

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

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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.

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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.

