Case No. _____

In the Supreme Court of Nevada

UNITED HEALTHCARE INSURANCE COMPANY, UNITED HEALTH CARE SERVICES, INC., UMR, INC., SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., HEALTH PLAN OF NEVADA, INC.,

Petitioners

vs.

THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark; and THE HONORABLE NANCY L. ALLF, District Judge,

Respondents,

and

FREMONT EMERGENCY SERVICES (MANDAVIA), LTD., TEAM PHYSICIANS OF NEVADA-MANDAVIA, P.C., CRUM STEFANKO AND JONES, LTD.,

Real Parties in Interest.

PETITION FOR WRIT OF MANDAMUS OR, ALTERNATIVELY, PROHIBITION

With Supporting Points and Authorities

District Court Case No. A-19-792978

D. LEE ROBERTS (SBN 8877)
COLBY L. BALKENBUSH, ESQ. (SBN 13,066)
BRITTANY M. LLEWELLYN (SBN 13,527)
WEINBERG, WHEELER,
HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118

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

Attorneys for Petitioner

PETITION FOR WRIT OF MANDAMUS
OR, ALTERNATIVELY, PROHIBITION

1. This petition arises from the district court's denial of Petitioners' Motion to Quash Out Of State Trial Subpoenas on Order Shortening Time ("Motion") (1 App. 1.)

2. On September 9, 2021, the Real Parties in Interest ("TeamHealth Plaintiffs")[1] hand delivered trial subpoenas to the law firm of Weinberg Wheeler, Hudgins, Gunn and Dial, LLC, counsel for the Petitioners, seeking to compel the trial appearance and testimony of ten out-of-state employees and former employees of Petitioners (the "Out of State Witnesses") (*See* 1 App. 17–86.)

3. The Petitioners filed a Motion to Quash Out Of State Trial Subpoenas on Order Shortening Time ("Motion"), which was heard on October 6, 2021.

4. The Petitioners contend that the subpoenas are invalid because

[1] "TeamHealth Plaintiffs" collectively refers to the three Plaintiffs that initiated this action, each of which is owned by and affiliated with TeamHealth Holdings, Inc. ("TeamHealth"): Fremont Emergency Services (Mandavia), Ltd. ("Fremont"), Team Physicians of Nevada-Mandavia, P.C. ("TPN"), and Crum, Stefanko and Jones, Ltd. d/b/a Ruby Crest Emergency Medicine ("Ruby Crest").

the "Out of State Witnesses" were not personally served and had not appointed Weinberg Wheeler, Hudgins, Gunn and Dial, LLC as agent to accept service.

5. The Petitioners further contend that the subpoenas are invalid because the "Out of State Witnesses" are not parties to the action below and are not within the subpoena power of the district court.

6. The district court orally denied the motion on October 6, 2021. The district court issued a written order on October 13, 2021.

7. The district court erred as a matter of law in refusing to quash the subpoenas. The district court was required to quash subpoenas which were not personally served in accordance with Nevada law, and an appointment to accept service must be express and cannot be implied.

8. The district court is currently acting in excess of its jurisdiction in seeking to compel nonparties residing outside the State of Nevada to attend trial in Nevada.

9. The district court has refused to follow binding precedent from this Court, which now needs to be clarified and confirmed.

Now, therefore, Petitioners ask this Court to exercise its discretionary jurisdiction and enter a writ of mandamus instructing the

district court to quash the subpoenas based on a lack of personal service, or, alternatively, for lack of subpoena power over the Out of State Witnesses.[2]

Dated this 14th day of October, 2021.

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

D. LEE ROBERTS (SBN 8877)
COLBY L. BALKENBUSH, ESQ. (SBN 13,066)
BRITTANY M. LLEWELLYN (SBN 13,527)
WEINBERG, WHEELER,
HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Boulevard
Suite 400
Las Vegas, Nevada 89118
(702) 938-3838

Attorneys for Petitioners

[2] Alternatively, Petitioners seeks a writ of prohibition to prevent the district court from enforcing the invalid subpoenas.

VERIFICATION

STATE OF NEVADA)
COUNTY OF CLARK)

Under penalty of perjury, I declare that I am counsel for the Petitioners in the foregoing petition and know the contents thereof; that the pleading is true of my own knowledge, except as to those matters stated on information and belief; and that as to such matters I believe them to be true. I, rather than Petitioners, make this verification because the relevant facts are procedural and thus within my knowledge as petitioners' attorney. This verification is made pursuant to NRS 15.010.

Dated this 14th day of October, 2021.

/s/ D. Lee Roberts, Jr.
D. LEE ROBERTS, JR.

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and 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.

UnitedHealth Group Incorporated is the parent corporation of Petitioners United Healthcare Insurance Company, United Health Care Services, Inc., UMR, Inc., Sierra Health and Life Insurance Company, Inc., and Health Plan of Nevada, Inc. UnitedHealth Group Incorporated is a publicly held company and directly and/or indirectly owns 10% or more of these Petitioners' stock

Petitioners have been represented by attorneys at Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC; Lewis Roca Rothgerber Christie, LLP; and O'Melveny & Myers LLP.

Dated this 14th day of October, 2021.

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 6
Las Vegas, Nevada 89169
(702) 949-8200
Attorneys for Petitioners

D. LEE ROBERTS (SBN 8877)
COLBY L. BALKENBUSH (SBN 13,066)
BRITTANY M. LLEWELLYN (SBN 13,527)
WEINBERG, WHEELER,
HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Blvd., Ste. 400
Las Vegas, Nevada 89118

ROUTING STATEMENT

The Supreme Court should retain this petition because the case originated in business court. *See* NRAP 17(a)(9). In addition, all issues presented raise a question of statewide public importance. *See* NRAP 17(a)(12).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

Treatises

Other Authorities

ISSUE PRESENTED

1. Whether the District Court has authority to enforce a trial subpoena on an out-of-state witness

2. Whether personal service of trial subpoenas on out-of-state employees and former employees of a corporate defendant can be accomplished by serving the attorney for the corporate defendant, in the absence actual appointment or authority of the corporation's attorneys by the witnesses to accept service.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

TeamHealth Plaintiffs are for-profit medical management companies that provide staffing services for emergency departments at hospitals located in Nevada, and are affiliated/owned with TeamHealth Holdings Inc., one of the largest national physician staffing companies in the United States ("TeamHealth Providers" or "Plaintiffs").

Defendants are affiliates and subsidiaries of UnitedHealth Group, Inc. "Defendants"). Defendants insure or administer health plans whose members have received medical treatment from emergency medicine providers who contract with the TeamHealth Plaintiffs and do not participate in the provider networks offered by Defendants. It is

undisputed that the TeamHealth Plaintiffs and Defendants did not, and do not, have a written or oral contract that specified the rate of reimbursement owed for any emergency medicine services rendered to members of the health plans insured or administered by Defendants. Nonetheless, TeamHealth Plaintiffs allege that the health plans have underpaid them for medical services rendered to plan members from July 1, 2017 through January 31, 2020, and they seek to compel the applicable health plans to reimburse TeamHealth Plaintiffs their full billed charges without any regard to the explicit terms of the plans or the reasonable value of those services. (1 App. 215.)

Trial is currently set to start with *voir dire* on October 25, 2021. The first witness will likely be sworn on November 1, 2021.

On September 9, 2021, the TeamHealth Plaintiffs hand delivered trial subpoenas to the law firm of Weinberg Wheeler, Hudgins, Gunn and Dial, LLC, seeking to compel the trial appearance and testimony of Angela Nierman, Jason Schoonover, John Haben, Jolene Bradley, Kevin Ericson, Lisa Dealy, Marty Millerliele, Rebecca Paradise, Scott Ziemer, and Vince Zuccarello (the "Out of State Witnesses"). (*See* 1 App. 17–86.) The TeamHealth Plaintiffs did not personally serve the subpoenas on any

of the Out of State Witnesses. *Id.*

The Out of State Witnesses are not residents of the State of Nevada[3], were not personally served, and cannot be compelled to attend trial in Nevada merely because counsel for their corporate employer or former corporate employer was served with process in Nevada. (*See* 1 App. 4.) Moreover, although all of these Out of State Witnesses are current or former employees of certain Defendants, none are employed by a Nevada-based Defendant, which are Sierra Health and Life Insurance Company, Inc., or Health Plan of Nevada, Inc*Id.* In fact, four of these witnesses[4] are no longer employed by any of the Defendants[5]. *Id.*

In *Consol. Generator-Nevada, Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998), this Court held that personal service on out-of-state employees and officers of a corporate defendant cannot be accomplished by serving the attorney for the

---

[3] These witnesses reside in the states of Florida, Minnesota, Pennsylvania, Connecticut, Texas, and Wisconsin.

[4] Angela Nierman, Jason Schoonover, John Haben, and Marty Millerliele.

[5] Defendants are not arguing that they have no control or influence over the Out Of State Witnesses, but rather, these subpoenas cannot be enforced as a matter of law.

corporate entity. The district court below disregarded this controlling case law and refused to quash the subpoenas, inferring that counsel for the corporate defendants had some sort of implied authority to accept personal service even in the absence of evidence that these Out of State Witnesses had given their express authority to accept service of trial subpoenas. (*See* 1 App 200.) But authority to accept personal service can only be based on actual authority, which does not exist under the facts of this case. *See Foster v. Lewis*, 78 Nev. 330, 332–34, 372 P.2d 679, 680–81 (1962) ("In the absence of actual specific appointment or authorization, and in the absence of a statute conferring authority, an agency to accept service of process will not be implied").

The district court also ignored the holding of this Court in *Quinn v. Eighth Jud. Dist. Ct. in & for Cty. of Clark*, 134 Nev. 25, 29, 410 P.3d 984, 987 (2018), which quashed subpoenas issued to out-of-state nonparty witnesses, while acknowledging that "[m]ost states retain strict limits on the reach of the subpoena power, holding that subpoena service cannot reach nonparties found outside the state." *Quinn*, 134 Nev. at 30, 410 P.3d at 988 (2018). See also, *Consol. Generator-Nevada, Inc.* 114 Nev. 1304, 1312, (personal service on out-of-state officers of a corporate

defendant cannot be accomplished by serving its attorney.)

The Out of State Witnesses being compelled to attend trial in Nevada have no plain, speedy and adequate remedy at the conclusion of this action. Assuming the witnesses comply with the improper subpoenas and travel to Nevada, it will be too late for this Court to grant meaningful relief. It will be a *fait accompli* at the conclusion of this action. The Court should grant this petition and it should instruct the district court to quash the subpoenas based on a lack of personal service.

WHY WRIT RELIEF IS APPROPRIATE

"A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (citing NRS 34.160). Nevada courts must entertain a writ of mandamus when a plain, speedy, and adequate remedy in the ordinary course of law does not exist. *See* NRS 34.170 (mandamus "shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law"). Conversely, a writ of prohibition is available to arrest proceedings

where a district court has acted in excess of its jurisdiction. NRS 34.320; *Las Vegas Sands v. Eighth Judicial Dist. Court*, 130 Nev. 643, 649, 331 P.3d 905, 909 (2014).

As the Court recently explained, "the chief requisites" for a petition of traditional writ of mandamus are:

> (1) The petitioner must show a legal right to have the act done which is sought by the writ; (2) it must appear that the act which is to be enforced by the mandate is that which it is the plain legal duty of the respondent to perform, without discretion on his part either to do or refuse; (3) that the writ will be availing as a remedy, and that the petitioner has no other plain, speedy, and adequate remedy.

Walker v. Second Jud. Dist. Ct., 136 Nev. ___, 476 P.3d 1194, 1196 (2020). Here, the Petitioners had a legal right to have the subpoenas quashed based on lack of personal service, and the district court had no discretion to waive or excuse the lack of personal service. A writ of mandate will provide an effective and immediate remedy, and the Out of State Witnesses have no other adequate remedy.

An appeal at the end of the case will be too late to grant any relief from the invalid and improper exercise of subpoena power by the district court. *See also* NRS 34.170 (mandamus "shall be issued in all cases

where there is not a plain, speedy and adequate remedy in the ordinary course of law").

ARGUMENT ON THE MERITS

I.

THE DISTRICT COURT ERRED IN REFUSING TO QUASH TRIAL SUBPOENAS WHICH WERE NOT PERSONALLY SERVED

A. Personal Service of a Trial Subpoena is Required by Nevada Law

For a subpoena to be enforceable, personal service on the witness is required. *See* NRCP 45(b). Service must be made "as appropriate under Rule 4.2 or 4.3." NRCP 45(b)(1).

NRCP 4.2(a), in turn, clearly defines how service can be made within Nevada:

> (a) **Serving an Individual.** Unless otherwise provided by these rules, service may be made on an individual:
>
> (1) by delivering a copy of the summons and complaint to the individual personally;
>
> (2) by leaving a copy of the summons and complaint at the individual's dwelling or usual place of abode with a person of suitable age and discretion who currently resides therein and is not an adverse party to the individual being served; or
>
> (3) by delivering a copy of the summons

> and complaint to an agent authorized by appointment or by law to receive service of process.

In order to be effective, a subpoena served within Nevada must comply with these requirements of NRCP 4.2. *See also* NRS 50.165 ("[a] witness, duly served with a subpoena, shall attend at the time appointed.")

The service of the subpoenas at issue in this petition did not comply with the requirements of NRCP 4.2. There is no factual dispute on this issue. There was no personal service of the subpoenas.

B. Service on Counsel for the Petitioners Does Not Comply with the Requirement for Personal Service of Trial Witnesses

It is undisputed that TeamHealth Plaintiffs hand delivered trial subpoenas for the Out of State Witnesses to the law firm of Weinberg Wheeler, Hudgins, Gunn and Dial, LLC in Las Vegas. No other service was made. The Nevada Supreme Court has held that service on a corporate defendant's counsel is not personal service on the defendant's out-of-state employees and officers, and is not sufficient to compel the appearance of the corporation's out-of-state employees and officers. In *Consol. Generator-Nevada, Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998), the Court held in pertinent part:

> First, we hold that the district court did not abuse its discretion in granting IR's and Cummins' motions to quash subpoenas naming out-of-state employees and officers of Cummins and IR, which had been served upon counsel for Cummins and IR, because Nevada Rules of Civil Procedure 45(c) requires that a subpoena be personally served.

There is no factual dispute on the issue of personal service. Just as in *Consolidated Generator*, the only attempted service in this case was on counsel for the corporate Defendants. Service on the law firm for the corporate Defendants was not personal service on the Out of State Witnesses.[6] But unlike the trial judge in *Consolidated Generator,* the district court here refused to quash the subpoenas. This was plain error.

---

[6] *See also Weiss v. Allstate Ins. Co.*, 512 F. Supp. 2d 463, 466 (E.D. La. 2007) ("The Court finds that each subpoena must be quashed. Under the plain language of the rule, as well as Fifth Circuit precedent, service is improper if the person himself is not served with a copy of the subpoena. *See Harrison v. Prather*, 404 F.2d 267, 273 (5th Cir.1968). As plaintiffs concede, this was not done as to these eight individuals. Moreover, even if the Court accepted, as plaintiffs contend, that these individuals were all agents of Allstate, service of these subpoenas would still not be proper, as service on a party's counsel only 'renders such service a nullity.' *Id.* The Court therefore quashes the trial subpoenas as to these eight individuals as they were not served in conformity with the procedures set forth in Rule 45(b).").

C. Authority to Accept Personal Service of a Trial Subpoena Cannot Be Assumed or Implied

The district court below did not expressly distinguish *Consolidated Generator*, but the district court did explain on the record why she was denying the motion to quash:

> The motion will be denied for the reason that the plaintiff was led to be able to rely on the availability of those witnesses in Nevada. The subpoenas were served at the address given. And so the motion is denied.

(1 App. 200:7–10.)

To put these comments in context, TeamHealth Plaintiffs argued in opposition to the motion to quash that service was valid because, on Defendants' prior NRCP 16.1 Disclosures, the at-issue witnesses were listed "c/o Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC." This is what the district court meant when it explained that the "subpoenas were served at the address given."

The district court erred in finding that listing a witness in a NRCP 16.1 disclosure care of a law firm implied that the law firm was authorized to accept personal service of a trial subpoena on behalf of out-of-state nonparties. Similarly, the statement "care of" in the NRCP 16.1 disclosures is not sufficient to constitute a waiver of the personal service

requirement in NRCP 45.No reasonable attorney would think the use of "care of" when identifying corporate employees and former employees was intended to convey that the Out of State Witnesses resided in Nevada in the law firm's offices.[7]

Disclosing employees and former employees of a party in this fashion merely conveys the standard and unremarkable practice that opposing counsel should not seek to communicate with an employee of a represented party except through counsel for the party. Indeed, NRCP 16.1 only requires parties to disclose the name and address of persons with relevant information to the suit and says nothing about the address on which those persons can be served with trial subpoenas.

The absurdity of TeamHealth Plaintiffs' arguments is further illustrated by their tender of mileage required by law. NRCP 45(b)(1) requires that "… the serving party must tender the fee for 1 day's attendance and the mileage allowed by law." TeamHealth Plaintiffs

[7] A district court's subpoena power depends on whether nonparties reside in Nevada. *See Quinn v. Eighth Jud. Dist. Ct. in & for Cty. of Clark*, 134 Nev. 25, 26 n.2, 410 P.3d 984, 985 n.2 (2018) ("For the purposes of this opinion, 'out-of-state' means a nonresident who is located outside of the state"). The NRCP 16.1 disclosures could not possibly change the fact that the Out of State Witnesses are nonresidents.

tendered each witness fees and mileage in the exact amount of $67, apparently calculating mileage based on the distance from the law offices of Weinberg Wheeler, Hudgins, Gunn and Dial, LLC to the courthouse. (*See* 1 App. 17, 24, 31, 38, 45, 52, 59, 66, 73.) But NRS 50.225(1)(b) requires that mileage be paid "for each mile necessarily and actually traveled from and returning to the place of residence by the shortest and most practical route." The appropriate mileage would have been over one thousand dollars for several witnesses if actually calculated from their personal residences. TeamHealth Plaintiffs cannot seriously contend that they believed, based on the NRCP 16.1 disclosures, these Out of State Witnesses actually resided in commercial law offices located in Las Vegas.

Similarly, the Team Health Plaintiffs claim that the prior agreement of the Out of State Witnesses to allow Weinberg, Wheeler, Hudgins, Gunn & Dial to accept service of deposition subpoenas requiring them to appear for depositions in their home state misled TeamHealth Plaintiffs into believing that the law firm would also accept trial subpoenas on behalf of the Out of State Witnesses. (1 App. 92–93). The district court apparently accepted this contention when it explained

that "plaintiff was led to be able to rely on the availability of those witnesses in Nevada." (1 App. 200:7–10.)

Once again, the district court erred. The fact that the Out of State Witnesses waived personal service of remote video deposition subpoenas during discovery cannot be used to imply waiver of the separate requirement for personal service of a much more burdensome trial subpoena requiring them to physically travel and appear in Nevada.[8] As Defendants argued during the hearing:

> And there's a big difference between our office getting permission and agreeing to accept subpoenas for depositions to be taken in their state of residence or where they normally work versus a presumption that they have agreed that we can accept personal service for the attendance of a trial proceeding in Nevada. And that can't be presumed.

(1 App. 198:18–23.)

In denying the motion to quash, the district court found that TeamHealth Plaintiffs reasonably relied on the mistaken view that the Out of State Witnesses would accept trial subpoenas through counsel for

[8] "Waiver requires the intentional relinquishment of a known right. If intent is to be inferred from conduct, the conduct must clearly indicate the party's intention." *Nevada Yellow Cab Corp. v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark*, 123 Nev. 44, 49, 152 P.3d 737, 740 (2007).

the Defendants. (1 App. 200:7–10.) But it is clear under Nevada law that authority to accept personal service cannot be presumed or implied, and the record is devoid of any fact with would support reasonable reliance.

Nevada law requires the actual appointment of an agent for personal service on the agent to be valid. In *Foster v. Lewis*, 78 Nev. 330, 332–34, 372 P.2d 679, 680–81 (1962), appellants contended that delivery on a party's agent to collect rents satisfied the requirement of NRCP 4(d)(6) that personal service may be made by delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process.

This Court disagreed, holding that an agent authorized by "appointment" to receive service of process is "intended to cover the situation where an individual *actually* appoints an agent for that purpose." *Id. citing* 2 Moore's Fed.Practice § 4:12, p. 52, (2d Ed.) (emphasis added). The Court added that where "the evidence that the person served was not authorized by the defendant to receive service of process is uncontradicted, as in this case, such denial of authority must be taken by the court as true, for the purpose of applying NRCP 4(d)(6)." *Id. citing Griffin v. Illinois Centr. R. Co.*, D.C., 88 F.Supp. 552; *Lawlor v.*

National Screen Service Corp., 10 F.R.D. 123.

Finally, the Nevada Supreme Court has held that: "In the absence of actual specific appointment or authorization, and in the absence of a statute conferring authority, an agency to accept service of process will not be implied". *Foster*, 78 Nev. 330, 332–34, 372 P.2d 679, 680–81 *citing* 681 42 Am.Jur. Process § 51 (1961 Cum.Supp., p. 7, n. 13.5).[9]

As discussed above, NRCP 45(b)(1) requires that service of a subpoena must be made "as appropriate under Rule 4.2 or 4.3." Accordingly, the holding in *Foster* applies equally to the service of trial subpoenas under NRCP 45. Agency to accept personal service cannot be implied or presumed.

It is therefore legally dispositive of this petition that the subpoenaed Out of State Witnesses never expressly appointed or authorized Petitioners' counsel to accept service on their behalf. Nor did counsel for the Petitioners ever expressly agree to accept service of subpoenas on behalf of these Out of State Witnesses, or communicate to counsel for TeamHealth Plaintiffs that it was authorized to accept service

[9] *See also Spinosa v. Rowe*, 87 Nev. 27, 30, 480 P.2d 157, 158 (1971) (counsel for a party allegedly represented that he had authority to accept service, but after he was served disclaimed actual authority).

of trial subpoenas. (1 App. 11.) The subpoenas were not personally served, and the district court clearly erred when it refused to quash them.

II.

THE DISTRICT COURT ERRED IN REFUSING TO QUASH TRIAL SUBPOENAS ISSUED TO NON-PARTY WITNESSES BEYOND THE COURT'S SUBPOENA POWER

The trial court's power to compel a witness to testify is not unlimited; a nonparty who works and lives beyond the geographic reach of a Nevada trial subpoena cannot be compelled to attend trial in this state. The Nevada Supreme Court has concluded that the subpoena power of Nevada courts over nonparties does not extend beyond state lines. *Quinn v. Eighth Jud. Dist. Ct. in & for Cty. of Clark*, 134 Nev. 25, 29, 410 P.3d 984, 987 (2018) (citing NRCP 45). In *Quinn*, the Court held that the district court had no authority to enforce subpoenas issued to out-of-state nonparty witnesses, or to compel those witnesses to appear in Nevada for deposition in a civil action. *Id.* at 33, 990. The *Quinn* Court offered a well-reasoned appraisal of the reach of NRCP 45 that is likewise instructive here:

> In determining that it had authority to compel [witnesses] to appear for depositions in Nevada, the district court relied on the [] attorneys' pro hac vice

> applications to find that the attorneys had subjected themselves to the jurisdiction of Nevada courts. By using this jurisdiction as the basis for its subpoena authority, the district court appeared to conflate personal jurisdiction with subpoena power. As other jurisdictions have recognized, the concept of personal jurisdiction is different from that of subpoena power. Personal jurisdiction is based on conduct that subjects an out-of-state party 'to the power of the [Nevada] court to adjudicate its rights and obligations in a legal dispute, sometimes arising out of that very conduct.' Subpoena power, on the other hand, 'is based on the power and authority of the court to compel the attendance at a deposition of [a witness] in a legal dispute between other parties.' Here, the out-of-state witnesses are not parties to the civil action pending in Nevada.

Id. at 32–33, 989–90 (internal citations omitted). That reasoning applies with equal force here because the Out of State Witnesses are not parties to this civil action pending in Clark County; they are merely employees or former employees of parties. Their current or former employment relationship with a party does not transform them into litigants subject to the subpoena power of the district court.

Nevada courts are vested with the authority to enforce subpoenas, but only so far as the state line. Upon the same rationale stated in *Quinn*, the subpoenas issued to the Out of State Witnesses here must be quashed. As *Quinn* pointed out, "NRCP 45's intra-state limitation on

Nevada courts' subpoena power is consistent with authority from other states recognizing the geographic restrictions of a state's discovery process." *Id.* (citing *Colo. Mills, LLC v. SunOpta Grains & Foods, Inc.*, 269 P.3d 731, 732 (Colo. 2012) ("Colorado courts, as a matter of state sovereignty, have no authority to enforce civil subpoenas against out-of-state nonparties."). In fact, "[m]ost states retain strict limits on the reach of the subpoena power, holding that subpoena service cannot reach nonparties found outside the state." *Quinn*, 134 Nev. at 30, 410 P.3d at 988 *citing* Ryan W. Scott, *Minimum Contacts, No Dog: Evaluating Personal Jurisdiction for Nonparty Discovery*, 88 MINN. L. REV. 968, 984 (2004).

NRCP 45 does not expressly distinguish between party and nonparty witnesses, but the holding in *Quinn* was expressly limited to "nonparty witnesses". Presumably, this distinction is because an out-of-state party has submitted 'to the power of the [Nevada] court to adjudicate its rights and obligations in a legal dispute…." *Quinn* at 32–33, 989–90.

TeamHealth Plaintiffs argued that employees and former employees of a corporate defendant are "party witnesses", and *Quinn*

therefore does not apply. (*See* 1 App. 198:18–23.) ("The issue is whether or not these are party witnesses or nonparty witnesses. And that -- and Your Honor, in the *Quinn* case, which counsel just talked about, if you go to page 33, that's the issue, is whether they're a party or a nonparty. All right?").

TeamHealth Plaintiffs' argument is belied by the plain language of the *Quinn* decision. While this Court did use the term "nonparty witnesses" in its *Quinn* holding, the Court found that the witnesses in question were nonparty witnesses because "… the out-of-state witnesses are not parties to the civil action pending in Nevada." *Quinn*, 134 Nev. at 30, 410 P.3d at 988. Similarly, the Out of State Witnesses here are not actual parties to the underlying district court case, and therefore they cannot be lawfully treated as "party witnesses" under *Quinn*. Unlike actual parties, the Out of State Witnesses have not submitted themselves to the jurisdiction of the Nevada court. They have not been sued by the TeamHealth Plaintiffs. No relief in the underlying litigation is being sought from these Out of State Witnesses. They are merely fact witnesses in a lawsuit between the actual litigants who are subject to the jurisdiction of the district court.

TeamHealth Plaintiffs also argued below that the language of the federal rules was materially different than the language in NRCP 45 and, thus, urged the district court to ignore the federal court decisions that support the Petitioners' argument that these trial subpoenas are unlawful. The terminology of NRCP 45 does indeed differ from the language of the federal law but not in any way that is material to this dispute

The phrase "party witness" is used in many federal decisions because FRCP 45(c)(3)(A)(ii) provided that a district court must quash or modify a subpoena that "requires a person who is **neither a party nor a party's officer** to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person…." *See Armenian Assembly of Am., Inc. v. Cafesjian*, 746 F. Supp. 2d 55, 60 (D.D.C. 2010) (emphasis added). Accordingly, the federal courts have sometimes referred to a person as a "party witness" … "whenever the person served is a party or the officer of a party." *Id*. citing *Chao v. Tyson Foods, Inc.*, 255 F.R.D. 556, 559 (N.D. Ala. 2009).

Unlike FRCP 45, NRCP 45 does not refer to "a party or the officer of a party." Instead, under controlling Nevada law, nonparty witnesses

are simply witnesses who "… are not parties to the civil action pending in Nevada." *Quinn*, 134 Nev. at 30, 410 P.3d at 988. Indeed, the witnesses served in *Consolidated Generator* were specifically described as including "officers" of the corporate parties. 114 Nev. at 1312, 971 P.2d at 1256. Nevertheless, even applying the federal definition *arguendo*, it is nonsensical to suggest that a "party witness" refers to every employee and former employee of a corporate defendant, as argued by TeamHealth Plaintiffs below. Even accepting their interpretation of the federal definition, a "party witness" must be limited to the officers of the corporate party.

It not necessary for the Court to reach the issue of the power of the district court to issue the subpoenas to out-of-state nonparty witnesses if it finds the subpoenas were not personally served, as Petitioners contend.

CONCLUSION

For the foregoing reasons, Petitioners request that the Court issue a writ of mandamus instructing the district court to quash the subpoenas based on a lack of personal service, or, alternatively, for lack of subpoena power over the Out of State Witnesses.

Dated this 14th day of October, 2021.

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

D. LEE ROBERTS (SBN 8877)
COLBY L. BALKENBUSH (SBN 13,066)
BRITTANY M. LLEWELLYN (SBN 13,527)
WEINBERG, WHEELER,
HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Boulevard
Suite 400
Las Vegas, Nevada 89118
(702) 938-3838

Attorneys for Petitioners

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 4,405 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 14th day of October, 2021.

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

D. LEE ROBERTS (SBN 8877)
COLBY L. BALKENBUSH (SBN 13,066)
BRITTANY M. LLEWELLYN (SBN 13,527)
WEINBERG, WHEELER,
HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
(702) 938-3838

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I certify that on October 14, 2021, I submitted the foregoing "Petition for Writ of Mandamus, or, Alternatively, Prohibition" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

Pat Lundvall
Kristen T. Gallagher
Amanda M. Perach
McDONALD CARANO LLP
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102

Attorneys for Real Parties in Interest

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, at Las Vegas, Nevada, addressed as follows:

The Honorable Nancy L. Allf
DISTRICT COURT JUDGE – DEPT. 27
200 Lewis Avenue
Las Vegas, Nevada 89155

Respondent

Joseph Y. Ahmad
John Zavitsanos
Jason S. McManis
Michael Killingsworth
Louis Liao
Jane L. Robinson
P. Kevin Leyendecker
AHMAD, ZAVISTANOS, ANAIPAKOS, ALAVI & MENSING, P.C.
1221 McKinney Street, Suite 2500
Houston, Texas 77010

Justin C. Fineberg
Martin B. Goldberg
Rachel H. LeBlanc
Jonathan E. Feuer
Jonathan E. Siegelaub
David R. Ruffner
Emily L. Pincow
Ashley Singrossi
LASH & GOLDBERG LLP
Weston Corporate Centre I
2500 Weston Road, Suite 220
Fort Lauderdale, Florida 33331

Attorneys for Real Parties in Interest

/s/ Jessie M. Helm
An Employee of Lewis Roca Rothgerber Christie LLP