IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 74519
District Court Case No. A-12-656710-B

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, DEPT. XI,

Respondent

and

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

Real Parties in Interest.

REAL PARTIES' ANSWER TO PETITION FOR WRIT OF PROHIBITION OR, ALTERNATIVELY, *MANDAMUS*

James J. Pisanelli, Esq., #4027
JJP@pisanellibice.com
Todd L. Bice, Esq., #4534
TLB@pisanellibice.com
Debra L. Spinelli, Esq., #9695
DLS@pisanellibice.com
Pisanelli Bice PLLC
400 South 7th Street, Suite 300
Las Vegas, NV 89101
702.214.2100

Robert L. Shapiro, Esq.
(*pro hac vice admitted*)
RS@glaserweil.com
GLASER WEIL FINK HOWARD AVCHEN & SHAPIRO LLP
10250 Constellation Boulevard, 19th Floor
Los Angeles, CA 90067
310.553.3000

Mitchell J. Langberg, Esq., 10118
mlangberg@bhfs.com
BROWNSTEIN HYATT FARBER & SCHRECK LLP
100 North City Parkway, Suite 1600
Las Vegas, Nevada 89106
Telephone: 702.382.2101

Attorneys for Real Parties in Interest Kimmarie Sinatra and Wynn Resorts, Limited

RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the foregoing are persons or 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.

PISANELLI BICE PLLC, WACHTELL, LIPTON, ROSEN & KATZ, GLASER WEIL FINK HOWARD AVCHEN & SHAPIRO, LLP, ORRICK, HERRINGTON & SUTCLIFFE LLP and BROWNSTEIN HYATT FARBER & SCHRECK, LLP are the only law firms whose partners or associates have or are expected to appear for Real Parties in Interest Kimmarie Sinatra and Wynn Resorts, Limited, a publicly-traded Nevada corporation, headquartered in Las Vegas, Nevada.

DATED this 1st day of December, 2017.

PISANELLI BICE PLLC

By: /s/ Todd L. Bice
James J. Pisanelli, Esq., 4027
Todd L. Bice, Esq., 4534
Debra L. Spinelli, Esq., 9695
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

Mitchell J. Langberg Esq., 10118
BROWNSTEIN HYATT FARBER SCHRECK
100 North City Parkway, Suite 1600
Las Vegas, Nevada 89106

Attorneys for Real Parties in Interest Kimmarie Sinatra and Wynn Resorts, Limited

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I. INTRODUCTION

The real issue before this court is not whether a Nevada court has the ability to enforce a California subpoena. Rather, the true issue is whether a District Court has the authority to require out-of-state attorneys who appeared in a case pro hoc vice to sit for depositions in that very same case. As a matter of common sense and as a matter of law, the answer is clearly, "yes."

Petitioners John B. Quinn, Michael T. Zeller, Michael L. Fazio, and Ian S. Shelton (collectively, the "Quinn Attorneys") each are California attorneys who requested and were granted permission to serve as counsel for Elaine Wynn ("Ms. Wynn") in ***this*** Nevada case.[1] Each of them participated in ***this*** Nevada case. One of the claims in ***this*** case is that Ms. Wynn engaged in an abuse of process when she filed and prosecuted her claims against Wynn Resorts, Limited ("Wynn Resorts") and its General Counsel, Kimmarie Sinatra ("Ms. Sinatra").

Despite the Quinn Attorneys' suggestion in the Petition, the claims are very serious. And, those claims have survived Ms. Wynn's motion to dismiss,

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[1] The Quinn Attorneys repeatedly states that the attorneys appeared on "now-expired *pro hoc vice* applications." Petition at 3. Even if that characterization mattered, it is made without any evidentiary support. In fact, the Quinn Attorneys state that "Quinn Emanuel represented Ms. Wynn from January 2016 to March 2017." Petition at 9. *Pro hoc vice* applications must be renewed annually on the date of the initial application to the Nevada State Bar. SCR 42(9). Either the Quinn Attorneys practiced law in Nevada in violation of the rules, or the Quinn Attorneys renewed the *pro hoc vice* applications and they do not expire until early next year.

notwithstanding her assertions of privilege. Those claims include allegations about Quinn Emanuel's participation in Ms. Wynn's tortious scheme – not the least of which were her efforts to force Wynn Resorts to terminate Ms. Sinatra under the extortionist threat of Ms. Wynn filing claims containing scurrilous accusations. (Petitioners Appendix ("PA") 118-124).

It should have been no surprise to anyone that the Ms. Sinatra would seek to depose the Quinn Attorneys. Not only are they percipient witnesses, they are participants in Ms. Wynn's tortious scheme. And, of course, not only is the conduct of Ms. Wynn and her representatives at issue, so too is Ms. Wynn's mental state as it relates to that conduct. Not everything that an attorney does, says, hears, or observes is privileged. And, even where privilege appears to exists, it may be lost (for example, when it is in furtherance of a tortious act) or waived (for example, when it is voluntarily disclosed).

To be sure, one would expect that depositions of attorneys would include many assertions of privilege that would require litigation before the District Court judge. But, without conducting the depositions and asking questions on the foundational issues, there would be little chance for a party to develop the record necessary to litigate issues pertaining to the applicability or wavier of such privileges.

Unfortunately, the discovery schedule did not permit the ordinary development of a discovery record before it was necessary to seek the depositions of the Quinn Attorneys. By the time Elaine Wynn responded to Ms. Sinatra's abuse of process claims (with a motion to dismiss), only weeks remained in the discovery schedule. To this day, Ms. Wynn has not filed an answer and Ms. Sinatra does not even know whether Ms. Wynn will assert an advice of counsel defense. In any event, Ms. Sinatra did not have the luxury of completing more fulsome discovery before seeking to depose the Quinn Attorneys.

As the Quinn Attorneys would have it, the decision to attempt to depose the Quinn Attorneys in California by issuing California subpoenas (in aide of Nevada subpoenas that were issues) somehow eviscerates whatever jurisdiction the District Court had, in its own right, to order the Quinn Attorneys' depositions. That is nonsense. If the District Court had jurisdiction to require the Quinn Attorneys to sit for deposition in Nevada – and it did – that jurisdiction was not lost simply because the Quinn Attorneys were given the opportunity to have those depositions conducted in their home state. The Quinn Attorneys rejected that opportunity when they first ducked service of the deposition subpoenas and then sought to quash them.

Contrary to the characterizations in the Petition, the truth is that the District Court decided the merits of Ms. Sinatra's request to depose the

Quinn Attorneys more than two weeks before the California court made any substantive ruling on the motion to quash. It was necessary. Having dodged service, the Quinn Attorneys waited almost two weeks before filing their California motion to quash the deposition subpoenas on October 23, 2017, which was only 10 days before the discovery cutoff. The California court, unfamiliar with the detailed facts and lengthy history of this case, refused to hear the Quinn Attorneys' motion to quash prior to the November 3, 2017 discovery cutoff in this case. The ***only*** court that could allow discovery to occur after that date was the District Court. It was perfectly appropriate for Ms. Sinatra to abandon her efforts to depose the Quinn Attorneys in California pursuant to subpoena and ask the District Court to assert its jurisdiction to order the Quinn Attorneys to sit for deposition in Nevada.

Because the District Court had jurisdiction to require the Quinn Attorneys to appear for deposition, they and Ms. Wynn are left only with their argument that the depositions should not be permitted pursuant to the standards set forth in *Club Vista Fin. Servs. v. Dist. Ct.*, 128 Nev. Adv. Op. 21, 276 P.3d 246 (2012). The District Court is the most familiar with the facts of this case and how they apply to those standards. But, even a cursory review of the facts and circumstance of this case – including the nature of the claims, Quinn Emanuel's status, not only as a percipient witness, but as one participating in the tortious acts, and the timing

issues created by Ms. Wynn and her counsel – reveals that this is one of the circumstances when depositions of former counsel must be permitted.

II. COUNTER-STATEMENT OF FACTS

A. Ms. Wynn's Position in this Lawsuit Until 2016.

For nearly four years, Ms. Wynn was represented by Munger Tolles & Olson in this complicated case. (Pet. at 8.) In January 2016, Quinn Emanuel entered the case and things changed dramatically.

The issues framing the need for the Quinn Attorneys' depositions are framed by Ms. Sinatra's abuse of process claims. Therefore, the allegations of her Counterclaim are pertinent.

As this Court knows, in 2012, after Wynn Resorts redeemed shares held by Aruze USA, Inc., Wynn Resorts initiated an action against Kazuo Okada, Aruze USA, Inc. and Universal Entertainment Corp. Generally, the action pertains to Mr. Okada's rule as member of the Wynn Resorts Board of Directors and certain actions taken by the Board of Directors, including the redemption of Wynn Resorts stock previously held by Aruze USA, Inc. (PA000119.) Counterclaims were asserted against Wynn Resorts, members of its Board of Directors (including Ms. Wynn), and Ms. Sinatra. (*Id*.)

Ms. Wynn saw this litigation as an opportunity to avoid her own obligations under a 2010 stockholders agreement entered into between Stephen Wynn,

Ms. Wynn and Aruze USA. So, in early 2012, she filed certain counterclaims and crossclaims challenging the stockholders agreement. (*Id*.)

In 2015, Ms. Wynn's term as a member of the Board of Directors ended when the shareholders of the corporation declined to vote her to another term. (*Id*.)

For the four year period between early 2012 until early 2016, Ms. Wynn conducted her litigation in a manner that was generally consistent with the alignment of the parties in the lawsuit. (*Id.*) Ms. Wynn had voted in favor of the redemption of the Aruze USA stock and other matters relating to Aruze and Okada. (*Id.*) Thus, as to the claims asserted by Aruze USA and Universal Entertainment, her interests are aligned with Wynn Resorts and she defended those claims accordingly. (*Id*.)

B. Quinn Emanuel Enters the Case.

Ms. Sinatra alleges that when Quinn Emanuel entered the case in 2016, Ms. Wynn began her campaign to abuse the legal process as against Ms. Sinatra for the purposes, among other things, of extracting a settlement from Mr. Wynn, Wynn Resorts, and Ms. Sinatra that could not be achieved in court, to intimidate and embarrass Mr. Wynn, Wynn Resorts and Ms. Sinatra, to create potential conflicts between them, and to intentionally jeopardize their case against Mr. Okada, Aruze and Universal. (PA000119-20.)

This intent was manifested beginning on February 12, 2016. As alleged by Ms. Sinatra, Quinn Emanuel contacted Mr. Wynn's attorney and made an unabashed threat on behalf of Ms. Wynn: either accept a "settlement proposal" or Ms. Wynn would amend her pleadings to add tort claims against Wynn Resorts and Ms. Sinatra. (*Id*. at 000120.) To add to the threat, Quinn Emanuel identified specific allegations Ms. Wynn would make in the amended pleading. (*Id*.)

Ms. Sinatra alleges that Ms. Wynn intended and hoped that the nature of the accusations would cause Mr. Wynn, Wynn Resorts and Ms. Sinatra to make a settlement decision not based on the merits of any claim, but based upon the fear of such accusations being made public. (*Id.*) Further, Ms. Wynn knew some of the accusations to be false. (*Id.*)

Through Quinn Emanuel, Ms. Wynn insisted that Mr. Wynn, Wynn Resorts and Ms. Sinatra could only avoid the filing of the threatened pleadings if Mr. Wynn would: 1) agree to release Ms. Wynn from the transfer restrictions contained in their stockholders agreement, 2) cause the company to terminate Ms. Sinatra, and 3) cause the company to separate the CEO and Chairman of the Board positions. (*Id.*) Obviously, other than her efforts to avoid the transfer restrictions on her stock, Ms. Wynn could not accomplish any of her other demands through litigation. And, of course, no claim needed to be asserted against anyone other than Mr. Wynn to accomplish that.

Having made these threats and demands, Quinn Emanuel provided Mr. Wynn's counsel with Ms. Wynn's draft amended pleading. Quinn Emanuel stated that Ms. Wynn intended to immediately file the pleading with a motion for leave to amend her operative counterclaims. (*Id*.) In the draft amended pleading Quinn Emanuel included allegations that Ms. Wynn knew to be false. (*Id*. at 000120-21). The draft amended pleading also included other serious allegations that had nothing to do with Ms. Wynn's claims. (*Id.* at 000121.)

On March 10, 2016, Ms. Wynn initiated legal process against Wynn Resorts and Ms. Sinatra by filing a motion for leave to file amended crossclaims and counterclaims. (Real Party in Interests Appendix ("RA") at 0286.) Ms. Sinatra alleges that on March 27, 2016, before filing the amended pleading and making her allegations public, Ms. Wynn, through Quinn Emanuel, again offered to settle the case. (PA000121.) This time, she added another extortionate option. Mr. Wynn could accept the prior proposal or he could agree to purchase all of Ms. Wynn's stock in Wynn Resorts at a premium of almost 50% – at the time, nearly $500 million more than the market value of Ms. Wynn's transfer restricted stock. (*Id*.) In other words, Ms. Wynn gave Mr. Wynn, Wynn Resorts and Ms. Sinatra one last chance to avert the publicity of Ms. Wynn's scurrilous allegations by agreeing to terms which were unavailable to Ms. Wynn in court. Again, Ms. Wynn's extortionate demands were not met.

On March 28, 2016, Ms. Wynn filed her amended pleading. (RA0213.) Immediately upon filing her new claims, and again under the perceived protection of privilege, Ms. Wynn issued a press release announcing that she had done so. The press release detailed some of the allegations (including some she knew to be false) and accused Wynn Resorts and Ms. Sinatra of wrongful conduct. (PA000121.)

As alleged by Ms. Sinatra, Ms. Wynn repeated this tactic more than once – using the legal process to give her the perceived protection of privilege so that she could issue press releases designed to embarrass, inconvenience and/or intimidate Mr. Wynn, Wynn Resorts and/or Ms. Sinatra in order to leverage a settlement on terms unavailable in the course of litigation. (PA000122.)

For example, on April 19, 2016, Quinn Emanuel filed a motion to compel the further deposition of one of Wynn Resorts' board members, former Governor Robert Miller. Ms. Wynn did not even wait to learn the outcome of that motion. The very next day, Ms. Wynn issued a press release announcing the fact that she had filed the motion. (*Id.*) However, again under the perceived cover of privilege, Ms. Wynn used the opportunity to reiterate the facts, some of which she knew to be untrue, contained in her prior press release and to repeat her allegations of wrongdoing against Wynn Resorts and Ms. Sinatra. (*Id.*)

Ms. Sinatra also alleges that Ms. Wynn, through Quinn Emanuel, began a process that was intended to multiply the proceedings to accomplish her tortious scheme. (*Id.*)

C. Ms. Wynn's Claims Against Ms. Sinatra are Dismissed.

On May 5, 2016, motions to dismiss filed by Wynn Resorts, Mr. Wynn, and Ms. Sinatra came on for hearing. The claims against Ms. Sinatra and Wynn Resorts were dismissed. (RA0332.)

On May 27, 2016, Quinn Emanuel filed a motion seeking leave to file amended counterclaims and crossclaims on behalf of Ms. Wynn. (RA0312.)

Soon thereafter, things dramatically changed.

D. Discovery is Stayed and Quinn Emanuel is Ordered to Stop Participating in the Case.

After discovering that Quinn Emanuel possessed Wynn Resorts' privileged information, Wynn Resorts filed a motion to disqualify Quinn Emanuel. Petition at 11. Initially, the District Court ordered that pending resolution of the matter, Quinn Emanuel could not participate in the lawsuit. However, in July 2016, the District Court determined that it would hold an evidentiary hearing regarding disqualification. (RA0336.) As part of that order, the District Court required the implementation of a protocol to identify all privileged information which Ms. Wynn may have taken from Wynn Resorts and provided to her counsel. (*Id*.)

The District Court was so concerned about Ms. Wynn and Quinn Emanuel's conduct it ordered "***that because of the potential for irreparable harm stemming from the potential misuse of privileged information, a stay of discovery in this proceeding is required at this time, except as otherwise ordered by the Court."*** **(***Id.*) (emphasis added).[2]

As Petitioners acknowledge, as a result of these proceedings, no progress was made in the case until March 2017. On April 21, 2017, following the Court's lifting of the stay of discovery, Ms. Wynn filed a Notice to Re-Set Hearing on Elaine P. Wynn's Motion for Leave to File Sixth Amended Counterclaim and Crossclaim and Request for Order Shortening Time. (RA0341.) Ms. Wynn had filed her Motion for Leave to File Sixth Amended Counterclaim on May 27, 2016, and the parties had fully briefed the motion before the stay of discovery. (*Id.*) The District Court granted the Motion on May 1, 2017. (RA0347.)Ms. Sinatra filed a motion to dismiss, which was heard and denied in an order that was entered on August 23, 2017. (PA000098-103.)

[2] In a sanctions hearing that only concluded yesterday, November 30, 2017, relating to a different abuse by Ms. Wynn while she was represented by Quinn Emanuel, the District Court found that Quinn Emanuel attorneys had lied to her on substantive matters.

E. Ms. Sinatra Files Her Abuse of Process Claim.

On September 7, 2017, Ms. Sinatra filed her Answer to Ms. Wynn's counterclaims and crossclaims and asserted her own counterclaim and crossclaim for abuse of process.

In no hurry to have the issue resolved, Ms. Wynn waited until October 7, 2017, to file a motion to dismiss Ms. Sinatra's abuse of process claim. (RA0354.) The motion was heard and denied on November 6, 2017. (PA000431-72.)

F. Ms. Sinatra Can Wait No Longer to Depose the Quinn Attorneys.

As active participants in the very torts that Ms. Sinatra alleges against Ms. Wynn, Ms. Sinatra always intended to depose them. Until she had an operative claim on file, it would have been premature. And Ms. Sinatra understandably preferred to wait until Ms. Wynn answered the abuse of process claims to ascertain whether Ms. Wynn would assert an advice of counsel defense. While the assertion of such a defense would not have impacted ***whether*** Ms. Sinatra would seek the Quinn Attorney depositions, it certainly would have impacted the scope of privilege that could be asserted at those depositions.

However, when Ms. Wynn did not answer Ms. Sinatra's claims, she could wait no more. On October 12, 2017, her counsel issued Nevada subpoenas for the Quinn Emanuel depositions and corollary California subpoenas. (PA000127-166.)

G. The Quinn Attorneys Evade Service, Then Attempt to Avoid Their Depositions, and Then Prevent the Matter from Being Heard Before the Discovery Cutoff.

The same day they were issued, Ms. Sinatra's counsel sent a process server to Quinn Emanuel's office in Los Angeles to serve subpoenas for the Quinn Attorneys to appear at the depositions in California. The process server was told that the lawyers were occupied and he should leave the subpoenas with a Quinn Emanuel staff member. Ms. Sinatra's counsel agreed to leave the subpoenas with calendar clerk, as requested, as a matter of professional courtesy. (PA000270.)

Ms. Sinatra's counsel then twice sought confirmation by email that the Quinn Emanuel lawyers would abide by the subpoenas and appear for their depositions. The Quinn Emanuel lawyers did not respond on either occasion. (*Id*.)

Ms. Sinatra's counsel then sent a process server to serve the deposition at each of Quinn Attorney's homes. Ultimately, and with repeat efforts, three of the four Quinn Attorneys were successfully served. (*Id.* at 000270-71.)

It was not until October 23, 2017, ***eleven days after they knew Ms. Sinatra was seeking their depositions and 11 days before the discovery cutoff***, that all four attorneys filed a Petition to Quash the deposition subpoenas on various grounds. (PA000296-320.) The Petition to Quash had the effect of staying the depositions and the matter was not set to be heard until November 21, well after

the November 3 discovery cutoff in the underlying case. Therefore, Ms. Sinatra filed an application with the California court to have the Petition to Quash heard on shortened time, along with her opposition to the Petition to Quash. (PA000167-75.) Although both sides had briefed the matter, the Quinn Attorneys opposed the request to shorten time on the hearing of their petition. The request to shorten time was denied. (PA000264.)

H. Ms. Sinatra Seeks Relief From the District Court.

The Quinn Attorneys had successfully avoided and delayed service of the California subpoenas. They similarly were able to delay any resolution on the merits until after the discovery cutoff. Therefore, Ms. Sinatra sought relief from the District Court.

On October 30, 2017, Ms. Sinatra filed her motion compel the Quinn Attorneys to appear for deposition in Nevada. (PA000266-320.) By definition, Ms. Sinatra was not seeking to enforce the California subpoenas, themselves. Those set depositions on particular dates to be conducted in California. Instead, Ms. Sinatra asked the District Court to exercise its own independent jurisdiction over the Quinn Attorneys and to order them to appear for deposition in Nevada.

Before the California Court issues any substantive ruling on the merits of this matter, the District Court granted that request and ordered the Quinn Attorneys to appear for deposition in Las Vegas.

III. REASONS WHY THE WRIT SHOULD NOT ISSUE

The Quinn Attorneys seek a writ of prohibition overriding the District Court's order requiring them to appear for deposition in Las Vegas to testify in this action.

Generally, "[d]iscovery matters are within the district court's sound discretion." *Okada v. Eighth Judicial Dist. Court*, 131 Nev. Adv. Op. 83, 359 P.3d 1106, 1110 (2015) (citing *Club Vista Fin. Servs., LLC*, 128 Nev. Adv. Op. 21, 276 P.3d at 249 (2012)); *Hyde & Drath v. Baker*, 24 F.3d 1162, 1166 (9th Cir.1994)). "A party is allowed to discover any information that is 'reasonably calculated to lead to the discovery of admissible evidence.'" *Harrison v. Falcon Products, Inc.*, 103 Nev. 558, 560,746 P.2d 642, 642-43 (1987) (quoting NRCP 26(b)(1)). This rule "has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (quoted with approval in *Esplanade Nevada LLC v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, 2013 WL 485812 (Nev. Feb. 6, 2013)).

A. The District Court Has Authority to Compel Attorneys Who Appear Before It to Give Deposition Testimony, Without Need to Rely on the California Subpoenas.

The Quinn Attorneys argue that the District Court did not have jurisdiction to order them to appear for deposition, (Pet. at 18-24), but at no point do they contend that they are not subject to personal jurisdiction in Nevada. (*See* PA000452 at 22:14-16 ("Ms. Lundvall: You have personal jurisdiction over them. And we're not contesting that, Your Honor.").) Rather, their position is that they are not required to comply with the District Court's orders, because (i) they have withdrawn as counsel in the case, and (ii) Ms. Sinatra issued subpoenas to them in California. Neither of these facts excuses them from complying with the District Court's order for them to appear at deposition. As attorneys who represented one of the parties in this case, the District Court has inherent authority to order Petitioners to appear for deposition. The issuance of subpoenas in California did not divest the District Court of that authority.

1. The District Court Has Inherent Authority to Compel Attorneys Who Appear Before It to Provide Discovery.

The District Court has extensive inherent authority over the attorneys appearing before it. Because the Quinn Attorneys appeared as counsel of record in this very case, the District Court properly acted within its discretion to require them to sit for depositions. There is no basis for the Quinn Attorneys' contention

that they are excused from complying with the District Court's orders in this case because they previously withdrew from representing their client.

Courts in Nevada not only exercise the authority expressly granted by statute, they "also have 'limited inherent authority to act in a particular manner to carry out [their] authority granted by statute.'" *Grace v. Eighth Jud. Dist. Ct*, 132 Nev. Adv. Op. 51, 375 P.3d 1017, 1018 (2016) (quoting *State v. Sargent*, 122 Nev. 210, 214, 128 P.3d 1052, 1054-55 (2006) (brackets in original)). A court's inherent authority "includes those powers 'which are necessary to the exercise of all others.'" *Sparks v. Bare*, 132 Nev. Adv. Op. 43, 373 P.3d 864, 868 (2016) (quoting *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980)). These include "the judiciary's inherent authority to procedurally manage litigation," *Washoe Medical Center v. Second Judicial Dist. Court*, 122 Nev. 1298, 1305, 148 P.3d 790, 795 n.29 (2006), and "to promote the ascertainment of truth and to insure the orderliness of judicial proceedings." *Mitchell v. State*, 124 Nev. 807, 813, 192 P.3d 721, 725 (2008) (quoting *State v. Briand*, 547 A.2d 235, 237 (N.H. 1988)); *see also Fergusen v. State*, 124 Nev. 795, 801-02 (2008) (court has inherent authority "to ensure the orderly administration of judicial business"). A district court's exercise of its inherent authority is reviewed ***for abuse of discretion***. *Mitchell*, 124 Nev. at 819, 192 P.3d at 729 (affirming

district court's exercise of inherent authority to order defendant to undergo psychiatric examination).

In particular, a court has "inherent authority over those who are the officers of the court," including the attorneys who practice before the court. *Maiola v. State*, 120 Nev. 671, 676-77, 99 P.3d 227, 230 (2004) (citing *Hunsucker v. Phinney*, 497 F.2d 29, 32 & n.3 (5th Cir. 1974)). A court has such jurisdiction over an attorney practicing before it, based on "the attorney's appearance as the client's counsel of record." *Argentena Consol. Mining Co. v. Jolley Urga Wirth Woodbury & Standish*, 125 Nev. 527, 532, 216 P.3d 779, 782-83 (2009) (citing *Earl v. Las Vegas Auto Parts*, 73 Nev. 58, 63, 307 P.2d 781, 783 (1957)). Thus, a court has inherent authority to issue directives as appropriate to the attorneys practicing before the court, up to and including removing the attorneys from representing their client. *See Middleton v. Warden, Nevada State Prison*, 120 Nev. 664, 667, 98 P.3d 694, 696 (2004) (affirming district court's exercise of "its inherent authority to *sua sponte* remove counsel" from representing the defendant); *see also Hooker v. Eighth Judicial Dist. Court*, No. 65016, 2014 WL 1998741, *2 n.1 (May 12, 2014) (district court has "inherent authority to sanction counsel or refer him to the State Bar"). "The power of a court over members of its bar is at least as great as its authority over litigants." *Young v. Ninth Judicial Dist. Court*, 107 Nev. 642, 646, 818 P.2d 844, 847 (1991) (denying writ as to sanctions

imposed against counsel by district court under its inherent authority) (quoting *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766, 100 S. Ct. 2455, 2464, 65 L. Ed. 2d 488 (1980)).

While a court's authority over counsel commonly comes into play in disciplinary proceedings, it is not limited to that context; rather, a court's authority to discipline attorneys stems from "its authority to govern the legal profession." *Minton v. Bd. of Medical Examiners*, 110 Nev. 1060, 1080, 881 P.2d 1339, 1352 n.11 (1994), *disapproved on other grounds*, *Nassiri v. Chiropractic Physicians' Bd.*, 327 P.3d 487 (2014). To apply a court's inherent authority over attorneys to the circumstance where an attorney's deposition is warranted follows logically from the District Court's general power to order discovery under NRCP 37. *Cf. Ricoh Co. v. Oki Data Corp.*, No. 09-694-SLR, 2011 WL 3563142, *8-8 (Aug. 15, 2011 D. Del.) (ordering an out-of-state attorney to appear for deposition, and relying on the attorney's *pro hac vice* application to establish personal jurisdiction over the attorney). It is also consistent with this Court's reasoning in *Ryan's Express Transportation Servs. v. Amador Stage Lines, Inc.*, 128 Nev. Adv. Op. 27, 279 P.3d 166 (2012), where this Court ordered remand to resolve factual issues regarding the conduct of attorneys appearing in the district court (in that case, pertaining to counsel's conflict screening measures), based on the Court's "inherent authority to accomplish or carry out basic functions of the judiciary." 279 P.3d at

173. There is no reason to prevent the District Court from issuing a discovery order that accomplishes a comparable fact-finding purpose.

Here, the Quinn Attorneys appeared before the District Court as counsel of record for Ms. Wynn, filing *pro hac vice* applications to practice in this court and submitting themselves to the District Court's authority. They contend that their *pro hac vice* applications limit the District Court's jurisdiction over them to "governing the conduct of attorneys." (Pet. at 23 (quoting SCR 42(13).) There are two flaws in this argument. First, this is no limitation at all. Being subject to rules "governing the conduct of attorneys" expressly means that out-of-state lawyers will be treated the same as members of the Nevada bar. *See* SCR 42(4)(j) (applicant "shall be subject to the jurisdiction of the courts and disciplinary boards of this state with respect to the law of this state governing the conduct of attorneys to the same extent as a member of the State Bar of Nevada"). Attorneys admitted *pro hac vice* are thus subject to the District Court's inherent authority the same as any other counsel appearing before the Court. *See Sisk v. Transylvania Community Hosp., Inc.*, 695 S.E.2d 429, 436 (N.C. 2010) ("[a]n attorney admitted *pro hac vice* is as much subject to this inherent authority of the court as is an attorney licensed" in the state). Second, the District Court ordered Petitioners to appear for depositions pertinent to Ms. Sinatra's claim for abuse of process in this litigation. Petitioners' examinations will very much focus on their conduct as attorneys,

including whether the pleadings they drafted alleged facts Ms. Wynn knew to be false, and whether they brought claims against Ms. Sinatra as a means to achieve an ulterior and improper purpose, such as ending Ms. Sinatra's employment and destroying her reputation.

Petitioners also assert that the District Court no longer has any authority over them, because they have withdrawn from representation of Ms. Wynn in this action. The court's authority over an attorney continues, however, even after the attorney has withdrawn as counsel for the client. *Argentena Consol. Mining Co.*, *supra*, 125 Nev. at 537-38, 216 P.3d at 786 (court retained jurisdiction over counsel after withdrawal for purposes of adjudicating fee dispute) (citing *Gordon v. Stewart*, 74 Nev. 115, 116, 324 P.2d 234, 235 (1958)). Indeed, the court retains collateral jurisdiction over the attorneys appearing before it even after the entire case is dismissed with prejudice. *Emerson v. Eighth Judicial Dist. Ct.*, 127 Nev. 672, 679, 263 P.3d 224, 229 (2011). An attorney cannot avoid a court's inherent authority over counsel by simply withdrawing his pro hac vice admission. *In re Hake*, 398 B.R. 892, 899 (6th Cir. B.A.P. 2008); *see also In re Saghir*, 595 F.3d 472, 474 (2d Cir. 2010) (an attorney may not avoid a court's authority through "strategic withdrawal"). The Quinn Attorneys offer no authority or reasoning in support of their assertion that withdrawing from representation of Ms. Wynn

somehow shields them from compliance with the Court's orders.[3] Instead they argue that the Nevada cases pertain to matters involving Nevada attorneys. The Quinn Attorneys efforts to conflate issues should be rejected. These cases make clear that a court's authority over counsel that have appeared before it extends beyond the time they withdraw from the case. That cannot be disputed. The Quinn Attorneys offer no support for any contention that this rule is limited to in-state attorneys. It would be beyond unjust if courts were to have ***less*** authority over attorneys who are granted permission to practice unlicensed before them than those same courts have over resident attorneys.

2. The California Subpoenas Do Not Divest the District Court of This Inherent Authority.

The Quinn Attorneys attempt to seize on the history of Ms. Sinatra's efforts to depose them to argue that the issuance of the California subpoenas divested the District Court of its inherent authority to order the discovery at issue. They argue that under the Uniform Interstate Depositions and Discovery Act ("UIDDA") and

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[3] The Quinn Attorneys also argue in a footnote that the Court's order to appear for deposition in Nevada was procedurally improper, because a court order was required to take a second deposition of three of the Petitioners and to take any deposition within less than 15 days. (*See* Pet. at 21 n.3.) But of course, the prior depositions were on a limited topic and, in any event, the District Court's order requiring them to appear itself constitutes the court order required by NRCP 30. This again falls within the District Court's inherent authority to manage litigation. *See Hill v. Second Judicial Dist. Court*, No. 62713, 2014 WL 1877689, *2 n.2 (Nev. May 8, 2014) (holding that the district court's order for the parties to meet and confer outside the 180-day time frame of NRCP 16.1(b)(1) was within the court's inherent authority).

basic principles of comity, Nevada courts should defer to the California court's prior ruling as to the depositions to be conducted in California. This argument is flawed for three independent reasons. First, the discovery at issue is to be conducted in Nevada, not in California. Second, the California court did not reach a ruling on the merits of Petitioners' depositions prior to the District Court's ruling below. Third, the result Petitioners seek here is directly contrary to the principle of comity they invoke.

a. <u>The depositions are to be conducted in Nevada</u>.

The Quinn Attorneys concede that under NRCP 37(a)(1), "[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." (*See* Pet. at 20.) This is consistent with NRS 53.190, which directs disputes over subpoenas "to the court in the county in which discovery is to be conducted." Since the District Court ordered Petitioners to appear for depositions *in Las Vegas*, under the plain terms of these provisions, this discovery dispute was a matter for the District Court to decide.

Petitioners attempt to turn the rule on its head by insisting that the District Court's order for them to appear for depositions in Las Vegas was actually an enforcement of subpoenas for Petitioners to be deposed in California. That makes no sense, and it is at odds with the District Court's Order. While the

District Court noted that the California subpoenas and the Nevada motion to compel were "not independent," in that both sought to depose Petitioners for purposes of the underlying Nevada lawsuit, the Court did *not* indicate that it was enforcing the California subpoenas or reaching any decision as to any issue before a California court. To the contrary, it expressly entered a discovery order in this Nevada action, based on its inherent authority over attorneys who have entered an appearance in this case:

> I am making a determination as to the scope of the discovery in the case that is pending before me, and I have jurisdiction to do that based upon the pro hac applications by the Quinn attorneys to appear in this case.

(PA000459, at 29:1-10.)

Petitioners observe that Respondent has not yet issued subpoenas or notices for depositions in Nevada, but this merely reflects that Petitioners requested and received a stay immediately upon entry of the Court's order compelling the depositions.

b. <u>The California court did not reach a decision on the merits before the District Court Ruled.</u>

The Quinn Attorneys assert that the California court had already decided the merits of this dispute before the District Court's ruling. They contend that, as a matter of comity and issue preclusion, the District Court should have deferred to the California court's decision. (Pet. at 21-22.) This argument proceeds from a false premise. At the time the District Court reached its decision, the California

court had not yet made any ruling on the merits of the parties' dispute. There was no merits decision to trigger issue preclusion or any concern of comity.

Petitioners' assertion that the District Court granted the same relief that the California court had already denied, (Pet. at 21), is false. On November 6, 2017, when the Nevada Court granted Respondent's motion to compel, the only prior ruling by the California Court was its October 27, 2017 order denying Ms. Sinatra's request to *shorten time* on the hearing of the Quinn Attorneys' petition to quash their deposition subpoenas.[4] The California court had not yet ruled on the merits of the petition to quash, merely that it would not decide the petition prior to the November 3 discovery cut-off. The District Court's November 6 order did not (and could not conceivably) reach the issue of whether the California court could make a ruling by November 3. Since the California court's October 27 ruling and the District Court's November 6 ruling did not reach the same issue, there is no possibility of issue preclusion, nor was there any decision in California to which the District Court here might have deferred.

[4] In its October 27, 2017 ruling, the California court stated that it was denying Ms. Sinatra's *ex parte* application to shorten time because it did not believe that the "time schedule requested by moving parties" was workable, in part because the "court is dark November 2 and 3, 2017." (PA000264.) While it also articulated due process concerns, the concerns were based on the particularities of that Court schedule, docket, and perception about the ability to work up a motion on facts with which it was unfamiliar.

c. The Quinn Attorneys' attempt to use the California subpoenas to thwart legitimate discovery is contrary to principles of comity.

The Quinn Attorneys argue that the District Court should have deferred to the California court as a matter of comity. But their attempt to use the California forum as a means to thwart legitimate discovery runs directly contrary to that principle of jurisprudence, attempting to use the California courts as a mechanism to thwart Ms. Sinatra from prosecuting her claim in Nevada and to prevent the District Court from managing its own case

The Quinn Attorneys cite to the Nevada Supreme Court decision in *Mianecki v. Second Judicial District Court*, 99 Nev. 93, 98, 658 P.2d 422, 424-25 (1983), in support of giving "deference and respect" to the California court. But the lesson of *Mianecki* is not that Nevada courts must always defer to decisions from another forum. Rather, this Court in *Mianecki* explained that "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" and that this "principle is appropriately invoked according to the *sound discretion of the court acting without obligation*." *Mianecki*, 99 Nev. at 98 (emphasis added; citations omitted); *see also Gonzalez-Alpizar v. Griffith*, 317 P.3d 820, 826, 827 (Nev. 2014) (noting that comity is a "principle of courtesy" and declining to enforce a Costa Rican order under the doctrine where the foreign court did not possess key information).

Here, it was the ***Nevada District Court*** that was the first to rule on the merits of whether the Quinn Attorneys must appear for deposition by Ms. Sinatra. The California court did not reach the merits of the dispute until more than two weeks later, on November 22, 2017. By the Quinn Attorneys' logic, it was the California court which should have exercised deference. That is particularly true because it is the District Court here, not the California Court, which is uniquely familiar with this litigation, including the relevant parties, witnesses, issues, claims and the key facts relating to Ms. Wynn and her counsel's abusive tactics, culminating in the Quinn Emanuel attorneys' withdrawal from the case. Moreover, the District Court made its ruling in the context of managing and controlling a complex litigation matter, with which it has great familiarity, facing an imminent discovery cut-off. In such circumstances, it is the court where the underlying action is pending that is best situated to address the permissible scope of discovery. *See, e.g., Greenspon v. Prommis Holdings, LLC*, No. N17M-03-300, 2017 WL 4856850, *2 (Del. Super. Ct. Oct. 25, 2017) (determining that the "permissible scope of discovery" from the nonparty in Delaware should be "established by the underlying Hawaii court"); *see also In the Matter of a Petition to Quash Subpoena Ad Testificandum ex rel. Kapon v. Koch*, 37 Misc.3d 1211(A), 961 N.Y.S.2d 361, 2012 N.Y. Slip Op. 51992(U), at *5 (2012) (declining to grant a request for protective order and recognizing that

the California court presiding over the underlying action would be in a better position to determine the scope and use of certain nonparty depositions).

The irony of the Quinn Attorneys' position is that they seek to employ the California court as a means to prevent the discovery the District Court here has already found appropriate, overriding the District Court by tactical use of the impending discovery cut-off. Once the California court indicated it could not reach the merits of the parties' dispute before that discovery cut-off, it was only proper for Ms. Sinatra to present the issue of deposing the Quinn Attorneys to the District Court which had jurisdiction here. The District Court resolved that dispute in a timely matter, as part of its ongoing efforts to manage this litigation. As a matter of comity, the California proceeding should not be used as a mechanism to undermine those efforts.

B. The *Club Vista* Factors, if They Apply, are Satisfied

The transcript reflects that the District Court is familiar with the *Club Vista* factors. Though the judge's comments on the subject may have been terse, the entire context of the argument reflects that the court was mindful of how those requirement apply under the facts of this case. This is particularly true where, as here, the Court had just conducted extensive argument on Ms. Wynn's motion to dismiss Ms. Sinatra abuse of process claims.

That the Quinn Attorneys' depositions are appropriate even under the *Club Vista* factors is readily apparent from the facts set forth above and the applicable law. Most significantly, the *Club Vista* court made clear that in evaluating the three factors of the analysis, "the district court should consider whether the attorney is a percipient witness to the facts giving rise to the complaint." *Club Vista Fin. Servs. v. Dist. Ct.*, 128 Nev. Adv. Op. 21, 276 P.3d 246, 250 (2012). This is because a court is to consider the "relative quality of the information ***purportedly*** in the attorney's knowledge." *Id.* (emphasis added). The word "purportedly" is important. Ms. Sinatra is not required to put on admissible evidence that supports her need for the Quinn Attorneys' depositions. Rather, the court considers the allegations in the case and the information which is purportedly in the attorney's knowledge.

Here, as discussed above, the Quinn Attorneys are not mere percipient witnesses. They are participants in the tortious scheme who might also have percipient knowledge of what Ms. Wynn's state of mind was at the time she launched and continued her abuse of process. The Quinn Attorneys do not have mere tangential knowledge. Nor is their knowledge limited to information that they simply collected in their role of counsel as they marshalled the evidence. To the contrary, to a great extent, they ***are*** the evidence – or at least their knowledge,

some of their observations, their conduct, and, to some extent, their communications are.

This raises the *Club Vista* factor that considers whether the proposed deposition testimony is privileged. Here, it is important to emphasize that this abuse of process claim involves allegations which, if true, indicate that the Quinn Attorneys were knowing participants in Ms. Wynn's tortious scheme. The Nevada Supreme Court long ago made clear that where a legal process has been misused and there have been assertions of the attorney-client privilege and work product doctrine, "[t]he normal protection may not be applicable to martials that shed direct light on a critical area of inquiry in the case." *Whitehead v. Nevada Comm'n on Judicial Discipline,* 110 Nev. 380, 415, 873 P.2d 946, 968 (1994) (judge alleging that Commission on Judicial Discipline has conducted investigation beyond scope of authority). The *Whitehead* court cited, with approval, *Diamond v. Stratton,* 95 F.R.D. 503, 506 (S.D.N.Y. 1982), explaining that a "substantial need for documents [was] shown where they shed direct light on motive and knowledge of defendant and counsel, and actions of counsel were an issue in the case."

Simply, whether the Quinn Attorneys were aware or not, the use of attorneys to perpetrate a tort amounts to a waiver of the attorney-client privilege under the crime-fraud exception. "[C]ourts have defined the exception to encompass communications in furtherance of a "tort." *Madanes v. Madanes*, 199 F.R.D. 135,

148 (S.D.N.Y. 2001) (collecting cases). The *Madanes* court expressly found that, "[a]t a minimum, then, the attorney-client privilege does not protect communications in furtherance of an intentional tort that undermines the adversary system itself."

Because the issues in this case involve the Quinn Attorneys' participation I Ms. Wynn's abuse of process, there are questions that would not reveal otherwise privileged communications or mental impressions, including Quinn Emanuel's participation in the extortionate settlement negotiations, whether Ms. Wynn was advised on certain subject matter, whether Ms. Wynn gave them information about certain subject maters, etc. Also, in light of the allegations, any privilege or work product protection likely was waived. Ms. Sinatra must be permitted to create the record that will allow the District Court to consider, among other things, the crime-fraud exception.

Continuing with the *Club Vista* factors, the information is critical ***because*** it is not available from any other source. The universe of knowledgeable people (unless they broke privilege) is Ms. Wynn and the Quinn Attorneys. The issues that are the subject of the inquiry go to the heart of the abuse of process claim ***and*** to the heart of whether any privilege that might have existed has been waived.

In any event, if this Court does not believe the *Club Vista* factors have not been adequately considered, the jurisdictional objection advanced in the Petition should be denied and the matter should be remanded for further proceedings.

C. The "Privileges" Asserted are Not a Basis to Avoid Depositions.

The Quinn Attorneys assert a host of privileges to support their efforts to avoid the depositions. However, the asserted privileges against liability. Through this Petition, the Quinn Attorneys and Ms. Wynn are seeking to have this Court reconsider Ms. Wynn's Motion to Dismiss. It was denied and reconsideration in the Supreme Court by a petition pertaining to discovery is not appropriate.

If this Court is inclined to reach the merits of Ms. Sinatra's claims, in full, Ms. Sinatra requests an opportunity to more fully brief the matter beyond in light of the deadline for filing this brief.

IV. CONCLUSION

The Quinn Attorneys should not be permitted to avoid their depositions. They sought and received special permission to practice in the District Court in the very case in which they are to be deposed. They subjected themselves to the District Court's jurisdiction. They participated in Ms. Wynn's tortious scheme in this case. It defies any sense of fair play and substantial justice if they will be able

to completely avoid answer questions under oath in relations to Ms. Sinatra's claims.

DATED this 1st day of December, 2017.

PISANELLI BICE PLLC

By: /s/ Todd L. Bice
James J. Pisanelli, Esq., 4027
Todd L. Bice, Esq., 4534
Debra L. Spinelli, Esq., 9695
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

Mitchell J. Langberg Esq., 10118
BROWNSTEIN HYATT FARBER SCHRECK
100 North City Parkway, Suite 1600
Las Vegas, Nevada 89106

Attorneys for Real Parties in Interest Kimmarie Sinatra and Wynn Resorts, Limited

CERTIFICATE OF COMPLIANCE

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 Office Word 2013 in size 14 font in double-spaced Times New Roman. I further certify that I have read this brief and that it complies with NRAP 21(d).

Finally, I hereby certify that 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)(1), which requires that every assertion in this brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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.

DATED this 1st day of December, 2017.

PISANELLI BICE PLLC

By: /s/ Todd L. Bice
James J. Pisanelli, Esq., 4027
Todd L. Bice, Esq., 4534
Debra L. Spinelli, Esq., 9695
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

Mitchell J. Langberg Esq., 10118
BROWNSTEIN HYATT FARBER SCHRECK
100 North City Parkway, Suite 1600
Las Vegas, Nevada 89106

Attorneys for Real Parties in Interest
Kimmarie Sinatra and Wynn Resorts, Limited

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 1st day of December, 2017, I electronically filed and served by electronic mail and United States Mail a true and correct copy of the above and foregoing **KIMMARIE SINATRA AND WYNN RESORTS LIMITED'S ANSWER TO PETITION FOR WRIT OF MANDAMUS OR IN THE ALTERNATIVE, PROHIBITION** properly addressed to the following:

J. Stephen Peek, Esq.
Bryce K. Kunimoto, Esq.
Robert J. Cassity, Esq.
HOLLAND & HART LLP
9555 Hillwood Drive, Second Floor
Las Vegas, NV 89134

Attorneys for Kazuo Okada

J. Randall Jones, Esq.
Mark M. Jones, Esq.
Ian P. McGinn, Esq.
KEMP, JONES & COULTHARD
3800 Howard Hughes Parkway
17th Floor
Las Vegas, NV 89169

David S. Krakoff, Esq.
Benjamin B. Klubes, Esq.
Joseph J. Reilly, Esq.
BUCKLEY SANDLER LLP
1250 – 24th Street NW, Suite 700
Washington, DC 20037

Attorneys for Universal Entertainment Corp.; Aruze USA, Inc.

Donald J. Campbell, Esq.
J. Colby Williams, Esq.
CAMPBELL & WILLIAMS
700 South 7th Street
Las Vegas, NV 89101

Attorneys for Stephen Wynn

William R. Urga, Esq.
JOLLEY URGA WOODBURY
HOLTHUS & ROSE
330 S. Rampart Blvd., Suite 380
Las Vegas, NV 89145

Mark E. Ferrario, Esq.
Tami D. Cowden, Esq.
GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway, #400
Las Vegas, NV 89169

James M. Cole, Esq.
SIDLEY AUSTIN LLP
1501 K. Street N.W.
Washington, D.C. 20005

Scott D. Stein, Esq.
SIDLEY AUSTIN, LLP
One South Dearborn St.
Chicago, IL 60603

Daniel F. Polsenberg, Esq.
Joel D. Henriod, Esq.
Abraham G. Smith, Esq.
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Pkwy, Ste. 600
Las Vegas, NV 89169

Attorneys for Real Party in Interest Elaine Wynn

SERVED VIA HAND-DELIVERY

The Honorable Elizabeth Gonzalez
Eighth Judicial District court, Dept. XI
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155

Respondent

Steve Morris, Esq.
Rosa Solis-Rainey, Esq.
MORRIS LAW GROUP
411 E. Bonneville Avenue, Suite 360
Las Vegas, NV 89101

Attorneys for Defendants

/s/ Kimberly Peets
An employee of PISANELLI BICE PLLC