HONORABLE RICARDO S. MARTINEZ

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Petitioner, v. MICROSOFT CORPORATION, et al., Respondents.	)	NO. 2:15-cv-00102 RSM **[PROPOSED] BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS** **NOTED FOR: NOVEMBER 11, 2016**

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
TELEPHONE (206) 624-0900

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America (the "Chamber") is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent company, and no publicly-held company has ten-percent or greater ownership in the Chamber. *See* Fed. R. App. P. 26.1.

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
TELEPHONE (206) 624-0900

TABLE OF CONTENTS

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
TELEPHONE (206) 624-0900

TABLE OF AUTHORITIES

Page(s)

Cases

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
TELEPHONE (206) 624-0900

Statutes

Other Authorities

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
TELEPHONE (206) 624-0900

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest federation of businesses and associations. It represents 300,000 direct members and indirectly represents the interests of more than three million U.S. companies and professional organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases raising issues of concern to the nation's business community.[1]

The vast majority of these businesses seek tax advice from lawyers, accountants, or both, in reliance on the understanding that this advice will be privileged from disclosure to the IRS. If adopted by this Court, the extreme positions articulated by the government in its Response (Dkt. # 145) to Microsoft's Brief Regarding Privileged Documents Still in Dispute (Dkt. # 140) would significantly undermine the ability of businesses to prevent the disclosure of such tax advice. That, in turn, would chill businesses from obtaining and relying on the uninhibited advice of their tax advisors. The Chamber accordingly has a strong interest in this Court's consideration of the privilege and work product protection arguments in this case.

[1] The Chamber certifies that no party's counsel authored this Brief in whole or in part, no party's counsel contributed money that was intended to fund preparing or submitting this Brief, and no person, other than the Chamber, its members, or its counsel, contributed money that was intended to fund preparing or submitting this Brief. Petitioner's counsel did not agree to the filing of this Brief and reserved the right to respond. *See* Fed. R. App. P. 29.

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
TELEPHONE (206) 624-0900

INTRODUCTION

Petitioner the United States of America (the "government") misapprehends the types of tax and legal advice that businesses like Microsoft receive, and conflates two distinct types of advice that accountants provide—tax return preparation (not subject to privilege once a return is filed) and tax planning advice (subject to privilege and, frequently, also subject to work product protection). The government argues that routine tax planning advice should not be protected under the tax practitioner privilege, section 7525, [2] which extended the attorney-client privilege to non-lawyer tax advisors, because this advice either (1) is not tax advice within the scope of the statute, or (2) should fall within the statute's "tax shelter promotion" exception. Under the government's view, only *post hoc* tax analysis of a transaction would be privileged. These arguments cannot be reconciled with section 7525 and its underlying policy purposes nor are these arguments consistent with Ninth Circuit precedent.

Protection from disclosure "encourage[s] full and frank communication between [tax advisors] and their clients and thereby promote broader public interests in the observance of [tax] law . . ." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). In order to serve these interests "the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected [because a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Id.* at 393; *see also Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

In 1998, Congress determined that these same principles should apply to communications between taxpayers and federally authorized tax practitioners. The government's position cannot be reconciled with these important policy goals. Most importantly, if the government's arguments are adopted by this Court, the future application of section 7525 would be burdened

[2] All references to "Section" or "§" herein are references to Title 26, United States Code, the Internal Revenue Code of 1986 (the "Code"), as amended.

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
TELEPHONE (206) 624-0900

by increased uncertainty, threatening to make it little better than if Congress never extended privilege to communications between taxpayers and tax advisors at all. The government also advances arguments challenging the application of the work product doctrine. The Ninth Circuit has already addressed and rejected similar arguments.

I. Background

Multinational companies generally solicit three types of tax advice from an accountant or lawyer—(1) tax planning advice, (2) tax return preparation, and (3) section 6662(e) contemporaneous documentation. These categories of tax advice take different forms, have different purposes, and receive different protections.

A. Section 482 and Cost-Sharing Arrangements

Based on publicly-available information, the core of this case appears to be a tax dispute over the amount of the "buy-in" payments associated with two cost-sharing arrangements between Microsoft and certain foreign affiliates.[3] Intercompany transactions such as these are governed by regulations promulgated under section 482, which generally provide that the price of goods and services sold between controlled entities shall be determined by reference to the price that would be paid in an arms-length transaction. Treas. Reg. § 1.482-1(b)(1).

Administrative guidance for cost-sharing arrangements was first introduced in Proposed Regulations issued in 1966.[4] Regulations bearing on cost-sharing arrangements have increased in complexity over the years, currently containing over 52,000 words that also refer to and draw extensively from other portions of the section 482 regulations. *Compare* Treas. Reg. § 1.482-7 (T.D. 9568, 77 Fed. Reg. 3606 (Jan. 25, 2012)) *with* Treas. Reg. § 1.482-7 (T.D. 8632, 60 Fed.

[3] *See, e.g.*, (Dkt. # 1 at pp. 3:8-10, 6:12-19.)
[4] *See* Prop. Treas. Reg. § 1.482-2(d)(4), 31 Fed. Reg. 10,394 (Aug. 2, 1966).

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
TELEPHONE (206) 624-0900

Reg. 65,553 (Dec. 20, 1995)). Regardless of which version is being applied, issues associated with the valuation of the intangibles to determine buy-in payments is a source of many transfer pricing tax disputes between taxpayers and the IRS.

B. Types and Forms of Tax Advice Related to Transfer Pricing

Multinational companies must regularly operate under the above-described complex regulatory framework, and candid advice is essential. Tax planning advice is legal advice, but its form does not merely consist of traditional legal memoranda. Rather, it routinely includes the preparation of studies, tax and financial models, spreadsheets, and charts that are inherently based on legal assumptions and conclusions. *See, e.g., Eaton Corp. v. Comm'r*, No. 5576-12, *4 (Tax Ct. Apr. 6, 2015) (recognizing that emails, memos, and data compilations are privileged, absent a waiver). These analyses are essential to understanding the defensibility of tax and legal positions against a potential IRS challenge, and the stakes are incredibly high for businesses to "get it right." *See, e.g., Veritas Software Corp. v. Comm'r*, 133 T.C. 297, 311 (2009) (for the years, 1999-2001, the IRS proposed an assessment based on a $2.5 billion cost sharing buy-in payment—which the Tax Court rejected and found to be arbitrary, capricious, and unreasonable—instead of the $166 million buy-in payment reported by the taxpayer).

If rendered in the course of tax planning that is not intended to be disclosed on a tax return, tax advice is privileged. *United States v. Abrahams*, 905 F.2d 1276, 1284 (9th Cir. 1990) ("Although communications made solely for tax return preparation are not privileged, communications made to acquire legal advice . . . may be privileged"), *overruled on other grounds, United States v. Jose*, 131 F.3d 1325 (9th Cir. 1997). In contrast, tax return preparation is generally not privileged because it is expected to be transmitted to the IRS, undermining the

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
TELEPHONE (206) 624-0900

taxpayer's expectation of confidentiality. *Abrahams*, 905 F.2d at 1284. Similarly, multinational companies—many of which are under continuous audit—prepare contemporaneous section 6662(e) documentation in conjunction with their tax returns and also with the expectation of production to the IRS.[5] Because of the expectation of its production to the IRS, this type of documentation is also often not subject to privilege or work product protection. In seeking to overcome Microsoft's privilege claims, the government appears to accept that the documents in question involve tax planning advice, and not non-privileged tax preparation or contemporaneous section 6662(e) documentation.

As discussed further below, many businesses, including Microsoft, obtain tax planning advice that they anticipate the IRS will challenge. In these situations, the tax planning advice is both privileged and work product protected. *In re Grand Jury Subpoena v. Torf*, 357 F.3d 900, 908-10 (9th Cir. 2004) (extensively citing *United States v. Adlman*, 134 F.3d 1194 (2d Cir. 1998) (holding work product shielded analysis of likely IRS challenges to a proposed transaction)); *Schaeffler v. United States*, 806 F.3d 34, 44-45 (2d Cir. 2015).

C. Section 7525—Tax Practitioner Privilege

Prior to the enactment of section 7525, in *Couch v. United States*, 409 U.S. 322, 335 (1973), the Supreme Court held that "no confidential accountant-client privilege exist[ed] under federal law, and no state-created privilege ha[d] been recognized in federal cases." In particular, the Supreme Court noted that there can be little expectation of privacy "where records are

---

[5] *See* Section 6662(e)(3) and (e)(3)(B); *see also* Treas. Reg. § 1.6662-6(d)(2)(iii). A substantial portion of the contemporaneous documentation typically consists of a report prepared by an external advisor where actual results (obtained and verified after year-end in conjunction with return preparation) are tested under the selected transfer pricing methodology. It may also include intercompany agreements, intercompany invoices, and other supporting information and records.

handed to an accountant knowing that mandatory disclosure of much of the information therein is required in an income tax return." *Id.* In 1998, Congress enacted section 7525 to statutorily extend the same protections available under the common law attorney-client privilege to certain non-lawyer "federally authorized tax practitioners," which include accountants and accounting firms. Section 7525, entitled "Confidentiality privileges relating to taxpayer communications," provides:

> With respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.

In essence, the tax practitioner privilege is "coterminous with the attorney-client privilege both in scope and in waiver." *Schaeffler*, 806 F.3d at 38 n.3.

ARGUMENT

I. The Government's Narrow Interpretation of the Tax Practitioner Privilege Conflicts with the Language of the Statute, Congressional Intent, and the Ninth Circuit Precedent.

The government urges the Court to adopt an erroneously narrow view of "tax advice." If accepted, this view would eviscerate the tax practitioner privilege for tax planning advice. If the tax practitioner privilege does not apply to either tax planning or tax return preparation, as the government advocates, the only advice covered would be *post hoc* tax analysis.

Relying heavily on cases that predate section 7525, including *United States v. Frederick*, 182 F.3d 496 (7th Cir. 1999), the government urges the Court to deny the privilege whenever advice from tax practitioners appears to be "accounting." (Gov't's Br., Dkt. # 145 at p. 13). That approach, however, is not supported by the language of the statute or this Court's precedent.

Section 7525(a)(1) expressly grants the privilege to communications between a taxpayer and a tax practitioner where the communication "would be considered a privileged communication if it were between a taxpayer and an attorney." It is self-evident that tax advice—interpreting the Code, regulations, and case law, and how it applies in a specific context—is legal advice. As the court discussed in *United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1076 (N.D. Cal. 2002):

> Determining the tax consequences of a particular transaction is rooted virtually entirely in the law. The advisor must analyze the tax code, IRS rulings, decisions of the Tax Court, etc. Communications offering tax advice or discussing tax planning or the tax consequences of alternate business strategies are "legal" communications. *Accord, In re Grand Jury*, 731 F.2d 1032, 1037-1038 (2d Cir. 1984). We realize that corporations often enlist the services of nonlawyers (*e.g.*, accountants, consulting firms) to advise them with respect to tax matters. This does not change the fact that the advi[c]e is rooted in the law, and *when solicited from or given by a client's attorney* it constitutes *legal* advice as contemplated by the attorney-client privilege.

The test for protection under section 7525 is not, as the government argues, whether the advice is "accounting" work. Instead, the test is the same as applies to attorney-client privilege—whether there is an expectation of confidentiality. The cases relied upon by the government merely reaffirm the general rule that communications regarding tax return preparation are not privileged, even if performed by a lawyer. *United States v. Gurtner*, 474 F.2d 297, 299 (9th Cir. 1973); *Olender v. United States*, 210 F.2d 795, 806 (9th Cir. 1954); *Abrahams*, 905 F.2d at 1284 ("Although communications made solely for tax return preparation are not privileged, communications made to acquire legal advice about what to claim on tax returns may be privileged."). Communications made "for inclusion in a tax return [are] not privileged

because [they are] communicated for the purpose of disclosure,"[6] negating any expectation of confidentiality. Such communications are not privileged because they were not intended to remain confidential—not because they are "accounting advice," as the government argues.

The government relies on the non-binding and unpersuasive decision in *Valero Energy Corp. v. United States*, 569 F.3d 626 (7th Cir. 2009) to argue that "[the] kinds of documents [at issue here] are not privileged under § 7525" because they contain "detailed and extensive financial modeling, design, and implementation services" and "worksheets containing financial data and estimates of tax liability."[7] *Valero* took language in *Frederick*, a case that was not governed by section 7525, out of context to incorrectly conclude that "these [kinds of] documents" are merely "accounting advice [that] is not covered by the privilege." *See Valero*, 569 F.3d at 631 (citing *Frederick*, 182 F.3d at 500). In context, *Frederick* stated as follows:

> Most of the documents in issue were created in connection with Frederick's preparation of [the taxpayers'] tax returns. They are drafts of the returns (including schedules), worksheets containing the financial data and computations required to fill in the returns, and correspondence relating to the returns. These are the kinds of document [sic] that accountants and other preparers generate as an incident to preparing their clients' returns. . . .

Frederick, 182 F.3d at 500.

In short, *Frederick* held that documents created incident to preparing a client's returns were not privileged. To the extent that *Valero* applied *Frederick*'s narrow holding to documents related to tax planning, it did so in error. Indeed, *Frederick* explicitly "reject[ed] the government's argument that numerical information can never fall within the attorney-client . . .

---

[6] H.R. Rep. No. 105–599, at 267 (1998) (Conf. Rep.); *Abrahams*, 905 F.2d at 1283; *see also e.g.*, *United States v. Richey*, 632 F.3d 559, 566-67 (9th Cir. 2011) (no privilege for appraisal document attached to taxpayer's return that was required to claim a deduction).

[7] (Gov't's Br., Dkt. # 145 at p. 14 (citing *Valero*, 569 F.3d at 631).)

privilege." *See Frederick* 182 F.3d at 501 (also noting that numerical information can constitute work product); *see also Torf*, 357 F.3d at 909 (reconciling *Frederick*'s work-product holding to the dual-purpose document standard adopted by the Ninth Circuit). *Valero* compounded its analytical error when it acknowledged that "these [kinds of] documents contain some legal analysis," but nonetheless held them categorically not privileged. *See Valero*, 569 F.3d at 631. There is no requirement in the tax practitioner privilege that suggests this result, and this conclusion is best explained by *Valero*'s repeated statements that its review of the district court's ruling is deferential, to be reversed only for clear error.

II. The Government's Application of the "Tax Shelter Promotion" Exception Swallows the Tax Practitioner Privilege and Undermines the Purposes of Section 7525.

The government also argues that the tax practitioner privilege does not apply in this case because the communications at issue were created for the "promotion" of a tax shelter. Yet the grounds identified by the government for invoking that exception are so minimal that, if the government's argument were accepted, the "tax shelter promotion" exception would swallow the general rule that section 7525 protects routine tax planning advice against disclosure to the IRS. Rather, under the government's interpretation, the tax practitioner privilege would never apply to tax planning advice that represents "legitimate attempts by a company to reduce its tax burden." *See Valero*, 569 F.3d at 632.

Congress clearly did not intend such a result when it enacted the tax practitioner privilege. As a general matter, courts are loath to assume that Congress "hide[s] elephants in mouseholes" or otherwise includes exceptions that render a broader provision ineffective. *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001). Moreover, the legislative history is clear that Congress intended that the tax shelter exception would be narrow. The

exception was merely intended to target communications by outside tax practitioners attempting to sell tax shelters to a corporate client.[8] Thus, the Conference Report stated, "[we] do not understand the promotion of tax shelters to be part of the routine relationship between a tax practitioner and a client" and stated that the exception should not "adversely affect such routine relationships." *See, e.g.*, H.R. Rep. No. 105-599 at 269 (1998) (Conf. Rep.).

Applying the tax shelter exception to deny the privilege to routine tax planning would not only ignore congressional intent but also would undermine the policy interests embodied in section 7525. By extending the attorney-client privilege to tax practitioner advice, Congress recognized the need for businesses to obtain uninhibited professional advice related to tax planning, with the goal of not only navigating complicated compliance requirements but also understanding planning opportunities and potential IRS challenges. These communications should be privileged under the policy that "seeking such advice serves the public's interest in making it more likely than not that the tax law will be followed."[9]

---

[8] *See* H.R. Rep. No. 105-599 at 269 (1998) (Conf. Rep.) ("Tax shelters for which no privilege of confidentiality will apply include, but are not limited to, those required to be registered as confidential corporate tax shelter arrangements under section 6111(d)."); *see also Countryside Ltd. P'ship v. Comm'r*, 132 T.C. 347, 353-55 (2009) (finding the practitioner did not act in promotion of a tax shelter because (1) the tax advice was provided as part of a routine tax practitioner-client relationship, and (2) the practitioner did not stand to benefit, beyond the continuation of the relationship, from the client's participation in the transaction).

[9] *See Evergreen Trading, LLC v. United States*, 80 Fed.Cl. 122, 131 (2007) ("Even though tax planning holds the potential for mischief, on balance, seeking such advice serves the public's interest in making it more likely than not that the tax law will be followed. In short, . . .'[p]ersons seek legal advice and assistance in order to meet legal requirements and to plan their conduct; such steps serve the public interest in achieving compliance with law and facilitating the administration of justice, and indeed may avert litigation.'" (citations omitted).

III. The Government's Work Product Arguments Conflict With Ninth Circuit Precedent.

To overcome Microsoft's work product claims, the government argues that because Microsoft's tax advice was obtained in the "ordinary course of business"—that is, routine—it is not protected work product. That conclusion does not follow from its premise. Many businesses obtain routine tax planning advice that they anticipate the IRS will challenge. In these situations, the tax planning advice is both privileged and protected work product.

Businesses and their tax advisors recognize that transfer pricing issues have been and remain a major source of tax disputes and litigation. Not surprisingly, many businesses take tax advice into account in making business decisions. Documents created in these circumstances are work product and protected from disclosure. *Torf*, 357 F.3d at 908-10; *Schaeffler*, 806 F.3d at 43 ("Documents prepared in anticipation of litigation are work product, even when they are also intended to assist in business decisions."). The government strains to overcome Microsoft's work product claims by arguing that the withheld documents would have been created in substantially similar form irrespective of anticipated litigation or in the "ordinary course of business."[10] The Ninth Circuit and the Second Circuit have rejected that argument. *Torf*, 357 F.3d at 908-10; *Schaeffler*, 806 F.3d at 43.

A. The Government's Work Product Arguments Were Rejected Under the Ninth Circuit's "Because Of" Test.

The government argues here—as it did in *Torf*—that work product protection does not attach to documents that are "prepared in the ordinary course of business" or that would have

[10] *See* (Gov't's Br., Dkt. # 145 at p. 20 ("[i]t is well established that documents prepared in the ordinary course of business are not protected . . . because they would have been created regardless of the litigation." *quoting Heath v. F/V Zolotoi*, 221 F.R.D. 545, 549-50 (W.D. Wash. 2004).)

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
TELEPHONE (206) 624-0900

been created in "substantially similar form" irrespective of litigation.[11] The government's arguments are too simplistic and contradict binding precedent. In *Torf*, the Ninth Circuit held, "when there is a true independent purpose for creating a document, work product is less likely, but when two purposes are profoundly interconnected, the analysis is more complicated." *Torf*, 357 F.3d at 908. Thus, *Torf* concluded that documents are entitled to work product protection when, "taking into account the facts surrounding their creation, their litigation purpose so permeates any non-litigation purpose that the two purposes cannot be discretely separated as a whole." *Id.* at 910. Based on the facts in *Torf*, the Ninth Circuit rejected the government's "substantially similar form" arguments and upheld work product for dual-purpose documents.

In reaching its conclusions, *Torf* adopted the same "because of" test used in the majority of circuits and commented on the Second Circuit's comprehensive discussions in *Adlman*. *Id.* at 908-10. In *Adlman*, the Second Circuit provided examples of dual-purpose documents where litigation was anticipated—but not yet commenced—that are protected work product. *Adlman*, 134 F.3d at 1199-1200; *see also Schaeffler*, 806 F.3d at 34. One such example is instructive:

> A company contemplating a transaction recognizes that the transaction will result in litigation; whether to undertake the transaction and, if so, how to proceed with the transaction, may well be influenced by the company's evaluation of the likelihood of success in litigation. Thus, a memorandum may be prepared in expectation of litigation with the primary purpose of helping the company decide whether to undertake the contemplated transaction.

Adlman, 134 F.3d at 1199.

B. The Government's Work Product Arguments Were Further Rejected in *Schaeffler*.

Torf also rejected the argument that there is no work product protection, "*when viewed in isolation of the facts of the case a document can be said to have been created for a nonlitigation*

[11] (Gov't's Br., Dkt. # 145 at p. 20.)

purpose," noting an open question in the Second Circuit's decision in *Adlman*. *Torf*, 357 F.3d at 909. Recently in *Schaeffler*, the Second Circuit directly addressed that question. *Schaeffler*, 806 F.3d at 43-45. In *Schaeffler*, the district court denied work product protection because the taxpayers "would have sought and received advice 'created in essentially similar form' even if they had not anticipated litigation." *Id*. The Second Circuit reversed, and rejected the district court's holding as "contrary to *Adlman*" and "virtually swallow[ing] the work-product protection *Adlman* extended to documents 'prepared or obtained because of the prospect of litigation.'" *Id.* at 43. Specifically, the Second Circuit rejected the argument that Ernst & Young's "tax analyses and opinions created to assist in large, complex transactions with uncertain tax consequences can never have work-product protection from [the] IRS."[12]

The interpretation advocated by the government is unjustified and "imposes an untenable choice upon companies in these circumstances":

> If the company declines to make such analysis or scrimps on candor and completeness to avoid prejudicing its litigation prospects, it subjects itself and its co-venturers to ill-informed decisionmaking. On the other hand, a study reflecting the company's litigation strategy and its assessment of its strengths and weaknesses cannot be turned over to litigation adversaries without serious prejudice to the company's prospects in the litigation.

Adlman, 134 F.3d at 1200. The government's arguments would deny protections to tax advice that is squarely protected as work product.

CONCLUSION

For the reasons herein, the Chamber respectfully requests that the Court reject the government's arguments for denying tax practitioner privilege and work product protection.

---

[12] *Id*. at 44-45. The documents at issue in *Schaeffler* contained tax advice regarding the tax consequences of a corporate restructuring and refinancing that could materially affect the taxpayer's tax liability. *Id.* at 37. Given the complexity and novelty of the issues, the taxpayer anticipated IRS scrutiny and sought advice on the tax implications of the transactions and possible litigation. *Id.*

Dated October 27, 2016

Respectfully submitted,

By: *s/ Timothy J. O'Connell*

Timothy J. O'Connell, WSBA 15372
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
(206) 624-0900
(206) 386-7500 FAX
Tim.oconnell@stoel.com

M. Todd Welty
(Texas Bar No. 00788642)
(pro hac vice pending)
Mark P. Thomas
(Texas Bar No. 24033388)
(pro hac vice pending)
Laura L. Gavioli
Texas Bar No. 24055538
(pro hac vice pending)
Denise Mudigere
(Texas Bar No. 24074770)
(pro hac vice pending)
MCDERMOTT WILL & EMERY LLP
2501 N. Harwood Street, Ste. 1900
Dallas, TX 75201
(214) 295-8082
(972) 232-3098 FAX
twelty@mwe.com

ATTORNEYS FOR CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties.

DATED: October 27, 2016 at Seattle, Washington.

STOEL RIVES LLP

s/ Timothy J. O'Connell

Timothy J. O'Connell, WSBA No. 15372
600 University Street, Suite 3600
Seattle, WA 98101
Telephone: (206) 624-0900
Facsimile: (206) 386-7500
Email: tim.oconnell@stoel.com