

STATE OF NEW YORK : SUPREME COURT
COUNTY OF ERIE : PART 22

HODGSON RUSS LLP,
Petitioner,

Hybrid proceeding/action for judgment
pursuant to Articles 78 and 30
of the CPLR and 42 U.S.C. Section 1983,

- vs -

INDEX # 000097/2014

MINNESOTA DEPARTMENT OF REVENUE,
MYRON FRANS, IN HIS OFFICIAL
CAPACITY AS COMMISSIONER OF THE
MINNESOTA DEPARTMENT OF REVENUE,

MOTION

Respondents.

25 Delaware Avenue
Buffalo, New York
December 15, 2014

B e f o r e :

HONORABLE TIMOTHY J. WALKER, JCC
Acting Supreme Court Justice
Presiding Justice, Commercial Division
Eighth Judicial District

A p p e a r a n c e s :

HODGSON RUSS LLP
BY: STEPHEN W. KELKENBERG, ESQ.
CHRISTOPHER L. DOYLE, ESQ.
DANIEL P. KELLY, ESQ.
MARISSA A. COHELEY, ESQ.
Appearing for the Plaintiff.

WOODS OVIATT GILMAN LLP
BY: WILLIAM F. SAVINO, ESQ.
and
JOHN R. MULE, ESQ.
Assistant Minnesota Attorney General
Appearing for the Respondents.

1 COURT CLERK: This is the matter of Hodgson Russ
2 versus Minnesota Department of Revenue under Index number
3 97/2014. Counselors, please state your appearance for the
4 record.

5 MR. SAVINO: Your Honor, we have present here at
6 counsel table John Mule, who is appearing pro hac vice.
7 He's with the Attorney General of Minnesota. And I'm with
8 Woods, Oviatt, Gilman, my name is William S. Savino.

9 I've spoken with Mr. Kelkenberg, and in respect
10 to both sides of the dispute, two different attorneys for
11 the respective parties will be speaking on different
12 issues. That's acceptable to Mr. Doyle and Mr.
13 Kelkenberg, and of course it's acceptable to Mr. Mule and
14 me. We hope it's acceptable to the court.

15 MR. KELKENBERG: It was discussed, Your Honor,
16 and we agreed to that, if that's okay to the court.

17 THE COURT: Mr. Mule, have you already been
18 admitted pro hac vice for the case?

19 MR. MULE: I have, Your Honor, yes.

20 THE COURT: Okay. Very good. Welcome.

21 MR. MULE: Thank you.

22 THE COURT: Off the record.

23 (Discussion off the record.)

24 MR. KELKENBERG: Stephen Kelkenberg and
25 Christopher Doyle on behalf of Hodgson Russ. We have with

1 us our colleagues Dan Kelly and Marissa Coheley.

2 THE COURT: All right. Would anyone like the
3 argument on the record?

4 MR. KELKENBERG: We would, Your Honor. I know
5 the drill.

6 THE COURT: Okay.

7 MR. KELKENBERG: Thanks.

8 THE COURT: Off the record.

9 (Discussion off the record.)

10 THE COURT: All right. On the record. We have
11 an application by Hodgson Russ LLP, I'll refer to them as
12 Hodgson or petitioner, in a hybrid action for a judgment
13 pursuant to CPLR article 78, injunctive relief and a
14 declaratory judgment that the Minnesota Department of
15 Revenue mistakenly determined that Hodgson had a nexus
16 with the State of Minnesota, it is therefore subject to
17 its taxing authority. Respondents Department of Revenue
18 and Myron Frans, or Frans, sued only in his official
19 capacity as Commissioner of Revenue, moved to dismiss the
20 petition pursuant to CPLR 3211(a)(2) and (7) as well as
21 CPLR 7804(f) due to an alleged failure to exhaust
22 administrative remedies as pre-mature and otherwise
23 without merit. Hodgson cross moved for partial summary
24 judgment on its first cause of action for declaratory
25 relief. Have I at least teed it up concisely and

1 properly?

2 MR. SAVINO: That's correct.

3 MR. KELKENBERG: With the exception of the
4 partial summary judgment motion is directed to the first
5 three causes. The partial nature of the relief is just
6 the relief that we're seeking on this application.

7 THE COURT: Fair enough. Batter up.

8 MR. SAVINO: I think it would be our motion to
9 go forward because of our motion to dismiss.

10 THE COURT: Probably.

11 MR. KELKENBERG: No disagreement here.

12 MR. SAVINO: Okay. Your Honor, there are a lot
13 of fascinating matters raised by the motion practice here.

14 THE COURT: We have nothing but fascination in
15 this court on a daily basis.

16 MR. SAVINO: Those are my speaking notes,
17 there's about 15 pages. So in many ways, when Your Honor
18 has heard enough or Your Honor gets it, as -- as you say,
19 just turn me off.

20 THE COURT: Is that what my tombstone is going
21 to read? I get it. And finally got it.

22 MR. SAVINO: But very seriously, if I were to
23 download everything that I've marked up as important, we
24 would miss lunch, and I want to get in sync with Your
25 Honor on that.

1 THE COURT: Much to the chagrin of all the other
2 attorneys who endured your last oral argument, fascinating
3 as it may have been.

4 MR. SAVINO: Well --

5 THE COURT: Kidding aside. Obviously you know
6 we read the papers.

7 MR. SAVINO: I know that.

8 THE COURT: Oral argument is your opportunity to
9 do a few things: Point out the really, really important
10 stuff that's contained in your written submissions;
11 respond perhaps to some issues that maybe were placed in
12 the record but not in as much detail as perhaps you would
13 have liked them to have been; to engage in a discussion
14 with, in particular, this court on issues the court may
15 see from the submissions; and to, as I understand it from
16 practitioners in the commercial division, convince me to
17 rule the other way, assuming I've ruled against them by
18 just reading the papers.

19 MR. SAVINO: I will do exactly what Your Honor
20 has suggested. I want to try to turn things around.
21 Let's turn things around. In 2012, Minnesota changed its
22 statute regarding income taxation to provide that there
23 could be a nexus without physical presence. In 2015, New
24 York State has a similar rule that says you don't need
25 physical presence to be exposed in New York State to

1 income tax. It just so happens Minnesota's was first.

2 Let's pretend, let's pretend it was the other
3 way around.

4 THE COURT: Instead of pretend, we use
5 hypothetical.

6 MR. SAVINO: We will call it a hypothetical.
7 Let's say the New York statute went first, the Minnesota
8 statute was second, and you learned that a Minnesota judge
9 in 2014 was about to rule on the constitutionality of a
10 New York State law that had not yet been interpreted by
11 the state's -- by the courts of the state that enacted it.
12 And you heard there's a judge in Minneapolis who's going
13 to tell us what our law means and tell us whether you
14 can't even start the process of exploring whether there is
15 an economic nexus. That's a serious thing.

16 By happenstance, Minnesota's law gets passed
17 first. By happenstance, Minnesota goes out there first
18 and starts the process. And now they're saying for a
19 foreign state to make the first decision interpreting
20 their law that affects how their tax department works --
21 Miss Berg is here from their tax department. Your ruling
22 here in a foreign state -- and to Minnesota, we're a
23 foreign state -- will in many ways restrict, control,
24 impact, maybe shut down how that tax administration is
25 done. This raises issues of comity, this raises issues of

1 forum non-convenience at an extraordinary level, because
2 what could be more basic than taxation? That is the
3 fundamental role of a government, because without taxation
4 there's no government. So it's by happenstance.

5 Now here's the irony. The fact that New York
6 State, a more populous state, a state with a higher GDP
7 than Minnesota, a state with higher taxation, both in
8 gross dollars and in rate, is imposing its own law,
9 reaching out in 2015, cited twice in our papers, has huge
10 implications that Your Honor might not want to make a
11 decision on, and I'm not telling Your Honor what to do,
12 might not want to make a decision on a parallel statute in
13 Minnesota, where the New York State AG is not sitting here
14 to have its say, that maybe it wants its law with the
15 parallel reach out based on economic nexus to be
16 applicable when New York State wants to go collect
17 taxation. There are incredible questions of goose and
18 gander, there are delicious issues of irony. And if ever
19 there was a time to say you know what? There's no factual
20 record here, there's no administrative finality here,
21 let's see how little has been done instead of how much.
22 Let's ask ourselves how far we should go on where we are
23 now because, Your Honor, this could be one of the farther
24 reaching decision Your Honor makes.

25 THE COURT: Aside from the one early on in my

1 career where I effectively shut down the state park
2 system --

3 MR. SAVINO: That kind of level.

4 THE COURT: -- on a tax issue?

5 MR. SAVINO: That kind of level, Your Honor.

6 THE COURT: Kind of like that?

7 MR. SAVINO: Yep, it's that magnitude.

8 THE COURT: But I had enough common sense at the
9 time to stay enforcement pending appropriate appeal.

10 MR. SAVINO: We bet that because an appeal is
11 likely whatever Your Honor does, one of the sides will ask
12 for such a stay here.

13 Now, let's think about if you were in New York
14 and you had this new rule that's based on services
15 rendered in New York State in 2015 and you were the head
16 of Department of Taxation and Finance.

17 THE COURT: See, isn't that one of the phrases
18 that needs to be addressed? Where were these services
19 rendered?

20 MR. SAVINO: But we have no record. And how can
21 we have an adjudication without a record? The Department
22 of Revenue in Minnesota started -- Miss Berg is here, Mr.
23 Mule can answer questions -- it started at the natural
24 point. It starts with the 1099s. The only thing that
25 comes into Revenue in Minnesota until tax returns are

1 filed are 1099s. Here's a 1099, good place to start.

2 THE COURT: I need you to stop for a minute.

3 The arguments you are making are predicated upon a

4 determination not having already been made.

5 MR. SAVINO: It's a preliminary determination

6 that's been made. The language --

7 THE COURT: But the letter that started this

8 whole snowball a'rolling is dated March 25, 2014, correct?

9 MR. SAVINO: And it's pretty aggressive.

10 THE COURT: Correct?

11 MR. SAVINO: Yes.

12 THE COURT: Revenue sent Hodgson a letter

13 asserting that Hodgson "has been conducting business in"

14 Minnesota, but had not filed Minnesota franchise tax

15 returns. The letter went on to state further that Hodgson

16 was "required to file all missing returns" unless its

17 business activities qualified for exemption from state

18 income tax under federal law. Revenue further stated that

19 it "has been determined" that Hodgson has "nexus" with

20 Minnesota. Did I quote, in part, that letter correctly?

21 MR. SAVINO: You quoted how Mr. Kelkenberg

22 rephrased it. I'm going to read how the letter reads.

23 The substance is largely the same, but this is a very

24 critical issue. Watch how it's phrased.

25 THE COURT: Did I get my merds wixed?

1 MR. SAVINO: He mixed them and you quoted him.
2 It actually reads as follows: Please carefully review the
3 revenue received from all Minnesota companies. And
4 remember that once nexus to Minnesota has been determined,
5 as it has been with your company, all Minnesota property,
6 payroll --

7 THE COURT: Mr. Savino, stop.

8 MR. SAVINO: The words are changed.

9 THE COURT: Wait a second. As it has been
10 determined?

11 MR. SAVINO: Oh, it's there. Oh, that is there.

12 THE COURT: Them be the words.

13 MR. SAVINO: Right. But the start is please
14 carefully review the revenue. It's inviting further
15 submission.

16 THE COURT: Really? Really? The state
17 department of taxation indicates on the one hand it's been
18 determined --

19 MR. SAVINO: Oh, it says that.

20 THE COURT: -- yet the door's open, please
21 review us?

22 MR. SAVINO: Absolutely. And that's their
23 process. And these people, these brilliant tax lawyers --
24 they've got more tax lawyers than most lawyers in most
25 Buffalo law firms. These brilliant tax lawyers know

1 enough to go open the Minnesota law. And when you open
2 the Minnesota law, there is a provision that we've
3 described in our papers how you contest any ruling, and
4 it's set up that that may say there's a determination, but
5 it's not a final, administrative, exhaustive
6 determination.

7 Look who's signing this. It's not even a senior
8 tax specialist. Miss Davidson, I'm sure she's a wonderful
9 intellect, she's only an intermediate tax specialist.
10 This is not the last word, this is not ex cathedra, this
11 is not the pope sitting in the chair.

12 THE COURT: It has been determined, and it has
13 been determined that Minnesota clients received services
14 within Minnesota --

15 MR. SAVINO: I know that's what it says.

16 THE COURT: -- for the tax years of 12/31/2004
17 forward. We now request that Minnesota corporation or
18 partnership tax returns. Why would they be asking for
19 returns if they haven't already determined there's going
20 to be tax liability?

21 MR. SAVINO: When you read --

22 THE COURT: Was it a dumb letter? Was it sent
23 in error?

24 MR. SAVINO: I think it's a poorly phrased
25 letter. I think this letter's poorly phrased.

1 THE COURT: Poorly phrased means dumb in my
2 book.

3 MR. SAVINO: I have a representative of Revenue
4 here, I'd like to use poorly phrased.

5 THE COURT: Okay. Since I'm the one wearing the
6 red coat, we're going to go with dumb.

7 MR. SAVINO: This was premature. All they had
8 was an indication, as we've said --

9 THE COURT: Hang on a second. You should
10 read -- keep reading. The letter goes on to say: Please
11 carefully review revenue -- the revenue received from all
12 Minnesota companies. And remember that once nexus to
13 Minnesota has been determined, as it has with your
14 company.

15 MR. SAVINO: That's what it says.

16 THE COURT: I can read that. That it's
17 determined, with a D, past tense, not to be determined,
18 future tense, correct?

19 MR. SAVINO: That's how the letter reads.

20 THE COURT: Correct?

21 MR. SAVINO: But when read --

22 THE COURT: Is that --

23 MR. SAVINO: Yes.

24 THE COURT: -- a reasonable read?

25 MR. SAVINO: Yes. But if you get a letter --

1 THE COURT: If I got that letter, oh my God, you
2 determined I've got nexus with Minnesota for rendering
3 services to clients who live in Minnesota when all the
4 work was done in our Buffalo office? Oh my God, we do
5 that with 50 other clients in 49 other states. Have we
6 now subjected ourselves to state tax liability in the
7 other 49 states as well? And maybe the territories of
8 Puerto Rico and the Virgin Islands? Yes, isn't that -- oh
9 my God, is that what that means?

10 MR. SAVINO: That's the implication.

11 THE COURT: It is, isn't it?

12 MR. SAVINO: But there were further
13 communications. And taken in isolation, that would be
14 Your Honor's conclusion. But what needs to be --

15 THE COURT: Can you imagine the partners at
16 Hodgson Russ when they received that letter? Can you
17 imagine? What if you received that letter as a practicing
18 lawyer? Your practice is not confined to clients who
19 reside within the borders of New York State, is it? Talk
20 about far reaching implications.

21 MR. SAVINO: New York has passed a parallel law
22 to pull in the revenue from law firms in Chicago doing
23 business here.

24 THE COURT: And I'm sure there will be a court
25 somewhere soon that's dealing with the New York issue and

1 any other state. By the way, has any other state statute
2 similar to the Minnesota statute at issue here been
3 challenged?

4 MR. SAVINO: There are all kinds of
5 constitutional cases. We cite the MBNA case, we cite the
6 KFC case, they cite the Penney's case. There are
7 constitutional cases on both sides debating is it economic
8 nexus, as we claim in the Indiana and Kentucky cases on
9 MBNA and on the KFC case, or do you need a physical
10 presence as the JC Penney's case in Tennessee, and the
11 Quill case. These -- there are all kinds of --

12 THE COURT: Were state courts deciding those
13 cases regarding the revenue code applicable in those
14 states?

15 MR. SAVINO: Yes.

16 THE COURT: As opposed to here we have a New
17 York judge being asked to decide issues pertaining to a
18 Minnesota statute.

19 MR. SAVINO: Those judges were generally
20 deciding their own law. The Indiana and West Virginia
21 decisions are fascinating because the Indiana tax court
22 was largely deferring to the West Virginia court. Fair
23 statement, John?

24 THE COURT: Minnesota going to do that here?

25 MR. SAVINO: We have --

1 THE COURT: Does Minnesota want to do that here?

2 MR. SAVINO: If you look at the Vogt affidavit,
3 the Vogt affidavit has made it that there will be no
4 jurisdictional challenge for Hodgson to exhaust
5 administrative remedy. It can bring -- your state court
6 sued, it can do whatever forum would be available without
7 regard to its qualifying to do business in Minnesota.

8 THE COURT: Can we go off the record for a
9 second?

10 (Discussion off the record.)

11 MR. SAVINO: Now, Your Honor, that letter, the
12 March letter, if taken in isolation, goes farther than it
13 would be interpreted when interpreted in context. The
14 context is the state law and regulations where there are
15 all manner of contestation, even after income tax returns
16 are filed, and they at Hodgson could have filed zero for
17 an income tax. Second of all, that wasn't the last
18 communication.

19 THE COURT: Well no, Hodgson then responds by
20 letter --

21 MR. SAVINO: Right.

22 THE COURT: -- advising it was not conducting
23 business in Minnesota, does not solicit business in
24 Minnesota. To the extent it performed services for
25 Minnesota clients, the services are attorney services

1 performed in either New York or Florida. Hodgson then
2 requested a copy of the "determination of nexus" and any
3 evidence supporting it. Revenue responds by letter,
4 citing authority, and directing the filing of returns,
5 offering to waive penalties but not interest, and
6 attaching a proposed settlement agreement and a
7 compilation of Hodgson's 1099 income allegedly received
8 from Minnesota. Was that the final letter?

9 MR. SAVINO: It's a preliminary determination.

10 THE COURT: I know you keep saying that.

11 MR. SAVINO: It's a last communication.

12 THE COURT: You're hoping you say that enough
13 and I'll believe it. What's that old saying -- I'm not
14 saying this is a lie. But isn't that old saying tell a
15 lie often enough and people will beginning to believe it?

16 MR. SAVINO: I do some tax work. When you deal
17 with Department of Taxation and Finance, it's over when
18 there's a tax warrant. That's when it's a judgment.

19 THE COURT: It's really over then.

20 MR. SAVINO: Right. Well, there's over and
21 there's over. That's the only over, when the tax warrant
22 goes on. There is no assessment here. We have said in
23 our papers and stated in the affidavit of Mr. Vogt, this
24 is not an assessment. And let us remember --

25 THE COURT: But it's a determination.

1 MR. SAVINO: It may be an interim --

2 THE COURT: By the way, who signed the last
3 letter from Revenue, the same -- what you did you call
4 her, mid-level, entry level?

5 MR. SAVINO: She's intermediate.

6 THE COURT: Same person signed the last one?

7 MR. SAVINO: Exactly. Same person. Did not go
8 up in the process.

9 THE COURT: Hmm.

10 MR. SAVINO: And Miss Davidson, the intermediate
11 level person, invited further communications, even invited
12 a call.

13 THE COURT: For settlement. Here's your
14 settlement agreement.

15 MR. SAVINO: I think that's her intention; but
16 the law remains the same, that until there is an
17 assessment. This may be, quote, a determination, but it's
18 not an assessment. There's no finality to it. Judge, you
19 could not appeal this letter. This letter is not
20 something appealable in Minnesota. It may be something
21 that here involves an article 78, which we think should
22 not proceed, but it is not something that is the final
23 stage in Minnesota that's appealable. It's not an
24 assessment. The way they do it, they have -- if you do
25 your income tax, submit your income tax, they -- the

1 Revenue can work from the income tax returns. If you
2 don't file an income tax return, Minnesota can file what's
3 called -- I hope I get this right, John -- a CFR, where
4 the CFR is an assessment of tax. We haven't reached that
5 point.

6 This may be a statement, this intermediate
7 specialist says there's nexus, but let's remember the only
8 thing she has available, the only thing possible is her
9 side of the ledger. Her side of the ledger's a 1099.
10 If -- without any further contacts, that implies nexus.
11 Then to have any kind of further analysis, you need the
12 person to say what happened.

13 Now here's what we don't know. Let me talk to
14 you about what we don't know. I wish I wrote as well as
15 Mr. Kelkenberg and Mr. Doyle. They beautifully avoided
16 saying did anyone from Hodgson ever appear in a court in
17 Minnesota? They avoided saying did anybody from Hodgson
18 ever get admitted pro hac vice in Minnesota? They never
19 say did anybody from Hodgson ever go to visit a client in
20 Minnesota? They don't say did anybody from Hodgson work
21 on a deal involving assets in Minnesota? They never say
22 did anybody from Hodgson work on a deal that closed in
23 Minnesota?

24 What they say is our lawyers are in New York and
25 Florida. We give advice from New York and Florida. Can I

1 tell you if they're trying cases and closing deals in
2 Minnesota, Your Honor would view this differently. But we
3 can't get there because what they want to do is end the
4 analysis at the start where the people at Revenue get a
5 1099, that's all they know, that's all they can know, and
6 they want to know more. Should that letter have said
7 look, it looks to us like you have a nexus, tell us what
8 you got. It's a dumb letter. But does a dumb letter mean
9 Your Honor sits in Buffalo and declares unconstitutional a
10 law in a different time zone? In a different circuit of
11 the federal courts? You know, something that wasn't even
12 one of the original 13 colonies.

13 THE COURT: Is there anything that prohibits
14 that?

15 MR. SAVINO: A direct prohibition?

16 THE COURT: Direct, to the point, nail, hammer,
17 head. Is there anything that prohibits this court from
18 doing so?

19 MR. SAVINO: On this record, it's premature.

20 THE COURT: Assume for the sake of argument I
21 decide otherwise.

22 MR. SAVINO: If you think the record is fine,
23 the things that we presented --

24 THE COURT: No, no, the premature issue.

25 MR. SAVINO: Right. If you think the premature

1 is past, the two responses we raise to that regarding
2 comity and regarding forum non-convenience involve
3 discretion. They aren't the hammer on the nail.

4 THE COURT: So there isn't a case out there that
5 says sorry, even though you've commenced the action in New
6 York, the Commercial Division for the Eighth Judicial
7 District has no jurisdiction over the matter because the
8 State of Minnesota, through its courts, has not yet had an
9 opportunity to pass on the issue.

10 MR. SAVINO: If you get to the -- past the
11 premature issue, there's no reason you -- and am I wrong
12 on this, John Mule? We could not find a case that said
13 there could not be a command by Your Honor --

14 THE COURT: It's not a command. I don't make --
15 I don't have the authority to command.

16 MR. SAVINO: That's what an order is.

17 THE COURT: It's a direction or a directive.

18 MR. SAVINO: A directive.

19 THE COURT: A determination.

20 MR. SAVINO: Okay. But for many reasons, you
21 know, Your Honor has that power. But the courts of the
22 State of New York have talked about when one should
23 exercise that power, and there are many arguments on why
24 Your Honor should not exercise that power.

25 What could be more fundamental than taxation?

1 When you look at the decisions that we have cited,
2 including the Iran versus Pahlavi, the Regal Knitwear,
3 this is one where there is an alternative forum. There's
4 no doubt on the availability after the Vogt affidavit
5 saying there will be no issue regarding the lack of
6 qualification to do business. This case should be done in
7 the state whose law you hold in your hand. And if you say
8 you can't proceed based on a 1099, as they have asked, the
9 only thing Revenue can get in Minnesota to start the
10 evaluation is the 1099. That's all it can get. And how
11 else can it get going, because it can't reach out to the
12 potential taxpayer if -- if -- if it needs more than the
13 one thing available, the 10 --

14 THE COURT: Is your client asking this court --
15 can you hear me?

16 MR. SAVINO: Yes.

17 THE COURT: Is your client, in effect, asking
18 this court to allow it to hit the proverbial reset button?

19 MR. SAVINO: I would say yes. I think that's a
20 good way of phrasing it. We want to do our --

21 THE COURT: You don't like dumb, but this one's
22 good?

23 MR. SAVINO: That would be good. The first
24 one -- the letter was -- the letter came from a low level,
25 we are going to stand by it.

1 THE COURT: Stop calling her that.

2 MR. SAVINO: What?

3 THE COURT: Stop calling her that.

4 MR. SAVINO: It's not from counsel.

5 THE COURT: It's her job to do it, though.

6 MR. SAVINO: Agree.

7 THE COURT: It was within the scope of her
8 duties to review the 1099 and issue the letter.

9 MR. SAVINO: Absolutely.

10 THE COURT: I don't want to go off on a side
11 track.

12 MR. SAVINO: Right.

13 THE COURT: I asked a very important question,
14 and I think you answered it.

15 MR. SAVINO: It's her job.

16 THE COURT: No, before that. On the reset. The
17 mulligan, the do over, let's get in our time machine and
18 travel back to that point just before she signed her name
19 to the letter.

20 MR. SAVINO: The letter -- if I wrote the
21 letter, here's what the letter should have said. We've
22 got these 1099s. We want to know if there's substantial
23 nexus. We know you got money; but if you got money to try
24 cases in New York where the Minnesotans go to New York and
25 nothing happened except in New York, and it's defending a

1 Target slip and fall and Target sends you some money, we
2 get it. But we need to know did you come into our state?
3 Did you use the courts of our state? Did you use the
4 assets of our state? And that would have been, under the
5 reset, what should have been the analysis.

6 And in 2015 when New York State starts the same
7 kind of outreach, I hope New York State is as rational to
8 get into the substantial nexus on a fact based analysis
9 the way you see in KFC, MBNA, and the cases we cite.

10 THE COURT: I was taking a minute to look at
11 Minnesota statute 290.015 sub C, 1, 2 as well as sub D 1,
12 4, 5, 6 and 8. All right.

13 MR. SAVINO: Your Honor, note that without
14 anything submitted by Hodgson Russ, the intermediate tax
15 specialist had to rely on the presumption recited, that
16 without more you assume that the services were received
17 where they were paid for, in Minnesota. Without a record
18 by this court, without investigation by Revenue, without
19 knowing what happened, without the answers to the
20 questions I posed, how does one know whether there is the
21 economic nexus?

22 THE COURT: You know, I'm long enough in this
23 position to have reviewed probably, now, thousands of
24 commercial cases. And when there are questions asked at
25 oral argument, I suspect counsel already knows the

1 answers.

2 MR. SAVINO: Oh, I don't.

3 THE COURT: I'm not finished. Or at least when
4 counsel speaks of did they appear in proceedings in
5 Minnesota, someone either in counsel's office or the
6 client itself would have done some sort of electronic
7 database search to see if there are any out there and
8 probably would have attached any such references to their
9 papers. That's not every case, but that seems to be a
10 pattern I see in these cases, especially doing business.
11 Someone does a Google search or searches the courts of the
12 State of Minnesota and looks for an appearance by Hodgson
13 Russ.

14 MR. SAVINO: I wouldn't know how to do that.
15 Mr. Mule can answer if it's something that can be done in
16 Minnesota.

17 THE COURT: I'm just noting for the record my
18 experience.

19 MR. SAVINO: I understand, Your Honor. But
20 this -- my question raises another phenomenon. Where
21 there is a motion for summary judgment, which is the
22 cross-motion by my opponents, that invokes 3212(f). We
23 have identified the questions that we would answer through
24 discovery. This is not ready for dispositive ruling
25 because we need to know whether we have that factual

1 support beyond the 1099 for the economic nexus.

2 THE COURT: Off the record.

3 (Discussion off the record.)

4 MR. SAVINO: Those papers were finalized in the
5 Rochester office, I don't know why that was sent by that
6 manner of mail. We would invite Your Honor -- and we know
7 Your Honor will make whatever decision you want. We would
8 invite Your Honor to consider our reply papers before
9 ruling on such an important issue.

10 THE COURT: Did Hodgson Russ have the reply and
11 the affidavit?

12 MR. KELKENBERG: You only submitted one
13 affidavit from Jeffrey Vogt, right?

14 MR. SAVINO: Yes.

15 MR. KELKENBERG: Okay. Yes, we did, Your Honor.

16 THE COURT: The court will consider them. Note
17 for the record, because I think I stated this off the
18 record, Mr. Garbo just handed me a letter dated December
19 11, 2014 from Mr. Savino's Rochester office enclosing
20 respondent's reply memorandum of law and the affidavit of
21 Jeffrey, with a J, D. Vogt, V-O-G-T. The court will
22 consider them. Obviously the court's going to reserve
23 decision. Go ahead.

24 MR. KELKENBERG: Good morning, Your Honor. As
25 Mr. Savino had indicated before we started off, to the

1 extent that the court has questions on some of the nexus
2 and constitutional issues, I'm probably going to defer
3 those to my colleague, Christopher Doyle.

4 THE COURT: Let me start with the very first --

5 MR. KELKENBERG: Sure.

6 THE COURT: -- issue, and one of the last
7 questions I asked Mr. Savino. If, in fact, his client is
8 seeking to invoke the reset button, what's your response?

9 MR. KELKENBERG: Your Honor, our response to
10 that would be, you know, essentially the horse has been
11 let out of the barn. Not once, but twice they've
12 indicated to Hodgson Russ that we're required to file tax
13 returns based on nothing more than the 1099s.

14 THE COURT: Okay. Let me start over. If, in
15 fact, they're requesting a reset, that undoes everything
16 that's happened from that letter at issue until today.

17 MR. KELKENBERG: It would, depending on how
18 they're electing to proceed from here on out, Your Honor.
19 If the idea is still we have these 1099s and you, Hodgson
20 Russ, still need to file and submit tax returns --

21 THE COURT: No, they have the 1099s. It's just
22 under our revenue statute that you're conducting business
23 within the State of Minnesota as defined by that statute,
24 it would like to talk about it.

25 MR. KELKENBERG: Understood, Judge.

1 THE COURT: And in the interim, penalties and
2 interest would be waived.

3 MR. SAVINO: Of course.

4 THE COURT: With that in mind, what would be
5 your response?

6 MR. KELKENBERG: My response to that, Your
7 Honor, would be, you know, part of the relief that we are
8 seeking is not just for the here and now and for what has
9 transpired over the last ten years. Clearly Revenue has
10 at this point taken it upon themselves to look back to
11 2004 all the way up through 2014.

12 THE COURT: And the statute wasn't even changed
13 until 2012.

14 MR. KELKENBERG: That's correct, Judge.

15 THE COURT: Question mark?

16 MR. KELKENBERG: Sorry?

17 THE COURT: No, big old question mark there.
18 Congress shall not enact any yada yada ex post factos yada
19 yada.

20 MR. KELKENBERG: And in our view, Your Honor,
21 the issue here is not for the finite period of time that
22 has been invoked by Revenue for purposes of these filings,
23 but also to give direction to Hodgson Russ moving forward.

24 THE COURT: Assuming that's part of the reset
25 process, you'd be amenable to that discussion, wouldn't

1 you?

2 MR. KELKENBERG: The prospective relief -- if
3 Revenue would agree that 1099s standing alone are not
4 enough to compel us to file tax returns, Your Honor,
5 that's what we've asked from you.

6 THE COURT: I don't think that's their position
7 to begin with. Their position is the 1099s raise a flag
8 with the Department of Revenue in Minnesota such that we
9 need to have a further discussion, which will require you
10 to sit down with us and give us some more paperwork and
11 information so that we can actually make an informed
12 determination --

13 MR. SAVINO: Exactly.

14 THE COURT: -- correct? Do you follow me?

15 MR. KELKENBERG: I do understand, Your Honor,
16 but --

17 THE COURT: Stop.

18 MR. KELKENBERG: Go ahead.

19 THE COURT: Off the record.

20 (Discussion off the record.)

21 (Case laid aside and later recalled.)

22 THE COURT: Returning to the Hodgson Russ versus
23 Minnesota Department of Revenue, et al., matter.
24 Counselor?

25 MR. KELKENBERG: Yes, Your Honor. Thank you.

1 Obviously, before we had the opportunity to speak off the
2 record with Miss Rutland, Mr. Savino had raised a number
3 of issues for the court's consideration. Obviously I
4 would like to address them. I forget the sequence, so I'm
5 going to go by my notes.

6 I think fundamentally, Your Honor, where I'd
7 like to start with this is that the issue presented on
8 Hodgson Russ's motion for partial summary judgment is not
9 as broad as the issue raised by Mr. Savino when he was
10 arguing the case. The issue that we have presented for
11 Your Honor for summary determination boils down to is the
12 issuance of federal forms 1099 sufficient for Minnesota
13 Revenue to assert constitutional nexus, substantial nexus
14 under the commerce clause. Our answer to that, obviously,
15 per our papers, is that the answer is no.

16 Mr. Savino had raised a host of issues
17 concerning Minnesota Revenue's statutory scheme and
18 inviting the court to allow Minnesota courts to address
19 the issues that Hodgson has raised here, and at some point
20 during his argument he had even tied in the notion that
21 New York State has a similar, I won't acknowledge that it
22 is because I haven't seen it myself, has a similar
23 statutory scheme that is coming into place sometime in
24 2015. Largely, Your Honor, the argument there would be
25 it's irrelevant. We are not actually attacking as a

1 facial sort of constitutional challenge Minnesota's
2 ability to tax or invoke its tax power.

3 THE COURT: No, but I think we all understand
4 why he put that on the record.

5 MR. KELKENBERG: Sure. Understood. But I
6 wanted to put some distance between the application that
7 we put before Your Honor and what it was that Mr. Savino
8 was speaking to, because I think there is daylight.

9 At one point the issue was raised, I think the
10 words let's pretend was raised in connection with the shoe
11 being on the other foot, and the court was invited to
12 envision a scenario where a Minnesota taxpayer is now
13 being essentially sort of called upon by the New York
14 State Department of Taxation and Revenue, and would it be
15 acceptable for this court to understand that the Minnesota
16 taxpayer might file a lawsuit against New York State's tax
17 commissioner in Minnesota in order to at least adjudicate
18 the issue of whether or not that's constitutionally
19 permissible, understanding the facts may be different.
20 But let's assume that they're the same.

21 I would invite Your Honor to answer that
22 question in the affirmative. I think there's no reason
23 why a Minnesota resident who is being called upon to file
24 New York State tax return for no contact other than the
25 issuance of federal forms 1099 by New York residents, for

1 instance, or New York businesses, would necessarily expect
2 itself to be required to file New York State tax returns.
3 I absolutely think that the converse would allow for this
4 court to say yes, and I would expect that the court would
5 understand that there would be and, in fact, there is no
6 case law stating that a Minnesota court in that
7 circumstance, much as Your Honor is put in this particular
8 circumstance, not precluded from ruling on the issue we
9 presented to you. There's no case law on that issue, and
10 the case law that we've been able to come up with allows
11 for our opportunity to present this to you either in the
12 context of an article 30 application or an article 78
13 application, tying in the section 1983 claim as well.

14 I think one of the points that Mr. Savino had
15 raised, and again this goes to the policy underlying
16 Minnesota's ability to sort of administer its affairs and
17 tax people who are doing business in the State of
18 Minnesota. I think the concern that Mr. Savino raised was
19 any determination by this court would essentially bring to
20 an abrupt halt Minnesota's ability to exercise its tax
21 jurisdiction over foreigners such as Hodgson Russ. And
22 that's only true to the limited extent, and again as we've
23 invited this court to decide on this motion, it continues
24 to abide the policy which is articulated in exhibit 7 and
25 9 to Chris Doyle's affidavit that states that Minnesota

1 Revenue's initiative and the policy that it is rolling out
2 is to enforce its tax jurisdiction against entities or
3 individuals who happen to receive 1099s by Minnesota
4 taxpayers.

5 Essentially, Your Honor, our focus is not on the
6 statute, it's on the conduct in question. And that is the
7 daylight that we see between what we've asked you to
8 consider and decide on and what it is that Mr. Savino has
9 raised for the court as a caution, as a word of caution,
10 and not asking you to actually adjudicate the dispute that
11 we've placed before you.

12 The issue was also raised as to administrative
13 finality. I would simply point out for Your Honor, we
14 cited the Gordon, G O R -- the Gordon v. Rush Court of
15 Appeals decision, it's cited in our brief, Your Honor,
16 that makes clear -- Court of Appeals decision makes clear
17 that finality is had any time an administrative body takes
18 an action that requires a response from an individual,
19 that is essentially being called upon in this case to file
20 Minnesota tax returns. Our argument would be that that is
21 sufficiently final.

22 And at this point I would sort of tie into this
23 notion that Miss Davidson is only an intermediate
24 operative within the Minnesota Revenue Department, to say
25 that regardless of her status, her position and her status

1 within Minnesota Revenue was sufficiently high that she
2 could fire off not one but two letters to Hodgson Russ
3 demanding that we file tax returns on the basis of her
4 nexus determination. If the Minnesota Revenue wants to
5 put distance between itself and this determination that is
6 clearly announced in those exhibits in Mr. Doyle's
7 affidavit, this is obviously hindsight and after the fact.
8 Mrs. Davidson didn't indicate in any of her letters that,
9 well, this is a preliminary sort of investigation and, you
10 know, should you choose to play nice with us, you know,
11 we'd like to learn more about Hodgson Russ and its
12 business activities. That's not the tone of that letter.
13 And as Your Honor pointed out, there was language included
14 within Miss Davidson's second letter that actually talks
15 about sort of the Minnesota statutory scheme, commerce
16 laws, juris prudence, due process, and the ability and
17 policy initiatives of Revenue to assert jurisdiction over
18 Hodgson in this particular instance.

19 THE COURT: Basically, to paraphrase, you're
20 saying here's Minnesota's position, comply with our
21 request, file the returns. If we assess the tax, then you
22 can challenge it.

23 MR. KELKENBERG: That's correct, Judge. Your
24 Honor, the other thing I would like to take up on this
25 issue, and I understand that Your Honor has not had the

1 opportunity to review the reply papers from Mr. Savino's
2 office. We definitely received them in time, so we have
3 had the chance to consider them. I'd simply like to touch
4 on a couple issues that I know Your Honor will have to
5 read sort of after the fact.

6 There's been this issue raised that, in fact,
7 Hodgson has an open forum for the adjudication of this
8 particular dispute, and that, in fact, it has a full
9 complement of remedies available to it in order to have
10 precisely the issue and the issues, so not just on this
11 motion but also within the complaint, adjudicated in
12 Minnesota. And it's just not true, Your Honor.

13 The representation in Mr. Vogt, I believe it's
14 V-O-G-T?

15 THE COURT: Vogt.

16 MR. KELKENBERG: Mr. Vogt's affidavit.

17 THE COURT: How do you pronounce it?

18 MR. MULE: Vogt.

19 MR. KELKENBERG: In Mr. Vogt's affidavit
20 suggests that Minnesota Revenue, tongue-in-cheek, Your
21 Honor, through its largess, will not invoke the capacity
22 to sue a statute which the Minnesota legislature has
23 clearly articulated. And they go on to cite some of the
24 Minnesota case law which they say allows them to do this.
25 The problem is, Your Honor, in order to plead this

1 particular cause of action in a Minnesota court, Hodgson
2 Russ would actually have to plead it. And Minnesota
3 Revenue, not unlike New York or the federal court system,
4 has a rule 11. And rule 11 requires your pleading to be
5 based on a good faith assertion of your ability not only
6 to bring the suit, but to have a legitimate cause of
7 action. We couldn't do that, Judge. We couldn't ask
8 Minnesota counsel to do it, and we couldn't do it on our
9 own behalf, because we're not certified to do business
10 within Minnesota. We're not authorized to do business
11 there.

12 The second piece of it is, and this was
13 something that was trumpeted in the initial application,
14 is that Minnesota Revenue said well not only do you have a
15 forum, but you have the full complement of remedies and
16 you can, in fact, obtain your fees from prosecuting your
17 litigation within Minnesota, and that's not true. We
18 disposed of that issue on our opposition papers, but I
19 think it's -- I think the silence by Revenue in its reply,
20 which Your Honor will see, is a testament to the fact that
21 it is not accurate to say that we had the ability to
22 pursue those remedies in the first instance, and we
23 certainly don't now based on the issues that Hodgson
24 points out in its opposition brief.

25 I think the one fact that bears repeating here,

1 and Mr. Savino acknowledged this during his argument, is
2 that when Minnesota Revenue took the opportunity in March
3 of this year, in May of this year, to send Hodgson Russ
4 two letters indicating that Hodgson was subject to its tax
5 jurisdiction, the only evidence at its disposal were the
6 1099s. They've acknowledged that in the reply papers.
7 Mr. Savino I think agreed with that when he was arguing.

8 So that is what we're talking about here. And
9 time and again the issue has been raised, well there's
10 disputed issues of fact as to this or that. It's
11 incorrect. It's incorrect to say that there are disputed
12 issues of fact. The 1099s were there, they issued the
13 letters, we disputed them. That's the sequence. It is
14 plain and simple, unlike so many matters Your Honor has to
15 contend with. For purposes of this application, that's
16 the sequence. And no one can disagree with it. People
17 might want to put their spin on it, might want to give it
18 a different characterization as to what it really, really
19 meant. But the truth is, what it meant to Hodgson was we
20 got tax jurisdiction over you, file your tax returns. We
21 asked them for information based on that. Yeah, we told
22 you our position. File your tax returns.

23 So we're here for that particular sequence and
24 to have that particular issue adjudicated because we think
25 it is ripe for Your Honor's decision.

1 Your Honor, when we started this out, I
2 mentioned that if there were concerns of the court on
3 issues related to nexus, particularly on constitutional
4 law issues, I would not be the appropriate person to
5 address them. If Your Honor has questions for me,
6 obviously I'm happy to address them; but if you have
7 constitutional questions, I would refer to Mr. Doyle.

8 THE COURT: Not at this time.

9 MR. SAVINO: I will be exceedingly brief, Your
10 Honor, I won't even take the podium. On the issue of the
11 pleading, if they state it in the pleading, it's been
12 waived and we have established the power to waive the need
13 to certify capacity. How could they ever be held
14 accountable by any forum regarding not being certified?
15 It's way before this waived. That's a nonissue.

16 Here's where I think there's a lot of agreement.
17 As Mr. Kelkenberg has argued, any decision of Your Honor,
18 should it be in part adverse to Minnesota, would -- would
19 not be fatally intrusive of its fundamental taxation
20 policy decisions because, as Mr. Kelkenberg described in
21 the argument, you wouldn't reach the constitutional ruling
22 and it would be limited as recited in the actual notice of
23 motion under 3212, where it would be declaring received
24 the firm's 1099 without more not creating nexus. It would
25 be that a nexus determination on the basis of receipt of

1 1099s alone would violate the due process. If Your
2 Honor's decision tracked with Mr. Kelkenberg's argument
3 that that's all they're seeking now by their 3212 motion
4 as to the 1099, then the decision is something where we're
5 less concerned with the issues of comity and a forum
6 non-convenience because you're not making a policy
7 decision, a broader policy decision for Minnesota.

8 I will say that my concerns were not invented.
9 There's a statement in their responsive papers on page 26
10 that gave us pause. We ask this court to declare that
11 physical presence is required for a state to establish
12 nexus of an out-of-state business. Mr. Kelkenberg says we
13 need not go there, he just said that. It's in their
14 papers. But we know New York State is proposing a tax law
15 effective in three weeks that would be inconsistent with
16 that.

17 We are hoping, Your Honor, whatever ruling Your
18 Honor makes is limited to what Mr. Kelkenberg said is his
19 concern on his motion, which is the 1099, and that you
20 can't make a determination based solely on the 1099. The
21 1099 does not alone create nexus. I think that has less
22 potential for -- for being a problem that has ripples
23 beyond what we want to create. I've said something
24 that's --

25 THE COURT: Off the record.

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(Discussion off the record.)

THE COURT: After considerable discussion with counsel off the record and a meeting among counsel without the court but with the court's court attorney, Miss Rutland, there are certain items pertaining to the motion and cross-motion before the court which the parties will submit to the court by agreement. There are other items which are not concessions, but based on how the court indicated it would rule with respect to the motion to dismiss, at least the procedure for where we go next would be agreed to. And I'll put it directly on the record.

The court is deciding the motion to dismiss solely with respect to the first cause of action pertaining to a declaratory judgment as to the nexus issue. That motion directed to the first cause of action was based upon the failure -- alleged failure of Hodgson Russ to exhaust its administrative remedies. That motion directed to the first cause of action only is denied. That's without prejudice to the balance of the motion with respect to the remaining causes of action.

The court is not yet prepared to render a decision. Instead, based on that ruling only, we will proceed to the first cause of action as follows: The court will decide, based on the submissions, including the reply that was timely filed but the court had not yet had

1 an opportunity to consider, the court will make a
2 determination as to whether Hodgson Russ's receipt of
3 forms 1099 from Minnesota clients, without more, creates a
4 nexus with the State of Minnesota under the United States
5 Constitution. That is all the court will determine for
6 now. You will get a decision and order well within 60
7 days --

8 MR. SAVINO: But more than 30 by agreement.

9 THE COURT: -- of today's date, but after 30
10 days to allow the parties an additional opportunity to
11 discuss the resolution of this matter without resort to
12 litigation.

13 MR. SAVINO: Thank you, Your Honor.

14 MR. KELKENBERG: Thanks, Judge.

15 THE COURT: Fair enough? All right. Thank you.

16 MR. SAVINO: And we'll leave the original papers
17 with Your Honor for now.

18 THE COURT: Off the record.

19 (Discussion off the record.)

20 THE COURT: Mr. Savino misspoke, he'll leave the
21 copies with us, we don't want originals.

22 MR. SAVINO: I remembered.

23 THE COURT: All right. Have a great holiday.

24 Thanks.

25 MR. KELKENBERG: Thank you, Judge.

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MR. MULE: Appreciate it, Your Honor.

THE COURT: Sure.

* * *

C E R T I F I C A T I O N

I certify that the foregoing 41 pages are a correct transcription of the proceedings recorded by me in this matter.

Lynn S. Dulak
LYNN S. DULAK, RPR, CRR,
Official Court Reporter.