IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioners,

vs.

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

REPLY IN SUPPORT OF MOTION FOR STAY[1]

On January 28, 2011, Petitioners filed their writ petition and their motion for a stay of the district court's order allowing the attorney depositions in question. The motion tracked NRAP 8, establishing that all four factors under that rule favor issuance of a stay.

This court granted a temporary stay on January 31, 2011, after considering the following factors: (1) whether the object of the petition will be defeated if the stay is not granted; (2) whether Petitioners will suffer irreparable or serious injury if the stay is denied; (3) whether real parties in interest will suffer irreparable or serious injury if the stay is granted; and (4) whether Petitioners are likely to prevail on the merits.

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[1]The undersigned appellate counsel for Petitioners has been informed that at a hearing on February 14, 2011, the district court continued the trial, which had previously been scheduled for March 8, 2011. A new trial date has not yet been set.

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Real parties in interest (Defendants) filed an answer to the writ petition on February 8, 2011. Rather than filing a separate opposition to the motion for stay, Defendants included the opposition in their answer. (Answer, pages 26-27). The opposition consists of a mere two paragraphs, neither of which cites or even mentions Rule 8 (or, for that matter, any other legal authority). Nor does the opposition provide any cogent discussion on the four factors on which this court relied in granting the temporary stay.

1. Whether the object of the petition will be defeated if the stay is not granted

Defendants' opposition is utterly silent on this factor. The object of the petition is a writ compelling the district court to vacate its order allowing the attorney depositions. If the depositions go forward, the object of the petition will be entirely defeated. Thus, this factor undeniably favors a stay.

2. Whether Petitioners will suffer irreparable or serious injury if the stay is denied

In a somewhat oblique reference to this factor, Defendants argue that Petitioners will not be prejudiced if the depositions go forward, because Petitioners can make objections at the depositions (Answer, page 26, lines 10-18) There are two significant reasons why Defendants' argument is fatally flawed.

First, the argument ignores the fact that the rulings of the Special Master and the district court allow Petitioner's attorneys to be deposed without limitation on "all factual issues referenced in Plaintiffs' Complaint" (1 P.App. 84, lines 20-21) and on any "factual issues going to the basis of Plaintiffs' case" (3 P.App. 565, lines 3-4). Defense counsel has never really articulated any of the specific deposition questions he intends to ask regarding "factual issues" in this case. As demonstrated in the petition, even seemingly innocuous deposition questions regarding an attorney's bases for specific allegations in a complaint, or regarding documents relied on or not relied on by the attorney, can provide the opposing party with valuable insight regarding the deposed attorney's mental impressions and thought process. (Petition, pages 14-15) As this court held in *Wardleigh v. District Court,* 111 Nev. 345, 359, 891 P.2d 1180, 1189

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(1995): "The mental impressions, conclusions, opinions, and legal theories of counsel concerning the litigation are not discoverable under any circumstances." (Emphasis added) Unless attorneys Morrill and Aronson object to virtually every deposition question, Petitioners will be irreparably harmed because information disclosed at the depositions will be irretrievable.

Second, Defendants' argument ignores the fact that preparation for the attorney depositions, and attending the depositions, will consume a tremendous amount of time and effort by attorneys Morrill and Aronson in this extremely unusual and complex commercial litigation. This time and effort will greatly detract from trial preparation and other important work on the case. Courts have recognized that taking the deposition of opposing counsel "disrupts the adversarial system." *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986). A deposition of the opposing attorney "provides a unique opportunity for harassment" and "disrupts the opposing attorney's preparation for trial." *Marco Island Partners v. Oak Development Corp.*, 117 F.R.D. 418, 420 (N.D. Ill. 1987). If attorneys Morrill and Aronson are required to spend countless hours (and perhaps several days) preparing for and attending their depositions, their preparation for the trial will be irreparably disrupted.

Accordingly, the second factor under the Rule 8 analysis favors a stay.

3. Whether real parties in interest will suffer irreparable or serious injury if the stay is granted

Defendants argue that the information they seek from attorneys Morrill and Aronson is "crucial" to the defense. (Answer, page 26) This is simply not true. Attorneys Morrill and Aronson are not percipient witnesses with personal first-hand knowledge of any of the underlying facts in the loan transactions that are the heart of this lawsuit. Every witness with personal knowledge of relevant information has been disclosed; and every relevant document has been produced. The attorney depositions will add nothing (except insight into their mental impressions and opinions).

Additionally, the record in this case amply demonstrates that Defendants have in no way been hamstrung in their defense of this case, even though they have not deposed Petitioners' attorneys. Indeed, in Defendants' recent motion to expedite this writ case, Defendants expressly

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acknowledged that Petitioners "recently lost more than half a dozen motions for summary judgment" in the district court. (Motion to Expedite filed February 9, 2011, page 3, lines 20-21). In other words, despite the fact that Defendants have not deposed attorneys Morrill and Aronson, Defendants nevertheless won more than half a dozen motions for summary judgment. Under these circumstances, Defendants can hardly assert that the attorney depositions are "crucial" to the defense.[2]

4. Whether Petitioners are likely to prevail on the merits

Defendants are silent on this factor, apparently satisfied that the arguments in their answer will suffice. Yet this court has already determined that Petitioners "have set forth issues of arguable merit" in the petition. Case law set forth in the petition demonstrates that depositions of attorneys in lawsuits are rarely permitted, and that there is no justification for the highly intrusive and disruptive depositions in the present case.

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[2]As noted in the writ petition, Defendants served contention interrogatories, seeking the factual bases for virtually every allegation in the amended complaint; and Petitioners provided thorough, comprehensive responses to these contention interrogatories. 2 P.App. 272-311. This alone establishes that the attorney depositions are not crucial to the defense. Although Defendants now argue that Petitioners' interrogatory responses were inadequate, Defendants did not pursue a motion to compel further responses. Attorney depositions have been denied in such circumstances. *BB&T Corporation v. United States,* 233 F.R.D. 447, 449-50 (M.D. N. Car. 2006) (plaintiff sought deposition of defense counsel, arguing that defendant's answers to contention interrogatories were inadequate; court rejected argument and issued order prohibiting attorney deposition, because plaintiff had not moved to compel further answers to the contention interrogatories).

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Conclusion

Petitioners' motion for a stay of the depositions, pending the outcome of this writ proceeding, was well-grounded in fact and in law. Defendants have failed to demonstrate that this court should vacate its order granting a temporary stay.

DATED: Feb. 14, 2011

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Lemons, Grundy & Eisenberg and that on this 14 day of FEB., 2011, I am causing to be sent via U.S. Mail, postage prepaid, a true and correct copy of the foregoing addressed to:

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