Case No. 74519

In the Supreme Court of Nevada

JOHN P. QUINN, MICHAEL T. ZELLER, MICHAEL L. FAZIO, and IAN S. SHELTON,

Petitioners,

vs.

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; WYNN RESORTS, LIMITED; and ELAINE P. WYNN,

Real Parties in Interest.

District Court
No. A656710

REAL PARTY IN INTEREST ELAINE P. WYNN'S
JOINDER IN WRIT PETITION BY FORMER COUNSEL
With Supporting Points and Authorities

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
LEWIS ROCA
ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway,
Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

JAMES M. COLE (*pro hac vice*)
SIDLEY AUSTIN, LLP
1501 K. Street, N.W.
Washington, D.C. 20005
(202) 736-8246

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

MARK E. FERRARIO (SBN 1625)
TAMI D. COWDEN (SBN 8994)
GREENBERG TRAURIG, LLP
3773 Howard Hughes
Parkway, Suite 400 North
Las Vegas, Nevada 89169
(702) 792-3773

Attorneys for Elaine P. Wynn

NRAP 26.1 DISCLOSURE

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

Elaine P. Wynn is an individual. She has been represented in this litigation by William R. Urga and David J. Malley of Jolley Urga Woodbury Holthus & Rose; Mark E. Ferrario and Tami D. Cowden of Greenberg Traurig, LLP; James M. Cole and Scott D. Stein of Sidley Austin LLP; Daniel F. Polsenberg, Joel D. Henriod and Abraham G. Smith of Lewis Roca Rothgerber Christie LLP; and John B. Quinn, Michael T. Zeller, Susan R. Estrich, Michael L. Fazio and Ian S. Shelton of Quinn Emanuel Urquhart & Sullivan, LLP.

Dated this 21st day of November, 2017.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Daniel F. Polsenberg*
DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
3993 Howard Hughes Pkwy., Ste. 600
Las Vegas, Nevada 89169
(702) 949-8200

Attorneys for Elaine P. Wynn

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

REAL PARTY IN INTEREST ELAINE P. WYNN'S JOINDER IN WRIT PETITION BY FORMER COUNSEL

Elaine P. Wynn joins the Quinn Attorneys' request for a writ of prohibition, but submits this brief to emphasize why the Court should block the depositions that Ms. Sinatra seeks: the depositions are barred under this Court's decision in *Club Vista Financial Services v. Eighth Judicial District Court*, 128 Nev., Adv. Op. 21, 276 P.3d 246, 250 (2012). The district court brushed aside that precedent, and Ms. Sinatra cannot make the required showing under that case to justify deposing four of Ms. Wynn's former trial lawyers in this case, about their work for Ms. Wynn in this case.

Allowing the depositions to proceed would severely undermine *Club Vista* and would incentivize countless Nevada defendants to delay and distract from the merits of their lawsuits by raising abuse-of-process counterclaims and then forcing plaintiffs' trial counsel into depositions based on such counterclaims. The principles underlying *Club Vista* are designed to prevent precisely that sort of maneuvering.

ARGUMENT

"Forcing 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*, 128 Nev., Adv. Op. 21, 276 P.3d at 249 (quoting *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986)). The district court's decision to allow Ms. Sinatra to force Ms. Wynn's former counsel into deposition was wrong because (1) *Club Vista* plainly covers Ms. Wynn's former trial counsel, and (2) Ms. Sinatra cannot meet its "stringent" test. *Id.* at 250.

I.

THE DISTRICT COURT ERRED IN HOLDING THAT *CLUB VISTA* DOES NOT APPLY

A. *Club Vista* Expressly Applies to Former Counsel

Ms. Sinatra argued to the district court that, "[b]ecause the Quinn Attorneys are no longer representing Ms. Wynn in this action, there should be no need for Ms. Sinatra to meet the test of *Club Vista*." (*See* Sinatra Motion to Compel, at 11 n.2, 2 App. 276 n.1.) That remarkable assertion, buried in a footnote with no supporting authority, is irreconcilable with *Club Vista*. The Court's *very first sentence* described the question presented as "whether, and under what circumstances, a party to a lawsuit may depose an opposing party's *former* attorney." *Club Vista*, 128 Nev., Adv. Op. 21, 276 P.3d at 247 (emphasis added).

And the Court's answer was unequivocal: the same "stringent" test applied to former as well as current counsel.

Ms. Sinatra's contention that *Club Vista* is categorically inapplicable to former counsel is untenable. Although this Court "recognize[d]" in *Club Vista* that being former counsel might "alleviate[] some of the concerns generally raised by deposing a party's current trial counsel," it went on to hold that "the district court should nonetheless apply the standards discussed here" when the attorney in question "was responsible for the filing of the complaint" and was the party's "counsel for a significant portion of the proceedings." *Id.* at 251 n.9. Both considerations are true here, as the Quinn Attorneys were Ms. Wynn's trial counsel when Ms. Wynn filed her claims against Ms. Sinatra and during the period of time that Ms. Sinatra has targeted through her abuse-of-process counterclaim.[1]

[1] Many courts have rejected Ms. Sinatra's artificial distinction between current trial counsel and other attorneys. *See, e.g.*, *Guantanamera Cigar Co. v. Corporacion Habanos*, S.A., 263 F.R.D. 1, 9 (D.D.C. 2009) ("the concerns articulated by the [test] did not indicate that only attorneys of record are protected by the standard"); *Alomari v. Ohio Dep't of Pub. Safety*, No. 11-0613, 2014 WL 12651191, at *6 (S.D. Ohio June 19, 2014) (denying motion to compel deposition of former counsel).

B. This Case Implicates *Club Vista's* Policy Concerns

The district court agreed with Ms. Sinatra that *Club Vista* does not apply and attributed its decision, without further explanation, to "the fact that the – in the circumstances under which Quinn Emanuel left this case." (11/6/17 Hr'g Tr. 28:9-11, 2 App. 458.) However, neither Quinn Emmanuel's withdrawal from the case nor the "circumstances" of its withdrawal supports any departure from *Club Vista*. To the contrary, the policy concerns that this Court articulated to justify the "stringent" three-pronged test in *Club Vista* are strongly present here.

1. The Depositions Would Extract Privileged Strategy Calls

This Court observed that "such depositions could provide a back-door method for attorneys to glean privileged information about an opponent's litigation strategy." 128 Nev., Adv. Op. 21, 276 P.3d at 250. The district court's ruling here threw that back door wide open. Ms. Sinatra claims that there is "no question" that deposing the Quinn Attorneys is "reasonably calculated" to lead to discoverable information, because they were "closely involved in Ms. Wynn's actions giving rise to Ms. Sinatra's abuse-of-process claim." (Sinatra Motion to Compel, at 11:3-6, 2 App. 276.) But that is just another way of saying—in no

uncertain terms—that Ms. Sinatra wants to "glean privileged information" about Ms. Wynn's litigation strategy in bringing claims against Ms. Sinatra. That strategy is what Ms. Sinatra's abuse-of-process counterclaim is all about. (*See* Sinatra Counterclaim 16–17, at ¶¶ 10–11, 1 App. 119–20 ("In early 2016 … Quinn Emanuel became [Ms. Wynn's] lead counsel. At that time, Ms. Wynn began her campaign to abuse the legal process as against Ms. Sinatra.").) *Club Vista*'s test was instituted to protect counsel from unwarranted questioning on such privileged matters.

2. The Depositions Would Chill Attorney-Client Communication

The Court also remarked that deposing trial counsel is disruptive because, among other things, it may "prevent clients from openly communicating with their attorneys." *Club Vista*, 128 Nev., Adv. Op. 21, 276 P.3d at 249. If affirmed, the district court's decision would risk doing so across all of Nevada's civil litigation. More specifically, if an abuse-of-process counterclaim like Ms. Sinatra's automatically secures a free pass to depose the other side's lawyers, it would be a devastating blow to open attorney-client communications and a huge boon to abuse-of-process counterclaims statewide. Such a result would produce a

chilling effect on the right of access to the court, which is precisely why abuse-of-process claims like Ms. Sinatra's are "heavily disfavored" in the first place. *N. Las Vegas Redev. Agency v. Skyview Corp.*, No. 14A70915, 2015 WL 13066381, at *6 (Nev. Dist. Ct. Jan. 22, 2015) (citing *Wagner Equip. Co. v. Wood*, 938 F. Supp. 2d 1203, 1212 (D.N.M. 2013)).

3. The Timing of the Depositions Would Maximize the Disruption and Prejudice Ms. Wynn

Permitting depositions of trial counsel creates delays and increases costs. 128 Nev., Adv. Op. 21, 276 P.3d at 249. The district court's decision will inevitably do so here. The alleged facts underlying her abuse-of-process claim occurred more than 16 months before Ms. Sinatra filed the claim on September 7, 2017, and that filing date was almost two months before the close of fact discovery. (*See* Sinatra Counterclaim 16–19, 1 App. 119–20.) Ms. Sinatra nevertheless waited until four days before the close of fact discovery to file her motion to compel, and the district court's order would force Ms. Wynn to defend her own lawyers "under the microscope of interrogation," after discovery has closed. *Club Vista*, 276 P.3d at 250. In sum, *Club Vista* applies and the district court's conclusion to the contrary was incorrect.

II.

MS. SINATRA'S MOTION TO COMPEL DEPOSITIONS FAILS TO SATISFY *CLUB VISTA'S* THREE-PRONGED TEST

To address the various problems inherently connected to deposing the other side's trial counsel, this Court adopted a "stringent" three-part test that the party seeking a deposition must satisfy. In particular, the movant must show 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*, 128 Nev., Adv. Op. 21, 276 P.3d at 250 (citation omitted). In the absence of *any* of these conditions, the deposition cannot proceed. *Id.* Having erroneously dispensed with *Club Vista* as inapplicable, neither Ms. Sinatra nor the district court confronted these factors, much less made any effort to satisfy them. Ms. Sinatra's motion fails all three prongs.

A. There Are Other Practicable Means to Obtain Non-Privileged Discovery Regarding Ms. Sinatra's Abuse-of-process Claim

Ms. Sinatra has not identified *anything* over which the Quinn Attorneys have exclusive percipient knowledge or for which no other means exist to obtain the information. Ms. Sinatra's abuse-of-process

counterclaim focuses on (a) the merits of the cross-claims that Ms. Wynn has pled against Ms. Sinatra, (b) settlement discussions between Ms. Wynn and the Wynn Parties, (c) Ms. Wynn's requests for discovery, and (d) media statements by Ms. Wynn. Ms. Sinatra has made no showing to establish that the Quinn Attorneys have exclusive percipient knowledge of any of these points.

To the contrary, the Quinn Attorneys lack percipient knowledge as to the facts underlying Ms. Wynn's cross-claims, which allege that Ms. Sinatra conspired with Mr. Wynn and Wynn Resorts to have Ms. Wynn removed from the Wynn Resorts Board. The cross-claims rest on allegations of historical fact about Ms. Wynn's ouster from the Board, an event to which the Quinn Attorneys could not have been percipient witnesses because they were not Ms. Wynn's lawyers at the time. Likewise, the Quinn Attorneys plainly do not have exclusive knowledge of the proceedings and settlement negotiations in this litigation, nor of Ms. Wynn's public statements about the litigation.

Ms. Sinatra, therefore, has utterly failed to establish that she cannot obtain relevant, non-privileged information regarding all of these topics from ordinary discovery channels. The only thing that the

Quinn Attorneys can possibly add through exclusive percipient knowledge is privileged information regarding their communications with Ms. Wynn and their and Ms. Wynn's legal strategy. This stands in stark contrast to *Club Vista*, where the plaintiff expressly stated in pre-trial disclosures that its trial attorney "may have discoverable information," and a representative for the plaintiff subsequently testified that the attorneys were the *only* ones who had personal knowledge of the factual allegations underlying the complaint. 128 Nev., Adv. Op. 21, 276 P.3d at 247. Yet even so, in *Club Vista* this Court *rejected* the district court's order compelling the attorney's deposition. *Id.* at 251.

B. The Testimony Sought from the Quinn Attorneys is Privileged and Protected

Ms. Sinatra has not shown that the information she seeks by way of deposition is "relevant and nonprivileged." *Club Vista*, 128 Nev., Adv. Op. 21, 276 P.3d at 250. The closest that Ms. Sinatra comes is to posit—in the vaguest of terms—that "there are questions [the Quinn Attorneys] can be asked that would call for relevant, unprivileged responses." (Sinatra Motion to Compel, at 11:14-15, 2 App. 276.) Ms. Sinatra never elaborates on what those "questions" might be.

Elsewhere, she similarly speculates that, while "the Quinn Attorneys will argue that anything they know is privileged," that "remains to be seen." (*Id.* at 11:13-14, 2 App. 276.) But it is *Ms. Sinatra's* burden to show she seeks relevant, non-privileged material, and her naked conjecture fails to do so.

Ms. Sinatra's failure of proof, moreover, is entirely unsurprising given that the information she seeks is covered by a host of protections—the attorney-client privilege, the work product doctrine, the absolute litigation privilege, the *Noerr-Pennington* doctrine, and settlement confidentiality. The Quinn Attorneys persuasively explain each of these infirmities in Ms. Sinatra's deposition requests, and Ms. Wynn incorporates those arguments. *See, e.g.*, *Bullivant Houser Bailey PC v. Eighth Judicial Dist. Court*, 128 Nev. 885, 381 P.3d 597 (2012) (recognizing absolute litigation privilege bars abuse of process claim). There is simply no "nonprivileged" information at stake here.

C. The Testimony Sought from the Quinn Attorneys is Not Crucial to Ms. Sinatra's Case

Ms. Sinatra has not demonstrated that information from the Quinn Attorneys is "crucial to the preparation of [her] case." *Club Vista*, 128 Nev., Adv. Op. 21, 276 P.3d at 250. Ms. Sinatra's abuse-of-

process claim against Ms. Wynn requires her to prove "(1) an ulterior purpose . . . other than resolving a legal dispute, and (2) a willful act . . . not proper in the regular conduct of the proceeding." *LaMantia v. Redisi*, 118 Nev. 27, 30, 38 P.3d 877, 879 (2002).

1. The Depositions will Not Establish an Ulterior Purpose by Ms. Wynn

As for the first prong, there is zero possibility that the Quinn Attorneys could provide "crucial" information about Ms. Wynn's purposes or mental state. Ms. Sinatra has already deposed Ms. Wynn on multiple occasions, and Ms. Sinatra has not articulated anything Ms. Wynn was unable to address during those interrogations that render examination of the Quinn Attorneys appropriate. If the Quinn Attorneys know anything further, moreover, it would plainly be privileged.

2. The Depositions will Not Reveal any Acts Not Already Known to Ms. Sinatra

As for the second prong, Ms. Sinatra likewise cannot establish that the Quinn Attorneys have "crucial" information about any willful act not proper in the regular conduct of the judicial proceedings. Any of Ms. Wynn's allegedly wrongful acts are matters of historical fact and readily available to Sinatra, including, for example, the settlement

demands and discovery requests alleged in Ms. Sinatra's pleading. (*See, e.g.*, Sinatra Counterclaim 16–19, 1 App. 119–22.) With the parties to the litigation fully available to her for discovery, Ms. Sinatra has failed to establish that the Quinn Attorneys can deliver any meaningful, much less "crucial," testimony.

* * *

Ms. Sinatra needed to satisfy all three *Club Vista* factors, but she satisfies none. This case forcefully illustrates the concerns led this Court to adopt a "stringent" test to limit depositions of former trial to "exceptionally limited circumstances." *Club Vista*, 128 Nev., Adv. Op. 21, 276 P.3d at 250. The Court should therefore enter a writ to stop the depositions.

CONCLUSION

This Court should issue a writ of prohibition to block the district court's order compelling deposition of the Quinn Attorneys.

Dated this 21st day of November, 2017.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Daniel F. Polsenberg*
DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

JAMES M. COLE (*pro hac vice*)
SIDLEY AUSTIN, LLP
1501 K. Street, N.W.
Washington, D.C. 20005
(202) 736-8246

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

MARK E. FERRARIO (SBN 1625)
TAMI D. COWDEN (SBN 8994)
GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway, Suite 400 North
Las Vegas, Nevada 89169
(702) 792-3773

Attorneys for Elaine P. Wynn

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 2,250 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this 21st day of November, 2017.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Daniel F. Polsenberg*
DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
3993 Howard Hughes Parkway,
Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

Attorneys for Elaine P. Wynn

CERTIFICATE OF SERVICE

I certify that on November 21, 2017, I submitted the foregoing REAL PARTY IN INTEREST ELAINE P. WYNN'S JOINDER IN WRIT PETITION BY FORMER COUNSEL for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

Pat Lundvall
MCDONALD CARANO LLP
2300 West Sahara Ave.
Suite 1200
Las Vegas, NV 89102

Attorneys for Specially Appearing Petitioners

Honorable Elizabeth Gonzalez
Department 11
EIGHTH JUDICIAL DISTRICT COURT
200 Lewis Ave.
Las Vegas, NV 89155

Respondent

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

Michal 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

/s/ Adam Crawford
An Employee of LEWIS ROCA ROTHGERBER CHRISTIE LLP