

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 Nevada Corporation, and
ELAINE P. WYNN, an individual,

Real Parties in Interest.

Supreme Court Case No.

District Court Case No. A-12656710-B

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Elizabeth A. Brown
Clerk of Supreme Court

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

**MOTION TO EXTEND DISTRICT COURT'S STAY PENDING WRIT
PETITION AND RULE 27(E) EMERGENCY MOTION FOR INTERIM
EXTENSION OF STAY (ACTION REQUIRED BY NOVEMBER 21, 2017)**

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In defiance of the Uniform Interstate Depositions and Discovery Act (“UIDDA”), 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 depositions in Nevada to answer questions about their representation of a party in this case. By its improper usurpation of exclusive jurisdiction already vested in a California court, the district court has created a conflict over the subpoenas between different courts in Nevada and California, thereby eviscerating the language and purpose of the UIDDA. In further error, the district court compelled these California depositions without any analysis of, or any findings required by, this Court’s stringent test limiting attorney depositions or its counterpart test in California.

Petitioners are California residents who practice law in the Los Angeles office of Quinn Emanuel Urquhart & Sullivan LLP (“Quinn Emanuel”). Quinn Emanuel represented Elaine P. Wynn in the underlying litigation from January 2016 until March 2017. In compelling these out-of-state attorneys to appear for depositions in Nevada regarding matters that indisputably arose from their representation of Ms. Wynn, the district court seized jurisdiction out of the hands of a California court and abrogated Ms. Wynn’s privileges and absolute protections.

The district court recognized that a stay of that order was appropriate so that Petitioners could seek relief in this Court. However, that stay expires on November 21, 2017, requiring exigent action by this Court.

Because of the imminent deadline, Petitioners make two requests. First, under NRAP 8(a)(2)(A)(ii), Petitioners ask this Court to extend a stay of the district court's order through the course of these writ proceedings. An extension of the stay is appropriate under the NRAP 8(c) factors, particularly since denying the stay would defeat the object of this petition. Second, Petitioners request under NRAP 27(e) a temporary, interim stay pending consideration of the full stay motion.

BACKGROUND

As set out in the petition contemporaneously filed with this motion, the district court had no jurisdiction to enter an order compelling four of Ms. Wynn's trial attorneys to testify as witnesses in Nevada regarding the merits of a claim against their former client. This ruling is contrary to the holdings of seven state supreme courts 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. *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).

During Quinn Emanuel’s representation, Ms. Wynn first asserted claims against Kim Sinatra, alleging that Ms. Sinatra interfered with a Stockholders Agreement governing Ms. Wynn’s shares of Wynn Resorts stock and orchestrated Ms. Wynn’s unlawful ouster from the Board in April 2015, among other unlawful conduct. (PA84-85, 87-88.) The district court has denied Ms. Sinatra’s motion to dismiss those claims (PA98-103) and compelled Ms. Sinatra to provide discovery related to them. (PA93-95.)

In response, Ms. Sinatra retaliated by filing an “abuse of process” claim against Ms. Wynn on September 7, 2017, some eight months after Quinn Emanuel had withdrawn as Ms. Wynn’s counsel in the lawsuit. (PA118-124.) Delaying several additional weeks, and on the eve of the November 3 discovery cutoff, Ms. Sinatra attempted to serve California subpoenas on Ms. Wynn’s former attorneys pursuant to the UIDDA, noticing their depositions in Los Angeles County, California. (PA127-128, 137-138, 147-148, 157-158.)

Because the California subpoenas were facially defective and sought to invade privilege, Petitioners served written objections (PA596-600, 602-606, 608-612, 614-618) and filed a petition to quash in the California Superior Court in accordance with the UIDDA. (PA523-547.) Ms. Sinatra then filed an application

with the California court to compel the attorney depositions before the November 3 discovery cutoff. (PA167-175.) The California court denied Ms. Sinatra's application on the merits, holding that such relief would deprive Petitioners of their due process rights under California law. (PA264.) The remaining issues raised by Petitioners' petition to quash are currently set to be heard by the California court on November 22, 2017. (PA423-24, 834.)

After having so invoked the jurisdiction of the California court and lost, and despite never having served any Nevada discovery process on Petitioners, Ms. Sinatra then filed a motion to compel in the Nevada district court, seeking the same relief that the California court had denied. (PA266-277.) Petitioners made a special appearance in Nevada and opposed Ms. Sinatra's motion to compel their depositions on jurisdictional grounds. (PA403-430.) Ms. Wynn joined in these jurisdictional objections and alternatively sought to quash the subpoenas under Nevada law. (PA395-402.)

On November 6, 2017, the district court orally granted Ms. Sinatra's motion to compel on order shortening time and ordered Petitioners to appear for depositions in Las Vegas, Nevada. (PA454, 455, 458.) Although Petitioners withdrew as Ms. Wynn's attorneys over eight months ago (PA5-10), the district court based its ruling on Petitioners' now-expired *pro hac vice* applications to appear before the district court as counsel for Ms. Wynn. (PA452, 454, 459.) In

compelling these attorney depositions, the district court did not analyze or make any findings under the three factors set forth in *Club Vista Financial Services LLC v. Eighth Judicial District Court*,¹ which sets forth this Court’s stringent test for deposing counsel.² (PA452, 454, 458, 459.)

The district court granted Ms. Sinatra’s motion to compel but stayed its order for ten court days, until November 21, 2017, to allow the Petitioners to seek relief from this Court.³ (PA458.) Petitioners filed their petition and this emergency motion on November 21.

¹ 128 Nev. Adv. Op. 21, 276 P.3d 246, 250 (2012) (*en banc*) (adopting a “stringent three-factor test under which the party seeking to take the deposition of an opposing party’s counsel has the burden of proving”: “(1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case.”) (internal citations and quotations omitted).

² Because California likewise disfavors attorney depositions given their potential for abuse and harassment and the risks of invading privilege, it too imposes stringent requirements before such depositions are allowed. *See Carehouse Convalescent Hospital v. Superior Court*, 143 Cal. App. 4th 1558, 1563 (2006) (“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.”) (internal citations omitted).

³ The district court has not yet entered an order on its ruling compelling the attorney depositions; however, Ms. Sinatra’s counsel has submitted a proposed written order to the district court. (PA835-841.)

**MOTION TO EXTEND DISTRICT COURT'S
STAY PENDING WRIT PETITION**

Extending the stay is the only way to preserve appellate review of Petitioners' jurisdictional objections and to prevent an irreversible disclosure of privileged information.

This Court has recognized that “[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.” *Club Vista*, 128 Nev. Adv. Op. 21, 276 P.3d at 249. Further, this Court has repeatedly recognized that writ relief is “necessary to prevent discovery that would cause privileged information to irretrievably lose its confidential nature and thereby render a later appeal ineffective.” *Aspen Fin. Services v. Eighth Judicial Dist. Court*, 128 Nev. Adv. Op. 57, 289 P.3d 201, 204 (2012).

When a district court overrules a claim of privilege or work-product protection (or in this case, does not consider the privilege objections after they are raised), that order is often stayed pending resolution of a writ petition challenging that order. *See Mitchell v. Eighth Judicial Dist. Court*, 131 Nev. Adv. Op. 21, 359 P.3d 1096, 1099 n.2 (2015); *Coyote Springs Inv., LLC v. Eighth Judicial Dist. Court*, 131 Nev. Adv. Op. 18, 347 P.3d 267, 270 (2015); *L.V. Dev. Assocs. v. Eighth Judicial Dist. Court*, 130 Nev. Adv. Op. 37, 325 P.3d 1259, 1262 (2014); *Las Vegas Sands v. Eighth Judicial Dist. Court*, 130 Nev. Adv. Op. 13, 319 P.3d 618, 620

(2014).

Similarly, in an earlier stage of this litigation this Court stayed the upcoming deposition of a party pending a writ petition challenging the conditions of that deposition. (See Doc. 15-20107, Order Staying Deposition and Directing Answer in Case. No. 68310, *Okada v. Eighth Judicial District Court*.) And the district court itself recognized the need for a stay in granting Petitioners a stay until November 21, 2017 to file the petition.

As all of the NRAP 8(c) factors continue to favor a stay, the extension of the district court's stay through this Court's resolution of the writ petition is warranted.

1. Denying a Stay Would Defeat the Object of the Petition to Determine the Jurisdiction of the District Court and the Propriety of the Attorney Depositions

The first factor in considering a stay is whether denying the stay would defeat the object of the appeal or writ petition. This factor weighs heavily in favor of a stay here, where the entire point of the petition is to *stop* the depositions, *stop* the district court from granting relief that it had no jurisdiction to award, and *stop* the disclosure of privileged and absolutely protected information in the possession of Ms. Wynn's former attorneys. If a stay is denied, the petition asserting jurisdictional objections to the order and resisting disclosure of privileged information would become purely academic. See *Club Vista*, 128 Nev. Adv. Op. 21, 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.”). No later ruling in Petitioners’ favor would undo the district court’s unlawful usurpation of the California Superior Court’s exclusive jurisdiction, or the compelled disclosure of privileged information. A ruling that Petitioners should not be deposed will be cold comfort if they have already been deposed. This factor, therefore, strongly supports a stay. *See State v. Robles-Nieves*, 129 Nev. Adv. Op. 55, 306 P.3d 399, 406 (2013) (where “denying a stay would effectively eliminate the right to appeal,” “the first stay factor weighs heavily in favor of a stay,” and “the final factor will counterbalance the first factor only when the appeal appears to be frivolous or the stay sought purely for dilatory purposes”).

2. *Denying a Stay Would Force Disclosure of Privileged and Absolutely Protected Information, Causing Irreparable Harm*

Similarly, denying a stay of the order would cause Petitioners and their former client, Ms. Wynn, serious and irreparable harm. *See* NRAP 8(c)(2). The Nevada Supreme Court has recognized on several occasions that an order requiring disclosure of privileged information “is likely to cause irreparable harm” if review is not available until after final judgment. *Club Vista*, 128 Nev. Adv. Op. 21, 276 P.3d at 249. In such cases, a writ of prohibition is the appropriate avenue for relief because if “the discovery permitted by the district court’s order is inappropriate, a

later appeal would not effectively remedy any improper disclosure of information.” *Id.*; see also *Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 350-51, 891 P.2d 1180, 1183-84 (1995) (“If improper discovery were allowed, the assertedly privileged information would irretrievably lose its confidential and privileged quality and Petitioners would have no effective remedy, even by a later appeal.”); NRS 34.330 (extraordinary writ is appropriate where “there is not a plain, speedy and adequate remedy in the ordinary course of law”).

3. *A Stay of the Order Will Not Harm the Real Party in Interest*

By contrast, a stay of the order will cause no harm to real parties in interest. See NRAP 8(c)(3). If Ms. Sinatra is truly entitled to depose four of Ms. Wynn’s trial attorneys, she would be able to take the attorney depositions after the completion of proceedings in this Court and the California court. In addition, the sole purported basis for these attorney depositions are Ms. Sinatra’s “abuse of process” claim against Ms. Wynn, which relates to the claims asserted by Ms. Wynn against Ms. Sinatra, discovery propounded in the underlying litigation, and settlement communications made during Quinn Emanuel’s representation of Ms. Wynn. Ms. Sinatra may seek any relevant, non-privileged information directly from other sources, including the parties, the litigation file, and her own attorneys who participated in the settlement discussions, during the pendency of the stay.

4. *The Petition has Substantial Merit*

In these circumstances, where a writ petition is the only way to preserve threshold jurisdictional objections to an *ultra vires* order and prevent disclosure of privileged information, only a showing that the petition is frivolous or sought solely for dilatory purposes will defeat a stay. *See Robles-Nieves*, 129 Nev. Adv. Op. 56, 306 P.3d at 406. It is enough that the appeal presents a “substantial case on the merits when a serious legal question is involved.” *Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000) (quoting *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981)). Indeed, this Court has granted a stay even where “the merits [were] unclear.” *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 254, 89 P.3d 36, 40 (2004).

Here, Petitioners have shown that the district court’s ruling is likely to be vacated on jurisdictional grounds, or reversed on the merits. The district court’s ruling is wrong and raises several issues of statewide importance to Nevadans and the attorneys who represent them. In particular, the ruling (1) contravenes the exclusive jurisdiction of the California Superior Court and asserts jurisdiction over foreign subpoenas issued to out-of-state residents, in conflict with the holdings of at least seven state supreme courts that, under the UIDDA, enforcement of foreign subpoenas is subject to the exclusive jurisdiction and laws of the state where the discovery is sought; (2) fails to give preclusive effect and deference to the

California court's orders; (3) compels Petitioners to appear for deposition in violation of Nevada law, and despite a complete absence of Nevada discovery process; (4) radically expands the scope of *pro hac vice* jurisdiction over former attorneys to include nationwide authority to compel out-of-state residents to appear as percipient witnesses in Nevada; and (5) overrules without analysis several meritorious objections to the subpoenas, including those based on privilege, other protections, and *Club Vista*.

The information sought in these attorney depositions is protected from disclosure by the attorney-client privilege and work product doctrine, the absolute litigation privilege, the *Noerr-Pennington* doctrine, and settlement confidentiality. Further, as explained in the petition, Ms. Sinatra cannot establish *any* of the three factors governing whether she is allowed to engage in the “remarkable” act of deposing her litigation adversary’s trial attorneys. *Club Vista*, 128 Nev. Adv. Op. 21, 276 P.3d at 250.

At the very least, this case presents a “serious legal question” warranting a stay. *Fritz Hansen A/S*, 116 Nev. at 659, 6 P.3d at 987. The balance of the NRAP 8 factors warrant extending the protections of the district court’s stay while this Court resolves this petition.

**RULE 27(E) EMERGENCY MOTION FOR
INTERIM EXTENSION OF STAY**

Because the protections of the district court's stay expire imminently, on November 21, 2017, an interim extension of the lower court's stay order is needed to avoid serious and imminent harm. *See* NRAP 27(e)(4). Petitioners have worked diligently to prepare the petition and this motion for stay within the deadlines set by the district court. Petitioners recognize, however, that this Court may want additional time to consider the request to extend the district court's stay through the resolution of the writ petition. If so, this Court should at least stay the order while the Court considers that stay request. Absent this emergency relief, Petitioners could be required to comply with an order that the district court had no jurisdiction to issue, and sit for depositions that will abrogate Ms. Wynn's privileges and absolute protections, making both the stay and the underlying petition moot.

CONCLUSION

To prevent depositions that the district court had no jurisdiction to compel and will irreversibly disclose privileged and absolutely protected information, this Court should grant an extension of the stay, pending disposition of the petition.

RESPECTFULLY SUBMITTED this 21st day of November, 2017.

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NRAP 27(E) CERTIFICATE

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B. Nature of emergency

On November 6, 2017, the district court orally granted Ms. Sinatra's motion to compel four non-party, out-of-state trial attorneys to testify at depositions in Nevada regarding the merits of a pending claim against their former client, Elaine P. Wynn. This order usurped the jurisdiction of the California Superior Court and will require Ms. Wynn's trial attorneys to sit for deposition and disclose their former client's privileged and absolutely protected information. The district court, however, stayed its ruling to allow Petitioners to seek relief from this Court, but granted the stay only through November 21, 2017.

Without an immediate extension of the stay from this Court, Petitioners may be required, under threat of contempt or other sanctions, to comply with an order that the district court was without jurisdiction to enter, and to disclose privileged and absolutely protected information without appellate review of that order.

C. Notice and service

Today I personally called Mitchell Langberg with Brownstein Hyatt and Todd Bice with Pisanelli Bice, notifying them of this motion for stay. I e-mailed copies of the motion for stay, and this certificate to each of the listed attorneys for real parties in interest.

RESPECTFULLY SUBMITTED this 21st day of November, 2017.

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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 MOTION TO EXTEND DISTRICT COURT'S STAY PENDING WRIT PETITION AND RULE 27(E) EMERGENCY MOTION FOR INTERIM EXTENSION OF STAY (ACTION REQUIRED BY NOVEMBER 21, 2017) 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).

Participants in the case who are registered with Eflex will be served by the Eflex system and other parties, listed below, who are not registered with the Eflex system will be served with a sealed copy of the forgoing via regular U.S. Mail.

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