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### Tricarichi v. Coöperatieve Rabobank, 135 Nev. Adv. Op. 73175 (May 2, 2019)

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## CONSPIRACY-BASED THEORY PERSONAL JURISDICTION

### **Summary**

The Court determined that (1) *Walden v. Fiore* did not overrule *Davis v. Eighth Judicial Dist. Court*, meaning that Nevada, under its long-arm statute, recognizes conspiracy-based theory personal jurisdiction and utilizes the conspiracy jurisdiction test as laid out in *Gibbs v. Prime Lending* and (2) Tricarichi failed to establish personal jurisdiction under either specific or conspiracy theory personal jurisdiction due to an inability to provide sufficient evidence connecting the respondents actions to Nevada.

### **Background**

Michael Tricarichi, president and sole shareholder of Westside Cellular, Inc. (an Ohio corporation) received approximately \$40 million from a civil lawsuit settlement. Fortrend International, LLC (a now defunct San Francisco corporation) proposed Tricarichi engage in an improper transaction known as a “Midco transaction” to avoid paying double taxation on the settlement. Tricarichi lived in Ohio when negotiations began for the transaction in March 2003. However, he moved to Nevada in May 2003. Fortrend’s affiliate, Nob Hill, Inc., sent Tricarichi a letter of intent to purchase Westside in July 2003. To facilitate the Midco transaction, Fortrend contacted Coöperatieve Rabobank, U.A. (a Dutch corporation with its principal place of business in the Netherlands) to request the loan to finance the Westside purchase, which would then be repaid by Westside once the purchase closed. To facilitate this transfer, Westside opened an account with Rabobank, and the documents for this account listed Tricarichi’s Nevada address.

On September 9, 2003, Tricarichi sold Westside to Nob Hill. Nob Hill, utilizing a loan from Rabobank’s subsidiary Utrecht-America Finance Co. (a Delaware corporation with its principal place of business in New York), transferred the funds to Tricarichi’s Rabobank account, which Tricarichi then transferred to another bank account he controlled in New York. Shortly thereafter, Tricarichi resigned from Westside, and Nob Hill told Tricarichi that his tax liability for 2003 would be satisfied and agreed to indemnify him against Westside’s tax liability. Nob Hill also warranted that it did not intend to cause Tricarichi to engage in an improper transaction.

Westside (now owned Nob Hill), allegedly partially relying on advice it had received from Seyfarth (a Chicago law firm) regarding a similar transaction, made a series of financial maneuvers to offset the settlement income and thereby claim it had no income tax liability for 2003. However, when the IRS audited Westside’s 2003 tax return, the Midco transaction and following financial maneuvers resulted in Westside being assessed over \$21,000,000 in tax deficiency and penalties, which Westside itself did not pay due to lack of assets. The IRS thus held Tricarichi liable as a transferee. After the tax court determined that Tricarichi had constructive knowledge of the improper transaction and was therefore liable, Tricarichi filed a complaint in Nevada district court against Rabobank, Utrecht, and Seyfarth for numerous claims, including civil conspiracy. All the opposing parties filed motions to dismiss for lack of personal jurisdiction, which the District Court granted, holding that (1) Tricarichi had not shown that the respondents engaged in conduct in or

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<sup>1</sup> By John Bays.

directed at Nevada and (2) Nevada did not recognize conspiracy-based theory personal jurisdiction because *Davis* was overruled by *Walden*. Tricarichi then appealed to the Nevada Supreme Court.

## **Discussion**

### *Specific Personal Jurisdiction*

In order for specific personal jurisdiction to be proper in Nevada, the cause of action must arise out of the defendant's contacts with Nevada.<sup>2</sup> The Court declared that the two factors to consider when making this determination are (1) if the defendant purposefully availed itself of the privilege of acting in Nevada or purposefully targeted its conduct towards Nevada and (2) whether the cause of action arises from the defendant's purposeful contact in connection with Nevada.<sup>3</sup>

For making this determination in tort actions, the Court endorsed the "effects test" laid out in *Calder v. Jones*, which considers whether the defendant (1) committed an intentional act (2) expressly targeted at the Nevada (3) causing harm that the defendant knows is likely to be suffered in Nevada.<sup>4</sup> The Court, utilizing *Walden v. Fiore* as guiding precedent, further elaborated that the proper focus is not on a defendant's contacts with residents of Nevada, but rather the defendant's contacts with Nevada itself.<sup>5</sup> In *Walden*, the Court held that although the defendant's conduct was directed at plaintiffs with known ties to Nevada and effected the plaintiff's when they returned to Nevada, this effect was insufficient to establish specific jurisdiction because the conduct itself occurred in Georgia, and it did not result from anything occurring in Nevada itself.<sup>6</sup>

### *Respondents did not purposefully direct activities at Nevada*

Applying this precedent, the Court analyzed whether Tricarichi had established that defendants Rabobank and Utrecht had directed their actions at him in Nevada. Tricarichi's main supporting evidence for this contention was documentation he sent to Rabobank and Utrecht during the course of the Midco transaction that contained Tricarichi's Nevada address. This included his resignation, wire transfer instructions, and documents regarding opening an account.. However, the Court held these contacts with Nevada insufficient. First, the Court pointed out that these documents were actually sent from a San Francisco fax number. More significantly, the Court emphasized that the respondent's acts of receiving the documents were merely incidental to the activities that made up the Midco transaction itself, and that all the primary activities of the Midco transaction had occurred outside of Nevada. The court held that such ancillary conduct and contact with Nevada does not show the necessary "purposeful availment or express aiming" needed for establishing specific personal jurisdiction.

The Court similarly held that Tricarichi's claim that he suffered personal injury in Nevada was also insufficient to establish the required "minimum contacts" necessary to exercise specific personal jurisdiction. The court, citing *Walden*, held that merely suffering injury in Nevada is not enough by itself because this would allow the Plaintiff's contacts with the forum to

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<sup>2</sup> *Fulbright & Jaworski LLP v. Eighth Judicial Dist. Court*, 131 Nev. 30, 37, 342 P.3d 997, 1002 (2015).

<sup>3</sup> *Dogra v. Liles*, 129 Nev. 932, 937, 314 P.3d 952, 955 (2013).

<sup>4</sup> 465 U.S. 783 (1984).

<sup>5</sup> 571 U.S. 277, 283–84 (2014).

<sup>6</sup> *Id.* at 290.

determine the jurisdictional analysis.<sup>7</sup> Therefore, because Rabobank and Utrecht's acts that caused the alleged injury were not connected to Nevada, the Court held that Tricarichi's injury suffered in Nevada because of these acts was by itself insufficient to establish specific personal jurisdiction.

*Tricarichi's claims do not arise from respondent's activities in connection with Nevada*

The court then analyzed whether Tricarichi's claims against Rabobank and Utrecht arose out of their activities in connection with Nevada. The only alleged Nevada contact by both Rabobank and Utrecht was the fact that they knew that Tricarichi used his Nevada address on bank account opening and loan closing documents. The Court held that this knowledge did not have the required direct relationship to the Midco transaction, which was the foundation of Tricarichi's various claims. This slight Nevada connection was merely ancillary because the transaction required that money be transferred by Rabobank through New York accounts to facilitate the purchase of an Ohio Corporation, made possible by Utrecht's New York loan. Since this primary conduct occurred outside of Nevada, the court ultimately found that even though the account opening and loan documents listed Tricarichi's Nevada address, it was ultimately inconsequential to the overall transaction at the heart of his claims. The Court concluded that Tricarichi's failure to identify any "jurisdictionally significant conduct" by the defendants meant that minimum contacts were not established and that specific personal jurisdiction was therefore improper.

*Conspiracy theory jurisdiction*

In the alternative, Tricarichi claimed that Rabobank, Utrecht, and Seyfarth were subject to Nevada jurisdiction under a theory of conspiracy-based jurisdiction because they were allegedly participants in a conspiracy that injured a Nevada resident. The respondents (and the District Court below) argued that (1) Nevada does not recognize a conspiracy theory of personal jurisdiction and that (2) *Walden* precludes conspiracy theory personal jurisdiction because it overruled *Davis*.

The Court began its analysis by describing conspiracy jurisdiction, stating that the theory allows for a co-conspirator without sufficient minimum forum contacts to be subject to personal jurisdiction based on a co-conspirators sufficient contacts.<sup>8</sup> To establish such jurisdiction, the plaintiff must prove that (1) there was an agreement to conspire, (2) the acts of co-conspirators establish minimum contacts with the forum state and (3) the co-conspirators reasonably expected that they would be subject to personal jurisdiction in the forum when they entered the conspiracy.<sup>9</sup>

The Court, emphasizing its previous decision *Davis v. Eighth Judicial Dist. Court*, ultimately held that Nevada's long arm statute does allow for the exercise of conspiracy theory personal jurisdiction.<sup>10</sup> In *Davis*, the Court had concluded that nonresidents engaged in a conspiracy to gain control of a Nevada estate could reasonably be subject to Nevada's jurisdiction because the injuries and much of the conduct regarding the conspiracy occurred in Nevada.<sup>11</sup> The Court also disagreed with the District Court's conclusion that *Walden* overruled *Davis*, because *Walden* itself did not involve a conspiracy or discuss conspiracy theory jurisdiction, meaning *Davis* was distinguishable, not overruled, and still valid precedent. Although *Davis* did not lay out

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<sup>7</sup> *Id.* at 289.

<sup>8</sup> *Gibbs v. PrimeLending*, 381 S.W.3d 829, 834 (Ark. 2011).

<sup>9</sup> *Id.* at 832.

<sup>10</sup> 97 Nev. 332, 334, 389–39, 629 P.2d 1209, 1211, 1213 (1981); NEV. REV. STAT. § 14.065(1) (2017).

<sup>11</sup> *Davis v. Eighth Judicial Dist. Court*, 97 Nev. 332, 334, 389–39, 629 P.2d 1209, 1211, 1213 (1981).

an explicit test for conspiracy theory personal jurisdiction, the Court held that its facts supported embracing the three-part *Gibbs* test (described above).

However, although the Court overruled the district court's conclusion that Nevada did not recognize conspiracy theory personal jurisdiction, it still held that Tricarichi failed to show "pertinent co-conspirator jurisdictional facts." Tricarichi alleged that Rabobank and Utrecht had been knowingly financing illegal Midco transactions and that Seyfarth's advice to Westside was relied upon by Westside when it claimed a deduction on its tax return in 2003. In addition, Tricarichi ultimately alleged that in March 2003, all the respondents conspired to induce him to engage in the illegal Midco transaction.

The court did not address whether these allegations were true. Rather, the Court held that even assuming *arguendo* that Tricarichi's assertions were true and the first prong of the *Gibbs* test, which requires a showing of a conspiracy, was met; the second prong, which requires a showing that the acts of the co-conspirators establish minimum contacts with Nevada; and the third prong which requires a showing that the co-conspirators reasonably expected that they would be subject to Nevada's jurisdiction when entering the conspiracy, were not met.

Tricarichi's main evidence asserted for establishing conspiratorial minimum contacts were letters of intent to purchase Westside sent by Nob Hill in July and August of 2003. However, the Court pointed out that these letters were not part of the initial solicitation to conduct the improper Midco transaction, because the negotiations between Fortrend and Tricarichi began in March or April of 2003, months before his move to Nevada. The Court held that since the initial solicitation occurred elsewhere, these letters were merely incidental to the initial solicitation that occurred outside of Nevada and therefore do not satisfy the minimum co-conspirator contacts with Nevada required to establish conspiracy theory personal jurisdiction. Similarly, the Court also held that prong three could not be established, because the Midco transaction concerned an Ohio corporation transferring funds to New York. Since none of this conduct concerned Nevada, there was no evidence to support the idea that the defendants knew their conspiracy would have consequences in Nevada when they entered the conspiracy.

## **Conclusion**

The Court ultimately concluded by again emphasizing that under Nevada's long arm statute and under the still valid precedent of *Davis*, Nevada recognizes conspiracy theory based personal jurisdiction as valid. However, although the District Court was incorrect in its analysis and rejection of conspiracy theory personal jurisdiction, the Court affirmed the lower court's order dismissing the claims for lack of personal jurisdiction because Tricarichi failed to provide sufficient evidence for either specific or conspiracy theory personal jurisdiction. Tricarichi failed to show the necessary jurisdictionally significant link between the respondents and Nevada necessary for specific jurisdiction, and the fact that Tricarichi suffered injury in Nevada is not in and of itself enough. For conspiracy theory jurisdiction, Tricarichi failed to allege sufficient conspirator acts necessary to establish minimum contacts and also failed to demonstrate that the respondents reasonably expected that their actions would have consequences in Nevada when they entered the conspiracy.