

UNITED STATES TAX COURT

[REDACTED], TRANSFEREE,)
)
Petitioner,)
)
v.) Docket No. [REDACTED]
)
COMMISSIONER OF INTERNAL REVENUE,) JUDGE [REDACTED]
)
Respondent.) Filed Electronically

PETITIONER'S MOTION *IN LIMINE* TO PRECLUDE RESPONDENT FROM INTRODUCING ANY EVIDENCE OF AN ASSERTION OF PROTECTION UNDER THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION BY CHARLES KLINK

PETITIONER MOVES, pursuant to Tax Court Rules 143 and Federal Rules of Evidence Rules 401 and 402, that the Court preclude respondent from introducing at trial any evidence of an assertion of protection under the Fifth Amendment to the U.S. Constitution by Charles Klink.

IN SUPPORT THEREOF, petitioner respectfully states:

1. In connection with the stock purchase agreement at issue in this case, Charles Klink served as outside counsel for the buyer, Fortrend International, Inc. ("Fortrend") and its affiliates including Nob Hill Holdings, Inc. ("Nob Hill"). Mr. Klink is listed as a "May Call" witness in respondent's Pretrial Memorandum.

2. Mr. Klink has never represented petitioner as an attorney nor has he represented or worked for petitioner in any capacity.

3. On December 3, 2013, respondent noticed and took the deposition of Mr. Klink. Aside from answering preliminary, non-substantive questions, Mr. Klink asserted his right to protection against self-incrimination under the Fifth Amendment to the U.S. Constitution in response to each question posted by respondent's counsel. At the deposition, petitioner's counsel did not ask any questions of Mr. Klink.

4. If called as a witness at trial, it is anticipated that Mr. Klink will continue to assert his right to protection under the Fifth Amendment. Petitioner has no knowledge as to the grounds for Mr. Klink's assertion of protection under the Fifth Amendment; respondent has not asserted in this proceeding that Mr. Klink does not have a reasonable basis for asserting protection under the Fifth Amendment.

5. Mr. Klink's assertion of his right to protection under the Fifth Amendment has no relevance or bearing whatsoever on the outcome of this case absent some ability by respondent to have an adverse inference drawn directly against petitioner from that assertion. Respondent may also attempt to draw an adverse

inference against petitioner from Mr. Klink's assertion indirectly, by asking this Court to first draw an adverse inference against Nob Hill, the alleged initial transferee in respondent's alternative transferee of a transferee theory. Nob Hill is not a party to this case and respondent has never brought a transferee liability case against Nob Hill directly. Accordingly, any inference respondent seeks to draw with respect to Mr. Klink can only be with respect to petitioner, irrespective of whether that inference is framed directly or indirectly.

6. Respondent's need for an adverse inference drawn against Nob Hill (and indirectly against petitioner) results from respondent's own self-defeating litigation strategy not to pursue Nob Hill as a transferee. Until respondent filed his amended answer in this case nearly 10 years after the close of the 2003 tax year at issue, he had not pursued Nob Hill even indirectly under a transferee of a transferee theory.

7. The Second Circuit in *LiButti v. United States*, 107 F.3d 110 (2d Cir. 1997) set forth the standard for determining whether to apply an adverse inference in connection with a third-party witness's assertion of protection under the Fifth Amendment. In *LiButti*, the court focused on the question of

whether the invocation of the privilege by the third-party witness was motivated by a desire to protect the party, or was purely for personal reasons. The court established four criteria in analyzing why a non-party witness would refuse to testify: (1) the nature of the relevant relationships; (2) the degree of control of the party over the non-party witness; (3) the compatibility of the interests of the party and the non-party witness in the outcome of the litigation; and (4) the role of the non-party witness in the litigation. *Id.* at 123-24.

8. Applying the *LiButti* factors here, there is no basis for respondent to argue for an adverse inference against petitioner:

- a. Nature of the Relevant Relationships. The nature of the relevant relationship "is the most significant [factor] for determining admissibility." *In re Ethylene Propylene Diene Monomer Antitrust Litigation*, 681 F. Supp. 2d 141 (D. Conn. 2009). There must be "some relationship of loyalty" between the party and the witness invoking the Fifth Amendment. *State Farm Mut. Auto Ins. Co. v. Abrams*, 2000 U.S. Dist LEXIS 6837 at *21 (N.D. Ill. May 11, 2000). Courts have found that sufficient loyalty exists "where there is a

close family or business relationship between the person who exercised the Fifth Amendment right and the individual agent against whom an adverse inference is drawn." *Id.* at *23; *Auto-Owners Ins. Co. v. Newsome*, 2013 U.S. Dist. LEXIS 153987 at *11-13 (D.S.C. Oct. 25, 2013) (comparing cases). In this case, there is only a tangential relationship between petitioner and Mr. Klink, far short of the requisite "close family or business relationship." Mr. Klink was outside counsel to Fortrend (and its affiliate, Nob Hill), petitioner's adversary in negotiating the stock purchase agreement. Mr. Klink's loyalty, if any, runs to petitioner's adversary. On the facts here, this factor provides no basis for an adverse inference.

b. Degree of Control of Petitioner Over Mr. Klink. Zero.

This factor should be "viewed as akin to testimony . . . approaching a vicarious admission" under Federal Rule of Evidence 801(d)(2). *LiButti*, 107 F.3d at 123. Mr. Klink served as the agent for petitioner's adversary during the transaction. There is no basis to impute any statement by Mr. Klink to petitioner as petitioner has never exercised any control over Mr.

Klink. Thus, this factor provides no basis for an adverse inference.

c. Compatibility of Interests. None. Courts evaluating this factor look to whether the party and witness share an "identity of interests." *Kontos v. Kontos*, 968 F. Supp. 400, 408 (S.D. Ind. 1997). In this case, the interests of petitioner and Mr. Klink are directly opposed. Petitioner and Mr. Klink's former client, Fortrend, are and remain adversaries, both with respect to the underlying stock purchase agreement and with respect to Fortrend's breach of its contractual representation to petitioner that the 2003 income tax liability of West Side would be satisfied fully.

d. Role of Non-Party Witness in Litigation. Nominal. This factor looks at whether the witness "was a key figure in the litigation and playing a controlling role in respect to any of its underlying aspects." *LiButti*, 107 F.3d at 123-24. If he were able to testify (and assuming there was also a waiver of Fortrend's attorney-client privilege), Mr. Klink might arguably provide some perspective on his client's

negotiating position, which would have little bearing on the ultimate outcome of this case.

9. Respondent also should not be permitted to draw an adverse interest against Nob Hill (and indirectly against petitioner) as respondent cannot show that by applying the *LiButti* factors here there is a basis for drawing an adverse inference against Nob Hill. The Court of Federal Claims recently held that the relationship between a party and its own outside counsel could not support an adverse inference. *Salem Financial, Inc. v. United States*, 2013 U.S. Claims LEXIS 2119 at *9 (Fed. Cl. June 13, 2013). In applying the four factors set forth in *LiButti*, the Court of Federal Claims held that (i) the plaintiff did not control its outside counsel's testimony, (ii) the assertion of the Fifth Amendment privilege did not enhance any interest of the plaintiff, but instead enhanced the outside counsel's personal interest; and (iii) the outside counsel had no interest or incentive to affect the outcome of the litigation. *Id.* at *8. Here, it cannot be shown that Fortrend or Nob Hill controlled Mr. Klink, that Mr. Klink's assertion of his Fifth Amendment privilege will enhance the interest of Nob Hill or Fortrend, or that Mr. Klink has any interest in

affecting the outcome of this litigation as Fortrend and Nob Hill are not being sought after to pay West Side's unpaid taxes.

10. Recently, this Court granted respondent an adverse inference against a taxpayer when it was shown that a non-party witness had "nearly unfettered authority over" the petitioning taxpayer. See *The Markell Company, Inc. v. Commissioner*, T.C. Memo 2014-86. Evidence of that control included the witness' managerial position in every entity that was needed to make the taxpayer's transaction work and the witness' signature on all transaction documents. *Id.* Given that high level of control over the taxpayer itself, this Court held that the witness' interests were aligned with those of the taxpayer.

11. In this case, there is no evidence that Mr. Klink has ever had any control over petitioner, or that petitioner has ever had any control over Mr. Klink. To the contrary, they are and have always been adversaries. There is also no evidence that Mr. Klink had anywhere near the same level of control over Fortrend or Nob Hill as the non-party witness did in the *Markell* case. Even if he did, it would be irrelevant since respondent is not pursuing a claim against Nob Hill and any inference he might seek would only run against petitioner.

Docket No. [REDACTED]

-9-

12. Applying the four factors set forth in *LiButti* leads to the inescapable conclusion that no adverse inference can be drawn against petitioner (directly or indirectly) from an assertion of Fifth Amendment protection by the outside counsel to petitioner's counter-party in the stock purchase agreement, a counter-party who stands in breach of the affirmative representations made to petitioner in that agreement.

13. In the absence of an adverse inference, Mr. Klink is a stranger to this case and his assertions of protection under the Fifth Amendment are not relevant and should be excluded from trial pursuant to Fed. R. Evid. 401 and 402.

14. Respondent objects to the granting of this motion.

Docket No. [REDACTED]

-10-

WHEREFORE, petitioner respectfully requests that this motion be granted and the Court preclude respondent from introducing at trial any evidence of an assertion of protection under the Fifth Amendment to the U.S. Constitution by Charles Klink.

Respectfully submitted,



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Dated: May 30, 2014

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Motion has been made this 30th day of May, 2014, by electronic mail to heather.l.lampert@irsounsel.treas.gov along with a physical copy by first class mail to the following:

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RESPONDENT'S OBJECTION TO PETITIONER'S MOTION IN LIMINE TO
PRECLUDE RESPONDENT FROM INTRODUCING ANY EVIDENCE OF AN
ASSERTION OF PROTECTION UNDER THE FIFTH AMENDMENT TO THE U.S.
CONSTITUTION BY CHARLES KLINK

RESPONDENT OBJECTS to petitioner's motion on the grounds
that the motion is premature, that Charles Klink's testimony is
relevant to the issues in this case, and that his possible
assertion of protection under the Fifth Amendment to the U.S.
Constitution does not diminish the relevancy of his testimony.

IN SUPPORT THEREOF, respondent respectfully states:

1. Petitioner's motion lacks foundation and erroneously
attempts to exclude the testimony of a relevant witness, Mr.
Klink.
2. Petitioner's motion is premature. Mr. Klink has not
yet presented himself for questioning during the trial of this

case. Only after Mr. Klink presents himself for questioning and asserts the Fifth Amendment can respondent move that this Court make an adverse inference in this case. Petitioner's motion tries to preclude respondent from not only requesting that the Court make an adverse inference, but from even calling Mr. Klink as a witness.

Mr. Klink's Testimony is Directly Relevant to This Case

3. As indicated in petitioner's motion, Charles Klink served as outside counsel for the buyer, Fortrend International, Inc. ("Fortrend") and its affiliates including Nob Hill Holdings, Inc. ("Nob Hill"), in connection with the stock purchase agreement at issue in this case.

4. As the counsel for Fortrend and Nob Hill, Mr. Klink possesses relevant, personal knowledge about the stock sale in this case. He communicated this personal knowledge to third parties. Mr. Klink drafted documents, negotiated terms of the stock purchase agreement, communicated with petitioner's counsel during the stock sale, and otherwise helped facilitate the stock sale. Mr. Klink advised his client Fortrend in the stock sale at issue here, as well as represented Fortrend in numerous other similar transactions.

5. Petitioner's characterization of Mr. Klink as "a stranger to this case" contravenes the parties' stipulations and

conflicts with petitioner's admission that Mr. Klink was counsel for Fortrend. Mr. Klink's testimony satisfies the requirements of Fed. R. Evid. 401 and should be allowed pursuant to Fed. R. Evid. 402. Whether Mr. Klink asserts his Fifth Amendment rights and any inferences the Court draws therefrom has no bearing on the relevancy of Mr. Klink's testimony.

6. Further, Mr. Klink possesses relevant, personal knowledge about Fortrend, its affiliates including Nob Hill, and its successors. Mr. Klink worked as counsel for Fortrend, beginning in 1999 as an associate at Manatt, Phelps and Phillips, through 2006 as owner of Acquisition Strategies International ("ASI"). As an owner of ASI, Mr. Klink adopted Fortrend's business model and acquired numerous corporations utilizing the same tactics employed in this case.

7. Mr. Klink is intimately familiar with Fortrend's operations, strategies, and expectations. With regard to Fortrend's acquisition transactions, Mr. Klink in a sworn interview with respondent described himself as "sort of the lieutenant, the hands-on individual dealing with them [Fortrend]. And that's how I first started to know some of the cast and characters involved here [with Fortrend]." (Internal Revenue Service Interview of Charles Klink, May 27, 2009)

8. Evidence of Fortrend's operations is relevant to the issue of petitioner's actual or constructive knowledge of Fortrend's plans to evade West Side's debts. See, e.g., Slone v. Commissioner, T.C. Memo 2012-57 ("Petitioner had no reason to believe that Fortrend's [planned tax] methods were illegal or inappropriate."). The Court has not found that petitioner did not know of Fortrend's plans. The Court has not found that petitioner was not willfully blind to questionable circumstances. And the Court has not found that petitioner was not on inquiry notice such that he had a higher than usual obligation to conduct due diligence. Until such facts are found, Fortrend's operations—anything that petitioner might have known, or might have been able to know upon appropriate due diligence—remains relevant to this case.

9. Further, Fortrend's operations are relevant to petitioner's liability as a transferee of a transferee. For example, in Frank Sawyer Trust of 1992 v. Commissioner, 712 F.3d 597 (1st Cir. 2013), the First Circuit establishes one avenue for finding transferee-of-transferee liability on facts analogous to the instant case. In context of that analysis, the First Circuit states that the promoter's expectations and beliefs, and the objective reasonableness of those expectations and beliefs, are relevant questions:

(a) In determining whether the intermediary transferee received reasonably equivalent value, the First Circuit instructed that such value might be found if the promoter "had a legitimate and reasonable expectation that the strategy . . . would succeed." Frank Sawyer Trust of 1992 v. Commissioner, 712 F.3d 597, 608 (1st Cir. 2013) (citing Mellon Bank, N.A. v. Metro Comm'ns, Inc., 945 F.2d 635, 647 (3d Cir. 1991)).

(b) In determining whether the promoter was left with unreasonably small assets, the First Circuit instructed that such inquiry includes determining whether the promoter "reasonably (although incorrectly) expected that the IRS would allow the loss deductions." Id. at 609.

(c) The First Circuit specifically noted "that the answer hinges not on what the [selling shareholder] knew or should have known, but on what the [promoter] knew or should have known. Id.

10. Petitioner's argument that Mr. Klink's testimony is irrelevant is contrary to (1) petitioner's concession set forth in the motion in limine, (2) petitioner's own statement regarding Mr. Klink,¹ (3) petitioner's attorney's statement

¹ During the examination of this case, respondent conducted an interview of petitioner on November 30, 2007. During the interview, petitioner stated, "[t]he only person at Fortrend that I ever had contact with was a guy named Klink."

regarding Mr. Klink,² (4) respondent's burden to support the transferee of a transferee, and (5) the law that governs this case.³ Whether Mr. Klink refuses to answer questions and asserts his Fifth Amendment rights has no bearing on the relevancy of his testimony or any inferences this Court draws therefrom.

Mr. Klink's Assertion of Fifth Amendment does Not diminish the Relevancy of his Testimony.

11. Respondent will call Mr. Klink as a witness in this case as petitioner refused to execute a stipulation regarding Mr. Klink's testimony.

12. Mr. Klink's attorney has indicated that Mr. Klink plans to make assertions of the Fifth Amendment to questions posed to Mr. Klink in this case, just as he did during his deposition in this case on December 9, 2013.

13. In order to rely on the Fifth Amendment as a defense to a refusal to answer questions, the individual must sufficiently assert the privilege by "present[ing] himself . . .

² Respondent deposed Jeffrey Folkman, petitioner's attorney during the stock sale, on December 6, 2013. In response to the question "[s]o with regard to this particular transaction, who did you deal with at Fortrend," Mr. Folkman stated that "[t]he only person that I recall with certainty that I dealt with is the attorney, Charles Klink." Folkman depo., p. 27, lines 4-7.

³ Respondent deposed Jeffrey Folkman, petitioner's attorney during the stock sale, on December 6, 2013. In response to the question "[s]o with regard to this particular transaction, who did you deal with at Fortrend," Mr. Folkman stated that "[t]he only person that I recall with certainty that I dealt with is the attorney, Charles Klink." Folkman depo., p. 27, lines 4-7.

for questioning, and as to each question . . . elect[ing] to raise or not to raise the defense. The district court may then determine . . . by considering each question whether, in each instance, the claim of self-incrimination is well founded."

United States v. Roundtree, 420 F.2d 845, 852 (5th Cir. 1970);
In re Grand Jury Subpoena, 831 F.2d 225 (11th Cir. 1987).

14. To properly invoke a Fifth Amendment claim, the claimant must have a reasonable fear of incrimination. Hoffman v. United States, 341 U.S. 479, 486 (1951); Fisher v. United States, 425 U.S. 391 (1976). While the Fifth Amendment privilege "not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime," this rule must be considered together with the following qualification:

[T]his protection [Fifth Amendment] must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself--his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, and to require him to answer if "it clearly appears to the court that he is mistaken."

Hoffman v. United States, 341 U.S. 479, 486 (1951) (citations omitted).

15. As previously stated, Petitioner's motion is premature. Mr. Klink has not yet presented himself for questioning during the trial of this case. Petitioner's motion seems to argue that Mr. Klink should not be allowed to testify in this case as his testimony is not relevant because he will assert the Fifth Amendment. This argument defies logic.

16. Petitioner's motion correctly cites LiButti v. United States, 107 F.3d 110 (2nd Cir. 1997) as setting the standard for determining whether to apply an adverse inference in connection with a non-party's invocation of the Fifth Amendment privilege.⁴ But, the petitioner incorrectly applies the standards to this case. Regardless, petitioner's motion is premature as respondent has not yet moved this Court to make a negative inference in this case.

17. The evidence presented at trial may support an adverse inference be drawn against Fortrend and Nob Hill. It may also support an adverse inference be drawn against petitioner.

Citing Salem Financial, Inc. v. United States, 2013 U.S. Claims

⁴ The Court in LiButti came up with a list of factors to consider when determining the admissibility of a non-party's invocation of the Fifth Amendment privilege, which are (1) the nature of the relevant relationships; (2) the degree of control of the party over the non-party witness; (3) the compatibility of the interest of the party and non-party witness in the outcome of the litigation; and (4) the role of the non-party witness in the litigation. Id. At 123-124.

LEXIS 2119 at *9 (Fed. Cl. June 13, 2013), petitioner seems to suggest that because Mr. Klink was Fortrend's outside counsel, an adverse inference based on Mr. Klink's Fifth Amendment assertions cannot be drawn against Fortrend. See also Markell v. Commissioner, T.C. Memo 2014-86. (Court drew a negative inference against the promoter in a Son-Of-Boss case).

18. Petitioner's attempt to minimize Mr. Klink's role at Fortrend finds no basis in fact. Mr. Klink was more akin to an employee of Fortrend, not merely Fortrend's outside counsel. Furthermore, Mr. Klink adopted Fortrend's business model and began completing acquisitions similar to the stock sale in this case. Mr. Klink clearly possessed knowledge of Fortrend's operations, expectations and beliefs and this Court may find this knowledge sufficient for an adverse inference.

19. Additionally, petitioner's description of his relationship with Mr. Klink as adversarial fails to acknowledge petitioner's and Mr. Klink's true adversary—the respondent. The negotiations over the purchase price of the West Side stock centered on the West Side's imputed tax liability. Both petitioner and Mr. Klink, on behalf of his client Fortrend/Nob Hill, wanted to retain the highest possible percentage of the imputed tax liability, but only at the expense of the United States treasury and the non-payment of the taxes owed by West

Side. Petitioner's attempt to now distance himself from his and Fortrend's common goal must fail.

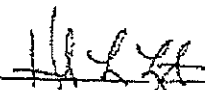
20. Respondent can speculate on Mr. Klink's testimony based on statements made by Mr. Klink's counsel, but he cannot anticipate and act on that testimony until it occurs. Respondent has not yet determined what arguments he will make in regards to Mr. Klink's testimony and he should not be precluded from making any valid arguments, including requesting this Court to draw a negative inference based on Mr. Klink's Fifth Amendment assertions.

Docket No. [REDACTED]

WHEREFORE, respondent requests that petitioner's motion be denied and Charles Klink be allowed to testify during the trial of this case.

WILLIAM J. WILKINS
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Date: JUN 04 2014

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Capital Reporting Company

952	<p>1 MR. DESMOND: I've got no questions for 2 this witness, Your Honor. 3 THE COURT: All right. You may step down. 4 THE WITNESS: Thank you, Mr. Desmond. 5 MS. GASPER: Your Honor, can we have a ten- 6 minute break? 7 THE COURT: Yes, I guess we need one. We 8 didn't fill the gap very well with that. 9 (Court in recess at 10:02.) 10 (Court resumes at 10:25.) 11 MS. WILLIAMS: Your Honor, Respondent calls 12 Charles Klink. 13 MR. BELL: Your Honor, at the close of 14 yesterday's hearing, you asked for us to give 15 additional consideration in light of your motion of 16 limine ruling. And if I understand your thought 17 process, was that this witness will testify in any 18 manner he testifies. The Petitioner has an objection 19 as to relevancy with regard to any response in which 20 the Fifth Amendment is revoked. And rather than 21 object to every question, we'd just want to note that 22 it should be a rolling objection for each and every 23 question which the Fifth Amendment is asserted, and 24 that you address the significance in the post-trial 25 closing briefs.</p>	954	<p>1 A I'm an attorney, and I received my JD at 2 the University of California Law School in 1992. 3 Q And what are your practice areas? 4 A Corporate law. I also regionally practice 5 bankruptcy law. 6 Q Do you possess any professional licenses? 7 A Other than a Juris Doctorate? I don't 8 understand what you're asking. 9 Q Are you licensed to practice law in -- 10 A Yes, in the State of California and in the 11 State of New York. 12 Q Do you possess any legal specializations? 13 A No. 14 Q Would you please describe for the Court 15 your work experience? 16 A I'm a corporate and securities attorney, my 17 training, and also practiced bankruptcy law for 18 several years at the beginning of my career. 19 Q And what law firms did you practice 20 bankruptcy law and when? 21 A At Browning Wood. 22 Q And for what period of time? 23 A Several years. From 1992 to 1995, I think. 24 Q And after you left Browning Wood, who did 25 you practice with?</p>
953	<p>1 THE COURT: Right. So your objection would 2 be based on relevancy, not on legitimacy of his claim 3 of privilege. 4 MR. BELL: That is correct. 5 THE COURT: Thank you. 6 MR. BELL: Another point you had asked 7 yesterday in regard to Mr. Hastings testimony about a 8 case out of Detroit called Alterman. I do have a 9 docket number for that case, if you need it. 10 THE COURT: We'll do that later. 11 MR. BELL: All right. 12 WHEREUPON, 13 CHARLES J. KLINK 14 Called as a witness, and having been first 15 duly sworn, was examined and testified as follows: 16 THE CLERK: Please state your name and 17 address. 18 THE WITNESS: Charles J. Klink. 15723 19 Parkhouse Drive, Unit 39, Fontana, California 92336. 20 DIRECT EXAMINATION OF CHARLES 21 KLINK 22 BY MS. WILLIAMS: 23 Q Good morning, Mr. Klink. 24 A Good morning. 25 Q Would you please describe your educational background for the Court?</p>	955	<p>1 A Andrews and Kirth from 1996 to 1997. 2 Returned to Browning Wood from 1997 to 1999. Then 3 went to Mannatt Phelps and Phillips. 4 Q And during this whole time, you were 5 practicing corporate and securities law? 6 A That's correct. Other than the bankruptcy 7 law. 8 Q When did you begin working on transactions 9 involving Fortrend International? 10 A On the advice of counsel, I assert my 11 rights under the Fifth Amendment of the United States 12 Constitution. 13 MS. WILLIAMS: Your Honor, permission to 14 treat the witness as hostile. 15 THE COURT: Granted. 16 Q Isn't it true that through a partner at 17 Mannatt Phelps Hill Boggs, you began working on 18 transactions involving Fortrend International in 19 1999? 20 A I assert my rights under the Fifth 21 Amendment. 22 Q Isn't it true that while at Mannatt, you 23 described yourself as the lieutenant of the Fortrend 24 transactions, the hands-on individual dealing with 25 these transactions?</p>

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956	<p>1 A I assert my rights under the Fifth 2 Amendment.</p> <p>3 Q Isn't it true that while at Mannatt, you 4 became familiar with the Fortrend employees, 5 including Alice Dill, Steve Block, Michael Bitner and 6 Tim Conn?</p> <p>7 A I assert my rights under the Fifth 8 Amendment.</p> <p>9 Q Isn't it true that while at Mannatt, you 10 also became familiar with the Fortrend strategy?</p> <p>11 A I assert my rights under the Fifth 12 Amendment.</p> <p>13 Q Isn't it true that on or in 2003, you 14 formed Klink and Associates?</p> <p>15 A I assert my rights under the Fifth 16 Amendment.</p> <p>17 Q Isn't it true that in 2003, you began 18 working with M and A Holdings, an entity owned by 19 Alice Dill and Michael Bitner?</p> <p>20 A I assert my rights under the Fifth 21 Amendment.</p> <p>22 Q Isn't it true that you labeled your 23 position with M and A Holdings as outside general 24 counsel because you never formally had a position at 25 M and A, but you worked on all of their transactions?</p>	958	<p>1 Q Isn't it true that for both Fortrend and 2 ASI you handled the legal negotiations and 3 documentation on the corporate side of the 4 acquisition transactions while Steve Block was 5 responsible for the marketing and sales of 6 acquisition and transactions?</p> <p>7 A I assert my rights under the Fifth 8 Amendment.</p> <p>9 Q Isn't it true that the Fortrend strategy 10 involved Fortrend engaging in acquisition 11 transactions structured for the purpose of minimizing 12 a target's corporate income tax liability for the 13 year in which the acquisition took place?</p> <p>14 A I assert my rights under the Fifth 15 Amendment.</p> <p>16 Q Isn't it true that Fortrend targeted 17 corporations with assets consisting of cash and cash 18 equivalence, and liabilities of only federal, state, 19 and local income taxes?</p> <p>20 A I assert my rights under the Fifth 21 Amendment.</p> <p>22 Q Isn't it true that you and/or Klink and 23 Associates provided legal advice regarding 24 acquisition transactions entered into by Fortrend or 25 one of Fortrend's related entities?</p>
957	<p>1 A I assert my rights under the Fifth 2 Amendment.</p> <p>3 Q Isn't it true that Alice Dill and Michael 4 Bitner were also employees of Fortrend International?</p> <p>5 A I assert my rights under the Fifth 6 Amendment.</p> <p>7 Q Isn't it true that in 2004, you formed 8 Acquisition Strategies International, ASI, an entity 9 that had the same purpose as Millennium Asset 10 Recovery Fund?</p> <p>11 A I assert my rights under the Fifth 12 Amendment.</p> <p>13 Q Isn't it true that ASI was owned 50 percent 14 by you and 50 percent by Steve Block?</p> <p>15 A I reserve my rights under the Fifth 16 Amendment.</p> <p>17 Q Isn't it true that you were president of 18 ASI and Steve Block was vice president?</p> <p>19 A I assert my rights under the Fifth 20 Amendment.</p> <p>21 Q Isn't it true that you practiced the 22 Fortrend strategy at Klink and Associates, M and A 23 Holdings and ASI?</p> <p>24 A I assert my rights under the Fifth 25 Amendment.</p>	959	<p>1 A I assert my rights under the Fifth 2 Amendment.</p> <p>3 Q Isn't it true that you were paid for the 4 services you rendered during the acquisition 5 transactions entered into by Fortrend, or one of 6 Fortrend's related entities?</p> <p>7 A I assert my rights under the Fifth 8 Amendment.</p> <p>9 Q Isn't it true that Klink and Associates 10 provided legal services with respect to the 11 acquisition transactions entered into for Fortrend or 12 one of Fortrend's related entities.</p> <p>13 A I assert my rights under the Fifth 14 Amendment.</p> <p>15 Q Isn't it true that Klink and Associates was 16 paid for the services that it provided during the 17 acquisition transactions entered into by Fortrend or 18 one of Fortrend's related entities?</p> <p>19 A I assert my rights under the Fifth 20 Amendment.</p> <p>21 Q Isn't it true that Fortrend provided 22 acquisition services to Westside by offering to 23 acquire Westside through a stock purchase agreement?</p> <p>24 A I assert my rights under the Fifth 25 Amendment.</p>

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<p style="text-align: right;">960</p> <p>1 Q Isn't it true that Fortrend created Knob 2 Hill to acquire Westside? 3 A I assert my rights under the Fifth 4 Amendment. 5 Q Isn't it true that you were concerned that 6 the tax indemnity clause in the stock purchase 7 agreement would require reporting the stock sale 8 transaction between Petitioner, Michael Tricarichi 9 and Knob Hill to the Internal Revenue Service? 10 A I assert my rights under the Fifth 11 Amendment. 12 Q Isn't it true that you did not want a 13 minimum net worth test because you knew that the 14 remaining assets of Westside would be transferred out 15 of Westside to other Fortrend entities within months 16 after the stock sale? 17 A I assert my rights under the Fifth 18 Amendment. 19 Q Isn't it true that you suggested obtaining 20 opinions from Seifert and Shaw and certain other law 21 firms because you knew you would obtain deceptive 22 opinions from those firms? 23 A I assert my rights under the Fifth 24 Amendment. 25 Q Isn't it true that at your direction,</p>	<p style="text-align: right;">962</p> <p>1 Amendment. 2 Q Isn't it true that you would not agree to 3 the more specific tax indemnification clause in the 4 stock purchase agreement between Michael Tricarichi 5 and Knob Hill because you knew that the federal and 6 state income taxes would not be paid? 7 A I assert my rights under the Fifth 8 Amendment. 9 Q In the final draft of the stock purchase 10 agreement between Knob Hill and Petitioner Michael 11 Tricarichi, isn't it true that you would not agree to 12 the following provision: After the closing buyer 13 shall not cause company to engage in or be a party to 14 any transaction subject to Treasury Regs. Section 15 1.6011-4. 16 A I assert my rights under the Fifth 17 Amendment. 18 Q In the final draft of the stock purchase 19 agreement between Knob Hill and Petitioner, isn't it 20 true that you would also not agree to the following 21 provision? After the closing company shall not 22 engage in or be a party to any transaction subject to 23 Treasury Regs. Section 1.6011-4. 24 A I assert my rights under the Fifth 25 Amendment.</p>
<p style="text-align: right;">961</p> <p>1 Graham Taylor of Seifert and Shaw prepared an opinion 2 letter? 3 A I assert my rights under the Fifth 4 Amendment. 5 Q Isn't it true that the structure of the 6 transaction was to create a contribution of debt on 7 paper from United Finance Company Limited to 8 Millennium Asset Recovery Fund? 9 A I assert my rights under the Fifth 10 Amendment. 11 Q Isn't it true that you had an ongoing 12 relationship with Olsen Lemons to provide opinion 13 letters? 14 A I assert my rights under the Fifth 15 Amendment. 16 Q Isn't it true that the opinion letters 17 provided by Olsen Lemons were nothing more than 18 boiler plate letters prepared in furtherance of the 19 acquisition transactions in which Fortrend engaged? 20 A I assert my rights under the Fifth 21 Amendment. 22 Q Isn't it true that material facts were 23 withheld from the opinion letters drafted by Olsen 24 Lemons? 25 A I assert my rights under the Fifth</p>	<p style="text-align: right;">963</p> <p>1 Q Isn't it true that you knew the federal and 2 state income tax liability of Westside would be 3 offset on paper through a distressed asset 4 contribution to Westside? 5 A I assert my rights under the Fifth 6 Amendment. 7 Q Isn't it true that you knew that the 8 distressed assets contributed to Westside were 9 purchased from Unified Credit in Japan and were not 10 contributed to Millennium Asset Recovery Fund under 11 Section 351 of the Internal Revenue Code? 12 A I assert my rights under the Fifth 13 Amendment. 14 Q Isn't it true that Knob Hill had no 15 reasonable expectation that they could utilize the 16 bad debt? 17 A I assert my rights under the Fifth 18 Amendment. 19 Q Isn't it true that you negotiated the 20 amount of the Fortrend premium in this case? 21 A I assert my rights under the Fifth 22 Amendment. 23 Q Isn't it true that the Fortrend premium was 24 31.88 percent of the net imputed federal and state 25 taxes of Westside?</p>

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<p style="text-align: right;">964</p> <p>1 A I assert my rights under the Fifth 2 Amendment.</p> <p>3 Q Isn't it true that the Fortrend premium was 4 not based on potential income from ongoing 5 operations?</p> <p>6 A I assert my rights under the Fifth 7 Amendment.</p> <p>8 Q Isn't it true that the cash payouts to 9 Petitioner was based on the remaining cash assets of 10 Westside, less the Fortrend premium?</p> <p>11 A I assert my rights under the Fifth 12 Amendment.</p> <p>13 Q Isn't it true that in the course of 14 negotiating the terms of the letter of intent and 15 stock purchase agreement between Petitioner and Knob 16 Hill, you communicated numerous times via email and 17 telephonically with Petitioner's attorney Randy Hart?</p> <p>18 A I assert my rights under the Fifth 19 Amendment.</p> <p>20 Q Isn't it true that in the course of 21 negotiating the terms of the letter of intent and 22 stock purchase agreement between Petitioner and Knob 23 Hill, you communicated numerous times via email and 24 telephonically with Petitioner's attorney Jeffrey 25 Fullman?</p>	<p style="text-align: right;">966</p> <p>1 Amendment.</p> <p>2 Q Isn't it true that after the acquisition of 3 the Westside stock by Knob Hill, Westside did not 4 actually maintain an office?</p> <p>5 A I assert my rights under the Fifth 6 Amendment.</p> <p>7 Q Isn't it true that Westside maintained a 8 bank account for the purposes of making payments to 9 Ohio and other agencies, and to shift payments 10 between Fortrend employees in order to appear to keep 11 Westside in technical existence?</p> <p>12 A I assert my rights under the Fifth 13 Amendment.</p> <p>14 Q Isn't it true that there were no actual 15 business operations of Westside after the acquisition 16 of its stock by Knob Hill?</p> <p>17 A I assert my rights under the Fifth 18 Amendment.</p> <p>19 Q Isn't it true that continued payments by 20 Westside to Professional Services LLC were paid to 21 you, John McNabola, Jeffrey Furman, Alice Dill, and 22 Tim Conn Vu?</p> <p>23 A I assert my rights under the Fifth 24 Amendment.</p> <p>25 Q Isn't it true that you communicated legal</p>
<p style="text-align: right;">965</p> <p>1 A I assert my rights under the Fifth 2 Amendment.</p> <p>3 Q Isn't it true that in the course of 4 negotiating the terms of the letter of intent and 5 stock purchase agreement between Petitioner and Knob 6 Hill, you communicated numerous times via email and 7 telephonically with Petitioner's brother Jim 8 Tricarichi?</p> <p>9 A I assert my rights under the Fifth 10 Amendment.</p> <p>11 Q Isn't it true that in the course of 12 negotiating the terms of the letter of intent and 13 stock purchase agreement between Petitioner and Knob 14 Hill, you communicated numerous times via email and 15 telephonically with Petitioner?</p> <p>16 A I assert my rights under the Fifth 17 Amendment.</p> <p>18 Q Isn't it true that you were the only person 19 from Fortrend that communicated with Petitioner?</p> <p>20 A I assert my rights with the Fifth 21 Amendment.</p> <p>22 Q Isn't it true that you negotiated the terms 23 of the stock purchase agreement on behalf of Knob 24 Hill?</p> <p>25 A I assert my rights under the Fifth</p>	<p style="text-align: right;">967</p> <p>1 advice to Tim Conn Vu regarding Westside Cellular 2 post acquisition?</p> <p>3 A I assert my rights under the Fifth 4 Amendment.</p> <p>5 Q Isn't it true that you communicated legal 6 advice to John McNabola regarding Westside Cellular 7 postacquisition?</p> <p>8 A I assert my rights under the Fifth 9 Amendment.</p> <p>10 Q Isn't it true that the continued payments 11 to Pole, McNabola, Burg and Company LLP for the 12 preparation of Westside's tax return were merely to 13 maintain the faof the corporate existence of 14 Westside?</p> <p>15 A I assert my rights under the Fifth 16 Amendment.</p> <p>17 MS. WILLIAMS: Your Honor, we have no 18 further questions for this witness.</p> <p>19 THE COURT: Just to clarify the record, 20 Petitioner has deemed to have objected to every one 21 of those answers on the grounds of relevancy.</p> <p>22 MR. DESMOND: With respect to where he 23 invoked his Fifth Amendment rights on the U.S. 24 Constitution.</p> <p>25 THE COURT: Anything further from</p>

1 Petitioner?

2 MR. DESMOND: We have no cross on the
3 questions you did ask regarding his work experience
4 and formal education.

5 THE COURT: Mr. Klink, you are dismissed.

6 THE WITNESS: Thank you, Your Honor.

7 MS. WILLIAMS: Your Honor, Respondent
8 requests --

9 THE COURT: Yes, before we -- I think, as I
10 mentioned before, I'm not going to rule on the
11 relevancy objections now. But they have been
12 preserved, and I will address them if necessary in
13 the opinion. What I would propose is that if
14 Respondent, I think we're going to have simultaneous
15 opening briefs in this case, we'll talk about that
16 later, but I would request that any use Respondent
17 proposes to make of Mr. Klink's testimony be made in
18 your opening brief. And if you do make use of it,
19 Petitioner can respond to it in their response brief
20 and I will address it in the opinion. If you do not
21 use any of his testimony in your opening brief, I
22 will decide and will deem you not to have -- that it
23 won't be necessary to address that question. Because
24 I don't want to have to rule on it if I don't have to
25 rule on it. So in other words, if you don't feel

1 Ireland, and we were unable to serve him. We have
2 also attempted to call Graham Taylor, who was with C.
3 Farkland Shaw I believe, and we have contacted his
4 attorney. And it is our understanding from the last
5 time that we talked to his attorney that he is out of
6 the country in Australia, so we have been unable to
7 serve him as well. Those are my representations for
8 the record. We are ready to rest our case, Your
9 Honor.

10 THE COURT: Okay. And Petitioner, you may
11 put on what is left of your case.

1 like you need it in your opening brief, then we'll
2 just deem the issue to have been gone away.

3 MS. WILLIAMS: Thank you, Your Honor.

4 THE COURT: Very good.

5 MS. WILLIAMS: Your Honor, Respondent
6 requests a 15-minute break.

7 THE COURT: Okay. And what's next?

8 MS. LAMPERT: Your Honor, that's what we're
9 going to discuss.

10 THE COURT: Good luck.

11 MS. LAMPERT: Thank you.

12 (Court in recess at 10:43 a.m.)

13 (Court resumes at 11:16 a.m.)

14 MS. LAMPERT: Your Honor, I'd like to make
15 a few representations for the record, so that you can
16 understand why we didn't call some of the witnesses
17 today, and then we'll rest our case. We attempted to
18 call Alice Dill-Wendland to the stand for her
19 testimony. And we believe she's located in Bali. We
20 contacted our foreign tax attachthat covers Bali and
21 have been unable to locate her to serve her with a
22 subpoena to appear. We have also attempted to call
23 John McNabola to the stand. I believe that we've
24 also heard testimony that we believe he's in Ireland.
25 We contacted our foreign tax attachthat covers