that encompassed documents relating to the *Marshall* transaction. (PwC Br. Ex. 10.) But PwC failed to produce the Wow! email, even though Weber and one recipient of the Wow! email, Gary Cesnik, were designated custodians and the word "Fortrend" (which appears in the Wow! email's subject line) was an agreed search term.

4. In 2018, the Marshalls served document requests on PwC. As in this case, the scope of the document requests encompassed the Wow! email, but PwC failed to produce it. Instead, while represented by the same Skadden attorneys that previously represented PwC in this case, PwC wrongly withheld the email as "privileged" and hid the document on its privilege log under

an inaccurate description. This ultimately led to the *Marshall* court's sanction of PwC at trial for violating its discovery obligations. (Mot. Ex. 5 at 2582–85.)

C. None of PwC's attempts to excuse its misconduct has merit.

With respect to the Wow! email, PwC asserts (without verification under oath) that its document searches in 2017 and 2018 did not uncover the email because the relevant custodians (i.e., Weber and Cesnik) already deleted it. But PwC cannot excuse concealment of the Wow! email by asserting that its partners deleted the email before the searches were run. Under PwC's own document-retention policies, "[a]ll documents (including those kept in an electronic medium) created, sent or received by the Firm that are necessary or appropriate to record, support or otherwise form the basis of the Firm's professional work product or administrative functions" were required to "be retained." (PwC's Br. Ex 8, ¶ 1.) In addition, PwC was required to "retain all documents (not just working papers) relating to its work that … is reasonably anticipated to become the subject of a lawsuit, investigation or subpoena." (*Id.*)

The Wow! email falls squarely within both retention requirements. It is the only document PwC ever produced that records the advice of PwC's National Office about a Midco transaction with Fortrend. For that reason alone, the Wow! email had to be retained. Moreover, it is the only document PwC ever produced that explains that PwC may have given its clients the wrong advice and that, if its clients followed that wrong advice, their transaction "probably" would "blow[] up at the IRS" and lead to personal liability. (Hessell Reply Decl. Ex. 2.) Thus, at minimum, PwC reasonably anticipated that its "wrong" advice would result in an investigation or subpoena. For that additional reason, all copies of the Wow! email had to retained.

Even setting aside issues of document preservation and spoliation, PwC received IRS summonses a full decade before the NRCP 56(f) discovery in 2017 and 2018. As addressed above, PwC's productions to the IRS should have included the copy of the Wow! email that survived. Producing the email would have been detrimental to PwC, including with respect to its clients'

then-unknown malpractice claims against the firm. At minimum, the Wow! email would have been available to clients like Tricarichi regardless of the spoliation that PwC caused or permitted to occur. But PwC did not comply with the IRS summonses—neither producing the Wow! email nor disclosing that it would not do so. PwC offers no plausible justification for its noncompliance.

Moreover, PwC's attorneys at Skadden knew about the Wow! email, because in response to the Marshalls' document requests in 2018, they improperly designated the Wow! email as "privileged" and hid the email on a privilege log. Yet despite that knowledge, PwC neither included the Wow! email in its 56(f) productions nor made a supplemental production containing it—not even after PwC's current attorneys at Bartlit Beck took over the representation of PwC in both cases and, after challenges by the Marshalls' counsel, reviewed and finally produced the Wow! email in February 2023 subject to the *Marshall* protective order.

PwC misleadingly highlights that, during a meet-and-confer about the 56(f) discovery, Tricarichi's counsel said he did not need PwC to produce documents regarding the *Marshall* transaction. (PwC's Br. at 4, 15.) Not only is the subject matter of the Wow! email not limited to the *Marshall* transaction, because it goes to the dangerous nature of Midco transactions generally, but the comment was based on the obvious presumption that PwC complied with its discovery obligations to the Marshalls. It provides no basis for excusing PwC's failure produce (or supplement its production with) the Wow! email.

With respect to the Risk Management Policy, PwC cannot explain why it failed to produce the document despite representing in August 2017 that it produced "documents related to any internal policies or guidelines regarding on-going communication with a client after PwC's services had been rendered concerning the client's engagement." (PwC's Br. at 16.) Instead, PwC plays word games—saying that the Risk Management Policy "is *not itself a policy*, but instead a risk management *tool* that *pointed* PwC practitioners *to ARMOR, the Firm's policy repository*, and specifically *to a policy* … for '*detailed guidance* on … troublesome practice matters,' and

that "*provides* practitioners with *a high-level overview* of the steps they should follow if a client brings (or threatens) a claim against the Firm for deficiencies in its services." (PwC's Br. at 17 (italics added).) But PwC may call the document whatever it likes. Call the document a *policy*, or call it a *tool that points to a policy* in PwC's policy repository while providing a high-level overview. Either way, it is "related to [PwC's] internal policies and guidelines regarding on-going communications with a client." It should have been produced.

PwC argues alternatively that its representation about what it produced in 2017 encompassed only documents supporting Tricarichi's continuing-representation argument. (PwC's Br. at 15–18.) In other words, while the Risk Management Policy plainly relates to PwC's policies regarding "on-going communication with a client after PwC's services had been rendered," PwC asserts that the document was properly withheld because the argument it supports is different than the continuing-representation argument. But the scope of the 56(f) discovery and what PwC agreed to produce was in no way confined to that argument. The Court explicitly permitted discovery (among other things) about "the reasons why PwC did not make Mr. Tricarichi aware of those transactions [similar to Mr. Tricarichi's transaction with Fortrend]." (Dkt. 100, at 1.) Nothing in Tricarichi's document requests narrowed the discovery's scope, much less suggested PwC could withhold documents relevant to arguments other than a continuing-representation argument. To the contrary, Tricarichi specifically asked for "[a]ny policies, procedures, internal guidance, and/or directives … with respect to communications with clients who previously participated in a Midco Transaction or other Listed Transaction." (PwC's Br. Ex. 10, Request 3.) That request clearly encompasses documents like the Risk Management Policy.

In short, the conclusion reached by the court in the *Marshall* litigation should be reached here. PwC should have produced the Wow! email and Risk Management Policy, and its failure to do so violated its discovery obligations.

III. Tricarichi's motion for relief under Rule 60(b) is timely.

PwC's remaining argument is that Tricarichi's motion should be denied as untimely. PwC concedes that, when it finally produced the Wow! email and Risk Management Policy in the *Marshall* litigation, it designated the documents as confidential. Thus, under the protective order entered by the court in the *Marshall* litigation, those documents could not be disclosed to Tricarichi or this Court. But PwC argues that, because one of Tricarichi's attorneys also represents the Marshalls in their litigation against PwC, his knowledge that PwC finally produced the documents in January and February of 2023 should be imputed to Tricarichi. According to PwC, Tricarichi's attorney should have shown more "diligence" after PwC finally produced those documents under the *Marshall* protective order to make them available in this case.

The chutzpah of PwC is remarkable. The Wow! email and Risk Management Policy were not available in this case *because PwC failed to produce them*. It should have produced the documents in this litigation in 2017, and it should have produced the Wow! email to the IRS a decade before that. But PwC did not comply with its obligations. It did not produce the Wow! email to the IRS or disclose to the IRS that the Wow! email was not produced. It did not produce the documents to Tricarichi in 2017. And when finally producing the documents under the *Marshall* protective order (after also failing in that litigation to produce them and, instead, hiding the Wow! email on a privilege log), PwC did not supplement its production in this case. PwC is in no position to accuse Tricarichi or his lawyers of failing to act with diligence in forcing PwC to comply with its obligations.

Nor is there any merit to PwC's accusation. While PwC invokes general agency principles as the basis of its argument, PwC cites no authority for imputing knowledge in circumstances like these—when Tricarichi's attorney learned about the documents in the *Marshall* litigation and was bound by a court order to *not* disclose the documents to Tricarichi. *See* Restatement (Third) of Law Governing Lawyers § 28(1) (2023) (explaining that lawyer's knowledge is not imputed when

"the lawyer's legal duties preclude disclosure of the information to the client"); Deborah A. DeMott, *When Is a Principle Charged With an Agent's Knowledge?*, 13 DUKE J. COMP. & INT'L L. 291, 304–05 (2003) ("[A] lawyer's knowledge is not imputed to a client when communicating the knowledge would breach the lawyer's duty to another client."). In addition, PwC fails to suggest any plausible actions that Tricarichi's attorney could have taken to make PwC's documents available any earlier in this litigation. He was forbidden from disclosing the documents to Tricarichi or this Court, and because the Marshalls had no reason or obligation to litigate PwC's assertion of confidentiality under the *Marshall* protective order, he was not free as the Marshalls' attorney to nonetheless litigate PwC's assertion of confidentiality. And while PwC suggests that Tricarichi's attorney could have asked the Court to "extend the Rule 59(b) deadline until the confidentiality issue was resolved" (PwC's Br. at 13), that suggestion is baseless. Even setting aside that the relief sought would have been the same under either rule, Rule 59 is explicit that "the 28-day time periods specified in this rule cannot be extended under Rule 6(b)." NRCP 59(f).

In short, because Tricarichi filed his motion under Rule 60(b) just two weeks after the improperly withheld documents were made available to him, the motion is timely and should be granted. *See United States v. Walus*, 616 F.2d 283, 285 (7th Cir. 1980) (concluding "in light of the strength of the new evidence," refusing to grant relief "would be to accept an evil far greater than waste of the court's or litigant's time").

CONCLUSION

The Wow! email and Risk Management Policy are material, noncumulative evidence that should have been produced by PwC in 2017 and likely would have changed the outcome of this case because, at minimum, they raise material questions of fact regarding PwC's advice and the scope of any notice provided to Tricarichi when he received IRS document requests in 2008. Thus, while Tricarichi acknowledges the additional time and effort that granting Rule 60(b) relief will entail for the Court, he respectfully submits that PwC's conduct has made that relief unavoidable.

Indeed, the significance of the documents that PwC withheld cannot be overstated. The jury trial in the *Marshall* litigation was centered on those documents, which led to a jury verdict for more than $60 million against PwC. In this case, the documents likely would have changed how this Court ruled at various points in the litigation—including in its ruling summary judgment; in its findings of fact and conclusions of law after the bench trial; and in its award of attorney's fees and costs. In addition, Tricarichi would have had the opportunity to press PwC for additional discovery surrounding the Wow! email and related communications—including by seeking assurance from PwC that it had taken all reasonable steps to search for and recover such communications. Tricarichi also would have had an opportunity to use the documents while deposing PwC witnesses, and he could have sought leave to allege a claim of fraudulent concealment.[1]

Relief under Rule 60(b) is warranted for all these reasons. At minimum, Tricarichi should be permitted to rebrief his opposition to PwC's motion for summary judgment on his 2003 claims in light of the previously concealed evidence. Tricarichi thus respectfully asks the Court to grant his motion and communicate the Court's intentions to the Nevada Supreme Court.

Dated: October 25, 2023

SPERLING & SLATER, LLC

By: */s/ Scott F. Hessell*
Scott F. Hessell (*Pro Hac Vice*)
55 West Monroe Street, 32nd Floor
Chicago, IL 60603

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

Attorneys for Plaintiff Michael A. Tricarichi

[1] Tricarichi would be able to allege a fraudulent-concealment claim. "To establish a prima facie case of fraudulent concealment, a plaintiff must offer proof that satisfies five elements: (1) the defendant concealed or suppressed a material fact; (2) the defendant was under a duty to disclose the fact to the plaintiff; (3) the defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; that is, the defendant concealed or suppressed the fact for the purpose of inducing the plaintiff to act differently than she would have if she had known the fact; (4) the plaintiff was unaware of the fact and would have acted differently if she had known of the concealed or suppressed fact; (5) and, as a result of the concealment or suppression of the fact, the plaintiff sustained damages." *Dow Chemical Co. v. Mahlum*, 114 Nev. 1148, 1485 (1998).

REPLY DECLARATION OF SCOTT F. HESSELL

IN SUPPORT OF PLAINTIFF'S MOTION FOR NRCP 60(b) RELIEF

I, Scott F. Hessell, declare as follows:

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

2. I submit this additional declaration in support of Plaintiff's motion for relief under NRCP 60(b).

3. Attached as Exhibit 1 is a true and correct copy of memoranda and notes from the files of Richard Stovsky produced in discovery by PwC.

4. Attached as Exhibit 2 is a true and correct copy of handwritten notes from the files of Richard Stovsky produced in discovery by PwC.

5. Attached as Exhibit 3 is a true and correct copy of the IRS summons issued to PwC regarding the *Marshall* transaction produced in discovery by PwC.

6. Attached as Exhibit 4 is a true and correct copy of PwC's "Declaration of Paralegal Certifying Records Pursuant to Federal Rules of Evidence 803(6) and 902(11)" in the United States Tax Court.

7. Attached as Exhibit 5 is a true and correct copy of the IRS summons issued to PwC regarding the Westside transaction produced in discovery by PwC.

8. Attached as Exhibit 6 is a true and correct copy of Richard Stovsky's letter to Michael Tricarichi, dated September 17, 2019, produced in discovery by PwC.

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

DATED this 25th day of October, 2023.

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

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Hutchison & Steffen, PLLC and that on this 25th day of October, 2023, I caused the above and foregoing documents entitled **PLAINTIFF'S REPLY IN SUPPORT OF HIS MOTION TO RECONSIDER PURSUANT TO NRCP 60(b) BASED ON NEWLY DISCOVERED EVIDENCE** to be served through the Court's mandatory electronic service system, per EDCR 8.02, upon the following:

ALL PARTIES ON THE E-SERVICE LIST

/s/ Kaylee Conradi
An employee of Hutchison & Steffen, LLC

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EXHIBIT PAGE ONLY

EXHIBIT 1

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

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"Red comments are from Telecon on 8/14/03 w/ Lohmer, Folkerth, Tricarichi, Turk, Stovsky" — pencil comments are from earlier mtg @ PwC w/ same group (Lohmer by phone) + Mike Tricarichi + Weinberg

Memo

To: / Location: Westside Cellular, Inc./Michael Tricarichi files / Cleveland BP Tower

From: / Location: Richard P. Stovsky

Date: April 13, 2003 <updated>

Subject: Potential transaction

NOTE: ALL CONCLUSIONS DISCUSSED WITH TRICARICHI, AND JIM TRICARICHI, WERE CLEARLY QUALIFIED AS "MORE LIKELY THAN NOT". FURTHER, NO WRITTEN ANSWERS WERE PROVIDED TO TRICARICHI.

Facts:

Westside Cellular, Inc. (Westside), a "C" Corporation, has been awarded a legal verdict (SETTLEMENT?) in the amount of $65,000,000. Westside is contemplating the following transaction ~~with Newco~~:

post sale facts are assumed

- New shareholders borrow approximately $36,000,000 and purchase 100% of the Westside shares outstanding from Michael Tricarichi ("Tricarichi"), the 100% shareholder. Westside's balance sheet consists of $40,000,000 of cash ($65,000,000 of cash from the legal verdict less bonus payments to employees of $13,000,000 and attorney's fees of $12,000,000), small accounts receivable, and minor furniture/fixtures/compute equipment (see attached).
- New shareholders contribute to Westside, in an Internal Revenue Code Section 351 transaction, high basis/low fair market value property (the assumption is that these are delinquent receivables)
- Westside is now in the business of purchasing "distressed/charged off" credit card debt from credit card issuers at pennies on the dollar, and collecting on this debt

EXHIBIT 25-J
Docket No. 23630-12
Page 1 of 12

- The business purpose for the acquisition of Westside is based on the new business' need for cash to purchase the charged off credit card debt as commercial financing for such purchases is, apparently, difficult. Westside's cash and accounts receivable will provide such needed cash (note that most of the $40,000,000 cash in Westside will be distributed out of Westside and used by the new shareholders of Westside to pay back the cash borrowed to purchase Tricarichi's Westside stock)

- Westside writes off (apparently deductible for federal income tax purposes) some of the high basis/low fair market value property contributed by the new shareholders. This deduction offsets the taxable income created within Westside upon the receipt of the $65,000,000 cash from the legal verdict. As stated above, the new shareholders of Westside receive from Westside cash to pay the loan from the bank used to purchase Tricarichi's shares in Westside

- Westside, now a charged off debt business utilizes "cost recovery tax accounting" which, apparently, results in tax deductions as a portion of the purchased credit card debt is collected

- The suggested result, from a federal tax perspective, is as follows:

  Tricarichi recognizes a long-term capital gain upon the sale of his shares in Westside (THE ASSUMPTION IS THAT ALL OF TRICARICHI'S STOCK HAS BEEN HELD FOR THE REQUISITE LONG-TERM HOLDING PERIOD)

  Westside offsets the taxable income from the legal verdict with the write off of high basis property

  Westside operates, on an ongoing basis (represents that it will be in this business for a minimum of six years), a charged off credit card debt collection business

Issues for discussion:

1. Will the transaction be respected for federal income tax purposes? TIME LOHNES, WNTS PARTNER, WAS INTEGRALLY INVOLVED IN THE ANALYSIS OF THIS TRANSACTION FROM MIKE TRICARICHI'S PERSPECTIVE. AFTER CONSULTING WITH OTHER MEMBERS OF WNTS, AND RESEARCHING THE TRANSACTION, LOHNES CONCLUDED THAT THE RISK TO TRICARICHI WAS THE IRS' RECHARACTERIZATION OF A PORTION OF THE PROCEEDS RECEIVED FROM THE PURCHASER AS FOLLOWS:

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AMOUNT RECEIVED BY TRICARICHI:	$36,000,000
AMOUNT THAT TRICARICHI WOULD HAVE RECEIVED HAD HE NOT SOLD THE STOCK, BUT INSTEAD LIQUIDATED WESTSIDE:	
WESTSIDE GROSS INCOME:	$65,000,000
LESS ATTORNEY'S FEES & BONUSES:	($25,000,000)
TAXABLE INCOME:	$40,000,000
CORPORATE FEDERAL TAX RATE:	34%
FEDERAL TAX:	$13,600,000
AMOUNT AVAILABLE FOR LIQ. DIST.:	$26,400,000
COMPARE WITH ACTUAL PROCEEDS	$34,000,000
AMOUNT RECHARACT. AS ORD. INC.	$ 7,600,000

LOHNES AND STOVSKY POINTED OUT TO TRICHARICHI THAT ONE ALTERNATIVE WOULD BE TO FILE THE 1040 WITH THIS ORDINARY INCOME ELEMENT, THEN IMMEDIATELY FILE A CLAIM FOR REFUND. HOWEVER, TRICARICHI INDICATED THAT HE WOULD NOT BE INCLINED TO DO SO, AND THAT THE STOCK SALE AGREEMENT WOULD PROBABLY PROHIBIT HIM FROM DOING SO. IN ADDITION, LOHNES CONCLUDED THAT ANY 269 ISSUES WOULD BE THE PURCHASER'S PROBLEM, NOT TRICARICHI'S. LOHNES ALSO STATED THAT THE DEDUCTION THE CORPORATION WAS TAKING FOR THE WRITE OFF OF THE HIGH BASIS/LOW VALUE PROPERTY CONTRIBUTED TO WESTSIDE (TO OFFSET THE TAXABLE INCOME IN WESTSIDE RELATIVE TO THE LEGAL VERDICT) WAS SUBJECT TO IRS CHALLENGE (THE IRS COULD PUSH THE DEDUCTION TO THE TIME PERIOD WHEN IT WAS IN THE HANDS OF THE CONTRIBUTING SHAREHOLDER). FURTHER, THE CHARACTER OF THAT LOSS, VS. THE CHARACTER OF THE TAXABLE INCOME FROM THE LEGAL VERDICT MAY NOT MATCH. HOWEVER, THIS IS NOT TRICARICHI'S CONCERN AS THE RESULT WOULD BE A CORPORATE TAX LIABILITY, NOT A SELLING SHAREHOLDER LIABILITY (AND, PER THE DISCUSSION BELOW, TRICARICHI HAS NOT SUCCESSOR/TRANSFERREE LIABILITY FOR WESTSIDE TAXES).

2. Will the transaction be a reportable transaction? LOHNES CONCLUDED THAT A POSITION CAN BE TAKEN THAT THIS IS NOT A REPORTABLE TRANSACTION. TYPICAL "MIDCO" TRANSACTIONS HAVE 3 PARTIES (THIS TRANSACTION HAS ONLY 2), AND TYPICAL MIDCO TRANSACTIONS RESULT IN AN ASSET BASIS STEP UP AND THE ASSOCIATED AMORTIZATION DEDUCTIONS GOING FORWARD (THIS TRANSACTION DOES NOT HAVE THESE CHARACTERISTICS).

3. Does Tricarichi have any liability for the federal income tax liability of Westside should the IRS challenge the write off of assets within Westside that is intended to offset the taxable income from the $65,000,000 legal verdict (less the deductions for attorneys fees and bonuses) (assuming Westside does not have cash sufficient to cover the tax liability)? PER LOHNES AND DON ROCEN (OF WNTS), TRICARICHI SHOULD HAVE NO SUCCESSOR/TRANSFEREE LIABILITY FOR ANY CORPORATE LEVEL TAX AS HE TOOK NOTHING OUT OF WESTSIDE. AT THE TIME TRICARICHI SOLD WESTSIDE, IT WAS A SOLVENT CORPORATION. TRICARICHI WAS NOT THE TRANSFEREE OF ANY WESTSIDE ASSET. **ROCEN TO PROVIDE NOTES MESSAGE.**

4. Is there any federal tax provision the would convert Tricarichi's long term capital gain into ordinary income (i.e. the Collapsible Corporation provisions, any other provision) **CALCULATION NEEDED. NOTE THAT SECTION 341 MAY BE REPEALED BY THE NEW TAX LAW. FURTHER, PER JIM BANKS, THE $65,000,000 TAXABLE INCOME WAS RECOGNIZED (EVEN THOUGH IT WILL ULTIMATELY BE OFFSET WITH DEDUCTIONS SO THAT NO TAX WILL BE INCURRED).**

5. Westside is planning to pay significant bonuses (total of $13,000,000) to certain non-shareholder employees unrelated to Tricarichi. In particular, employee A will receive $2,500,000 (regular compensation $81,000), employee B will receive $2,000,000 (regular compensation $80,000), employee C will receive $1,500,000 (regular compensation $76,000). These bonuses are, presumably, for past services during the period in which Westside was in the litigation that yielded the $65,000,000 verdict (when Westside could only afford to pay modest compensation). Will these bonuses be deductible? PER JIM CONNOR OF WNTS, THESE BONUSES WILL BE DEDUCTIBLE SINCE THEY ARE PAID FOR COMPENSATORY REASONS.

6. Tricarichi is planning to move from Ohio to a non-taxing state so that the gain will escape state taxation. What steps are necessary to accomplish this goal? Will an installment sale effectively defer the gain into 2004 if Tricarichi cannot relocate until 2004? SEE THE STATE TAX MEMO WRITTEN BY DAVID COOK AND RAY TURK OF SALT.

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7. Are any other tax areas applicable such as the Accumulated Earnings Tax provisions, the Personal Holding Company provisions, etc? If so, which party bears the burden for such tax? Would Tricarichi be liable for such taxes? PER PARAGRAPH 3 ABOVE, TRICARICHI SHOULD BE SUBJECT TO NO CORPORATE LEVEL TAX.

8. OPEN ITEMS: Section 341 analysis; Section 384 analysis; Section 453 and 453A analysis and conversation with attorney to ensure the appropriate language is in place in the agreements (note, escrow and Stock Sale) to ensure installment sale treatment for federal tax purposes; representations in Stock Sale agreement re: Tricarichi has no liability for any corporate level taxes;

Note - No installment sale will be used for state tax. (to be re-discussed) per Joey Tuck.

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Memo

To: / Location: Westside Cellular, Inc./Michael Tricarichi files / Cleveland BP Tower

From: / Location: Richard P. Stovsky

Date: April 13, 2003

Subject: Potential transaction

Facts:

Westside Cellular, Inc. (Westside), a "C" Corporation, has been awarded a legal verdict in the amount of approximately $60,000,000. Westside is contemplating the following transaction with Newco:

- Newco shareholders borrow approximately $52,000,000 and purchase 100% of the Westside shares outstanding from Michael Tricarichi ("Tricarichi"), the 100% shareholder. Westside's balance sheet consists of $60,000,000 cash, small accounts receivable, and minor furniture/fixtures/compute equipment.

- Newco shareholders contribute to Newco, in an Internal Revenue Code Section 351 transaction, high basis/low fair market value property (the assumption is that these are delinquent receivables)

- Newco is in the business of purchasing "charged off" credit card debt from credit card issuers at pennies on the dollar, and collecting on this debt

- The business purpose for the acquisition of Westside is based on Newco's need for cash to purchase the charged off credit card debt as commercial financing for such purchases is, apparently, difficult. Westside's cash and accounts receivable will provide such needed cash

- Newco writes off (apparently deductible for federal income tax purposes) some of the high basis/low fair market value property contributed by its shareholders. This deduction offsets the taxable income created within Westside upon the receipt of the

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Memo

To: / Location: Westside Cellular, Inc./Michael Tricarichi files / Cleveland BP Tower

From: / Location: Richard P. Stovsky

Date: April 13, 2003

Subject: Potential transaction

Facts:

Westside Cellular, Inc. (Westside), a "C" Corporation, has been awarded a legal verdict in the amount of approximately $60,000,000. Westside is contemplating the following transaction with Newco:

- Newco shareholders borrow approximately $52,000,000 and purchase 100% of the Westside shares outstanding from Michael Tricarichi ("Tricarichi"), the 100% shareholder. Westside's balance sheet consists of $60,000,000 cash, small accounts receivable, and minor furniture/fixtures/compute equipment.

- Newco shareholders contribute to Newco, in an Internal Revenue Code Section 351 transaction, high basis/low fair market value property (the assumption is that these are delinquent receivables)

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- Westside, now a charged off debt business utilizes "cost recovery tax accounting" which, apparently, results in tax deductions as a portion of the purchased credit card debt is collected

- The suggested result, from a federal tax perspective, is as follows:

  Tricarichi recognizes a long-term capital gain upon the sale of his shares in Westside

  Westside offsets the taxable income from the legal verdict with the write off of high basis property

  Westside operates, on an ongoing basis (represents that it will be in this business for a minimum of six years), a charged off credit card debt collection business

Issues for discussion:

1. Will the transaction be respected for federal income tax purposes?

2. Will the transaction be a reportable transaction?

3. Does Tricarichi have any liability for the federal income tax liability of Westside should the IRS challenge the write off of assets within Westside that is intended to offset the taxable income from the $60,000,000 legal verdict (assuming Westside does not have cash sufficient to cover the tax liability)?

4. Is there any federal tax provision the would convert Tricarichi's long term capital gain into ordinary income (i.e. the Collapsible Corporation provisions, any other provision)

5. Westside is planning to pay significant bonuses to certain non-shareholder employees unrelated to Tricarichi. In particular, employee A will receive $2,500,000 (regular compensation $81,000), employee B will receive $2,000,000 (regular compensation $80,000), employee C will receive $1,500,000 (regular compensation $76,000). These bonuses are, presumably, for past services during the period in which Westside was in the litigation that yielded the $60,000,000 verdict (when Westside could only afford to pay modest compensation). Will these bonuses be deductible?

6. Tricarichi is planning to move from Ohio to a non-taxing state so that the gain will escape state taxation. What steps are necessary to accomplish this goal? Will an installment sale effectively defer the gain into 2004 if Tricarichi cannot relocate until 2004?

7. Are any other tax areas applicable such as the Accumulated Earnings Tax provisions, the Personal Holding Company provisions, etc? If so, which party bears the burden for such tax? Would Tricarichi be liable for such taxes?

PRICEWATERHOUSECOOPERS

Memo

To: / Location:	Westside Cellular, Inc./Michael Tricarichi files / Cleveland BP Tower
From: / Location:	Richard P. Stovsky
Date:	April 13, 2003
Subject:	Potential transaction

Facts:

Westside Cellular, Inc. (Westside), a "C" Corporation, has been awarded a legal verdict in the amount of approximately $60,000,000. Westside is contemplating the following transaction with Newco:

- Newco shareholders borrow approximately $52,000,000 and purchase 100% of the Westside shares outstanding from Michael Tricarichi ("Tricarichi"), the 100% shareholder. Westside's balance sheet consists of $60,000,000 cash, small accounts receivable, and minor furniture/fixtures/compute equipment.
- Newco shareholders contribute to Newco, in an Internal Revenue Code Section 351 transaction, high basis/low fair market value property (the assumption is that these are delinquent receivables)
- Newco is in the business of purchasing "charged off" credit card debt from credit card issuers at pennies on the dollar, and collecting on this debt
- The business purpose for the acquisition of Westside is based on Newco's need for cash to purchase the charged off credit card debt as commercial financing for such purchases is, apparently, difficult. Westside's cash and accounts receivable will provide such needed cash
- Newco writes off (apparently deductible for federal income tax purposes) some of the high basis/low fair market value property contributed by its shareholders. This deduction offsets the taxable income created within Westside upon the receipt of the

$60,000,000 cash from the legal verdict. The shareholders of Newco receive from Newco cash to pay the loan from the bank used to purchase Tricarichi's shares in Westside

- Westside, now a charged off debt business utilizes "cost recovery tax accounting" which, apparently, results in tax deductions as a portion of the purchased credit card debt is collected

- The suggested result, from a federal tax perspective, is as follows:

  Tricarichi recognizes a long-term capital gain upon the sale of his shares in Westside

  Westside offsets the taxable income from the legal verdict with the write off of high basis property

  Westside operates, on an ongoing basis (represents that it will be in this business for a minimum of six years), a charged off credit card debt collection business

Issues for discussion:

1. Will the transaction be respected for federal income tax purposes?

2. Will the transaction be a reportable transaction?

3. Does Tricarichi have any liability for the federal income tax liability of Westside should the IRS challenge the write off of assets within Westside that is intended to offset the taxable income from the $60,000,000 legal verdict (assuming Westside does not have cash sufficient to cover the tax liability)?

4. Is there any federal tax provision the would convert Tricarichi's long term capital gain into ordinary income (i.e. the Collapsible Corporation provisions, any other provision)

5. Westside is planning to pay significant bonuses to certain non-shareholder employees unrelated to Tricarichi. In particular, employee A will receive $2,500,000 (regular compensation $81,000), employee B will receive $2,000,000 (regular compensation $80,000), employee C will receive $1,500,000 (regular compensation $76,000). These bonuses are, presumably, for past services during the period in which Westside was in the litigation that yielded the $60,000,000 verdict (when Westside could only afford to pay modest compensation). Will these bonuses be deductible?

PRICEWATERHOUSECOOPERS

6. Tricarichi is planning to move from Ohio to a non-taxing state so that the gain will escape state taxation. What steps are necessary to accomplish this goal? Will an installment sale effectively defer the gain into 2004 if Tricarichi cannot relocate until 2004?

7. Are any other tax areas applicable such as the Accumulated Earnings Tax provisions, the Personal Holding Company provisions, etc? If so, which party bears the burden for such tax? Would Tricarichi be liable for such taxes?

PHC - lawsuit income not PHC income -
interest earned may be, but not over 60%

AA - ? no accumulation
- true claim but always been in
company

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EXHIBIT 2

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

Tricarichi

Richard P. Stovs

...icewate... seCoopers LLP
BP Tower
200 Public Square, 27th Floor
Cleveland, OH 44114-2301
Telephone 216 875 3111

§269 - prevent use of losses

Other penalty - professional penalty.

C-T Holding Period

We have Sub. Authority.

Notes:
341
return n 4534

PRICEWATERHOUSECOOPERS

Exhibit #
Stovsky 42
09/01/2020 - MP

PwC200002(Tricarichi)

4/8/03

<u>Tricarichi</u>

WNPS : Terr Thundeson

1. Acquirer buys stock @ a discount

Feldman – Hahn Loeser – Hill Court
Zurich – Fortune

Concerned that Midco would be liquidated immediately – wanted a rep. that Cellnet remained in existence

Marsh & AON – insure the tax exposure

2. Relocate to Nevada bought house no intent (move for one year then move out)
list of factors

3. Deductibility of bonuses to non-related individuals

4. PHC vs. AET (investment company rule interplay)

Michael A Tricarichi
Westside Cellular, Inc.

23632 Mercantile Rd
Beachwood, Ohio 44122

PwC200003(Tricarichi)

EXHIBIT 104-J
Docket No. 23630-12
Page 2 of 73

AA 001670

4/10/03

1/2

Few

Mci cost investments

MC is in the asset recovery business (primary business)

Purchase written off credit card debt from credit card issuers

KPMG attorneys Tom [illegible]

Purchase stock of companies w/shareholders interested in selling stock

Keep capital in the company and purchase credit card debt for 6 years, also contribute delinquent receivables into the company (351) (high basis, low FMV debt) & collection is used to purchase bad credit card debt

Need new companies due to 351

Business purpose exists

Cellnet remains a stand alone c corp.

Cellnet's A/R has been collected, ~~and tax paid~~ (can be ~~uncollected~~ — will)

Cost Recovery Tax Accounting 3.0 pct for bad credit card @ 6¢ on dollar (50m of debt)

each A/R has a basis of 64, collect from say 20% of the accounts @ 70¢ on dollar. Or 70 is collected, at the same time w/D's of 80%.

Q: why is the lender interested in this loan? in 100% fees?

Why buy Cellnet other assets → cash w/i co. Cash is in co - can leverage

Shelter of gain from litigation proceeds - w/o a high basis low FMV asset disposition
352 (w/4)

Contribution of high basis asset ⟷ for equity

Cash to buy Mike's stock comes from one of the new shareholders (bank borrowing)

Tax opinion insurance

Tax opinion letter - Will include a "no" [illegible] rep - to Cellnet not Mike T.

Not a reportable transaction

PwC200004(Tricarichi)

EXHIBIT 104-J
Docket No. 23630-12
Page 3 of 73

AA 001671

Indemnity

Rep / warrant - certain amt
cert stays in co.
spent for 5-7 yrs.

If tax and offsetting gain is disallowed by IRS,
might have no exposure

Q: what if IRS comes after me?
because co. has — or cert
Answer - it will generate cash
in time for IRS over 3 yrs down the road

4/11/03

Fortune

one cost to buy company

Re-organize company to be in charge of debt business

IRS has never come in

company will have cost to pay by new business operation in one

business purpose: allocate tax cost, cost is needed for charged off debt business

Selling SIH bits?

Bank bits?

PwC200006(Tricarichi)

Tim Lohr - PTE - M&A
202-414-1686

Tricarichi

Transaction

1. Shareholder borrows funds from lender
2. Shareholder purchases Westside Cellular, Inc. ("Westside") from Tricarichi. corporation's assets are comprised of cash, AIR — receivables, furniture & fixtures (negligible), other assets, and a significant litigation receivable (or additional cash)
3. Shareholder contributes to Westside, in an IRC § 351 transaction, high basis, low value assets (credit card debt?)
4. Westside enters into the business of buying distressed credit card debt for pennies on the dollar, and collecting on this debt. Westside employs "cost recovery tax accounting" as follows to generate tax deductions:

$3,000,000 paid for $50,000,000 of credit card debt (.06 on dollar)

ES issue — appearance of pay, of no pay.

Ohio — # in account — Gary Zwick
re: 2003 gain — structure of account
→ Fortrend

* Listed Transaction

Not a company selling assets

Tax opinion

April

* Seller - Ordinary income & collapsible
§ 269

1) Trans
2) State Tax / Ineligible
3) Dept. of Business

* I-T Holding (Fortrend) — Not capital — to capital

PwC200007(Tricarichi)

EXHIBIT 104-J
Docket No. 23630-12
Page 6 of 73

Trevor Bowden X1849 1197

Accuracy
2nd int call 4/16/03
4/3/03

<u>Kohnen call</u>

Risk: Sale proceeds in excess of what another buyer would pay is ordinary income

<u>Lowenstein</u> case:

Purchaser's treatment - bought case with cash. Purchaser had income cash received vs paid

Seller still received loss

$384

Q: Is Tricarichi actually receiving a fee for facilitating a transaction

there is still cash as purchase price & cash in a corp

If cash is used to pay off bank debt, then business purpose of financing the business of the cash is N/A.

Galanis advice to another client to report intercompany gain as ord. inc then file a refund claim immediately

Hypo legend w/ 8 sale

269 - risk all on buyer

IRS could go all ...

60,000,000
39,600,010
52,000,000
12,400,000
31,680
7,440
Fee

65
Fees -12
Comp Exp -13
40
.6

36
.8
28.8
(9.6)

12
.6
7.2

24
.8
19.2

31,680,000
39,120,000

PwC200008(Tricarichi)

AA 001675

EXHIBIT 104-J
Docket No. 23630-12
Page 7 of 73

Tank

Mock of return 1040

Load tax proj. - corporate

PwC200009(Tricarichi)

EXHIBIT 104-J
Docket No. 23630-12
Page 8 of 73

5/5/03

[illegible] – Conference call

✓ [illegible] : high risk to buyer re: low property:

• < 50% chance : ordinary income ∴ would still do the
  (less than)
  transaction 10 times out of 10.

  Medicare tax may apply

✓ Report ordinary income, then file claim for refund.

  Risk of reporting all cap. gains: penalty – same as substantial understatement penalty (but since there is substantial authority, taxpayer penalty is minimal)

• Installment sale rules w/ Conni

EXHIBIT 30-J

PWC-WS 0605

PRICEWATERHOUSECOOPERS

Memo

To: / Location:	Rich Stovsky / Cleveland
From: / Location:	Stephanie Moss / Cleveland
Date:	May 22, 2003
Subject:	Code Section 384 – Limitation on Use of Pre-acquisition Losses to Offset Built-In Gains

acquiring corporation

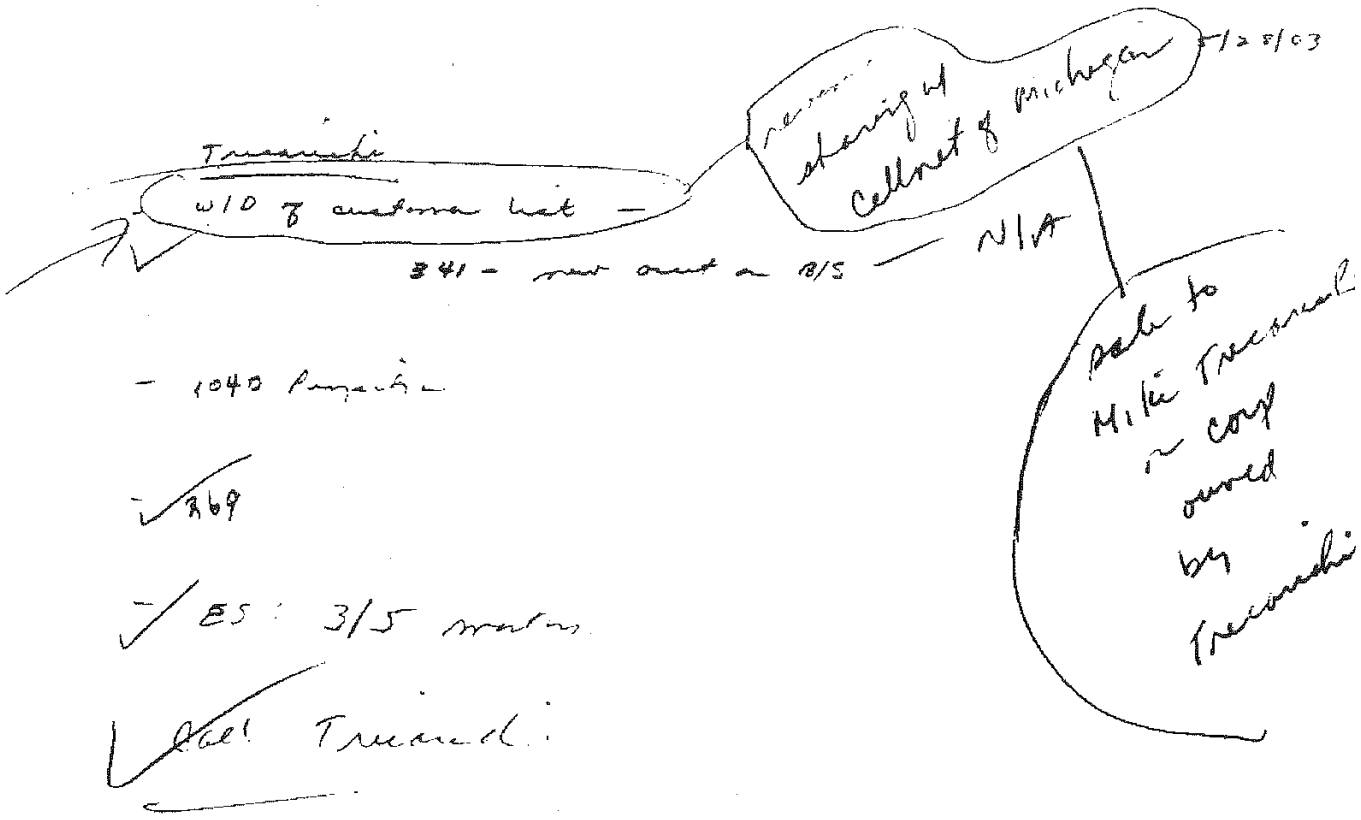
Internal Revenue Code Section 384 states that a corporation may not use its pre-acquistion losses against the built-in gains of a company (1) whose assets are acquired in an (A), (C), or (D) reorganization or (2) that becomes directly or indirectly controlled by the acquiring corporation. This restriction does not apply to the pre-acquisition loss of any corporation if such corporation and the gain corporation were members of the same controlled group at all times during the five year period prior to the acquisition.

Lohnes / Bonds concern - not an issue as no corporate purchaser (verify) In any event, it would not be Aiki Tsumichi problem

may be a corporate purchaser

EXHIBIT 16-J

PWC-WS 0049



Indemnification for all corp tax - to agree.

357 the loss OK? - Not necessarily -
loss should go to
S/H, not wry.

341 - N/A - no collapsible mult.
If AIR in. cash - still o'c of a
accrual method.

If ACT, PHC - co liab

- 269

PwC200011(Tricarichi)

Reserve Iron

Section 341 Analysis (Vaught fully understands the section 341 risk and did not want to perform supporting valuations etc.)

1. Section 341 will not apply unless more than 70% of the gain can be traced to section 341 assets. In other words, if we can prove that at least 30% of the gain is attributable to goodwill, then section 341 is not applicable (see examples below)

2 Q: Does section 341 apply to a corporation (P. Joseph) that was NOT "formed or availed of principally for the manufacture, construction, or production of property, for the purchase of property which (in the hands of the corporation) is (stock in trade/inventory, unrealized receivables or fees, 1231 property), or for the holding of stock in a corporation so formed or availed of, WITH A VIEW TO.

AS P. JOSEPH WAS FORMED TO HOLD A PP INT? and even if the partnership interest fact doesn't avoid 341, clearly P Joseph was not formed with a view to sell.

P. Joseph Iron & Metal

A/B of RIM, L.P. section 341 assets (@ 8/31/96)	
Inventory	23,375,049.00
Investment in R & M Iron Ltd (?)	591,075.00
	23,966,124.00
Profit % to be earned on these assets	0.01
Profit to be earned on these assets	239,661.24
P. Joseph % share of this profit	0.25
P. Joseph profit to be earned on these assets	59,915.31
P. Joseph selling price	1,541,660.00
P. Joseph % of selling price attributable to section 341 assets	0.04
P. Joseph % of selling price attributable to non-section 341 assets	0.96

FTL (stevedoring)

A/B of FTL section 341 assets (@ 12/31/95)	
Inventory	74,897.00
Profit % to be earned on these assets	0.03
Profit to be earned on these assets	2,246.91
Joseph family % share of this profit	0.25
Joseph family profit to be earned on these assets	561.73
Joseph family selling price	3,157,816.00
Joseph family % of selling price attributable to section 341 assets	0.00
Joseph family % of selling price attributable to non-section 341 assets	1.00

Recycling (warehousing)

A/B of Hoogewerff Reserve, L.P. section 341 asse	0.00
Profit % to be earned on these assets	0.00
Profit to be earned on these assets	0.00
Joseph family % share of this profit	0.25
Joseph family profit to be earned on these assets	0.00
Joseph family selling price	1,776,272.00
Joseph family % of selling price attributable to section 341 assets	0.00
Joseph family % of selling price attributable to non-section 341 assets	1.00

Example of 341 - [illegible] N/A for [illegible] charged (341 repealed) [illegible]

PwC200012(Tricarichi)

EXHIBIT 104-J
Docket No. 23630-12
Page 13 of 73

AA 001681

other (440) 5433?

Mike Tricharchi cell (216) 978 90?

office = (216) 514-490?

① furnished home & obtained license last week June, 2003 and son reg'd for grade school prior thereto

② family goes out week of 7/7

③ deal +/b closed 7/31

(a) Draft memo relative to meeting ~~points~~

To Do's

F/up ① Composite returns – work w/ ~~Scott~~ to get done – eff 2003 make sense?

② Any comm. domicile of flow thru's make sense? Maybe not.

③ F/u Rich & Dave – any sense to having LXV acquire customer list for $180 K to create cash flow for exel employees?

PwC200015(Tricarichi)

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EXHIBIT 3

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
450 GOLDEN GATE AVE, SAN FRANCISCO, CA 94102

LARGE AND MID-SIZE
BUSINESS DIVISION

Pricewaterhouse Coopers
c/o John Weber, Tax Partner
1300 Fifth Ave., Ste. 3100
Portland, OR 97201

Dear Sir,

Attached is a summons regarding First Associated Contractors, Inc. for the period April 1, 2002 through March 31, 2003. If you have questions regarding the summons, please call me at the number listed below. In lieu of appearing in person, you may mail the records to the following address:

Internal Revenue Service, LMSB
Lynn E. Anderson, Revenue Agent
450 Golden Gate Ave. 6th Floor
MS 6-1-07
San Francisco, CA 94102

If it would be more convenient, you may deliver the records to the following address:

Internal Revenue Service
Sheryl Lafferty Revenue Agent
LMSB CTM 1422
1220 SW 3rd Ave. 8th Floor
Portland, OR 97204

Thank you for your cooperation.

Lynn Anderson

Lynn Anderson
Revenue Agent
Badge Number 94-11702
415-522-4283

Summons

In the matter of First Associated Contractors, Inc, formerly known as Marshall Associated Contractors, Inc (EIN 93-0522225)

Internal Revenue Service (Division): Large and Mid-Sized Business

Industry/Area (name or number): CTM 1232

Periods: Form 1120, for the tax year ended March 31, 2003

The Commissioner of Internal Revenue

To: Pricewaterhouse Coopers c/o John Weber, Tax Partner

At: 1300 Fifth Ave., Ste. 3100, Portland, OR 97201

You are hereby summoned and required to appear before Lynn E. Anderson, ID #94-11702, or other authorized IRS official an officer of the Internal Revenue Service, to give testimony and to bring with you and to produce for examination the following books, records, papers, and other data relating to the tax liability or the collection of the tax liability or for the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws concerning the person identified above for the periods shown.

See attachment A.

IN LIEU OF PERSONAL DELIVERY, YOU MAY MAIL YOUR RESPONSE TO THE ADDRESS LISTED BELOW.

Attestation

I hereby certify that I have examined and compared this copy of the summons with the original and that it is a true and correct copy of the original.

Lynn E Anderson — Signature of IRS officer serving the summons

Revenue Agent — Title

Business address and telephone number of IRS officer before whom you are to appear:

450 Golden Gate Ave., 6th Floor, MS 6-1-07 San Francisco, CA 94102 415/522-4283

Place and time for appearance at 450 Golden Gate Ave., 6th Floor , San Francisco, CA 94102

on the 12th day of February, 2007 (year) at 3:00 o'clock p. m.

Issued under authority of the Internal Revenue Code this 18th **day of** January, 2007 (year).

Lynn E. Anderson — Signature of issuing officer

Revenue Agent — Title

Victoria Oy 94-06323 — Signature of approving officer *(if applicable)*

Group Manager — Title

IRS

Department of the Treasury
Internal Revenue Service

www.irs.gov

Form 2039 (Rev. 12-2001)
Catalog Number 21405J

Part A - to be given to person summoned

AA 001685

Provisions of the Internal Revenue Code

Sec. 7602. Examination of books and witnesses

(a) Authority to Summon, etc. - For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized -

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry.

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(b) Purpose may include inquiry into offense. - The purposes for which the Secretary may take any action described in paragraph (1), (2), or (3) of subsection (a) include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.

(c) Notice of contact of third parties. -

(1) General Notice. - An officer or employee of the Internal Revenue Service may not contact any person other than the taxpayer with respect to the determination or collection of the tax liability of such taxpayer without providing reasonable notice in advance to the taxpayer that contacts with persons other than the taxpayer may be made.

(2) Notice of specific contacts. - The Secretary shall periodically provide to a taxpayer a record of persons contacted during such period by the Secretary with respect to the determination or collection of the tax liability of such taxpayer. Such record shall also be provided upon request of the taxpayer.

(3) Exceptions. - This subsection shall not apply-

(A) to any contact which the taxpayer has authorized,

(B) if the Secretary determines for good cause shown that such notice would jeopardize collection of any tax or such notice may involve reprisal against any person, or

(C) with respect to any pending criminal investigation.

(d) No administrative summons when there is Justice Department referral.-

(1) Limitation of authority. - No summons may be issued under this title, and the Secretary may not begin any action under section 7604 to enforce any summons, with respect to any person if a Justice Department referral is in effect with respect to such person.

(2) Justice Department referral in effect. - For purposes of this subsection-

(A) In general. - A Justice Department referral is in effect with respect to any person if-

(i) the Secretary has recommended to the Attorney General a grand jury investigation of, or the criminal prosecution of, such person for any offense connected with the administration or enforcement of the internal revenue laws or

(ii) any request is made under section 6103(h)(3)(B) for the disclosure of any return or return information (within the meaning of section 6103(b)) relating to such person.

(B) Termination. - A Justice Department referral shall cease to be in effect with respect to a person when-

(i) the Attorney General notifies the Secretary, in writing, that -

(I) he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws,

(II) he will not authorize a grand jury investigation of such person with respect to such an offense, or

(III) he will discontinue such a grand jury investigation.

(ii) a final disposition has been made of any criminal proceeding pertaining to the enforcement of the internal revenue laws which was instituted by the Attorney General against such person, or

(iii) the Attorney General notifies the Secretary, in writing, that he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws relating to the request described in sub paragraph (A)(ii).

(3) Taxable years, etc., treated separately. - For purposes of this subsection, each taxable period (or, if there is no taxable period, each taxable event) and each tax imposed by a separate chapter of this title shall be treated separately.

(e) Limitation on examination on unreported income. - The Secretary shall not use financial status or economic reality examination techniques to determine the existence of unreported income of any taxpayer unless the Secretary has a reasonable indication that there is a likelihood of such unreported income.

Authority to examine books and witness is also provided under sec. 6420 (e)(2) - Gasoline used on farms: sec. 6421(g)(2) - Gasoline used for certain nonhighway purposes by local transit systems, or sold for certain exempt purposes; and sec. 6427(j)(2) - Fuels not used for taxable purposes.

* * * * *

Sec. 7603. Service of summons

(a) In general - A summons issued under section 6420(e)(2), 6421(g)(2), 6427(j)(2), or 7602 shall be served by the Secretary, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty

(b) Service by mail to third-party recordkeepers. -

(1) In general. - A summons referred to in subsection (a) for the production of books, papers, records, or other data by a third-party recordkeeper may also be served by certified or registered mail to the last known address of such recordkeeper.

(2) Third party record keeper. - For purposes of paragraph (1), the term *third-party recordkeeper* means -

(A) any mutual savings bank, cooperative bank, domestic building and loan association, or other savings institution chartered and supervised as a savings and loan or similar association under Federal or State law, any bank (as defined in section 581), or any credit union (within the meaning of section 501 (c)(14)(A));

(B) any consumer reporting agency (as defined under section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681 a(f));

(C) Any person extending credit through the use of credit cards or similar devices;

(D) any broker (as defined in section 3(a)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4));

(E) any attorney;

(F) any accountant;

(G) any barter exchange (as defined in section 6045(c)(3));

(H) any regulated investment company (as defined in section 851) and any agent of such regulated investment company when acting as an agent thereof;

(I) any enrolled agent; and

(J) any owner or developer of a computer software source code (as defined in section 7612(d)(2)). Subparagraph (J) shall apply only with respect to a summons requiring the production of the source code referred to in subparagraph (J) or the program and data described in section 7612(b)(1)(A)(ii) to which source code relates.

Sec. 7604. Enforcement of summons

(a) Jurisdiction of District Court. - If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement. - Whenever any person summoned under section 6420(e)(2), 6421 (g)(2), 6427(j)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States Commissioner[1] for the district within which the person so summoned resides or is found for an attachment against him as for a contempt, it shall be the duty of the judge or commissioner[1] to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States Commissioner [1]shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

[1]Or United States magistrate, pursuant to P L. 90-578.

* * * * *

Sec. 7605. Time and place of examination

(a) Time and place. - The time and place of examination pursuant to the provisions of section 6420(e)(2), 6421 (g)(2), 6427(j)(2), or 7602 shall be such time and place as may be fixed by the Secretary and as are reasonable under the circumstances. In the case of a summons under authority of paragraph (2) of section 7602, or under the corresponding authority of section 6420(e)(2), 6421 (g)(2) or 6427(j)(2), the date fixed for appearance before the Secretary shall not be less than 10 days from the date of the summons.

Sec. 7610. Fees and costs for witnesses

(a) In general. - The secretary shall by regulations establish the rates and conditions under which payment may be made of -

(1) fees and mileage to persons who are summoned to appear before the Secretary, and

(2) reimbursement for such costs that are reasonably necessary which have been directly incurred in searching for, reproducing, or transporting books, papers, records, or other data required to be produced by summons.

(b) Exceptions. - No payment may be made under paragraph (2) of subsection (a) if -

(1) the person with respect to whose liability the summons is issued has a proprietary interest in the books, papers, records or other data required to be produced, or

(2) the person summoned is the person with respect to whose liability the summons is issued or an officer, employee, agent, accountant, or attorney of such person who, at the time the summons is served, is acting as such.

(c) Summons to which section applies. - This section applies with respect to any summons authorized under section 6420(e)(2), 6421 (g)(2), 6427(j)(2), or 7602.

Sec. 7210. Failure to obey summons

Any person who, being duly summoned to appear to testify, or to appear and produce books, accounts, records, memoranda or other papers, as required under sections 6420(e)(2), 6421(g)(2), 6427(j)(2), 7602, 7603, and 7604(b), neglects to appear or to produce such books, accounts, records memoranda, or other papers, shall, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with costs of prosecution.

Notice to Third Party Recipient of IRS Summons

As a third-party recipient of a summons, you may be entitled to receive payment for certain costs directly incurred which are reasonably necessary to search for, reproduce, or transport records in order to comply with a summons.

This payment is made only at the rates established by the Internal Revenue Service to certain persons served with a summons to produce records or information in which the taxpayer does not have an ownership interest. The taxpayer to whose liability the summons relates and the taxpayer's officer, employee, agent, accountant, or attorney are not entitled to this payment. No payment will be made for any costs which you have charged or billed to other persons.

The rate for search costs is $8.50 an hour or fraction of an hour and is limited to the total amount of personnel time spent in locating and retrieving documents or information requested by the summons. Specific salaries of such persons may not be included in search costs. In addition, search costs do not include salaries, fees, or similar costs for analysis of material or for managerial or legal advice, expertise, research, or time spent for any of these activities. If itemized separately, search costs may include the actual costs of extracting information stored by computer in the format in which it is normally produced, based on computer time and necessary supplies; however, personnel time for computer search may be paid for only at the Internal Revenue Service rate specified above.

The rate for reproduction costs for making copies or duplicates of summoned documents, transcripts, and other similar material is 20 cents for each page. Photographs, films, and other material are reimbursed at cost.

The rate for transportation costs is the same as the actual cost necessary to transport personnel to locate and retrieve summoned records or information, or costs incurred solely by the need to transport the summoned material to the place of examination.

In addition to payment for search, reproduction, and transportation costs, persons who appear before an Internal Revenue Service officer in response to a summons may request payment for authorized witness fees and mileage fees. You may make this request by contacting the Internal Revenue Service officer or by claiming these costs separately on the itemized bill or invoice as explained below.

Instructions for requesting payment

After the summons is served, your should keep an accurate record of personnel search time, computer costs, number of reproductions made, and transportation costs. Upon satisfactory compliance, you may submit an itemized bill or invoice to the Internal Revenue Service officer before whom you were summoned to appear, either in person or by mail to the address furnished by the Internal Revenue Service officer. Please write on the itemized bill or invoice the name of the taxpayer to whose liability the summons relates.

If you wish, Form 6863, Invoice and Authorization for Payment of Administrative Summons Expenses, may be used to request payment for search, reproduction, and transportation costs. Standard Form 1157, Claims for Witness Attendance Fees, Travel, and Miscellaneous Expenses, may be used to request payment for authorized witness fees and mileage fees. These forms are available from the Internal Revenue Service officer who issued the summons.

If you have any questions about the payment, please contact the Internal Revenue Service officer before whom you were summoned to appear.

Anyone submitting false claims for payment is subject to possible criminal prosecution.

IRS
Department of the Treasury
Internal Revenue Service
www.irs.gov
Form 2039 (Rev. 12-2001)
Catalog Number 21405J

Part B — to be given to person summoned

Sec. 7609. Special procedures for third-party summons

(a) Notice-

(1) In general. - If any summons to which this section applies requires the giving of testimony on or relating to, the production of any portion of records made or kept on or relating to, or the production of any computer software source code (as defined in 7612(d)(2)) with respect to, any person (other than the person summoned) who is identified in the summons, then notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the 23rd day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which has been served and shall contain an explanation of the right under subsection (b)(2) to bring a proceeding to quash the summons.

(2) Sufficiency of notice. - Such notice shall be sufficient if, on or before such third day, such notice is served in the manner provided in section 7603 (relating to service of summons) upon the person entitled to notice, or is mailed by certified or registered mail to the last known address of such person, or, in the absence of a last known address, is left with the person summoned. If such notice is mailed, it shall be sufficient if mailed to the last known address of the person entitled to notice or, in the case of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, to the last known address of the fiduciary of such person, even if such person or fiduciary is then deceased, under a legal disability, or no longer in existence.

(3) Nature of summons. - Any summons to which this subsection applies (and any summons in aid of collection described in subsection (c)(2)(D)) shall identify the taxpayer to whom the summons relates or the other person to whom the records pertain and shall provide such other information as will enable the person summoned to locate the records required under the summons.

(b) Right to intervene; right to proceeding to quash. -

(1) Intervention. - Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604.

(2) Proceeding to quash. -

(A) In general. - Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to begin a proceeding to quash such summons not later than the 20th day after the day such notice is given in the manner provided in subsection (a)(2). In any such proceeding, the Secretary may seek to compel compliance with the summons.

(B) Requirement of notice to person summoned and to Secretary. - If any person begins a proceeding under subparagraph (A) with respect to any summons, not later than the close of the 20-day period referred to in subparagraph (A) such person shall mail by registered or certified mail a copy of the petition to the person summoned and to such office as the Secretary may direct in the notice referred to in subsection (a)(1).

(C) Intervention, etc. - Notwithstanding any other law or rule of law, the person summoned shall have the right to intervene in any proceeding under subparagraph (A). Such person shall be bound by the decision in such proceeding (whether or not the person intervenes in such proceeding).

(c) Summons to which section applies. -

(1) In general. - Except as provided in paragraph (2), this section shall apply to any summons issued under paragraph (2) of section 7602(a) or under sections 6420(e)(2), 6421(g)(2), 6427(j)(2), or 7612.

(2) Exceptions. - This section shall not apply to any summons

(A) served on the person with respect to whose liability the summons is issued, or any officer or employee of such person;

(B) issued to determine whether or not records of the business transaction or affairs of an identified person have been made or kept;

(C) issued solely to determine the identity of any person having a numbered account (or similar arrangement) with a bank or other institution described in section 7603(b)(2)(A);

(D) issued in aid of the collection of-

(i) an assessment made or a judgment rendered against the person with respect to whose liability the summons is issued, or

(ii) the liability at law or in equity of any transferee or fiduciary of any person referred to in clause (i).

(E) - (i) issued by a criminal investigator of the Internal Revenue Service in connection with the investigation of an offense connected with the administration or enforcement of the internal revenue laws, and

(ii) served on a person who is not a third-party recordkeeper (as defined in section 7603(b)), or

(F) described in subsection (f) or (g).

(3) Records. - For purposes of this section, the term records includes books, papers, and other data.

(d) Restriction on examination of records. - No examination of any records required to be produced under a summons as to which notice is required under subsection (a) may be made -

(1) before the close of the 23rd day after the day notice with respect to the summons is given in the manner provided in subsection (a)(2), or

(2) where a proceeding under subsection (b)(2)(A) was begun within the 20-day period referred to in such subsection and the requirements of subsection (b)(2)(B) have been met, except in accordance with an order of the court having jurisdiction of such proceeding or with the consent of the person beginning the proceeding to quash.

(e) Suspension of Statute of Limitations. -

(1) Subsection (b) action. - If any person takes any action as provided in subsection (b) and such person is the person with respect to whose liability the summons is issued (or is the agent, nominee, or other person acting under the direction or control of such person), then the running of any period of limitations under section 6501 (relating to the assessment and collection of tax) or under section 6531 (relating to criminal prosecutions) with respect to such person shall be suspended for the period during which a proceeding, and appeals therein, with respect to the enforcement of such summons is pending.

(2) Suspension after 6 months of service of summons. - In the absence of the resolution of the summoned party's response to the summons, the running of any period of limitations under section 6501 or under section 6531 with respect to any person with respect to whose liability the summons is issued (other than a person taking action as provided in subsection (b)) shall be suspended for the period-

(A) beginning on the date which is 6 months after the service of such summons, and

(B) ending with the final resolution of such response.

(f) Additional requirements in the case of a John Doe summons. -

Any summons described in subsection (c)(1) which does not identify the person with respect to whose liability the summons is issued may be served only after a court proceeding in which the Secretary establishes that -

(1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,

(2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and

(3) the information sought to be obtained from the examination of the records or testimony (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources.

(g) Special exception for certain summonses. -

A summons is described in this subsection if, upon petition by the Secretary, the court determines, on the basis of the facts and circumstances alleged, that there is reasonable cause to believe the giving of notice may lead to attempts to conceal, destroy, or alter records relevant to the examination, to prevent the communication of information from other persons through intimidation, bribery, or collusion, or to flee to avoid prosecution, testifying, or production of records.

(h) Jurisdiction of district court; etc. -

(1) Jurisdiction. - The United States district court for the district within which the person to be summoned resides or is found shall have jurisdiction to hear and determine any proceedings brought under subsection (b)(2), (f), or (g). An order denying the petition shall be deemed a final order which may be appealed.

(2) Special rule for proceedings under subsections (f) and (g) .- The determinations required to be made under subsections (f) and (g) shall be made ex parte and shall be made solely on the petition and supporting affidavits.

(i) Duty of summoned party. -

(1) Recordkeeper must assemble records and be prepared to produce records- On receipt of a summons to which this section applies for the production of records, the summoned party shall proceed to assemble the records requested, or such portion thereof as the Secretary may prescribe, and shall be prepared to produce the records pursuant to the summons on the day on which the records are to be examined.

(2) Secretary may give summoned party certificate. - The Secretary may issue a certificate to the summoned party that the period prescribed for beginning a proceeding to quash a summons has expired and that no such proceeding began within such period, or that the taxpayer consents to the examination.

(3) Protection for summoned party who discloses. - Any summoned party, or agent or employee thereof, making a disclosure of records of testimony pursuant to this section in good faith reliance on the certificate of the Secretary or an order of a court requiring production of records or the giving of such testimony shall not be liable to any customer or other person for such disclosure.

(4) Notice of suspension of statue of limitations in the case of a John Doe summons. - In the case of a summons described in subsection (f) with respect to which any period of limitations has been suspended under subsection (e)(2), the summoned party shall provide notice of such suspension to any person described in subsection (f).

(j) Use of summons not required. -

Nothing in this section shall be construed to limit the Secretary's ability to obtain information, other than by summons, through formal or informal procedures authorized by sections 7601 and 7602.

In the matter of First Associated Contractors, Inc.
Summons to: Pricewaterhouse Coopers c/o John Weber, Tax Partner

Attachment A

A. Instructions

(1) In responding to this Summons, the summoned party is required to furnish all documents that are available to it, or subject to its reasonable inquiry, including documents in the possession of its attorneys, accountants, affiliates, advisors, or other persons directly or indirectly employed by, or connected with, the summoned party or its attorneys, and anyone else otherwise subject to the summoned party's control, and only such information as is known to the summoned party of its personal knowledge.
(2) The summoned party is required to make a diligent search of its records and of all other documents and records in its possession or available to it or its representatives.

B. Documents Already in Possession

(1) This summons is not intended to request documents already in the possession of the Internal Revenue Service.
(2) If you believe a document requested by this summons is already in the Service's possession, provide a description of the document, when it was provided and to whom it was provided.

C. Documents Unable to Be Produced

If you are unable to produce a document because it has been destroyed, cannot be located or is otherwise unavailable, provide a description of the document and identify where the document may be located and the last known custodian of the document by name, address and telephone number, and state with specificity the efforts made to locate the documents or records and a specific reason for their disappearance or unavailability. Also, if records or documents are requested but do not exist, please so state.

D. Definitions:

(1) The terms "document" or "documents" means any writings in any form whether of paper, electronic, or other medium, for example, memoranda, correspondence, opinion letters, email, contracts, agreements, invoices, computations, billing records, bank records, trust records, ledgers, books and records, flyers, brochures, promotional materials and appointment books, and includes handwritten records and records maintained in electronic format. All requests are for complete and unedited copies of documents. Requests for contracts and other operative documents are for copies of drafts and intermediate versions as well as final, executed versions.

(2) The terms "First Associated Entity" or "First Associated Entities" means any one or more of the following entities:

First Associated Contractors, Inc., formerly Marshall Associated Contractors, Inc.
Essex Solutions, Inc.
Marshall Associated, LLC

(3) The term "First Associated Transaction" refers to the formation and any change of ownership occurring in 2002 or 2003 of one or more of the First Associated Entities or of any assets belonging to one or more of the First Associated Entities. Parties to a First Associated Transaction may include, but are not limited to, any one or more of the following:

Willow Investment Trust
Willow Holdings LLC
Richard L. Marshall
Patsy L. Marshall
John M. Marshall
Karen M. Marshall
Fortrend International
MidCoast Credit Corp.
Willow Ventures, LLC
Corinth Trust
Fortrend Securities, Inc.
Forbach, Inc.
Marshall Excavating Inc.
Chestnut, Inc.
Canberra Properties, LLC
Peachtree Financial
Deutsche Bank
First Light Holdings LLC

(4) The term "Woodvale Transaction" refers to the formation and any change of ownership occurring in 2002 or 2003 of Woodvale Investments, LLC or of any assets belonging to Woodvale Investments, LLC. Parties to a Woodvale Transaction may include, but are not limited to, any one or more of the following:

Arizona Media Holdings, Inc.
First Light Holdings LLC
Capital American Associates, Inc.

(5) The term "Receivables Transfer" refers to the transfer of consumer credit card receivables to Arizona Media Holdings, Inc., Woodvale Investments, LLC, Willow Investment Trust or one or more of the First Associated Entities during 2002 or 2003.

(6) The term "Treasury Bills Transfer" refers to any transfer of United States Treasury Bills under IRC section 351 to First Associated Contractors, Inc. during the fiscal year ended March 31, 2003.

(7) The term "Foreign Currency Transfer" refers to any transfer of foreign currency options to First Associated Contractors, Inc., during the fiscal year ended March 31, 2003.

(8) The term "Rabobank Loan" refers to any loan to one or more of the First Associated Entities from Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A., New York Branch, during the year ended December 31, 2003.

(9) The term "Bad Debt Deduction" refers to the deduction for bad debts claimed by First Associated Contractors, Inc. on its tax return for the fiscal year ended March 31, 2003.

(10) The term "Partnership Loss" refers to the $6 mi. short-term partnership loss claimed on Schedule D of the Form 1120 for First Associated Contractors, Inc. for the fiscal year ended March 31, 2003.

(11) The term "Distribution" refers to the $510,000 distribution referred to on line 5a, Schedule M-2 of Form 1120 for First Associated Contractors, Inc. for the fiscal year ended March 31, 2003.

(12) The term "The Sale" refers to the $2,766,500 reported as the gross sales price on Form 4797, Part III, line 20 of Form 1120 for First Associated Contractors, Inc. for the fiscal year ended March 31, 2003.

(13) The term "identify" in reference to an individual means to provide the individual's name, title (at the time and at present), function in the transaction, and current whereabouts, including place of business or employment, address, and telephone number.

(14) The term "identify" in reference to a document, means to provide the title, description, date prepared, names of those who prepared it, names of those who signed it, and its current whereabouts, including name, address, and telephone number of custodian, librarian, or archivist.

E. Provide the following:

(1) All documents that discuss, describe, effectuate or otherwise relate to any First Associated Transaction, including documents of meetings, negotiations, valuations, billing records, engagement letters, side letters, communications, agreements, due diligence, promotional materials and/or legal opinions.

(2) All documents that discuss, describe, effectuate or otherwise relate to any Woodvale Transaction, including documents of meetings, negotiations, valuations, billing records, engagement letters, side letters, communications, agreements, due diligence, promotional materials and/or legal opinions.

(3) All documents that discuss, describe, effectuate or otherwise relate to any Receivables Transfer, including documents of meetings, negotiations, valuations, billing records, engagement letters, side letters, communications, agreements, due diligence, promotional materials and/or legal opinions.

(4) All documents that discuss, describe, effectuate or otherwise relate to any Treasury Bills Transfer, including documents of meetings, negotiations, valuations, billing records, engagement

letters, side letters, communications, agreements, due diligence, promotional materials and/or legal opinions.

(5) All documents that discuss, describe, effectuate or otherwise relate to any Foreign Currency Transfer, including documents of meetings, negotiations, valuations, billing records, engagement letters, side letters, communications, agreements, due diligence, promotional materials and/or legal opinions.

(6) All documents that discuss, describe or otherwise relate to any Rabobank Loan, including documents of meetings, negotiations, valuations, billing records, engagement letters, side letters, communications, agreements, due diligence, promotional materials and/or legal opinions.

(7) All documents that discuss, describe or otherwise relate to the Bad Debt deduction, including documents of meetings, negotiations, valuations, billing records, engagement letters, side letters, communications, agreements, due diligence, promotional materials and/or legal opinions.

(8) All documents, including loan documents, promissory notes, wire instructions, and bank statements, that discuss, describe, effectuate or otherwise relate to loans or any money transfer taking place in relation to any First Associated Transaction, Woodvale Transaction, or Receivables Transaction.

(9) All documents that discuss, describe or otherwise relate to the "Partnership Loss" including documents of meetings, negotiations, valuations, billing records, engagement letters, side letters, communications, agreements, due diligence, promotional materials and/or legal opinions

(10) All documents that discuss, describe or otherwise relate to the "Distribution" including documents of meetings, negotiations, valuations, billing records, engagement letters, side letters, communications, agreements, due diligence, promotional materials and/or legal opinions. Also, All documents, including loan documents, promissory notes, wire instructions, and bank statements, that discuss, describe, effectuate or otherwise relate to the "Distribution."

(11) All documents that discuss, describe or otherwise relate to "The Sale" including documents of meetings, negotiations, valuations, billing records, engagement letters, side letters, communications, agreements, due diligence, promotional materials and/or legal opinions. Also, all documents, including loan documents, promissory notes, wire instructions, and bank statements, that discuss, describe, effectuate or otherwise relate to the "Distribution."

F. Claim of Privilege -- For any document you deem privileged, list the following:

(1) The name and title of the author.
(2) The name and title of the signor of the document, if signed.
(3) The type of document (e.g. letter, notebook, etc.) and the number of pages it contains.
(4) The date of the document.
(5) The name and title of each recipient or addressee of the document or copies thereof.
(6) The present location of the document.

(7) A statement of the basis for the privilege claim, and the relationship or underlying facts upon which the protection or privilege is claimed.
(8) A general statement of the subject matter of the document.
(9) Identify the request to which the production of the document would otherwise be responsive.

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EXHIBIT PAGE ONLY

EXHIBIT 4

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

UNITED STATES TAX COURT

RICHARD L. MARSHALL and PATSY L. MARSHALL, TRANSFEREES, et al.,	)	
Petitioners,	)	
v.	)	Docket Nos. 27241-11 28661-11 28782-11
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent.	)	

DECLARATION OF PARALEGAL CERTIFYING RECORDS PURSUANT TO FEDERAL RULES OF EVIDENCE 803(6) AND 902(11)

Pursuant to 28 U.S.C. § 1746, and under penalty of perjury,

I, Ivan P. Stolze, declare as follows:

1. I am a paralegal at PricewaterhouseCoopers LLP, and in such capacity, I have the authority to certify the attached records to this declaration.

2. The attached records, Bates numbered PWC 00015 through PWC 0550, are true copies of documents that were, except as limited below in this paragraph, contemporaneously maintained by PricewaterhouseCoopers in files associated with professional services rendered by PricewaterhouseCoopers to the shareholders of Marshall Associated, LLC, including in connection with tax returns prepared for the shareholders of Marshall Associated, LLC for the year ending December 31, 2003, and related to a March 7, 2003 transaction involving Marshall Associated Contractors, Inc. The documents include documents sent to PricewaterhouseCoopers by a client and by third parties, so the dates embedded in those documents may not be the dates on which those documents were received by PricewaterhouseCoopers or the dates those documents were placed in PricewaterhouseCoopers' files.

3. The attached records, Bates numbered PWC 0001 through PWC 0014, are billing statements and records from PricewaterhouseCoopers to John Marshall for professional services

rendered by PricewaterhouseCoopers and invoiced on the dates on the billing statements, together with certain associated documentation.

4. It is the regular practice of PricewaterhouseCoopers to maintain files associated with professional services rendered by PricewaterhouseCoopers.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 27th day of March, 2014.

Signature of Declarant

Ivan P. Stolze, Paralegal

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EXHIBIT PAGE ONLY

EXHIBIT 5

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

Internal Revenue Service

Department of the Treasury
5450 Stratum Drive, Ste 150
Fort Worth, TX 76137

Telephone Number:
(817) 232-6383

Refer Reply To:
Denise McCaskill
MC: 4296 NFTW

Date: January 29, 2008

PricewaterhouseCoopers LLP
Attn: Rich Stovsky
200 Public Square, 18th Floor,
BP Tower
Cleveland, OH 44114

Dear PricewaterhouseCoopers,

Attached is a summons regarding West Side Cellular, Inc. for the year ended 12/31/2003. If you have questions concerning the summons, please call me at the number listed above.

In lieu of appearing in person in order to comply with the summons, you may have the records delivered, no later than the appearance date in the summons, to the following address:

Internal Revenue Service
MC:4296 NFTW / McCaskill
5450 Stratum Drive, Suite 150
Fort Worth, TX 76137

Sincerely,

Denise McCaskill

Denise McCaskill
Revenue Agent
ID No. 75-11917

Summons

In the matter of West Side Cellular, Inc.

Internal Revenue Service (Division): Large and Mid Size Business

Industry/Area (name or number): LMSB:Communication, Technology, Media:Team 1296

Periods: Taxable year ended December 31, 2003

The Commissioner of Internal Revenue

To: PricewaterhouseCoopers LLP

At: Attn: Rich Stovsky; 200 Public Square, 18th Floor; BP Tower,Cleveland, OH 44114

You are hereby summoned and required to appear before Cheryl M. Dever, ID #31-09741, or other authorized IRS official an officer of the Internal Revenue Service, to give testimony and to bring with you and to produce for examination the following books, records, papers, and other data relating to the tax liability or the collection of the tax liability or for the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws concerning the person identified above for the periods shown.

See Attachment 1.

Attestation

I hereby certify that I have examined and compared this copy of the summons with the original and that it is a true and correct copy of the original.

Denise McCaskill — Signature of IRS officer serving the summons

Revenue Agent — Title

Business address and telephone number of IRS officer before whom you are to appear:

Internal Revenue Service, Attn: LMSB:HMT:1486:CD; 5990 West Creek Road; Independence, OH 44131 Phone (216) 520-7084

Place and time for appearance at Internal Revenue Service, 5990 West Creek Road; Independence, OH 44131

on the 25th day of February, 2008 (year) at 10 o'clock a m.

Issued under authority of the Internal Revenue Code this 29th **day of** January, 2008 (year).

Denise McCaskill — Signature of issuing officer

Revenue Agent — Title

Signature of approving officer *(if applicable)*

Team Manager — Title

IRS

Department of the Treasury
Internal Revenue Service

www.irs.gov

Form 2039 (Rev. 12-2001)
Catalog Number 21405J

Part A - to be given to person summoned

Provisions of the Internal Revenue Code

Sec. 7602. Examination of books and witnesses

(a) Authority to Summon, etc. - For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized -

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry.

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(b) Purpose may include inquiry into offense. - The purposes for which the Secretary may take any action described in paragraph (1), (2), or (3) of subsection (a) include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.

(c) Notice of contact of third parties. -

(1) General Notice. - An officer or employee of the Internal Revenue Service may not contact any person other than the taxpayer with respect to the determination or collection of the tax liability of such taxpayer without providing reasonable notice in advance to the taxpayer that contacts with persons other than the taxpayer may be made.

(2) Notice of specific contacts. - The Secretary shall periodically provide to a taxpayer a record of persons contacted during such period by the Secretary with respect to the determination or collection of the tax liability of such taxpayer. Such record shall also be provided upon request of the taxpayer.

(3) Exceptions. - This subsection shall not apply-

(A) to any contact which the taxpayer has authorized,

(B) if the Secretary determines for good cause shown that such notice would jeopardize collection of any tax or such notice may involve reprisal against any person, or

(C) with respect to any pending criminal investigation.

(d) No administrative summons when there is Justice Department referral.-

(1) Limitation of authority. - No summons may be issued under this title, and the Secretary may not begin any action under section 7604 to enforce any summons, with respect to any person if a Justice Department referral is in effect with respect to such person.

(2) Justice Department referral in effect. - For purposes of this subsection-

(A) In general. - A Justice Department referral is in effect with respect to any person if-

(i) the Secretary has recommended to the Attorney General a grand jury investigation of, or the criminal prosecution of, such person for any offense connected with the administration or enforcement of the internal revenue laws or

(ii) any request is made under section 6103(h)(3)(B) for the disclosure of any return or return information (within the meaning of section 6103(b)) relating to such person.

(B) Termination. - A Justice Department referral shall cease to be in effect with respect to a person when-

(i) the Attorney General notifies the Secretary, in writing, that -

(I) he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws,

(II) he will not authorize a grand jury investigation of such person with respect to such an offense, or

(III) he will discontinue such a grand jury investigation.

(ii) a final disposition has been made of any criminal proceeding pertaining to the enforcement of the internal revenue laws which was instituted by the Attorney General against such person, or

(iii) the Attorney General notifies the Secretary, in writing, that he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws relating to the request described in sub paragraph (A)(ii).

(3) Taxable years, etc., treated separately. - For purposes of this subsection, each taxable period (or, if there is no taxable period, each taxable event) and each tax imposed by a separate chapter of this title shall be treated separately.

(e) Limitation on examination on unreported income. - The Secretary shall not use financial status or economic reality examination techniques to determine the existence of unreported income of any taxpayer unless the Secretary has a reasonable indication that there is a likelihood of such unreported income.

Authority to examine books and witness is also provided under sec. 6420 (e)(2) - Gasoline used on farms: sec. 6421(g)(2) - Gasoline used for certain nonhighway purposes by local transit systems, or sold for certain exempt purposes; and sec. 6427(j)(2) - Fuels not used for taxable purposes.

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Sec. 7603. Service of summons

(a) In general - A summons issued under section 6420(e)(2), 6421(g)(2), 6427(j)(2), or 7602 shall be served by the Secretary, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty

(b) Service by mail to third-party recordkeepers. -

(1) In general. - A summons referred to in subsection (a) for the production of books, papers, records, or other data by a third-party recordkeeper may also be served by certified or registered mail to the last known address of such recordkeeper.

(2) Third party record keeper. - For purposes of paragraph (1), the term *third-party recordkeeper* means -

(A) any mutual savings bank, cooperative bank, domestic building and loan association, or other savings institution chartered and supervised as a savings and loan or similar association under Federal or State law, any bank (as defined in section 581), or any credit union (within the meaning of section 501 (c)(14)(A));

(B) any consumer reporting agency (as defined under section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681 a(f));

(C) any person extending credit through the use of credit cards or similar devices;

(D) any broker (as defined in section 3(a)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4));

(E) any attorney;

(F) any accountant;

(G) any barter exchange (as defined in section 6045(c)(3));

(H) any regulated investment company (as defined in section 851) and any agent of such regulated investment company when acting as an agent thereof;

(I) any enrolled agent; and

(J) any owner or developer of a computer software source code (as defined in section 7612(d)(2)). Subparagraph (J) shall apply only with respect to a summons requiring the production of the source code referred to in subparagraph (J) or the program and data described in section 7612(b)(1)(A)(ii) to which source code relates.

Sec. 7604. Enforcement of summons

(a) Jurisdiction of District Court. - If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement. - Whenever any person summoned under section 6420(e)(2), 6421 (g)(2), 6427(j)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States Commissioner[1] for the district within which the person so summoned resides or is found for an attachment against him as for a contempt, it shall be the duty of the judge or commissioner[1] to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States Commissioner[1] shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

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[1] Or United States magistrate, pursuant to P L. 90-578.

* * * * *

Sec. 7605. Time and place of examination

(a) Time and place. - The time and place of examination pursuant to the provisions of section 6420(e)(2), 6421 (g)(2), 6427(j)(2), or 7602 shall be such time and place as may be fixed by the Secretary and as are reasonable under the circumstances. In the case of a summons under authority of paragraph (2) of section 7602, or under the corresponding authority of section 6420(e)(2), 6421 (g)(2) or 6427(j)(2), the date fixed for appearance before the Secretary shall not be less than 10 days from the date of the summons.

Sec. 7610. Fees and costs for witnesses

(a) In general. - The secretary shall by regulations establish the rates and conditions under which payment may be made of -

(1) fees and mileage to persons who are summoned to appear before the Secretary, and

(2) reimbursement for such costs that are reasonably necessary which have been directly incurred in searching for, reproducing, or transporting books, papers, records, or other data required to be produced by summons.

(b) Exceptions. - No payment may be made under paragraph (2) of subsection (a) if -

(1) the person with respect to whose liability the summons is issued has a proprietary interest in the books, papers, records or other data required to be produced, or

(2) the person summoned is the person with respect to whose liability the summons is issued or an officer, employee, agent, accountant, or attorney of such person who, at the time the summons is served, is acting as such.

(c) Summons to which section applies. - This section applies with respect to any summons authorized under section 6420(e)(2), 6421 (g)(2), 6427(j)(2), or 7602.

Sec. 7210. Failure to obey summons

Any person who, being duly summoned to appear to testify, or to appear and produce books, accounts, records, memoranda or other papers, as required under sections 6420(e)(2), 6421(g)(2), 6427(j)(2), 7602, 7603, and 7604(b), neglects to appear or to produce such books, accounts, records memoranda, or other papers, shall, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with costs of prosecution.

Notice to Third Party Recipient of IRS Summons

As a third-party recipient of a summons, you may be entitled to receive payment for certain costs directly incurred which are reasonably necessary to search for, reproduce, or transport records in order to comply with a summons.

This payment is made only at the rates established by the Internal Revenue Service to certain persons served with a summons to produce records or information in which the taxpayer does not have an ownership interest. The taxpayer to whose liability the summons relates and the taxpayer's officer, employee, agent, accountant, or attorney are not entitled to this payment. No payment will be made for any costs which you have charged or billed to other persons.

The rate for search costs is $8.50 an hour or fraction of an hour and is limited to the total amount of personnel time spent in locating and retrieving documents or information requested by the summons. Specific salaries of such persons may not be included in search costs. In addition, search costs do not include salaries, fees, or similar costs for analysis of material or for managerial or legal advice, expertise, research, or time spent for any of these activities. If itemized separately, search costs may include the actual costs of extracting information stored by computer in the format in which it is normally produced, based on computer time and necessary supplies; however, personnel time for computer search may be paid for only at the Internal Revenue Service rate specified above.

The rate for reproduction costs for making copies or duplicates of summoned documents, transcripts, and other similar material is 20 cents for each page. Photographs, films, and other material are reimbursed at cost.

The rate for transportation costs is the same as the actual cost necessary to transport personnel to locate and retrieve summoned records or information, or costs incurred solely by the need to transport the summoned material to the place of examination.

In addition to payment for search, reproduction, and transportation costs, persons who appear before an Internal Revenue Service officer in response to a summons may request payment for authorized witness fees and mileage fees. You may make this request by contacting the Internal Revenue Service officer or by claiming these costs separately on the itemized bill or invoice as explained below.

Instructions for requesting payment

After the summons is served, your should keep an accurate record of personnel search time, computer costs, number of reproductions made, and transportation costs. Upon satisfactory compliance, you may submit an itemized bill or invoice to the Internal Revenue Service officer before whom you were summoned to appear, either in person or by mail to the address furnished by the Internal Revenue Service officer. Please write on the itemized bill or invoice the name of the taxpayer to whose liability the summons relates.

If you wish, Form 6863, Invoice and Authorization for Payment of Administrative Summons Expenses, may be used to request payment for search, reproduction, and transportation costs. Standard Form 1157, Claims for Witness Attendance Fees, Travel, and Miscellaneous Expenses, may be used to request payment for authorized witness fees and mileage fees. These forms are available from the Internal Revenue Service officer who issued the summons.

If you have any questions about the payment, please contact the Internal Revenue Service officer before whom you were summoned to appear.

Anyone submitting false claims for payment is subject to possible criminal prosecution.

Department of the Treasury
Internal Revenue Service

www.irs.gov

Form 2039 (Rev. 12-2001)
Catalog Number 21405J

Part B — to be given to person summoned

Sec. 7609. Special procedures for third-party summons

(a) Notice-

(1) In general. - If any summons to which this section applies requires the giving of testimony on or relating to, the production of any portion of records made or kept on or relating to, or the production of any computer software source code (as defined in 7612(d)(2)) with respect to, any person (other than the person summoned) who is identified in the summons, then notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the 23rd day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which has been served and shall contain an explanation of the right under subsection (b)(2) to bring a proceeding to quash the summons.

(2) Sufficiency of notice. - Such notice shall be sufficient if, on or before such third day, such notice is served in the manner provided in section 7603 (relating to service of summons) upon the person entitled to notice, or is mailed by certified or registered mail to the last known address of such person, or, in the absence of a last known address, is left with the person summoned. If such notice is mailed, it shall be sufficient if mailed to the last known address of the person entitled to notice or, in the case of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, to the last known address of the fiduciary of such person, even if such person or fiduciary is then deceased, under a legal disability, or no longer in existence.

(3) Nature of summons. - Any summons to which this subsection applies (and any summons in aid of collection described in subsection (c)(2)(D)) shall identify the taxpayer to whom the summons relates or the other person to whom the records pertain and shall provide such other information as will enable the person summoned to locate the records required under the summons.

(b) Right to intervene; right to proceeding to quash. -

(1) Intervention. - Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604.

(2) Proceeding to quash. -

(A) In general. - Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to begin a proceeding to quash such summons not later than the 20th day after the day such notice is given in the manner provided in subsection (a)(2). In any such proceeding, the Secretary may seek to compel compliance with the summons.

(B) Requirement of notice to person summoned and to Secretary. - If any person begins a proceeding under subparagraph (A) with respect to any summons, not later than the close of the 20-day period referred to in subparagraph (A) such person shall mail by registered or certified mail a copy of the petition to the person summoned and to such office as the Secretary may direct in the notice referred to in subsection (a)(1).

(C) Intervention, etc. - Notwithstanding any other law or rule of law, the person summoned shall have the right to intervene in any proceeding under subparagraph (A). Such person shall be bound by the decision in such proceeding (whether or not the person intervenes in such proceeding).

(c) Summons to which section applies. -

(1) In general. - Except as provided in paragraph (2), this section shall apply to any summons issued under paragraph (2) of section 7602(a) or under sections 6420(e)(2), 6421(g)(2), 6427(j)(2), or 7612.

(2) Exceptions. - This section shall not apply to any summons

(A) served on the person with respect to whose liability the summons is issued, or any officer or employee of such person;

(B) issued to determine whether or not records of the business transaction or affairs of an identified person have been made or kept;

(C) issued solely to determine the identify of any person having a numbered account (or similar arrangement) with a bank or other institution described in section 7603(b)(2)(A);

(D) issued in aid of the collection of-

(i) an assessment made or a judgment rendered against the person with respect to whose liability the summons is issued, or

(ii) the liability at law or in equity of any transferee or fiduciary of any person referred to in clause (i).

(E) - (i) issued by a criminal investigator of the Internal Revenue Service in connection with the investigation of an offense connected with the administration or enforcement of the internal revenue laws, and

(ii) served on a person who is not a third-party recordkeeper (as defined in section 7603(b)), or

(F) described in subsection (f) or (g).

(3) Records. - For purposes of this section, the term records includes books, papers, and other data.

(d) Restriction on examination of records. - No examination of any records required to be produced under a summons as to which notice is required under subsection (a) may be made -

(1) before the close of the 23rd day after the day notice with respect to the summons is given in the manner provided in subsection (a)(2), or

(2) where a proceeding under subsection (b)(2)(A) was begun within the 20-day period referred to in such subsection and the requirements of subsection (b)(2)(B) have been met, except in accordance with an order of the court having jurisdiction of such proceeding or with the consent of the person beginning the proceeding to quash.

(e) Suspension of Statute of Limitations. -

(1) Subsection (b) action. - If any person takes any action as provided in subsection (b) and such person is the person with respect to whose liability the summons is issued (or is the agent, nominee, or other person acting under the direction or control of such person), then the running of any period of limitations under section 6501 (relating to the assessment and collection of tax) or under section 6531 (relating to criminal prosecutions) with respect to such person shall be suspended for the period during which a proceeding, and appeals therein, with respect to the enforcement of such summons is pending.

(2) Suspension after 6 months of service of summons. - In the absence of the resolution of the summoned party's response to the summons, the running of any period of limitations under section 6501 or under section 6531 with respect to any person with respect to whose liability the summons is issued (other than a person taking action as provided in subsection (b)) shall be suspended for the period-

(A) beginning on the date which is 6 months after the service of such summons, and

(B) ending with the final resolution of such response.

(f) Additional requirements in the case of a John Doe summons. -

Any summons described in subsection (c)(1) which does not identify the person with respect to whose liability the summons is issued may be served only after a court proceeding in which the Secretary establishes that -

(1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,

(2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and

(3) the information sought to be obtained from the examination of the records or testimony (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources.

(g) Special exception for certain summonses. -

A summons is described in this subsection if, upon petition by the Secretary, the court determines, on the basis of the facts and circumstances alleged, that there is reasonable cause to believe the giving of notice may lead to attempts to conceal, destroy, or alter records relevant to the examination, to prevent the communication of information from other persons through intimidation, bribery, or collusion, or to flee to avoid prosecution, testifying, or production of records.

(h) Jurisdiction of district court; etc. -

(1) Jurisdiction. - The United States district court for the district within which the person to be summoned resides or is found shall have jurisdiction to hear and determine any proceedings brought under subsection (b)(2), (f), or (g). An order denying the petition shall be deemed a final order which may be appealed.

(2) Special rule for proceedings under subsections (f) and (g) .- The determinations required to be made under subsections (f) and (g) shall be made ex parte and shall be made solely on the petition and supporting affidavits.

(i) Duty of summoned party. -

(1) Recordkeeper must assemble records and be prepared to produce records- On receipt of a summons to which this section applies for the production of records, the summoned party shall proceed to assemble the records requested, or such portion thereof as the Secretary may prescribe, and shall be prepared to produce the records pursuant to the summons on the day on which the records are to be examined.

(2) Secretary may give summoned party certificate. - The Secretary may issue a certificate to the summoned party that the period prescribed for beginning a proceeding to quash a summons has expired and that no such proceeding began within such period, or that the taxpayer consents to the examination.

(3) Protection for summoned party who discloses. - Any summoned party, or agent or employee thereof, making a disclosure of records of testimony pursuant to this section in good faith reliance on the certificate of the Secretary or an order of a court requiring production of records or the giving of such testimony shall not be liable to any customer or other person for such disclosure.

(4) Notice of suspension of statue of limitations in the case of a John Doe summons. - In the case of a summons described in subsection (f) with respect to which any period of limitations has been suspended under subsection (e)(2), the summoned party shall provide notice of such suspension to any person described in subsection (f).

(j) Use of summons not required. -

Nothing in this section shall be construed to limit the Secretary's ability to obtain information, other than by summons, through formal or informal procedures authorized by sections 7601 and 7602.

ATTACHMENT 1 TO THE SUMMONS OF
PricewaterhouseCoopers LLP

INSTRUCTIONS

When responding to this summons, PricewaterhouseCoopers LLP ("PWC") is required to produce all requested documents. PWC is required to diligently search all available documents to locate the requested documents. All available documents include those in PWC's immediate possession and those that it can locate through a reasonable search. PWC should gather all requested documents in the possession of parties affiliated with PWC, including but not limited to its attorneys, accountants, affiliates, and advisors.

All requests for documents should be construed expansively rather than narrowly. All documents produced should include all attachments, exhibits, addendums, and appendices.

This summons is not intended to request documents that are already in the possession of the Internal Revenue Service. If PWC believes that a document requested by this summons is already in the possession of the Internal Revenue Service, it should describe the document, when it was produced, and to whom it was produced.

If PWC does not produce a requested document, it should state the efforts made to locate the requested document. In addition, PWC must state whether the requested document ever existed, existed but was destroyed, or existed but was misplaced.

If a privilege is being claimed with respect to any requested document, state with specificity the nature of the privilege and the extent of all allegedly privileged matters. If PWC objects to producing part of a document, PWC should provide a redacted copy and retain the original for review by a court. With respect to each allegedly privileged document, or portion of a document, provide the following:

1. The date appearing on such document or, if it has no date, the date or approximate date that such document was created;

2. The identity or descriptive code number, file number, title, or label of such document used by the custodian of the document to identify it for retrieval;

3. The general nature and description of such document and the name, title, and address of the person who signed such document and, if it was not signed, the response shall so state and give the name, title, and address of the person(s) who prepared it;

4. The name, title, and address of the person to whom such document was addressed and the name, title, and address of each person other than such addressee to whom such document, or a copy thereof were given or sent at any time;

5. The name, title, and address, if known, of the person having or who may have present possession, custody, or control of such document or a copy thereof;

6. Whether or not any draft, copy, or reproduction of such document contains any postscripts, notation, change, or addendum not appearing on the document itself and, if so, the response shall give the description of each such draft, copy or reproduction; and

7. The privilege claimed.

DEFINITIONS

References herein to transactions and events are for convenience only and are not a concession by respondent that the transactions and events are properly recognized for federal income tax purposes. Accordingly, descriptive terms herein such as "Stock Sale Transaction," "Contribution Transaction," "Bad Debts Transactions," "Asset Recovery Business," "business," "purchasing," "collecting," and "managing," together with all derivatives thereof and related terms, are used merely for convenience in describing the form of the disputed transactions. By use of such terms in this document, respondent is not agreeing that such terms represent or describe the actual substance or proper characterization of the transactions for federal income tax purposes.

1. The term "document" or "record" is any writing under Rule 1001(1) of the Federal Rules of Evidence, including, but not limited to, memoranda, agreements, contracts, plans, term sheets, opinions, papers, correspondence, notes, studies, graphs, diagrams, photographs, charts, projections, tabulations, analyses, questionnaires and responses, work papers, schedules, summaries, data sheets, reports, statistical or informational accumulations, data processing cards or worksheets, computer stored and generated documents, computer databases, computer disks and formats, machine readable electronic files or records maintained on a computer, telexes, telegrams, electronic mail (commonly referred to as "e-mail"), and similar or related documents and materials.

2. The term "communications" means any contact, oral or written, formal or informal, at any time or place and under any circumstances, whereby information of any nature was recorded, transmitted, or transferred.

3. The term "Relevant Parties" means any one or any group of the following persons, other persons affiliated with the listed persons that are not specifically listed below, and the directors, officers, employees, representatives, agents, and advisors of each listed and affiliated unlisted persons.

West Side Cellular, Inc. d/b/a
Cellnet of Ohio
Michael Tricarichi
Nob Hill Holdings, Inc.
Millennium Recovery Fund
Prime Asset Business Trust
Fortrend International, LLC
MidCoast Credit Corp.
Alice Dill Wendland
Steven Block
Charles G. Klink

4. The term "Stock Sale Transaction" means the 2003 sale by the stockholder of West Side Cellular, Inc. to Nob Hill Holdings, Inc. of West Side Cellular, Inc. stock and all similar transactions.

5. The term "Contribution Transaction" means the 2003 I.R.C. § 351 contribution to West Side Cellular, Inc. by Millennium Recovery Fund of notes receivable with a claimed tax basis of approximately $43,323,069, and all similar transactions.

6. The term "Bad Debts Transactions" means the 2003 transactions that resulted in a deduction for bad debts being claimed on the Form 1120 of West Side Cellular, Inc. for the taxable year ended December 31, 2003, and all similar transactions.

7. The term "Asset Recovery Business" means West Side Cellular, Inc.'s business of purchasing, collecting, and managing charged off consumer debt during the years 2003 through 2006.

8. The term "Servicing and Management Agreement" means the agreement dated on or about November 6, 2003, between Prime Asset Business Trust and West Side Cellular, Inc. for professional services to be provided by Prime Asset Business Trust.

9. The term "similar transactions" means each and every transaction that has some, though not all, features in common with the described transaction. One or two aspects of a "similar transaction" may vary from the described transaction. For example, if the parties and nature of a transaction match the described transaction, the transaction is similar even though the date and identified asset do not match. Similarly, if an action taken with a specific asset matches the described transaction, the transaction is similar even if one of the parties and the date vary.

REQUESTED DOCUMENTS

1. All documents and communications by, among, or pertaining to the Relevant Parties, that plan, debate, analyze, discuss, describe, effectuate or otherwise relate to the below transactions and/or activities:

   (a) Stock Sale Transaction
   (b) Contribution Transaction
   (c) Bad Debts Transactions
   (d) Asset Recovery Business
   (e) Servicing and Management Agreement

   The documents produced under 1(a) through 1(e) should include all documents evidencing the transfer of money or property between the Relevant Parties pursuant to these transactions, including but not limited to wire transfers.

2. All schedules and/or proforma or draft tax returns for the year ended December 31, 2003, showing the amount of income tax that would be due from West Side Cellular, Inc. as a result of proceeds from lawsuit settlements being received by West Side Cellular, Inc. during 2003.

3. All documents that substantiate the basis of the notes receivable described in the definition of the term "Contribution Transaction," including but not limited to all documents and communications that evidence the transactions that purportedly generated the claimed basis, loan agreements, certified copies of the registrations of companies entering into the loan agreements, copies of notices relating to the transfer of loans to the Millennium Recovery Fund, copies of post office certificates confirming delivery of the notices, copies of the certificates of the seal impression as of the date that each loan agreement was entered into, and all relevant tax opinions.

4. All documents and communications sent, received, or prepared by any of the Relevant Parties in connection with the transactions and/or activities listed in paragraph 1 above between 2003 and 2006, including but not limited to e mail and facsimile correspondence.

5. All documents and communications between 2003 and 2006 pertaining to buildings and other depreciable assets shown on the balance sheet included with the Form 1120 of West Side Cellular, Inc. in the amount of $299,682 for the tax year ended December 31, 2003, including but not limited to billings and notices for real estate taxes and records reflecting payments of real estate taxes.

6. All documents, including tax or legal opinions, invoices, statements, billings, and/or any other documents provided to any Relevant Parties by PWC regarding any and all services performed by PWC for the transactions listed in paragraph 1 for the relevant parties during the calendar years 2003 through 2006, as well as detailed billing records relating to such services.

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EXHIBIT PAGE ONLY

EXHIBIT 6

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

PRICEWATERHOUSECOOPERS

PricewaterhouseCoopers LLP
200 Public Square, 18th Floor
Cleveland OH 44114-2301
Telephone (216) 875 3000
Facsimile (216) 566 7846

September 17, 2009

Mr. Michael A. Tricarichi
341 Arbour Garden St.
Las Vegas, NV 89148

Dear Mike:

Per my discussion with Jim Tricarichi, enclosed are copies of the relevant materials you requested. I believe these are essentially the same materials provided to the IRS in February 2008, after review by you and your counsel.

Sincerely,

Richard P. Stovsky

Enclosures

Electronically Filed
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Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

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

BEFORE THE HONORABLE JOANNA S. KISHNER
DISTRICT COURT JUDGE
WEDNESDAY, NOVEMBER 1, 2023

RECORDER'S TRANSCRIPT OF PLAINTIFF'S MOTION TO RECONSIDER PURSUANT TO NRCP 60(B) BASED ON NEWLY DISCOVERED EVIDENCE

APPEARANCES

For the Plaintiff: SCOTT F. HESSELL, ESQ., PRO HAC VICE
ARIEL C. JOHNSON, ESQ.

For the Defendant: MARK L. LEVINE, ESQ., PRO HAC VICE
CHRISTOPHER D. LANDGRAFF, ESQ., PRO HAC VICE
PATRICK G. BYRNE, ESQ.
BRADLEY T. AUSTIN, ESQ.

RECORDED BY: LARA CORCORAN, COURT RECORDER

Las Vegas, Nevada, Wednesday, November 01, 2023

[Case called at 8:29 a.m.]

THE COURT: Okay. Page 1. Tricarichi v. Pricewaterhouse 735910. Welcome back, counsel. So can we have appearances first on behalf of Plaintiffs?

MR. JOHNSON: Good morning, Your Honor. Ariel Johnson, bar number 13357. Local counsel for Plaintiff Michael Tricarichi.

THE COURT: Thank you.

MR. HESSELL: Scott Hessel on behalf of Plaintiff Michael Tricarichi, pro hac vice admitted.

MR. BYRNE: Good morning, Your Honor. Patt Byrne on behalf of Defendant PricewaterhouseCoopers, local counsel.

MR. LANDGRAFF: Good morning, Your Honor. Chris Landgraff for PricewaterhouseCoopers. Also, pro hac vice.

MR. LEVINE: Good morning, Your Honor. Mark Levine for PricewaterhouseCoopers as pro hac vice.

MR. AUSTIN: Good morning, Honor. Brad Austin, on behalf of PricewaterhouseCoopers, local counsel.

THE COURT: Are we doing anymore or just observing in our gallery seats? One on each side. Okay. Perfect. And you have someone observing remotely, which means you can't see them, but they can see the screen remotely. So just to let you know. I think it's from your side, somebody's remote, observing.

Okay. Well, so counsel, this is -- so let's call this is the

motion to reconsider. Plaintiff's motion to reconsider pursuant to NRCP 60(b), based on newly discovered evidence, document 451. Opposition thereto document 458. Reply thereto document 464. Counsel, feel free to commence with your argument.

MR. HESSELL: Well, I know you're very familiar with the case, and I know that you spent a lot of time reviewing briefs. And so I thought I would start out by giving you the opportunity, if you had any questions for me to address that were either unanswered in the reply brief or otherwise.

THE COURT: Well, you all know I wasn't the judge back in 2017, nor was I the judge in 2018, but I was the trial judge. So you can appreciate I was reading through different things. In fact, before we went on the record, I made a reference to a statement made in the transcript from the September 24, 2018 hearing, which is the subject of your motion for reconsideration. I did have a question from that, which is actually for both sides.

And that question is to what extent, if any, does each side argue that the issue was already addressed in the 2018 hearing? And specifically page references, transcript maybe page 6 and transcript maybe page 16/17, and just the general concept. Because the concept was discussed. So for this Court, since I wasn't the one that heard it of each party's perspective of how much it was fleshed out or not fleshed out, so I have to evaluate for the motion for reconsideration of the concept of new evidence, right.

MR. HESSELL: And the concept you're referring to is the

concept of fraudulent concealment or the failure to have adequate documents?

THE COURT: It's actually both, but was more so on the fraudulent concealment generalized concept because there were some statements made in that transcript that -- as not being the trial judge, I wanted to hear each party's perspective, and since I have the two counsel who argued it back in 2018, I thought you might be able to give me the perspective of what you think of the breadth and depth that was discussed.

MR. HESSELL: Yeah, I think there's --

THE COURT: If you wish to. Nobody's requiring it. That was just going to be my question, if it wasn't addressed.

MR. HESSELL: Right. And I think there's no question that we argued that fraudulent concealment under Nevada's accounting statute of limitations, there's an express exception that even if a Plaintiff knows or should have known that they have a claim against an accountant, if the accountant conceals acts or omissions for the period of time that he concealed those acts -- he or she conceals those acts or omissions, then that period does not count for statute of limitations purposes. It's an express statute -- statutory tolling.

It is that statutory tolling that precipitated Judge Hardy's order in the first instance in 2017, granting us 56(f) discovery. In fact, things that he ordered that we were entitled to, which were based on an affidavit from Tricarichi saying, I need these things --

THE COURT: Yeah. Paragraph 10.

MR. HESSELL: -- in order to respond. Yeah. In order to be able to respond to 56(f) is what precipitated the meet and confer and the exchange on what would be relevant.

In 2018, in front of Judge Gonzalez, we did then argue that PwC fraudulently concealed and there should be tolling. What is, I think, critical is that PwC, in their reply brief, their entire attack on that defense was that we had not come forward with evidence that showed that PwC knew before Mr. Tricarichi had engaged them or during the course of its engagement, that the transaction was risky, was wrong. That you should not go forward with that transaction. In fact, in their reply brief, at pages -- that's one of the things I was actually going to show you --

THE COURT: No worries. Feel free to do it in your ordinary course. I was presuming you all were really incorporating it in each of your arguments, and I was going to ask questions at the end, but since you asked me, I said it. Feel free to just do your regular argument, and you can reference it when you want to. It's fine either way.

MR. HESSELL: Well, I think it's -- I think it is directly relevant to the issues at hand. At pages 26 and 25 of their reply brief that preceded the ruling by Judge Gonzalez, they say in response to fraudulent concealment that "there are zero facts supporting Plaintiff's theory that PwC knew its advice to Plaintiff was incorrect, but fraudulently concealed that fact from Plaintiff in order to establish concealment tolling."

They go on to say," even though we had 56(f) discovery, there are zero documents that we've come forward that establish that

they knew their advice was wrong. And all we could refer to was what they had told the Marshalls, which is that they claimed -- PwC claimed that they told the Marshalls not to do the deal. And that was the subject of lots of litigation at the trial in this case. But what we didn't have at trial and we didn't have in 2018, but they were required to have produced, is the "Wow!" email. And that "Wow!" email was the opening, the examination of every witness at the *Marshall* trial, the closing, and what, in large part, led to the verdict that we got in that case. That document wasn't produced in the *Marshall* case until five months before trial, two weeks before you issued the order in your case.

And I thought it would be helpful, which is why I have it up on the screen to at least just walk through what's going on in the "Wow!" email. I know it is somewhat self -- I think Mr. Weber's response is somewhat -- speaks for itself. But what starts the exchange is about a week before the transaction was supposed to close in Marshall -- can you see that all right?

THE COURT: Yes.

MR. HESSELL: Dempsey -- sorry about that. Dempsey -- Mr. Dempsey, who was the Stovsky of the *Marshall* case. He was the local person who was working on the transaction and had day to day responsibility, reaches out to Dan Mendelsohn, who, as we point out in our brief, was the national risk manager responsible for the reportability of transactions involving PwC. And he writes in his subject Tax Shelter Disclosure Fortrend deal.

He attaches -- Mr. Dempsey attaches the stock purchase

agreement that was then in draft, and notes that he is concerned about certain provisions in that, the disclosure language and the confidentiality conditions. And could you please email me your comments? Mr. Mendelson then responds 15 minutes later, and not only does he respond to Mr. Dempsey, but he also adds all these other people who are national top of risk management and complex tax shelter transactions at PwC.

And just so you know, Mr. Emilian was National Director of Tax at PwC. Mr. Housel was in the same department as Mr. Lohnes was, which was these technical experts on tax shelter and reportable transactions. Gary Cesnik is a name that should be familiar to you because he was one of the people that PwC agreed to search their emails for related to Fortrend during this time period. And Alan Fox, the head of Tax in the Office of General Counsel.

And there's a reason why Mr. Mendelson included all those people, which I'll get to in a minute when I refer you to the policy of don't admit responsibility. Fifteen minutes after he first gets the draft engagement agreement -- I mean, the draft stock purchase agreement, he reports to Dempsey that he's had separate conversations with all these people, including Bill Galanis, who was another head National Risk Management Tax shelter guy at PwC at the time.

They've all had separate conversations. And we are very uncomfortable taking any advisory role in this transaction. The transaction is way too difficult. And I understand, basically, that we're on the same page, and that you and Gary are going to have a

conversation that we shouldn't be advising on this transaction. John Dempsey then forwards that email to Mr. Weber, and that's because Mr. Weber was his supervisor within the Portland office and also working on the transaction. At this point in time, they had been working on the Marshall deal for six months. And this is the eve of closing, when they're finally consulting the national experts.

And after Mr. Dempsey forwards that email, Mr. Weber has his "Wow!" response. I mean, there's really no other way to put it. And the "Wow!" response includes just about every aspect of an admission of knowing that this -- now realizing that this transaction, this basic transaction is risky. We didn't think that before. We thought this deal was done all the time, and we may have already given this client the wrong advice.

He goes on to say that it appears from whatever advice he's getting from the national office, either in this underlying email or subsequent conversations, that it's going to blow up at the IRS, and that the client may get sued for aiding and abetting a transaction, the sole purpose of which is to evade income tax. And he -- Mr. Mendelson, after getting this email, which Mr. Weber wasn't on the prior email threads, right, it was only Mr. Dempsey and the other individuals.

Mr. Mendelson, after receiving the email, forwards the response and you see a blank here, but that's because PwC had marked this as -- whatever this communication was, as attorney-client privilege. And at trial in Marshall, they asked that that redaction be removed so the jury wouldn't intuit something untoward that was being kept from them.

That's why there's just a white blank spot, but there's a one line communication that was never produced to us. But he forwards it to Alan Fox, Housel, Galanis, and the rest.

This top email was what was on the privilege log in 2019 -- June of 2019 that Skadden and Arps put on a privilege log in the *Marshall* case. So this top -- the rest of the privilege log entry did not reveal that there was any more communications, and they certainly didn't produce this in redacted form until February of 2023. PwC doesn't dispute today, and didn't dispute in the *Marshall* case, that all of this underlying communication was relevant in *Marshall* and not privileged. And it sort of speaks for itself that it's not privileged.

So as of June of 2019, at which point this case, the summary judgment order, had been granted, but we had sought leave to amend to add the 2008 claims. The Supreme Court had not considered the mandamus petition of PwC on the jury waiver issue. You hadn't had the evidentiary hearing on the jury waiver issue, and the trial hadn't happened. It remained on that privilege log for four years, during which all of those other events happened.

So as of June of 2019, PwC, as an institution, knew of the "Wow!" email, knew that they had not produced it in response to custodial searches that required it to be produced.

THE COURT: Focus on which case --

MR. HESSELL: Oh, yeah.

THE COURT: -- when you're switching between --

MR. HESSELL: Yeah.

THE COURT: -- when you're switching from Marshall to Tricarichi --

MR. HESSELL: Yeah.

THE COURT: -- I think I know where you're going, but unless you're saying it --

MR. HESSELL: Yeah.

THE COURT: Okay.

MR. HESSELL: Right. So, in Tricarichi, PwC agreed, in response to Judge Hardy's order requiring the production of 56(f) discovery, they agreed to produce, number one, documents related to internal --

THE COURT: Hold on. Anybody who's logging on, please we are in the middle of a hearing, so please make sure you mute yourselves. Thank you so much.

MR. HESSELL: So, Judge Hardy, and you've probably seen the order requiring 56(f) discovery, right, he denies summary judgment initially on the basis of the 56(f) discovery.

THE COURT: Just so that we're clear on the record. Yes, I have the orders. I said I looked at both of the orders 17 and 18 transcript, and everything else that you all provided. Go ahead, please.

MR. HESSELL: Right. So 56(f) discovery is required by Judge Hardy. He denies their initial motion to dismiss, requiring that discovery to be produced on fraudulent concealment, among other issues. And Skadden, on behalf of PwC, in August of 2017, represents that they have produced, number one, documents related to any internal

policies or guidelines regarding ongoing communication with the client after PW services and advice has been rendered concerning the client engagement. And, number four, documents collected from a custodial search with the following agreed upon search parameters. No one disputes in this case, not even PwC on the motion for reconsideration, that the "Wow!" email meets these search parameters.

Their excuse, which by the way, is not supported by any declaration from anyone at PwC, not supported by anybody at Skadden, is that they tried to find the documents responsive to these search parameters and produce them, but nobody says what the nature of the search that they did was at the time, nobody explains how they complied with it, nor, more importantly, does anyone explain why in June of 2019, when Skadden puts the "Wow!" email on a log in *Marshall*, they are not, at the minimum, logging it in this case and allowing us the opportunity to challenge it in the same way we did in *Marshall* and get before the court in all the subsequent proceedings that document. That, by itself, effectively an admission of discovery misconduct in this case.

And as a general matter, we come to the Court recognizing that there is a high standard on 60(b) motions, especially one that has involved the extent of the proceedings that have been both before this Court, before the Supreme Court, before Judge Hardy, before Judge Gonzalez. But civil litigation depends on a party's good faith compliance with discovery obligations. And the adversarial process cannot work unless both sides treat discovery not as a game of hide the ball, but where they actually produce what they agreed to produce. And the

failure to produce the "Wow!" email and the Don't Admit Wrongdoing Policy, just like in *Marshall*, have fundamentally compromised this litigation process.

The "Wow!" email, as I just walked through, I think speaks for itself. But I did want to say that it calls into question Judge Gonzalez's summary judgment order as -- not calls into question, but Judge Gonzalez likely would have reached a different result on the basis of these two documents alone. Reading all of the inferences from those documents in our favor, not their favor, that there was a question of fact as to whether -- why they didn't share the "Wow!" email with Mr. Tricarichi, and the policy then gives the explanation for why they did it.

And so, all that needs to be established -- and by the way, I recognize that there is an inclination by courts, especially on motions for reconsideration, to not want to start this whole process all over. But the fact remains that --

THE COURT: That's not true.

MR. HESSELL: I wasn't speaking specifically to you, but --

THE COURT: I can only speak for myself. But records have shown I have granted reconsiderations. I have denied reconsiderations. I've allowed supplemental briefing. It's been all over depending on a fact specific inquiry in accordance with the rules and the law. Go ahead, please.

MR. HESSELL: Yes. So the summary judgment order concludes that Mr. Tricarichi knew, by virtue of document requests from the IRS, that PwC's advice was wrong. He could not possibly have

known that they were intentionally concealing from him that the national office had concluded that those who participate in these types of transactions subject themselves to potentially aiding and abetting tax evasion by Fortrend because that was never known to him. Their advice, all the way until the end was that this transaction, more likely than not, will not subject you to personal liability. That was the Stovsky memo. Its conclusion was you won't be subject to personal liability.

The only response that PwC can make is a claim that somehow the 15 minute reaction by the national office is specific to the Marshall transaction. But there is nothing in that email that suggests that it is anything about the particulars of the Marshall transaction or suggests anything about how it would be different from this.

In addition, the enforceability of the engagement agreement was at the center of the evidentiary hearing that you found that the jury trial was --

THE COURT: Okay, counsel, please. As much as you might like to play with papers, type and do all sorts of different things, we are in the middle of a hearing. Please do mute yourselves so that they get a nice, clear record. Thank you so very much. Okay. Evidentiary hearing. I heard what you said.

MR. HESSELL: Yeah. And the Supreme Court case. How could it? The entire idea behind the engagement agreement being binding on Tricarichi is undermined if, before he even entered that engagement agreement they had disclosed to him what they then knew. This February "Wow!" email is five months before Mr. Tricarichi even

engaged PwC or signed the engagement agreement with them, which included the jury trial waiver. We certainly would have been able to cross examine their witnesses, Mr. Stovsky and Mr. Lohnes, saying, did you know that PwC's national office had concluded a nearly identical transaction was going to subject your client to aiding and abetting tax evasion? And did you tell him that before he engaged you?

Carrying on to the trial itself, the whole trial was about whether or not they had an obligation to correct their prior advice, right? The entire 2008 negligence claim was about whether they had an obligation to correct their prior advice. Look what the policy says about that. It says that if you learn any matter or event which calls into question the quality of services provided by PwC or which might damage PwC's reputation, is regarded as a troublesome practice matter, what do you do? In the event -- what should you not do in the event of a troublesome practice matter where you might learn that you didn't do -- you didn't give the right advice? Don't admit liability, shortcomings, or defects in our services.

How could that not be a policy regarding ongoing communications with a client? How could that not have been required to be produced in 2017 or later once we amended our claim to add a 2008 claim? How could that not be directly relevant? They produced other policies, but they never produced this one, and we couldn't cross-examine their witnesses on that subject. We couldn't cross-examine their experts on the subject of -- that they had a policy that says don't admit responsibility.

Remember, Mr. Lohnes and Mr. Stovsky claimed that they looked at the transaction after 2003, but just concluded that they had given the same advice, that they were standing by their prior advice. But what we didn't know then, but we do know now, is that there's a reason why they were standing by their prior advice because there was a policy, a risk management policy that dictated that they do so. And even if they were to conclude otherwise, that they shouldn't tell the client about screw-ups.

So at the end of the day, we recognize that cases must end, and finality is an important goal to the litigation process, but this is not the first time that we've raised the issue of discovery misconduct by PwC.

In fact, a year ago yesterday, we brought to your attention a motion for discovery sanctions where we said they have come to us and produced a few handful of additional documents that had not been produced before trial. There's a minute order, entry order on October 31st of 2022, that reflects that you imposed a monetary sanction.

We actually asked that you also allow us a deposition from a corporate representative witness to confirm that they had produced everything that they had agreed to produce up until that time. And they put in a declaration from Ms. Roin that said that they have gone back and made sure that all responsive documents and that they had agreed to have already been produced. And you took that representation. As I reread the hearing this morning, you relied on that representation from Ms. Roin that they had gone back and made sure nothing else hadn't

been produced to deny us the relief of a deposition of a corporate representative deposition. If we had gotten that deposition at the time, we might have unearthed this issue before.

At the end of the day, it's in your hands whether to express an intention to give us some of the relief that we're seeking. What would that entail, ultimately? In our view, at a minimum, it would entail briefing the 2018 summary judgment issue with the benefit of the evidence that we now have. Obviously, we raised those issues, and I tried to articulate those issues here now, but as you noted, you weren't the judge that heard the issues at the time, but that order became -- was interlocutory and became incorporated into your final judgment.

So do you allow it to proceed on the existing record without the benefit of us briefing the issue and deny us the relief that we're seeking now, or do you give us that opportunity as well as the opportunity to suggest that there may be other claims that we could have made in 2019 when they admit that they knew of the document?

THE COURT: Okay. Thank you. Counsel, your response?

MR. LEVINE: Yes, Your Honor. I am mindful of your question at the beginning, and I will -- if it's all right with the Court deal with it kind of in a normal course --

THE COURT: Sure.

MR. LEVINE: -- as I go through, because I think it will make more sense that way, just from a logical standpoint. So I want to address first, why is it the "Wow!" email wasn't produced in the 56(f) discovery and then why, under the standard for newly discovered

evidence under Nevada Rule of Civil Procedure 60(b)(2), the relief requested should not be granted.

First, the "Wow!" email and when it was produced. And there's all kinds of arguments that we violated discovery rules, et cetera. But as shown in the response, there was an agreement with Mr. Hessell to produce documents in the 56(f) discovery from certain custodians. In fact, there were nine custodians that were agreed to, and those nine custodians is set forth in the August 23, 2017 email. That's for Tricarichi Exhibit 4 at record page 30.

And in that it included Weber and Cesnik. But Weber and Cesnik didn't have the "Wow!" email in their files. You know, people, you know, don't always keep emails years and years down the road before the litigation came up, when Tricarichi first approached PwC with the tolling agreement in 2011.

So in the *Marshall* case, PwC found the "Wow!" email later on and produced it from the custodial files of Bill Galanis, whose name you heard during the trial. And he was not an agreed -- he was an agreed to custodian for the *Marshall* case, but not for the Tricarichi 56(f) discovery when the parties were negotiating it. So that's why it ended up being put on a privilege log in the *Marshall* case, but not produced in the 56(f) discovery in the Tricarichi case.

Now, in his reply, Mr. Hessell pivots and says, well, Weber and Cesnik should have saved the email, so it would have been in their files, but under Nevada law, and we cited the *Bass-Davis v. Davis* case from the Supreme Court in 2006, there's no obligation to save

documents until the party is, "on notice of a potential legal claim." And here that didn't happen until we were put on notice in 2011. And PwC immediately did put on a legal hold at that point. And that's in the Genord declaration, paragraphs 19 and 20, which is PwC Exhibit Eleven at 73.

And PwC's document retention policy says you save documents that are necessary to show the work done, but emails generally are, "not necessary -- that are not necessary to record or support the firm's work should not be retained." And that's PwC Exhibit 8 at 46, paragraph 2(b)(i).

THE COURT: Are you saying that an email that references not the "Wow!" email, right, literally, for purposes of the record, it does use the word "wow" in the email, starts it off with the word "wow", which is why I presume you're calling it the "Wow!" email.

MR. LEVINE: Sure.

THE COURT: Is that didn't have to do with the work performed?

MR. LEVINE: It had -- the way that PwC's policy is set up, document retention policy, you take the documents that are necessary, and that's the phrase that's used, necessary to show the work performed, put it in a file and save it. But every email that you have discussing the matter doesn't need to be saved.

THE COURT: I'm hearing what you're saying, but you can appreciate with newer eyes on it, right, you're saying the -- in reading the policy that was attached, are you saying that it doesn't require that if

you decide not to perform work, that people don't keep the reasons why they chose to limit the scope of representation not to do certain work, or a change in -- hypothetically, a change in an IRS regulation that might modify work that's currently in progress? Don't take that as any comment from the 2008 issue. I'm just saying, hypothetically, it might be work in progress?

MR. LEVINE: The standard is you keep what's necessary to show the work that was done. If it's -- you know, possibly what wasn't, you know, decided not to be done. But that is different. It also says every email doesn't have to be saved, every email back and forth on matter. But regardless of that, Nevada law says you don't have an obligation to retain documents until you're put on notice of a claim, which shouldn't happen until 2011.

THE COURT: So you're saying PwC was not on notice of the claim when there was earlier IRS issues?

MR. LEVINE: Mr. Tricarichi was on notice. And Mr. Tricarichi -- and this is going to be an important point because this is the basis of the Court's ruling in 2018, which was not the four-year prong of statute of limitations, but the two-year prong on discovery.

Mr. Tricarichi was on notice that the IRS could come after him. And he was on notice, therefore, that he could have a claim against PwC, but he didn't approach PwC with his request or his tolling agreement to request for that until 2011.

So in any event, even if PwC were considered to be on notice in 2008 as well, when the IRS came -- because they sent document

requests to PwC too.

THE COURT: That's the focus of my question.

MR. HESSELL: But that doesn't mean that -- first of all, it doesn't mean that the documents were still in Mr. Weber's or Mr. Cesnik's files at that point because, remember, they're the two custodians from the Tricarichi case. The document was found from Mr. Galanis' files, and so Mr. Galanis had it, but he wasn't a custodian. Mr. Weber didn't keep his emails. That was his testimony. He just deleted emails each day unless it was like a to do item. That's how he did it. He liked a clean inbox. There was not testimony from Mr. Cesnik one way or another. But there isn't evidence that the emails from Mr. -- the "Wow!" email was in Mr. Cesnik's possession in 2008. We do know it was in Mr. Galanis' possession, but he wasn't a custodian in the agreed to list in the Tricarichi case.

THE COURT: But you do understand there's a challenge, and that's part of my finding, finding 50, right. The IRS also issued a summons to PwC on January 29th, 2008, seeking documents related to the Westside transaction, Exhibit 152. On February 22, 2008, PwC responded to the summons on its own behalf. In doing so, PwC provided documents that set forth its contention that it had not provided any services to Tricarichi since 2003, Exhibit 155. Tricarichi was not billed for any of these activities. See Exhibit 3.

MR. LEVINE: Correct.

THE COURT: So when you get a summons from the IRS, PwC, doesn't maintain documents potentially related to that could advise

-- are you carving out the IRS' issues in Westside versus Fortrend overall? I'm just -- I'm trying to get the sense because hearing that PwC wouldn't retain documents when they get an IRS subpoena doesn't -- it seems a little inconsistent.

MR. LEVINE: And that's not what I'm saying.

THE COURT: Okay.

MR. LEVINE: And you know, PwC did retain documents then. But when Mr. Stovsky sent in the documents to the IRS in 2007 or '08, I can't remember the exact date, but when he sent it in at that time -- remember, he's in the Cleveland office, and the work came out of the Cleveland office and certain people, including Mr. Lohnes in the national office. And he produced the documents that he had that were in the file largely from the Cleveland office.

What we're talking about here with that "Wow!" email is something specific to the Marshall transaction in Portland that Mr. Stovsky and Mr. Lohnes, who were working on the transaction -- in the Westside transaction, never saw

THE COURT: Do I have that as evidence versus argument?

MR. LEVINE: You certainly have it as argument.

THE COURT: You have very well written briefs, everyone --

MR. LEVINE: Yeah.

THE COURT: -- but do I have that as evidence?

MR. LEVINE: I would have to go back and -- I can't remember, frankly, Mr. Stovsky's testimony about his -- what he put in -- you know, what he produced and when in 2007 or 2008 to the IRS. I

would have to go back and look at that. It's certainly not produced -- it's not brought to you by either side as part of this briefing and the 60(b) motion, but there could be testimony from the trial or deposition on that. And I don't recall offhand.

THE COURT: Okay. No worries. Please continue. Go ahead.

MR. LEVINE: So the standard for newly discovered evidence under Rule 60(b)(2) is an extremely high standard for relief.

Now, we cited the 9th Circuit case -- and there's no law in Nevada on that, which is why Nevada Court is saying what the federal rule, it's the same. And the *Feature Realty* case, the 9th Circuit said the standard is that the new evidence is, "of such magnitude that it would have been likely to change the disposition of the case."

Now, Mr. Tricarichi cited two cases from the 7th Circuit in his motion, the *Wallace* case from 1980, that talked about a similar kind of standard, probably produced a different result. But also, the *U.S. v. McGaughey* case from -- also from the 7th Circuit, 1992, 977 F.2d 1067. The *McGaughey* case is particularly relevant because it took that general standard about -- it would probably produce a different result and laid out some more details about that. It specifically said, that where "the new evidence is virtually determinative on the merits of the litigation is the standard." That's at page 1075. It said the issue is, "whether the document causes us to believe with virtual certainty that the judgment in favor of the government, regardless of whether it was obtained summarily or after trial, is incorrect." Virtual certainty or virtually determinative, that's a pretty strong standard.

And here, that test is not met for three reasons. Well, first of all, in the 2008 claim, Mr. Hessell -- which was ignored, in their reply -- Mr. Hessell said, "boy, they would have wanted to see this QR&M booklet that said that if you see an issue, don't talk, which is basically don't talk, go talk to the Risk Management folks before you say things to the client. But the court's ruling -- I mean, the Court ruled against -- for PwC against Mr. Tricarichi in the 2008 claim at the trial for four independent reasons, as you know. No duty, no breach, no causation, statute of limitations. They have to overcome all those, and the policy doesn't do that.

And on the no duty, which is the one out of the four independent grounds for ruling against Plaintiff, Mr. Hessell said, boy, it would have shown -- you know, this booklet would have shown something. No, because the Court's ruling of no duty was based on the SST's or the standards, and what the standards say about when you need to correct something, and that it doesn't apply to a former client. So that is not affected by these documents.

But on the 2003 claim, which I think is the focus of their efforts, I want to make three different points. First, the Court's ruling was that the 2008 document request from the IRS put Mr. Tricarichi on notice of the claim. And therefore there is -- the two-year prong applies. And this goes to, I think, what the Court's question was at the beginning about what was going on at the hearing.

PwC had two different reasons why it argued that there should be a finding in its favor on summary judgment on statute of

limitations. First, the four-year prong. And there was a question about which law applied New York versus Nevada. But ignoring that, and just focusing on Nevada, there's the four --

THE COURT: Yeah, Nevada was longer, so it really doesn't matter.

MR. LEVINE: Sure. Right.

THE COURT: Got it.

MR. LEVINE: So there's the four-year prong under 11.20752, and there the response was fraudulent concealment. And then there's also the two-year prong under 11.20751A. And Mr. Byrne, right here, argued on pages 6 to 7 of the transcript, and I think you referred to those pages, that even if, you know, the Court doesn't find that there was a statute of limitations bar under the four-year prong, the two-year prong is an independent basis because Mr. Tricarichi was on notice as of 2008 that the IRS was going to or could go after him.

And in fact, this Court had a finding of fact specific to that notice, paragraph 49. It sounds like you've looked at that because you looked at the one after that on paragraph 50, which is that on January 22nd, 2008, the IRS sent the information document request to Mr. Tricarichi for documents related to the Westside transaction. The IDR or Information Document Request advised Tricarichi that he may be liable for all or part of Westside's tax liability. That's part of this Court's finding. That's what it said.

And when you look at that -- now, Mr. Hessell argued, well, that's not -- didn't give him enough. He didn't really know until 2012 or

2013, when he had more information and there was a finding against him, but the Court said no. The Court, who was Judge Gonzalez at that time, said, no, he was on sufficient notice. And PwC had cited a number of cases in its brief that when the IRS gives you that kind of request, it puts you on sufficient notice that you should go and, you know, that you could have this put against you.

So the Court ruled that under Nevada's interpretation of the rule, two years after discovery, under the best case scenario for the Plaintiffs was the statute expired before the January 2011 tolling agreement being executed. That's a docket 116 transcript page 19, line 7 through 15. So you already have -- you had these two different grounds. And the courts basically said, I don't need to get into this whole fraudulent concealment issue. I can decide it based on the notice that Mr. Tricarichi got in 2008.

So this whole argument about the "Wow!" email and fraudulent concealment, et cetera, is beside the point to the Court's ruling, which was on a different prong of the statute of limitations. That's the first point.

The second point is that the "Wow!" email wouldn't have changed the thrust of the fraudulent concealment argument because Mr. Hessell argued extensively that PwC didn't tell Mr. Tricarichi that PwC was giving different advice to the Marshalls in 2003. He argued that in the transcript at page 17, which was one of the pages you referred to with page 17, lines 1 through 3. And that was based, you know, on the Tax Court decision and what the findings were there.

And in the response to the response brief, docket 113, page 20, he made the same point about how "PwC actually gave at least one other taxpayer completely the opposite advice that it gave Mr. Tricarichi." So this is an argument that was made. The "Wow!" email is additional evidence on that point, but the evidence -- the argument was already made.

Third, Mr. Hessell's reference to the statements in the "Wow!" email about the transaction don't help him, because the Court's already found the Marshall transaction was different. Now, Mr. Hessell says that this was the National Tax Office making a finding about a basic transaction. If I could use the ELMO here, I want to put this out because -- I don't know what I need to do to turn it on.

THE COURT: There you go.

MR. LEVINE: All right.

THE COURT: Sideways, yeah.

MR. LEVINE: Okay.

THE COURT: Thank you.

MR. LEVINE: I don't know is there -- sorry, I'm not very good at the ELMO. There's a way to --

THE COURT RECORDER: There's an arrow.

THE COURT: There's an arrow. You see the arrow.

[Court and counsel confer re ELMO]

MR. LEVINE: I appreciate that. All right. So remember, the second page of the "Wow!" email is someone from -- Mr. Dempsey from the Portland office sending the 57-page stock purchase agreement, the

draft, to Dan Mendelson from the national office. And the national office, what do they say about it? So this is commenting on the 57-page draft document that they got. They say -- and I've underlined -- that we talked about this transaction. Were uncomfortable taking an advisory role in this transaction. The 57 stock page stock purchase agreement, you know, et cetera, refers -- and he refers to risks in this transaction. It's referring to the Marshall transaction, the one in the 57 page stock purchase agreement.

Now, Mr. Dempsey, the local guy, the local engagement guy, responds by talking about, I didn't know the basic transaction was risky because he didn't know. He wasn't the guy who knew about the different issues in the -- you know, in this which is why he turned to the national office. And the national office focused on this transaction, the Marshall transaction.

And as this Court knows, this Court's already found in a couple of different places that the Marshall transaction was different than the Tricarichi transaction. And that's paragraphs 39 and 135 in the Court's findings of fact and conclusions of law, docket 416.

So for those three reasons, you have a situation where Mr. Tricarichi can't show -- cannot show that it was likely that the "Wow!" email and the booklet would have likely caused there to be a different result. In all of those, maybe the most important is that the Court ruled, based on the discovery rule, based on a two-year prong, and the two-year prong is not affected by it.

There's also a question about whether or not Mr. Hessell

exercised reasonable diligence in bringing this to the Court as a Rule 60(b)(2) instead of a Rule 59(e) motion when he had knowledge as an attorney. And we're not imputing that knowledge to Mr. Tricarichi, but it's a question of reasonable diligence. And he had knowledge of this email before the 28 days after the judgment was issued, which I believe would be -- February 22nd, was the judgment, so I think it's March 22nd, but that has been briefed and the basic response was, well, you don't impute knowledge to the client. And we're not imputing, we're just saying you could have asked it more diligently.

So unless Your Honor has any questions but --

THE COURT: I do not.

MR. LEVINE: All right. Thank you.

MR. LANDGRAFF: Your Honor, I know it's a one rider --

THE COURT: Unless I have consent by counsel for Plaintiff.

MR. LANDGRAFF: If I can just confer with Mr. Levine? I want to give him the transcript. You asked if there was evidence that Mr. Lohnes or Stovsky knew about this. And there is trial testimony that I wanted to hand to Mr. Levine.

THE COURT: He had a full opportunity. He utilized all his time in fairness because realistically, right, it's now 9:15. We've been going about 40ish minutes.

MR. LANDGRAFF: Okay. Can I just give a transcript cite or?

THE COURT: To a transcript to a particular trial date?

MR. LANDGRAFF: Yes. Counsel for Plaintiff, do you have an objection?

MR. HESSELL: No, I don't know.

THE COURT: No, you don't agree, or no, you don't have an objection?

MR. HESSELL: I don't object.

THE COURT: Okay. Then feel free to either -- which way do you want to do it most efficiently? He gives me transcript cite, he states it, he tells it to counsel, who's arguing.

THE COURT: I think he's just giving -- if he's just giving a transcript site, I don't have any objection to Mr. Landgraff saying it, but it looks like he's already passed it to Mr. Levine.

THE COURT: Okay.

MR. LANDGRAFF: It's dated -- November -- just so Mr. -- it's in front of Mr. Levine, but it's day two of the trial, November 1st, 2022 transcript, at -- he can give you the cite.

MR. LEVINE: It's pages 66, line 21 to page 67, line 12.

THE COURT: Go ahead, counsel. Would you like to respond?

MR. HESSELL: Yeah, briefly. I know that we've already taken up our lot of time.

THE COURT: I'm trying to give everyone -- I'm just trying to give everyone the full opportunity. I appreciate it's important to everyone, it's been a long time since this case has been around. Go ahead.

MR. HESSELL: Yeah. I want to start with the doesn't make a difference to the 2008 ruling. And I just want to reiterate if I didn't make

the point before, the fraudulent concealment statute in Nevada does not speak to what the Plaintiff knows. It speaks to the Defendant's conduct. Where the Defendant fraudulently conceals acts or omissions which it is aware of from the Plaintiff during that period of time, the statute of limitations is tolled. It is an exception to the A(1) and (2) that precede it.

And so the defense or the argument that this evidence the "Wow!" email doesn't establish that PwC knew that the transaction -- the national office at PwC, before Mr. Tricarichi even engaged them, knew that it would expose him to aiding and abetting tax evasion and concealed those conclusions to him before he signed the engagement agreement and throughout the entire course of the services that they provided to him.

That is then paired with the policy, which is that the national office knows that these transactions, the basic transactions are risky, knows that they are likely to blow up at the IRS, knows that he may be subject to personal liability, but Mr. Lohnes and Mr. Stovsky then give the advice that they gave, which is documented. And the policy suggests that the reason why the "Wow!" email and the conclusions of the national office were not shared with Mr. Tricarichi is because they had a policy against admitting shortcoming.

Now, while it is true that the 60(b) standard is a heavy standard, the issue before you is whether this evidence would have allowed Judge Gonzalez or even you, now, to conclude that a reasonable juror could find that PwC concealed this information from him intentionally to accept the statute of limitations. The standard on

summary judgment is all inferences must be read in our favor, not their favor. The fact that there's some characterization of this email, the fact that there's a characterization of the policy, that would have been good to have that fight back in the day, but we didn't have the evidence to be able to have that fight. We would have been able to cross-examine their witnesses. We would have been able to present evidence from the witnesses about whether they consulted with any of these individuals on the "Wow!" email, and whether any of them shared this information with him.

The other thing that we make the point of in the brief is it should beg the question of how is it possible that after this email gets shared with the Office of General Counsel, with the higher ups at PwC, that there's not one additional email in reference to this document? There's not one additional communication that follows it? And that just leads to the point of -- that Mr. Tricarichi, whatever he knew as a result of receiving document requests from the IRS in 2008, could not possibly include the idea that PwC knew that the transaction was risky, knew that he was proceeding in a transaction that might expose him to aiding and abetting tax evasion.

Yes, we did argue to Judge Gonzalez that he didn't know about the Tricarichi advice, but that's not what the "Wow!" email reflects. It's not about that we ultimately told the Marshalls that it was not a Notice 2001-16 transaction. This goes to the heart of why he was found personally liable, and it is the opposite of what Mr. Lohnes and Mr. Stovsky told him, and yet they didn't ever share it.

The explanation of how this document wasn't produced in this case, how it wasn't preserved in the custodians that they agreed to produce, is not believable. They get a subpoena from the IRS in 2007 in the Marshall case. They get a summons in Tricarichi in 2008. How are there not litigation holds in all of these people who touched any Midco transaction? And this transaction that's being referred to in the while email is about a Fortrend Midco deal, it is not about the particulars of that deal. They came to that conclusion within 15 minutes. They responded in 15 minutes to the 57-page engagement agreement.

Yes, I know you said that it was different or that the advice can be different in Marshall versus Tricarichi based on the evidence that you had before you, but what is spoken to there is the basic idea of a Midco, and the basic idea of a Midco, the national office at PwC knew its clients would be exposed.

The idea that a firm of PwC's caliber would come to these conclusions at the highest level and allow any client to get anywhere near these deals after those conclusions, is mind boggling. And we should have the opportunity to make the pitch on fraudulent concealment and probably a fraud claim because they told him the opposite, none of which Judge Gonzalez had before her.

THE COURT: Okay. Thank you very much. Everyone's had, well, way more than ten minutes, because it's been about an hour. So everyone had a full opportunity to engage in their argument, but extensive briefing, and historical. As the Court noted, it went back to everyone's rulings and transcripts galore, including the transcript from

the 2018 summary judgment hearing, that was on the 24th. So it's all part of the records for the Court to review.

The Court has to look at this -- first off, let's go to standards, Rule 60(b) relief from a judgment or Order. 60(b) grounds of relief. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons. One is mistake, inadvertent, surprise, excusable neglect. Two, which is the focus here, is newly discovered evidence that with a reasonable diligence, could not have been discovered in time to move for a new trial under 59(b). Three, fraud, and then goes into extrinsic and intrinsic. Four, the judgment is void. Five, the judgment has been satisfied, release discharge. Six, any other reason that justifies relief.

So realistically, it's subpart two and subpart six, a more global catch all. And then the newly discovered evidence. And then it talks about the timing. It says must -- timing. The motion under Rule 60(b) must be made within a reasonable time and for reasons one, two and three, no more than six months after the date of the proceeding or the date of service of the written notice of entry of the judgment or order, whichever date is later. The time for filing the motion cannot be extended under Rule 6(b), effective finality.

So here we have a timing of the motion. How do I address that timing issue?

MR. HESSELL: Do you want me to address it?

THE COURT: I'll give you a minute, and I'll give you a minute

response.

MR. HESSELL: Sure. Sure. First and foremost B(3), fraud on the Court does not have any time limitation at all.

THE COURT: Actually, counsel, a motion under 60(b) must be made within a reasonable time, dash, and for reasons one, two, and three --

MR. HESSELL: Right. Fraud.

THE COURT: -- no more --

MR. HESSELL: Sorry.

THE COURT: -- than six months after the date of the proceeding.

MR. HESSELL: Right. So --

THE COURT: Three, fraud, whether previously called intrinsic or extrinsic, misrepresentation or misconduct by an opposing party, is subpart three.

MR. HESSELL: Right. And that's what I was referring to, which is the fraud on the Court can be brought to the court's attention at any time. And they made representations to this Court, both to Judge Gonzalez and later in time, that they produced the documents that said that they produced in response to 56(f) discovery.

But more specifically, is that I learned of the "Wow!" email and the policy five months -- in February of 2023. Mister -- the document is produced pursuant to a protective order in *Marshall* that precludes Marshall or its counsel from using it in any other proceeding. I had no ability to come to this Court because the trial is concluded when I learn

of it, and I don't even get the "Wow!" email until two weeks before you issued the findings of fact. I cannot share the document with Mr. Tricarichi because it's subject to a protective order. And I cannot ask one client to sacrifice their case or put their case in any kind of disadvantage for the benefit of another client. I did want to make one other point, which is --

THE COURT: I was going to tell people who keep on not putting themselves on mute to please put it on mute. Counsel's in the middle of arguing something, you might want to play a record. Thank you.

MR. HESSELL: Also, we moved within the six months of final judgment. And as I mentioned earlier, the summary judgment order is an interlocutory ruling --

THE COURT: Okay.

MR. HESSELL: -- incorporated into your final judgment. And we moved as soon as we could when it became public.

THE COURT: Okay. Did you want a moment?

MR. LEVINE: Yeah. Two quick things. One is that Mr. Hessell, when he got the "Wow!" email on February 3rd, he had until March 22nd to file a Rule 59(e)motion. He could have asked PwC for permission to use the documents in this case. He could have challenged the confidentiality designations in the *Marshall* Court, and he could have asked the *Marshall* Court, under the protective order there, to be able to use the document in a different case. So all those things could have been done. And that's something that would not only go to timeliness

under 60(c)(1), but reasonable diligence under 60 (b)(2).

On the fraud on the court argument on 60(b)(3), which really wasn't explicitly made in the motion, which called it a rule 60(b)(2)motion, but we addressed it thinking that they might go to it. And as you saw in the case law, *NCDSH v. Garner*, the Nevada Court -- in 2009, Nevada Supreme Court said that it is rare and requires egregious misconduct and mere discovery. And then the case out of the 9th Circuit says a mere discovery violation or nondisclosure does not rise to the level of fraud in the Court. That's all I have, Your Honor.

THE COURT: Okay. So let's walk through what it is. So looking at 60(b), whether I look at it as b(2) or b(3), they do have the six month provision. So both of those would preclude it if I was looking at it under -- narrowly as written under NRCP 60(b), procedurally. However, the Court finds it's appropriate to give the analysis under 60(b)(6), the any other reason, because here it's been articulated to this Court, so you have the unique aspect of having a protective order in another case that would preclude the counsel from sharing it with the client, which would then preclude the client from authorizing any brief to be submitted to this Court.

And so the Court finds, that in interest of justice, the Court has to analyze independently and also under 60(b)(6), but taking into account the assertions are raised under the concept of B(2) and (3), but without that time preclusion under 60(c)(1).

So now we look at substance. Realistically, when I look at substance, I have to break it down to two different things. There's two

different aspects of relief. One aspect of relief is there should be relief from the summary judgment order from 2018, and September 24th was the actual hearing date, and the order was dated October 24th, 2018, filed at 10:33, and the NEO was shortly thereafter. So that's the first order of relief, and that's been referred to as the 2003 case.

When I look at the 2003 case, I have to look at what was available in 2018, and whether or not the said "Wow!" memo and the additional policy would have changed the determination of granting the summary judgment on a statute of limitations ground. And in so doing, the Court relies, in part, on the transcript of the hearing and all the pleadings that were provided. Obviously, your oral argument for this case as well as all your pleadings for this proceeding.

But when you look at the actual transcript and the Court already referenced pages 6 and 7, right, counsel for PwC, at the time, did say on page 7, but -- okay, first.

"Your Honor, there's nothing to support a fraudulent concealment claim in this case. But even if the Court thinks there is, your Honor has nailed the second issue, and that was not briefed before, but that's under 20751A. The clock started two years after he received this notice." And what is Plaintiff's response to that? "Your Honor, he argues that he did not have definitive knowledge till the IRS completed investigation in June of 2012," which is consistent when you have counsel for Plaintiff, their argument was that it was 2012.

I think you used the word bunk. Oh, yes. "The only point in time when he knows the PwC advice is bunk is in 2012." This is on page

13, when the IRS formally asserts liability against him. That dispute goes on for six or seven years, and that's a dispute. And then the Court says, "In the Tax Court, yes." And then it continues on. And then it says, "The 2015 Tax Court, why not?" And then there's also the argument about it's not triggered by damages. But then -- and it specifically talks about the concealment on pages 15 and 16, asserted therein. And then it talks about the Marshall facts. And it says, "The Marshall facts were" -- the bottom 16, page 7. At the top of page 17, it says -- 17, line 2, "And those facts were never learned until discovery in the Tax Court case. Those facts were concealed from day one of the representation." And sorry, then the Marshall notice argument is also set forth in that hearing transcript.

So then what you look at is the Court did have the benefit in 2018, of the concept of fraudulent concealment and what impact the fraudulent concealment issue would have for purposes of the statute of limitations argument. And then the Court says specifically, regardless -- "Well, thank you. All right, thanks. Regardless of what law applies, even under Nevada law, given the IRS investigation, the statutory interpretation of NRS 11.2075-1, the period is two years after discovery under the best case scenario for Plaintiffs, which would be before whenever the receipt of the information document request was, which was before the response to the information document request is dated February 21st, 2008. Therefore, the statute limitations expired prior to the January 2011 tolling agreement being executed." And then the next paragraph, it's going to go to the 2008 claim. So not going to read that

paragraph right now.

So it appears from looking, and then it's incorporated in the order as well that I already referenced. And so what it appears is that while both the "Wow!" memo and the policy might have been, "evidence," it was asserted that there would be, "per se negligence, or clearly negligence or "wow," negligence" or -- right, it would be further support for the negligence. It does not address the timing of the notification and when Mr. Tricarichi was on notice, when he needed to file his claim for purposes of statute of limitations. That was fully addressed. It appears that Judge Gonzalez gave the benefit of all the way from 2003 up to 2008.

So it took the full time period, even if there was fraudulent concealment, but said, once the IRS put Mr. Tricarichi on notice and rejected the argument of counsel and Mr. Tricarichi, that there was a distinction between whether or not there was corporate liability versus personal liability, but it took all those factors into consideration and then did find that Mr. Tricarichi, for purposes of when he needed to file his case, he had enough information to file his case, was under the discovery rule. It's two years. So that would be from 2008 gets you to 2010. It's prior to the tolling agreement of 2011.

So the statute of limitations would still apply, fully taking into account -- assuming even with the benefit of the memo and that policy, you've got that still and taken into account, because the factor is not what PwC did in that regard. That is taken into account because the analysis presented in the transcript incorporated in the summary

judgment ruling, the written documentation under Rust versus -- *Division of Family Services v. Clark County and Rust*. But under both of those, the written memorialization also includes the concept is that Mr. Tricarichi needed to do something once he was put on notice, so he could choose whether he wanted to file the litigation or not. He didn't file litigation until 2016.

So the time period under the most general -- generous concept, even taking into account fraudulent concealment, because that was specifically, I said addressed, and I already mentioned different provisions in the transcript, it appears that the Court in 2018 was fully taking that into consideration. So even if the memo and the policy did exist, that might have gone to the concept of whether there was or is not ultimately negligence, but it did not impact the summary judgment ruling on the statute of limitations that was focused on Mr. Tricarichi would have had information, getting notifications from the IRS, being sufficient notification that you have potential liability issues here.

And so, therefore, he should have filed his case earlier was the analysis in 2018. And so, therefore, the Court can't find under 60 NRCP 60, that relief should be granted from the 2018 ruling on summary judgment. It is so ordered.

So now we break down the 2008 case, which is the case that came to trial basically a year ago in this department. So then it goes to whether or not the -- and I have to break this down with two things -- with the 2008 concept. What claims were thought to be brought that precipitated the trial that happened in 2022, i.e., the 2008 case, the Court

does not see that there is any limitation on the nature of any type of claims. That the concept of fraudulent concealment was already out there, already discussed in 2018, already saying that there could be an amendment. How those claims get phrased and how many claims there are, I don't see any prohibition. Once again, I wasn't the trial judge, so I have to look through the record. I don't see any prohibition. So if there was a concern about fraud in that juncture, it's not saying that it couldn't have been brought. There wasn't a preclusion. The nature of the claims that were brought, were the nature of the claims that were brought and those went to trial in this court.

So the Court can't find that there was -- Plaintiff met his burden under 60(b), that somehow, if they got an additional document that says in a different transaction in Portland, Oregon, that does have -- and this is where I would look to some of the email language that's been presented to this Court, this transaction was focused on -- it doesn't say all four transactions. The Court then has to look, does that preclude someone from deciding the scope and breadth of the claims they wanted to bring after they've been provided that opportunity in 2018? The Court finds that it does not.

So the breadth of claims that could have been brought was the choice of what claims to bring because they already had the information about Marshall and the difference in documentation back at least in 2018, because it was discussed in the transcript of the summary judgment hearing. It was also part of paragraph 10 of Mr. Tricarichi's declaration back in 2017, with the first motion for summary judgment.

So there was sufficient basis, and time, and information of whether or not having additional information might have made a trial strategy. It may or may not have, but the Court doesn't have sufficient evidence of proof that it would meet the high standard under 60(b), that somehow that should be a relief on its own that the trial did not incorporate all the claims that were before it. Trial did incorporate all the claims that were before it.

So now I have to go to the trial in the 2008 case. Is should there be relief from judgment in that regard? And the assertions there are that the scope of the information, the cross-examination of the witnesses and that the evidence that was presented could have been different if there had been knowledge of that memo. But then the Court has to go back to the claims presented to the Court, the breadth and scope of the trial, the discovery done in that trial. And the Court did -- and, yes, the reference on November 1 that starts around page 66, where Mr. Hessell during examination, the Court did allow -- let's go back. Okay.

The question was,

"Mr. Hessell: Aare you aware that in the Marshall circumstance, they had litigation with the Bureau of Reclamation that resulted in a litigation award 40 million?"

"Ms. Roin: Objection. Relevance as to 2008-2011.

"The Court: Counsel, do you wish to respond?"

"Mr. Hessell: Well, the motions limited that happened before the trial address whether *Marshall* and advice about other transactions

that PwC gave to similarly-situated people at the time, determined that they were relevant. But even more importantly, our position is that PwC knew that the transaction was bogus, didn't tell Mr. Tricarichi in 2008."

"The Court: Okay. Relevancy objection goes to this case. The Court is going to allow a small area of inquiry so you can tie it into the facts of this case. The Court will overrule it, but you have narrowness here."

"Mr. Hessell: Yep."

"The Court: Thank you so much."

Mr. Hessell, then he broke down -- sorry. Then he states,

"Mr. Hessell: Let's sort of break it down to its -- the essence of what happened here. In Marshall, PwC advised the Marshalls that it was a list of reportable transactions of the stock sale of Fortrend, correct?"

"Answer: Again, that's what I saw in reading the case, yes."

"Mr. Hessell: In fact, it was Don Mendelson in your -- Don Mendelson in your or the tax quality and risk management group that he said that he was concerned about the Marshall transaction."

And then the witness says, "Yes, I have no firsthand experience with that, but I remember reading that in the case."

"Mr. Hessell: And do you have any explanation why Mr. Mendelson or other PwC advisors concluded that the Marshall transaction was listed or reportable transaction in 2003, in contradiction to your conclusions about the Westside deal?"

"I don't know exactly what Dan or Mr. Mendelson, or a larger

team. I don't know who worked on it with him or how they reached their conclusion or what was otherwise considered."

So the questioning was allowed, at least an example of one witness, right, that was presented. And the Court is trying to say if the witness had said, at that juncture, didn't know how it happened, I'm trying to see what prejudice would result by asking the witness the same question and saying, well, here's a memo. You sure you didn't really know about it? I mean, that means the first time the person -- perjury? It wasn't one of the people that's listed on the email.

So when the Court walks through the various aspects of how the trial would be different, and I take it into account on a Rule 60 standard, because that's the only motion before me. And my analysis right now as you know is the substance of Rule 60, because I am going to go back in a second and say the first prong, I would say the motion for reconsideration, and I probably should say this first, is whether there are new facts or evidence. I'm treating these -- the memo and the policy as new facts or evidence. So that's why I'm going to give you the substantive analysis.

So I'm saying the first prong of a motion for reconsideration, okay, because it's not being asserted there was an error by the Court because the Court can't make it on something it doesn't know about, right. And it wasn't stated that there was new law. So I was presuming for purposes of my analysis, that the first prong of a motion for reconsideration was meant that there was new facts or evidence. The Court is not precluding the analysis on an untimeliness aspect, as I

already mentioned a moment ago with the 60(b)(1) and (2) analysis and then the general concept under a motion for reconsideration. So that's why my analysis has been on the substance, automatically the second prong. It's not that I didn't do the first prong, it's just I was taking the first prong as a given for purposes of my analysis.

So circling back again to the rest of the 68, what are the aspects of the trial that would have been different and how should there be relief from judgment that was the findings of fact and conclusions of law and judgment from February of 2023 based on the trial the previous October/November.

When I look through that and I look at the Court's findings of facts and conclusions of law and judgment, and compared that with the trial transcript, and compared it with the briefs for purposes of this motion, this Court doesn't see that it's met the burden under Rule 60 that there is a direct nexus for what was articulated in the case before this Court that went to trial in October and November of 2022. So I do not see that -- well, let me be clear. There is no way this Court is condoning a failure to disclose anything, okay.

The Court really doesn't need to reach, specifically, the issue about whether or not it fell or didn't fall within the actual production requirements of 2017. I'm assuming for this purposes that it did. That's what my whole analysis has been. So I've been evaluating it, taking into account if that information was available, right. If the information should have been provided, what impact would it have, okay? And I'm fully familiar with *Bass v. Bass Davis, Franchise Tax Board v. Hyatt*, and the

more recent mortgage *MDB Trucking*, you know, on the aspects and where you go for-- and this isn't a destruction case. This is a very disclosed case.

But this is coming up to this Court in the context of a 60 motion, and I have to take the blend of how it's coming in a 60 motion. And so that's why this Court has presumed that the documentation should have been provided. And I'm not saying that for sanctions purposes. I'm just saying that for my analysis under 60(b), because the Court finds that that would be the most appropriate way, giving all the benefits to the moving party who's presenting this on a motion for reconsideration.

I would have needed to do that on summary judgment anyway, all the inferences, but even for the purpose of this trial and making that assumption, because right now, this Court doesn't have true clarity from either side whether or not it should or should not have been produced. So if it didn't need to be produced, that makes the analysis that I would be denying the motion for reconsideration. But, realistically, I'm finding it more appropriate to go on the substantive aspect that it should have been produced and what would be the impact there, because I think that gets you over the breadth of all the issues that are outstanding before the Court.

And I don't see how it merits the standards of 60 under Nevada case law, other case law that Nevada relies on, because I don't find it under -- that the newly discovered evidence, taking into account might go ultimately -- could have ultimately maybe gone to the concept

of liability or lack of liability for the 2003 case, but there you had the statute of limitations issue, so you didn't need to get to liability.

So then you go to what was the focus of the 2008 case. I don't see it in that regard based on issues presented to this Court. When I look if it's fraud, I do not see it as fraud on the Court, because I do not think that that has been established in this case, because I think there is a lack of clarity about whether or not the information should have been provided. I am utilizing that the information should have been provided for my purposes of now analyzing it under newly discovered and justice requires, but I don't see it rises to the level of fraud in the Court under the applicable case law, okay.

Given the time period of 2017, there was a 56(f) motion and the documents at issue were more than a decade old, okay, and with regards to retention policies, et cetera. And this Court doesn't know the -- has not been provided sufficient enough information by anybody's declaration, et cetera, that somehow, if they knew, it would have been for Marshall that somehow it would have applied here. And so in the absence of that, that would have been burden of the moving party.

But even -- that's why I'm assuming, for purposes of my second round of analysis under the other reasons that justice requires, that they should have been produced, and I don't see it that the Court should give relief from judgment under Rule 60 given the applicable case laws, because I do not see it impacts the actual issues presented to this Court. When the Court goes to whether it's conclusions of law -- I'm not read through my -- okay. Whether you look at the time periods and I did

have to incorporate 2018, I'm not going to repeat the analysis there -- so then the Court looks at the professional malpractice claim, right, which was brought, the alleged acts of negligence, the impact. I did look at both, whether it was New York or Nevada law again in 2008, that didn't have any impact here.

So what really the Court had to look at is the various prongs. I mean, I'm not going to recite everything that I stated here, but remember, there wasn't any duty, right. PwC did not breach the duty to maintain advice in writing, maintain the documentation. And I made a specific finding that the failure to disclose PwC's prior involvement in *Enbridge* and *Marshall* was not a breach of any duty.

So taking into account even if that documentation did exist, right, and should have been provided in this case, there wasn't -- and given the fact that *Marshall* was able to be explored with some of the witnesses, at least one witness during the course of the trial, the Court can't find that if the documents that were presented and being viewed as the new evidence, the policy and the "Wow!" memo that would have changed the judgment of this Court based on the findings of fact and conclusions of law that the Court did in its February 9th, 2023 findings of fact conclusions of law and judgment.

So, therefore, the Court needs to deny the motion for reconsideration. I've done so. And the Court reaffirms the prior decision on the summary judgment of 2018 stated herein. The Court reaffirms the Court's findings of fact and conclusions of law of February 9th, 2023 for all the reasons stated herein. And the Court is incorporating the case law

without citing each and every case that's in your very well written and long pleadings. I'm incorporating that in, and I've given citations where appropriate and including transcript and order citations. It is so ordered.

That means counsel for the non-movant, you prepare the order, circulate it to opposing counsel, provide it back to the Court. It would be nice to say 14 days under EDCR 7.21, but I think you're going to ask me for an extension, so might as well ask me now.

MR. AUSTIN: We would ask for 30 days, Your Honor.

THE COURT: Counsel, does that meet your needs or you want 14 days? If he insists on 14 days, you know I'm going to say 14 days.

MR. HESSELL: Fourteen days because we have to move -- we have to notice of appeal this along with the underlying case, and so we're already up against it. If they -- we might be able to work something out, but it would require subsequent discussion.

MR. AUSTIN: Fourteen days is fine, Your Honor.

THE COURT: Okay. Fourteen days EDCR 7.21, unless there's some stipulation by the parties that's requesting something different. Okay. So that leaves everything for you all to discuss it and provide it back to the Court. Okay. It is so order. Thank you so very much. Thank you for your time.

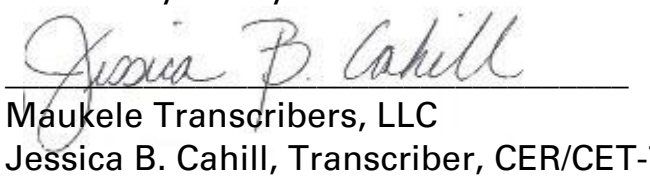
MR. HESSELL: Thank you, Your Honor.

MR. LEVINE: Thank you, Your Honor.

[Proceedings concluded at 9:52 a.m.]

/////

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



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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI, Plaintiff, vs. PRICEWATERHOUSECOOPERS LLP, Defendant.	CASE NO.: A-16-735910-B DEPT. NO.: XXXI **NOTICE OF ENTRY OF ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION PURSUANT TO NRCP 60(B) BASED ON NEWLY DISCOVERED EVIDENCE**

PLEASE TAKE NOTICE that an *Order Denying Plaintiff's Motion for Reconsideration Pursuant to NRCP 60(b) Based on Newly Discovered Evidence* was entered in the above-captioned matter on November 28, 2023, a copy of which is attached hereto.

Dated: November 28, 2023

SNELL & WILMER L.L.P.

By: /s/ *Bradley Austin*

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On November 28, 2023, I caused to be served a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION PURSUANT TO NRCP 60(B) BASED ON NEWLY DISCOVERED EVIDENCE** upon the following by the method indicated:

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

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

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

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

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

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4869-4356-6484

ELECTRONICALLY SERVED
11/28/2023 12:58 PM

Electronically Filed
11/28/2023 12:57 PM
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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI, Plaintiff, vs. PRICEWATERHOUSECOOPERS LLP, Defendant.	CASE NO.: A-16-735910-B DEPT. NO.: XXXI **ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION PURSUANT TO NRCP 60(b) BASED ON NEWLY DISCOVERED EVIDENCE**

Case Number: A-16-735910-B

On November 1, 2023, the Court conducted a hearing on Plaintiff's Motion for Reconsideration Pursuant to NRCP 60(b) Based on Newly Discovered Evidence ("Motion"). Patrick Byrne, Esq. and Bradley Austin, Esq. of Snell & Wilmer L.L.P, and Mark Levine, Esq. and Chris Landgraff, Esq. of Bartlit Beck, L.L.P., appeared on behalf of Defendant PricewaterhouseCoopers LLP ("PwC"). Scott Hessell of Sperling & Slater, LLC and Ariel Johnson of Hutchinson & Steffen, LLC appeared on behalf of Plaintiff Michael Tricarichi. The Court, having reviewed the record, the briefs submitted in support of and in opposition to the Motion, the Court's order granting Plaintiff Tricarichi's motion for Rule 56(f) discovery, the parties' respective briefs submitted in support of and in opposition to PwC's 2018 motion for summary judgment, the transcript from the September 24, 2018 summary judgment hearing, and transcripts from the parties' October and November 2022 bench trial, and the oral arguments of counsel, hereby DENIES the Motion and makes the following findings of fact, conclusions of law, and order:

FINDINGS OF FACT

1. Plaintiff Michael Tricarichi filed his complaint in this case on April 29, 2016, alleging claims of gross negligence, negligent misrepresentation and simple negligence as to PwC.

2. In 2017, PwC moved for summary judgment on Tricarichi's original claims regarding PwC's 2003 advice on the ground that they were barred under the applicable statute of limitations.

3. On May 31, 2017, the Court denied summary judgment, ordering Rule 56(f) discovery as requested by Plaintiff Tricarichi's affidavit submitted as part of the summary judgment briefing. Dkt. 100, Order. PwC produced over 2,000 documents in response but did not produce the "newly discovered" evidence identified by Plaintiff as the subject of this motion. For the purpose of its analysis of this motion, the Court assumes, without deciding, that such evidence should have been produced.

4. PwC renewed its motion for summary judgment on June 14, 2018. *See* Dkt. 107, PwC's Renewed Mot. Summ. J. As part of his response in opposition, Plaintiff argued that he

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"was entitled to know [at the time of the transaction] and certainly before litigation with the IRS that PwC advised at least one other taxpayer to avoid the very transaction that PwC was advising Plaintiff to proceed with," and that PwC's failure to disclose to him this advice on the Marshall transaction amounted to fraudulent concealment that tolled the statute of limitations. Dkt. 113, Pl.'s Resp. Opp'n at 20, 30.

5. After considering the parties' briefing and hearing oral argument on the motion, the Court granted summary judgment, concluding that "regardless of whether New York's or Nevada's statute of limitations applies, Plaintiff's claims are time-barred" because "[i]n the best-case scenario for Plaintiff . . . Plaintiff discovered, or as a matter of law, should have discovered the alleged act, error or omission no later than when he received the IDR [Information Document Request] from the IRS" to which he responded on February 21, 2008. Dkt. 119, Order at ¶¶ 17–18. The Court entered summary judgment "in favor of PwC regarding any and all claims arising from the services PwC provided Plaintiff in 2003." *Id.* at 3.

6. Plaintiff filed an amended complaint on April 1, 2019, which included a negligence claim against PwC based on its alleged failure in "advising Plaintiff regarding [IRS] Notice 2008-111 and its impact on the tax position Plaintiff had taken with respect to the Fortrend transaction." Dkt. 140, Am. Compl. at ¶ 117.

7. The Court held a nine-day bench trial on Plaintiff Tricarichi's repleaded claim beginning on October 31, 2022. Over the course of the bench trial, this Court heard testimony from 14 different witnesses and received 112 exhibits into evidence.

8. The Court entered its Findings of Fact and Conclusions of Law entering judgment for PwC on Plaintiff's negligence claim on February 9, 2023. Dkt. 416. The Court concluded that PwC did not breach a duty it owed to Plaintiff Tricarichi to render its advice in writing or to disclose earlier transactions to him, that Plaintiff's claim failed on causation, and also that Plaintiff's claim was untimely based on the evidence in the trial record. *Id.* at ¶¶ 104, 110–11, 114–15, 137, 139–140, 161. Written notice of entry of the Court's Findings of Fact and Conclusions of Law and Judgment was served on February 22, 2023. Dkt. 420.

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9. On August 21, 2023, Plaintiff Tricarichi filed the instant Motion to Reconsider Pursuant to NRCP 60(b) Based on Newly Discovered Evidence, citing two documents—a February 14, 2003 email thread between PwC practitioners in its Portland and Washington National offices and a PwC policy booklet—as newly discovered evidence that severely undermined the Court's entry of judgment for PwC on both the 2003 and 2008 negligence claims. *See* Dkt. 451.

10. Both documents were produced by PwC in the litigation *Marshall v. PricewaterhouseCoopers LLP* in Multnomah County, Oregon. Mr. Hessell, counsel for Plaintiff Tricarichi, also represented the plaintiffs in the Oregon litigation. PwC produced the PwC policy booklet on January 20, 2023, and the email was produced on February 3, 2023.

11. Both documents were produced in the *Marshall* litigation subject to a protective order that restricted the documents' use in other litigation.

12. Both documents were used publicly at a jury trial of the Marshall plaintiffs' claims that began on July 31, 2023. After that point, counsel's use of the documents was not restricted by the Marshall litigation protective order.

CONCLUSIONS OF LAW

13. NRCP 60(b) provides that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding" on various grounds, including "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)," "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party," and "any other reason that justifies relief." NRCP 60(b)(2), (3), (6).

14. NRCP 60(b) requires that motions be made "within a reasonable time," and, if the motion is based on newly discovered evidence or fraud, "no more than 6 months after the date of the proceeding or the date of service of written notice of entry of the judgment or order, whichever date is later." NRCP 60(c)(1).

15. Plaintiff's motion relies on the concepts set out in NRCP 60(b)(2) and (b)(3), but the Court finds it appropriate to analyze Plaintiff Tricarichi's motion under NRCP 60(b)(6), the

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catchall provision for "any other reason that justifies relief." NRCP 60(b)(6) is fitting because of the unique circumstances here: a protective order in the Marshall litigation that, absent leave of the Oregon court, prevented Plaintiff Tricarichi's counsel from sharing the newly discovered evidence with his client in this case, and which in turn prevented Plaintiff Tricarichi from authorizing any Rule 60(b) motion to be submitted to this Court. A motion brought under NRCP 60(b)(6) is not subject to the six-month time limit in NRCP 60(c)(1), so the Court concludes Plaintiff Tricarichi's motion is timely.

16. While there is relatively little Nevada caselaw interpreting the substantive requirements for relief under NRCP 60(b)(2), Nevada courts look to how federal courts interpret FRCP 60(b)(2), which is nearly identical. *See Foster v. Dingwall*, 126 Nev. 49, 54, 228 P.3d 453 (2010) (explaining that "federal decisions involving the Federal Rules of Civil Procedure provide persuasive authority when this court examines its rules," and in particular following federal decisions regarding FRCP 60(b) because "NRCP 60(b) largely replicates Fed. R. Civ. P. 60(b)") (citation omitted); *see also* NRCP 60, Adv. Cmte. Notes to 2019 Amendment (explaining that the "amendments generally conform Rule 60 to FRCP 60"); *Bonnell v. Lawrence*, 128 Nev. 394, 398 282 P.3d 712, 714 (2012) ("Rule 60(b) of the Nevada Rules of Civil Procedure is modeled on Rule 60(b) of the Federal Rules of Civil Procedure").

17. To obtain relief under FRCP 60(b)(2), the Ninth Circuit requires that "(1) the moving party [] show that the evidence relied on in fact constitutes 'newly discovered evidence' within the meaning of Rule 60(b); (2) the moving party exercised due diligence to discover this evidence; and (3) the new evidence must be 'of such magnitude that it would have been likely to change the disposition of the case.'" *Feature Realty, Inc. v. City of Spokane*, 331 F.3d 1082, 1093 (9th Cir. 2003) (citation omitted). The moving party is required to satisfy all three elements. *See id.*

18. Plaintiff Tricarichi's Rule 60(b) motion asks for two different forms of relief: (1) relief from the 2018 summary judgment order entered for PwC on Plaintiff Tricarichi's claim that PwC negligently rendered its advice in 2003; and (2) relief from the Court's 2023 Findings of Fact and Conclusions of Law entering judgment for PwC on Plaintiff Tricarichi's claim that PwC was

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negligent in 2008 for failing to revise its earlier advice after the IRS issued Notice 2008-111. This Order and the corresponding analysis takes into consideration how the newly discovered evidence relates to the claims brought by Tricarichi.

2003 Negligence Claim

19. In evaluating Plaintiff Tricarichi's Rule 60(b) claim for relief as to his 2003 negligence claim, the Court must evaluate what evidence was available and in the summary judgment record in 2018 and determine whether the February 14, 2003 email and the PwC policy booklet would have changed the Court's decision to enter summary judgment for PwC on Plaintiff Tricarichi's 2003 claim on statute of limitations grounds.

20. In reviewing the pleadings and transcript of the parties' 2018 summary judgment hearing, the Court determines that it considered, in 2018, whether the statute of limitations should be tolled because of fraudulent concealment, and further that it heard argument from the parties on the impact that fraudulent concealment would have on the statute of limitations argument. *See, e.g.*, Sept. 24, 2018 Hearing Tr. 6:7–8:8; 12:1–14:7; 15–17.

21. The Court concluded in 2018 that regardless of whether New York or Nevada law applied—a point of contention between the parties—Plaintiff had two years after discovery of his claim to file suit, which "under the best case scenario for Plaintiff[]" would be the date that Plaintiff Tricarichi responded to an information document request from the IRS, or February 21, 2008. Therefore, the Court concluded, the statute of limitations expired more than two years before execution of the parties' January 2011 tolling agreement. Dkt. 119 ¶¶ 18–19 ("Plaintiff's claims were time-barred no later than February 21, 2010 under NRS § 11.2075(1)(a), nearly a year before the parties entered into a tolling agreement in January 2011.").

22. Neither the email nor the PwC policy booklet addresses the timing of when Plaintiff was on notice and when he needed to file his claim for purposes of the statute of limitations. And, in entering summary judgment for PwC in 2018, the Court concluded that even if there were fraudulent concealment, the IRS put Plaintiff on notice, and it rejected Plaintiff's arguments that the IRS information document request only put him on notice that there might be corporate liability, rather than personal liability for him as a transferee.

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23. As a result, even assuming the Court had had the benefit of the email and the policy, it would not have changed the Court's timeliness analysis. There is therefore no basis for Rule 60(b) relief from the Court's 2018 summary judgment order on Plaintiff Tricarichi's 2003 negligence claim.

2008 Negligence Claim

24. Turning to Plaintiff Tricarichi's 2008 claim, the Court first concludes that Plaintiff has not met his burden under Rule 60(b) of demonstrating that the nature and scope of his 2008 negligence claim would have been different if Plaintiff had received the email at the time of the 2018 summary judgment briefing. Plaintiff Tricarichi already knew about the Marshall transaction and PwC's differing advice to its clients in that different transaction at the time of the 2018 summary judgment briefing and as he considered what claims, if any, to pursue after the Court's entry of summary judgment in 2018. The Court therefore has not been presented with sufficient evidence under the high standard of NRCP 60(b) that Plaintiff Tricarichi is entitled to relief on the basis that the parties' 2022 bench trial did not adequately incorporate all of the negligence claims against PwC that were before it – the trial did incorporate all the claims that were before it.

25. Plaintiff Tricarichi also moved for relief from the Court's 2023 Findings of Fact and Conclusions of Law following the 2022 bench trial of Plaintiff's 2008 negligence claim, arguing that he would have presented different evidence and examined (or cross-examined) witnesses differently with the benefit of the February 14, 2003 email. Dkt. 451, Mot. at 7, 11–12. But even if the email and the PwC policy booklet are "newly discovered evidence" under NRCP 60(b)(2)—which the Court will assume for the sake of its analysis—the Court concludes that Plaintiff Tricarichi has not met his burden under NRCP 60(b) on his 2008 negligence claim, either.

26. At the 2022 bench trial, the Court permitted Plaintiff Tricarichi to ask some questions of PwC witnesses, including Washington National Office tax professional Tim Lohnes, regarding their awareness of PwC's work for the Marshalls. Lohnes testified in response to this line of inquiry that he had "no firsthand experience" with PwC's concerns regarding the Marshall transaction, that he did not know who worked on the analysis with PwC Quality & Risk Management partner Dan Mendelson, nor "how they reached their conclusion or what was

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otherwise considered." Dkt. 397, Trial Tr. Day 2, 66:3–67:12. Given the witness's lack of knowledge regarding PwC's work on the Marshall transaction, the Court concludes that counsel's cross-examination would not have been materially different with the benefit of an additional document that the witness did not contemporaneously receive.

27. Considering the Court's Findings of Fact and Conclusions of Law, the testimony in the trial transcript, and the parties' briefing on Plaintiff Tricarichi's Rule 60(b) motion, the Court further finds no direct nexus between the newly discovered evidence and the case that went to trial in October 2022.

28. Based on the evidence at trial, the Court found as a matter of law that PwC did not breach a duty to Plaintiff Tricarichi to document its advice in writing or to maintain that documentation. The Court also made a specific finding that PwC's failure to disclose its prior involvement in the Enbridge and Marshall transactions was not a breach of any duty PwC owed Plaintiff Tricarichi. *See* Dkt. 416, FOFCOL, ¶¶ 102–104, 117–130, 135. The Court concluded that there were "numerous differences between the Marshall matter" and Tricarichi's case, and that "[g]iven the differences in the matters, Tricarichi did not meet his burden to show that PwC has liability to him for failing to disclose or take into account the advice given in that transaction." Id. ¶¶ 39, 135, 137.

29. The Court cannot conclude that the email or PwC policy booklet would have changed the Court's judgment on Plaintiff's 2008 negligence claim as reflected in its February 9, 2023 Findings of Fact and Conclusions of Law. The Court therefore denies Plaintiff Tricarichi's Rule 60(b) motion for relief from its 2023 judgment. *See Renteria v. Canepa*, No. 3:11CV-00534-RCJ, 2013 WL 837127, at *3 (D. Nev. Mar. 5, 2013) (denying Rule 60(b)(2) motion because "[t]he allegedly new evidence does not support a finding that the Court would have decided otherwise had that evidence been before the Court prior to the judgment"); *Abet Just., L.L.C. v. Am. First Credit Union*, No. 2:13-CV-02082-MMD-PAL, 2015 WL 4110800, at *2 (D. Nev. July 7, 2015) (stating that "the Court would still deny Plaintiffs' [Rule 60(b)(2)] Motion even if it were timely because the newly discovered evidence would not have changed the outcome of the case") (citation omitted).

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ORDER

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

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Plaintiff's Motion for Reconsideration Pursuant to NRCP 60(b) Based on Newly Discovered Evidence is **DENIED**.

Dated this 28th day of November, 2023

Joanna S Kishner

050 FCE 23B4 B04E
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District Court Judge

Submitted by:

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Austin, Bradley

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Subject: Re: Tricarichi/PwC Proposed Order re Rule 60(b) Mot

[EXTERNAL] **shessell@sperling-law.com**

Confirmed

On Nov 20, 2023, at 5:23 PM, Austin, Bradley <baustin@swlaw.com> wrote:

Hi Scott and Ariel,

Following up on our prior correspondence, please confirm that I have authorization to affix your e-signature to the attached order and submit.

Thank you,

Brad

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