IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN B. QUINN, an individual, MICHAEL T. ZELLER, an individual, MICHAEL L. FAZIO, an individual, and IAN S. SHELTON, an individual,

Petitioners,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the County of Clark; and THE HONORABLE ELIZABETH GONZALEZ, District Judge,

Respondents.

and

KIMMARIE SINATRA, an individual, WYNN RESORTS, LIMITED, a NevadaCorporation, and ELAINE P. WYNN, an individual,

Real Parties in Interest.

Supreme Court Case No.

District Court Case No. A-12-656710-B

PETITION FOR WRIT OF PROHIBITION OR, IN THE ALTERNATIVE, WRIT OF *MANDAMUS*

PAT LUNDVALL (#3761)
McDONALD CARANO LLP
2300 West Sahara Avenue, Suite 1200
Las Vegas, NV 89102
Telephone: (702) 873-4100
Fax: (702) 873-9966
lundvall@mcdonaldcarano.com

Attorneys for Specially Appearing Petitioners

NRAP 26.1 Disclosure

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Petitioners John B. Quinn, Michael T. Zeller, Michael L. Fazio, and Ian S. Shelton are individuals, residents of California, and attorneys in the Los Angeles office of QUINN EMANUEL URQUHART & SULLIVAN LLP. Petitioners are represented in this litigation by Pat Lundvall of MCDONALD CARANO LLP.

Petitioners formerly represented Elaine P. Wynn, an individual, in this litigation from January 2016 until March 2017. Ms. Wynn is currently represented in this litigation by Daniel F. Polsenberg and Abraham G. Smith of LEWIS ROCA ROTHERGERBER CHRISTIE LLP; Mark E. Ferrario and Tami D. Cowden of GREENBERG TRAURIG LLP; James M. Cole and Scott D. Stein of SIDLEY AUSTIN LLP; and William R. Urga and David J. Malley of JOLLEY URGA WOODBURY HOLTHUS & ROSE.

RESPECTFULLY SUBMITTED this 21st day of November, 2017.

McDONALD CARANO LLP

By: */s/ Pat Lundvall*

PAT LUNDVALL (#3761)
McDONALD CARANO LLP
2300 West Sahara Avenue, Suite 1200,
Las Vegas, NV 89102
Telephone: (702) 873-4100
Fax: (702) 873-9966
lundvall@mcdonaldcarano.com

Attorneys for Specially Appearing Petitioners

Routing Statement

The Nevada Supreme Court should retain this writ proceeding because it presents issues of first impression on matters of statewide importance, including the interpretation of the Uniform Interstate Depositions and Discovery Act, the power of courts in this state to grant a request for relief that was previously made and is pending before the courts of another state, and the interpretation of this Court's stringent test limiting depositions of a party's trial attorneys. NRAP 17(a)(10).

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MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR, IN THE ALTERNATIVE, WRIT OF *MANDAMUS*

I. INTRODUCTION

The Uniform Interstate Depositions and Discovery Act ("UIDDA") has been enacted by 38 states, including Nevada. NRS 53.100-.200. In this case, and in violation of the UIDDA and the holdings of at least seven other state supreme courts, the district court wrested exclusive jurisdiction over California subpoenas from a California court, which had already made substantive rulings in favor of Petitioners, and then ordered four non-party, out-of-state trial attorneys to sit for deposition in Nevada to answer questions as alleged percipient witnesses about another party's claim against their former client.

In compelling these attorneys to appear for depositions regarding matters that indisputably arose from their representation of a former client, the district court usurped the exclusive jurisdiction of the California court and abrogated the former client's privileges and absolute protections without any analysis of this Court's stringent test providing that attorney depositions are "exceptionally limited" to "remarkable" circumstances. *Club Vista Financial Services LLC v. Eighth Judicial Dist. Court*, 128 Nev. Adv. Op. 21, 276 P.3d 246, 250 (2012).

Petitioners John B. Quinn, Michael T. Zeller, Michael L. Fazio, and Ian S. Shelton are California residents who practice in the Los Angeles office of Quinn Emanuel Urquhart & Sullivan LLP, and who represented Elaine P. Wynn in this

case from January 2016 until March 2017. They respectfully ask this Court to issue a writ of prohibition or, in the alternative, *mandamus* to correct significant errors of law that, if left unaddressed, will adversely affect courts and litigants in both Nevada and California, will create a conflict between Nevada and the supreme courts of at least seven other states, and infringe upon fundamental privileges. These grave abuses of discretion justify extraordinary review because "[i]f improper discovery were allowed, the assertedly privileged information would irretrievably loose its confidential and privileged quality and petitioners would have no effective remedy, even by a later appeal." *Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 350-51, 891 P.2d 1180, 1183-84 (1995).

Extraordinary review is appropriate here because the district court's unprecedented and capricious order of November 6, 2017 violates important legal principles and privileges that cannot be adequately remedied after final judgment. The compelling reasons for the writ are four-fold:

First, the district court's order compelling the depositions of non-party, out-of-state attorneys subpoenaed in California contravenes the language of the UIDDA and the holdings of seven state supreme courts that enforcement of foreign subpoenas pursuant to the UIDDA is subject to the exclusive jurisdiction and laws of the state where discovery is sought—in this case, California. *See Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 289 Va. 426, 435, 770 S.E.2d 440, 443-44 (2015)

(collecting supreme court cases from Alabama, Louisiana, Colorado, Florida, Mississippi, and Oklahoma, and joining the holding of those courts).

In ordering the Quinn Emanuel attorneys to appear for depositions in Las Vegas, the district court clearly exceeded its authority. This ruling violates the exclusive jurisdiction of the California Superior Court, which had already issued a merits ruling denying on due process grounds the same relief awarded by the district court, and which will imminently decide a petition to quash the California subpoenas at a hearing taking place on November 22.

In defying the UIDDA, the district court improperly wrested jurisdiction from, and set up a tug of war with, the California court system—exactly the kind of jurisdictional battles the UIDDA was designed to eradicate. This error, alone, compels a writ of prohibition or *mandamus*. *See Club Vista*, 276 P.3d at 249 ("A writ of prohibition may issue to arrest the proceedings of a district court exercising its judicial functions when such proceedings are in excess of the jurisdiction of the district court.")

Second, the district court improperly sought to sidestep the UIDDA and concoct jurisdiction over foreign subpoenas based on Petitioners' now-expired *pro hac vice* applications. (PA459, 452, 454, 458.) This purported jurisdictional ground is baseless. The fact that out-of-state attorneys file a routine admission to appear on behalf of a client *as counsel* does not give the district court unbridled

authority to compel them to appear *as percipient witnesses* in Nevada long after they withdraw from the representation.

Petitioners were served with California subpoenas. Their depositions were noticed in Los Angeles County, and their petition to quash remains pending before the California Superior Court. Even as of today, Petitioners have been served with no Nevada subpoena or other discovery process. The district court's vast, unwarranted expansion of *pro hac vice* jurisdiction to trump the constraints of the UIDDA and basic Nevada rules is unprecedented in its scope and requires immediate review and relief. *See Redeker v. Eighth Judicial Dist. Court,* 122 Nev. 164, 167, 127 P.3d 520, 522 (2006) "([T]his court may exercise its discretion to grant *mandamus* relief where an important issue of law requires clarification . . . .").

Third, even if the district court somehow could establish jurisdiction over the California subpoenas (it cannot), it also compelled the attorney depositions without applying or analyzing this Court's rigorous three-factor test in *Club Vista Financial Services LLC v. Eight Judicial District Court*, or its California counterpart, *Carehouse Convalescent Hospital v. Superior Court*, 143 Cal. App. 4th 1558, 1563 (2006).[1] This error requires writ relief because it abrogates Ms.

[1] *Club Vista* embraced the three-factor test adopted by the Eighth Circuit in *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986), "under which

Wynn's privileges and other protections. *Club Vista* presents a threshold test that bars attorney depositions in the first instance if the test is not met. *Club Vista*, 276 P.3d at 250 ("in the absence of these conditions, a party should not be permitted to depose an opposing party's attorney . . . .")

In disregarding the presumption against the "disfavored [] practice of taking the deposition of a party's attorney" due to the risk of harassment and the chilling effect on the attorney-client relationship, the district court ignored that "privileged information about an opponent's litigation strategy" will be gleaned from compelled attorney depositions. *Id.* at 250-51. This bell cannot be unrung once the depositions occur. By failing to consider whether the information sought could be obtained through other means or whether the information was crucial to the retaliatory "abuse of process" claim that triggered these attorney depositions, the district court failed to apply the "heightened standard when a party is attempting to

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the party seeking to take the deposition of an opposing party's counsel has the burden of proving that (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and non privileged; and (3) the information is crucial to the preparation of the case.'" *Club Vista*, 276 P.3d at 250. California similarly imposes stringent requirements before any attorney deposition may proceed. *See Carehouse*, 143 Cal. App. 4th at 1563 ("California applies a three-prong test in considering the propriety of attorney depositions. First, does the proponent have other practicable means to obtain the information? Second, is the information crucial to the preparation of the case? Third, is the information subject to a privilege? Each of these prongs poses an independent hurdle to deposing an adversary's counsel; any one of them may be sufficient to defeat the attempted attorney deposition.").

depose opposing counsel," which requires it to consider "alternative discovery methods and discourage endeavors to seek confidential and privileged information." *Id.*

Fourth, the district court erroneously permitted the depositions of Ms. Wynn's former attorneys without even considering whether they would invade fundamental privileges and protections, including the attorney-client privilege, work product doctrine, absolute litigation privilege, *Noerr-Pennington* doctrine, and settlement confidentiality. In light of the district court's failure to address these objections before compelling the depositions, writ review is warranted to ensure that such privileges are considered before any discovery orders are issued. For these reasons, this Court should grant Petitioners' request for a writ of prohibition or, in the alternative, *mandamus*.

II. ISSUES PRESENTED

1. Whether the district court erred as a matter of law when it ruled, contrary to Nevada law, seven other state supreme courts, and the UIDDA, that it could usurp the exclusive jurisdiction of a California court over California subpoenas, ignore the preclusive effect and deference owed to orders of the California court, and compel non-party, out-of-state attorneys to appear for depositions as percipient witnesses in Nevada without the service of any Nevada discovery process.

2. Whether the district court erred as a matter of law when it ruled that its expired *pro hac vice* jurisdiction over former attorneys includes the ability to compel non-party, out-of-state residents to appear as percipient witnesses in Nevada.

3. Whether the district court erred as a matter of law when it compelled the depositions of former trial attorneys for a party without applying the three-factor test adopted by this Court in *Club Vista Financial Services LLC v. District Court*.

4. Whether the district court erred as a matter of law in failing to consider whether privileges and absolute protections barred the attorney depositions, including the attorney-client privilege, work product doctrine, absolute litigation privilege, *Noerr-Pennington* doctrine, and settlement confidentiality.

III. RELIEF SOUGHT

Petitioners seek a writ of prohibition preventing the district court from enforcing its November 6, 2017 Order compelling non-resident Quinn Emanuel attorneys to appear as alleged percipient witnesses for depositions in Nevada. In the alternative, Petitioners seek a writ of *mandamus* (1) compelling the court to vacate and expunge its November 6 order; (2) to hold that the California subpoenas are subject to the exclusive jurisdiction of the California Superior Court and the laws of California, and (3) to hold that the district court's residual *pro hac vice*

jurisdiction over former attorneys does not include the power to compel non-party, out-of-state residents to appear as percipient witnesses in Nevada, especially in the absence of any Nevada discovery process to enforce in the first place.

IV. FACTS NECESSARY TO UNDERSTAND THE RELIEF SOUGHT

A. Background on the Underlying Litigation

Kim Sinatra is an executive of Wynn Resorts Limited. (PA54.) She seeks to depose four Quinn Emanuel attorneys who represented her litigation adversary, Ms. Wynn. The underlying lawsuit originally was filed in 2012. (PA127-166.)

Between March 12, 2012 and February 2, 2016, Ms. Wynn was represented in the litigation by Munger Tolles & Olson LLP, both in defending against claims and in asserting her own claims. As a result of improper conduct by Wynn Resorts and its executives, including Mr. Wynn and Ms. Sinatra, and despite the fact that she is one of Wynn Resorts' largest shareholders, Ms. Wynn was ousted from its Board in 2015. As Ms. Wynn has alleged, Wynn Resorts, its CEO and Chairman Steve Wynn, and Ms. Sinatra breached and/or interfered with a Stockholders Agreement governing Ms. Wynn's shares of Wynn Resorts stock, violated their fiduciary duties, and orchestrated her unlawful ouster from the Board, in retaliation for the claims that Ms. Wynn had asserted against Mr. Wynn, and for Ms. Wynn's attempts to address serious corporate governance problems and malfeasance within Wynn Resorts. (PA54-71.)

Quinn Emanuel represented Ms. Wynn from January 2016 to March 2017. (PA5-10.) During that time, Ms. Wynn asserted claims against Ms. Sinatra, alleging that she interfered with the Stockholders Agreement and orchestrated Ms. Wynn's unlawful ouster from the Board in April 2015. (PA84-85, 87-88.) In particular, Ms. Wynn alleged that when she was asked questions regarding apparent improprieties by senior management of the Company, she encountered a "tone at the top" that rebuffed her concerns and unlawfully punished her inquiry. (PA54, 56, 67-68.) Ms. Wynn further alleged that Mr. Wynn and Ms. Sinatra intentionally participated in, and allowed others, to engage in illegal conduct at Wynn Resorts. (PA69-70.) Ms. Wynn also alleged that Mr. Wynn, along with Ms. Sinatra, effectively undermined the role and proper decision-making authority of the Board by withholding material information from or affirmatively misleading the Board, and by retaliating against Ms. Wynn for raising proper inquiries into the conduct of Wynn Resorts, including by Mr. Wynn. (PA82-85, 86-88.)

The district court has denied Ms. Sinatra's motion to dismiss Ms. Wynn's claims (PA98-103) and compelled Ms. Sinatra to provide discovery related to such claims. (PA93-95.) On September 7, 2017, many months after Quinn Emanuel withdrew as Ms. Wynn's counsel, Ms. Sinatra filed a retaliatory "abuse of process" claim against Ms. Wynn (PA118-124), and noticed depositions of four of Ms. Wynn's former attorneys to take place in California, purportedly to obtain

percipient fact discovery to support her new (and only) claim. (PA127-166.) Ms. Sinatra's sole basis for seeking the depositions is to question counsel about litigation matters during their representation of Ms. Wynn, which necessarily involve protected settlement communications and privileged information.

B. Quinn Emanuel's Representation of Elaine Wynn

On February 2, 2016, Munger Tolles withdrew as counsel of record for Ms. Wynn, and Quinn Emanuel entered its appearance as her new trial counsel. (PA625-629.) Between approximately January 2016 and November 2016, Quinn Emanuel attorneys had various settlement communications with counsel for Mr. Wynn, Ms. Sinatra, and Wynn Resorts in an attempt to resolve the parties' disputes. (PA819-820.) During the course of those settlement discussions, counsel for both parties orally agreed—consistent with the law governing the confidentiality of settlement discussions—that any such discussions would not be used against the other party; nor would they be used to support any claim or other allegation of misconduct. (*Id.*)

Shortly after Quinn Emanuel's retention, Ms. Wynn informed counsel for Mr. Wynn, Ms. Sinatra, and Wynn Resorts that she intended to assert additional claims against them. (PA800-801.) Prior to filing a motion for leave to amend her pleading, Ms. Wynn shared drafts of her proposed amended pleading with Respondents to obtain their consent to amend her pleading. (*Id.*) Because

Respondents denied consent, Ms. Wynn filed under seal a motion for leave to amend her pleading. (*Id.*) After receiving leave from the Court, Ms. Wynn filed her amended pleading on March 28, 2016, alleging various contractual and tort claims, including claims against Wynn Resorts and Ms. Sinatra. (*Id.*) Quinn Emanuel thereafter served written discovery and deposed witnesses in order to obtain evidence supporting Ms. Wynn's claims.

On June 3, 2016, Wynn Resorts filed a motion to disqualify Quinn Emanuel, claiming that Ms. Wynn received privileged information during her time on the Board that Ms. Wynn used against Wynn Resorts. Quinn Emanuel opposed that motion. In response, the district court stayed all merits discovery, implemented protocols to collect documents, and appointed a special master to review certain documents in Quinn Emanuel's possession. These disqualification proceedings dragged on from June 2016 until March 2017. During this period, Wynn Resorts filed multiple motions asserting that Quinn Emanuel violated court orders or did not adequately comply with the protocol. Quinn Emanuel opposed those motions.

In connection with those satellite proceedings, the district court granted leave to depose three of the Quinn Emanuel attorneys who are Petitioners here—Mr. Zeller, Mr. Fazio, and Mr. Shelton. (PA815.) Those depositions occurred on February 24 and 27 and March 6, 2017, respectively. (*Id.*) Due to the substantial costs and inordinate delays associated with these protracted proceedings, Quinn

Emanuel subsequently withdrew as counsel for Ms. Wynn. Ms. Wynn filed a substitution of counsel on March 9. (PA5-10.)

Although Quinn Emanuel had withdrawn, the Court held an evidentiary hearing on March 13, 2017 because the parties could not reach a stipulation regarding how to complete the review of documents in Quinn Emanuel's possession. The parties ultimately reached a stipulation on March 17, which specifically reflected their agreement that the resolution entailed no finding of wrongdoing. The Court entered the stipulation as an order and ended the evidentiary hearing without ruling on the various disqualification or other motions filed by Wynn Resorts.

C. Kim Sinatra's "Abuse of Process" Claim against Elaine Wynn

After Quinn Emanuel withdrew, Greenberg Traurig LLP and Sidley Austin LLP assumed the representation of Ms. Wynn, and have continued to pursue her claims. (PA5-10.) The district court denied Ms. Sinatra's motion to dismiss to claims asserted by Ms. Wynn (PA98-103) and, because Wynn Resorts had been stonewalling, granted Ms. Wynn's motions to compel discovery. (PA93-95.)

The discovery deadline was November 3, 2017 (PA96), and the case is set for trial on April 16, 2018. (PA2.) The supposed facts supporting Mr. Sinatra's "abuse of process" claim occurred between January and June 2016 and were known to her since that time—well over 16 months ago. (PA119-123.) Ms.

Sinatra nevertheless elected not to pursue discovery sought by the subpoenas or even assert her claim against Ms. Wynn until September 7, 2017—less than two months before the November 3 discovery cutoff. (PA124.) And even after those unreasonable delays, Ms. Sinatra waited for weeks more—until late October—before pursuing the attorney depositions at issue here. (PA128, 138, 148, 148.)

Ms. Sinatra's "abuse of process" claim identifies three categories of allegedly improper acts that relate to Ms. Wynn's litigation conduct during the time she was represented by Quinn Emanuel: (1) "making of extortionate settlement offers both before and after initiating legal process," (2) "filing the claims," i.e., her claims against Ms. Sinatra and Wynn Resorts, and (3) "propounding an unreasonable amount of discovery." (PA123.)

On October 12, 2017, over a month after she asserted her "abuse of process" claim, Ms. Sinatra's counsel signed *California* subpoenas directed to the Quinn Emanuel attorneys pursuant to the UIDDA. (PA128, 138, 148, 148.) Ms. Sinatra personally served Mr. Fazio with his California subpoena on October 14, and she personally served Mr. Quinn and Mr. Shelton with their subpoenas on October 17. (PA813.) Ms. Sinatra has not personally served Mr. Zeller with any subpoena as of the date of filing this writ petition. (*Id.*) Ms. Sinatra purported to notice the depositions of Mr. Zeller, Mr. Quinn, Mr. Shelton, and Mr. Fazio for October 24, 25, 26, and 31, 2017, respectively. (*Id.*) To date, Ms. Sinatra has served none of

the Petitioners with any Nevada subpoenas or other discovery process or even attempted to do so.

The Quinn Emanuel attorneys served written objections to the California subpoenas on October 19. (PA596-600, 602-606, 608-612, 614-618, 813.) After unsuccessful meet and confer efforts, the Quinn Emanuel attorneys filed on October 23, 2017 a petition to quash the subpoenas in the California Superior Court in accordance with the procedures of the UIDDA. (PA523-547.) The petition to quash in the California Superior Court asserted each of the following grounds: (1) Ms. Sinatra failed to satisfy California's stringent three-factor test governing depositions of a litigation adversary's counsel; (2) Ms. Sinatra seeks information barred from disclosure by privileges and absolute protections, including the attorney-client privilege, work product doctrine, litigation privilege, *Noerr-Pennington*, and settlement confidentiality; (3) the subpoenas impose an unfair, undue burden on non-party attorneys because Mr. Fazio and Mr. Shelton have no personal knowledge of the settlement communications that form the basis of the "abuse of process" claim; (4) Mr. Zeller, Mr. Fazio, and Mr. Shelton have already been deposed once, and Respondents have not obtained the required leave necessary to obtain a second deposition from them; and (5) Ms. Sinatra failed to effectuate service of the Subpoenas on Mr. Quinn and Mr. Shelton within the

minimum time period before their depositions, and in the case of Mr. Zeller, has not effectuated service at all. (PA525-526.)

D. The Quinn Emanuel Attorneys File their Petition to Quash in the California Superior Court

On October 27, Ms. Sinatra filed an *ex parte* application in the California Superior Court to compel the depositions before the November 3 discovery cutoff (PA167-175)—which the California Superior Court denied on the merits. (PA261-265.) In particular, the California Superior Court ruled that Ms. Sinatra's request to compel the attorney depositions on such shortened notice before the November 3 discovery cutoff was "not possible under any circumstance but especially regarding a motion that appears to relate to attorney-client privilege issues. Simply put, the time schedule requested by moving parties [Ms. Sinatra and Wynn Resorts] would deprive Quinn, et al. of due process and would certainly deprive the court of time to fully consider and prepare the motion." (PA264.)

E. Kim Sinatra Files her Motion to Compel in Nevada

After the California Superior Court denied her application on the merits, Ms. Sinatra engaged in forum shopping and filed a motion to compel in the district court on October 30, which sought the same relief that the California Superior Court had just denied. (PA266-277.) The district court granted the order shortening time and set the hearing for November 6. (PA269.) At the hearing, the district court denied Ms. Wynn's previously filed motion to dismiss the "abuse of

process" claim (PA448), and granted Ms. Sinatra's motion to compel the depositions of the Quinn Emanuel attorneys in Las Vegas, despite the fact that the California Superior Court already was vested with exclusive jurisdiction over the subpoenas and despite its own recognition that Ms. Sinatra had not served any Nevada discovery process on Petitioners.[2] (PA454, 455, 458.) The district court stayed its ruling on the motion to compel for ten court days, until November 21, to allow the filing of the present writ petition. (*Id*.)

V. REASONS WHY THE WRIT SHOULD ISSUE

A. The Legal Standards for Issuing a Writ Are Satisfied

Under this Court's precedents, a writ or prohibition or mandamus is "an available remedy, where, as here, petitioners have no plain, speedy and adequate remedy at law other than to petition this court." *Wardleigh*, 891 P.2d at 1183. As the Court stated, "when a discovery order directs disclosure of privileged information, a later appeal may not be an effective remedy." *Mitchell v. Eighth*

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[2] The district court stated the following at the November 6 hearing: "The motion to compel the deposition of the Quinn Emanuel attorneys is granted. The Quinn Emanuel attorneys asked for permission to practice in this case before this Court, and I have jurisdiction to make a determination whether it is appropriate given the abuse of process claim that is currently pending before this Court for their depositions to occur. I disagree that *Club Vista* applies given the fact that the—in the circumstances under which Quinn Emanuel left this case. The deposition notices are of concern to me, but given the activities that have occurred among counsel, I am not going to prevent those depositions or parse them given that." (PA458.) The district court repeatedly identified Petitioners' *pro hac vice* applications as the basis for its order. (PA452, 454, 459.)

Judicial Dist. Court, 131 Nev. Adv. Op. 21, 359 P.3d 1096, 1099 (2015); *see also Las Vegas Sands v. Eighth Jud. Dist. Court*, 130 Nev. Adv. Op. 69, 331 P.3d 905, 909 (2014) (same). "Further, this court may address writ petitions when they raise important issues of law in need of clarification, involving significant public policy concerns, of which this court's review would promote sound judicial economy." *Pac. W. Bank v. Eighth Judicial Dist. Court*, 132 Nev. Adv. Op. 383 P.3d 252, 254 (2016).

The district court committed several serious, fatal errors of law that warrant granting a writ of prohibition or, in the alternative, *mandamus* because no adequate remedies exist at law. This includes the court's: (1) contravention of long-standing precedent that enforcement of foreign subpoenas pursuant to the UIDDA (which both California and Nevada have enacted) is subject to the exclusive jurisdiction and laws of the state where discovery is sought—in this case, California; (2) unprecedented expansion of expired *pro hac vice* jurisdiction over former attorneys to include authority to compel depositions of non-party, out-of-state residents to testify as percipient witnesses in Nevada regarding the merits of pending claims; (3) refusal to consider the three-pronged test established in *Club Vista* that must be established before an attorney deposition may proceed; (4) disregard that Ms. Sinatra had served no Nevada discovery process to enforce in the first place; (5) disregard of Nevada's rules limiting second depositions and minimum time

requirements; and (6) failure to consider whether privileges and protections—including the attorney-client privilege, work product doctrine, absolute litigation privilege, *Noerr-Pennington* doctrine, and settlement confidentiality—barred the depositions of Ms. Wynn's trial attorneys.

B. The Court had No Jurisdiction to Compel Non-Party, Out-of-State Attorneys to Testify as Percipient Witnesses in Nevada

1. The California Court has Exclusive Jurisdiction over the California Subpoenas

The district court acknowledged that it was purporting to enforce *California* subpoenas against out-of-state residents, stating that Ms. Sinatra "noticed the depositions with California subpoenas, so [its November 6 order] is not independent." (PA459.) However, the California Superior Court has exclusive jurisdiction over those subpoenas pursuant to the UIDDA and has scheduled a hearing on the petition to quash those subpoenas for November 22, 2017. (PA834.) Through her voluntary actions in serving California subpoenas (PA127-166) and unsuccessfully seeking relief from the California Superior Court to compel the depositions before the November 3 discovery cut-off date (PA261-265), Ms. Sinatra submitted to the exclusive jurisdiction of the California Superior Court and waived any objections to that jurisdiction.

Both Nevada and California have enacted the UIDDA. NRS 53.100-.200; *see also* Cal. Civ. Proc. Code, §§ 2029.100 and 2029.700. The UIDDA provides

that a petition or motion to quash a foreign subpoena that is domesticated under the UIDDA must comply with all applicable rules of court and laws of the state in which the discovery is sought, and must be submitted to the court in the county in which the discovery is to be conducted. NRS 53.190; *see also* Cal. Civ. Proc. Code, §§ 2029.400, 2029.500. If a dispute arises, California law provides for the filing of a petition to quash "in the superior court in the county in which discovery is to be conducted," which "shall comply with the applicable rules or statutes of this state." Cal. Civ. Proc. Code, § 2029.600. A non-party may seek "an order quashing the subpoena entirely, modifying it, or directing compliance with it upon those terms or conditions as the court shall declare, including protective orders." *Id*., § 1987.1.

The filing of a petition to quash automatically stayed the noticed depositions until the California Court rules on the petition. Cal. Civ. Proc. Code, § 2025.410(c). The California Superior Court also has continuing jurisdiction over all future discovery disputes in the same county related to the same out-of-state proceeding. *Id*., § 2029.620(a). Petitioners have the right to seek a stay and obtain appellate relief in the event the California Superior Court denies the petition and/or compels the disclosure of privileged information. *Id*., § 2029.650.

By serving California subpoenas pursuant to the UIDDA, Ms. Sinatra recognized that the Quinn Emanuel attorneys are out-of-state residents entitled to

UIDDA protections. Once the jurisdiction of California was triggered through the serving of the subpoenas, the California Superior Court obtained exclusive and continuing jurisdiction over all matters related to those subpoenas. The UIDDA simply does not allow for an unsuccessful litigant like Ms. Sinatra to run to her home court to enforce California subpoenas against out-of-state residents, especially after having lost in the California Superior Court.

Nevada has embraced the UIDDA and recognizes the exclusive jurisdiction of the California Superior Court. NRCP 37(a)(1), entitled "Appropriate Court," vests mandatory jurisdiction over this discovery dispute with the California Superior Court, stating that "[a]n application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being, or is to be, taken." Nevada's UIDDA clearly states that an application to quash a subpoena "must" be submitted "to the court in the county in which discovery is to be conducted." NRS 53.190.

This approach is consistent with the holdings of seven other state supreme courts. Each has recognized that enforcement of foreign subpoenas is subject to the exclusive jurisdiction and law of the state where the discovery is sought. *See Yelp*, 289 Va. at 435 (joining the holding of supreme court cases from Alabama, Louisiana, Colorado, Florida, Mississippi, and Oklahoma). Notably, Ms. Sinatra

has not served any Nevada "discovery" for the district court to compel, and any attempt to do so would violate Nevada law.[3]

The district court's unprecedented order not only violates settled precedents but raises serious issues of general importance to the residents of Nevada, who will now be faced with courts in other states unwilling to respect the exclusive jurisdiction of Nevada courts over subpoenas served within its borders. The UIDDA was enacted precisely to avoid such jurisdictional battles. *See Yelp*, 289 Va. at 435 (explaining that the UIDDA contemplates that foreign courts "will respect the territorial limitations of their own subpoena power").

2. The California Court's Orders are Entitled to Preclusive Effect and Deference in Nevada

In refusing to recognize the exclusive jurisdiction of the California court, the district court also failed to give preclusive effect and deference to the California court's orders. In particular, the district court granted the same relief—compelling the depositions of the Quinn Emanuel attorneys on an expedited basis—that the California court had already denied on due process grounds. This past ruling is

[3] In compelling these attorney depositions in Nevada without Nevada discovery process, the district court violated several other Nevada laws that barred the depositions, including because (1) Ms. Sinatra did not obtain the required court order authorizing the second depositions of Mr. Zeller, Mr. Fazio, and Mr. Shelton as required by NRCP 30(d); and (2) Ms. Sinatra sought to take the attorney depositions in violation of the 15-day minimum time period set forth in NRCP 30(b)(1).

entitled to preclusive effect and should have been accorded full faith and credit by the district court. *See Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008) (recognizing doctrine of issue preclusion); *see also Hoffman v. Second Judicial Dist. Court*, No. 60119, 2013 WL 7158424, at *4 (Nev. Dec. 16, 2013) (discussing practical finality for issue preclusion purposes); U.S. Const. Art. IV, Sec. 1.

Further, to avoid the very forum shopping and gamesmanship that Ms. Sinatra is engaging in here, the district court was required to defer to the jurisdiction and rulings of the California court as a matter of comity and fairness. *See Mianecki v. Second Judicial District Court*, 99 Nev. 93, 98, 658 P.2d 422, 424-25 (1983) ("In general, comity is a principle whereby the courts of one jurisdiction may give effect to the laws and judicial decisions of another jurisdiction out of deference and respect."); *Yelp*, 289 Va. at 435 explaining that the jurisdictional balance struck by UIDDA "furthers the preservation of comity").

3. The Court's *Pro Hac Vice* Jurisdiction Cannot Justify Its Order Compelling Former Attorneys to Testify as Percipient Witnesses in Nevada

Unable to dispute that California has exclusive jurisdiction over these foreign subpoenas, the district court tried to sidestep the UIDDA based on its purported residual jurisdiction over Petitioners' now-expired *pro hac vice* applications. But merely because out-of-state attorneys seek routine court

authorization to appear *as counsel* on behalf of a client does not constitute a general consent to appear in Nevada—for all purposes and for all time—*as percipient witnesses* to provide merits testimony regarding pending claims. Nevada's own rule governing *pro hac vice* applications limits such jurisdiction to "governing the conduct of attorneys." Nev. Sup. Ct. R. 42(13). This Court has rejected imposing additional burdens on out-of-state attorneys that "lie[] outside of SCR 42's requirements." *See Imperial Credit Corporation v. Eighth Judicial District Court*, 130 Nev. Adv. Op. 59, 331 P.3d 862, 864 (2014) (rejecting requirement that out-of-state counsel must be "more capable" of handling the matter than Nevada local counsel because it had no basis in the language of SCR 42].)

Whatever residual jurisdiction the district court might have over the Quinn Emanuel attorneys who no longer practice before it does not give it unfettered authority to compel former attorneys to appear in Nevada as third-party witnesses or supersede the laws of California regarding domestic enforcement of foreign subpoenas.[4] Indeed, not only is the district court's ruling contrary to the UIDDA,

[4] In the proceedings below, Ms. Sinatra cited authority holding that the district court has jurisdiction over Nevada attorneys in order to adjudicate fee disputes and attorney liens for services performed in connection with a Nevada lawsuit. *Argentena Consol. Min. Co. v. Jolley Urga Wirth Woodbury & Standish*, 125 Nev. 527, 532, 216 P.3d 779, 782–83 (2009); *Earl v. Las Vegas Auto Parts, Inc.*, 73 Nev. 58, 63, 307 P.2d 781, 783 (1957). These cases have nothing to do

but it specifically violates NRCP 37(a)(1). By stating that "[a]n application for an order to a ***deponent who is not a party*** shall be made to the court in the district where the deposition is being, or is to be, taken," NRCP 37(a)(1) expressly vests mandatory jurisdiction over disputes in a deponent's home state, regardless of that deponent's status as a attorney or not. (Emphasis added.) Notably, neither the district court nor Ms. Sinatra cited any precedent to support the district court's anomalous position. To avert unnecessary harms to all Nevadans, who could be subject to similar jurisdictional overreach by the courts of other states, and to avoid bringing Nevada law into conflict with at least seven state supreme courts interpreting the UIDDA, writ relief should be granted.

C. The Court Failed to Apply Nevada Law Safeguarding the Attorney-Client Relationship

Setting aside the fact that the district court's order should be vacated for lack of jurisdiction, it should also be reversed on the merits because the district court made a fatal legal error: it refused to consider whether the requested attorney depositions meet the "stringent three-factor test" set forth in *Club Vista*, or its virtually identical counterpart in California, *Carehouse*.

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with the question whether the district court can compel non-party, out-of-state attorneys to provide merits testimony in Nevada based on the mere fact that the attorneys previously represented a party.

Those precedents recognize that "[f]orcing an opposing party's trial counsel to personally participate in trial as a witness 'has long been discouraged and recognized as disrupting the adversarial nature of our judicial system.'" *Club Vista*, 276 P.3d at 249 (quoting *Shelton*, 805 F.2d at 1327); *accord Carehouse*, 143 Cal. App. 4th at 1562 ("Depositions of opposing counsel are presumptively improper, severely restricted, and require 'extremely' good cause—a high standard."). In light of this presumption against deposing counsel, the district court was required to analyze whether *Club Vista* was satisfied. Instead, the district court dismissed the applicability of *Club Vista* by vaguely alluding to "the circumstances under which Quinn Emanuel left this case." (PA458.) But Quinn Emanuel simply withdrew as counsel for Ms. Wynn without any findings or rulings by the district court, let alone findings relevant to the *Club Vista* factors. *Club Vista* is clear that satisfying all three factors is mandatory, stating that "in the absence of these conditions, a party should not be permitted to depose an opposing party's attorney." 276 P.3d at 250. In *Club Vista* itself, this Court granted writ review due to the lower court's failure to consider whether the three-factor test. *Id.* at 250-51. The same result is compelled here.[5]

[5] Ms. Sinatra argued below for a categorical rule that *Club Vista* only applies to "current" trial attorneys, not former ones. This argument is meritless. The protections embedded in Nevada case law are designed to safeguard the attorney-client relationship, and prevent an obvious chilling effect on

Had the district court applied the proper legal standard, it would have had no choice but to conclude that the attorney depositions could not proceed. Ms. Sinatra never even attempted to show that "'no other means exist to obtain the information than to depose opposing counsel.'" *Club Vista*, 276 P.3d at 250 (quoting *Shelton*, 805 F.2d at 1327). Nor could she. The actual parties to the case were available for deposition, and all of the facts about the litigation—the claims asserted, discovery propounded, settlement communications, and the complete case file—are already in Ms. Sinatra's possession. *See Marco Island Partners v. Oak Dev. Corp.*, 117 F.R.D. 418, 419 (N.D. Ill. 1987) (precluding attorney deposition where defendants did not show the information sought from the attorney could not be obtained from other sources, including attendees at the negotiations in question).

Ms. Sinatra also failed to identify any non-privileged, percipient information solely in the possession of Quinn Emanuel that is relevant to her "abuse of

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communications from the client to the attorney. *Club Vista*, 276 P.3d at 249. This presumption against placing counsel under the "microscope of interrogation" applies irrespective of whether the attorney is currently involved in the case, particularly where, as here, the depositions would cover matters that indisputably arose during Quinn Emanuel's legal representation of Ms. Wynn. *See id.* at 250 (attorney depositions "could provide a back-door method for attorneys to glean privileged information about an opponent's litigation strategy from the opposing attorney's awareness of various documents"). Recognizing this fact, courts applying the *Shelton* test, which *Club Vista* adopted, have held that it is not limited to only "current" counsel. *See, e.g., Guantanamera Cigar Co. v. Corporacion Habanos, S.A.*, 263 F.R.D. 1, 9 (D.D.C. 2009); *see also Alomari v. Ohio Department of Public Safety*, 2014 WL 12651191, at *6 (S.D. Ohio June 19, 2014).

process" claim. *Club Vista*, 276 P.3d at 249. Any unique information that Ms. Sinatra could conceivably seek from Quinn Emanuel attorneys would necessarily relate to claims, discovery, and settlement communications that would infringe upon attorney-client privilege and work product, such as Quinn Emanuel's legal strategy, communications with client, and mental impressions. This information is absolutely shielded from discovery. *See* NRS 49.095 (attorney-client privilege); NRCP 26(b)(3) (work product); *see also* Cal. Evid. Code, § 954 (attorney-client privilege); Cal. Civ. Proc. Code, § 2018.030 (work product).

Finally, Ms. Sinatra's vague and cursory assertions below that Petitioners were witnesses to conversations, discussions and written communications that are part of her "abuse of process" claim do not satisfy her burden of proving that deposing Ms. Wynn's attorneys is "crucial" to her case. There is simply no basis to conclude that it is "crucial" to depose counsel when Ms. Sinatra has all the non-privileged discovery already (or could seek to compel more), and she can question the actual parties in the litigation.

D. The Court Failed to Consider Other Privileges and Absolute Protections

Ms. Wynn's protections are not limited to the attorney-client privilege and work product doctrine. They also include the absolute litigation privilege, the *Noerr-Pennington* doctrine, and settlement confidentiality. Neither Ms. Sinatra nor the district court addressed any of them.

Absolute Litigation Privilege. Ms. Sinatra's abuse of process claim is barred by Nevada's absolute litigation privilege because it exclusively relates to the routine litigation activity of Ms. Wynn's trial attorneys in filing claims, propounding discovery, and engaging in settlement discussions. Because Nevada's absolute litigation privilege bars Ms. Sinatra's "abuse of process" claim, it also bars discovery related to this defective claim. *See Bullivant Houser Bailey PC v. Eighth Judicial District Court*, 128 Nev. 885, 381 P.3d 597 (2012) (recognizing absolute litigation privilege that mirrors the California privilege); *Las Vegas Sands Corp. v. First Cagayan Leisure & Resort Corp*., 2016 WL 4134523, at *2 (D. Nev. Aug. 2, 2016) (dismissing claim "for abuse of process because [a party allegedly] misled the court when it asked for permission to allow service by email" based on the litigation privilege).[6]

***Noerr-Pennington* Doctrine.** For similar reasons, these attorney depositions are barred by the *Noerr-Pennington* doctrine because Ms. Wynn has a First Amendment right to petition for redress for her grievances against Ms.

[6] California courts routinely dismiss "abuse of process" claims based on California's absolute litigation privilege. *See, e.g., Ramona Unified School Dist. v. Tsiknas*, 135 Cal. App. 4th 510, 522 n.7 (2005) ("The litigation privilege bars an abuse of process claim insofar as the claim is premised on conduct within the privilege"]; *Brown v. Kennard*, 94 Cal. App. 4th 40, 51 (2001) ("We conclude the litigation privilege of section 47(b) bars Brown's cause of action for abuse of process.").

Sinatra. *See Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 931 (9th Cir. 2006) (holding that RICO claim was barred: "we conclude that the No*err-Pennington* doctrine stands for a generic rule of statutory construction, applicable to any statutory interpretation that could implicate the rights protected by the Petition Clause"); *see also Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.*, 136 Cal. App. 4th 464, 471, 478-79 (2006) (rejecting abuse of process claim and concluding "these activities were taken in the exercise of their First Amendment right to petition and so fall within the *Noerr-Pennington* doctrine"].)[7]

Settlement Confidentiality. Although Ms. Sinatra's "abuse of process" claim is based in part on settlement communications, discovery regarding such matters is barred by settlement confidentiality. Because settlement communications are inadmissible (NRS 58.105), courts have recognized a settlement privilege or protection and routinely forbidden discovery regarding them. *See Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 977 (6th Cir. 2003) ("The issue presented on appeal is whether statements made in furtherance of settlement are privileged and protected from third-party

[7] Nor is there any basis for Ms. Sinatra to invoke the sole "sham litigation" exception to this doctrine because the district court has already denied Ms. Sinatra's motion to dismiss Ms. Wynn's claims against her, showing that the litigation is not a sham as a matter of law. *See Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus.*, Inc., 508 U.S. 49, 60 (1993) (describing narrow scope of sham litigation exception).

discovery. We affirm the decision of the district court and find that they are."); *Cook v. Yellow Freight Sys., Inc.*, 132 F.R.D. 548, 554 (E.D. Cal. 1990) (denying motion to compel production of settlement communications); *Allen Cty., Ohio v. Reilly Indus., Inc.*, 197 F.R.D. 352, 354 (N.D. Ohio 2000). The district court should have rejected Ms. Sinatra's efforts to depose counsel based on this privilege, particularly because the parties to those settlement discussions specifically agreed that their settlement communications would be confidential and not used against each other, which Ms. Sinatra never disputed. (PA819-820.) The district court's failure to address, much less analyze, these well-established protections compels writ review to safeguard them.

VI. CONCLUSION

For the reasons stated, Petitioners respectfully asked this Court to grant a writ of prohibition or, in the alternative, *mandamus*, vacate the November 6 order on jurisdictional grounds, or alternatively reverse the order on the merits.

RESPECTFULLY SUBMITTED this 21st day of November, 2017.

McDONALD CARANO LLP

By: */s/ Pat Lundvall*

PAT LUNDVALL (#3761)
McDONALD CARANO LLP
2300 West Sahara Avenue, Suite 1200,
Las Vegas, NV 89102
Telephone: (702) 873-4100
Fax: (702) 873-9966
lundvall@mcdonaldcarano.com

Attorneys for Specially Appearing Petitioners

Verification

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

Under penalties of perjury, the undersigned declares that she is counsel for Petitioners named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and that as to such matters she believes them to be true. This verification is made pursuant to NRS 15.010.

DATED this 21st day of November 2017.

Pat Lundvall

Subscribed and sworn to before me
this 21st day of November 2017.

Notary Public

TUBOU NELSON
Notary Public State of Nevada
No. 93-1487-1
My appt. exp. May 15, 2018

Certificate of Compliance

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14 point, double-spaced Times New Roman font.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 7,328 words.

3. I hereby certify that I have read this appellate brief, 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 NRAP 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.

RESPECTFULLY SUBMITTED this 21st day of November, 2017.

McDONALD CARANO LLP

By: */s/ Pat Lundvall*

PAT LUNDVALL (#3761)
McDONALD CARANO LLP
2300 West Sahara Avenue, Suite 1200,
Las Vegas, NV 89102
Telephone: (702) 873-4100
Fax: (702) 873-9966
lundvall@mcdonaldcarano.com

Attorneys for Specially Appearing Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on this 21st day of November, 2017, a copy of the foregoing PETITION FOR WRIT OF PROHIBITION OR, IN THE ALTERNATIVE, WRIT OF MANDAMUS was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (Eflex).

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James J. Pisanelli
Todd L. Bice
Debra L. Spinelli
PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, NV 89101

Mitchell J. Langberg
BROWNSTEIN HYATT
FARBER SCHRECK LLP
100 North City Parkway,
Suite 1600
Las Vegas, NV 89106

Attorneys for Kimmarie Sinatra and Wynn Resorts, Limited

DANIEL F. POLSENBERG
JOEL D. HENRIOD
ABRAHAM G. SMITH
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

SCOTT D. STEIN
SIDLEY AUSTIN, LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7520

James M. Cole
SIDLEY AUSTIN, LLP
1501 K. Street, N.W.
Washington, D.C. 20005
(202) 736-8246

MARK E. FERRARIO
TAMI D. COWDEN
GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway,
Suite 400 North
Las Vegas, Nevada 89169
(702) 792-3773

Attorneys for real party in interest Elaine P. Wynn

Honorable Elizabeth Gonzalez
Department 11
EIGHTH JUDICIAL DISTRICT COURT
200 Lewis Avenue
Las Vegas, Nevada 89155

By: */s/ Beau Nelson*
An Employee of McDonald Carano LLP