IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN B. QUINN, an individual, MICHAEL T. ZELLER, an individual, MICHAEL L. FAZIO, an individual, IAN S. SHELTON, an individual, and ELAINE P. WYNN, 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, and WYNN RESORTS, LIMITED, a Nevada Corporation,

Real Parties in Interest.

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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*

SUPPLEMENT TO WRIT PETITION AND MOTION TO EXTEND DISTRICT COURT'S STAY PENDING WRIT PETITION

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I. INTRODUCTION

Petitioners John B. Quinn, Michael T. Zeller, Michael L. Fazio, and Ian S. Shelton file this supplement to inform the Court of a new development that affects the writ petition. On November 22, 2017, the California Superior Court for Los Angeles County quashed the California subpoenas directed to Petitioners—*the same California subpoenas* over which the Nevada district court impermissibly purported to assert jurisdiction in compelling Petitioners to appear for deposition in Nevada (PA127, 137, 147, 157), and *the only subpoenas* ever served on Petitioners in this litigation. (PA813.) The California order is conclusively binding in these Nevada proceedings and holds what Petitioners have maintained all along:

(1) The district court improperly usurped the California court's exclusive jurisdiction to decide the propriety of Kimmarie Sinatra's California subpoenas seeking percipient testimony from Petitioners under the Uniform Interstate Depositions and Discovery Act ("UIDDA")—a district court decision that is in conflict with seven other state supreme courts addressing the issue (PSA854);

(2) The district court erred when it adopted Ms. Sinatra's "non-sensical" argument (PSA858) that Petitioners' depositions were not subject to the stringent test governing the propriety of depositions of former trial counsel as set forth in *Carehouse Convalescent Hospital v. Superior Court*, 143 Cal. App. 4th 1558, 1563 (2006), and this Court's "similar" test in *Club Vista Financial Services LLC v.*

Eighth Judicial Dist. Court, 128 Nev. Adv. Op. 21, 276 P.3d 246, 250 (2012); and

(3) Ms. Sinatra did not demonstrate *any* of the three required factual elements required to depose Petitioners—so much so that the California court sanctioned Ms. Sinatra because her position was "without substantial justification." (PSA857-858.)

II. FACTUAL BACKGROUND

Many months after Petitioners' withdrawal as trial counsel for Elaine Wynn from the underlying Nevada proceedings and over a month after asserting an "abuse of process" claim against Ms. Wynn, Ms. Sinatra served California subpoenas on non-party Petitioners pursuant to the UIDDA, and did not serve any Nevada discovery on Petitioners. (PA127, 137, 147, 157.) On October 23, 2017, Petitioners filed a petition to quash the California subpoenas in the California court. (PA523-547.) On October 27, Ms. Sinatra filed with the California court an *ex parte* application to compel the depositions before the November 3 discovery cutoff (PA167-175)—which the California court denied on due process grounds. (PA261-265.) After losing in California, and in a forum-shopping effort to preempt the hearing date already set on Petitioners' motion to quash in California, Ms. Sinatra hastily filed a motion to compel in Nevada district court. (PA266-320.) On November 6, the Nevada district court orally granted Ms. Sinatra's motion, ruling that the requirements of *Club Vista* were inapplicable to Petitioners

(PA458), and that it could compel the Petitioners' attendance—in Nevada—based on Petitioners' expired *pro hac vice* applications. (PA452, 454, 459.)

The district court stayed its ruling until November 21 to allow the filing of the writ petition. (PA458.) One day later, at the previously set hearing on November 22, the California court entered an order quashing the subpoenas and awarding sanctions against Ms. Sinatra. (PSA853-858.) The court granted that relief after full briefing (PA321-337, 523-547, PSA822-833), and after a full hearing including argument from counsel. (PSA859-878.) The district court entered its written order compelling Petitioners' depositions in Nevada on November 30. (PSA883-887.)

III. ANALYSIS

A. The California Court Correctly Ruled That It Has Jurisdiction

The California court concluded from the plain language of California's UIDDA, which is substantively identical to Nevada's UIDDA, that it "has jurisdiction over the subpoenas at issue." (PSA854.) *See also Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 138, 206 P.3d 572, 576 (2009) ("To determine legislative intent, this court first looks at the plain language of a statute."); *compare* Cal. Civ. Proc. Code, § 2029.600, *with* NRS 35.190. This ruling is not only binding, as indicated below, but also is consistent with the purposes of the UIDDA, as described by the Uniform Law Commission that drafted the statutory scheme:

> The act requires that any application to the court for a protective order, or to enforce, quash, or modify a subpoena, or ***for any other dispute relating to discovery*** under this Act, must comply with the law of ***the discovery state***. Those laws include ***the discovery state's*** procedural, evidentiary, and conflict of laws rules. Again, the discovery state has a significant interest in protecting its residents who become non-party witnesses in an action pending in a foreign jurisdiction from any unreasonable or unduly burdensome discovery requests, and this is easily accomplished by ***requiring that any discovery motions must be decided under the laws of the discovery state***. This protects the deponent by requiring that all applications to the court that directly affect the deponent ***must be made in the discovery state***.[1]

By serving California subpoenas and unsuccessfully seeking enforcement of them in a California court, Ms. Sinatra submitted to the exclusive jurisdiction of the California court, waived any jurisdictional objections, and is bound by the result.

As a result of the California court's decision, the district court's ruling compelling Petitioners' depositions based on enforcement of the now quashed California subpoenas under the UIDDA is a nullity. All that potentially remains to support the district court's ruling is its unprecedented assertion of authority to order attorney depositions based on Petitioners' now long-expired *pro hac vice* applications. For the reasons stated in the petition, this rationale is meritless.[2]

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[1] Uniform Interstate Depositions and Discovery Act, drafted by the National Conference of Commissioners on Uniform State Laws (April 3, 2008), *available at*: http://www.uniformlaws.org/shared/docs/interstate%20depositions%20and%20discovery/uidda_final_07.pdf (emphasis added).

[2] Although it vaguely alluded to the "circumstances" of Petitioners' departure from the case at the November 6 hearing (PA548), the district court's order addressing

B. The California Court Correctly Ruled That Ms. Sinatra Failed To Meet Her Stringent Burden For Deposing Counsel

In addition to its jurisdictional ruling, the California court made two other controlling rulings. First, the California court rejected Ms. Sinatra's argument that the stringent test limiting the depositions of trial attorneys only applies to current counsel. After analyzing *Shelton v. America Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986)—a case that "[b]oth *Carehouse* and *Club Vista* cited and relied on"—the California court ruled that Ms. Sinatra's attempt to cabin the test to current attorneys of record was so "non-sensical" as to warrant sanctions. (PSA856, 858.) As the California court found, "[n]othing in the *Carehouse* decision limits its application to current attorneys' of record," and "various courts around the county have held the above test applies to more than just current counsel of record." (PSA856.) The court found "no logical reason not to apply the well-established three-factor test" to Ms. Wynn's "former counsel in the action currently pending between the parties," and this Court should reach the same conclusion. (*Id.*)[3]

Second, the California court ruled that Ms. Sinatra failed to meet her burden of establishing any of the three factual elements that are common to both the

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that withdrawal stated that it was making no findings that could be relevant to its jurisdiction over this matter. (PSA850, at ¶ 24.)

[3] As Ms. Wynn's joinder explains, the very language of *Club Vista* makes clear that its requirements apply to "an opposing party's former attorney." 276 P.3d at 247.

Carehouse and *Club Vista* tests—(1) whether the information sought is available from other sources, (2) whether it is critical, and (3) whether it is privileged. *Compare Club Vista*, 276 P.3d at 250 (describing three-element test), *with Carehouse*, 143 Cal. App. 4th at 1563 (describing substantively identical three-element test). Aside from "summarily speculat[ing] that the Petitioners were 'witnesses to conversations, discussions, and written communications that are part of the abuse of process claim . . . [and] participated in non-privileged communications . . . . ,'" Ms. Sinatra "provide[d] no other evidence or argument regarding the necessity of the depositions or her inability to obtain the information sought from other sources." (PSA857.) And since the three-factor test "require[s] the moving party to *show* or *prove* the relevance and necessity of the testimony sought," the California court found "that plaintiff's conclusory assertions do not meet this burden.'" (*Id*.) These determinations—fully dispositive of the issues in the writ petition—should be accorded both issue preclusive effect and deference as a matter of comity. (PSA880.) Moreover, in Nevada, Ms. Sinatra offered no evidence, and the district court made no findings, that any *Club Vista* requirements were met. (PA452, 454, 458, 459.)

C. The California Court's Order Is Entitled To Issue Preclusion

To establish issue preclusion, each of the following elements must be met: "(1) the issue decided in the prior litigation must be identical to the issue presented

in the current action; (2) the initial ruling must have been on the merits and have become final; (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation; and (4) the issue was actually and necessarily litigated." *Frei ex rel. Litem v. Goodsell*, 129 Nev. Adv. Op. 43, 305 P.3d 70, 72 (2013) (quotations and citations omitted). Each of those factors is satisfied here, both as to the California Superior Court's finding that it had jurisdiction over the dispute and its findings that Ms. Sinatra failed to satisfy the necessary requirements to depose former trial counsel.

1. The Issue Decided in California is Identical to that in Nevada

Whether Ms. Sinatra can carry her burden of establishing the three-factor test for deposing trial counsel was decided in California and is the same issue before this Court. As the California court recognized, the *Carehouse* and *Club Vista* tests for deposing counsel are "similar" and both rely on *Shelton* "as the leading case involving attorney depositions." (PSA855-856.) The court's factual finding that Ms. Sinatra failed to satisfy the test is binding here.

2. The Parties are in Privity

The privity requirement is easily satisfied. *See Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. Adv. Op. 28, 321 P.3d 912, 917 (2014). Ms. Sinatra and Petitioners were actual parties to the California proceeding that resulted in the California court's November 22 order.

3. The California Court's Order Actually and Necessarily Litigated the Issue before this Court

"When an issue is properly raised and is submitted for determination, the issue is actually litigated." *Alcantara*, 130 Nev. Adv. Op. 28, 321 P.3d at 918 (citations and quotations omitted). Whether Ms. Sinatra satisfied the test for deposing Petitioners was actually and necessarily litigated in California.

Other courts have found issue preclusion in similar circumstances. In *Gunning v. Doe*, a local politician filed a lawsuit in Maine state court against "John Doe" defendants who anonymously published allegedly defamatory material on the internet. 159 A.3d 1227, 1229 (Maine 2017). The plaintiff served a California subpoena on the website that hosted the allegedly defamatory material to identify individuals associated with the publications. *Id.* The owner and writer of the website proceeded anonymously in California with a motion to quash the subpoena, which the California court granted. *Id.* at 1229-30. The plaintiff did not appeal the ruling, but later served a subpoena in Maine demanding that a Maine resident sit for a deposition "to learn whether he was the writer[.]" *Id.* The target of the subpoena moved the Maine court to quash on the ground that the plaintiff "was collaterally estopped by the California judgment from further discovery seeking to learn the identities of Does #1 and #2[.]" *Id.* The Maine trial court granted the motion to quash, noting that "the California decision is entitled to collateral estoppel effect and precludes . . . relitigating the same issue here in

Maine." *Id.* The Supreme Judicial Court of Maine affirmed, stating that the plaintiff "cannot simply elect to relitigate the very same issue involving the same parties in another jurisdiction, hopeful of obtaining a more favorable result. Such is the long-standing, well-established doctrine of collateral estoppel." *Id.* at 1233.

This analysis applies with equal force here. The California court's ruling that Ms. Sinatra (1) "provides no other evidence or argument regarding the necessity of the depositions or her inability to obtain the information sought from other sources," and that she (2) "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," were actually and necessarily litigated, and thus should be accorded preclusive effect in this Nevada proceeding. (PSA857-858.)

4. The California Court's Order is Final

"For purposes of issue preclusion, a final judgment includes any prior adjudication of an issue in another action that is 'determined to be sufficiently firm to be accorded conclusive effect.'" *Univ. of Nevada v. Tarkanian*, 110 Nev. 581, 599, 879 P.2d 1180, 1191 (1994) (quoting Charles A. Wright, Law of Federal Courts § 100A, at 682 (4th ed. 1983)). The order memorializing Ms. Sinatra's agreement not to pursue a writ petition or any appeal of the California Superior Court's order conclusively establishes that the decision is final for purposes of issue preclusion. (PSA880, at ¶ 1.) *See, e.g., Five Star Capital Corp. v. Ruby*, 124

Nev. 1048, 1059, 194 P.3d 709, 716 (2008) (finding preclusion because party "failed to appeal"); *Murray v. Alaska Airlines, Inc.*, 50 Cal. 4th 860, 878 (2010) (same). Since the order and stipulation to which Ms. Sinatra agreed precludes her from appealing, it is axiomatic that the California court's decision is final, regardless of whether Nevada or California law applies. *See Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 488, 215 P.3d 709, 722 (2009) (addressing law governing issue preclusion); *Garcia v. Prudential Ins. Co. of Am.*, 129 Nev. Adv. Op. 3, 293 P.3d 869, 870 (2013) (same).

D. This Court Should Defer to the California Court's Order

Finally, and independently, this Court should defer to the California court's order as a matter of comity and to further the purpose of the UIDDA. *Mianecki v. Second Judicial Dist. Court*, 99 Nev. 93, 98, 658 P.2d 422, 424-25 (1983) (recognizing the comity principle); *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 289 Va. 426, 445 (2015) (the UIDDA is "rooted in principles of comity") (citations and quotations omitted). The requirement that the California decision be afforded Full Faith and Credit also independently compels this result. *See Franchise Tax Bd. of California v. Hyatt*, 136 S. Ct. 1277, 1281 (2016).

IV. CONCLUSION

For the reasons stated above and in the petition, the Court should grant a writ of prohibition or, alternatively, *mandamus.*

RESPECTFULLY SUBMITTED this 30th day of November, 2017.

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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 supplement 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 30th day of November 2017.

Pat Lundvall

Pat Lundvall

Subscribed and sworn to before me
this 30th 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 2,424 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.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on this 30th day of November, 2017, a copy of the foregoing **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).

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