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.

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Nov 22 2017 02:32 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court Case No. 74519

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

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

NOTICE OF INTENT TO FILE SUPPLEMENT TO WRIT PETITION AND MOTION TO EXTEND DISTRICT COURT'S STAY PENDING WRIT PETITION

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Petitioners intend to file a supplement to their writ petition and their motion to extend the district court's stay pending writ petition in order to apprise this Court of new developments resulting from an order of the California Superior Court for Los Angeles County. Petitioners filed their writ petition and motion to extend the district court's stay on November 21, 2017. During a hearing the next day, on November 22, the California court issued a tentative order, a true and correct copy of which is attached hereto as Exhibit 1, and stated at the hearing that it intended to enter the tentative order as the final order of the court.

The November 22 order of the California court directly relates to issues raised in the writ petition and motion to extend the district court's stay. In particular, the California court (1) ruled that "this court has jurisdiction over the subpoenas at issue" served on the Quinn Emanuel attorneys, (2) ruled that Real Party in Interest Kim Sinatra had "failed to meet her burden to establish a proposed basis for deposing Petitioners" under the "stringent test for deposing an adversary's counsel" in California and Nevada, and (3) awarded $10,000 in sanctions, representing a portion of Petitioners' attorneys' fees, because Petitioners' petition to quash "was opposed without substantial justification."

Petitioners intend to file a supplement to their writ petition and motion to extend the district court's stay, which will discuss the impact of the California court's order, as soon as the final order is issued by the California court. By filing

this notice, Petitioners do not intend to delay a ruling on their NRAP 27(e) emergency motion for interim extension of stay, and still seek immediate issuance of a temporary, interim stay pending this Court's consideration of the full stay motion and forthcoming supplement.

RESPECTFULLY SUBMITTED this 22nd day of November, 2017.

McDONALD CARANO LLP

By: */s/ Pat Lundvall*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on this 22nd day of November, 2017, a copy of the foregoing NOTICE OF INTENT TO FILE SUPPLEMENT TO WRIT PETITION AND MOTION TO EXTEND DISTRICT COURT'S STAY PENDING WRIT PETITION 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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EXHIBIT 1

Superior Court of California

County of Los Angeles

Department 31

JOHN B. QUINN, et al., Plaintiff, v. WYNN RESORTS, LIMITED, et al., Defendant(s).	Case No.: BS171352 Hearing Date: November 22, 2017 **[TENTATIVE] ORDER RE:** PETITION TO QUASH NON-PARTY ATTORNEY DEPOSITION SUBPOENAS FOR PERSONAL APPEARANCE IN ACTION PENDING OUTSIDE CALIFORNIA, FOR ORDERS STAYING DEPOSITIONS, FOR PROTECTIVE ORDERS, AND FOR SANCTIONS IN THE AMOUNT OF $10,000

The Petition to Quash Non-Party Attorney Deposition Subpoenas for Personal Appearance in Action Pending Outside California, for Orders Staying Depositions, for Protective Orders, and for Sanctions in the Amount of $10,000 is GRANTED. The subpoenas issued by Kimmarie Sinatra for the depositions of non-party attorneys John B. Quinn, Michael T. Zeller, Michael L. Fazio, and Ian S. Shelton are ordered quashed.

Petitioners' request for judicial notice is GRANTED as to Exhibit Nos. 10-21 only. (Evid. Code § 452(d).) Subpoenas, objections, and letters between the parties are not court records.

This petition arises out of extensive litigation, including multiple counter-claims, in the State of Nevada involving Wynn Resorts. Petitioners seek to quash deposition subpoenas for personal appearance directed to Michael T. Zeller, John Q. Quinn, Ian S. Shelton, and Michael L. Fazio, four attorneys from the law firm Quinn Emanuel Urquhart & Sullivan, LLP who represented Elaine Wynn in the Nevada action from January 2016 through March 2017.

Pursuant to CCO § 2029.500, enforcement of out-of-state subpoenas are subject to the same provisions of the Discovery Act. Pursuant to CCP § 2029.600, "[i]f a dispute arises relating to discovery under this article, any request for a protective order or to enforce, quash, or modify a subpoena, or for other relief may be filed in the superior court in the county in which discovery is to be conducted and, if so filed, shall comply with the applicable rules or statutes of this state." Thus, this court has jurisdiction over the subpoenas at issue.

The court "may make 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. In addition, the court may make any other order as may be appropriate to protect the person from unreasonable or oppressive demands, including unreasonable violations of the right of privacy of the person." (CCP § 1987.1.) The court, upon motion reasonably made by the party, may rule upon motions for quashing, modifying or compelling compliance with, subpoenas. (*See e.g. Lee v. Swansboro Country Property Owners Ass'n* (2007) 151 Cal.App.4th 575, 582-83.)

Petitioners contend that Kimmarie Sinatra cannot satisfy the stringent test for deposing an adversary's counsel. "Attorney depositions chill the attorney-client relationship, impede civility and easily lend themselves to gamesmanship and abuse. Counsel should be free to devote his or her time and efforts to preparing the client's case without fear of being interrogated by his or her

opponent. In the highly charged atmosphere of litigation, attorney depositions may serve as a potent tool to harass an opponent. To effectuate these policy concerns, 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." (*Carehouse Convalescent Hosp. v. Superior Court* (2006) 143 Cal.App.4th 1558, 1563 (internal citations omitted).) "[T]he proponent has the burden of proof to establish the predicate circumstances for the first two prongs." (*Ibid.*) Nevada has adopted a similar test:

> To address the difficulties presented by attorney depositions, the Eighth Circuit Court of Appeals has developed 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 that "(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." *Shelton,* 805 F.2d at 1327 (citations omitted). We agree with the *Shelton* court that, in the absence of these conditions, a party should not be permitted to depose an opposing party's attorney, and thus, we adopt this three-factor test.

(*Club Vista Financial Servs. v. Dist. Ct.* (2012) 128 Nev. Adv. Op. 21, 276 P.3d 246, 250.) "By establishing this heightened standard when a party is attempting to depose opposing counsel, we advise litigants to resort to alternative discovery methods and discourage endeavors to seek confidential and privileged information. When the facts and circumstances are so remarkable as to allow a party to depose the opposing party's counsel, the district court should provide specific limiting instructions to ensure that the parties avoid improper disclosure of protected information." (*Ibid.*)

In Opposition, Sinatra contends that this test only applies to current opposing counsel. Sinatra provides no authority for this proposition, but rather focuses on a portion of the court's rationale in *Carehouse*, that "[c]ounsel should be free to devote his or her time and efforts to preparing the client's case without fear of being interrogated by his or her opponent." (*Carehouse, supra* at 1563.) Nothing in the *Carehouse* decision limits its application to current attorneys' of record. Both *Carehouse* and *Club Vista* cited and relied on *Shelton v. American Motors Corp.* (8th Cir. 1986) 805 F.2d 1323 as the leading case involving attorney depositions. While no California Court of Appeal has addressed the issue, various courts around the country have held the above test applies to more than just current counsel of record. (See *Massillon Management, LLC v. Americold Realty Trust* (N.D. Ohio, Jan. 21, 2009, No. 5:08CV0799) 2009 WL 614831, at *5 (applying test to in-house attorney); *Alomari v. Ohio Department of Public Safety* (S.D. Ohio, June 19, 2014, No. 2:11-CV-00613) 2014 WL 12651191, at *7 (same).) In *Massachusetts Mut. Life Ins. Co. v. Cerf* (N.D. Cal. 1998) 177 F.R.D. 472, 481, the court applied *Shelton* to grant a motion for protective order regarding former counsel in an existing case.

As noted by the court in *Alomari, supra* "*Shelton* applies to cases in which allowing an opposing party to depose counsel might expose litigation strategy in the current case." Similarly, "the concerns articulated by the *Shelton* court did not indicate that only attorneys of record are protected by the standard." (*Guantanamera Cigar Co. v. Corporacion Habanos, S.A.* (D.D.C. 2009) 263 F.R.D. 1, 9.) The court finds no logical reason not to apply the well-established three-factor test above where, as here, Sinatra seeks to depose those who served as Wynn's former counsel in the action currently pending between the parties. "Taking the deposition of opposing counsel not only disrupts the adversarial system and lowers the standards of the profession, but it also adds to the already burdensome time and costs of litigation. It is not hard to imagine

additional pretrial delays to resolve work-product and attorney-client objections, as well as delays to resolve collateral issues raised by the attorney's testimony. Finally, the practice of deposing opposing counsel detracts from the quality of client representation." (*Shelton, supra* at 1327.)

Petitioners note that the subpoenas relate solely to Sinatra's abuse of process claim. In Nevada, "[t]o support an abuse of process claim, a claimant must show (1) an ulterior purpose by the party abusing the process other than resolving a legal dispute, and (2) a willful act in the use of the legal process not proper in the regular conduct of the proceeding." (*Land Baron Inv. v. Bonnie Springs Family LP* (2015) 131 Nev. Adv. Op. 69, 356 P.3d 511, 519.)

"[T]he proponent has the burden of proof to establish the predicate circumstances for the first two prongs." (*Carehouse, supra* at 1563.) Sinatra fails to meet this burden. Sinatra summarily speculates that the Petitioners were "witness to conversations, discussions, and written communications that are part of the abuse of process claim . . . [and] participated in non-privileged communications and it is believed that some have not been produced or disclosed by Ms. Wynn in the litigation." Sinatra provides no other evidence or argument regarding the necessity of the depositions or her inability to obtain the information sought from other sources. "Because *Shelton* and the related cases require the moving party to *show* or *prove* the relevance and necessity of the testimony sought, this Court finds that plaintiff's conclusory assertions do not meet its burden." (*Guantanamera, supra* at 9.)

Based on the foregoing, the motion to quash is GRANTED. Sinatra has failed to meet her burden to establish a proper basis for deposing Petitioners, who served as Wynn's trial counsel for over a year in the Nevada action at issue.

Petitioners seek sanctions in the amount of $10,000.00 pursuant to CCP §§ 2025.410 and 1987.2 against Wynn Resorts Limited and Kim Sinatra. Petitioners are not parties to the litigation and were not served with a deposition notice. Therefore, § 2025.410, which applies to deposition notices, not subpoenas, is inapplicable. Section 1987.2 provides "the court may in its discretion award the amount of the reasonable expenses incurred in making or opposing the motion, including reasonable attorney's fees, if the court finds the motion was made or opposed in bad faith or without substantial justification or that one or more of the requirements of the subpoena was oppressive." Based on the court's review of Sinatra's opposition and the subpoenas and the court's analysis set forth herein, the court comfortably finds that the motion was opposed without substantial justification. More specifically, Sinatra proffered no evidence in support of her opposition and provided no specific showing that any information that she sought to obtain from petitioners via the subpoenas was not protected by the attorney-client privilege. Moreover, Sinatra failed to provide the court with any authority for her non-sensical assertion that the *Carehouse* factors do not apply to counsel that are not counsel to parties to the action. The amount of sanctions sought, $10,000.00 is reasonable, given that it is far less than the attorneys actually billed on this matter. Pursuant to CCP §1987.2, Sinatra and/or her attorneys of record, are ordered to pay sanctions to petitioners in the amount of $10,000.00 within 20 days of the date of this order.

Moving party is ordered to give notice.

DATED: November 22, 2017

Hon. Samantha P. Jessner
Los Angeles Superior Court