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 PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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REPLY IN SUPPORT OF WRIT PETITION

Petitioners hereby reply to the answer filed by real parties in interest (Defendants).

I

Introduction

With a harsh and caustic tone that is hardly appropriate for appellate advocacy, the answer attacks everyone who has dared to cross Defendants' path. If the answer is to be believed, Petitioners are wealthy ogres who have flexed their muscles to pummel the helpless Defendants (most of whom are financial institutions[1]); Petitioners' trial attorneys are unethical manipulators of Nevada judicial proceedings; and the Arizona judge is a rube who favored local attorneys. When Defendants' exaggerated and vitriolic advocacy is disregarded, and when the court looks at this petition objectively, the court will conclude that the attorney depositions are unnecessary and inappropriate, and that the order challenged in this writ proceeding should be vacated.

In this court's order directing an answer to the writ petition, the court identified specific issues to be addressed in the answer. Yet the answer, for the most part, either ignores these issues or gives them no more than cursory attention. As we will establish in this reply, the answer's legal authorities are inapplicable and distinguishable; the depositions should be denied under any standard; and Defendants' other collateral arguments provide no justification for the highly unusual tactic of taking the deposition of opposing counsel in a litigated dispute.[2]

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[1] One of the Defendants is Bank of Oklahoma, N.A., which is a member of BOK Financial Corporation, a $24 billion financial services company. See www.bokf.com

[2] When Petitioners filed their petition, a trial date of March 8, 2011 was pending. As noted in Petitioners' reply in support of their motion for stay (filed February 14, 2011), the trial date has been vacated. As of the date of the present reply, a new trial date has not yet been set.

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II

Argument

A. Defendants' case law is inapplicable

As noted in the petition in this case, Defendants' 22-page district court brief failed to cite any case, from any state or federal jurisdiction, in which a court allowed a party to take the deposition of the opposing party's trial attorney. (Pet., p. 11, lines 14-17) In their answer, Defendants have now finally cited limited case law allowing attorney depositions, but the attorney in each case was a percipient witness to the underlying events in the litigation, as discussed in detail below. Defendants have still failed to locate and cite any case, from any jurisdiction, in which the court allowed the deposition of an opponent's attorney who was not a percipient witness to the underlying events. Under any standard, no legal authority supports Defendants' effort to depose attorneys Morrill and Aronson regarding the factual bases of the complaint.

In arguing that the attorney depositions should be allowed, Defendants rely primarily on four cases from other jurisdictions. (Answer, pages 13-14) These cases are clearly inapplicable to the present case. If anything, the cases support issuance of a writ here.

Defendants first rely on *Kaiser v. Mutual Life Ins. Co.,* 161 F.R.D. 378 (S.D. Ind. 1994), for the proposition that a stricter standard should not apply when a party is seeking the deposition of opposing counsel. (Answer, page 13) Although the *Kaiser* court may have stated this general proposition, the court also recognized several dangers and concerns regarding attorney depositions. First, the court recognized "the disruption to the effective operation of the adversarial system entailed in the disclosure of attorney work product and privileged attorney-client communications." *Id.* at 381. Second, the court recognized that depositions of opposing counsel present a "unique opportunity for harassment," and the court expressed fear that the time involved in preparing for and undergoing such depositions "will disrupt counsels' preparation of parties' cases and thus decrease the overall quality of representation." *Id.* The *Kaiser* court also pointed to the potential of counsel depositions spawning litigation over collateral issues, thus imposing additional delays and burdens on parties and the courts. *Id.* The

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court was also concerned that such depositions may lead to the disqualification of counsel. *Id.* And finally, the court expressed fear that permitting depositions of a party's counsel would have a chilling effect on the truthfulness of attorney-client communications. *Id.*

Although the *Kaiser* court ultimately allowed an attorney's deposition in that case, the attorney had been personally involved in the underlying transactions that led to the lawsuit. The court allowed the attorney to be deposed regarding his personal involvement in the transactions, so long as attorney-client and work product protections were maintained. *Id.* at 382-83. Unlike the facts in *Kaiser*, in the present case the attorneys were not personally involved in the underlying loan transactions that led to the lawsuit. They are not percipient witnesses, and they have no first-hand knowledge of the facts. Their information was obtained from other sources, all of which have been disclosed. Additionally, every danger and concern expressed by the *Kaiser* court is applicable here (disruption of deposed attorney's preparation; interference with the litigation; harassment; collateral litigation over deposition issues; potential disclosure of privileged information; delays for parties and the court).

Defendants also rely on *Munn v. Bristol Bay Housing Authority,* 777 P.2d 188 (Alaska 1989), for the general proposition that an attorney may be required to testify at a deposition as to material, non-privileged matters. (Answer, page 13) One of the substantive claims in *Munn* was abuse of process. The plaintiffs sought an order allowing them to depose one of the defendant's attorneys, because the attorney had been personally involved in the events constituting the alleged abuse of process. *Id.* at 194-95. The trial court issued an order preventing the plaintiffs from taking the attorney's deposition, based upon the attorney-client privilege. The *Munn* court reversed, mainly because the plaintiffs had never been allowed an opportunity to demonstrate that they should be able to depose the attorney. *Id.* at 195. Furthermore, although the court ruled that the attorney could be deposed, the deposition was allowed as to subjects on which the attorney had personal knowledge in his capacity as a percipient witness to the events constituting the alleged abuse of process. *Id.* at 194-97.

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Munn is nothing like the present case, where the attorneys were not participants in the underlying transaction, and where the attorneys were not percipient witnesses to any relevant events.

The answer also relies on *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.,* 117 F.R.D. 83 (M.D.N.C. 1987), for the proposition that an attorney may be deposed if the attorney has the best information concerning non-privileged matters relevant to a lawsuit. (Answer, page 13) Like the other cases on which Defendants rely, the attorney in *N.F.A.* was a percipient witness to the underlying transaction that led to the litigation. *N.F.A.* was a patent infringement action. The plaintiff sought to depose the defendant's patent attorney, based upon the defendant's declaration that one of its defenses was reliance on the advice and opinion letters from the patent attorney. *Id.* at 84. In other words, the attorney was a direct participant in the defendant's conduct forming the basis of the underlying alleged patent infringement, and the defendant expressly declared, as part of the patent infringement litigation, that the defendant would be relying on the advice and opinions of its patent attorney, as part of the defense on the substantive claims of patent infringement.

The *N.F.A.* court observed that attorney depositions can result in "delay, disruption of the case, harassment, and perhaps disqualification of the attorney." *Id.* at 85. "In addition to disrupting the adversarial system, such depositions have a tendency to lower the standards of the profession, unduly add to the costs and time spent in litigation, personally burden the attorney in question, and create a chilling effect between the attorney and client." *Id.* Additionally, the court observed: "More often deposition of the attorney merely embroils the parties and the court in controversies over the attorney-client privilege and more importantly, involves forays into the area most protected by the work product doctrine -- that involving an attorney's mental impressions or opinions."

The opinion in *N.F.A.*, on which Defendants rely in the present case, also held that a party seeking to depose the opponent's attorney "must demonstrate that the deposition is the only practical means available of obtaining the information." *Id.* at 86 (emphasis added). The court then held: "Also, other methods, such as written interrogatories which do not involve the

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same dangers as an oral deposition, should be employed." *Id.* (emphasis added). After analysis of the facts in *N.F.A.,* the court held that the attorney could not be deposed, because the party seeking the deposition failed to demonstrate a sufficient showing to permit the deposition. *Id.*

Defendants also rely on *United Phosphorus Ltd. v. Midland Fumigant, Inc.,* 164 F.R.D. 245 (D. Kan. 1995), for the rather bland proposition that attorneys are not exempt from discovery. (Answer, pages 13-14) Although the attorney deposition was allowed in that case, the attorney had agreed that he could be deposed, and the only issue was the scope of the deposition. *Id.* at 247. The attorney had personally participated in the underlying events leading to the lawsuit. Specifically, he had participated in the business negotiations at issue; he drafted contracts; and he attended corporate meetings at issue. In other words, he was clearly a percipient witness to the underlying events, and his deposition was limited to these events. *Id.* at 248-50. The situation in *United Phosphorus* was similar to the other cases on which the answer relies in the present case -- the attorney was a direct participant in, and a percipient witness to, the underlying transaction. That situation was nothing like the present case, where the attorney deponents are not witnesses to, and did not participate in, the underlying commercial transaction in the case.

B. Defendants' proposed "flexible approach"

This court's order directing an answer specifically required Defendants to address whether the court should adopt the three-factor test set forth in *Shelton v. American Motors Corp.,* 805 F.2d 1323 (8th Cir. 1986). Although Defendants' answer contends that the *Shelton* factors are satisfied in this case, the answer does not really address whether this court should adopt the *Shelton* analysis. The answer does, however, cite to a Second Circuit opinion adopting a "more flexible approach." (Answer, pages 16-17) Specifically, Defendants cite to *In re: Subpoena Issued to Dennis Friedman,* 350 F.3d 65 (2d Cir. 2003). Defendants cite language in *Friedman* adopting a flexible approach involving balancing of various factors, other than the *Shelton* factors. (Answer, page 17)

Actually, the entire *Friedman* opinion was *dicta* (despite the fact that the opinion was written by a judge who is now on the United States Supreme Court). After spending several

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pages discussing various tests that can be applied to attorney deposition cases, the *Friedman* opinion ended by stating: "However, we need not rule definitively whether the reliance on *Shelton* tainted the district court's exercise of discretion because we have recently been advised that [attorney] Friedman has agreed to be deposed. Under these circumstances, the appeal has become moot." *Id.* at 72. The court then concluded: "The appeal is dismissed as moot." *Id.* And in a footnote, the court specifically recognized that the mootness of the appeal meant that "any discussion of the merits is *dicta* and would normally be inappropriate." *Id.*, f.n. 4. The court recognized that its opinion was merely "a non-binding discussion." *Id.* In other words, Defendants in the present case are relying on an opinion that the court itself expressly recognized was *dicta* and merely a "non-binding discussion" intended to give guidance to trial judges in the Second Circuit.

In any event, even the *dicta* flexible test in *Friedman* precludes the deposition in the present case. The factors considered in *Friedman* included (1) whether the deposition would entail an inappropriate burden or hardship; (2) the lawyer's role in connection with the matter on which discovery is sought; (3) the risk of encountering privilege and work-product issues; and (4) the extent of discovery already conducted. *Id.* at 72. And the court specifically recognized that interrogatories can be used in lieu of an attorney's deposition.[3] *Id.*

In the present case, all of the *Friedman* factors weigh heavily in favor of precluding the attorney depositions. First, the depositions would entail an inappropriate burden or hardship. Defendants' answer expressly concedes that at Mr. Tharaldson's seven-day deposition,

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[3]Although the *Friedman* opinion suggests that the deposition of the attorney in that case may have been allowed if the issue had not become moot, it is noteworthy that the attorney was clearly a percipient witness to the underlying events in question. He had served as counsel during merger negotiations that were the subject of the subsequent litigation; the deposition only sought the attorney's information regarding his involvement in the merger negotiations; and the attorney "is not a litigator and is not counsel of record either in the court below or in the underlying action." *Id.* at 66-67. In other words, the attorney was clearly a percipient witness with personal knowledge (not merely knowledge gained from other sources) regarding the events that constituted the basis of the litigation, and he was not an attorney in the suit in which his deposition was sought.

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"Defendants' counsel painstakingly went through every allegation and claim in the 57-page, 311-paragraph complaint, asking for the factual bases supporting those allegations." (Answer, page 20, lines 4-6) There is every reason to believe that Defendants' counsel will adopt the same scorched-earth tactic at the attorney depositions he is seeking. Petitioners' attorneys will be burdened with spending an enormous amount of time preparing for the depositions and appearing at the depositions, instead of preparing for trial. This is certainly an inappropriate burden and hardship under the first *Friedman* factor.

Second, attorneys Morrill and Aronson had no direct role or connection with the underlying commercial transactions on which discovery is sought. They are not percipient witnesses with personal knowledge of the underlying facts alleged in the complaint. Thus, the second *Friedman* factor weighs against the depositions.

Third, there is a high risk of encountering privilege and work-product issues. As explained in detail in the petition, an attorney's thought process and mental impressions are invaded when the attorney is asked to segregate evidence and to identify documents that he remembers, that he relied on, or that he did not rely on, in formulating the allegations of the complaint.[4] Invading an attorney's thought process and mental impressions is forbidden "under any circumstances." *Wardleigh v. District Court,* 111 Nev. 345, 359, 891 P.2d 1180, 1189 (1995). The third *Friedman* factor certainly weighs against the attorney depositions in this case.

Fourth, the extent of discovery already conducted in this case clearly eliminates any need for the attorney depositions. This is particularly true in light of the extensive and comprehensive answers to interrogatories provided by plaintiffs. The contention interrogatories

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[4]The facts (or evidence) an attorney relied on in formulating the allegations of a complaint, long before trial, are often just the tip of the iceberg of facts that the attorney might rely on at trial. Thus, the question of what facts an attorney possessed at the outset of a lawsuit is an irrelevant question when the case gets to trial. In the present case, there have been dozens of depositions and thousands of documents disclosed. This additional evidence has fortified and supplemented the facts available to counsel when the complaint was first drafted. Thus, there is simply no relevance to any deposition questions asking Petitioners' attorneys to recite the facts on which they relied many months ago when drafting the complaint.

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sought "in detail all material facts" concerning the allegations of the complaint. (E.g., 2 P.App. 275, lines 5-7) One interrogatory answer, which was provided in response to a request for "all material facts" supporting the allegation of fraud, was nearly twelve full pages of information (much of it single spaced), providing a comprehensive recitation of the facts supporting the fraud claim. 2 P.App. 281-92.

Defendants now argue, for the first time ever, that Petitioners' comprehensive answers to the contention interrogatories were "worthless" and "useless" (Answer, page 20) Yet Defendants never filed a motion challenging the interrogatory responses and seeking an order requiring Petitioners to supplement the responses. This is similar to *BB & T Corp. v. United States*, 233 F.R.D.447 (M.D. N.C. 2006), where the plaintiff sought defense counsel's deposition, to obtain facts on which defenses were based. In denying the deposition, the court noted that when a case involves complicated issues, contention interrogatories may be useful and may eliminate the need for attorney depositions. *Id.* at 449-50. The plaintiff argued, however, that the defendant's answers to contention interrogatories were cursory and unhelpful. Although the court agreed that the interrogatory answers were inadequate, the court observed that the plaintiffs had not pursued a motion to compel further answers. The court held that "until a party has first shown that the interrogatory process cannot be used, it may not seek to use depositions [of attorneys] for contention discovery." *Id.* at 449. Because the plaintiffs had not filed a motion to compel more complete answers to interrogatories -- before the plaintiffs sought opposing counsel's deposition -- the court rejected the plaintiffs' argument that the insufficient answers to the contention interrogatories provided justification for the attorney deposition.[5]

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[5]One of the cases on which Defendants rely is *In re Savitt/Adler Litigation,* 176 F.R.D. 44 (N.D.N.Y. 1997). (Answer, page 19, lines 23-28) The *Savitt/Adler* opinion dealt with a motion to compel the plaintiffs to supplement their answers to interrogatories. The interrogatories had asked the plaintiffs to state facts supporting various contentions in their complaint. In ruling on the defendants' discovery motion, the court held that many of the plaintiffs' responses were inadequate. Thus, the court ordered the plaintiffs to supplement their responses to the contention interrogatories. This is obviously the appropriate (continued)

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Regarding the interrogatory responses, this court's order directing an answer specifically required Defendants to "explain the timing of real parties in interest's attempts to depose petitioners' counsel, in light of the October 2009 detailed answers to interrogatories, . . ." (Order, p.2) The answer fails to provide an explanation. As observed in this court's order, the interrogatory responses were served in October 2009. 2 P.App. 312. Defendants did not seek the attorney depositions until nearly a year later, in September 2010. 2 P.App. 317. Defendants never challenged the adequacy of the interrogatory responses during this entire time.[6]

C. The *Shelton* approach

In addition to the flexible approach, defendants also contend that the *Shelton* factors are satisfied in the present case.

1. The first *Shelton* factor (no other means exists to obtain the information than to depose opposing counsel)

Defendants argue that this factor is satisfied where the evidence supporting a party's position is "known exclusively by trial counsel." (Answer, page 18, lines 20-21) Defendants

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(continued) remedy in a case where a defendant sends contention interrogatories to the plaintiff, and where the defendant believes the plaintiff's responses are inadequate. In the present case, although Defendants rely on *Savitt/Adler* for another point of law, Defendants ignore the appropriate procedural device used in that case (i.e., a motion to compel further or supplemental interrogatory responses). Here, during the year after Petitioners served the interrogatory responses in October 2009, Defendants never filed a motion challenging the adequacy of the responses. Thus, Defendants were presumably satisfied with petitioner's interrogatory responses. The Answer's argument in this court appears to be the first time Defendants have ever suggested that Petitioners' responses to the contention interrogatories were inadequate.

[6]This court's order directing an answer also specifically required Defendants to explain the timing of their attempts to depose Petitioners' counsel "in light of the discovery cutoff of November 19, 2010, and the trial set for March 8, 2011." (Order, pp. 2-3) The answer essentially ignores this part of the order directing an answer, providing no explanation for the late timing of the depositions. Of course, the record here supports a strong inference that Defendants' timing of the deposition request -- coming moments before the discovery cutoff, and on the eve of trial -- was designed, to a large extent, as part of strategy to harass Petitioners and to disrupt their counsel from necessary trial preparation. See *Kaiser, supra*, 161 F.R.D. at 381 (a deposition of counsel presents a "unique opportunity for harassment" and "will disrupt counsels' preparation of parties' cases").

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cite *Alcon Laboratories, Inc. v. Pharmacia Corp.*, 225 F.Supp. 2d 340 (S.D.N.Y. 2002). (Answer, page 18, lines 22-28) Although Defendants quote various language from the *Alcon* opinion, Defendants conveniently omit the opinion's observation that depositions of opposing counsel "are strongly disfavored" in case law. *Id.* at 342. Additionally, in *Alcon* the attorney's deposition was truly the only source of information on an issue in the patent infringement lawsuit. The attorney whose deposition was sought was the attorney who had prepared the original patent more than 20 years earlier. The patent infringement lawsuit included a defense that was "predicated on multiple events, most or all of which involve [the attorney] as a participant or possible percipient witness." *Id.* The attorney was the only person whose name was on the face of the patent as an attorney; he had personally filed the patent documents; and he was "the only source" for relevant information in the case. *Id.*

In addition to the fact that the attorney was a percipient witness and a participant in historical events leading to the patent infringement action, the court also noted that the reluctance of courts to allow attorney depositions is, for the most part, not applicable in a situation where the attorney was counsel in a previous action, not the action in which the deposition is being sought. *Id.* at 343. Furthermore, the court held that an attorney's deposition should be precluded "if interrogatories are available." *Id.*

In the present case, attorneys Morrill and Aronson were not involved in the real estate development and commercial loan transactions giving rise to the lawsuit. Unlike the attorney in *Alcon*, the attorneys in the present case are not percipient witnesses and do not have any first-hand knowledge of relevant facts.

Defendants next rely on *United Phosphorus, Ltd. v. Midland Fumigant, Inc., supra.* (Answer, page 19, lines 8-17) Defendants would have this court believe that the issue in *United Phosphorus* was whether the attorney could be deposed. This is simply untrue. As noted earlier in this reply, the attorney in *United Phosphorus* expressly agreed that he could be deposed. The sole issue was the scope of the deposition inquiry. *Id.* at 247 ("The issue in this case is not whether opposing counsel's deposition will be taken. Defendant [the client] agrees that [the

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attorney's] deposition is appropriate, and [the attorney] has agreed to give his deposition. Rather, the issue now before the court is the scope of the deposition inquiry.")

As also noted above, the attorney in *United Phosphorus* had been heavily involved in the transactions giving rise to the litigation. He personally participated in negotiations between the two litigant companies; he drafted agreements; he attended meetings involving officers of the two corporate litigants; he prepared and kept relevant corporate records; and he drafted a letter containing a misrepresentation which was one of the bases for the lawsuit. *Id.* at 248-49. As the court observed, the attorney had "personal knowledge of the underlying facts which are related to the action." *Id.* at 250. Obviously, this is nothing like the circumstances of the present case.

In further discussion of the first *Shelton* factor, Defendants contend that other discovery devices in this case -- including more than 50 days of depositions, and more than one million pages of documents produced -- were insufficient to provide the information that Defendants are seeking from Petitioners' attorneys. (Answer, pages 19-20) As noted above, Defendants never filed a motion challenging the adequacy of Petitioners' discovery responses; and Defendants never sought an order compelling petitioners to supplement the interrogatory responses. Without taking these fundamental steps, Defendants cannot argue that the allegedly insufficient answers to contention interrogatories now provide a belated justification for the attorney depositions. See *BB&T Corp., supra,* 233 F.R.D. at 449-50.

In conclusion, Defendants have not established that the first *Shelton* factor is satisfied. Attorneys Morrill and Aronson are not the only source of information. In fact, the attorneys have no personal knowledge of the underlying facts, because they were not participants in, or percipient witnesses to, any of the underlying transactions.

2. The second *Shelton* factor (the information sought is relevant and non-privileged)

On the second *Shelton* factor, defendants argue that the relevance of the information they seek from attorneys Morrill and Aronson "cannot be questioned," because defendants seek "the factual and evidentiary bases for the specific allegations in the Complaint." (Answer, page 21,

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lines 18-20) Actually, the opposite is true. Because attorneys Morrill and Aronson are not percipient witnesses to any of the facts in this litigation, their deposition testimony will be completely irrelevant.

Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. NRS 48.015. Because attorneys Morrill and Aronson did not participate in any of the underlying events, and because they only have second-hand information they gathered as attorneys for petitioners, their second-hand knowledge is irrelevant. See also NRS 50.025 (witness may not testify to a matter unless the witness has personal knowledge of the matter).

The second *Shelton* factor also includes an analysis of whether the information sought at the deposition is privileged. The petition established that the information defendants are seeking in this case is protected by the work-product rule. (Petition, pages 14-15) Defendants' only response is that the district court's order preserved petitioners' right to make objections during the attorney depositions. (Answer, pages 21-22) This argument, however, ignores the careful analysis conducted by the *Shelton* court, as explained in detail at pages 14-15 of the petition in this case. In *Shelton*, the court held that even seemingly innocent questions regarding the attorney's work in examining and selecting documents, and regarding the attorney's memory regarding such documents, can invade the attorney's thought process, revealing the attorney's mental impressions. *Id.*

Here, Defendants want to ask Petitioners' attorneys to describe and identify the evidence that the attorneys are relying on to prove the allegations of the complaint. This directly invades the attorneys' thought process and mental impressions. For example, as the *Shelton* court observed, an attorney's deposition testimony regarding documents that the attorney may recall can provide insight into the attorney's thought process, because the testimony would reveal which documents were important enough for the attorney to remember, and which documents were not. *Shelton,,* 805 F.2d at 1328-29.

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Attorneys Morrill and Aronson cannot be expected to testify regarding "the facts" that formed the basis of their case, without directly or indirectly revealing their mental impressions and thought processes. This is absolutely prohibited. *Wardleigh,* 111 Nev. at 359 (attorney's mental impressions are "not discoverable under any circumstances.")

Defendants vaguely suggest that Mr. Tharaldson somehow consented to the attorney depositions, or that he waived the attorney-client privilege or the work-product rule at his deposition. (Answer, pp. 2-3 and 20, citing to deposition testimony indicating that Defendants can ask Petitioners' attorneys what they relied upon). There is no basis for any suggestion that Mr. Tharaldson consented to the attorney depositions, because he was never asked whether he agreed that his attorneys could be deposed. Nor is there a basis for suggesting that he waived any privilege or work-product protections. Indeed, the record conclusively establishes that he did not waive any privileges or protections.[7] 2 P.App. 228.

3. The third *Shelton* factor (whether the information is crucial to the preparation of the case)

Defendants argue that "it is difficult to imagine what could be more crucial to the preparation of Defendant's case than the factual bases for the 311 paragraphs of allegations in petitioners' complaint." (Answer, page 22, lines 12-14) Defendants argue that without these depositions, defendants "will be handicapped in a way that no defendant should ever be handicapped." (Answer, page 23, lines 11-12)

The court should ignore these gross exaggerations. Defendants' own filings in this court establish that defendants have certainly not been handicapped in their defense of the case without the attorney depositions. On February 9, 2011, Defendants filed a motion to expedite

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[7]The answer also contends that attorney Morrill waived any work-product protection when he had conversations with Vicki and Jim Sheppard. (Answer, p. 16) The answer cites to appendix pages 539 and 543-45 as support for the waiver argument. Those pages reveal no blanket waiver (or even a limited waiver) of work-product protection. Additionally, Morrill's conversations with the Sheppards certainly did not disclose the so-called factual bases for Petitioners' claims in this lawsuit, which is the subject on which Defendants seek Morrill's deposition.

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this writ proceeding. Defendants' motion informed this court that Petitioners "recently lost more than half a dozen motions for summary judgment" in the district court. (Motion, page 3, lines 20-21) In other words, even without the depositions of attorneys Morrill and Aronson, Defendants have won more than half a dozen motions for summary judgment. This alone demonstrates that the Defendants have more than enough evidence with which to understand and defend this case, without the necessity of the two attorney depositions. Defendants have hardly been "handicapped" without the depositions.[8]

Defendants also argue that attorneys Morrill and Aronson are the only witnesses who can identify evidentiary facts that support the claims against Defendants. (Answer, page 23, lines 12-13) This is not true. The responses to Defendants' extensive contention interrogatories identify the facts supporting Petitioners' claims; and other discovery responses identify all witnesses with personal knowledge of such facts, and all documentary evidence relevant to the disputed facts.

As noted in the petition, the third *Shelton* factor must be considered in the context of the tremendous disruption that the attorney depositions will cause. (Petition, pages 16-17) Defendants' answer concedes that at Mr. Tharaldson's seven-day deposition, defense counsel "painstakingly went through every allegation and claim in the 57-page, 311-paragraph complaint, asking for the factual bases supporting those allegations." (Answer, page 20, lines

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[8]Defendants' answer twice states that attorneys Morrill and Aronson "concocted" the allegations of Petitioners' case. (Answer, p. 1, line 16, and p. 4, line 2). Defendants' puffery is meaningless. If a plaintiff's allegations are truly concocted, without any evidentiary support disclosed during discovery, the appropriate remedy for the defendant is a motion for summary judgment. NRCP 56. Or, if a plaintiff attempts to introduce new evidence at trial (i.e., evidence which was not disclosed during discovery), the defendant's remedy is to object to the new evidence and seek to exclude it. In either situation, a deposition of the plaintiff's attorney is not an appropriate remedy.

Furthermore, the contention that Petitioners' case is merely "concocted" is belied by the record. The district court has denied Defendants' summary judgment motions on various claims, finding that there are genuine issues of fact on claims such as fraudulent concealment, constructive fraud, and other claims. 4 P.App. 567-78.

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4-6) Defense counsel will undoubtedly adopt the same painstaking tactic at the attorney depositions he is seeking. This will cause Petitioner's attorneys to be burdened with spending enormous amounts of time preparing for the depositions and appearing at the depositions, instead of preparing for trial. Defendants' answer essentially ignores the tremendous burden and disruption that the attorney depositions will cause (and are probably intended to cause).

D. The Arizona court's decision

As noted in the petition, the Nevada Special Master and the district court acknowledged the Arizona judge's decision, but they nevertheless gave the decision no weight whatsoever. (Petition, pages 18-20) Defendants' answer ignores all of the legal authorities cited in the petition (at pages 19-20), dealing with constitutional requirements and principles of estoppel and issue preclusion. Indeed, the answer fails to cite a single legal authority in the section dealing with the Arizona court's decision. (Answer, pages 24-25)

Defendants' only response is pointing the finger at attorneys Morrill and Aronson for obtaining "the decision of their home court" in quashing the Arizona subpoenas. (Answer, page 24, lines 6-7) Defendants contend that attorneys Morrill and Aronson should not have argued the legitimacy of the depositions in "their home court in Arizona." (Answer, page 24, lines 12-14)

Of course, Defendants conveniently ignore the fact that they are the parties who filed the Arizona action, obtained the Arizona subpoenas, and essentially invited the deponents to file the motion to quash in the Arizona court.[9] Furthermore, Defendants' counsel was given a full and fair opportunity to present his entire argument, and nothing in the record suggests that the Arizona judge somehow gave a "home court" advantage to attorneys Morrill and Aronson.

The answer argues that the petition ignored the Arizona judge's comment that he did not intend to suggest how the Nevada Special Master should rule. (Answer, page 25, lines 6-10) Defendants go so far as to state that Petitioners' counsel's "failure to mention" the Arizona

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[9]The subpoenas that Defendants obtained from the Arizona court expressly indicated that any person served with such a subpoena has the right to object, pursuant to the Arizona Rules of Civil Procedure. 1 P.App. 128-29.

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judge's comment constitutes an ethical violation of the rule requiring full candor to a court. (Answer, page 25, lines 27-28) Obviously, Defendants did not read the entire petition. Had they done so, they would have observed that Petitioners did not ignore or fail to mention the Arizona judge's comment. The comment was specifically discussed in the petition at page 20, lines 25-28.[10]

III

Conclusion

The petition established that a writ should issue, preventing the attorney depositions in question. The answer fails to provide cogent arguments against issuance of the writ. Accordingly, a writ should issue, and the depositions should be denied.

DATED: February 23, 2011

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[10]Finally, Defendants allege that attorney Morrill attempted to tamper with witnesses Jim and Vicki Sheppard, and that this somehow justifies Morrill's deposition. (Answer, pages 9-11) This argument was anticipated and rebutted in the petition. (Petition, pages 17-18; see also 1 P.App. 75-76) In any event, the final versions of the Sheppard affidavits were accurate (1 P.App. 75-76; 2 P.App. 330-33), and no evidence was destroyed (2 P.App. 326-28). Any issues involving the admissibility of this subject at trial will presumably be dealt with in motions in limine. Deposing Morrill regarding the Sheppard interviews would invade his work-product protection because the questioning would necessarily delve into his thought process and mental impressions concerning the interviews. The Sheppards have been thoroughly deposed regarding their conversations with Morrill; and Petitioners do not intend to call Morrill has a witness on any matter, including his conversations with the Sheppards. This entire issue is nothing but a red herring that is irrelevant in this writ proceeding.

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Lemons, Grundy & Eisenberg and that on this 23 day of Feb., 2011, I am causing to be sent via U.S. Mail, postage prepaid, a true and correct copy of the Reply in Support of Writ Petition and Supplemental Appendix (Vol. 4) to:

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