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IN THE SUPREME COURT OF THE STATE OF NEVADA

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Tracie K. Lindeman

CLUB VISTA FINANCIAL SERVICES, L.L.C., a Nevada Limited Liability Company; THARALDON MOTELS II, INC., a North Dakota corporation; and GARY D. THARALDSON,

Petitioners,

v.

THE EIGHTH JUDICIAL DISTRICT COURT, COUNTY OF CLARK, STATE OF NEVADA, AND THE HONORABLE MARK R. DENTON, DISTRICT JUDGE,

Respondents

and

SCOTT FINANCIAL CORPORATION, a North Dakota corporation; BRADLEY J. SCOTT; BANK OF OKLAHOMA, N.A., a national bank; GEMSTONE DEVELOPMENT WEST, INC., a Nevada corporation; ASPHALT PRODUCTS CORPORATION D/B/A APCO CONSTRUCTION, a Nevada corporation,

Real Parties in Interest.

Case No.: 57641

District Court Case: A579963

ANSWER TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION and OPPOSITION TO EMERGENCY MOTION FOR STAY

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Jennifer C. Dorsey
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COUNTERSTATEMENT OF THE ISSUE

Depositions of opposing counsel are unusual but may be permitted by the judicial officer supervising discovery if, in his discretion, the relevant facts and circumstances warrant them. Petitioners named their own trial counsel as a witness with "discoverable information." And all of Petitioners' representatives disavow knowledge of the facts supporting their claims and identify their counsel as the exclusive source of all allegations in their 57-page complaint. Did Special Master Floyd Hale and District Court Judge Mark Denton abuse their discretion by ordering Petitioners' trial counsel to be deposed solely about the facts supporting their claims?

INTRODUCTION

Real Parties in Interest Scott Financial Corporation and Bradley J. Scott ("Scott") agree that this is a most extraordinary situation. What makes it extraordinary, however, is not that Defendants are seeking to depose Plaintiffs' counsel, but that Plaintiffs' counsel have made themselves percipient witnesses in this case.

The evidence overwhelmingly demonstrates that the Petitioners'[1] case was concocted by their out-of-state attorneys K. Layne Morrill and Marty Aronson with the support, encouragement, and approval of the Plaintiff guarantor, Gary Tharaldson, in a preemptive strike against his lenders to stave off foreclosure on his $100 million in personal guarantees. As a result, and as Mr. Tharaldson has repeatedly admitted, the testimony of numerous witnesses has corroborated, and Petitioners' own formal designation of attorney Morrill as one of their witnesses confirms, the "facts" that Petitioners claim give rise to their claims are known only by the lawyers who spun them into the grandiose and highly fact-intensive theories in their speciously comprehensive 57-page complaint.

Petitioners attempt to distract this Court from their counsel's extraordinary roles in this litigation by claiming that Defendants are acting with the ulterior motive of gaining

---

[1]Plaintiffs below.

their attorneys' mental impressions on the eve of trial. But this portrayal is belied by the nine-month history of this issue and Defendants' singular focus on the factual bases for Plaintiffs' claims, which Mr. Tharaldson has testified are known only by his attorneys and should be sought from them.[2]

They further argue that the District Court was bound by the decision of Morrill and Aronson's home-state judge in Arizona, who quashed their *Arizona* deposition subpoenas. But Arizona Judge Daughton expressly left the ultimate decision to Special Master Hale, who carefully determined that the circumstances justified enforcement of the deposition subpoenas issued and served on them in *Nevada*. Judge Denton properly exercised his discretion in adopting the Special Master's recommendation that Defendants be permitted to depose Messrs. Morrill and Aronson for the limited purpose of discovering the true factual bases for the epic complaint they crafted. With trial just a month away and the facts supporting Petitioners' claims (assuming there are any) still hidden behind their lawyers, this Court immediately should deny writ relief and order the depositions to proceed.

STATEMENT OF FACTS

A. General Background of this Litigation.

Gary Tharaldson and Tharaldson Motels II, Inc. agreed to be the guarantors on construction loans totaling approximately $110 million to build a mixed-use residential and commercial project in Clark County, Nevada, known as the Manhattan West condominiums. When the loans went into default, triggering the guaranties, Tharaldson, Tharaldson Motels, and related entity and loan participant Club Vista Financial Services, LLC (collectively "Petitioners" or "Tharaldson") recognized they had no real defenses. In a transparent attempt to deflect the inevitable claims that were about to be initiated

[2] Petitioners' Appendix ("P.App.") 83 (wherein the Special Master summarizes, "Gary Tharldson has testified on numerous occasions that his counsel were the individuals with the factual information utilized to draft the Complaint in this action" and that Tharaldson supplied no allegations, rather "the attorneys simply gathered the facts and drafted the Complaint based upon the facts known only to the attorneys."); P.App. 407:2-6.

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against them, Petitioners employed the age-old stratagem that *the best defense is a good offense* and filed a complaint against Scott and other lenders involved in financing Manhattan West's construction. Consequently, the complaint is a smorgasbord of disjointed, inconsistent, and untenable civil claims designed only to create confusion and to delay Tharaldson's obligation to pay on the guaranties. At the heart of Tharaldson's claims is the premise that Scott fraudulently induced savvy, seasoned, billionaire-businessman Tharaldson to execute several loan documents, including two loan guaranties that now require Tharaldson to pay the defaulted loans in full. But there's one critical problem with their strategy: because it was dreamed up entirely by counsel, Mr. Tharaldson and Petitioners' other representatives can offer no facts to support these elaborate allegations.

B. The Only People with Knowledge of the Factual Bases for Plaintiffs' Claims are the Attorneys Who Contrived Them.

When pressed during early depositions to identify a scintilla of supporting evidence of the nefarious deeds they allege, Tharaldson's witnesses claimed that their only knowledge of those allegations came from their attorneys and was therefore protected by the attorney client privilege. When Scott's counsel challenged Petitioners' assertion of the privilege last May, Judge Denton evaluated the relevant legal authority and ruled that the privilege did not apply, and he compelled the testimony of the Petitioners' witnesses regarding the basic factual information supporting their claims. P.App. 430 ("[T]hese are facts. As far as I'm concerned they're entitled to them."); Supplemental Appendix of Real Parties in Interest Scott Financial Corporation and Bradley J. Scott ("Scott App.") 257.

Unfortunately, the Court's elimination of the privilege did not unlock the factual bases of these claims because the information remained exclusively in the possession of Tharaldson's attorneys. As Mr. Tharaldson testified, he – the *principal* of the Plaintiff entities – had zero involvement in providing the factual bases for his lawsuit even though the complaint was packed with factual allegations of the worst kinds of frauds, breaches

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of fiduciary duties, negligence, defamation, and sundry other kinds of nefarious, tortious acts; the true factual bases are known only to the lawyers who concocted the allegations:

> Q: You said at some point a recommendation was made that a suit should be brought against my client personally and you approved that lawsuit?
>
> A: Yes. Based on what they told me.
>
> Q: In providing your approval to go forward, did you look at any of the evidence that your attorneys had amassed against my client?
>
> A: I took their word on what they had told me was accurate. [P.App. 405:7-15].
>
> Q: **Did you tell your attorneys – did you like specifically pull out documents or did you tell them, I was lied to on this occasion, or did you provide them any kind of conversations like that?**
>
> A: **No.** [P.App. 406:13-17].
>
> **Q: Would you agree the best way to figure out where these conclusions come from is to sit down with your attorneys and ask them what they relied upon?**
>
> **A: I wouldn't have a problem with that.** [P.App. 407:2-6 (emphasis added)].

Indeed, as the following chart summarizes, Petitioners' three key witnesses, Gary Tharaldson, Ryan Kucker, and Kyle Newman, admit that they are the only percipient witnesses on Petitioners' side of the transaction yet universally disclaim any knowledge of the bases for their claims; they defer to Morrill and Aronson to supply them, painting the very clear picture that the only way to discover the factual bases for Petitioners' claims is to depose Messrs. Morrill and Aronson:

Witness	**Testimony**	**Page/Line**
Gary Tharaldson	Only **three people** associated with Plaintiffs, apart from Plaintiffs' attorneys, have knowledge related to the project in this case: Gary Tharaldson, Ryan Kucker, and Kyle Newman.	Scott App. 60:18-301:6
Ryan Kucker	The three persons most knowledgeable about this case are: (1) Gary Tharaldson, (2) Ryan Kucker, and (3) Kyle Newman.	P.App. 417:8-340:3

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Gary Tharaldson	Is unaware of anyone other than Kucker and his attorneys who might have personal knowledge about the factual allegations of the Complaint.	P. App. 400:8-14
Gary Tharaldson	Has had no discussion with his attorneys as to what the facts are that support the claims in the Complaint. He says, "**No. I did not discuss the facts. That's their [the attorneys'] job to present the facts. . . . I don't have the facts. I haven't provided anything to my attorneys.**"	Scott App. 90:14-91:6
Gary Tharaldson	Is not aware of any source of information for the First Amended Complaint other than his attorneys. He specifically says, "**it's strictly through my lawyers.**"	P.App. 399:11-20
Gary Tharaldson	**Neither Gary Tharaldson nor any of his entities conducted any "due diligence" to determine whether a lawsuit should be brought in this matter.** They relied entirely on Plaintiffs' attorneys.	P.App. 404:10-23
Gary Tharaldson	**Has relied on his attorneys for "mostly all" of the factual allegations made by the Plaintiffs in this matter.**	P.App. 402:23-403:15
Gary Tharaldson	**"[W]ouldn't have a problem" with defense attorneys questioning Plaintiffs' attorneys regarding what evidence they relied upon** in creating the Complaint.	P.App. 407:2-13
Gary Tharaldson	**His attorneys, not him, made the decision to sue Alex Edelstein for fraud.**	Scott App. 91:19-95:13
Gary Tharaldson	His understanding that APCO did not comply with its contract is "**[b]ased on analysis from my attorneys and why they filed the complaint against APCO.**"	Scott App. 85:9-13
Gary Tharaldson	Is not aware of any witnesses **other than his attorneys** that would be abel to support the claims made against Defendant APCO in Plaintiffs' Complaint.	Scott App. 88:5-11
Gary Tharaldson	Does not know the provisions of the Gross Maximum Price contract because he "didn't read them." **He states that his "attorneys filed the complaint based on the things that they studied in all the documents they got."** [sic]	Scott App. 81:8-14
Gary Tharaldson	When asked how Defendant Brad Scott was not truthful relating to the issue of broken priority, Witness testifies that "**again, my attorneys wrote that in the complaint and they would have all the background knowledge on broken priority.**" Witness confesses that the doesn't fully understand "the broken priority situation."	Scott App. 82:16-83:18
Gary Tharaldson	**Did not know about allegation of poor presale quality** until complaint was filed by attorneys.	Scott App. 39:10-20 & 40:13-47:3
Gary Tharaldson	Has **no knowledge** that Defendant Scott Financial Corporation or Brad Scott committed fraud in **any** capacity in connection with APCO contract.	Scott App. 43:19-44:11

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Gary Tharaldson	Does not discuss factual allegations behind "broken priority" fraud because "**this is the discussions with the lawyers**."	Scott App. 44:13-75:8
Gary Tharaldson	"**Has nothing to add**" in terms of factual allegations to what his attorneys say, and so does not testify regarding how he knew that presales were made to buyers who could not qualify for loans.	Scott App. 47:8-48:12
Gary Tharaldson	**Is "not sure" what Scott Financial Corporation did wrong** in connection with the gross maximum price contract, "other than what my lawyers have discussed with me," and has no personal knowledge on the subject.	Scott App. 51:14-52:1
Gary Tharaldson	Personal knowledge of whether Scott Financial Corporation met or violated any standards "**is based on what my attorneys have told me**."	Scott App. 54:20-55:9
Gary Tharaldson	Admits that he has **no personal knowledge of fraud allegations** and learned what information he does have **from his attorneys**.	Scott App. 63:11-22
Gary Tharaldson	Admits that he does not have any evidence, **apart from what lawyers assessed**, supporting the First Amended Complaint's allegation that the presale condition in the Senior Loan Agreement was commercially atypical.	Scott App. 65:23-66:17
Gary Tharaldson	Was not aware of amounts of residential and commercial sales/lease activity **until after he met with his attorneys**.	Scott App. 67:15-24
Gary Tharaldson	**Does not know the meaning of the term "first lien condition"** that is used repeatedly in the Complaint drafted by his attorneys.	Scott App. 68:6-13
Gary Tharaldson	Has **no knowledge (though his attorneys may)** regarding whether Plaintiffs were informed of any "priority construction liens" as discussed in the First Amended Complaint.	Scott App. 70:11-71:16
Kyle Newman	Believes that Brad Scott is an "honest person" and was **"surprised" by the information conveyed to him by Plaintiffs' attorneys regarding the allegations against Brad Scott**.	P. App. 442:4-14
Gary Tharaldson	Has **no knowledge** regarding allegation of fraud in closing certifications by Scott Financial – he testifies that this information came "**through my attorneys** . . . what he [the attorney] told me."	Scott App. 71:17-72:13
Kyle Newman	Has **no knowledge** of Brad Scott or Scott Financial Corporation committing fraud in connection with any project.	P. App. 438:1-19
Kyle Newman	Has **no knowledge** of Brad Scott or Scott Financial Corporation being negligent in connection with any project.	P. App. 438:20-439:17

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Kyle Newman	Has **no knowledge** of any facts regarding defamation by Brad Scott or Scott Financial Corporation.	P.App. 440:15-25, 441:4-20, 443:5-12, and 444:4-7
Kyle Newman	Has **no knowledge** of any of the defendants acting in concert to harm Gary Tharaldson or his companies.	P.App. 444:13-24
Kyle Newman	Has **no knowledge** of any breach of contract by Scott Financial Corporation or Bank of Oklahoma, **other than what Plaintiffs' attorneys have told him**.	P.App. 445:2-12
Kyle Newman	Has **no knowledge** of whether construction began prior to the closing of the Senior Loan, **apart from conversations with Plaintiffs' attorneys.**	P.App. 446:14-447:2
Gary Tharaldson	Agrees that **he would need more information** to know whether he really has a **legitimate claim** against Defendants Brad Scott and Alex Edelstein.	Scott App. 76:3-8
Gary Tharaldson	With regard to "virtually all" of the allegations in the Complaint prepared by his attorneys, **he never had any input.** He does not remember making any changes to this Complaint.	Scott App. 77:9-20
Gary Tharaldson	Confesses that he does not know whether or what fraud was allegedly discussed by Alex Edelstein in e-mails. He says, "I believe that the attorneys [sic] analysis that there was fraud, I would leave that up to them. **I don't know exactly what they were referring to there.**"	Scott App. 86:14- 87:3
Gary Tharaldson	Did not discuss with his attorneys any of the facts that support the contentions made in paragraph 11 of the First Amended Complaint. **He does not remember any facts that support it.**	Scott App. 89:24-90:8
Gary Tharaldson	**Does not have any facts or evidence** that would invalidate the subcontractor mechanic's liens against the Manhattan West Project. He says, "**That's to be determined by my attorneys.** They're working on that."	Scott App. 93:3-8
Gary Tharaldson	**Did not look at any of the evidence that was amassed by attorneys prior to approving lawsuit.** He "took their word on what they had told me was accurate." [sic]	P. App. 405:7-15
Gary Tharaldson	**Did not provide any information to his attorneys** about specific instances that he believed he was lied to with regard to this project.	P. App. 406:13-17
Ryan Kucker	Only formed an opinion that the release of certain deposits was improper **after** he spoke with Plaintiffs' attorneys.	P. App. 410:8- 24
Ryan Kucker	Did not think that presales to "insiders" would impair the quality of those sales until **after the Complaint was filed.** He does not have "any experience with this matter **other than what's been discussed with counsel**."	P. App. 412:20-413:9

Ryan Kucker	Believes that Plaintiffs were misled, but **has no evidence "separate from what the attorneys have told me."**	P. App. 415:10-15
Ryan Kucker	Did not believe that sales to parties related to the Developer were a problem **until he met with Plaintiffs' attorneys.**	P. App. 416:13-20
Kyle Newman	Nobody spoke to him prior to filing of complaint and asked whether the factual allegations were accurate.	P. App. 437:14-23

C. Petitioners Designated Their Own Trial Attorney Layne Morrill as a Witness with "Discoverable Information."

As all of the facts supporting Petitioners' claims are known by their lawyers exclusively, they naturally put trial counsel Mr. Morrill on their witness list in their NRCP 16.1 disclosures when this case began, citing his "**discoverable information** related to dealings between Scott Financial and Tharaldson and related companies":

> 28. Layne Morrill
> Morrill & Aronson, PLC
> Attorney
> One East Camelback Road, Suite 340
> Phoenix, Arizona 85012
> Tel: (602) 650-4121
> lmorrill@maazlaw.com
> Attorney for Plaintiffs
>
> The individual may have discoverable information related to dealings between Scott Financial and Tharaldson and related companies. Information related to advice to Plaintiffs is protected by the attorney/client and/or work product privileges.

P.App. 468. Morrill remained one of his own clients' specifically named witnesses with "discoverable information" for 15 months[3] until Scott's counsel announced their intention to depose him.[4] Petitioners then amended their witness list, **still including Morrill** but

[3] From initial disclosures on July 24, 2009, P. App. 461, through the October 29, 2010, supplement, P.App. 511.

[4] Scott's attorney requested dates for Messrs. Morrill and Aronson's depositions in mid-September when it became apparent that all Petitioner fact witnesses had deferred to counsel. *See* September 29, 2010, letter from J. Randall Jones at P.App.153 ("As you aware, having defended the depositions of Gary Tharaldson, Ryan Kucker, and Kyle Newman, **they acknowledged that they were the only persons with any personal knowledge of the facts of this case other than their attorneys . . . [and] all testified that you, Layne Morrill and/or Neil Cumsky were the**

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with an about-face claim that he has no relevant information:

> Plaintiffs do not believe Mr. Morrill has any discoverable information relevant to this lawsuit. Any knowledge Mr. Morrill has about this case is protected by the attorney/client and/or work product privileges. As Alex Edelstein testified, Mr. Morrill may have discoverable information about the negotiations with Mr. Edelstein concerning the workout reached to the Manhattan Serene loans, but that subject is not relevant to this lawsuit. P.App. 514-15.

In sum, Petitioners held Mr. Morrill out as the source of discoverable information about the factual issues at the heart of Petitioners' claims for 15 months while they proclaimed their own ignorance of those facts. Only when Mr. Morrill's self-proclaimed "discoverable information" was sought did his factual knowledge mysteriously evaporate and his role in this case shrink.

D. Attorney Morrill Has Made Himself a Percipient Witness, and He Has Freely Shared his Factual Knowledge, Thoughts, and Mental Impressions with Third Parties.

Even if Mr. Morrill had not listed himself as a witness, his behavior in this case has also placed him squarely in the center of a controversy regarding important witnesses in the case. Two relationship managers for the Manhattan West project's preferred lender First Horizon Mortgage, Jim and Vicki Sheppard, testified under oath that Morrill contacted them and attempted to pressure and intimidate them into signing an affidavit that contained false testimony. P.App.538-540. Jim Sheppard was unequivocal on this point:

> Q. . . .Based upon all this whole experience, going all the way back to the first meeting you had with Mr. Muckleroy and **Mr. Morrill, do you feel, especially considering the totality of everything that had happened up to this point, September 9th of 2010, that Mr. Muckleroy and Mr. Morrill were trying to pressure you or intimidate you into signing false**

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persons who had knowledge of virtually all of the facts contained in the complaint. When specifically asked about their personal knowledge of the factual allegations in the complaint, they all deferred to their attorneys.") (Emphasis added). Petitioners' witness disclosure was amended more than a month later in a transparent attempt to fix the witness problem they had created by their initial disclosure and hide-the-ball-under-the-attorney strategy. *See* P.App. 511.

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affidavits?

MR. ARONSON: Objection. Form.

THE WITNESS: **Of course. Yeah, the affidavits were composed by him and he wanted his own words in our affidavit. Of course I objected strongly in every conversation I had.**

Q. **And did you feel that they were attempting, essentially, to intimidate you into signing these things?**

MR. ARONSON: Objection. Form.

THE WITNESS: **Yeah**, they were using the affidavit in lieu of, You know what, if you do this you're probably not going to be deposed. It was using that against, you guys don't want to be dragged through all that. We get it. We understand. Let's just do the affidavit and that probably will be the end of it. So, sure.

Q. **When you didn't want to sign it because you weren't comfortable with the language that Mr. Morrill had chosen, did you feel that he was attempting to -- the manner in which he tried to follow up to get you to sign it was trying to pressure you to sign that?**

A. **Yeah.** I think he realized –

MR. ARONSON: Objection. Form.

THE WITNESS: **It was pretty clear to me he had realized at that point that he went down the wrong path of trying to convince us and pressure us to sign the affidavit, sure**.

P.App.549-550 (emphasis added). After it became clear that the Sheppards would not sign the affidavit, Morrill told Jim Sheppard to destroy the communications evidencing this intimidation:

Q. The next entry reads, September 9 of 2010, Layne [Morrill] returned a call to our cell phone and I reiterated what I left on the voice message. **At that time he instructed me for mine and Vicki's own good to destroy any and all e-mails and correspondence between us as it would shorten our deposition time with the other attorneys?**

A. **Yes. He said, From now on let's communicate by phone and if I were you, ha, ha, ha, I would get rid of those e-mails because, if you are deposed, it would maybe take half the time.**

Q. **So did you get the impression that he was telling you to, essentially, destroy evidence?**

A. **Absolutely.**

MR. ARONSON: Objection. Form.

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THE WITNESS: **It was pretty clear.**

. . .

Q. **But did you believe that was really the reason he thought you should destroy the evidence, for your good, or did you believe it was for his good?**

MR. ARONSON: Objection. Form.

THE WITNESS: **I think it was pretty obvious it was for <u>his</u> good, yeah.**

P.App. 546-548 (emphasis added).

Morrill and Tharaldson's Nevada counsel also shared with the Sheppards Morrill's factual knowledge, thoughts, and mental impressions of this case. Vicki Sheppard testified:

> But I will tell you now that I was stunned by some of the things that I heard within that hour's meeting. I was told, and I'm going to be honest, Jim and I were both told, and both Mr. Morrill and Mr. Muckleroy were there, that Alex and his father had committed bank fraud, that they were con artists basically that -- you explained who Bank of Oklahoma was and these 30 investors. We had no idea who these people were. This is knowledge we had no part of.

P.App. 539. Her husband corroborated her recollection, detailing the "diatribe" they heard about Scott and others being "con artists," "scum," having "defrauded the system" and "committed fraud." P.App.543-45. Thus, contrary to the representations in Petitioners' 16.1 Supplement, Mr. Morrill **doe**s have factual information pertaining to Petitioners' claims that is absolutely discoverable by the Real Parties in Interest. He freely disclosed this factual knowledge -- and his opinions and mental impressions -- to the Sheppards and possibly other third parties without any concern for the work-product protections he now claims apply.

E. After Months of Evading their Depositions, Morrill and Aronson were Ordered to Submit to Deposition Regarding the Factual Bases for Petitioners' Complaint.

Unable to get the factual support for the allegations in the complaint from Petitioners' representatives who should know them, and having been directed by Mr. Tharaldson to ask his lawyers for these evidentiary facts, Scott subpoenaed Messrs.

Morrill and Aronson for deposition. P.App. 88, 96, 100, 108. Morrill and Aronson refused to appear and further held up their depositions by seeking an order from their home state of Arizona quashing the subpoenas. P.App 225, 231. But even the Arizona judge deferred the ultimate decision to Special Master Hale, who was also considering Petitioners' request for a protective order pursuant to the authority granted him under the Case Management Order. The Arizona Court cautioned:[5]

> **I want the minute entry to reflect that this Court does not intend in any way to suggest to Floyd A. Hale, Special Master, what he ought to rule** with regard to the matters which will finally be briefed by him on December 3rd, 2010.[6]

The Special Master denied Tharaldson's Motion for Protective Order after determining that "Tharaldson himself has admitted that only his attorneys, Morrill and Aronson, are familiar with the facts utilized to draft the Complaint." P.App. 84:1-2. He recommended that Judge Denton order Morrill and Aronson "be deposed regarding factual issues that are at issue in this lawsuit, including all factual issues referenced in the Plaintiffs' Complaint." P.App.84. Judge Denton agreed and signed the order on December 13, 2010;[7] he reaffirmed it on January 21, 2011, after considering and overruling Petitioners' Objections. P.App. 565. Judge Denton thoughtfully considered the proceedings before the Arizona court but did not find the Court's decision binding upon Special Master Hale. He concluded, "given Defendants' professed intention to focus only on factual issues going to the basis of Plaintiffs' case, the Court cannot say that Special Master Hale's well-considered recommendations should not stand." P.App.

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[5] *See* Scott App.1 & 9.

[6] P.App. 268-69 (emphasis added). Special Master Hale had already ruled that "The filing of the Motions to Quash in the Arizona Court is in direct conflict with the local District Court Case Management Order indicating that discovery disputes are to be submitted to the Special Master. . . . The Plaintiffs could have submitted this issue to the Special Master for resolution, with a request to Stay the depositions until a ruling was issued." Scott App. 13.

[7] *See* Scott App. 264.

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564-65.

Morrill and Aronson have already spent more than four months, in two jurisdictions, before two different judges and a court-appointed special master trying to evade their depositions. With trial commencing on March 8th, they now come to this Court seeking final refuge. It must be denied. Special Master Hale properly exercised his discretion in recommending that the district court order these attorneys – under these unique circumstances – to submit to deposition, and Judge Denton's adoption of that recommendation after substantial briefing and much consideration was well within his discretion. This Court must deny writ relief and order Messrs. Morrill and Aronson to immediately submit to deposition so trial may timely proceed.

ARGUMENT

A. The Information that Morrill and Aronson Seek to Protect With this Petition Is Not Privileged, and the District Court Properly Compelled their Limited Depositions.

In Nevada, "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery. . .." NRCP 26(b)(1). Sometimes, the relevant information is known only to lawyers. While depositions of opposing counsel are unusual, they are not "so rarely justified or so great a phenomenon as to warrant imposing a stricter standard for their allowance." *Kaiser v. Mutual Life Ins. Co.*, 161 F.R.D. 378, 382 (S.D. Ind. 1994). "The Rules do not grant a special privilege or immunity from discovery to parties' counsel." *Id*. at 381. "An attorney is no more entitled to withhold information than any other potential witness, and may be required to testify at a deposition or trial as to material, non-privileged matters." *Munn v. Bristol Bay Housing Auth.*, 777 P.2d 188, 196 (Alaska 1989).

"Sometimes there are very legitimate reasons for deposing a party's attorney," and the "attorney may be the person with the best information concerning non-privileged matters relevant to a lawsuit." *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.*, 117 F.R.D. 83, 85 & n.2 (M.D. N.C. 1987). Thus, "Not only are attorneys not exempt from

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[Rule 26], discovery from them is clearly contemplated." *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 164 F.R.D. 245, 248 (D. Kan. 1995). "Attorneys with discoverable facts, not protected by attorney-client privilege or work product, are not exempt from being a source for discovery by virtue of their license to practice law or their employment by a party to represent them in litigation." *Id*. The District Court's decision to compel an attorney's deposition is well within its discretion,[8] and writ relief is not available unless the discovery is ordered without regard to relevance or requires the disclosure of privileged information. *Hetter v. Eighth Jud. Dist. Ct.*, 110 Nev. 513, 874 P.2d 762, 763 (1994).

1. The Work-Product Doctrine Offers these Attorneys No Protection from Depositions that Seek Only Facts.

Petitioners cite *Wardleigh v. Second Judicial District Court*, 111 Nev. 345, 891 P.2d 1180 (1995), as Nevada's authority protecting attorneys from being deposed. But *Wardleigh* is not an attorney-deposition case; it's a work-product doctrine case. The *Wardleigh* Court simply rejected "the unbridled depositional testimony" of an attorney, *allowing* his testimony on factual issues, while refusing to compel his deposition on issues regarding documents and tangible things prepared in anticipation of litigation because the proponents had not made the demonstration required to circumvent the work-product doctrine. *Wardleigh*, 891 P.2d at 1188.

Wardleigh has no application here because Scott was not given access to the "unbridled depositional testimony" of these attorneys, just the facts. Not legal theories or thought processes regarding the case. Not analyses of the law. Not their legal advice to Petitioners. The Defendants seek only one thing from the depositions of Morrill and Aronson: the factual support for Petitioners' claims to which the Tharaldson and Petitioners' other representatives simply could not testify. Admittedly, that is a rather

[8] *In re Adoption of a Minor Child*, 118 Nev. 962, 60 P.3d 485, 489 (2003) ("absent a clear abuse of discretion, we will not disturb a district court's decision regarding discovery").

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long list, but any dilemma facing these attorneys is of their own creation – the unavoidable consequence of engineering a 57-page, fact-driven lawsuit without any input from the sophisticated businessmen who were intimately involved in every aspect of this business deal and on whose behalf it was filed.[9]

Although the work-product doctrine places limitations on the discovery of attorneys' mental impressions, it does not shield counsel from providing facts and evidence supporting his client's case. As the United States Supreme Court recognized in *Hickman v. Taylor*, 329 U.S. 495, 508 (1947) (emphasis added):

> **Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.**

"Discovery is mutual – [ ] while a party may have to disclose his case, he can at the same time tie his opponent down to a definite position." *Id*. at 508 n.8. "The protective cloak of this privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation." *Id*. Nor are such facts protected by the work product doctrine. "Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had." *Id*. at 511. "Material, non-privileged facts" cannot "be hidden" by counsel. *Id*. at 513. And as Justice Jackson emphasized in his *Hickman v. Taylor* concurrence, "It seems clear and long has been recognized that discovery should provide a party access to anything that is evidence in his case." *Id*. at 515 (Jackson, J., concurring). As Defendants only seek – and the District Court only ordered – the depositions of Morrill and Aronson regarding the facts supporting the Petitioners' claims, P.App. 565 ("Defendants' professed intention [is] to focus only on factual issues going to the basis of Plaintiffs' case"), the work-product doctrine is not

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[9] On February 2, 2011, Judge Denton issued a decision bifurcating the bench trial of the guaranty-based claims from the remaining jury issues. In the decision, he emphasizes the savvy of "the obviously sophisticated Mr. Tharaldson." Scott App. 276:5-6.

implicated.

2. Any Work-Product Protection Was Waived by Petitioners' Counsel's Voluntary Disclosure of Information to Independent Third Parties.

Even if the work-product doctrine were implicated by the limited discovery that the District Court ordered, its protections were waived by Mr. Morrill's disclosure of this information to unrelated third parties, Vicki and Jim Sheppard. If Mr. Morrill has no compunction in offering extensive accounts of his theories and the factual bases for Petitioners' claims to potential third party witnesses as he did with the Sheppards, *see* P.App. 539, 543-45, he cannot hide behind the work-product doctrine to avoid disclosing that information to the parties that must defend against the claims he engineered and who and have a due-process right to that information. *See* 23 AM. JUR. 2D *Depositions and Discovery* § 49 ("The protection derived from the work product doctrine is not absolute and like other qualified privileges, it may be waived"); *United States v. Nobles*, 422 U.S. 225, 239 (1975) ("The privilege derived from the work-product doctrine is not absolute. Like other qualified privileges, it may be waived."); 8 Charles Allan Wright, Arthur R. Miller & Mary K. Kane, FEDERAL. PRACTICE AND PROCEDURE § 2016.4 (3d ed.) (as a general rule, disclosure to a third party not involved in the litigation waives privilege and work-product protection).

3. The District Court's Decision to Allow Petitioners' Attorneys to be Deposed on the Factual Bases for the Complaint is Consistent with Shelton and Other Prevailing Authority.

Petitioners next argue that the Eighth Circuit's three-part test in *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986) should guide this Court and was not satisfied in the District Court. The *Shelton* approach is not the only popular judicial approach to opposing-counsel depositions. (Now United States Supreme Court) Justice Sotomayor, then writing for the Second Circuit Court of Appeals, rejected *Shelton's* test and adopted a more flexible approach in *In re: Subpoena Issued to Dennis Friedman*, 350 F.3d 65 (2003):

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> [T]he standards set forth in Rule 26 require **a flexible approach to lawyer depositions whereby the judicial officer supervising discovery takes into consideration all of the relevant facts and circumstances** to determine whether the proposed deposition would entail an inappropriate burden or hardship. Such considerations may include the need to depose the lawyer, the lawyer's role in connection with the matter on which discovery is sought and in relation to the pending litigation, the risk of encountering privilege and work-product issues, and the extent of discovery already conducted. These factors may, in some circumstances, be especially appropriate to consider in determining whether interrogatories should be used at least initially and sometimes in lieu of a deposition. Under this approach, the fact that the proposed deponent is a lawyer does not automatically insulate him or her from a deposition nor automatically require prior resort to alternative discovery devices, but it is a circumstance to be considered.

Friedman, 350 F.3d at 72 (emphasis added). Justice Sotomayor's "balancing-of-factors analysis stands in contrast to the stricter test prescribed in *Shelton*" and takes "a more pragmatic, fact-bound approach to the deposition of attorneys," permitting the "deposition of counsel more readily, as 'the fact that the proposed deponent is a lawyer does not automatically insulate him or her from a deposition,' but is merely one factor to be considered." Scott Tolchinsky, *Deposition of Opposing Counsel in Patent Litigation*, 19 GEO. J. LEGAL ETHICS 993, 999-1000 (2006) (quoting *id*.).

These are unique circumstances:

- Tharaldson is a savvy, billionaire businessman and real estate developer who has admittedly signed personal guaranties totaling several billion dollars over the years. In this transaction alone, he actively negotiated more than a hundred million dollars in loans from 29 commercial lenders and personally guaranteed to pay them back in exchange for a healthy guarantor fee of at least $5.5 million. Yet, he and the other representatives of his companies had zero involvement in masterminding Petitioners' 13-claim, 57-page complaint. P.App. 201-203, 220; Scott App. 8:6-25;
- After 13 days of depositions between them, not one of Petitioners' three key witnesses could identify the factual bases for their claims. *See* chart *supra*

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at pp. 4-8;

- At the very outset of this case, Petitioners designated their own trial attorney Morrill as a witness with "discoverable information" going to the heart of the allegations in this case. They amended to retract Mr. Morrill's claimed knowledge of relevant and discoverable information on the deadline for amendment and only after Scott's counsel asked for convenient deposition dates. P.App. 468; and
- Mr. Morrill has freely disclosed his theories, mental impressions, and purported factual bases for his clients' claims with independent third parties who he was attempting to intimidate into signing erroneous affidavits, waiving any possible privilege or protection that this information otherwise had. P.App. 539.

These highly unusual circumstances satisfy Justice Sotomayor's flexible *Friedman* standard and more than support the District Court's exercise of discretion in compelling the depositions. But even if this Court adopts the *Shelton* standard, it, too, is satisfied by these unusual circumstances.

a. The first Shelton factor is satisfied because Mr. Tharaldson testified that the factual underpinnings of Petitioners' claims are known only to his lawyers.

The first *Shelton* consideration is whether there is any means of obtaining the information other than to depose opposing counsel. When the facts and evidence supporting a defense are known exclusively by trial counsel, deposing trial counsel is the only way to obtain that information. The court in *Alcon Laboratories, Inc. v. Pharmacia Corp*., 225 F. Supp.2d 340 (S.D. N.Y. 2002), recognized this principle and allowed the deposition of lead trial counsel for the opposing party because he was the only person with knowledge of the facts supporting his client's claims. The Court concluded, "While an attorney's deposition should be precluded when there are other persons available to testify as to the same information or if interrogatories are available, deposing [lead counsel] is the only practical avenue here." 225 F. Supp.2d at 343. The court even

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rejected the notion that the party seeking to depose trial counsel must first "exhaust every available avenue for the testimony, especially since certain information is exclusively within [the attorney's] knowledge and interrogatories are arguably unavailable since [he] is not a party to this action." *Id*. It further found that the lack of "nefarious" motives in seeking to depose the lawyer "quell[ed] many of the fears that routinely plague courts faced with the issue of attorney depositions, and supports the denial of a protective order." *Id*. at 345.

A Kansas Federal Court reached a similar conclusion in *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 164 F.R.D. 245, 248 (1995). In this trademark litigation, the court ruled that an attorney who served as trial counsel and had knowledge of the facts leading to the litigation could be deposed because he "possess[] relevant, nonprivileged information crucial to the preparation of this case. No other satisfactory means exist for obtaining facts known to [him] than his deposition." 164 F.R.D. at 250. The court explained that it was "unwilling to preclude plaintiff from discovery of facts which may be relevant in this case simply because defendant has chosen [this attorney] to represent it as counsel in this matter notwithstanding his personal knowledge of the underlying facts which are related to the action."[10]

Petitioners argue that there were "other discovery devices" that Defendants could have employed to "discover the factual bases for the complaint," like depositions of other witnesses or review of the "more than 1 million pages of documents" in this case. Petition at 12. Defendants have exhausted all other possible sources of the factual bases

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[10] *Id*.; *see also In re Savitt/Adler Litigation*, 176 F.R.D. 44, 48 (N.D. N.Y. 1997) (requiring attorneys to disclose specific "facts which support the contentions in their complaints" over work-product objections, reasoning, "Defendants here must determine the bases for the principal factual allegations in the complaints in order to prepare appropriate motions and defenses. While defendants may speculate as to those bases and even identify from their own knowledge of the cases what those bases may be, it is only from plaintiffs themselves that these bases can be reliably determined. Where, as here, critical information is in the sole possession of an adversary, the interrogating party has satisfied its burden of establishing both substantial hardship and undue burden. For this reason as well, then, plaintiffs' work product objections must be overruled and the information sought must be disclosed.").

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for Petitioners' claims. As Petitioners point out, discovery in this case was comprehensive and included more than 50 days of depositions – 13 days consumed by Petitioners' three key witnesses and 7 of those days dedicated exclusively to Mr. Tharaldson. *See* Petition at 3. Defendants' counsel painstakingly went through every allegation and claim in the 57-page, 311-paragraph complaint, asking for the factual bases supporting those allegations; the overwhelming response from all three of Petitioners' persons most knowledgeable was *I don't know; only the lawyers do.* Tharaldson has repeatedly testified that he performed no investigation into whether he had a valid claim, he did not supply any facts to the lawyers but rather, he relied on them exclusively to come up with the bases for Petitioners' claims, and he "wouldn't have a problem with" Defendants "sitting[ing] down with [Petitioners'] attorneys and ask[ing] them what they relied upon." *See*, testimony summarized *supra* at pp. 4-8. But that has not happened, so after seven days of Mr. Tharaldson's deposition, six more days between Messrs. Kucker and Newman, and with just a month remaining before trial, the factual bases for the Petitioners' claims remain undiscovered.

Petitioners also claim that they already provided the factual and evidentiary bases for their claims in "comprehensive" interrogatory responses. Petition at 12 & 13. But these interrogatory responses were worthless, verbatim regurgitations of the allegations in the complaint that offered nothing new and identified no evidence to support these unsworn allegations. *Compare* P.App.1-55 *with* P.App.272-310. Petitioners' responses even contain the objection that their "facts" are "pleaded in detail," so "'explanatory' discovery of these carefully pleaded allegations is unnecessary and unwarranted." P.App. 273:25-27. And they basically refer and "incorporate[] by reference in its entirety in general response" the Amended Complaint. P.App. 274:1-6.

Useless interrogatory responses were rejected as a substitute for attorney depositions in *Nguyen v. Excel Corp*., 197 F.3d 200 (5th Cir. 1999), a labor dispute. The court reasoned that "the only source of information besides defense counsel is Excel's executives [who] offered only 'vague and non-specific' explanations in response to

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appellees' questions." *Nguyen*, 197 F.3d at 209. And, "on at least one occasion, an Excel executive requested a break in the deposition to confer with counsel before he would be able to provide with specificity the bases underlying his belief that Excel acted in good faith. The district court found, without clear error, that Excel responded to interrogatories with answers so incomplete and ambiguous that they were without meaning, and that the executives had made no writings that might enable them to respond to future inquiries posed by appellees." *Id*.

As Special Master Hale properly discerned, "The test in the *Shelton* decision is that to depose Plaintiffs' counsel, that counsel must be the only source of the information sought . . . . Mr. Tharaldson himself has admitted that only his attorneys, Morrill and Aronson, are familiar with the facts that were utilized to draft the Complaint. Consequently, those witnesses should be deposed regarding the factual issues that were utilized to draft the Complaint." P.App.83-84. This ruling was proper, well supported, and must not be disturbed.

b. The second Shelton factor is satisfied because Defendants are not seeking any privileged information – just facts.

The second prong of the *Shelton* test is that the information sought is relevant and not privileged. The relevance of the information that Defendants intend to get from Morrill and Aronson cannot be questioned as it is the very essence of Petitioners' claims: the factual and evidentiary bases for the specific allegations in the Complaint. These facts are not privileged or otherwise protected. *Supra* at p. 14. Even if they once were, any protections were waived when Morrill shared this information with the Sheppards in an attempt to persuade them to provide affidavits in support of Petitioners' claims. *Supra* at p. 15.

Moreover, the district court's order carefully preserves Petitioners' right to make legitimate privilege objections during the attorneys' depositions:

> **The fact that depositions may be noticed and commenced does not preclude the deponents and the parties' counsel from making objections and appropriate instructions. A**

> **record will be made and the propriety of specific questioning can then be assessed. The fact that privilege and work product may bar some questioning does not mean that those protections would necessarily be applicable to all questions.** Thus, given Defendants' professed intention to focus only on factual issues going to the basis of Plaintiffs' case, the Court cannot say that Special Master Hale's well-considered Recommendations should not stand.

P.App. 564-565 (emphasis added). Thus, Judge Denton's order provides reasonable safeguards for any privileged or otherwise protected information that may be implicated during the course of the ordered depositions,[11] and it satisfies the second prong of *Shelton*.

c. The cruciality of this information to the preparation of Defendants' defense satisfies the third prong of Shelton.

Finally, it is difficult to imagine what could be more crucial to the preparation of Defendants' case than the factual bases for the 311 paragraphs of allegations in Petitioners' complaint. Mr. Tharaldson could not provide them. Nor could Messrs. Kucker or Newman. They just kept deferring to their lawyers who they claim exclusively hold the most discoverable, relevant thing in this case – the actual, evidentiary facts on which Petitioners' heavy-handed claims are truly based.[12]

A litigant must be given access to the people who know the facts and can identify the evidence that supports his opponent's claims. "A lawsuit is not a contest in

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[11] Petitioners' argument that "even a simple inquiry regarding the attorney's basis for an allegation in a complaint" will force him to reveal his "mental impressions and thought process" and therefore, **no** questioning should be permitted is a gross overextension of the work-product doctrine. Were this the rule, attorneys could **never** be deposed, and litigants could completely prevent their opponents from fairly defending themselves by claiming ignorance of the facts and exclusive reliance upon their attorneys' investigation. Clearly, this cannot be the rule.

[12] Defendants should also be permitted to depose Mr. Morrill on the separate issue of his efforts to inappropriately intimidate and influence material witnesses. The fact that he was unsuccessful in this effort does not make it any less discoverable. At a minimum, this exchange goes to witness credibility, which is always relevant. *See Walker v. State*, 97 Nev. 266, 267, 628 P.2d 680 (1981) (citing *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974)).

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concealment, and the discovery process was established so that 'either party may compel the other to disgorge whatever facts he has in his possession.'" *Southern Railway Co. v. Lanham*, 403 F.2d 119, 130 (5th Cir. 1969) (quoting *Hickman v. Taylor*, 329 U.S. at 507). The discovery rules are intended to encourage full pretrial disclosure to ensure that trials are "less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958); *see also Palmer v. Pioneer Inns Assocs, Ltd.*, 118 Nev. 943, 59 P.3d 1237, 1243 (2002) ("the rules of civil procedure, especially the discovery rules, are designed to afford parties broad access to information").

If Defendants are not allowed to question these two witnesses on this crucial information, they will be handicapped in a way that no defendant should ever be handicapped: they will not have access to the only witnesses who allegedly can identify the evidentiary facts that support the claims against them. While Scott does not believe that there are any facts that support these claims (and that is why none of Petitioners' own witnesses could supply them and why Morrill and Aronson are so adamant that they not be deposed),[13] Defendants have the right to defend themselves, and one of the primary ways any defendant defends itself is to confront the witnesses making the allegations against it. In this case, the only witnesses who appear to have any factual information against the Defendants are Morrill and Aronson, one of whom Petitioners even put on their own witness list as someone with relevant "discoverable information." It would be a violation of fundamental due process rights to allow a plaintiff to bring a lawsuit, disclaim all personal knowledge of the evidentiary bases for it, and never have to disclose

[13] Petitioners suggest, "if the defendant in a lawsuit truly believes there is no evidence to support a complaint," its remedy "is a motion for summary judgment." Petition at 16. Scott is successfully utilizing the summary judgment vehicle, too. So far, Judge Denton has granted summary judgment in Scott's favor on several of Petitioners' causes of action, including fraudulent misrepresentation, securities fraud, defamation, and breach of fiduciary duty. *See*, *e.g.* Scott App. 267 & 271. Judge Denton's elimination of some of Petitioners' claims for lack of evidentiary support, however, does not alleviate Defendants' need to depose these attorneys to discover the evidentiary bases for the remaining claims.

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them because they are known only to his trial counsel.[14] Such a shell-game policy would encourage frivolous lawsuits, barratry, and champerty, and undermine the very foundation of our modern discovery rules and Rule 11.

B. Special Master Hale and District Court Judge Denton Gave All Due Credence to the Arizona Court's Decision to Quash the Subpoenas.

Petitioners argue that the decision of their home court quashing the Arizona subpoenas should have been the final word on the issue, and Defendants should not have been permitted to "relitigate" the issue before Special Master Hale. Petition at 18-20. This argument completely ignores the fact that this case is pending in Nevada, not Arizona, and Messrs. Morrill and Aronson are guests in our courts, with the privilege of practicing on a *pro hac vice* basis. They cannot have it both ways; either they have submitted to this Court's jurisdiction and they get to practice here, or they have not and do not, in which case their argument that their home court in Arizona is the forum for determining their obligations has more weight. But since they were the ones that decided to file Petitioners' claims in the Nevada court, and they specifically asked for permission to practice in Nevada, they should be subject to Judge Denton's order.[15] They also

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[14] Petitioners' argument that "there are many cases in which plaintiffs lack personal knowledge about allegations in their attorney-drafted complaints" like head-injury and wrongful-death cases, is a poor analogy. *See* Petition at 12. Mr. Tharaldson is a sophisticated and self-made billionaire businessman who has guaranteed billions of dollars in loans in the past and personally guaranteed the repayment of more than $100 million in commercial loans for the real estate development at issue in this case. P. App. 201-203; 220; Scott Ap.. 8. He does not have a head injury, and he is not bringing this lawsuit on behalf of a deceased relative. If anyone knows the basis for his elaborate claims, it should be him. Permitting such a plaintiff to maintain a lawsuit with absolutely no knowledge of the factual and evidentiary bases for it would be the real "broad and absurd result." Petition at 13.

[15] This is particularly true with regard to Mr. Morrill's deposition, as he was accused of serious misconduct during the depositions of two witnesses in this case. Mr. Morrill should not be able to block discovery regarding these allegations, particularly after he has submitted to the jurisdiction of the Nevada courts. *See* S.C.R. 42(13) ("Out-of-state counsel appearing under this rule shall be subject to the jurisdiction of the courts and disciplinary boards of this state with respect to the law of this state governing the conduct of attorneys to the same extent as a member of the State Bar of Nevada. Counsel shall become familiar and comply with the standards of

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expressly agreed to the appointment of Special Master Hale and that all discovery-related disputes would be resolved by him, for review and approval by Judge Denton. *See* Scott App. 1 & 9. And their depositions were most recently noticed in Nevada, and the valid Nevada subpoenas were served on them while they were physically in Nevada – a fact Petitioners fail to mention and which was not the subject of the Arizona proceeding.[16]

Worse yet, Petitioners' argument ignores the scope and express caveat of the Arizona judge's ruling that he was leaving the ultimate decision to Special Master Hale. P.App. 268-69 ("I want the minute entry to reflect **that this Court does not intend in any way to suggest to Floyd A. Hale, Special Master, what he ought to rule** with regard to the matters which will finally be briefed by him on December 3rd, 2010.") (Emphasis added). As even the Arizona judge recognized that his ruling was not dispositive of the motion for protective order that was pending before Special Master Hale, Petitioners' claim that the Arizona decision is somehow binding on the Eighth Judicial District Court or should have been the last word on the subject is patently unsupportable.[17] Accordingly, Morrill and Aronson's arguments about full faith and credit, comity, collateral estoppel, and issue preclusion are all misplaced.

Notwithstanding the fact that the Special Master and district court had no legal obligation to follow the Arizona court's decision, they did give it significant consideration. Special Master Hale acknowledged the ruling but focused on his power over "discovery matter[s], including the issuance of appropriate District Court Orders for

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professional conduct required of members of the State Bar of Nevada and shall be subject to the disciplinary jurisdiction of the State Bar of Nevada.")

[16] *See* P.App. 551-562. Service of a subpoena on an out of state resident while they are in the State of Nevada constitutes proper and effective service. NRCP 45(b)(2); *Tiedmann v. Tiedmann*, 35 Nev. 259, 129 P. 313, 314 (1913) (holding that service of a summons on a nonresident was voluntarily in state to pursue another legal matter).

[17] Petitioners' counsel's failure to mention this critical qualification in Judge Daughton's minute order begs the larger question of their ethical obligations of full candor to this Court. *See* NEV. R. PROF.CONDUCT 3.3 (Candor Toward the Tribunal).

sanctions in this Nevada Litigation," and he noted that "Morrill and Aronson have submitted themselves as counsel in this litigation by formal Court Order granting their Motions to Associate." P.App. 83. Judge Denton referred to the fact that the parties' positions were "extensively argued to Judge Daughton in the Arizona Court." P.App. 564. He further noted that, in making his ruling, Judge Daughton "specifically stated that he did not intend that his ruling be binding upon Special Master Hale," so "the Court does not consider issue preclusion and law of the case doctrines to be applicable." *Id.* Nothing more was required.

C. The Stay Should Be Lifted Immediately.

Finally, this Court should also immediately lift the stay of these depositions granted by its January 31, 2011, order because there is no risk that permitting the depositions in the manner ordered by the district court will cause any irreparable harm. The scope of the depositions is limited to facts only, so privileged or protected information will not be implicated. Judge Denton's order further safeguards against this risk by specifically preserving the right of the "deponents and the parties' counsel" to make "objections and appropriate instructions." P.App.564. As Judge Denton explained, "A record will be made and the propriety of specific questioning can ***then*** be assessed." *Id.* (emphasis added).

This case is set for trial on March 8, 2011, a date agreed upon by all parties. Scott's counsel attempted to schedule Morrill and Aronson's depositions back in September, which would have allowed ample time to complete this discovery well before the close of discovery and the commencement of trial, P.App. 152, and it is only Messrs. Morrill and Aronson's repeated refusal to submit to the now court-ordered depositions that has left this issue unresolved on the eve of trial. The fact information that they have is crucial to Defendants' preparation of their defenses for the impending trial, and Defendants would be extremely prejudiced by the inability to take these depositions – with the limitations and under the procedures established by the District Court. Accordingly, this Court should immediately lift the stay of the depositions despite the

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pendency of the petition.

CONCLUSION

Morrill and Aronson chose to list Morrill as a fact witness in this case. They chose to independently investigate the facts of these claims, then not share that information with their clients. They chose to file a complaint without verifying the allegations of that complaint with their clients. And they chose to communicate to third parties the very facts – and mental impressions and thoughts – that they now attempt to shield from disclosure under the work-product doctrine.

Defendants must be allowed to defend themselves from Petitioners' allegations by verifying the alleged factual evidence on which they are based. Morrill and Aronson have created a situation where Defendants have no choice but to depose the only witnesses who are in possession of the evidence the Defendants need: the attorneys. Unusual or not, Defendants are entitled to the facts, and Morrill's and Aronson's constant attempts to hide the ball are an affront to fundamental fairness, the rules of discovery, and the integrity of the civil justice system. Their petition must be denied, the stay immediately lifted, and Morrill and Aronson must be ordered to submit themselves for deposition without further delay.

DATED this 7th day of February, 2011.

Respectfully submitted by:

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this **Answer to Petition for Writ of Mandamus or Prohibition and Opposition to Emergency Motion for Stay**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 7th day of February, 2011.

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of February, 2011, the foregoing **ANSWER TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION AND OPPOSITION TO EMERGENCY MOTION FOR STAY AND SUPPLEMENTAL APPENDIX (VOLUME I AND II)** was served on the following person(s) by U.S. Mail:

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