IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

CASE NO.: 3D18-2165

L.T.: Case No.: 18-025431 CA 34

MARK IACONO and
L24M, LLC,

Petitioners,

v.

SANTA ELENA HOLDINGS, LLC and DOMINIC CAVAGNUOLO,

Respondents.
_____ /

SANTA ELENA HOLDINGS, LLC'S AND DOMINIC CAVAGNUOLO'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI

(ON REVIEW FROM THE CIRCUIT COURT IN AND FOR MIAMI-DADE COUNTY, FLORIDA)

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Respondents, SANTA ELENA HOLDINGS, LLC'S and DOMINIC CAVAGNUOLO'S (collectively, "Respondents"), through undersigned counsel, respectfully urges that Petitioners, MARK IACONO and L24M, LLC, (collectively, "Petitioners") Petition for Writ of Certiorari be dismissed or denied, and in support states the following:[1]

The Petition must be dismissed or in the alternative denied, because the Petitioners have failed to demonstrate to this Court that the Trial court's discovery order (1) departed from the essential requirements of the law (2) that they will suffer material injury for the remainder of the trial (3) that the discovery order requiring Jared Lopez, Joshua Shore and Barbara Andrade cannot be corrected on post-judgment appeal. Given the lack of substantive facts in the Petition as well as the failure to provide accurate background information in the Motion to Stay, the Respondents must provide the true facts surrounding the two non-final orders on appeal.

[1] The Respondents' Appendix to Respondents' Response to Petition for Writ of Certiorari is referred to as "RA" followed by the page number.

RESPONDENTS' STATEMENT OF THE CASE AND FACTS

This subject complaint was filed in circuit court on July 27, 2018, by the law firm of Black, Srebnick, Kornspan & Stumpf, P.A. ("Black Srebnick") on behalf of Petitioners L24M, LLC, a Florida manager-managed limited liability company and Mark Iacono, individually; a minority member of L24M, LLC and against Respondent Dominic Cavagnuolo, the co-founding member and first cousin of Mark Iacono. RA-3. Respondent Dominic Cavagnuolo is also the managing manager of L24M, LLC, and has been so since its inception. In response to the filing of this action, the Respondents filed their Motion to Disqualify the Petitioner L24M, LLC's attorneys on August 30, 2018. RA-5.

The Petitioners main claim in this action is based upon Petitioner Mark Iacono's allegations that he was fraudulently induced into entering into L24M, LLC's operating agreement by Mr. Cavagnuolo. RA-3. Specifically, the Petitioner Mark Iacono, alleges that he entered into the L24M, LLC's operating agreement **"without conducting an independent review of the terms of the operating agreement."** Id. at ¶38.

The operating agreement at issue in this case clearly and unambiguously identifies Respondent Dominic Cavagnuolo as the "sole" manager of L24M, LLC. RA-5. The operating agreement also delineates that L24M, LLC is a manager

managed, limited liability company. Id. (see section 6.1 of the L24M, LLC operating agreement). The Respondent Dominic Cavagnuolo has never authorized L24M, LLC to hire the Black Srebnick firm or authorized the filing of this lawsuit on its behalf. Id. Respondent Dominic Cavagnuolo, as the manager, is the only person who can authorize this action per section 6.4 of the L24M, LLC's operating agreement. Id. This is the main basis for the Respondents' Motion for Disqualification that was filed over two months ago. Id.

The Respondents' Motion for Disqualification is actually pending before two separate Judges. The Respondents were sued in this case and in another case that is currently pending before Judge Beovides in the case L24M, LLC v. Dominic Cavagnuolo and Santa Elena Holdings, LLC, Case No. 2018-016267 CC (05). RA-4. Fortunately, the Judge in the county court case, immediately intervened and ordered that the hearing on the Motion for Disqualification in her case be heard on November 13, 2018.

The Respondents have been trying to set the Motion for Disqualification since August of 2018 on this case and the Petitioners simply refused to cooperate. Specifically, on August 31, 2018, the Respondents attorneys requested a special set date for said Motion. RA-6. On September 17, 2018, Judge Smith's Judicial Assistant provided three dates and all of the dates were not acceptable to the

Petitioners. RA-8.

The Petitioners paralegal actually stated on the telephone that they were not available until after January of 2019. At this point, the Judge Smith's Judicial Assistant put the parties on hold, including Respondent's attorney, Anthony Accetta, Esquire, and returned on the phone and stated the Judge wants the issues of dates for all pending Motions or conflicts of dates to be set on his regular Motion Calendar for a "Status Conference" and directed the Respondents to immediately set that for hearing.

At the same time of trying to get dates for the Motions for Disqualification, the Respondents were also requesting deposition dates for the three material witnesses at issue on this appeal. Specifically, on September 17, 2018, the Respondents requested that they select from five dates to insure that the depositions took place before the Motions for Disqualification were set for hearing. RA-7.

The Petitioners playing Judge simply advised in a letter dated the same day, September 17, 2018, that they will not appear at any Deposition because they are "opposing counsel" and refused to select from the dates provided. RA-9. It was very clear that the witnesses from the Black Srebnick law firm had no intention on appearing without a court order directing them to do so. Therefore, the

Respondents simply needed to get a date in this case for the Motion for Disqualification and for the three "material" witnesses identified in the October 17, 2018 order on appeal to be deposed based on their direct knowledge of the facts and circumstances set forth in the Respondents' Motion for Disqualification.

The central issue in the Motion for Disqualification is the fact that this action and the county court action were brought by Petitioner Mark Iacono on behalf of L24M, LLC, in direct in violation of the Operating Agreement. RA-5. Specifically, section 7.1 of the operating agreement states:

> **"No Member acting alone shall have the authority to act for, in the name of, or as the representative of the Company, or to deal with the company's assets in any way or to undertake or assume any obligation, debt, duty, or responsibility on behalf of any Member or the Company. Any violation of this section shall be deemed to constitute willful misconduct."**[2]

Id.

Petitioner L24M, LLC, in the related action in county court, L24M, LLC v. Dominic Cavagnuolo et al, Case No. 2018-016267 CC (05) is moving to dissociate Respondent Dominic Cavagnuolo based on allegations that Mr. Cavagnuolo was

[2] As a result of Mark Iacono's improper filing of this action and a related action in the County Court, L24M et al v. Dominic Cavagnuolo, et.al., Case No 2018-016267 CC (05) on behalf of the Company. L24M, LLC, will be filing an action pursuant to section 605.0602(6)(b), to expel, Mark Iacono as a member, for his willful misconduct as set forth in 7.1 of the Operating Agreement.

removed as the manager of L24M, LLC by sixty percent (60%) vote of the members at an April 18, 2018, member meeting per the operating agreement. RA-4. The same operating agreement that Petitioner Mark Iacono is claiming in this action was obtained through fraud and is unenforceable. RA-3.

Specifically, in paragraph 13 of the county court complaint, L24M, LLC alleges that "on April 18, 2018, in the presence of a quorum of the Members, at least sixty percent of the membership interest voted in favor of removing Defendant Cavagnuolo as the manager and appointing Mark Iacono as the sole Manager of the Company." RA-4.

However, L24M, LLC's operating agreement, company's records and the minutes circulated by the Petitioner Mark Iacono do not reflect that, in fact, sixty percent (60%) of the voting member's units actually voted at the member meeting held on April 18, 2018. RA-2; RA-5. This is one of the key facts that will be explored during the depositions of the three witnesses. They were all present at the meeting and Jared Lopez, Esquire, actually conducted the April 18, 2018 meeting on behalf of L24M, LLC. RA-2; RA-5. According to Mr. Lopez, the purpose of the April 18, 2018 member meeting was for the members to vote on the removal of the current manager, Petitioner Dominic Cavagnuolo, and to appoint a successor manager. Id. As set forth in section 6.3 of the operating agreement and

confirmed at the meeting by two of the three material witnesses, namely, Jared Lopez and Joshua Shore, the members were required to obtain "**at least sixty percent (60%) of the voting members Units" in order to legally remove Dominic Cavagnuolo as the sole manager of the L24M, LLC."** Id.

The plain and unambiguous language set forth in sections 2.7.1 identifies all of the members with voting rights as set forth in Schedule A, which is attached to the operating agreement. RA-5. The members with voting units identified in Exhibit A in May of 2013 were as follows:

(a) Mark Iacono (does not identify units)

(b) Dominic Cavagnuolo (does not identify units)

(c) Michael Lacqua M.D. (3%) (30 units)

(d) Thomas Chiarello (10%) (100 units)

(e) Josh Dubin (7%) (70 units)

(f) Frank and Haida McGovern (1%) (10 units)

(g) LDL Investments (Designated Member Luca Sartini) (1%) (10 units)

(h) 123 Investments Inc. (Designated member Robert Cruz) (3%) (30 units)

RA-5

The total voting units identified in Schedule A are 22 and Robert Cruz was added by the manager, Respondent Dominic Cavagnuolo and members on September 1, 2013, who obtained a 3% voting interest. RA-5. However, the March 29, 2018 Notice of the April 18, 2018 Member Meeting was prepared by the three material witnesses' law firm Black Srebnick and did NOT INCLUDE the two original members with voting interest, Thomas Chiarello and Josh Dubin. RA-1. However, the Notice of Meeting does include, Christina Ventura and Joseph Chiarello who are not identified on Schedule A of the Operating Agreement and were never approved by the manager or by the manager and by the **unanimous** vote of all of the original members as required by the Operating Agreement. RA-1; RA-5.

Specifically, per sections 2.7.2 (Member Admission) **"persons other than the initial Members identified in section 2.7.1 (Schedule A) of this agreement may become members upon the consent of the Manager in its sole discretion** and **no Person may become a Member without providing a Capital Contribution as agreed upon the consent of the Manager in its sole discretion and no Person may become a Member without executing a counterpart of this agreement** and 8.6.11 (Obligations of Transferees) **"a transferee of an Economic Interest of the Company shall not become a member or have any vote in the**

Company without the consent of the Manager and one hundred percent (100%) of the non-selling Members, but shall be entitled to receive the Economic Interest to which the Transferring Economic Interest Holder would be entitled." RA-5. At the April 18, 2018, member meeting, material witness Jared Lopez, Esquire, a partner at Black Srebnick, stated the following:

> I can cite the specific operating agreement provisions now, but I suppose that won't make that much difference to you because you probably are not aware of the specific provisions, but the specific provisions are in the meeting minutes that are being disseminated to the members.[3]

RA-5

RECORDING OF THE APRIL 18, 2018 MEMBER MEETING

Material witness, Jared Lopez, Esquire, actually conducted the entire meeting and stated as follows:[4]

> Present Robert Cruz (member), Mark Iacono (member), Dominic Cavagnuolo, Dr. Lacqua (via phone), Joseph Chiarello (member's son), Jared Lopez and Joshua Shore *(an associate attorney from Plaintiff's alleged attorney's firm who actually drafted the frivolous complaint at issue in this case)*

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[3] Jared Lopez never disseminated any specific provisions at the board meeting or after the board meeting. RA-5. The only minutes that were disseminated were sent by his client, Petitioner Mark Iacono, and those minutes failed to cite to any specific provisions of the operating agreement. RA-2.

[4] The entire meeting was recorded (with all present consenting) and this portion was transcribed by the undersigned's paralegal, Leslie Canales. RA-5.

Lopez: Alright everybody my name is Jared Lopez I'm a lawyer for Iacono I've been asked to help facilitate this members' meeting for L24M. This is your meeting, I'm just going to set this framework. There's only one official item up for official action that's the removal of the existing manager and the election of a new manager. There's any business that you guys would like to discuss... feel free to discuss if you like to discuss before the vote and the official action is held that is fine. If you would like to do that immediately then proceed to the discussion of the business, that's fine too you let us know how you'd like to proceed. Okay? The first item though I'd like to note that there is quorum for the meeting under the LLC agreement majority of interest holders of the LLC are required to attend in order for there to be quorum in attendance we have through the sign in sheet members Mark Iacono, Dominic Cavagnuolo, Joseph Chiarello, Robert Cruz Jr. and on the phone attending Dr. Michael Lacqua and we also have his proxy that was provided to us yesterday. Dr. Lacqua provided his proxy votes to Mark Iacono. Okay. So, the minutes of this meeting are going to be recorded and are going to be disseminated to the members at the conclusion of the meeting. Fair enough? Understood? Is there any decision on that you would like to discuss business, informally, first then proceed to the vote or proceed to the official action and meet afterwards? So, we can get out of the way, we'll proceed to the first item for official action removal of member Dominic Cavagnuolo as the manager of L24M, LLC for the following reasons:

(a) Misappropriation of certain company property in the form of certain SISCO **food products**, a **refrigerator** purchased through the company for personal benefit, **pots of pans** purchased for personal benefit on the company account as well as miscellaneous items of **petty cash** and **other items to be determined to be determined upon a full accounting once the full books and records have been disclosed.**

(b) The assumption of a debt of a company through the formation of SEA Corp, LLC which is a Delaware entity that was formed to

assume the loan from the Robins companies that was used to finance to liquor license for LUCALI that assignment was executed in favor of a company that Mr. Cavagnuolo has interest an in. It's a Delaware entity. **Mr. Cavagnuolo's obligation under the agreement was 1-not to assume any debt of the company**; **and 2-to disclose in writing prior to all of the investors that he was in fact assuming that loan and intended to collect interest on that loan as opposed to cause a company to pay off the loan and pay any more interest.**

(c) There is understanding that Mr. Cavagnuolo has proceeded with the separate business called DC Pie that he intends to form and carry on those business activities and on that basis and part, **Mr. Iacono believes that under the Operating Agreement it's a breach of fiduciary loyalty and fiduciary duty that Mr. Cavagnuolo owes to LUCALI to establish a separate business not under the LUCALI brand and operate on that basis.** So that's the general framework **I can cite the specific operating agreement provisions now, but I suppose that won't make that much difference to you because you probably are not aware of the specific provisions, but the specific provisions are in the meeting minutes that are being disseminated to the members.** So, having said that, I'd like to put out the motion to remove Mr. Cavagnuolo through a vote. I'll start with member Mark Iacono and how many shares membership units do you owe?

Mr. Iacono: 40

Lopez: The required vote to remove the existing manager is 60%. (inaudible)

Lopez: Mr. Chiarello, how many membership units do you own?

Mr. Chiarello: 17

Lopez: And what is your vote?

Mr. Chiarello: To remove him

Lopez: Mr. Cruz, how many membership interests' units to you own?

Mr. Cruz: I'm going to abstain from voting

Lopez: (Very well)

Mr. Cruz: two guys are friends of mine, I can't be in between that.

Lopez: (I, I, I, I**,** understand that)

Mr. Cruz: I'm going to abstain from voting.

Lopez: Mr. Cavagnuolo, I think its academic, but I have to offer you the opportunity to vote for your removal.

Mr. Cavagnuolo: I'm going to abstain as well.

Lopez: (Very well), ((he's going to abstain))

Lopez: We have by proxy Dr. Lacqua who's also present on the phone. Dr. Lacqua has provided his proxy votes to Mr. Iacono, Mr. Iacono, how do you intend to Dr. Lacqua membership units?

Mr. Iacono: to remove him

Lopez: How many membership units is that?

Mr. Iacono: three

Lopez: That adds to 60%. I believe the 40% from Mr. Iacono, **17% from Mr. Chiarello,** and 3% from Dr. Lacqua via proxy **is noted that the other members of Haida and Frank McGovern, Luca Sartini, Christina Ventura are not here present today.**

> **Lopez: Alright with the said, the Motion passes**, we will reflect that to the minutes of the meeting we will disseminate them to the members, if there is any other business you guys would like to discuss well step out now and you guys are free to discuss it or meeting is concluded. Dr. Lacqua, any further business? **That concludes the meeting.**[5]

RA-5

Unfortunately, Jared Lopez, and his partner, Josh Shore, failed to conduct any due diligence to determine pursuant to the operating agreement, who were the actual voting members and who were simply Economic Interest Holders with no voting interest at the April 18, 2018, member meeting. A simple review of the operating agreement would have made it clear that Joseph Chiarello was not a member with voting interest and has never been admitted as a member by the manager and One Hundred Percent (100%) of the other members as required per section 8.6.11 of the Operating Agreement. RA-5.

Mr. Joseph Chiarello was never a member with voting interest and his father, Thomas Chiarello only had ten (10) member votes when he was a member. RA-5. Therefore, even assuming, Mr. Thomas Chiarello was still a member and

[5] The Notice that set forth the items to be voted on at the member meeting stated the purpose of the member meeting was to "conduct an election concerning the removal of the Manager and **the appointment of a successor manager for L24M, LLC. The members NEVER voted to elect the "successor manager for L24M, LLC" at the member meeting.** RA-1.

gave his son the right to vote on his behalf, the members would still not have obtained the required (60%) vote.[6] RA-5.

The operating Agreement, clearly and unambiguously, states in section 8.1 **"any person to whom membership rights are attempted to be transferred in violation of this section 8.1 shall not be entitled to vote on matters coming before the members…"**[7] RA-5. In addition, to all of the other conditions that must be met per sections 2.7.2 and 8.6.11 of the Operating Agreement before you can be admitted as a member with voting interest. Id. Therefore, the members did not have the required Sixty (60%) percent member vote to remove Respondent Dominic Cavagnuolo as the "sole" manager of L24M, LLC, as alleged by the Petitioners in this action. Id.

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[6] Per section 7.2.4 of the operating agreement, Mr. Thomas Chiarello would have had to provide a proxy or would have had to appoint his son as an attorney-in-fact before he was able to vote. RA-5. There is no reference to any proxies or appointment of attorneys-in-fact on behalf of Thomas Chiarello on the meeting minutes. RA-2.

[7] Mr. Joseph Chiarello was involved in an illegal transfer of shares in violation of sections 8.1 of the operating agreement. However, Mr. Lopez clearly lies when he states in the meeting "**I can cite the specific operating agreement provisions now, but I suppose that won't make that much difference to you because you probably are not aware of the specific provisions, *but the specific provisions are in the meeting minutes that are being disseminated to the members."*** RA-5.

Furthermore, pursuant to section 6.3 of the operating agreement, a manager may only be removed upon the vote of the members holding at least sixty percent (60%) of the units, **provided that such decision is based on at least one of the following occurrences:** [8]

(a) Managers conviction of, or plea of guilty to a second degree (or higher) felony (a claim of sexual harassment by an employee shall not give rise to the removal of the manager);

(Mr. Cavagnuolo has never been convicted of a second-degree felony)

(b) Managers material breach of a term of this agreement, including any amendments hereto;

(**Mr. Cavagnuolo never materially breached the operating agreement)**

(c) In the event that the Manager shall be unable to perform his duties hereunder by virtue of illness or physical or mental disability (from cause or causes whatsoever) in substantially the manner and to the extent required of him hereunder prior to the commencement of such disability and Manager shall fail to perform such duties for periods aggregating ninety (90) days, whether or not continuous, in any continuous three hundred sixty (360) day period;

(Mr. Cavagnuolo is very healthy and has no mental or physical

[8] This means the members needed both the sixty percent (60%) member vote and evidence that the manager materially breached the operating agreement or misappropriated monies. There was no evidence presented at the member meeting of either a material breach of the operating agreement or misappropriation. RA-5.

illness)

(d) Any act by the Manager of fraud or dishonesty, misappropriation or embezzlement or willful misconduct or in connection with the performance of the manager's duties hereunder.

(Mr. Cavagnuolo has never committed fraud, misappropriation, embezzlement or any willful misconduct in connection with his performance and duties).

RA-5

Apparently, the members were voting to remove the manager, Respondent Dominic Cavagnuolo, due to alleged and unsubstantiated misappropriation of company property and money (i.e. theft by Respondent Cavagnuolo as manager of the company). RA-3. According to Mr. Lopez, the following was the "evidence" set forth at the meeting of the misappropriation:

> Misappropriation of certain company property in the form of certain SISCO **food products**, a **refrigerator** purchased through the company for personal benefit, **pots of pans** purchased for personal benefit on the company account as well as miscellaneous items of **petty cash** and **other items to be determined to be determined upon a full accounting once the full books and records have been disclosed.**

RA-3

The last sentence is another significant area of inquiry that will be explored at Mr. Lopez's deposition, "**other items to be determined upon a full accounting, once the books and records have been disclosed."** RA-3.

As reflected in the recorded minutes, Jared Lopez, Esquire and Joshua Shore, Esquire and there paralegal Barbara Andrade from Black Srebnick, were all material witnesses to the April 18, 2018, meeting and have information directly related to the allegations in both this case and in the related county court case where the Motion for Disqualification is currently set for an evidentiary hearing on November 13, 2018. RA-2.

The above facts are the exact reason why the trial court on October 17, 2018, directed that Jared Lopez, Esquire, Joshua Shore, Esquire and Barbara Andrade appear for their depositions in advance of the evidentiary hearing on Respondent's motion to disqualify Black Srebnick as counsel for Petitioner L24M, LLC. Tab 2.

Contrary to the Petitioners' false claims, they were not deprived of due process by the trial court. It is clear, as reflected in the October 17, 2018, transcript, that counsel for the respective parties appeared before the Honorable Daryl E. Trawick (who was presiding over this matter temporarily in the place of the division judge, the Honorable Rodney Smith) and Judge Trawick conducted a full hearing and applied the factors from the *Shelton* test, in ordering that the depositions be had, contrary to the misrepresentations made to Judge Smith (see Tab 8 at Page 5 lines 5-9 "As far as I have been told by the lawyer who did attend

the hearing before last week…There was no consideration of the Shelton factors.")

and in the Petition:

> THE COURT: Let me hear from counsel. Shouldn't that deposition wait until after the special set hearing occurs?
>
> MR. ACCETTA: The reasons -- it actually goes to the heart of the motion to disqualify --
>
> THE COURT: Okay.
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> MR. ACCETTA: -- because the motion to disqualify talks about what was your role in that meeting. Who were you representing at the meeting. Who hired you? And I asked for a retainer and you know what he said? Oh, we don't have a retainer. So I need that information because I don't want to be sandbagged at the evidentiary hearing when they start presenting all kinds of documents or retainers or contents, you know. Specifically, Joseph Chiarello is not a member, but at the meeting he's claiming he's a 70 percent member. I said where is the documentation? Provide it to me via e-mail. Request for Production, third-party subpoena. Judge, they're not providing anything except saying we're not available. Maybe give us dates in February 2019. Judge, that are the Plaintiff. They sued my client. And my client -- and the most bizarre thing is my client is the only person that's entitled to hire lawyers and sue a member of the company. There's no member meeting authorizing Mark Iacono to sue anyone. And there's no member meeting that actually made him the managing manager to hire this firm.
>
> THE COURT: Okay.
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> ***
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> THE COURT: Secondly, as to the deposition. Well, counsel, I can understand you're saying this is -- these allegations are without merit. They certainly are entitled to explore the factual basis behind it which will be an issue in this evidentiary hearing. So I'm going to order the

depositions to go forward. And I'm going to set a date, unless the parties -- except for October 23rd -- but is that date bad for you or the other witnesses?

MR. DUNLAP: November 6th and going forward is fine for the special set hearing.

THE COURT: **I'm talking about the depositions.**

MR. DUNLAP: **That would be fine, Your Honor. If I may, though, in the case that was provided to you there's factors that are enunciated --**

THE COURT: Yes.

MR. DUNLAP: **-- and it states that opposing counsel are not -- the way the factors read opposing counsel are not to be deposed unless the information cannot be received from --**

THE COURT: **Any other source.**

MR. DUNLAP: -- **any other source.** And at the meeting there were multiple laypeople there who could testify as to what occurred at the meeting. These are the very first depositions that have been set in this case. And at the same time as these have been set, counsel has filed a motion the stay this case pending a resolution of the motion for disqualification. And I would just suggest that it’s inappropriate at this stage of the proceedings when they haven't even articulated what the conflict is between our client and the corporation for them to be taking depositions of opposing counsel as well as their secretary.

THE COURT: Well, let me address that specific point. Counsel, go ahead.

MR. ACCETTA: **First and foremost, they keep saying opposing counsel. He’s claiming he represents the company. We're not lying. My client is a member of the company.**

> THE COURT: Right.
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> MR. ACCETTA: So there's no opposing counsel. Why we're taking his deposition has nothing to do with these two lawsuits. He, as an attorney, Joshua Shore and Jared Lopez, acted as the attorneys for the company at the meeting. They took -- they had a vote of 60 percent. They took a person by the name of Joseph Chiarello. And they said he's a 70 percent member. After that meeting I sent letters and my client's prior lawyer sent letters saying show us the documentation that makes this person a member with a 70 percent ownership interest, and they say you have it. You have it. We don't have it. That's the purpose of these depositions. We're not inquiring, and it's not about conflict of interest. It's about who hired you, who brought you to that meeting, and who gave you the right to conduct a meeting to remove my client? It's a manager managed, LLC. My client is a founder of the company. My client is the one who invested to open up the company. And then Mark Iacono, who invested a total $20,000 compared to my client of over $200,000, what they're trying to do is avoid --
>
> THE COURT: Let me cut you -- because this is motion calendar and -- no, I'm not going to allow a response. Counsel, I'm going to require the depositions to go forward.

(emphasis supplied)
Tab 6 at Page 8 line 16-Page 9 line 25; Page 15 line 17-Page 18 line 20.

The trial court was advised by the Respondents' counsel that they would not inquire into any information being claimed by Black Srebnick as attorney-client privileged at the depositions, if such privilege even exists as it relates to L24M, LLC. The fact that a person is a lawyer does not necessarily disqualify him as a witness. Somarriba v. Ali, 941 So. 2d 526, 528 (Fla. 3d DCA 2006) (citing to Hoyas v. State, 456 So.2d 1225 (Fla. 3d DCA 1984); Sec. Trust Co. v.

Grant, 155 So.2d 805 (Fla. 3d DCA 1963)). Therefore, the trial court entered an order on the same day, October 17, 2018, commanding the depositions take place.[9] Tab 2.

However, before setting the deposition date for the three material witnesses, the trial court specifically asked the Petitioners counsel if they were not available of the scheduled date they can provided alternate dates. The Petitioners attorney, Joshua Dunlop, contacted his office and then returned before the trial Judge with three dates. The Respondents chose October 29, 2018, and the Depositions were all re-noticed with the agreed upon date. The Petitioners misrepresented to the sitting Judge Smith that the deposition date was never cleared or agreed to by the three witnesses' attorney (See Tab 6 at Page 5 line 22-Page 6 line 4: "…an order on an ore tenus motion to compel, which required the three witness from my law firm to sit for a deposition on a specific date that was not coordinated with my office along with a duces tecum attached to the subpoena, which requires essentially the production of our entire case file."), which was a blatant lie and

[9] The *Shelton* test found in Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir.1986), states that "opposing counsel" could only be required to submit to a deposition upon a showing that: 1. No means existed to obtain the desired information other than to depose opposing counsel; 2. The information sought was relevant and nonprivileged; 3. The information was crucial to preparation of the case. Zimmerman v. State, 114 So. 3d 446, 447 (Fla.

simply confirms what Respondents have been dealing with since both lawsuits were filed. The deposition date contained in the October 17, 2018 order was offered by Petitioners' counsel during the hearing before Judge Trawick:

> **THE COURT: Correct. And make sure in the order it indicates that this may not be canceled by counsel without a court order. Okay. Now, what about the deposition dates?**
>
> **MR. DUNLAP: We're available the 29th, 30th, and 31st of this month.**
>
> **THE COURT: So you're not available October 23rd or all of the attorneys are not available the 23rd?**
>
> **MR. DUNLAP: Right.**
>
> THE COURT: Okay. What about those dates, Mr. Accetta?
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> MR. ACCETTA: It's actually two attorneys, one secretary.
>
> THE COURT: Okay.
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> MR. ACCETTA: What date, the 29th?
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> MS. HOELLE: The 28th, 29th --
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> **MR. DUNLAP: Sorry. The 29th and 30th and the 31st I think it's a Monday and Tuesday and Wednesday.**
>
> **THE COURT: Any time on those dates?**
>
> **MR. DUNLAP: "Uh-huh."**

5th DCA 2013).

MR. ACCETTA: The 29th I'm fine. I can take all three. I wouldn't anticipate them more than being an hour each.

THE COURT: What time do you want to set it the 29th?

MR. ACCETTA: We can start at 10:00 a.m.

THE COURT: All right. 10:00 a.m. October 29th. The same direction. The deposition will not be canceled without a court order approving it.

MR. ACCETTA: Okay. Then allow me to rewrite this.

THE COURT: All right. Thank you, folks.

(emphasis supplied)
Tab 6 at Page 20 line 10-Page 21 line 21

Therefore, the trial court acted well within its discretion to order the depositions to take place on the issue of the conflict of interest. There are no grounds that justify the extraordinary remedy of certiorari relief because the deposition of two non-party witnesses, is governed by the broad, liberal discovery rules that are applicable all depositions, and there is no irreparable harm shown. The Petitioners have failed to make a prima facie showing that the orders create any irreparable harm. Florida Rule of Civil Procedure 1.310(a) permits the taking of a deposition of "any person"; however, subsection (d) of the rule also recognizes that the trial court has broad discretion to control the use of discovery procedures. The Petitioners had the burden of establishing good cause to obtain a

protective order and failed to meet their burden, as discussed below. See, Molina v. Yoder Auto Sales, Inc., 743 So. 2d 621 (Fla. 2d DCA 1999). Therefore, because the Petitioners failed to show that irreparable material injury would result from the taking of the depositions under the conditions the trial court imposed, the Petitions must be dismissed.

A second order, which was entered on October 24, 2018, which is also the subject of the Petition, is also an interlocutory non-final order. Tab 4. Likewise, the Petition must be dismissed and denied as to the October 24, 2018 denying the Petitioners' motion for protective order. Id. The October 24, 2018 order was entered by the division Judge, The Honorable Rodney Smith. Id. Judge Smith denied the motion for protective order, which sought relief from having the depositions of Jared Lopez, Esquire and Barbara Andrade take place. Id. The trial court specifically indicated that he would not revisit the previous October 17, 2018 order or act in some quasi-appellate fashion, because the October 17, 2018 order was entered by a different judge, namely, the Honorable Daryl E. Trawick. Tab 8. In sum, the depositions of Jared Lopez, Esquire, Joshua Shore, Esquire and Barbara Andrade are governed by the broad, liberal discovery rules that are generally applicable to depositions of non-parties. Given their refusal to appear for deposition, under these circumstances, the trial court acted well within its

discretion to oversee the scheduling of discovery and ordered these witnesses to appear. Lastly, Petitioners were given an opportunity to be heard two times, which is all that due process requires.

The trial court acted within its authority to order the parties to appear before it when it was alerted to the fact that the Petitioners were delaying these proceedings. The Petitioners have failed to demonstrate to this Court that the trial court (1) departed from the essential requirements of the law (2) that the order requiring them to appear at a deposition will result in material injury for the remainder of the trial (3) that it cannot be corrected on post judgment appeal. In reality, if the court would have entered a protective order based on the facts set forth herein, that would have been a clear violation of the Respondents right to depose said witnesses. Therefore, the Petitioners' have been afforded due process and there is not any reason here that warrants extraordinary certiorari relief. For these reasons, this Court should not exercise its discretionary jurisdiction.

RESPONSE TO BASIS FOR INVOKING CERTIORARI JURISDICTION

The Petition for Certiorari should either be dismissed or denied.

PETITION SHOULD BE DISMISSED

The Petition should be dismissed if the Court finds that the petition does not show a prima facie case of "irreparable harm or material injury." Sardinas v. Lagares, 805 So.2d 1024(Fla. 3d DCA 2001). Although common law certiorari is a discretionary writ, the question of irreparable harm and thus jurisdiction is not discretionary. Bared & Company v. McGuire, 670 So.2d 153 (Fla. 4th DCA 1996)(because reviewing court initially determined that petition failed to show likelihood of irreparable harm, petition was properly dismissed rather than denied.); S.E.R. v. J.R. 803 So.2d 861(Fla. 4th DCA 2002)(failure to show irreparable harm-petition dismissed); Ribel v. Ribel ,766 So.2d 1185(Fla.4thDCA 2000)(no showing of departure of law which will materially injure petitioner throughout remaining proceedings, not remedial on appeal-dismissed).

The Petition should be dismissed because there is no irreparable harm or material injury where the trial court granted the discovery requested by the Respondents. The trial court, within its discretion, ordered the depositions to be had. As noted in Parkway Bank v. Ft. Myers Armature Works, Inc., 658 So.2d 646 (Fla. 2d DCA 1995), a petitioner must establish that an interlocutory order creates material harm, irreparable by a post-judgment appeal, before this Court has power to determine whether the order departs from the essential requirements of

the law. It is clear that not only is this Petition not an emergency, but this Petition is frivolous in terms of the extraordinary remedy of certiorari. Under the facts of this case, there can be and has been no showing of a departure from the essential requirements of the law or any irreparable injury.

PETITION SHOULD BE DENIED

The Petition should be denied if the Court finds that the petitioner fails to make prima facie showing that the order to be reviewed departs from essential requirements of law. Novartis Pharm. Corp. v. Carnoto, 798 So.2d 22 (Fla. 4th DCA 2001) (failure to show irreparable harm-petition denied); Bared & Company v. McGuire, 670 So.2d 153 (Fla. 4th DCA 1996) (court will deny petition for certiorari review of non-final order if petitioner fails to make prima facie showing that order to be reviewed departs from essential requirements of law). The Petition should also be denied because not only have Petitioners failed to show any departure from the essential requirements of law, they have failed to show that the trial court's orders will materially injure Petitioners throughout the remainder of these proceedings.

Standard of Review for Certiorari

To obtain certiorari review of an unappealable, non-final order of a lower court, the party seeking review must demonstrate that the trial judge departed from

the essential requirements of law and that such order resulted in harm which cannot be remedied in a plenary appeal from the final judgment. Martin-Johnson, Inc. v. Savage, 509 So.2d 1097 (Fla.1987). If the asserted injury can be addressed on appeal from the final judgment, the court should deny the petition. A certiorari petition must pass a three-prong test before an appellate court can grant relief from an erroneous interlocutory order. Barker v. Barker, 909 So.2d 333, 336 (Fla. 2d DCA 2005)("A petitioner must establish (1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the trial (3) that cannot be corrected on post judgment appeal," *Id*., quoting Parkway Bank v. Fort Myers Armature Works, Inc., 658 So.2d 646, 648 (Fla. 2d DCA 1995)). The final two prongs of the test are jurisdictional. The appellate court must conduct the jurisdictional analysis before it is empowered to determine whether to grant relief on the merits, i.e., whether the nonfinal order departs from the essential requirements of the law. *Id*. at 649. (emphasis supplied). Based upon the facts of the case, there can be no showing of irreparable harm, and therefore this Honorable Court on certiorari review, which is very limited in its scope, lacks jurisdiction.

The Petition should be denied because Petitioners have not demonstrated the order departs from the essential requirements of law; that it has no adequate remedy by plenary appeal; and, that it will suffer "irreparable harm throughout the remaining proceedings where the order under review is without prejudice to the Petitioners re-addressing the issue with the trial court

Certiorari should be denied in this case because the non-final order under review is a non-appealable order for which certiorari relief is not available. A certiorari petition must pass a "three-prong" test before an appellate court can grant relief from an erroneous interlocutory order:

> A petitioner must establish (1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the trial (3) that cannot be corrected on postjudgment appeal.

Barker v. Barker, 909 So.2d 333, 336 (Fla. 2d DCA 2005) (quoting Parkway Bank v. Fort Myers Armature Works, Inc., 658 So.2d 646, 648 (Fla. 2d DCA 1995). In the case at bar, Petitioners have established none of the three requirements. As such, it is subject to an abuse of discretion standard of review. Petitioners have failed to demonstrate any basis to establish an abuse of discretion, or, that the orders depart from the essential requirements of law, or, that Petitioners have no adequate remedy by appeal.

ARGUMENT

NO IRREPARABLE INJURY

It is clear that there is no irreparable injury that has been shown by Petitioners and none that can be at this juncture. The trial court considered the representations of the Respondents' counsel that no attorney client privileged information would be elicited during the depositions. Given the posture of the pleadings, the trial court was well within its discretion to grant the discovery. Accordingly, there can be no irreparable harm and no departure from the essential requirement of the law as the petition is premature at best. As stated in Martin-Johnson, Inc. v. Savage, 509 So.2d 1097 (Fla.1987), common-law certiorari is an extraordinary remedy which should not be used to circumvent the interlocutory appeal rule which authorizes appeal from only a few types of nonfinal orders.

JUDGE TRAWICK FULLY ADDRESSED THE *SHELTON* FACTORS

Petitioners claim that there is no reason for the taking of their counsel's deposition under Shelton v. Am. Motors Corp, 805 F.2d 1323 (8th Cir. 1986) cited in Zimmerman v. State, 114 So. 3d 446 (Fla. 5th DCA 2013). The Shelton factors are all satisfied where the *claimed* pertinent evidence is nothing more than fraudulently created deductions by the defendant's lawyer. Moreover, under Bush v. Schiavo, 866 So. 2d 136 (Fla. 2004), it is Petitioners' counsel who has the

burden of showing good cause to prevent the taking of a deposition. Petitioners did not make any showing, much less a 'strong' showing to prevent the taking of their counsels' deposition. Thus, Petitioners' claim that there is no legal basis for permitting the depositions to go forward, is meritless on this record. Judge Trawick considered Petitioners' arguments before he ruled and decided that the depositions needed to be had. The controlling precedent for the denial of Appellant's motion for protection is Bush v. Schiavo, supra.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION

The trial court properly exercised its discretion in overseeing discovery in this matter:

> "A trial court possesses broad discretion in overseeing discovery, and protecting the parties that come before it." Rojas v. Ryder Truck Rental, Inc., 625 So. 2d 106, 107 (Fla. 3d DCA 1993), approved, 641 So. 2d 855, 857 (Fla. 1994). Pursuant to Florida Rule of Civil Procedure 1.280(c), a trial court may, upon a showing of good cause, issue a protective order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" as justice may require. The burden of showing good cause is on the party seeking the protective order. City of Oldsmar v. Kimmins Contracting Corp., 805 So. 2d 1091, 1093 (Fla. 2d DCA 2002). And, "a strong showing is required before a party will be denied entirely the right to take a deposition." Deltona Corp. v. Bailey, 336 So. 2d 1163, 1169-70 (Fla. 1976) (approving the construction of rule 1.280(c) contained in Orlando Sports Stadium, Inc. v. Sentinel Star Co., 316 So. 2d 607, 611 (Fla. 4th DCA 1975), which quoted from Moore's Federal Practice, pp. 493-95 (2d ed.)). Florida courts have disapproved the entry of protective orders prohibiting the taking of depositions

> generally and orders providing for lengthy postponements of discovery. See Office of Att'v Gen, v. Millennium Communications & Fulfillment, Inc., 800 So. 2d 255 (Fla. 3d DCA 2001); Maris Distrib. Co. v. Anheuser-Busch, Inc., 710 So. 2d 1022, 1024-25 (Fla. 1st DCA 1998); Brennan v. Bd. of Pub. Instruction, 244 So. 2d 463, 464 (Fla. 4th DCA 1971).

Bush v. Schiavo, 866 So. 2d 136, 138 (Fla. 2d DCA 2004)

Petitioners also argue that the trial court did not afford them due process; however, these assertions above are simply not true. The status conference hearing that took place on October 17, 2018 was ordered by the trial court because the Petitioners' counsel refused to coordinate with the Respondents' request for their deposition even though they had not filed a motion for protective order.

On October 17, 2018, a status conference was held before the Honorable Daryl E. Trawick, who was temporarily presiding over the matter in the place of the Honorable Rodney Smith. Tab 6. After Respondents' counsel, Anthony Accetta, Esquire, advised Judge Trawick that the Judge Smith's judicial assistance advised him that "Judge Smith said that you need to set it on a status conference…because we need to get these cases moving", Judge Trawick indicated his agreement with Judge Smith's procedure in setting the matter: "THE COURT: Which is exactly what I would do." Tab 6.

Furthermore, Judge Trawick did in fact consider the *Shelton* factors in accordance with Zimmerman v. State, 114 So.3d 446 (Fla. 5th DCA 2013). First, the fact that Petitioners' counsel represents both Petitioners does not make them "an opposing counsel", because the law firm is acting as a lawyer for Petitioner L24M, LLC, of which Respondent is a member. Moreover, the *Shelton* test "was intended to protect against the ills of deposing opposing counsel in a pending case that could potentially lead to the disclosure of the attorney's litigation strategy." Zimmerman v. State, 114 So. 3d 446, 447 (Fla. 5th DCA 2013). At multiple points during the status conference, the Respondents' counsel represented to Judge Trawick that Respondents were not seeking any information from Petitioners' counsel that would infringe upon the attorney-client privilege. (Tab 6 "MR. ACCETTA: Obviously, I will not get into any information regard attorney-client privilege. It'll be specifically limited to their representation at the meeting, what documents were presented at that meeting."; "MR. LOMBANA: But we're not going to ask him questions about attorney-client privilege…").

Additionally, any deposition testimony obtained regarding the April 18, 2018 meeting would not violate the attorney client privilege because any privilege that may have existed was waived when the meeting was had in the presence of Joseph Chiarello who is not a member of L24M, LLC. (Tab 6: "And, more

importantly, Judge, we have evidence that the meeting was taking place with a member -- with Joseph Chiarello who basically is not a member… Specifically, Joseph Chiarello is not a member, but at the meeting he's claiming he's a 70 percent member.").

PETITIONERS WERE AFFORDED DUE PROCESS

Petitioners argue that the trial court did not afford them due process; however, the assertions above are completely inaccurate. Petitioners were afforded notice and an opportunity to be heard. That is all that due process requires. Crescenzo v. Marshall, 199 So. 3d 353, 355 (Fla. 2d DCA 2016) (citation omitted).

THE PRESIDING JUDGE HAD FULL DISCRETION NOT TO DISREGARD AN INTERLOCUTORY ORDER ENTERED BY A PRIOR JUDGE

"As a matter of 'comity and courtesy,' a judge should hesitate to undo the work of another judge who presided earlier in the case." Hull & Co., Inc. v. Thomas, 834 So. 2d 904, 906 (Fla. 4th DCA 2003) (citing to Tingle v. Dade County Bd. of County Comm'rs, 245 So.2d 76, 78 (Fla. 1971)); see also, Shermer v. State, 16 So. 3d 261, 265 (Fla. 4th DCA 2009) ("The trial court did not abuse its discretion in refusing to reconsider the prior judge's ruling on the motion to suppress, particularly where the defense provided no reason based upon evidence

or law which would change the result."); Sanz v. Carter, 937 So. 2d 1126, 1127 (Fla. 4th DCA 2006) ("While a trial judge has the power to vacate or modify a predecessor judge's interlocutory ruling, a successor judge should hesitate to undo the work of the other judge, if possible.").

CONCLUSION

The Petition should be dismissed, or in the alternative, should be denied. Petitioners have failed to demonstrate any departure from the essential requirements of law which will cause material prejudice which cannot be remedied on appeal. The petition for certiorari should be DISMISSED or DENIED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response To Petition For Writ Of Certiorari was sent by electronic mail to: Jared Lopez, Esq. and Joshua A. Shore, Esq., Counsel for Petitioners, Mark Iacono and L24M, LLC, Black, Srebnick, Kornspan & Stumpf, P.A., JLopez @royblack.com JShore@royblack.com civilpleadings@royblack.com, 201 S. Biscayne Boulevard, Suite 1300, Miami, Florida 33131 this 31st day of October, 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) i.e. Times New Roman 14 pt.

By: /s/ *Lazaro Vazquez*
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