

1 **NO. 76639**

2 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

3
4 NEVADA DEPARTMENT OF EMPLOYMENT, TRAINING AND
5 REHABILITATION, EMPLOYMENT SECURITY DIVISION,

6 Appellants,

7 **vs.**

8 SIERRA NATIONAL CORPORATION, *dba* THE LOVE RANCH,
a NEVADA CORPORATION,

9 Respondent.

10
11 On Appeal from the First Judicial District Court
of the State of Nevada, in and for Carson City, Hon. James T. Russell
District Court Case No. 17 OC 00222 1B
12

13 **APPELLANT'S APPENDIX**

14 **Volume 2**

15 **Pages 107 - 227**

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Electronically Filed
Dec 27 2018 08:25 a.m.
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Clerk of Supreme Court

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have an employment relationship. SNC submits that DETR's determination is erroneous and arbitrary and capricious. In addition, DETR's determination violates SNC's Due Process rights and the Contracts Clauses of the United States and Nevada Constitutions. Finally, DETR's Determination is barred by several equitable doctrines. Accordingly, SNC submits that DETR's determination must be reversed.

II. ANALYSIS

A. Standard of Review

Pursuant to NRS 612.510(1), the Appeal Tribunal is authorized to "affirm, modify, or reverse" DETR's determination. The Tribunal "shall inquire into and develop all facts bearing on the issues," NRS 612.500(2), and must conduct a *de novo* review of the evidence and law, without deference to DETR's earlier determination. See *Clark County School District v. Bundley*, 122 Nev. 1440, 1445, 148 P.3d 750, 754 (2006); *Kraft v. Nev. Emp. Sec. Dep't*, 102 Nev. 191, 193 n.2, 717 P.2d 583, 584 n.2 (1986). As such, the Appeal Tribunal "has a paramount role in drawing out the relevant facts." *Villalobos v. Nev. Emp. Sec. Dep't*, 2012 WL 3139855, at *6 (Nev., July 31, 2012). Further, "[a]n Appeal Tribunal shall not participate in an appeal hearing in which the Appeal Tribunal has a direct or indirect interest." NRS 612.500(7). The courts will review and reverse any agency decision that was "erroneous in view of the record as a whole," *Weaver v. State Dep't of Motor Vehicles*, 117 P.3d 193, 196 (Nev. 2005), or "arbitrary or capricious." *United Exposition Serv. Co. v. State Indus. Ins. Sys.*, 851 P.2d 423, 424 (Nev. 1993).

B. DETR's Determination is Erroneous and Arbitrary and Capricious

Nevada utilizes the "ABC test," codified in NRS 612.085, under which a person is an independent contractor for purposes of unemployment compensation when the following conditions are met:

- (1) The person has been and will continue to be free from control or direction over the performance of the services, both under his or her contract of service and in fact;
- (2) The service is either outside the usual course of the business for which the service is performed or that the service is performed outside of all the places of business of the enterprises for which the service is performed; and
- (3) The service is performed in the course of an independently established trade, occupation, profession or business in which the person is customarily engaged, of the same nature as that involved in the contract of service.

NRS 612.085.

The Nevada Supreme Court's application of the ABC test in *Reliable Health Care Services of Southern Nevada* is instructive. 983 P.2d 414, 417 (Nev. 1999). There, the court considered whether trained respiratory technicians were "employees" of a temporary

Res. ... d: NRS 612.265 limits the use of this material to unemployment compensation litigation except for specified exceptions.

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placement agency that referred healthcare workers to medical providers. 983 P.2d at 416. Notwithstanding the fact that the agency chose which technicians were referred, dictated each of the technician's hourly wage, and required them to keep time records, the Court determined that those circumstances were insufficient to demonstrate the control required under NRS 612.085(1). *Id.* at 417. Instead, the relevant indicia of "control" includes "whether the employer has the right to direct the daily manner and means of a person's work, whether the worker is required to follow the putative employer's instructions, and whether the worker can refuse work offered without ramifications." *Id.*

Applying these principles, the Supreme Court noted that the agency neither trained nor instructed the technicians, nor had any direct control over the method or means of how the technicians performed their services. *Id.* at 417-18. Further, the technicians were free to decline any work offered by the agency, to work for other employers or competitors, and to substitute another technician when they were unable to work. *Id.* at 418. Thus, in essence, the agency "was merely a conduit for payment and did not supervise, instruct, or set work standards" for the technicians. *Id.*

Turning to the second statutory requisite, NRS 612.085(2), the Supreme Court noted that it "cannot ignore the simple fact that providing patient care and brokering workers are two distinct businesses." *Id.* Indeed, unlike the technicians, the agency did not treat patients. *Id.*

Regarding the third and final statutory requisite, NRS 612.085(3), the Supreme Court concluded that the facts that the technicians did not have a substantial capital investment in their work, and did not possess business licenses, hire employees, or advertise their services, were insufficient to demonstrate that they were not in an independent occupation or profession. *Id.* "The mere fact, however, that members of an occupation opt not to become entrepreneurs will not render them non-professionals." *Id.* Instead, the relevant focus is whether workers "have an identifiable occupation characterized by education, training, or a licensure requirement, and who work independently of their putative employer on their own behalf." *Id.* at 419. With regard to the technicians, the court observed that respiratory therapy requires an education, training, and certification or license. *Id.* In sum, the technicians' "occupational pursuit existed independently" of the agency. *Id.* Accordingly, the Court held that the technicians were not "employees" of the agency, and thus were excluded from unemployment compensation benefits. *Id.*

1. *The independent contractors are free from SNC's direction and control*

Here, *fifteen* independent contractors (who, unlike the unidentified "former bartender" which DETR relies almost exclusively upon, have the requisite personal knowledge to competently testify about the nature of their relationships with SNC) have sworn, under oath, to facts unequivocally showing that they do not have employment relationships with SNC. See Declarations, attached as "Exhibit 1."

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EXHIBIT 10



As the independent contractors attest, they are free to set their own booking schedules, without input or supervision from SNC. *See id.* SNC exercises no control over the independent contractors' choice of clients, the services they perform for clients, the prices they charge for the services they decide to undertake, the number of clients they provide services for per day, or the duration of their Occupancy Period. *See id.* The independent contractors also have their own, independently-determined guidelines (which they colloquially call "do's and don'ts") regarding clients. *See id.*

Moreover, the independent contractors are not subject to ramifications from SNC for declining to provide services to any client, or for low productivity if they choose to provide little or no services. *See id.* Additionally, SNC does not set any work standards, instruct the independent contractors how to perform their services, or control the method or means of how they perform their services. *See id.* Further, the independent contractors are free to come and go as they please, and are not required to keep time records.³ *See id.*

When clients come in without an appointment, the client selects which independent contractor they want to provide them services. *See id.* Again, SNC does not have any say in selecting which independent contractor will serve clients. *See id.* That decision is exclusively between the independent contractors and the clients. *See id.* Once selected, the independent contractor negotiates the rate and the services directly with the client, without input or control by SNC. *See id.* If the client and the independent contractor cannot reach a deal, the client may elect to negotiate with another independent contractor, again without any input or control from SNC. *See id.*

Each of the independent contractors have their own price ranges for services, which they can raise or lower at their own discretion. *See id.* It is completely up to the independent contractors to decide what they want to charge for a particular service, and they often refer clients to one another based upon what others may be willing to accept. *See id.* Independent contractors' rates for services vary depending on a number of factors, such as their own personal preferences, profit/loss, timing, or simply the "vibe" from a client. *See id.* But SNC does not set, negotiate, or have any input in independent contractors' rates for services. *See id.*

In addition, the independent contractors each maintain their own regular clients with whom they often negotiate discounted rates. *See id.* SNC does not select which independent contractor will work with clients who elect to engage services on a regular basis. *See id.* Rather, those regular relationships are formed exclusively by the effort and relationship between the independent contractor and the client. *See id.* The independent contractors each set their own boundaries with their clients. *See id.* For instance, some independent contractors are willing to act like their clients' "girlfriend," whereas others draw firmer privacy boundaries. *See, e.g., Price Decl. at ¶ 17.*

³Thus, the independent contractors' relationships with SNC are very different than, for example, the relationship between strip clubs and exotic dancers. *See, e.g., Caballin Decl. at ¶ 4; Robinson Decl. at ¶ 3.*

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Although DETR's determination emphasized that "when a customer arrives, a bell is rung, and the prostitutes are summoned to the parlor to be displayed for the customer to select," the fact is that the independent contractors are free to simply ignore the bell, without any consequence. Thus, to reiterate, the independent contractors are free to decline to provide services to clients altogether, without ramification. *See Ex. 1.* Further, contrary to DETR's suggestion, the independent contractors *are* permitted to keep the compensation (including tips) they receive. The independent contractors simply pay a percentage of that compensation to SNC as their rent. Additionally, the independent contractors are paid via 1099, and no withholdings are taken from their earnings. *See id.* Further, the independent contractors do not get vacation, sick or other time off from SNC. *See id.* Quite the contrary, if they want time off, they decide when and how much without any input or control from SNC. *See id.*

In sum, much like the scenario in *Reliable Health Care*, SNC essentially serves as a licensed conduit for payment between the independent contractors and their clients. Simply stated, SNC does not exercise any control over the independent contractors, let alone the degree of control required to establish an employment relationship.

2. The independent contractors' service is outside the usual course of SNC's business

Regarding the second factor, SNC rents the independent contractors rooms, often on an intermittent basis, at a licensed location where they can perform the prostitution services for which they are licensed. But SNC does not, and cannot, provide prostitution services to clients. Thus, whereas the independent contractors are directly engaged in prostitution, SNC is not. *See id.* By the same token, while SNC owns rooms and is engaged in renting those rooms, the independent contractors do not. *See id.*

Of particular note, clients are clients of the independent contractors, not SNC. *See id.* The financial arrangement regarding services is decided exclusively by the independent contractors and their clients. *See id.* SNC is not a party to those contracts. *See id.* Rather, SNC's agreements with the independent contractors are separate, and are for the provision of a location, not the services which the independent contractors provide their clients. *See id.*

In fact, the independent contractors' interests and likely profit are in some ways the opposite of SNC's. *See, e.g., Caballin Decl. at ¶ 22.* For example, on days when there are relatively few independent contractors leasing space from SNC, this means that the number of clients per contractor is more likely to increase. *See id.* Thus, on such days, the independent contractors' profits are likely to be larger. *See id.* In contrast, because SNC has fewer girls leasing space on such days, it has less revenue to cover their costs for powering and maintaining the property. *See id.* Indeed, the independent contractors' profits and losses are independent from those of SNC. *See, e.g., Guerrero Decl. at ¶ 18.*

As one independent contractor aptly attests, SNC is akin to a mall that rents space to businesses. *See e.g., Sitar Decl. at ¶ 6.* The legally distinct nature of such enterprises is integral to numerous relationships. But, by DETR's reading of NRS 612.085(2), this

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distinction would be erased. For example, an office owner renting office space to a law firm or accounting office would be considered to be engaged in law or accounting. A mall owner renting store space to a retail store would be considered to be engaged in retail. A motel or apartment renting a room to a stockbroker traveling on business would be considered to be engaged stockbroking. A company that leases a vehicle to someone who decides to drive for Uber or Lyft would be considered to be engaged in the ridesharing business. DETR's blurring of the lines between such enterprises would concomitantly create a host of new, never-contemplated employment relationships. In sum, DETR's reading of NRS 612.085(2) would lead to absurd results, and must be rejected. *See Washoe Med. Ctr. v. Second Judicial Dist. Court*, 148 P.3d 790, 793 (Nev. 2006) (in construing a statute, one should consider "the policy and spirit of the law and will seek to avoid an interpretation that leads to an absurd result.").

Ironically, DETR's references to Lyon County Code underscore the conclusion that the independent contractors are engaged in a service outside the usual course of SNC's business, and should be treated as such. The very provision cited by DETR draws a distinction between "licensed employees [and] working prostitutes." *See Lyon County Code* 5.08:15. If, as DETR apparently believes, prostitutes are employees of the brothel where they provide services, then there would have been absolutely no need to mention both employees and prostitutes. Thus, DETR's interpretation contravenes basic canons of statutory construction. *See Arguello v. Sunset Station, Inc.*, 252 P.3d 206, 209 (Nev. 2011) (when interpreting a statute, terms must be given "their plain meaning, considering its provisions as a whole so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory.").

In sum, the realities of the services provided by the independent contractors, the applicable statutory and regulatory schemes, and common sense, all make clear that the services the independent contractors provide are outside of the usual course of SNC's business.

3. *The independent contractors' service is performed in the course of an independently established trade, occupation, or business*

Regarding the final statutory factor, the independent contractors are plainly in an identifiable trade, occupation, or business. To begin, as DETR acknowledges, the independent contractors are subject to various regulations that are distinct from those applicable to SNC. The independent contractors are solely responsible for complying with all applicable licensing laws and requirements. *See Ex. 1*. They are also responsible for making the payments associated with obtaining a business license and requisite workers' compensation or other insurance. *See id.*

In addition, the independent contractors provide and choose their own attire and business supplies, including but not limited to promotional materials (e.g., business cards, poker chips, coins, etc.), computers, tax software, accounting software, furniture, bedding, make-up, soap, decorations, condoms, lubricants, "party" toys (e.g., saddles, whips, paddles, and restraints), videos, outfits (e.g., doctor or nurse outfits for role playing), food, lingerie,

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televisions, and shoes. *See id.* The independent contractors are not required to wear any merchandise bearing the insignia of SNC (or its dba's), although they may do so if they wish. *See id.* In other words, the independent contractors are in an occupational pursuit in which they provide their services on their own behalf, independently of SNC. *See id.*

It is also important to note that the independent contractors undertake their own entrepreneurial efforts, including marketing and advertising themselves. *See id.* Each independent contractor's profitability directly depends upon their own marketing efforts and ability to develop their own "brand." *See id.* Some of them have formed their own LLCs, *see, e.g.,* Myers Decl. at ¶ 3; Costa Decl. at ¶ 24, have copyrighted and have sued to protect their "stage" names (and adult photos), have their own fan bases, *see, e.g.,* Costa Decl. at ¶ 2-4, and their own brands. *See, e.g.,* Sitar Decl. at ¶ 9. Many have also developed and market "packages" that involve things like going on dates, vacations, and other activities (as permitted by law). *See, e.g., id.* at ¶ 9. They also pay for things like hair and nail appointments, monthly plastic surgery, Botox, "tummy tucks," breast enhancements, and tanning. *See* Smolensky Decl. at ¶ 12.

Also underscoring the distinct nature of their business, the independent contractors have their own specialties or niches, ranging from particular "fetishes" to role-playing "fantasies." *See* Ex. 1. Many of the independent contractors refer clients to other independent contractors based upon their specialty or niche. *See id.* Many of the independent contractors take workshops or attend conventions to develop their specialties. *See, e.g.,* Gable Decl. at ¶ 7. For instance, some of the independent contractors involved with "dominatrix" attend seminars on safety. *See e.g., id.* Other independent contractors who are involved in specialties such as "food fetishes" research trends to distinguish themselves, and their own brand, from others. *See id.; see also* Morris Decl. at ¶ 15. Further, the independent contractors take courses to educate themselves and develop their own carriers, on various topic relating to safety, how to prepare for certain sexual activities, and how to use equipment. *See, e.g.,* Guerrero Decl. at ¶ 8. Moreover, the independent contractors often collaborate with one another to provide for services such as "threesomes" for clients, completely independently from SNC. *See, e.g.,* Medrano Decl. at ¶ 9.

Further, the independent contractors are free to, and in fact do, engage in a number of the other occupations, including working at Wal-Mart, *see, e.g.,* Morris Decl. at ¶ 2, to producing and directing pornographic films, *see, e.g.,* Guerrero Decl. at ¶ 2, free-lance writing, *see* Gable Decl. at ¶ 11, or appearing in Hustler and Penthouse magazine. *See* Smolensky Decl. at ¶ 12. The independent contractors also have their own websites, blogs, and their own unique social media profiles on platforms like Twitter, Instagram, Facebook, and a number of adult websites. *See, e.g.,* Myers Decl. at ¶ 3. Because the independent contractors buy their own supplies and pay for their own room and board, licensing, travel, food and all other business expenses, they have a substantial investment in their own business. *See id.* In fact, they pay 100% of their own expenses, ranging from the cost of Sheriff's cards to the cost of doctor's visits. *See, e.g.,* Costa Decl. at ¶ 23. As a result, the independent contractors may have a profit or loss independent of SNC's profit and loss for any period of time that they lease space in order to provide services. *See* Ex. 1. Further,

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EXHIBIT 14

many of the independent contractors do not live in Nevada, and travel extensively, bearing all of their own travel costs. *See, e.g.,* Hollins Decl. at ¶ 16. In summary, each of the relevant factors set forth in NRS 612.085 are easily met here.

4. *The Independent Contractor Lease Agreements*

Finally, although DETR's determination notes that "a written contract, in itself, does not establish 'independent contractor' status," DETR has gone a step further—it has actually invalidated such agreements. The statute cited by DETR, NRS 612.700, does not prohibit or even apply to agreements memorializing an independent contractor relationship, or lease agreements. Rather, that statute concerns employees' waiver of unemployment benefits.

Moreover, Nevada law has been clear, for decades, that contracts between private parties may not lightly be invalidated. As the Nevada Supreme Court has explained, "[w]hen a contract is clear on its face, it 'will be construed from the written language and enforced as written.'" *Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 776, 121 P.3d 599, 603 (2005) (quoting *Ellison v. C.S.A.A.*, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990)). There is "no authority to alter the terms of an unambiguous contract," *id.*, and courts "will not rewrite contract provisions that are otherwise unambiguous" nor "attempt to increase the legal obligations of the parties where the parties intentionally limited such obligations." *Griffin v. Old Republic Ins. Co.*, 122 Nev. 479, 483, 133 P.3d 251, 254 (2006) (quoting *Senteney v. Fire Ins. Exchange*, 101 Nev. 654, 656, 707 P.3d 1149, 1150 (1985)). Finally, "[n]either abstract justice nor the rule of liberal construction justifies the creation of a contract for the parties for which they did not make themselves or the imposition upon one party to a contract an obligation not assumed." *Reno Club v. Young Inv. Co.*, 64 Nev. 312, 323, 182 P.2d 1011, 1016-17 (1947).

DETR's determination runs afoul of each of these principles. Although unmentioned by DETR, each of the independent contractors have each entered into Independent Contractor Lease Agreements with SNC, expressly providing:

15. No Employment Relationship. Independent Contractor understands and agrees that she is not an employee of Company, but rather is engaged in an independent enterprise from that of Company. For all purposes, including but not limited to Medicare and Social Security taxes, the Federal Unemployment Tax Act ("FUTA"), income tax withholding and any and all other federal, state and local laws, rules and regulations, Independent Contractor shall be treated as an independent contractor and not as an employee with respect to Company.

Thus, by its plain language, this provision memorializes what is already apparent from the nature of the independent contractors' relationship with SNC, as detailed above. DETR's determination, however, not only ignores the realities of how that relationship

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EXHIBIT 15

works in practice, but it has the effect of arbitrarily scribbling out these private contracts, by bureaucratic fiat. This, it cannot do.

As the foregoing demonstrates, DETR's determination that the independent contractors and SNC have an employment relationship is erroneous and arbitrary and capricious. Accordingly, DETR's determination should be reversed.

C. DETR's Determination Violates SNC's Due Process Rights

The Fifth and Fourteenth Amendments of the United States Constitution and Section Eight of the Nevada Constitution, guarantee, in relevant part, that no person shall be deprived of property without due process of law. What constitutes adequate procedure varies depending on the circumstances of a particular case. Stated another way, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

Broadly speaking, three factors determine whether a given procedure violates due process: "[(1)] the private interest that will be affected by the official action; [(2)] the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and [(3)] the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

1. SNC's private interests are directly affected by DETR's determination

There can be no dispute SNC's private interests, particularly its property interests, are directly affected by DETR's determination. Indeed, through its determination, DETR seeks to impose tens, if not hundreds, of thousands of dollars in tax liability against SNC on an ongoing basis.

2. The risk of an erroneous deprivation is manifest

Further, the risk that DETR's determination will erroneously deprive SNC of its constitutionally-protected interests is manifest given the arbitrary, incomplete, and one-sided nature of DETR's audit. As detailed above, DETR ignored, or unexplored, a host of critical evidence. Indeed, DETR did not interview so much as a single independent contractor. One would think that a fair and competent audit would have entailed, at a minimum, interviewing the actual individuals who DETR determined supposedly have an employment relationship with SNC. Instead, DETR based its determination, almost exclusively, on an interview of an unidentified "former bartender." DETR did not give SNC notice of this interview, let alone an opportunity to be present and ask questions.

While DETR has some latitude over the scope of its audit, its failure to even give SNC an opportunity to respond to this secret witness' story, which DETR apparently found critical, smacks of bad faith. This directly prejudiced SNC by preventing it from pointing

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EXHIBIT 16



out that the witness appears to not only be biased, but patently unfamiliar with the actual nature of the relationships between SNC and the independent contractors.

DETR's actions, including its failure to implement competent and unbiased audit procedures in a timely manner, and apply the relevant statutory framework in a consistent manner, have directly and arbitrarily prejudiced SNC. For years, DETR raised no objection to SNC's classification of the independent contractors. In fact, DETR's auditor conceded that the audit and its known adverse results "were made above [her] head," and is the exact opposite of DETR's prior view that the independent contractors are not employees of SNC. It is patently unfair for DETR to say nothing for years, leading SNC to rely to its detriment on DETR's position, only to later abruptly reverse course, based upon an arbitrary and incomplete audit.

3. DETR's interests are minimal

In contrast to the real and pronounced harm DETR's determination poses to SNC's interests, DETR's supposed interests in departing from basic principles of fairness and procedural protections are minimal. DETR can hardly complain about the cost that a fair and competent audit would entail. DETR already initiated an audit; it simply conducted it in an arbitrary and capricious manner designed to reach a pre-determined result. Further, DETR can hardly complain about the nominal cost that providing SNC with an opportunity to respond to its secret witness would have entailed. In summary, on balance, the costs to DETR to abide by appropriate procedural safeguards is nominal, and pale in comparison to SNC's private interests and the great risk of an erroneous deprivation of those interest. Accordingly, DETR's determination violates SNC's due process rights, and must be reversed.

D. DETR's Determination Violates the Contracts Clause

The Contracts Clause of the United States Constitution provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ." U.S. Const. art. I, § 10, cl. 1. Similarly, the Nevada Constitution provides that "[n]o . . . law impairing the obligation of contracts shall ever be passed." Nev. Const. art. 1, § 15.

In analyzing Contracts Clause challenges, a three-step analysis is conducted:

The threshold inquiry is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.

....

If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation . . .

....

Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of the rights and

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EXHIBIT 17

responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.

Energy Reserves Group v. Kansas Power & Light, 459 U.S. 400, 411-12 (1983).

1. DETR's determination substantially impairs SNC's contractual relationships

"Total destruction of contractual expectations is not necessary for a finding of substantial impairment." *Energy Reserves*, 459 U.S. at 411. In considering a party's reasonable contractual expectations, courts "are to consider whether the industry the complaining party has entered has been regulated in the past." *Id.* However, even in industries that are historically subject to extensive regulation, and "[e]ven when the public welfare is invoked as an excuse," the expectations a party has in its contracts cannot be invalidated "without moderation or reason or in a spirit of oppression." *Worthen Co. v. Kavanaugh*, 295 U.S. 56, 60 (1935).

Here, DETR is operating in the area of prostitution—a landscape that has historically been subject to regulation in Nevada. While SNC could expect that there might be some legislative or regulatory conditions imposed on its operations, it could not have anticipated that its investment, and all of its independent contractor lease agreements, would essentially be scribbled out by a retroactive, sweeping, unprecedented determination like that made here by DETR. Thus, DETR's determination operates as a severe and substantial impairment of SNC's contractual relationships with the independent contractors.

2. DETR lacks a significant and legitimate public purpose for its determination

Where a state agency is attempting to provide "a benefit to special interests," rather than exercising its general police power, the agency lacks a significant and legitimate public purpose. *See Energy Reserves*, 459 U.S. at 412. Here, DETR has not identified any public purpose for its determination, let alone a significant and legitimate one.

3. DETR's infringement of SNC's contracts is unreasonable and not tailored to any public purpose

Even if DETR could establish a significant and legitimate public purpose for its determination, its action is not reasonable and appropriate to accomplish its desired result. *See Federal Land Bank of Wichita v. Bott*, 732 P.2d 710, 718 (Kan. 1987) (even if the impairment of a contract is justified under the police power, courts still must evaluate whether "the remedy [is] reasonable and appropriate to accomplish the desired result"). Because DETR's determination operates as such a severe impairment of SNC's contractual relationships, the statute must be closely examined. *See Energy Reserves*, 459 U.S. at 411 ("The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected."). And, crucially, "a State is not free to impose a drastic

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EXHIBIT 18



impairment when an evident and more moderate course would serve its purposes equally well." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 31 (1977).

It was completely unnecessary for DETR to indiscriminately erase SNC's preexisting contracts, years after those agreements were executed, in order to carry out any supposed public purpose. If DETR had any inkling that the independent contractors had an employment relationship with SNC, then it could and should have notified SNC, before SNC had relied to its detriment, year after year, on DETR's previously-stated view that the independent contractors are not employees. In sum, there were less drastic and more moderate means available for DETR to utilize. Accordingly, DETR's determination violates the Contracts Clause, and must be reversed.

E. DETR is Barred by Several Equitable Doctrines

In addition, DETR's determination is barred various equitable doctrines, including the doctrines of unclean hands, equitable estoppel, laches, and consent and acquiescence. These doctrines, either separately or cumulatively, warrant reversal of DETR's determination.

1. DETR has unclean hands

"The unclean hands doctrine 'closes the doors of a court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant.'" *Adler v. Federal Republic of Nigeria*, 219 F.3d 869, 876-77 (9th Cir. 2000) (quoting *Precision Instr. Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814 (1945)). The rationale for the defense is as follows:

The unclean hands doctrine protects judicial integrity and promotes justice. It protects judicial integrity because allowing a plaintiff with unclean hands to recover in an action creates doubts as to the justice provided by the judicial system. Thus, precluding recovery to the unclean plaintiff protects the courts, rather than the opposing parties' interest. The doctrine promotes justice by making a plaintiff answer for its own misconduct in the action. It prevents a wrongdoer from enjoying the fruits of his transgression.

Kendall-Jackson Winery, Ltd v. Superior Court, 76 Cal. App. 4th 970, 978-79 (1999).

The defense of unclean hands "is available in legal as well as equitable actions," *id.*, and "applies to the government as well as to private litigants." *EEOC v. Recruit USA, Inc.*, 939 F.2d 746, 752 (9th Cir. 1991). The doctrine is triggered in situations where a party's conduct is "unconscientious, unjust, or in bad faith." *Winnemucca Farms, Inc. v. Eckersell*, 2009 WL 1360378, at *4 (D. Nev. May 13, 2009). In determining whether the doctrine applies, two elements are considered: "(1) egregiousness of the misconduct at issue and (2) seriousness of the harm caused by the misconduct." *Id.*

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Here, as detailed, DETR's determination rests on an incomplete, one-sided, and arbitrary audit. Rather than proceeding in a fair and timely manner, DETR has abruptly reversed course, years after the fact. DETR has cherry-picked facts to support its pre-ordained determination, grossly misinterpreted and misapplied several statutes and decades of caselaw, and violated SNC's due process and contractual rights. DETR's failure to even interview a single independent contractor, and near-exclusive reliance on a private interview of an unnamed witness, smacks of bad faith. To make matters worse, DETR has attempted to take Tom Potter out of context, or attribute statements to him that he simply did not make. There is no question that all of this has caused serious harm to SNC, as evinced by the substantial tax liability DETR is seeking to impose. This is the precise type of misconduct and harm giving rise to the doctrine of unclean hands.

2. *DETR is equitably estopped*

"In order to establish equitable estoppel, '(1) the party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; (4) he must have relied to his detriment on the conduct of the party to be estopped.'" *USF Ins. Co. v. Smith's Food and Drug Center, Inc.*, 921 F. Supp. 2d 1082, 1095 (quoting *In re Harrison Living Trust*, 112 P.3d 1058, 1062 (Nev. 2005)). Notably, "silence can raise an estoppel quite as effectively as can words." *In re Harrison*, 112 P.3d at 1062. Specifically, "estoppel may arise from silence when the party has a duty to speak, such as where a legal obligation requires disclosure." *Hansen v. State Farm Mut. Auto. Ins. Co.*, 2012 WL 6204822, at *6 (D. Nev., Dec. 12, 2012).

Here, despite being fully aware that the independent contractors had been classified as such, DETR gave no indication otherwise, for years. In fact, DETR expressed its agreement that the independent contractors were not employees. As a result, SNC had no reason to believe the independent contractors could be considered employees by DETR. And, SNC understandably relied on DETR, to its detriment, for years. Accordingly, DETR's determination should be equitably estopped.

3. *DETR is barred by the doctrine of laches*

In determining whether the doctrine of laches applies, two elements are considered: (1) an unreasonable delay and (2) prejudice. *Couveau v. American Airlines, Inc.*, 218 F.3d 1078, 1083-84 (9th Cir. 2000). "In determining reasonableness, courts look to the cause of the delay." *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 954 (9th Cir. 2001). Notably, as the Ninth Circuit has observed, an "agency's workload has been rejected as an excuse for unreasonable delay." *EEOC v. Alioto Fish Co.*, 623 F.3d 86, 88 (9th Cir. 1980).

Here, DETR delayed for years before abruptly reversing course and determining that the independent contractors are supposedly employees. This delay is inexplicable and inexcusable. Several additional months passed before DETR finished its audit (although it still has not conducted a complete audit) and bothered to issue a written determination.

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EXHIBIT 20

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Meanwhile, every day, month, and year that went by, SNC's potential liability only increased.

4. *DETR is barred by the doctrines of consent and acquiescence*


The doctrines of consent and acquiescence are closely-related to the defenses of estoppel and laches. *See, e.g., Danjaq*, 263 F.3d at 950-51 ("Laches is an equitable defense that prevents a plaintiff, who 'with full knowledge of the facts, acquiesces in a transaction and sleeps upon his rights.'"). In the interest of brevity, SNC incorporates by reference its arguments regarding those defenses, and submits that the doctrines of consent and acquiescence require reversal of DETR's determination.

III. CONCLUSION

For the foregoing reasons, DETR's determination is erroneous and arbitrary and capricious. In addition, DETR's determination violates SNC's Due Process rights and the Contracts Clauses of the United States and Nevada Constitutions. Finally, DETR's Determination is barred by several equitable doctrines. Accordingly, SNC submits that DETR's determination must be reversed.

Thank you for your time and attention. If you have any questions, please do not hesitate to call.⁴

Sincerely,


for Anthony L. Hall, Esq.
of Holland & Hart LLP

ALH/RNC: mf
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⁴This letter is based upon the undersigned's understanding of the facts at this time. SNC reserves the right to present additional facts, evidence, and arguments.

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EXHIBIT 21

Laurie Trotter

From: April Bryant
Sent: Wednesday, September 20, 2017 2:36 PM
To: 'ahall@hollandhart.com'; Laurie Trotter
Cc: Scott Larsen; Kelly Nguyen; Jeffrey Frischmann; Edgar Roberts; Melanie Maguire; Arturo Martinez; Sheri Ihler; Lisa Rosas; Sharon Falline
Subject: Scheduling Prehearing Conference for V-17-A-04041-TX

Good Afternoon,

On behalf of Referee Larsen, a prehearing conference shall be held in the matter of *Sierra National Corporation* (Docket # V-17-A-04041-TX) via a telephone conference call. Please provide the Appeals Office with your availability dates beginning with the week of October 16, 2017 for a 9:00 a.m. conference.

Prehearing Conference Instructions: The parties shall come to the prehearing conference prepared to identify all documentary evidence each party may rely on to resolve the issue(s) in dispute, and to disclose and discuss the witnesses that may testify at the hearing. The parties must be prepared to disclose and discuss the sufficient specificity of each witness's testimony to enable the Appeals Referee to determine which witnesses' testimony will be relevant to the issues and the required length of the hearing.

Ten days prior to the scheduled prehearing conference, the parties shall submit a written statement identifying all documentary evidence each party may rely upon to resolve the issues in dispute, as well as a list of witnesses who may testify at the hearing and an identification of the issues that are in dispute.

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Administrative Assistant I
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EXHIBIT 22

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6760089
<https://www.nvdetr.org>

NOTICE OF PREHEARING CONFERENCE

SIERRA NATIONAL CORPORATION
162 GARNET CIR
CARSON CITY, NV 89706

DOCKET NUMBER: V-17-A-04041-TX

DATE MAILED: 10/05/2017

REFEREE: SCOTT LARSEN / AB

**A PREHEARING TELEPHONE
CONFERENCE WILL BE HELD ON:**

**ALL PARTIES INVOLVED IN THIS
CONFERENCE WILL PARTICIPATE BY
TELEPHONE.**

DATE: THURSDAY, OCTOBER 19, 2017
TIME: 9:00 AM PDT

ALL PARTICIPATING PARTIES: At least 48
hours **PRIOR** to the hearing date, you must
call (702) 486-7933 or fax (702) 486-7949 to
provide the contact name and the telephone
number to use for the conference.

Have the mailed documents available as they will
be used at the prehearing conference.

PREHEARING CONFERENCE INSTRUCTIONS:

The parties shall come to the prehearing conference prepared to identify all documentary evidence each party may rely on to resolve the issue(s) in dispute, and to disclose and discuss the witnesses that may testify at the hearing. The parties must be prepared to disclose and discuss with sufficient specificity each witness's testimony to enable the Appeals Referee to determine which witnesses' testimony will be relevant to the issue(s) and the required length of the hearing.

Ten days prior to the scheduled prehearing conference, the parties shall submit a written statement identifying all documentary evidence each party may rely upon to resolve the issue(s) in dispute, as well as a list of witnesses that may testify at the hearing and an identification of the issue(s) that are in dispute.

CC:
LAURA TROTTER, ESQ.
ANTHONY HALL, ESQ

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EXHIBIT 23

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Laurie Trotter

From: Laurie Trotter
Sent: Friday, October 06, 2017 5:39 PM
To: April Bryant; Scott Larsen
Cc: Jeffrey Frischmann; Edgar Roberts; Melanie Maguire; Sharon Falline
Subject: Sierra National Corporation, V-17-A-04041-TX
Attachments: 1. Nevada Business Registration Forms.pdf; 3. Audit Billing.pdf; 4. General Ledger, 2014.pdf; 5. General Ledger, 2015.pdf; 6. General Ledger, 2016.pdf; 2. Interview Notes (2).pdf

April,

In compliance with Referee Larsen's Instructions, ESD has attached the following documentary evidence it may rely upon to resolve the issues in dispute in the above-reference matter:

1. Nevada Business Registration Forms – for the purpose of identifying the correct business name(s): Sierra National Corporation dba the Love Ranch; and Cherry Patch LLC dba Love Ranch Brothel.
2. Notes taken from interview with Megan LaPorte, and notes taken from interview with Sierra National's Comptroller, Tom Potter, on September 12, 2016 and December 1, 2016.
3. Audit Billing for Sierra National Corporation for the years 2014, 2015, 2016.
4. General Ledger for Sierra National, 2014
5. General Ledger for Sierra National, 2015
6. General Ledger for Sierra National, 2016

ESD's List of Witnesses"

1. Sharon Falline, ESD's investigator who interviewed Megan LaPorte and Sierra National Comptroller, Tom Potter, and the investigator who worked on the audit, and who collected information related to sections 1-3 of NRS 612.085.
2. Lisa Rosas, ESD's investigator who interviewed Tom Potter, and was the investigator who worked on the audit, and who collected information related to sections 1-3 of NRS 612.085.
3. Megan LaPorte, bartender and prostitute for Sierra National Corp., who supplied information related to the sections 1, 2, and 3 of NRS 612.085.
4. Alisa Chighizola, a former prostitute who worked for Sierra National, who supplied Melanie Maguire information related to sections 1, 2 and 3 of NRS 612.085.
5. Dianne Petaccia, a former cashier who worked for Sierra National, who supplied Melanie Maguire information related to section 1, and perhaps other sections of NRS 612.085.
6. Melanie Maguire, ESD Audit Manager, who interviewed Alisa Chighizola and Dianne Petaccia.

Please don't hesitate to contact me with any questions or if any additional information is requested.

Thank you,

Laurie L. Trotter, Esq.

Laurie L. Trotter
Senior Legal Counsel
Nevada Department of Employment, Training and Rehabilitation
Employment Security Division

1340 South Curry Street
Carson City, Nevada 89703
775-684-6317
775-684-6344 (Fax)
I-trotter@nvdecr.org



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LAURIE L. TROTTER, ESQ.
Senior Legal Counsel
STATE OF NEVADA DETROESD
1340 So. Curry Street
Carson City, NV 89703
(775) 884-6317
(775) 884-6344 (Fax)

EXHIBIT 24

Laurie Trotter

From: Laurie Trotter
Sent: Wednesday, October 11, 2017 9:56 AM
To: 'Anthony Hall'
Subject: FW: Sierra National Corporation, V-17-A-04041-TX
Attachments: 1. Nevada Business Registration Forms.pdf; 3. Audit Billing.pdf; 4. General Ledger, 2014.pdf; 5. General Ledger, 2015.pdf; 6. General Ledger, 2016.pdf; 2. Interview Notes (2).pdf

Dear Mr. Hall,

In compliance with Referee Larsen's Instructions, ESD submitted the following documentary evidence it may rely upon to resolve the issues in dispute in the above-reference matter:

1. Nevada Business Registration Forms – for the purpose of identifying the correct business name(s): Sierra National Corporation dba the Love Ranch; and Cherry Patch LLC dba Love Ranch Brothel.
2. Notes taken from interview with Megan LaPorte, and notes taken from interview with Sierra National's Comptroller, Tom Potter, on September 12, 2016 and December 1, 2016.
3. Audit Billing for Sierra National Corporation for the years 2014, 2015, 2016.
4. General Ledger for Sierra National, 2014
5. General Ledger for Sierra National, 2015
6. General Ledger for Sierra National, 2016

ESD's List of Witnesses"

1. Sharon Falline, ESD's investigator who interviewed Megan LaPorte and Sierra National Comptroller, Tom Potter, and the investigator who worked on the audit, and who collected information related to sections 1-3 of NRS 612.085.
2. Lisa Rosas, ESD's investigator who interviewed Tom Potter, and was the investigator who worked on the audit, and who collected information related to sections 1-3 of NRS 612.085.
3. Megan LaPorte, bartender and prostitute for Sierra National Corp., who supplied information related to the sections 1, 2, and 3 of NRS 612.085.
4. Alisa Chighizola, a former prostitute who worked for Sierra National, who supplied Melanie Maguire information related to sections 1, 2 and 3 of NRS 612.085.
5. Dianne Petaccia, a former cashier who worked for Sierra National, who supplied Melanie Maguire information related to section 1, and perhaps other sections of NRS 612.085.
6. Melanie Maguire, ESD Audit Manager, who interviewed Alisa Chighizola and Dianne Petaccia.

Best regards,

Laurie L. Trotter, Esq.

Laurie L. Trotter
Senior Legal Counsel
Nevada Department of Employment, Training and Rehabilitation
Employment Security Division
1340 South Curry Street
Carson City, Nevada 89703

775-684-6317
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LAURIE L. TROTTER, ESQ.
Senior Legal Counsel
STATE OF NEVADA DETROISED
1340 So. Curry Street
Carson City, NV 89703
(775) 684-6317
(775) 684-6344 (Fax)

EXHIBIT 25

Policy No.: 104
Effective Date: October 9, 2017
References: NRS 239; N.A.C. 239; SAM 0406, 0409, 1616, 2014, 2905.1; Nevada Public Records Manual

Department of Employment, Training and Rehabilitation (DETR) Public Records Policy and Fee Schedule

1.0 PURPOSE

The purpose of this policy is to outline DETR's policy for public records requests, establish and publish a fee schedule for administering and responding to public records requests, and providing copies of public records.

2.0 STAKEHOLDERS

This policy provides guidance for DETR employees, the general public, media, and other stakeholders and constituents requesting public records in the custody of DETR.

3.0 DEFINITIONS

3.1 NRS 232.900 Definitions:

Department: Department of Employment, Training and Rehabilitation (DETR).

Director: The Director of the Department.

3.2 **Administrator:** DETR's division heads.

3.3 **Division:** DETR divisions including, but not limited to: Employment Security Division; Nevada Equal Rights Commission; Rehabilitation Division; Information Development and Processing Division; Research and Analysis Bureau; and, Administrative Services Division.

3.4 **NRS:** Nevada Revised Statute.

3.5 **Public Record:** All public agency records as defined in NRS 239.080 and NAC 239.705, which are open to public inspection and copying, unless specifically declared confidential by law. Essentially, a public record is any record that is prepared, used or maintained by any state agency in the course of governing or performing a governmental function. A request should be for an identifiable record (i.e., specific in nature).

4.0 POLICY

The Nevada Department of Employment, Training and Rehabilitation (DETR) is a public agency created under NRS 232.910. As such, DETR adheres to the Public Records Act (Act), which was established by the Nevada Legislature and codified in NRS 239. Essentially, the Act applies to "all public books and public records of a government entity, the contents of which are not otherwise declared by law to be confidential." This policy establishes the protocol for which public records requests are to be administered and responded to public records request, and the agency's fee schedule for providing copies of public records.

4.1 The records "must be open at all times during office hours to inspection by any person, and may be fully copied." Also, "A person may request a copy of public record in any medium in which the public record is readily available."

Policy No.: 104
Effective Date: October 9, 2017
References: NRS. 239; N.A.C. 239; SAM 0406, 0409, 1616, 2014, 2905.1; Nevada Public Records Manual

- 4.2 Pursuant to NRS 239.008(3)(a), the State Library and Archives Administrator shall prescribe a **form** for the written notice required to be provided by an agency of the Executive Department.
- 4.3 Pursuant to NRS 239.008(4), DETR has developed this policy that conforms to NRS 239, and has posted this policy and the form in which to request public records at agency offices and the agency's internet website.
- 4.4 Pursuant to NRS 239.052, DETR has established a fee schedule for the charge of fee(s) associated with public record requests.
- 4.5 Pursuant to NRS 239.008, DETR has designated with the Nevada State Library, Archives and Public Records public records officers for DETR.
- 4.6 Pursuant to NRS 239.080, DETR shall adhere to the state's schedules for retention and disposition of public records. Said records retention policy for public records requests is as follows:
 - 4.6.1 **Requests:** Request forms and response letters are to be retained for one (1) calendar year after the request was fulfilled. (RDA 2009047)
 - 4.6.2 **Denials:** Request documentation and denial letters, in whole or in part, are to be retained for three (3) calendar years. (RDA 2009048) Denial letters are public records and shall be made available upon request.
 - 4.6.3 **Destruction Holds:** Agencies must immediately cease the destruction of all relevant records if they receive a public records request, even if destruction is authorized by an approved Retention and Disposition Schedule. Failure to cease the destruction of relevant records could result in penalties. (NRS 239.310)
 - 4.6.4 **Copies:** If copies of public records were requested and the requestor fails to claim the copies, the agency is not obligated to hold the copies for pick up for more than 30 days after the date the copies were made available to the requestor.
 - 4.6.5 **State Records Retention Schedules:** Nevada's State Agency Retention Schedules are developed and published by the Nevada State Library, Archives and Public Records on their website at: http://nsla.nv.gov/uploadedFiles/nslanvgov/content/Records/State/1_General_Schedule/General%20Schedule.PDF

5.0 PROCEDURES

Pursuant to NRS 239.0107, DETR will respond to requests for public records accordingly:

1. Not later than the end of the *fifth business day* after the date on which the person who has legal custody or control of a public book or record of a governmental entity receives a request from a person to inspect or copy the public book or record, a governmental entity shall do one of the following, as applicable:
 - (a) Allow the person to inspect or copy the public book or record.
 - (b) If the governmental entity does not have legal custody or control of the public book or record, provide to the person, in writing:
 - (1) Notice of the fact; and
 - (2) The name and address of the governmental entity that has legal

DETR

POLICIES AND PROCEDURES MANUAL

Policy No.: 104
Effective Date: October 9, 2017
References: NRS, 239; N.A.C. 239; SAM 0406, 0409, 1616, 2014, 2905.1; Nevada Public Records Manual

custody or control of the public book or record, if known.

- (c) Except as otherwise provided in paragraph (d), if the governmental entity is unable to make the public book or record available by the end of the fifth business day after the date on which the person who has legal custody or control of the public book or record received the request, provide the person, in writing:

- (1) Notice of the fact; and
- (2) A date and time after which the public book or record will be available for the person to inspect or copy. If the public book or record is not available to the person to inspect or copy by that date and time, the person may inquire regarding the status of the request.

- (d) If the governmental entity must deny the person's request to inspect or copy the public book or record because the public book or record, or a part thereof, is confidential, provide to the person, in writing:

- (1) Notice of the fact; and
- (2) A citation to the specific statute or other legal authority that makes the public book or record, or a part thereof, confidential.

- 5.1 **Public Records Requests** — Public records requests must be submitted to the agency on the prescribed/attached State of Nevada Public Records Request form, which is attached to this policy.

Public Records Requests for DETR and its divisions *may* be submitted via postal or electronic mail to:

ATTN: Public Information Officer
Office of the Director
Nevada Department of Employment, Training and Rehabilitation
2800 E. St. Louis Ave.
Las Vegas, NV 89104
(702) 486-7991

or

Assistant to the Director
Office of the Director
Nevada Department of Employment, Training and Rehabilitation
500 E. Third Street
Carson City, NV 89713
(775) 684-3891

A state agency is not required, nor is it obligated, to comply with a request for information that is not compiled or tracked as a standard procedure of the agency, or that is compiled or tracked in a different way by the agency. Further, the agency is not obligated to create new materials to comply with a public record document request.

Policy No.: 104
Effective Date: October 9, 2017
References: NRS. 239; N.A.C. 239; SAM 0406, 0409, 1616, 2014, 2905.1; Nevada Public Records Manual

Ensure handwritten requests are legible. Other forms of public records requests, such as verbal, will be allowed only as a reasonable accommodation under the Americans with Disabilities Act.

All requesters shall be treated uniformly and shall be provided with all reasonable accommodations for inspection, including accommodations in accordance with the Americans with Disabilities Act (ADA) requirements.

5.2 DETR Divisional Public Record Requests – DETR divisions may receive and administer public records requests pursuant to **Section 5.0** and procedures outlined in this policy, NRS 239.0107, and as follows:

5.3.1 DETR divisions shall designate one (1) *divisional* public records officer and one (1) *divisional* delegate public records officer, who shall act as the division's point of contacts for public records requests.

5.3.2 Public record requests that are submitted directly to DETR divisions are to be administered pursuant to, and in accordance with, this policy and NRS 239.

5.3.3 DETR divisions shall maintain and submit to DETR's Director's Office a log of all public records requests and their respective status on a quarterly basis.

5.3.4 DETR divisions shall adhere to the state's schedules for retention and disposition of public records pursuant to NRS 239.080, and as outlined in this policy's subsections 4.6.1 through 4.6.5.

5.3 Fee Schedule — Pursuant to NRS 239.052, DETR has established the following fee schedule:

Personnel Time: Pursuant to NRS 239.055, a fee may be charged for extraordinary staff time for processing, researching, copying, or legal/technical review. "Extraordinary staff time" is defined as any time over 30 minutes required to retrieve, inspect and/or redact the record. See Op. Nev. Atty. Gen. No. 2002-32 (August 27, 2002). Personnel time will be charged at the rate of the staff person qualified to provide or prepare the requested information as follows:

- \$20 per hour per staff member (Grades 20-29)
- \$30 per hour per staff member (Grades 30-39)
- \$40 per hour per staff member (Grades 40+)

Copying and Scanning Fees:

- Black & white, 8 1/2" x 11" page copy: \$0.10 per page for documents
- Scanned/electronic document: \$0.10 per page
- Electronic scanning to CD: \$5 per CD
- Transcripts will be charged at the exact rate that is charged to the agency

Postage: All shipping will be via USPS parcel post, unless otherwise requested. The requestor may request that DETR use a personal or business account with another delivery service (e.g., FedEx, UPS) to pay for said postage.

DETR

POLICIES AND PROCEDURES MANUAL

Policy No.: 104
Effective Date: October 9, 2017
References: NRS. 239; N.A.C. 239; SAM 0406, 0409, 1616, 2014, 2905.1; Nevada Public Records Manual

Payment: Full payment of estimated fees is required before any records will be provided. If the final cost is less than estimated, the requestor will be refunded the difference.

6.0 ASSOCIATED FORMS

The prescribed State of Nevada Public Records Request form is included in this policy. Requests may also be submitted in writing or verbally. Please see section 5.1 for contact information.

7.0 RESPONSIBLE OFFICE

Pursuant to NRS 239.008, DETR's Director is responsible for ensuring public records requests are carried out in accordance with Nevada's Public Records Act, NRS 239.

8.0 CONTACT INFORMATION

Any questions or inquiries regarding this policy can be submitted to:

Nevada Department of Employment, Training and Rehabilitation
ATTN: Public Information Officer – Office of the Director
2800 E. St. Louis Ave.
Las Vegas, NV 89104
(702) 486-7991

or

Nevada Department of Employment, Training and Rehabilitation
ATTN: Assistant to the Director – Office of the Director
500 E. Third Street
Carson City, NV 89713
(775) 684-3891

9.0 APPROVAL



Director, DETR

10/06/17

Approval Date

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LAURIE L. TROTTER, ESQ.
Senior Legal Counsel
STATE OF NEVADA DISTRICT
1340 So. Curry Street
Carson City, NV 89703
(775) 884-8317
(775) 884-8344 (Fax)

EXHIBIT 26

Laurie Trotter

From: Laurie Trotter
Sent: Wednesday, October 18, 2017 4:10 PM
To: April Bryant
Cc: 'Anthony Hall'
Subject: Sierra National Corporation, V-17-A-04041-TX
Attachments: Message from "RNP002673BE1BFD"; Memo.Sierra National contacts.doc; Message from "RNP002673BE1BFD"

April,

Attached are additional documents that may be relevant to the hearing in the above-referenced case.

The first attachment (204KB) is a note from the investigator's file for casual labor found in the general ledger.

The second attachment (515KB) the Investigator's audit notes reconciling the federal reports with what was reported to ESD in 2016.

The third attachment is the Word memo with the contact list of the witnesses the investigator and the audit manager interviewed on the phone and the quarters in which they were paid.
The audit period is from 1/1/14 - 9/30/16.

The fourth attachment (10MB) are the signed quarterly wage reports and a check signed by Sierra National Corporation controller Tom Potter, plus ESD's wage list for the witnesses that were interviewed.

Regards,

Laurie L. Trotter, Esq.

Laurie L. Trotter
Senior Legal Counsel
Nevada Department of Employment, Training and Rehabilitation
Employment Security Division
1340 South Curry Street
Carson City, Nevada 89703
775-684-6317
775-684-6344 (Fax)
ltrotter@nvdetr.org



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LAURIE L. TROTTER, ESQ.
Senior Legal Counsel
STATE OF NEVADA DETR/ESD
1340 So. Curry Street
Carson City, NV 89703
(775) 684-6317
(775) 684-6344 (Fax)

EXHIBIT 27

Laurie Trotter

From: Laurie Trotter
Sent: Wednesday, October 18, 2017 4:12 PM
To: April Bryant
Cc: 'Anthony Hall'
Subject: Sierra National Corporation, V-17-A-04041-TX
Attachments: the love ranch prostitutes.xlsx; 20171018141155325.pdf

April,

Attached are additional documents which may be relevant to the hearing in the above-referenced matter.

Regards,

Laurie L. Trotter, Esq.

Laurie L. Trotter
Senior Legal Counsel
Nevada Department of Employment, Training and Rehabilitation
Employment Security Division
1340 South Curry Street
Carson City, Nevada 89703
775-684-6317
775-684-6344 (Fax)
l-trotter@nvdetr.org



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LAURIE L. TROTIER, ESQ.
Senior Legal Counsel
STATE OF NEVADA DEPT. OF
1340 So. Curry Street
Carson City, NV 89703
(776) 684-6317
(776) 684-6344 (Fax)

EXHIBIT 28

Laurie Trotter

From: Laurie Trotter
Sent: Monday, November 06, 2017 3:25 PM
To: April Bryant
Cc: 'Anthony Hall'; Sheri Ihler
Subject: Sierra National Corporation, v-17-A-04041-TX - Supplemental Documentary Evidence
Attachments: 20171106152718154.pdf

April,

In compliance with Referee Larsen's Instructions, ESD provides the attached supplemental documentary evidence it may rely upon to resolve the issues in dispute in the above referenced matter.

- It is a letter from ESD dated October 5, 2017 to Anthony Hall, counsel for Sierra National Corporation.

The continued Prehearing Conference with Referee Larsen is set for December 15, 2017 at 0830 a.m.

Regards,

Laurie L. Trotter, Esq.

Laurie L. Trotter
Senior Legal Counsel
Nevada Department of Employment, Training and Rehabilitation
Employment Security Division
1340 South Curry Street
Carson City, Nevada 89703
775-684-6317
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LAURIE L. TROTTER, ESQ.
Senior Legal Counsel
STATE OF NEVADA DEPT. OF
1340 So. Curry Street
Carson City, NV 89703
(775) 684-6317
(775) 684-6344 (Fax)

EXHIBIT 29

Laurie Trotter

From: Laurie Trotter
Sent: Friday, November 17, 2017 12:29 PM
To: April Bryant
Cc: 'Anthony Hall'; Melanie Maguire; Sheri Ihler
Subject: Sierra National Corporation, V-17-A-04041-TX
Attachments: 1. Working Girl - Qtrly Pay.pdf; 2. SNC's Sec. of State Registration.pdf; 3. SNC Qtrly Report- Tom Potter, Controller.pdf; 4. Add'l Audit Interview Notes.pdf; 5. Handwritten Notes - Megan Laporte.pdf; 6. Chrono Notes.pdf; 7. Prostitutes who have bus. licenses.pdf; 8. Internet Article by Laura Anderson.pdf; 9. Sex-Bot Article.pdf; 10. Article - Hof's Former Employee Suit to Legalize Prostitution.pdf

April,

Attached are additional documents which may be relevant to the hearing in the above-referenced matter.

1. Working Girl – Quarterly Pay
2. SNC's Secretary of State Registration
3. SNC Quarterly Report – Tom Potter, Controller
4. Additional Audit Interview Notes
5. Handwritten Notes – Megan Laporte Interview
6. Chrono Notes
7. Prostitutes who have business licenses
8. Internet Article by Laura Anderson
9. Sex-Bot Article
10. Article – Hof's Former Employee Suit to Legalize Prostitution

Regards,

Laurie L. Trotter, Esq.

Laurie L. Trotter
Senior Legal Counsel
Nevada Department of Employment, Training and Rehabilitation
Employment Security Division
1340 South Curry Street
Carson City, Nevada 89703
775-684-6317
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1 LAURIE L. TROTTER, ESQ.
Nevada State Bar No. 8696
2 STATE OF NEVADA, Department of
Employment, Training & Rehabilitation (DETR)
3 Employment Security Division (ESD)
1340 South Curry Street
4 Carson City, NV 89703
Telephone No.: (775) 684-6317
5 Facsimile No.: (775) 684-6344
Attorney for DETR/ESD

REC'D & FILED
2017 NOV 21 PM 3:20
SUSAN MERRIWETHER
CLERK
BY V. Alecia
DEPUTY

7 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
8 **IN AND FOR CARSON CITY**

9 --ooOoo--

10 SIERRA NATIONAL CORPORATION, DBA,
THE LOVE RANCH, A NEVADA
11 CORPORATION,

CASE NO.: 17 OC 00222 1B

12 Petitioner,

DEPT. NO.: I

13 vs.

14 NEVADA DEPARTMENT OF
EMPLOYMENT, TRAINING AND
15 REHABILITATION – EMPLOYMENT
SECURITY DIVISION,

16 Respondent.

17 **AFFIDAVIT OF LAURIE L. TROTTER, IN SUPPORT OF**
18 **THE ANSWER TO PETITION FOR WRIT OF MANDAMUS**

19 STATE OF NEVADA)
: ss.
20 In and For CARSON CITY)

21 Laurie L. Trotter, after first being duly sworn, deposes and avers under penalty of
22 perjury the assertions of this Affidavit are true as follows:

23 1. That I am employed as Senior Legal Counsel for the Nevada Employment
24 Security Division of the Department of Employment, Training and Rehabilitation.

1 2. That I prepared the contemporaneously filed Answer to Petition for Writ
2 of Mandamus.

3 3. That the information contained in the Answer to the Petition for Writ of
4 Mandamus is true and correct, based upon my information and belief.

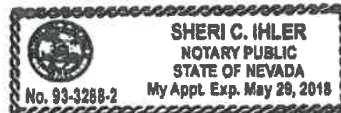
5 4. It is therefore prayed that this Honorable Court issue an Order Denying the
6 Petition for Writ of Mandamus.

7 FURTHER YOUR AFFIANT SAYETH NAUGHT.

8 DATED this 21st day of November, 2017.

9 *Laurie L. Trotter*
10 LAURIE L. TROTTER, ESQ.

11
12 Subscribed and Sworn to before me
13 this 21st day of November, 2017.
14 *Sheri C. Ihler*
15 NOTARIAL OFFICER



16 AFFIRMATION Pursuant to NRS 239B.030:

17 The undersigned does hereby affirm that the preceding document does not contain
18 confidential information; including, but not limited to: the Social Security number or employer
19 identification number of any person or party.

20 DATED this 21st day of November, 2017.

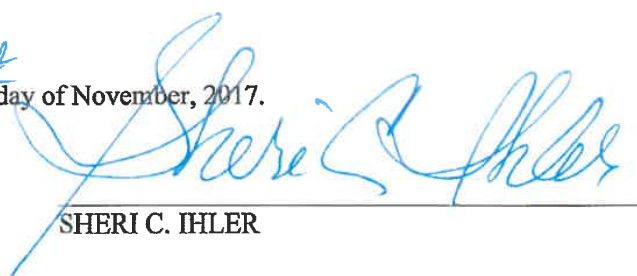
21 *Laurie L. Trotter*
22 LAURIE L. TROTTER, ESQ.

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of the State of
3 Nevada, over the age of 18 years; and that on the date hereinbelow set forth, I served a true and
4 correct copy of the foregoing AFFIDAVIT OF LAURIE L. TROTTER, IN SUPPORT OF THE
5 ANSWER TO PETITION FOR WRIT OF MANDAMUS, by placing the same within an
6 envelope which was thereafter sealed and deposited for postage and mailing with the State of
7 Nevada Mail at Carson City, Nevada, addressed for delivery as follows:

8 Anthony L. Hall, Esq.
9 *Holland & Hart*
5441 Kietzke Lane, Second Floor
10 Reno, NV 89511

11 DATED this 21st day of November, 2017.

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13 SHERI C. IHLER
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1 LAURIE L. TROTTER, ESQ.
Nevada State Bar No. 8696
2 STATE OF NEVADA, Department of
Employment, Training & Rehabilitation (DETR)
3 Employment Security Division (ESD)
1340 South Curry Street
4 Carson City, NV 89703
Telephone No.: (775) 684-6317
5 Facsimile No.: (775) 684-6344
Attorney for DETR/ESD

REC'D & FILED
2017 NOV 21 PM 3:21
SUSAN MERRIWETHER
CLERK
BY V. Alegria
DEPUTY

7 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
8 **IN AND FOR CARSON CITY**

9 - -ooOoo- -

10 SIERRA NATIONAL CORPORATION, DBA,
THE LOVE RANCH, A NEVADA
11 CORPORATION,

CASE NO.: 17 OC 00222 1B

12 Petitioner,

DEPT. NO.: I

13 vs.

14 NEVADA DEPARTMENT OF
EMPLOYMENT, TRAINING AND
15 REHABILITATION – EMPLOYMENT
SECURITY DIVISION,

16 Respondent.

17 **AFFIDAVIT OF MELANIE MAGUIRE, IN SUPPORT OF**
18 **THE ANSWER TO PETITION FOR WRIT OF MANDAMUS**

19 STATE OF NEVADA)
: ss.
20 In and For CARSON CITY)

21 Melanie Maguire, after first being duly sworn, deposes and avers under penalty of
22 perjury the assertions of this Affidavit are true as follows:

23 1. That I am employed as an Audit Manager for the Nevada Employment
24 Security Division of the Department of Employment, Training and Rehabilitation.

3. That I provided the entire Audit file associated with the above-referenced SNC, to Laurie L. Trotter, Esq., counsel for the Employment Security Division, for the purpose of discovery related to SNC's pending administrative appeal of the Employment Security Division's Determination issued on May 25, 2017, finding that the prostitutes are employees of SNC and not independent contractors, and that their wages are reportable for the purposes of unemployment insurance compensation.

DATED this 17th day of November, 2017.

MELANIE MAGUIRE
Audit Manager
Employment Security Division
Nevada Department of Employment, Training and
Rehabilitation

Subscribed and Sworn to before me
this 14 day of November, 2017.

NOTARIAL OFFICER



The undersigned does hereby affirm that the preceding document does not contain confidential information; including, but not limited to: the Social Security number or employer identification number of any person or party.

DATED this 17th day of November, 2017

SHERI C. IHLER

2

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of the State of
3 Nevada, over the age of 18 years; and that on the date hereinbelow set forth, I served a true and
4 correct copy of the foregoing AFFIDAVIT OF MELANIE MAGUIRE, IN SUPPORT OF THE
5 ANSWER TO PETITION FOR WRIT OF MANDAMUS, by placing the same within an
6 envelope which was thereafter sealed and deposited for postage and mailing with the State of
7 Nevada Mail at Carson City, Nevada, addressed for delivery as follows:

8 Anthony L. Hall, Esq.
9 *Holland & Hart*
5441 Kietzke Lane, **Second Floor**
10 Reno, NV 89511

11 DATED this 21st day of November, 2017.

12 
13 SHERI C. IHLER
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Sanford

HOLLAND, HART LLP
5441 K LAKE LANE
SECOND FLOOR
RENO, NV 89511

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

REC'D & FILED

2018 JAN -4 PM 2:06

SUSAN MERRIWETHER
CLERK

Case No. 170C002221B

Dept. No. I

SIERRA NATIONAL CORPORATION, dba
THE LOVE RANCH, a Nevada Corporation,

Petitioner,

vs.

NEVADA DEPARTMENT OF
EMPLOYMENT, TRAINING AND
REHABILITATION – EMPLOYMENT
SECURITY DIVISION,

Respondent.

**PROPOSED ORDER GRANTING MOTION FOR LEAVE TO FILE REPLY IN
SUPPORT OF PETITION FOR WRIT OF MANDAMUS**

This matter came before the Court upon the Motion for Leave to File Reply In Support of Petition for Writ of Mandamus (“Motion”), filed on or about December 5, 2017, by Petitioner Sierra National Corporation, dba The Love Ranch (“Petitioner”), pursuant to NRS 34.260. Respondent Nevada Department of Employment, Training and Rehabilitation – Employment Security Division (“Respondent”) filed an Opposition. Petitioner filed a Reply, which included a Proposed Reply in Support of Petition for Writ of Mandamus as Exhibit 2. After a careful review of the Motion, Opposition, Reply, and Proposed Reply, and the other papers filed with the Court, the Court finds that the Motion should be GRANTED. Accordingly, the Court hereby directs the Clerk of Court to detach and file The Love Ranch’s Proposed Reply in Support of Petition for Writ of Mandamus.

DATED this 4th day of January, 2018.

J. Russell
DISTRICT COURT JUDGE

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Laurie Trotter, Esq.
NDETR-Employment Security Division
1340 South Curry Street
Carson City, NV 89703

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Ahall@hollandhart.com
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Attorneys for Petitioner

REC'D & FILED
2018 JAN 18 PM 12:24
SUSAN MERRIWETHER
CLERK
BY  DEPUTY

6
7 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
8 **IN AND FOR CARSON CITY**

9 SIERRA NATIONAL CORPORATION, dba
THE LOVE RANCH, a Nevada Corporation,

10 Petitioner,

Case No. 170C002221B

Dept. No. I

11 vs.

12 NEVADA DEPARTMENT OF
13 EMPLOYMENT, TRAINING AND
REHABILITATION – EMPLOYMENT
14 SECURITY DIVISION,

15 Respondent.

16 **PETITIONER'S NOTICE OF ENTRY OF ORDER**

17 PLEASE TAKE NOTICE that on the 4th day of January, 2018, the Court entered the
18 attached Order Granting Motion for Leave to File Reply in Support of Petition for Writ of
19 Mandamus. A copy of said Order is attached hereto as Exhibit "1".

20 The undersigned affirms that the foregoing does not contain the social security of any
21 person.

22 DATED this 17th day of January 2018.

23 
24 Anthony L. Hall, Esq. (SBN 5977)
Ricardo N. Cordova, Esq. (SBN 11942)
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RENO, NV 89511

CERTIFICATE OF SERVICE

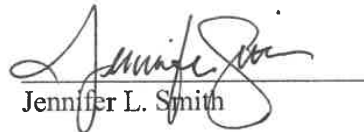
I, Jennifer L. Smith, certify:

I am employed in the City of Reno, County of Washoe, State of Nevada by the law offices of Holland & Hart LLP. My business address is 5441 Kietzke Lane, Second Floor, Reno, Nevada 89511. I am over the age of 18 years and not a party to this action.

I am readily familiar with Holland & Hart LLP's practice for collection and processing of its hand deliveries. Such practice in the ordinary course of business provides for the distribution of hand deliveries the same day they are collected.

On January 17, 2018, I served the foregoing **PETITIONER'S NOTICE OF ENTRY OF ORDER** by First-Class Mail, postage prepaid, to the following:

Laurie Trotter, Esq.
NDETR-Employment Security Division
1340 South Curry Street
Carson City, NV 89703


Jennifer L. Smith

10549583_1

HOLLAND & HART LLP
5441 VINEYARD LANE
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EXHIBIT INDEX

NUMBER DESCRIPTION NO. PAGES (W/ COVER)

Exhibit "1"	Order	2
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EXHIBIT "1"

EXHIBIT "1"

HO. D & HART LLP
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RENO, NV 89511

1 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
2 IN AND FOR CARSON CITY

REC'D & FILED

2018 JAN -4 PM 2:06

3 SIERRA NATIONAL CORPORATION, dba
4 THE LOVE RANCH, a Nevada Corporation,

5 Petitioner,

6 vs.

7 NEVADA DEPARTMENT OF
8 EMPLOYMENT, TRAINING AND
REHABILITATION - EMPLOYMENT
SECURITY DIVISION,

9 Respondent.

SUSAN MERRIWETHER
CLERK

Case No. 170C002221B

Dept. No. I

11 **(PROPOSED) ORDER GRANTING MOTION FOR LEAVE TO FILE REPLY IN**
12 **SUPPORT OF PETITION FOR WRIT OF MANDAMUS**

13 This matter came before the Court upon the Motion for Leave to File Reply In Support of
14 Petition for Writ of Mandamus ("Motion"), filed on or about December 5, 2017, by Petitioner
15 Sierra National Corporation, dba The Love Ranch ("Petitioner"), pursuant to NRS 34.260.
16 Respondent Nevada Department of Employment, Training and Rehabilitation - Employment
17 Security Division ("Respondent") filed an Opposition. Petitioner filed a Reply, which included a
18 Proposed Reply in Support of Petition for Writ of Mandamus as Exhibit 2. After a careful
19 review of the Motion, Opposition, Reply, and Proposed Reply, and the other papers filed with
20 the Court, the Court finds that the Motion should be GRANTED. Accordingly, the Court hereby
21 directs the Clerk of Court to detach and file The Love Ranch's Proposed Reply in Support of
22 Petition for Writ of Mandamus.

23 DATED this 4th day of January, 2018.

24 J. 7. Russell
DISTRICT COURT JUDGE

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Laurie Trotter, Esq.
NDETR-Employment Security Division
1340 South Curry Street
Carson City, NV 89703

Appellant's Appendix 170

1 LAURIE L. TROTTER, ESQ.
2 Nevada State Bar No. 8696
3 STATE OF NEVADA, Department of
4 Employment, Training & Rehabilitation (DETR)
5 Employment Security Division (ESD)
6 1340 South Curry Street
7 Carson City, NV 89703
8 Telephone No.: (775) 684-6317
9 Facsimile No.: (775) 684-6344
10 *Attorney for DETR/ESD*

REC'D & FILED

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SUSAN MERRIWETHER
V. ~~Allegre~~ CLERK
BY _____ DEPUTY

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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

SIERRA NATIONAL CORPORATION,
DBA, THE LOVE RANCH, A NEVADA
CORPORATION,

CASE NO.: 17 OC 00222 1B

DEPT. NO.: I

Petitioner,

vs.

NEVADA DEPARTMENT OF
EMPLOYMENT, TRAINING AND
REHABILITATION – EMPLOYMENT
SECURITY DIVISION,

Respondent.

ESD'S OPPOSITION TO MOTION FOR LEAVE TO FILE REPLY

COMES NOW, Respondent, Administrator, State of Nevada, Department of
Employment, Training and Rehabilitation, Employment Security Division (ESD), by and
through counsel, Laurie L. Trotter, Esq., and hereby opposes the above-named Petitioner's
Motion for Leave to file Reply In Support of Petition for Writ of Mandamus, as follows:

///

///

LAURIE L. TROTTER, ESQ.
Division Sr. Legal Counsel
STATE OF NEVADA DETR/ESD
1340 So. Curry Street
Carson City, NV 89703
(775) 684-6317
(775) 684-6344 (Fax)

1 POINTS AND AUTHORITIES

2 This Court should deny Petitioner's motion as it is unsupported by any relevant
3 law and fact. A Reply is unwarranted under the circumstances of this case for several reasons as
4 more particularly set forth hereinbelow. The defenses contained in ESD's Answer to the Petition
5 for Writ of Mandamus (Petition) include statutory defenses which should have been reasonably
6 researched and anticipated by Petitioner before its NRS 34.160 Petition was filed with this Court.
7 For example, ESD's primary defense is based directly upon NRS 34.170, which provides that the
8 Petition should be denied if the Petitioner has "a plain, speedy and adequate remedy." Here,
9 Petitioner has a plain, speedy and adequate remedy in the pending NRS Chapter 612
10 administrative litigation before ESD's Appeal Tribunal (referee), who is vested with subject
11 matter jurisdiction over this discovery issue. *See*, NRS 612.495 & NRS 612.500. Petitioner was
12 less than candid concerning the factual basis upon which it seeks relief from this Court. ESD has
13 already provided Petitioner all the relevant documents Petitioner seeks by way of the concurrent
14 administrative litigation. And, since the concurrent administrative litigation was pending when
15 Petitioner submitted the Public Records Request on October 11, 2017, ESD explained to
16 Petitioner that to the extent that the Public Records Request was for the purpose of litigation,
17 ESD did not waive any objections it may raise pursuant to such pending administrative litigation,
18 and ESD also referenced Nevada Administrative Code. *See*, Petition for Writ of Mandamus, Ex.
19 3; Answer to Petition for Writ of Mandamus, Ex. 6-20.

20 Petitioner's reliance on *Kieren* is misplaced. Unlike the facts in *Kieren*, ESD did
21 not reframe or recast any of the arguments lodged in the Petition for Writ of Mandamus. *See*,
22 *Kieren v. Feil*, 2016 WL 4082463. *Kieren*, therefore, is factually distinguished from this case.
23 ESD appropriately responded to the contentions set forth in the Petition for Writ of Mandamus,
24 and primarily relied upon statutory defenses contained in NRS Chapter 34, NRS Chapter 239,

1 and NRS Chapter 612. *Kieren*, an unpublished opinion, does not hold any persuasive value to
2 support Petitioner's motion.

3 *Reno Newspapers, Inc.*, likewise does not support Petitioner's instant motion
4 because the holding is limited to the pre-litigation context. *See, Reno Newspapers, Inc. v.*
5 *Gibbons*, 266 P.3d 623, 631, 127 Nev. Adv. Op 79 (2011). The Supreme Court's holding only
6 applies to pre-litigation public records requests. *See, Id.* The high court held, "if a state entity
7 declines a public records request prior to litigation, it must provide the requesting party with
8 notice and citation to legal authority that justifies nondisclosure. No log, in the form of a
9 *Vaughn* index or otherwise, is required." (Emphasis added.) Here, Petitioner's October 10, 2017
10 Public Records Request was submitted after its May 24, 2017 appeal of ESD's Determination to
11 the Appeal Tribunal (referee), and therefore *Reno Newspapers, Inc.* does not apply to this case;
12 as the Public Records Request was submitted after Petitioner initiated the administrative
13 litigation. (ESD's Answer, Exhibit 6-20) *See, Id.*

14 *City of Sparks* similarly renders Petitioner no legal support for its arguments in
15 the instant motion. *City of Sparks* provides that the "writ of mandamus is *generally* the
16 appropriate means for pursuing disclosure of public records," but this holding clearly does not
17 apply in every case; nor does it apply in this situation -- when Petitioner has been less than
18 candid about having already received the discovery it allegedly seeks. *See, City of Sparks v.*
19 *Reno Newspapers, Inc.*, 399 P.3d 352, 355 (2017)(emphasis added). Moreover, *City of Sparks*
20 does not apply here because the instant Petition raised legal arguments that are unsupportable
21 under Nevada law. *See, e.g.*, NRS 239.010 (Petitioner cannot satisfy any of the requisite
22 elements to bring a successful claim for relief under NRS 239.010).

23 A review of the NRS Chapter 34 statutory defense(s) would have provided
24 Petitioner with an opportunity to anticipate the defenses ESD would lodge in its Answer. If

1 Petitioner had conducted a review of the relevant law (*for example*: NRS Chapter 34, NRS
2 Chapter 239, NRS Chapter 612) it would have likely refrained from filing the Petition for Writ of
3 Mandamus, altogether. Petitioner cannot even meet its threshold burden of proof. This Court
4 should therefore deny Petitioner's motion.

5 Despite the above, and thus far, ESD has not complained about Petitioner's bad
6 faith motive in filing the Petition (as Petitioner incorrectly suggests in its motion), but rather,
7 ESD emphasized to this Court that Petitioner was less than candid about the discovery it has
8 already received in the pending administrative litigation before the referee. ESD did not suggest
9 that Petitioner had a bad faith motive in filing the Petition, but rather, ESD is concerned about
10 the credibility of factual representations Petitioner has made to this Court in support of its
11 Petition, and specifically about compliance with the Rule 11(b) mandate, including truthfulness,
12 *inter alia*. Petitioner should not be granted another opportunity to stray from its Rule 11(b)
13 responsibilities in a Reply.

14 **WHEREFORE**, based upon the reasons set forth above, this Honorable Court
15 should deny the instant Motion for Leave to File Reply in Support of Petition for Writ of
16 **Mandamus**.

17 AFFIRMATION Pursuant to NRS 239B.030:

18 The undersigned does hereby affirm that the preceding document does not contain
19 confidential information; including, but not limited to: the Social Security number or employer
20 identification number of any person or party.

21 **RESPECTFULLY SUBMITTED** this 19th day of December, 2017.


LAURIE L. TROTTER, ESQ.
Attorney for Respondent ESD

24
LAURIE L. TROTTER, ESQ.
Division Sr. Legal Counsel
STATE OF NEVADA DETRES
1340 So. Curry Street
Carson City, NV 89703
(775) 684-8317
(775) 684-8344 (Fax)

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of the State of
3 Nevada, over the age of 18 years; and that on the date hereinbelow set forth, I served a true and
4 correct copy of the foregoing ESD'S OPPOSITION TO MOTION FOR LEAVE TO FILE
5 REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS, by placing the same
6 within an envelope which was thereafter sealed and deposited for postage and mailing with the
7 State of Nevada Mail at Carson City, Nevada, addressed for delivery as follows:

8 Anthony L. Hall, Esq.
9 *Holland & Hart LLP*
5441 Kietzke Lane, Second Floor
10 Reno, NV 89511

11 DATED this 20th day of December, 2017.

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13 SHERI C. IHLER
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1 Anthony L. Hall, Esq. (SBN 5977)
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5 Rncordova@hollandhart.com

6 *Attorneys for Petitioner*

7 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
8 **IN AND FOR CARSON CITY**

9 SIERRA NATIONAL CORPORATION, dba
10 THE LOVE RANCH, a Nevada Corporation,

Case No. 170C002221B

11 Petitioner,

Dept. No. I

12 vs.

13 NEVADA DEPARTMENT OF
EMPLOYMENT, TRAINING AND
14 REHABILITATION – EMPLOYMENT
SECURITY DIVISION,

15 Respondent.

17 **MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF PETITION FOR WRIT OF**
18 **MANDAMUS**

19 Pursuant to NRS 34.260, Petitioner, Sierra National Corporation, dba The Love Ranch
20 (“The Love Ranch”), moves the Court for leave to file a reply in support of its Petition for Writ
21 of Mandamus (“Petition”). NRS Chapter 34 sets forth the general principles governing petitions
22 for writs of mandamus. Under the applicable procedure, if the Answer to a Petition for a Writ of
23 Mandamus does not raise an essential question of fact, “but only such matters as may be
24 explained or avoided by a reply, the court may, in its discretion, grant time for replying.” NRS
25 34.260. “While the decision to allow a reply is discretionary,” refusal to permit a reply is an
26 abuse of discretion where, for example, the agency answering the petition “reframed the claim
27 raised in the petition to exclude it from the ambit of mandamus relief.” *Kieren v. Feil*, 2016 WL
28 4082463, at *1 n.1, Case No. 68341 (Nev., July 28, 2016) (unpublished disposition).

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1 Here, the Answer submitted by Respondent Nevada Department of Employment Training
2 and Rehabilitation – Employment Security Division (“DETR”) does not raise an essential
3 question of fact. Rather, DETR’s Answer raises legal arguments that may be addressed by way
4 of a reply. Permitting a reply is particularly appropriate here given that DETR’s Answer consists
5 almost entirely of newly-raised arguments it failed to raise in its Response to The Love Ranch’s
6 Request under the Nevada Public Records Act (“NPRA”). In DETR’s terse, one-page Response
7 to the Public Records Request, it based its blanket denial solely on two grounds: (1) the request
8 allegedly did not sufficiently identify specific records; and (2) the agency is not required to
9 create records to satisfy the request. *See* Petition at Ex. 3.

10 Now, however, DETR takes a kitchen-sink approach, asserting a host of new arguments
11 for the first time in its Answer. The first, that The Love Ranch “has a plain, speedy and adequate
12 remedy under the NRS Chapter 612 administrative process,” is specifically aimed at reframing
13 the Petition to fall outside the ambit of mandamus relief. The same is true of DETR’s second
14 argument, that The Love Ranch “failed to exhaust its administrative remedies.” These are the
15 precise types of new arguments that warrant permitting a reply. *See Kieren*, 2016 WL 4082463,
16 at *1 n.1.

17 DETR raises several other new arguments, including: The Love Ranch was “less than
18 candid with the Court regarding the discovery it had already received in the pending
19 administrative proceeding”; the NPRA “was not intended for use after the start of litigation”; the
20 requested records are “confidential by state and federal law”; and the request sought “privileged
21 material.” None of these additional arguments were addressed in the Petition due to DETR’s
22 failure to timely raise any of these contentions in its Response to the Public Records Request, as
23 required. *See Reno Newspapers, Inc. v. Gibbons*, 266 P.3d 623, 629 (Nev. 2011) (even prior to
24 the initiation of an NPRA lawsuit, the agency withholding records has a legal obligation to
25 provide citation to legal authority “that justifies nondisclosure,” and “merely pinning a string of
26 citations to a boilerplate declaration of confidentiality” does not suffice); NRS 239.0107(1)(d).

27 The Love Ranch needs an opportunity to flesh out the reasons these new arguments, even
28 if not already waived, are unavailing. To begin, it is well-established that mandamus relief is the


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1 appropriate procedural vehicle to challenge the denial of an NPRA request, notwithstanding the
2 alleged existence or non-exhaustion of other remedies. *See, e.g., City of Sparks v. Reno*
3 *Newspapers, Inc.*, 399 P.3d 352, 354-55 (Nev. 2017). Similarly, DETR's argument about The
4 Love Ranch's supposed bad faith is factually baseless, and legally irrelevant, as "the NPRA does
5 not provide that a requester's motive is relevant to a government entity's duty to disclose public
6 records." *LVMPD v. Blackjack Bonding*, 343 P.3d 608, 612 (Nev. 2015). Similarly, DETR's
7 claim that the NPRA does not apply after the commencement of litigation is misguided—if
8 anything, a governmental agency's NPRA obligations increase after the start of litigation. *See*
9 *Gibbons*, 266 P.3d at 881-82. Finally, DETR badly misconstrues the confidentiality provisions
10 and privileges it asserts in its Answer.

11 Given the spurious nature and sheer volume of the new arguments raised for the first time
12 in DETR's Answer, a reply will assist the Court in reaching an appropriate resolution of the
13 Petition. Accordingly, The Love Ranch respectfully requests the Court to grant time to file a
14 reply in support of the Petition.

15 The undersigned affirms that the foregoing does not contain the social security of any
16 person.

17 DATED this 5th day of December 2017.

18
19 
20 Anthony L. Hall, Esq. (SBN 5977)
21 Ricardo N. Cordova, Esq. (SBN 11942)
22 HOLLAND & HART LLP
23 5441 Kietzke Lane, Second Floor
24 Reno, Nevada 89511
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27 Ahall@hollandhart.com
28 Rncordova@hollandhart.com

Attorneys for Petitioner

HOLLAND & HART LLP
5441 KIETZKE LANE
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RENO, NV 89511

CERTIFICATE OF SERVICE

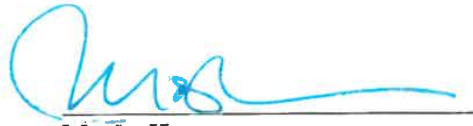
I, Martha Hauser, certify:

I am employed in the City of Reno, County of Washoe, State of Nevada by the law offices of Holland & Hart LLP. My business address is 5441 Kietzke Lane, Second Floor, Reno, Nevada 89511. I am over the age of 18 years and not a party to this action.

I am readily familiar with Holland & Hart LLP's practice for collection and processing of its hand deliveries. Such practice in the ordinary course of business provides for the distribution of hand deliveries the same day they are collected.

On December 5, 2017, I served the foregoing **MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS** by causing the above-named document to be served via electronic service to counsel of record, addressed as follows:

Laurie Trotter, Esq.
NDETR-Employment Security Division
1340 South Curry Street
Carson City, NV 89703



Martha Hauser

10472408_1

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Ricardo N. Cordova, Esq. (SBN 11942)
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Rncordova@hollandhart.com



Attorneys for Petitioner

**IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY**

SIERRA NATIONAL CORPORATION, dba
THE LOVE RANCH, a Nevada Corporation,

Case No. 170C002221B

Petitioner,

Dept. No. I

vs.

NEVADA DEPARTMENT OF
EMPLOYMENT, TRAINING AND
REHABILITATION – EMPLOYMENT
SECURITY DIVISION,


Respondent.

REQUEST FOR SUBMISSION OF MOTION FOR LEAVE

Pursuant to First Judicial District Court Rule 15(6), Petitioner, Sierra National Corporation, dba The Love Ranch (“The Love Ranch”), by and through its counsel of record, requests that its Motion for Leave to File Reply in Support of Petition for Writ of Mandamus be submitted for decision, and granted.

Pursuant to NRS 239B.030, the undersigned hereby affirms that the preceding document does not contain the social security number of any person.


DATED this 2nd day of January 2018.


Anthony L. Hall, Esq. (SBN 5977)
Ricardo N. Cordova, Esq. (SBN 11942)
HOLLAND & HART LLP
Attorneys for Petitioner

HOLLAND & HART LLP
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RENO, NV 89511

Anthony L. Hall, Esq. (SBN 5977)
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Attorneys for Petitioner

REC'D & FILED
2018 JAN -2 PM 4: 04
SUSAN MERRIWETHER
CLERK
BY 
DEPUTY

**IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY**

SIERRA NATIONAL CORPORATION, dba
THE LOVE RANCH, a Nevada Corporation,

Petitioner,

vs.

NEVADA DEPARTMENT OF
EMPLOYMENT, TRAINING AND
REHABILITATION – EMPLOYMENT
SECURITY DIVISION,

Respondent.

Case No. 170C002221B

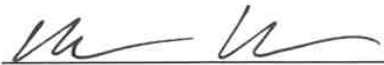
Dept. No. I

REQUEST FOR SUBMISSION OF MOTION FOR LEAVE

Pursuant to First Judicial District Court Rule 15(6), Petitioner, Sierra National Corporation, dba The Love Ranch (“The Love Ranch”), by and through its counsel of record, requests that its Motion for Leave to File Reply in Support of Petition for Writ of Mandamus be submitted for decision, and granted.

Pursuant to NRS 239B.030, the undersigned hereby affirms that the preceding document does not contain the social security number of any person.

DATED this 2nd day of January 2018.


Anthony L. Hall, Esq. (SBN 5977)
Ricardo N. Cordova, Esq. (SBN 11942)
HOLLAND & HART LLP
Attorneys for Petitioner

HOLLAND & HART LLP
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CERTIFICATE OF SERVICE

I, Liz Ford, certify:

I am employed in the City of Reno, County of Washoe, State of Nevada by the law offices of Holland & Hart LLP. My business address is 5441 Kietzke Lane, Second Floor, Reno, Nevada 89511. I am over the age of 18 years and not a party to this action.

I am readily familiar with Holland & Hart LLP's practice for collection and processing of its hand deliveries. Such practice in the ordinary course of business provides for the distribution of hand deliveries the same day they are collected.

On January 2, 2018, I served the foregoing **REQUEST FOR SUBMISSION OF MOTION FOR LEAVE** by First-Class Mail, postage prepaid, to the following:

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NDETR-Employment Security Division
1340 South Curry Street
Carson City, NV 89703


Liz Ford

10549583_1

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10 *Attorneys for Petitioner*

11 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
12 **IN AND FOR CARSON CITY**

13 SIERRA NATIONAL CORPORATION, dba
14 THE LOVE RANCH, a Nevada Corporation,

15 Petitioner,

16 vs.

17 NEVADA DEPARTMENT OF
18 EMPLOYMENT, TRAINING AND
19 REHABILITATION – EMPLOYMENT
20 SECURITY DIVISION,

21 Respondent.

Case No. 170C002221B

Dept. No. I

22 **REPLY IN SUPPORT OF MOTION FOR LEAVE**

23 Petitioner, Sierra National Corporation, dba The Love Ranch (“The Love Ranch”), files
24 this Reply in support of its Motion for Leave to file a Reply in support of its Petition for Writ of
25 Mandamus (“Motion for Leave”).

26 Notwithstanding the filibustering offered in the Opposition by Respondent Nevada
27 Department of Employment, Training and Rehabilitation – Employment Security Division
28 (“DETR”), this is a straightforward matter. DETR’s Answer to the Petition indisputably
contains new arguments that it failed to raise in its Response to The Love Ranch’s Public
Records Request, and thus, were not addressed in The Love Ranch’s Petition. Common sense,
and fundamental fairness, dictate that The Love Ranch should be granted leave to file a reply.
And, NRS 34.260 specifically contemplates that a reply should be permitted under these
circumstances. Even when a reply is not permitted as a matter of course, motions for leave to

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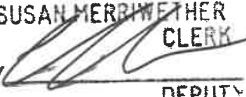
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REC'D & FILED

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SUSAN MERRIWETHER
CLERK

BY  DEPUTY

22 **REPLY IN SUPPORT OF MOTION FOR LEAVE**

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24 this Reply in support of its Motion for Leave to file a Reply in support of its Petition for Writ of
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28 (“DETR”), this is a straightforward matter. DETR’s Answer to the Petition indisputably
contains new arguments that it failed to raise in its Response to The Love Ranch’s Public
Records Request, and thus, were not addressed in The Love Ranch’s Petition. Common sense,
and fundamental fairness, dictate that The Love Ranch should be granted leave to file a reply.
And, NRS 34.260 specifically contemplates that a reply should be permitted under these
circumstances. Even when a reply is not permitted as a matter of course, motions for leave to

1 file a reply are routinely granted. *See, e.g., Guerin v. Guerin*, 993 P.2d 1256, 1258 n.3 (Nev.
2 2000); *Sullivan v. District Court*, 904 P.2d 1039, 1040 n.2 (Nev. 1995); *Torres v. State Bar of*
3 *California*, 245 F. App'x 645, 646 (9th Cir. 2007); *U.S. v. Baras*, 2014 WL 129606, at *1 (N.D.
4 Cal., Jan. 14, 2014); *S. Fork Band Council of W. Shoshone of Nevada v. U.S. Dep't of Interior*,
5 2012 WL 13780, at *1 n.3 (D. Nev. Jan. 4, 2012); *Goodman Ball, Inc. v. Clear Water USA, Inc.*,
6 2007 WL 3232237, at *4 n.8 (N.D. Cal. Oct. 31, 2007); *E.E.O.C. v. U.S. Bakery*, 2003 WL
7 23538023, at *4 (D. Or. Nov. 20, 2003).

8 In fact, such motions are rarely opposed at all. *See, e.g., Torres*, 245 F. App'x at 646;
9 *Baras*, 2014 WL 129606, at *1; *S. Fork Band Council*, 2012 WL 13780, at *1 n.3; *Goodman*
10 *Ball*, 2007 WL 3232237, at *4 n.8; *U.S. Bakery*, 2003 WL 23538023, at *4. It is unfortunate that
11 the same cannot be said here. Respectfully, the Court has far more important issues to resolve
12 (such as the underlying Petition) than entertaining DETR's bickering about a preeminently
13 reasonable and statutorily-authorized request to reply to the newly-raised arguments in DETR's
14 Answer to the Petition.

15 DETR fails to cite even a single case in which a motion for leave to file a reply in support
16 of a petition for a writ of mandamus was properly denied. In *Kiernan v. Feil*, a case where a
17 district court issued a rare order denying such leave, the Nevada Supreme Court summarily
18 reversed the lower court, finding it had abused its discretion. 2016 WL 4082463, at *1 n.1, Case
19 No. 68341 (Nev., July 28, 2016) (unpublished disposition). Although DETR makes the
20 conclusory claim that *Kieren* is "factually distinguished [sic] from this case," *see* Opp'n at 2,¹
21 DETR's own arguments bely this claim. Here, in an attempt to exclude the Petition from
22 mandamus relief, DETR devoted its Answer to disingenuously recasting the Petition as
23 supposedly seeking discovery regarding the Parties' pending administrative dispute. This is the
24 precise situation in which denial of leave to file a reply would be an abuse of discretion. *See*
25

26 ¹In addition, DETR asserts "*Kiernan*, an unpublished opinion, does not hold any persuasive value to
27 support Petitioner's motion." *See* Opp'n at 3. Although unclear, to the extent DETR is suggesting *Kiernan* is non-
28 citable or unpersuasive as an unpublished order, DETR is mistaken. *See* NRAP 36(c)(3) ("A party may cite for its
persuasive value, if any, an unpublished disposition issued by this court on or after January 1, 2016."); *see also*
ADKT 504 (Nov. 12, 2015).

1 *Kieren*, 2016 WL 4082463, at *1 n.1. By doggedly opposing the Motion for Leave, DETR is
2 inviting this Court to commit reversible error.

3 It bears repeating that DETR does not deny that its Answer to the Petition contains new
4 arguments it failed to raise in its Response to the Public Records Request. One cannot help but
5 be surprised that DETR has nonetheless decided to fight what should be a routine, unopposed
6 Motion for Leave to reply to its newly-raised arguments. Apparently sensing the frailty of the
7 arguments raised in its Answer, DETR has resorted to obstructionism. DETR's Opposition to
8 the Motion for Leave should be seen for what it is—an attempt to shield its spurious arguments
9 from examination.

10 DETR theorizes, however, that The Love Ranch should have “researched and
11 anticipated” the newly-raised arguments in its Answer and pre-emptively addressed them in its
12 Petition. *See id.* This is a remarkably misguided theory. The Love Ranch does not have a
13 crystal ball. And, it is not The Love Ranch's job to raise arguments for DETR.² It is *DETR's*
14 job to raise arguments for DETR. On top of that, DETR does not even deny that it already
15 waived the vast majority of the arguments contained in its Opposition to the Petition. So,
16 DETR's suggestion that The Love Ranch's Petition should have addressed baseless arguments
17 that DETR already indisputably waived, is baffling. DETR's Opposition is simply the latest
18 example of the baseless positions that it has taken throughout the Parties' dispute.

19 The only other excuse DETR offers for its obstructionism is a personal attack. *See Opp'n*
20 at 4. DETR asserts it “thus far” “has not complained about Petitioner's bad faith motive in filing
21 the Petition.”³ *See id.* In almost the same breath, however, DETR makes an idle threat to invoke
22 Rule 11, accusing The Love Ranch being “less than candid” about discovery it supposedly “has
23

24 ²To be sure, if DETR had raised these arguments in its Response, then The Love Ranch would have
25 addressed them in its Petition. Indeed, in its Petition, The Love Ranch specifically addressed both of the bases
26 DETR cited in its Response to the Request, although DETR has effectively abandoned those arguments in its
Answer, preferring to spring new arguments to justify its failure to comply with the NPRA. The Love Ranch must
be allowed to reply to DETR's moving target of arguments.

27 ³This assertion is demonstrably false. One of the primary arguments in DETR's Answer, which it
28 underlined and prominently placed as a heading, was as follows: “This Court Should Deny the Petition for Writ of
Mandamus Because it was Not Brought in Good Faith.” *See Answer at 7* (emphasis in original). Evidently, DETR
has lost track of its own spurious attacks.

1 already received in the pending administrative litigation before the referee.” *See id.* DETR says
2 “Petitioner should not be granted another opportunity to stray from its Rule 11(b) responsibilities
3 in a Reply.” *See id.*

4 The notion that DETR believes it is free to launch this outrageous and unprofessional
5 attack, and then oppose The Love Ranch’s request for leave to reply to these and the other
6 accusations in its Answer to the Petition, is disturbing. Above all, DETR’s attacks are baseless.
7 The “audit file” and the other materials DETR says are “relevant,” do not satisfy the Public
8 Records Request. Indeed, these materials are either non-responsive, or do not even begin to
9 scratch the surface of the thirteen (13) categories of public records requested by The Love
10 Ranch.

11 *If* DETR actually believed it had already provided the requested records, then there
12 would have been no reason for it to deny the Request. DETR could have simply responded by
13 identifying the supposedly responsive materials. Instead, DETR issued a blanket denial,
14 claiming that the Request did not “sufficiently identify any specific records” and that DETR “is
15 not required to create records to satisfy your request.” *See* Petition at Ex. 3. *Nowhere in*
16 *DETR’s Response did it raise what it now calls the “material fact” that it allegedly “already*
17 *provided” the requested records.* In other words, DETR is attempting to use its *own*
18 inexplicable omissions to defame the undersigned.

19 In sum, DETR’s Opposition only bolsters the conclusion that The Love Ranch should be
20 given an opportunity to flesh out why DETR’s accusations, and the other newly-raised
21 arguments in DETR’s Answer to the Petition, are unavailing. Accordingly, The Love Ranch
22 respectfully requests the Court to grant leave to file a reply in support of the Petition. For the
23 Court’s convenience, a Proposed Order Granting Motion for Leave is attached hereto as
24 “**Exhibit 1.**” In addition, The Love Ranch’s Proposed Reply in Support of Petition for Writ of
25 Mandamus is attached as “**Exhibit 2,**” and may be detached and filed upon entry of the
26 foregoing Order.

27 The undersigned affirms that the foregoing does not contain the social security of any
28 person.

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1 DATED this 2nd day of January 2018.

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EXHIBIT INDEX

EXHIBIT #	DESCRIPTION	# OF PAGES
1	Proposed Order Granting Motion for Leave to File Reply in Support of Petition for Writ of Mandamus	1
2	Proposed Reply in Support of Petition for Writ of Mandamus	28

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RENO, NV 89511

CERTIFICATE OF SERVICE

I, Liz Ford, certify:

I am employed in the City of Reno, County of Washoe, State of Nevada by the law offices of Holland & Hart LLP. My business address is 5441 Kietzke Lane, Second Floor, Reno, Nevada 89511. I am over the age of 18 years and not a party to this action.

I am readily familiar with Holland & Hart LLP's practice for collection and processing of its hand deliveries. Such practice in the ordinary course of business provides for the distribution of hand deliveries the same day they are collected.

On January 2, 2018, I served the foregoing **REPLY IN SUPPORT OF MOTION FOR LEAVE** by First-Class Mail, postage prepaid, to the following::

Laurie Trotter, Esq.
NDETR-Employment Security Division
1340 South Curry Street
Carson City, NV 89703


Liz Ford

10534211_2

EXHIBIT "1"

EXHIBIT "1"

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1 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
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11 **Respondent.**

Case No. 170C002221B

Dept. No. I

12 **[PROPOSED] ORDER GRANTING MOTION FOR LEAVE TO FILE REPLY IN**
13 **SUPPORT OF PETITION FOR WRIT OF MANDAMUS**

14 This matter came before the Court upon the Motion for Leave to File Reply In Support of
15 Petition for Writ of Mandamus (“Motion”), filed on or about December 5, 2017, by Petitioner
16 Sierra National Corporation, dba The Love Ranch (“Petitioner”), pursuant to NRS 34.260.
17 Respondent Nevada Department of Employment, Training and Rehabilitation – Employment
18 Security Division (“Respondent”) filed an Opposition. Petitioner filed a Reply, which included a
19 Proposed Reply in Support of Petition for Writ of Mandamus as Exhibit 2. After a careful
20 review of the Motion, Opposition, Reply, and Proposed Reply, and the other papers filed with
21 the Court, the Court finds that the Motion should be GRANTED. Accordingly, the Court hereby
22 directs the Clerk of Court to detach and file The Love Ranch’s Proposed Reply in Support of
23 Petition for Writ of Mandamus.

24 DATED this ____ day of _____, 2018.

25 _____
26 DISTRICT COURT JUDGE

27 10540802_1

EXHIBIT “2”

EXHIBIT “2”

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**IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
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Dept. No. I

[PROPOSED] REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

Petitioner, Sierra National Corporation, dba The Love Ranch (“The Love Ranch”),
submits this Reply in support of its Petition for Writ of Mandamus (“Petition”).

I. INTRODUCTION

As Justice Neil Gorsuch has observed, “[t]o this day, one of the surest proofs any nation enjoys an independent judiciary must be that the government can and does lose in litigation before its ‘own’ courts like anyone else.” *In re Renewable Energy Dev. Corp.*, 792 F.3d 1274, 1278 (10th Cir. 2015) (Gorsuch, J.). This observation is especially poignant in this matter. In its Answer to the Petition (“Answer”), Respondent Nevada Department of Employment, Training and Rehabilitation – Employment Security Division (“DETR”) has asserted a series of new and spurious arguments. As a consequence, DETR has utterly failed to meet its burden to overcome the presumption that the public records requested by The Love Ranch are open to disclosure. If

1 credited, DETR's obstructionism would result in the precise type of governmental secrecy,
2 unaccountability, and capriciousness the Nevada Public Records Act ("NPRA") was intended to
3 root out. The Petition should be granted in its entirety.

4 **II. ARGUMENT**

5 **A. DETR Waived the Vast Majority of the Arguments Raised in its Answer**

6 DETR's Answer consists almost entirely of newly-raised arguments that it failed to assert
7 in its Response to The Love Ranch's Public Records Request. In DETR's terse, one-page
8 Response, it based its blanket denial of the Request solely on two grounds: (1) the Request
9 allegedly did not sufficiently identify specific records; and (2) DETR is not required to create
10 Records to satisfy the request. *See* Petition at Ex. 3.

11 Now, however, DETR takes a kitchen-sink approach, asserting a host of new arguments
12 for the first time in its Answer. For instance, DETR argues that The Love Ranch "has a plain,
13 speedy and adequate remedy under the NRS Chapter 612 administrative process" and "failed to
14 exhaust its administrative remedies." DETR raises several other new arguments, including: The
15 Love Ranch was "less than candid with the Court regarding the discovery it had already received
16 in the pending administrative proceeding"; the NPRA "was not intended for use after the start of
17 litigation"; the requested records are "confidential by state and federal law"; and the Request
18 sought "privileged material."

19 DETR did not raise any of these arguments in its Response to the Public Records
20 Request, as required. *See Reno Newspapers, Inc. v. Gibbons*, 266 P.3d 623, 629 (Nev. 2011)
21 (even prior to the initiation of an NPRA lawsuit, the agency withholding records has a legal
22 obligation to provide citation to legal authority "that justifies nondisclosure," and "merely
23 pinning a string of citations to a boilerplate declaration of confidentiality" does not suffice); *see*
24 *also* NRS 239.0107(1)(d). Accordingly, DETR waived these arguments. Notably, DETR does
25 not contend otherwise in its Answer. Even if not waived, DETR's newly-raised arguments are
26 unavailing, as detailed below.

27 **B. Mandamus is the Proper Vehicle to Challenge the Denial of an NPRA Request**

28 One of the new arguments in DETR's Answer is procedural, namely, that mandamus

1 relief is not available because there is allegedly a plain, speedy, and adequate remedy available
2 under the unemployment compensation statutes set forth in NRS Chapter 612. *See* Answer at 4-
3 5. According to DETR, The Love Ranch is seeking to “short-circuit” the administrative process,
4 which, DETR says, supplies the exclusive means to seek records associated with such disputes.
5 *See id.* DETR is mistaken.

6 The Nevada Legislature has expressly declared that a party who has been denied access
7 to public records may proceed with an action before the district court:

8 If a request for inspection, copying or copies of a public
9 book or record open to inspection and copying is denied, *the*
10 *requester may apply to the district court* in the county in which the
11 book or record is located for an order:

12 (a) Permitting the requester to inspect or copy the book or
13 record; or

14 (b) Requiring the person who has legal custody or control
15 of the public book or record to provide a copy to the requester, as
16 applicable.

17 NRS 239.011(1) (emphasis added).

18 It is undisputed that The Love Ranch’s request for public records was denied. Thus,
19 under the plain language of NRS 239.011(1), The Love Ranch has a statutory right to bring this
20 action. Nowhere does this statute exempt public records that may also be relevant in
21 administrative proceedings under the unemployment compensation statutory scheme set forth in
22 NRS Chapter 612. Moreover, the Nevada Supreme Court has held that mandamus is the
23 appropriate procedural vehicle to compel production of public records. *DR Partners v. Bd. of*
24 *County Comm’rs*, 6 P.3d 465, 468 (Nev. 2000). In fact, the law has been settled on this point for
25 nearly thirty years. *See Morrow v. LeGrand*, 2017 WL 1397335, at *1, Case No. 68768 (Nev.,
26 April 14, 2017) (unpublished disposition) (“This court has repeatedly recognized that mandamus
27 is the appropriate procedural remedy to compel the production of public records under NRS
28 Chapter 239.”).¹

¹*See, e.g., Las Vegas Metro. Police Dep’t v. Blackjack Bonding, Inc.*, 343 P.3d 608 (Nev. 2015) (affirming writ of mandamus compelling the disclosure of public records); *Reno Newspapers, Inc. v. Gibbons*, 266 P.3d 623 (Nev. 2011) (“mandamus was the appropriate procedural vehicle” to seek access to public records and a log regarding records withheld by the government); *PERS v. Reno Newspapers*, 313 P.3d 221 (Nev. 2013) (affirming

1 The Nevada Supreme Court recently reaffirmed the validity of this principle in *City of*
2 *Sparks v. Reno Newspapers*, 399 P.3d 352 (2017). There, much like DETR in the instant case,
3 the City of Sparks argued that mandamus relief was not available because it had denied a public
4 records request by invoking a confidentiality regulation which could have been challenged by
5 way of a declaratory judgment proceeding under NRS 233B.110 of the Administrative Procedure
6 Act. *Id.* at 354. The court disagreed, observing “a writ of mandamus is generally the appropriate
7 means for pursuing the disclosure of public records pursuant to NRS 239.011.” *Id.* at 355. In
8 addition, the newspaper was challenging the denial of its records request, not merely seeking to
9 determine its rights regarding the confidentiality regulation invoked by the City. *Id.* Thus, NRS
10 239.011 specifically applied, and took precedence over a separate statute generally providing an
11 alternate avenue of relief. *Id.*

12 Here, as in *City of Sparks v. Reno Newspapers*, DETR fundamentally mischaracterizes
13 the records at issue and relief sought by the Love Ranch. To be sure, some of the records sought
14 by The Love Ranch may ultimately prove relevant in its pending administrative appeal. But
15 many of the records sought may also expose DETR’s systematically biased and arbitrary
16 practices.² The public undoubtedly has an interest in rooting out such activity, and the NPRA
17 provides citizens an avenue to do so. *See, e.g., DR Partners*, 6 P.3d at 467 (approving of an
18 NPRA request made in connection with investigation into governmental waste and the extent of
19 influence over public officials by private lobbyists); *Donrey*, 798 P.2d at 145 (approving of an
20 NPRA request to obtain a report generated by the Reno Police Department regarding bribery of a
21 public official).

22 Most importantly, the remedial process The Love Ranch is entitled to pursue to enforce
23

24 writ of mandamus requiring production of public records); *Donrey of Nevada v. Bradshaw*, 798 P.2d 144, 148 (Nev.
1990) (directing district court to issue a writ of mandamus compelling disclosure of public records).

25 ²As The Love Ranch detailed in its Petition, DETR has been well-aware of The Love Ranch’s classification
26 of its tenants as independent contractors. Despite conducting audits of The Love Ranch and affiliated brothels over
27 the years, DETR did not object to the classification of the tenants as independent contractors, let alone request that
28 contributions be made into the State Unemployment Fund based upon the tenants’ earnings. DETR does not dispute
any of this in its Answer. Nor could it. As recently as December 2016—in the midst of its purportedly random
audit of the Love Ranch—DETR’s Board of Review affirmed its view that that The Love Ranch’s tenants are
independent contractors, not employees. *See* Board of Review Order, attached as “Exhibit A.”

1 its rights under the plain language of NRS 239.011(1) is not dictated by DETR's re-
2 characterization of the parties' dispute. And, if credited, DETR's position would mean that a
3 party to an administrative dispute has less rights under the NPRA than the general public. This
4 would be an absurd result and is unsupported by any caselaw or statutory language. In sum,
5 DETR's contention that mandamus relief is not available here is unavailing.

6 **C. DETR's Argument Regarding Exhaustion Fails**

7 **1. The NPRA Does Not Require Exhaustion of Administrative Remedies**

8 Another new procedural argument raised in DETR's Answer is that The Love Ranch
9 supposedly failed to exhaust its administrative remedies. See Answer at 6-7. This argument
10 likewise fails. As noted, NRS 239.011(1) expressly declares that a party who has been denied
11 access to public records may proceed with an action before the district court. The Love Ranch is
12 indisputably a party who has been denied access to public records, and thus, under NRS
13 239.011(1), it may proceed with this action. The NPRA does not impose any obligation to
14 exhaust supposedly available administrative remedies. Further, any of the general requirements
15 in NRS Chapter 613, including exhaustion, are inapplicable because this action is specifically
16 governed by the NPRA. See *City of Sparks v. Reno Newspapers*, 399 P.3d at 355. Stated
17 simply, the only pre-requisites to an action under the NPRA is that a party make a request that is
18 denied. Such pre-requisites have indisputably been fulfilled here.

19 **2. Exceptions to the Exhaustion Doctrine Apply Here**

20 Further, there are exceptions to statutory schemes that do have exhaustion requirements.³
21 First, "[t]he exhaustion doctrine will not deprive the court of jurisdiction 'where the issues relate
22 solely to the interpretation or constitutionality of a statute.'" *State, Nevada Dep't of Taxation v.*
23 *Scotsman Mfg. Co.*, 849 P.2d 317, 319 (Nev. 1993) (quoting *State v. Glusman*, 651 P.2d 639
24 (Nev. 1982)). Second, "where resort to administrative procedures would be futile, exhaustion of
25 administrative remedies is not required." *Englemann v. Westergard*, 647 P.2d 385, 388-89 (Nev.
26 1982).

27 ³Even the authorities cited by DETR recognize these exceptions. See *Malecon Tobacco, LLC v. State*, 59
28 P.3d 474, 476 (Nev. 2002) ("Two exceptions exist to the exhaustion requirement.").

1 This dispute falls squarely within the exceptions to the exhaustion doctrine. To begin, the
2 Petition raises purely legal questions regarding the interpretation of the NPRA and other statutes.
3 See *Blackjack Bonding*, 343 P.3d at 612 (the interpretation of caselaw and the statutory language
4 of the NPRA are questions of law, subject to de novo review). In addition, exhaustion of the
5 administrative procedures under NRS Chapter 612 would have been futile. In fact, The Love
6 Ranch requested the Appeals Referee to issue an administrative subpoena compelling DETR to
7 produce records concerning, among other things, its previous audits and determinations
8 regarding The Love Ranch, and other brothels. See June 6, 2017, Letter Regarding Subpoena to
9 Compel the Production of Records, attached as “Exhibit B.” It is undisputed that the Appeals
10 Referee denied the request. Thus, although DETR disingenuously suggests that The Love Ranch
11 can seek to discover such records via the administrative process, it has already done so, and its
12 effect is futile. Thus, DETR’s argument regarding exhaustion misses its mark.

13 **D. DETR’s Accusations of Bad Faith and Improper Motives are Baseless**

14 Next, DETR accuses The Love Ranch of being “less than candid with the Court” in its
15 Petition. See Answer at 7. In support of this accusation, DETR claims it “already provided” the
16 “audit file” regarding its Determination, and says The Love Ranch “omitted the material fact that
17 [DETR] has disclosed the information relevant to [The Love Ranch’s] appeal.” See *id.* at 8.
18 DETR’s accusations do not withstand scrutiny.

19 **1. DETR Relies on Non-responsive and Incomplete Materials**

20 The “audit file” and the other materials DETR says are “relevant to [The Love Ranch’s]
21 appeal,” do not satisfy the Public Records Request. Indeed, these materials are non-responsive,
22 or do not even begin to scratch the surface of the thirteen (13) categories of public records
23 requested by The Love Ranch.

24 To summarize those categories, The Love Ranch requested: (1) records obtained by
25 DETR in connection DETR’s audit and determination concerning The Love Ranch, (2) records
26 DETR prepared in connection with its audit and determination, (3) communications between
27 DETR’s investigators/auditors and other DETR employees regarding its audit, (4) documents
28 concerning DETR’s initiation and implementation of its audit, (5) records concerning the

1 methodology used by DETR in selecting The Love Ranch to be audited, (6) records of
2 conversations or interviews with any witnesses any other evidence obtained by DETR in
3 connection with any of its prior audits and determinations concerning The Love Ranch, (7)
4 records prepared by DETR in connection with its prior audits and determinations concerning The
5 Love Ranch, (8) communications between DETR and its employees concerning The Love
6 Ranch's Appeal of DETR's audit and determination, (9) records of conversations or interviews
7 with any witnesses and other evidence obtained by DETR in connection with any of its audits
8 and determinations concerning other brothels, (10) records prepared by DETR in connection
9 with its audits and determinations concerning other brothels, (11) records of communications
10 between DETR's investigators/auditors and other DETR employees regarding the preparation for
11 its audits of other brothels, (12) records concerning DETR's initiation and implementation of its
12 audits of other brothels, (13) records concerning the methodology used by DETR in selecting
13 any other brothels to be audited. *See* Petition at Ex. 2.

14 DETR does not, and cannot, even attempt to argue that the documents it produced in the
15 context of the Parties' administrative dispute satisfy each of these specific categories. Instead,
16 DETR lumps all of these categories together, and then announces it already provided all of the
17 requested records. This is simply not the case, as is easily seen from an examination of the
18 categories spelled out above.

19 *If* DETR actually believed it "already provided" the requested records, then there would
20 have been no reason for it to deny the Request. DETR could have simply responded by
21 identifying the supposedly responsive materials. Instead, DETR issued a blanket denial,
22 claiming that the Request did not "sufficiently identify any specific records" and that DETR "is
23 not required to create records to satisfy your request." *See* Petition at Ex. 3. *Nowhere in*
24 *DETR's Response did it raise what it now calls the "material fact" that it supposedly "already*
25 *provided" the requested records.*⁴

26
27 ⁴This is particularly egregious given that DETR now uses its *own* omission to attempt to defame the
28 undersigned by claiming that the failure to "anticipate" this newly-raised argument, and pre-emptively raise it for
DETR (i.e., to do DETR's job for it), violated Rule 11. *See* Opposition to Motion for Leave at 4.

1 DETR has concocted a shell game to draw attention away from its blatant violation of the
2 NPRA. In effect, DETR is attempting to grant itself an exception to the NPRA by pointing to
3 materials it voluntarily produced in the Parties' administrative dispute (i.e., the materials DETR
4 believes are beneficial to its own case). If this is permitted, the NPRA is a dead-letter.
5 Fortunately, it is for the courts, not DETR, to decide whether DETR has complied with the
6 NPRA.

7 **2. DETR's Accusations of Bad Faith and Improper Motives are Irrelevant**

8 DETR's accusations are not only unfounded, but they are irrelevant. The Nevada
9 Supreme Court's opinion in *Las Vegas Metropolitan Police Department v. Blackjack Bonding,*
10 *Inc.* is instructive on this point. 343 P.3d 608 (Nev. 2015). There, Blackjack Bonding, a private
11 bond company, made an NPRA request for records of telephones used by prison inmates. *Id.* at
12 610-11. The police department that administered the prison denied the request, arguing, among
13 other things, that it "had no duty to fulfill Blackjack's records request because Blackjack
14 purportedly acted to serve a business interest." *Id.* at 611 n.2. The court found that this
15 argument was "without merit," explaining, "*the NPRA does not provide that a requester's*
16 *motive is relevant to a government entity's duty to disclose public records.*" *Id.* (emphasis
17 added).

18 As *Blackjack Bonding* makes clear, DETR's accusations of supposed bad faith and
19 improper motives are irrelevant. This is simply a matter of common sense. The Love Ranch
20 does not have any fewer rights under the NPRA simply because it was targeted for an audit,
21 assessed a substantial tax liability, and forced into administrative proceedings by bureaucrats at
22 DETR. In sum, DETR's accusations of bad faith and improper motives are meritless and
23 irrelevant.

24 **E. DETR Misconstrues the Nevada Supreme Court's NPRA Jurisprudence**

25 Referencing *Reno Newspapers v. Gibbons*, DETR next argues "relief under [the NPRA]
26 only applies to the pre-litigation context." See Answer at 8-9. DETR contends that *Gibbons*
27 supposedly established that the NPRA does not apply during the pendency of an administrative
28 proceeding. See *id.* DETR badly misreads *Gibbons*.

1 In *Gibbons*, the Nevada Supreme Court held if a state entity denies a public records
2 request prior to the initiation of an NPRA lawsuit, “it must provide the requesting party with
3 notice and citation to legal authority that justifies non-disclosure.” 266 P.3d at 631 (citing NRS
4 239.0107(1)(d)). There, the State’s “blanket denial” of a newspaper’s pre-litigation NPRA
5 request was improper where it “provided no explanation whatsoever as to why the cases it cited
6 actually supported its claim of confidentiality or were anything other than superfluous.” *Id.*
7 Additionally, the Court explained, “[w]e cannot conclude that merely pinning a string of
8 citations to a boilerplate declaration of confidentiality satisfies the State’s prelitigation obligation
9 under NRS 239.0107(1)(d)(2) to cite to ‘specific’ authority ‘that makes the public book or
10 record, or a part thereof, confidential.’” *Id.*

11 The court further held that “after the commencement of an NPRA lawsuit, the requesting
12 party is generally entitled to a log.” *Id.* at 629. As the court reasoned, “in view of the emphasis
13 placed on disclosure and the importance of testing claims of confidentiality in an adversarial
14 setting, we agree . . . that ‘it is anomalous’ and inequitable to deny the requesting party basic
15 information about the withheld records, thereby relegating it to a nebulous position where it is
16 powerless to contest a claim of confidentiality.” *Id.* Accordingly, “in most cases, in order to
17 preserve a fair adversarial environment, this log should contain, at a minimum, a general factual
18 description of each record withheld and a specific explanation for nondisclosure.” *Id.* Because
19 the State failed to provide such a log to the newspaper, its “response was, in a word, deficient.”
20 *Id.* at 630. Accordingly, the Court reversed the district court’s denial of the newspaper’s writ
21 petition, and remanded the case with instructions to direct the State to provide the newspaper
22 with the requisite log. *Id.*

23 **1. DETR Failed to Meet its Pre-litigation Obligations under the NPRA**

24 The *Gibbons* court did not, contrary to DETR’s bizarre suggestion, hold that the NPRA
25 does not apply after the commencement of litigation or during the pendency of an administrative
26 proceeding. If anything, a governmental entity’s obligations under the NPRA *increase* after the
27 start of litigation. *Gibbons* underscores that DETR has fallen woefully short of its obligations
28 under the NPRA. In its blanket denial of The Love Ranch’s Public Records Request, DETR

1 failed to provide citation to legal authority that justifies non-disclosure. DETR did not even
2 assert that the records, or any portions thereof, are confidential or privileged in any way. Instead,
3 as noted, DETR based its denial on only two grounds: (1) the Request allegedly did not
4 sufficiently identify specific records; and (2) DETR is not required to create Records to satisfy
5 the request.

6 Both of these grounds are superfluous and pretextual, in contravention of *Gibbons* and
7 NRS 239.0107(1)(d)(2). To begin, NAC 239.865 authorizes an agency responding to a public
8 records request to ask for additional information or clarification from the party that made the
9 request. Despite this, and despite a specific invitation in the Request for DETR to contact The
10 Love Ranch with any questions, DETR did not ask for any additional information or
11 clarification. This belies DETR's claim that the Request is not sufficiently detailed or that it
12 requested the creation of records, and shows that DETR does not actually believe its own
13 purported justifications for its denial of the request.

14 DETR does not deny any of this. In fact, in its Answer, DETR makes an argument about
15 the detail of the Request only as an afterthought, lumping that contention together with its new
16 arguments regarding privileges. And, DETR has essentially abandoned its argument that the
17 Request supposedly asked for the creation of records.⁵ Accordingly, DETR failed to comply
18 with its pre-litigation obligations under the NPRA.

19 **2. DETR Failed to Satisfy its Litigation Obligations under the NPRA**

20 In addition, DETR has failed to satisfy its obligations under the NPRA that were
21 triggered after the commencement of this lawsuit. In particular, DETR has failed to provide a
22 log containing, at a minimum, a general factual description of each record withheld and a
23 specific explanation for non-disclosure, as required under *Gibbons*. Considered alone or
24 cumulatively, DETR's inexplicable failures to comply with the NPRA justify granting the
25 Petition in its entirety. At a minimum, in order to preserve a fair adversarial environment, this

26
27 ⁵In its 17-page Answer, DETR only provides a one-sentence argument on this issue, stating, "to the extent that
28 the information requested by SNC is not already included in a public record, ESD is not required to create a record
to satisfy SNC's request." See Answer at 13. Contrary to DETR's suggestion, The Love Ranch never requested
DETR to create any records.

1 Court should compel DETR to provide the requisite log to The Love Ranch.

2 **F. DETR's Assertions of Confidentiality are Meritless**

3 **1. DETR Ignores the Applicable NPRA Framework**

4 As discussed in the Petition, the NPRA provides that all public books and public records
5 of governmental entities must remain open to the public, unless "otherwise declared by law to be
6 confidential." NRS 239.010(1). The Legislature has declared that the purpose of the NPRA is to
7 foster democratic principles and governmental accountability and transparency by ensuring that
8 records are broadly accessible. NRS 239.001(1). The provisions of the NPRA must be liberally
9 construed to maximize the public's right of access. NRS 239.001(1)-(2). In contrast, "*any*
10 limitations or restrictions on the public's right of access *must* be narrowly construed." *Gibbons*,
11 266 P.3d at 626 (emphasis added).

12 In reviewing public records requests, Nevada courts "begin with the *presumption* that *all*
13 government-generated records are open to disclosure." *Id.* at 628 (emphasis added). "[O]pen
14 records are the rule,' and any nondisclosure of records is the exception." *Id.* at 627 (quoting
15 *Haley*, 234 P.3d at 926). Indeed, "the provisions of the NPRA place an unmistakable emphasis
16 on disclosure." *Id.* at 629. "In harmony with the overarching purposes of the NPRA, the burden
17 of proof is imposed on the state entity *to prove* that a requested record is confidential." *Id.*
18 (emphasis added). Absent a statutory provision that "*expressly and unequivocally*" declares a
19 record to be confidential, any limitations on disclosure may only be based upon a broad
20 balancing of the interests involved. *Haley*, 234 P.3d at 924 (emphasis added). Even if portions
21 of a public record may be properly deemed confidential, this does not mean that the entire
22 document may be withheld. *See id.* at 927-28. Instead, the state entity has a duty to redact any
23 confidential portions. *Id.* (citing NRS 239.010(3)).

24 DETR's Answer runs afoul of each of these principles. To begin, as will be shown in a
25 moment, DETR broadly and liberally construes the confidentiality provisions it invokes for the
26 first time in its Answer. At the same time, DETR affords a cramped construction of the NPRA,
27 or simply ignores its provisions altogether. Thus, DETR has turned the applicable rules of
28 construction directly on their head.

1 Elsewhere in its Answer, DETR discusses what it believes “an applicant for a court order
2 must first show” to bring a “successful” NPRA claim, *see* Answer at 7, or to “prevail” on such a
3 claim. *See id.* at 15. In addition, DETR suggests it is entitled to deference, claiming its denial
4 was not “an abuse of discretion.” *Id.* at 11, 15. Tellingly, these arguments are unaccompanied
5 by citation to any relevant authority, because no such authority exists. The law is well-settled
6 that DETR, as the state entity resisting disclosure, bears the burden to overcome the NPRA’s
7 presumption of openness by proving that the requested records are expressly and unequivocally
8 declared confidential by law. DETR’s attempt to shift its burden onto The Love Ranch is at odds
9 with the provisions of the NPRA, and nearly three decades of NPRA jurisprudence. *See* NRS
10 239.001(2)-(3); NRS 239.0113; *Gibbons*, 266 P.3d at 626-28; *Haley*, 234 P.3d at 924-26;
11 *Donrey*, 798 P.2d at 147.

12 **2. DETR’s Reliance on NRS 612.265 is Misplaced**

13 Because DETR refuses to acknowledge the applicable NPRA framework, it has utterly
14 failed to meet its burden to overcome the NPRA’s presumption of openness. DETR first invokes
15 NRS 612.265, claiming the statute broadly makes “*all* information and communications prepared
16 under Nevada’s unemployment chapter confidential and privileged.” *See* Answer at 9 (emphasis
17 added). NRS 612.265 does no such thing.

18 Notwithstanding the selective quotation offered in DETR’s Answer, NRS 612.265
19 provides, in relevant part, as follows:

20 1. Except as otherwise provided in this section and NRS
21 239.0115 and 612.642, information obtained from any employing
22 unit or person pursuant to the administration of this chapter and
23 any determination as to the benefit rights of any person is
24 confidential and may not be disclosed or be open to public
25 inspection *in any manner which would reveal the person’s or*
26 *employing unit’s identity.*

27 2. Any claimant or a legal representative of a claimant is
28 entitled to information from the records of the Division, to the
extent necessary for the proper presentation of the claimant’s claim
in any proceeding pursuant to this chapter. A claimant or an
employing unit is not entitled to information from the records of
the Division for any other purpose.

(Emphasis added).

1 Thus, although DETR glosses over it, NRS 612.265(1) narrowly exempts information
2 from the NPRA *only to the extent that disclosure of such information would reveal the identity*
3 *of a claimant for unemployment benefits or his or her employer*. Even then, this narrow
4 exemption is conditional, as NRS 612.265(2) provides that such information may still be
5 disclosed to the extent it is needed for any proceeding pursuant to NRS Chapter 612. In other
6 words, when NRS 612.265 is narrowly construed as required, *see Gibbons*, 266 P.3d at 626-28;
7 *Haley*, 234 P.3d at 924-26, it does not afford the sweeping protection DETR would have this
8 Court believe. Stated simply, NRS 612.265 does not even begin to justify DETR's blanket
9 denial of The Love Ranch's Public Records Request. Indeed, the Request expressly explained
10 that it does not seek the identity of any claimant or his or her employer. *See* Petition at Ex. 2.
11 The Request further explained that to the extent such information was reflected in the requested
12 records, such documents should still be disclosed, as they are necessary for the proper resolution
13 of its appeal of DETR's Determination. *See id.*

14 Further, any supposedly confidential portions of the requested records simply triggered
15 DETR's duty to redact such information. *See* NRS 239.010(3); *Haley*, 234 P.3d at 927-28. This
16 is a routine process and could have easily been completed given the narrow scope of
17 confidentiality arguably afforded by NRS 612.265(1). Specifically, the only information which
18 is confidential under NRS 612.265(2) is that "which would reveal the person's or employing
19 unit's identity." And, The Love Ranch specifically requested that any records that arguably
20 would reveal such information simply be redacted, with an appropriate log. *See* Petition at Ex. 2.
21 In summary, DETR has failed to demonstrate that NRS 612.265 expressly and unambiguously
22 declares the requested records to be confidential.

23 **3. DETR's Resort to Federal Regulations is Fruitless**

24 Another confidentiality provision, 20 C.F.R. § 603.4, is also raised by DETR for the first
25 time in its Answer. *See* Answer at 10. Even as paraphrased by DETR, however, this regulation
26 does not help its cause. Entitled, "[w]hat is the confidentiality requirement of Federal UC law?"
27 this provision reads, in pertinent part, as follows:
28

1 Interpretation. The Department of Labor interprets Section
2 303(a)(1), SSA, to mean that ‘methods of administration’ that are
3 reasonably calculated to insure the full payment of UC when due
4 must include provision for maintaining the confidentiality of any
5 UC information *which reveals the name or any identifying*
6 *particular about any individual or any past or present employer*
7 *or employing unit, or which could foreseeably be combined with*
8 *other publicly available information to reveal any such*
9 *particulars*, and must include provision for barring the disclosure
10 of any such information, except as provided in this part.

11 20 C.F.R. § 603.4(b) (emphasis added).

12 Thus, this regulation, like NRS 612.265, shields only a narrow segment of information
13 *to the extent it reveals the identity of an unemployment claimant or his or her employer.* As
14 noted, The Love Ranch did not request such information, and it expressly informed DETR of
15 this. Further, The Love Ranch specifically requested that if any such information was reflected
16 in the requested records it should be redacted. Rather than what the law required of it, DETR
17 issued a blanket denial of the Request. Thus, DETR has failed to meet its burden to demonstrate
18 that the requested records expressly and unambiguously declared confidential by law.
19 Accordingly, DETR’s assertions of confidentiality should be rejected.⁶

20 **G. DETR’s Arguments about the Specificity of the Request are Spurious**

21 Next, DETR claims the Request did not “identify specific records,” was “exceedingly
22 general in nature,” and was a “fishing expedition” for information “clearly” beyond the scope of
23 the NPRA. *See Answer at 12-13.* DETR further quibbles that the Request “was not contained
24 within DETR’s designated Public Records Form.” *See id.* at 13. DETR’s arguments are
25 spurious.

26 Although DETR lumps all of the categories in the Request together and announces they
27 are too general, The Love Ranch invites the Court to review the actual Request. *See Petition at*
28 *Ex. 2.* As can easily be seen from the Request, The Love Ranch spelled out, in painstaking
detail, the records sought. In fact, the Love Ranch’s description of the requested records is far

⁶DETR relies exclusively on NRS 612.265 and 20 C.F.R. § 603.4, announcing that it need not resort to the
Bradshaw balancing test as a basis for non-disclosure. *See Answer at 10-11.* Accordingly, DETR has failed to
demonstrate that the requested records are expressly and unambiguously declared by law to be confidential, and
waived any other basis, including the *Bradshaw* balancing test, for asserting that the records are confidential.

1 more detailed than public records requests the Nevada Supreme Court has routinely discussed
2 approvingly. *Compare* Petition at Ex. 2 with *Gibbons*, 266 P.3d at 625 and 630 n.3 (approving
3 request for “e-mail communications sent over a six-month time period between Governor
4 Gibbons and ten individuals” and describing the 106 e-mails in dispute as a “relatively limited
5 number”); *Haley*, 234 P.3d at 924 (approving request for “all records ‘detailing the status of any
6 and all [concealed firearms] permits issued by the Washoe County Sheriff’s Office to Gov. Jim
7 Gibbons,’ and all ‘documents detailing action taken by the Washoe County Sheriff’s Office on
8 that permit, including a decision to suspend, revoke, or hold the permit.’”).

9 Notably, NAC 239.865 authorizes an agency responding to a public records request to
10 ask for additional information or clarification from requesting party. Despite this, and despite a
11 specific invitation in the Request for DETR to contact The Love Ranch with any questions, *see*
12 Petition at Ex. 2, DETR does not deny that it failed to request any additional information or
13 clarification. Nor did DETR request any “narrowing” of the Request that it now suggests was
14 necessary. This belies DETR’s claim that the Request is not sufficiently detailed.

15 Finally, DETR’s quibbling over the fact that the Request was not contained on the
16 “designated” DETR form, but was instead detailed in an attachment to the form, is unavailing.
17 On the one hand, DETR claims the Request was too generalized. On the other hand, DETR
18 complains that the Request was not confined to the small space on DETR’s “designated” form,
19 where it would have been impossible to specify the records sought. In short, DETR’s arguments
20 are contradictory. Accordingly, DETR’s claim that the Request was not sufficiently detailed
21 should be rejected.

22 **H. DETR’s Belated and Haphazard Invocation of Privileges Fails**

23 **1. DETR Waived Any Privileges**

24 Finally, as yet another afterthought, DETR claims the requested records are privileged.
25 *See* Answer at 13-15. This claim fails for several reasons. To begin, DETR waived its
26 arguments regarding privileges due to its failure to timely raise them in its Response to The Love
27 Ranch’s Public Records Request, as required. *See Gibbons*, 266 P.3d at 629; NRS
28 239.0107(1)(d). In addition, DETR has waived any privileges a second time by failing to supply

1 a privilege log in this litigation at the point when it asserted the privilege. Under the Nevada
2 Rules of Civil Procedure, which are applicable in writ proceedings pursuant to NRS 34.300, a
3 party invoking a privilege must provide a privilege log. In particular,

4 [w]hen a party withholds information . . . by claiming that
5 it is privileged . . . the party shall make the claim expressly and
6 shall describe the nature of the documents, communications, or
7 things not produced or disclosed in a manner that, without
8 revealing information itself privileged or protected, will enable
other parties to assess the applicability of the privilege or
protection.

9 See NRCP 26(b)(5).

10 As the Nevada Supreme Court has noted, this rule “requires a party claiming privilege to
11 describe the nature of the materials that are allegedly privileged.” *Valley Health Sys., LLC v.*
12 *Eighth Judicial Dist. Court*, 252 P.3d 676, 681 n.7 (Nev. 2011). Federal courts have likewise
13 recognized that the party asserting a privilege has an affirmative burden to produce “a detailed
14 privilege log.” *Nevada Power Co. v. Monsanto Co.*, 151 F.R.D. 118, 121 (D. Nev. 1993). A
15 privilege log generally must “separately identify each document withheld under claim of
16 privilege, and set forth for each document (1) its type (i.e., letter, memo, notes, etc.), (2) its
17 author, (3) its intended recipients, (4) the names of any other individuals with access to the
18 document, (5) the date of the document, (6) the nature of the claimed privilege (i.e., attorney-
19 client, work-product, etc.), and (7) a brief summary of the subject matter of the document.” *Id.* at
20 121 n.5. Thus, a privilege log must contain enough detail to “enable other parties to assess the
21 applicability of the privilege or protection,” and the “[f]ailure to do so may constitute an
22 ‘implied’ waiver of the privilege or protection.” *In re Imperial Corp. of Am.*, 174 F.R.D. 475,
23 477 (S.D. Cal. 1997); see also *Koninklijke Philips Electronics N.V. v. KXD Technology, Inc.*,
24 2007 WL 778153, at *4 (D. Nev., Mar. 12, 2007).

25 Here, DETR has failed to provide any privilege log whatsoever, despite the fact that The
26 Love Ranch specifically requested a log if DETR withheld any of the requested records. Due to
27 this failure, DETR does not, for instance, separately identify any allegedly privileged materials
28 by date or otherwise, making it impossible to verify its claim that it is withholding materials that

1 purportedly predate its audit determination. Nor has DETR provided any summary of the subject
2 matter of the supposedly privileged materials, or the parties to any communications it is
3 withholding, making it impossible to verify its claim that it is withholding attorney-client
4 communications. Thus, by failing to provide a privilege log, DETR has completely failed to
5 support its claims of privilege, and thwarted The Love Ranch and this Court from meaningfully
6 evaluating DETR's assertions of privilege. Therefore, DETR has impliedly waived any of its
7 purported privileges.

8 2. ***DETR's Belated Assertion of the Deliberative Process Privilege Fails***

9 (a) ***DETR's invocation is conclusory and unsupported***

10 Even if not already waived, DETR's eleventh-hour assertion of the deliberative process
11 privilege is unavailing. DETR claims, in astonishingly conclusory fashion, that the deliberative
12 process privilege "clearly" applies because the requested records are "clearly" predecisional and
13 deliberative. *See* Answer at 14. All that DETR offers in support of this claim is its counsel's
14 sweeping assertion that the requested records "involve" its deliberative processes. *See id.*
15 DETR's invocation of the deliberative process privilege is embarrassingly deficient.

16 "It is well settled that privileges, whether creatures of statute or the common law, should
17 be interpreted and applied narrowly." *DR Partners*, 6 P.3d at 468. As DETR admits, *see*
18 Answer at 14, the deliberative process privilege does not protect "purely factual matters." *DR*
19 *Partners*, 6 P.3d at 469. Instead, "[t]o qualify for non-disclosure under this privilege, the
20 requested documents must be both predecisional and deliberative." *Id.* To satisfy the
21 "deliberative" prong, "the materials must consist of opinions, recommendations, or advice about
22 agency policies." *Id.* "The agency bears the burden of establishing the character of the
23 decision, the deliberative process involved, and the role played by the documents in the course of
24 that process." *Id.* at 470 (quoting *Paisley v. C.I.A.*, 712 F.2d 686, 698 (D.C. Cir. 1983)).

25 Here, DETR does nothing to demonstrate that the requested records are anything other
26 than purely factual. This is a glaring omission. Nor does DETR attempt to meet its burden to
27 establish the character of the decision, the deliberative process, the role played by the documents
28 in that process. In fact, does DETR even bother to support its assertions with so much as a

1 declaration and, as noted, DETR does not even provide any description of the documents it has
2 withheld. DETR has utterly failed to meet its burden to show that the deliberative process
3 privilege applies.

4 ***(b) Any deliberative process privilege is qualified, and overcome here***

5 Even if DETR could satisfy its threshold burden, “a deliberative process privilege, even
6 when applicable, is conditional.” *DR Partners*, 6 P.3d at 471. As “a qualified privilege,” it can
7 be overcome by a showing that the “need for the information outweighs the regulatory interest
8 in preventing disclosure.” *Id.* (quoting *Capital Info. Group v. Office of the Governor*, 923 P.2d
9 29, 36 (Alaska 1996)). Here, any supposed regulatory interest DETR may have in non-
10 disclosure is easily overcome. In contrast to DETR’s unarticulated and unsupported interests in
11 non-disclosure, The Love Ranch needs the requested records for several critical reasons. Among
12 other things, the requested records are necessary to expose DETR’s bias and capriciousness.
13 Nevada law—specifically the NPRA—recognizes The Love Ranch’s legitimate interest in doing
14 so. Accordingly, DETR’s invocation of the deliberative process privilege should be rejected.

15 **3. *The attorney-client privilege does not shield the requested public records***

16 Parroting its conclusory arguments regarding the deliberative process privilege, DETR
17 next claims that the requested records are “clearly” attorney-client privileged. *See* Answer at 15.
18 Once again, DETR’s haphazard invocation of privilege fails.

19 Even if DETR could somehow establish that it has not already waived the attorney-client
20 privilege, it cannot meet its burden to show that the requested records are privileged. As with the
21 deliberative process privilege, the party asserting the attorney-client privilege bears the burden of
22 establishing that it applies. *DR Partners*, 6 P.3d at 468; *United States v. Martin*, 278 F.3d 988,
23 1000 (9th Cir. 2002); *Weil v. Investment/Indicators, Research & Management, Inc.*, 647 F.2d 18,
24 24 (9th Cir. 1980). “[B]lanket assertions are ‘extremely disfavored,’” *Martin*, 278 F.3d at 1000,
25 and, “[b]ecause it impedes full and free discovery of the truth, the attorney-client privilege is
26 strictly construed.” *Weil*, 647 F.2d at 25. As the Nevada Supreme Court has put it, “[w]hatever
27 their origins, these exceptions to the demand for every man’s evidence [i.e., privileges] are not
28

1 lightly created nor expansively construed, for they are in derogation of the search for truth.
2 *Ashokan v. State, Dep't of Ins.*, 856 P.2d 244, 247 (Nev. 1993).

3 A party asserting the privilege “*must identify specific communications* and the grounds
4 supporting the privilege as to each piece of evidence over which privilege is asserted.” *Martin*,
5 278 F.3d at 1000 (emphasis added). Further, it is axiomatic that in order for the attorney-client
6 privilege to apply, “the communication must be between the client and the attorney *for the*
7 *purpose of obtaining legal advice.*” *Id.* (emphasis added). In determining whether a document
8 was created for the purpose of securing legal advice, “courts have examined the nature, content,
9 and context in which the document was prepared.” *LightGuard Systems, Inc. v. Spot Devices,*
10 *Inc.*, 281 F.R.D. 593, 600 (D. Nev. 2012).

11 Here, DETR’s blanket invocation of the attorney-client privilege fails for multiple
12 reasons. To begin, DETR identifies no specific communications or the grounds supporting the
13 privilege as to each communication over which it asserts the privilege. Nor does DETR provide
14 any detail to support its claim that the communications it is apparently withholding were made
15 for the purpose of obtaining legal advice. And, DETR does not provide any evidence, such as a
16 declaration, to support its claim of privilege. Accordingly, DETR has failed to meet its burden to
17 show the requested records are privileged.⁷

18 **4. DETR should have Redacted any Arguably Privileged Records**

19 A careful examination of the (13) categories sought in the Request shows that the vast
20 majority do even remotely implicate any supposed privileges. See Petition at Ex. 2. The only
21 categories in the Request that could arguably implicate privileged material are the requests for e-
22 mails and communications by DETR about its audit and determination. It is conceivable that
23 portions of a small number of those communications implicated a privilege, such as emails to
24 and from DETR’s legal counsel, but it was improper for DETR to deny *all* of the requested
25 communications on basis that some portions might, hypothetically, be privileged. Any
26

27 ⁷Also unavailing is DETR’s presumptuous announcement that the Court “must” deny The Love Ranch’s
28 request for attorneys’ fees. See Answer at 15-16. As detailed in the Petition, attorney’s fees and costs are expressly
authorized here by the NPRA.

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1 privileged portions simply should have been redacted, with an accompanying privilege log
2 describing any redactions, and the remainder of the communications should have been disclosed.

3 **III. CONCLUSION**

4 For the foregoing reasons, the Petition should be granted in its entirety.

5 The undersigned affirms that the foregoing does not contain the social security of any person.

6 DATED this 2nd day of January 2018.

7 
8 Anthony L. Hall, Esq. (SBN 5977)
9 Ricardo N. Cordova, Esq. (SBN 11942)
10 HOLLAND & HART LLP
11 5441 Kietzke Lane, Second Floor
12 Reno, Nevada 89511
13 Tel.: 775-327-3000
14 Fax: 775-786-6179
15 Ahall@hollandhart.com
16 Rncordova@hollandhart.com

17 *Attorneys for Petitioner*

EXHIBIT "A"

EXHIBIT "A"

HOLLAND & HART
THE LAW OUT WEST



Anthony L. Hall
Phone (775) 327-3000
Fax (775) 786-6179
ahall@hollandhart.com

June 6, 2017

Via U.S. Mail

Attn: Contributions / Appeal Tribunal
Nevada Department of Employment,
Training and Rehabilitation
Employment Security Division
Field Audit Office
500 East Third St.
Carson City, NV 89713

Re: **Sierra National Corporation**
Account No. 16379400
Subpoena to Compel the Production of Records

Dear Appeal Tribunal:

As you know, this firm represents Sierra National Corporation, Inc. ("SNC"), dba The Love Ranch, in its appeal of the audit determination issued by the Nevada Department of Employment, Training and Rehabilitation ("DETR"), dated May 12, 2017 (the "audit and May 12, 2017 determination"). Pursuant to NRS 612.270(1)(c), SNC requests that the Appeal Tribunal issue a subpoena to DETR to compel its production of the records set forth below to SNC. These documents should be provided to SNC's counsel, Anthony L. Hall, Esq., Holland & Hart, 5441 Kietzke Lane, Second Floor, Reno, Nevada 89511, within twenty-one (21) days of the date of this request.

General Instructions

DETR should be compelled to produce any and all documents that are in its possession, custody or control, that fit any of the descriptions below. An attorney for SNC will clarify any ambiguity in the following definitions and descriptions upon request.

Definitions

1. "Document" means all forms of tangible expression including, but not limited to, e-mails, notes, letters, memoranda, writings, diaries, calendars, day-planners,

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videotapes, audio tapes, photographs, computer disks, printouts, data on the hard drives of computers, etc.

2. "DETR" specifically includes any individual acting on DETR's behalf, including its auditors, agents, representatives, and employees;

3. "Referencing," "referring to," or "regarding" means, without limitation, constituting, discussing, covering, supporting or contradicting, directly or indirectly in any way.

4. The singular form of a noun or pronoun includes the plural form, and the plural form includes the singular.

5. The conjunctions "and" and "or" should be construed either disjunctively or conjunctively so as to bring within the scope of the subpoena all documents that otherwise might be construed to be outside of its scope.

6. If DETR objects to any request in part, it should be directed to respond to such request fully to the extent that it is not objected to, and set forth specifically the grounds upon which the objection is based.

7. If DETR withholds any document on the basis of privilege, it should be directed to provide the following information: (1) the date the document was prepared or the date it bears; (2) the author of the document; (3) the addressee(s) and recipient(s) of the document; (4) the title and/or subject matter of the document; (5) the source of the document; (6) the identity of persons to whom the document or any portion thereof has already been revealed, and (7) the basis for withholding the document.

Description of Documents Sought

1. Any and all records of all of DETR's audit and May 12, 2017 determination regarding SNC, including notices, correspondence, notes, audio or video recordings or other records of conversations or interviews with any witnesses and any documents or other tangible evidence obtained by NDETR (such as photographs, film, recordings, text messages, and emails), and any other evidence obtained by NDETR in connection with any of the its audits and May 12, 2017 determinations regarding SNC.

2. Any and all documents prepared, relied upon, consulted, or reviewed by DETR in connection with its audit and May 12, 2017 determination, including but not limited to, all notes, e-mails and communications regarding the audit, including the decision to conduct the audit, or directing or framing the scope of the audit.

3. Any and all records of all of DETR's prior audits and determinations regarding SNC, including notices, correspondence, notes, audio or video recordings or other



records of conversations or interviews with any witnesses and any documents or other tangible evidence obtained by DETR (such as photographs, film, recordings, text messages, and emails), and any other evidence obtained by DETR in connection with any of the prior audits and determinations regarding SNC.

4. Any and all documents prepared, relied upon, consulted, or reviewed by DETR in connection with its prior audits and determinations regarding SNC, including but not limited to, all notes, e-mails and communications regarding the audits, including the decisions to conduct the audits, or directing or framing the scope of the audits.

5. Any and all records of all of DETR's audits and determinations regarding other brothels, including notices, correspondence, notes, audio or video recordings or other records of conversations or interviews with any witnesses and any documents or other tangible evidence obtained by DETR (such as photographs, film, recordings, text messages, and emails), and any other evidence obtained by DETR in connection with any of the audits and determinations regarding other brothels.

6. Any and all documents prepared, relied upon, consulted, or reviewed, by DETR in connection with its audits and determinations regarding other brothels, including but not limited to, all notes, e-mails and communications regarding the audits, including the decisions to conduct the audits, or directing or framing the scope of the audits.

Thank you for your attention to this matter. Please do not hesitate to contact me if you have any questions or need anything further.

Sincerely,

Anthony L. Hall, Esq.
of Holland & Hart LLP

ALH/RNC: mf
9876634_2

EXHIBIT “B”

EXHIBIT “B”

Employment Security Division
Board of Review
500 East Third Street
Carson City, NV 89713
Tel (775) 687-6820
Fax (775) 684-0486



5289171
<https://www.nvdetr.org>

BOARD OF REVIEW

In the Matter of:

SAGEBRUSH LLC
162 GARNET CIRCLE
CARSON CITY, NV 89706

Date Decision is Mailed: 12/13/2016
Date Board's Decision is Final: 12/27/2016
Final Date for Appeal to Court: 01/09/2017

SSN: REDACTED

MEGAN LAPORTE
116 LINEHAN RD
MOUND HOUSE, NV 89706

Appeal Rights: An appeal to the state district court of the county in which the work was performed must be filed on or before the "Final Date for Appeal to Court," as set forth above (NRS 612.525 and 612.530).

Docket Number: V-16-B-01175 (V-16-A-06842)

REVERSAL OF REFEREE'S DECISION:

Having reviewed the complete record and having considered the arguments of the parties:

The Board of Review reverses the decision of the appeals referee, issued pursuant to Nevada Revised Statutes (NRS) 612.380 (voluntary quit). The referee found that the claimant had good cause to quit her employment. The Board disagrees.

NRS 612.380 provides that a person is ineligible for benefits if she has left her last or next-to-last employment without good cause, or to seek other employment, and until she earns remuneration in covered employment equal to or exceeding her weekly benefit amount in each of ten weeks, or until she secures other employment.

To constitute "good cause" for quitting, a claimant must establish a compelling reason that would cause a reasonably prudent person, genuinely desirous of maintaining her employment, to consider leaving. Having done so, she must act reasonably and in good faith. Her actions must be consistent with a genuine desire to resolve the matter without sacrificing her employment. Further, "good cause" is generally held to mean that the individual had reasons so urgent and compelling that she had no reasonable alternative to quitting, and that she exhausted reasonable recourse prior to leaving her job.

Additionally, the Unemployment Compensation Law is not intended to provide financial support for individuals endeavoring to start a new business. Thus, good cause for voluntarily quitting covered employment is not established, if the reason for quitting is to enter self-employment and become an independent contractor. Furthermore, the Nevada Supreme Court has held that the Board of Review acts as "an independent trier of fact . . ." *Clark County School District v. Bundley*, 122 Nev. 1440, 1444 (2006) (citation omitted).

Docket #V-16-B-01175

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In the present case, the Board finds the following:

On September 2, 2016, the Employment Security Division issued a disqualifying determination, after the claimant filed for unemployment insurance benefits and was found to have voluntarily quit her previous employment, without good cause. The claimant appealed the disqualification, and an evidentiary hearing was conducted. The written decision issued after the evidentiary hearing found the claimant eligible for benefits, reversing the disqualification from the original determination.

However, as an aside, the Board notes that in addition to a dearth of information in the referee's written decision, in an apparent scrivener's error the written decision purports to "affirm" the determination, when the referee's intent was to "reverse" the determination. Nevertheless, as explained, *infra*, the Board finds that the conclusion which was a scrivener's error of the referee, was in fact the correct result.

In the instant case, the claimant was a bartender for the employer. The employer owned other businesses, including a brothel, "Kit Kat Ranch." The prostitutes in the brothel were not employees of the brothel, but rather, were independent contractors, i.e., they were engaged in self-employment. The claimant had decided she wanted to engage in self-employment as a prostitute in the Kit Kat Ranch. On May 25, 2016, the claimant worked her last shift for the employer as a bartender, and she voluntarily quit her bartender position to become an independent contractor in the Kit Kat Ranch brothel.

Based upon the foregoing, the Board finds that the claimant has not established a compelling or urgent reason for choosing to become unemployed, and she did not secure other employment prior to quitting, since she quit to start her own business. Accordingly, good cause for quitting has not been established.

DECISION: The appealed decision, issued under NRS 612.380, is reversed. The claimant is disqualified for benefits from May 22, 2016 onward, until she works in covered employment and earns an amount equal to or greater than the weekly benefit amount in each of ten weeks.

This decision is unanimous.

BOARD OF REVIEW

/s/ KATIE JOHNSON, CHAIRPERSON

Docket #V-16-B-01175

Page 2 of 2

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Recipient List

MEGAN LAPORTE
116 LINEHAN RD
MOUND HOUSE, NV 89706-7036

SAGEBRUSH LLC
162 GARNET CIRCLE
CARSON CITY, NV 89706

granted

REC'D & FILED

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

2017 JAN -4 PM 2: 06

SIERRA NATIONAL CORPORATION, dba
THE LOVE RANCH, a Nevada Corporation,

SUSAN MERRIWETHER
CLERK
Case No. 170C00222-1B
OFF/MT

Petitioner,

Dept. No. I

vs.

NEVADA DEPARTMENT OF
EMPLOYMENT, TRAINING AND
REHABILITATION – EMPLOYMENT
SECURITY DIVISION,

Respondent.

**PROPOSED ORDER GRANTING MOTION FOR LEAVE TO FILE REPLY IN
SUPPORT OF PETITION FOR WRIT OF MANDAMUS**

This matter came before the Court upon the Motion for Leave to File Reply In Support of
Petition for Writ of Mandamus (“Motion”), filed on or about December 5, 2017, by Petitioner
Sierra National Corporation, dba The Love Ranch (“Petitioner”), pursuant to NRS 34.260.
Respondent Nevada Department of Employment, Training and Rehabilitation – Employment
Security Division (“Respondent”) filed an Opposition. Petitioner filed a Reply, which included a
Proposed Reply in Support of Petition for Writ of Mandamus as Exhibit 2. After a careful
review of the Motion, Opposition, Reply, and Proposed Reply, and the other papers filed with
the Court, the Court finds that the Motion should be GRANTED. Accordingly, the Court hereby
directs the Clerk of Court to detach and file The Love Ranch’s Proposed Reply in Support of
Petition for Writ of Mandamus.

DATED this 4th day of January, 2018.

[Signature]
DISTRICT COURT JUDGE

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HOLLAND & HART LLP
5441 KIETZKE LANE
SECOND FLOOR
RENO, NV 89511

1 **CERTIFICATE OF MAILING**

2 Pursuant to NRCP 5(b), I certify that I am an employee of the First Judicial District
3 Court, and that on this 4 day of January, 2018, I deposited for mailing, postage paid, at Carson
4 City, Nevada, a true and correct copy of the foregoing Order addressed as follows:

5 Anthony L. Hall, Esq.
6 Ricardo N. Cordova, Esq.
7 Holland & Hart LLP
8 5441 Kietzke Lane, Second Floor
9 Reno, NV 89511

10 Laurie Trotter, Esq.
11 NDETR-Employment Security Division
12 1340 South Curry Street
13 Carson City, NV 89703

Sydnie Wells
Sydnie Wells
Law Clerk, Dept. 1

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Ahall@hollandhart.com
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Attorneys for Petitioner

**IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY**

SIERRA NATIONAL CORPORATION, dba
THE LOVE RANCH, a Nevada Corporation,

Petitioner,

vs.

NEVADA DEPARTMENT OF
EMPLOYMENT, TRAINING AND
REHABILITATION – EMPLOYMENT
SECURITY DIVISION,

Respondent.

Case No. 170C002221B

Dept. No. I

REC'D & FILED
2018 JAN -5 AM 11:10
SUSAN MERRIWETHER
CLERK
BY *[Signature]*
DEPUTY

PROPOSED REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

Petitioner, Sierra National Corporation, dba The Love Ranch (“The Love Ranch”),
submits this Reply in support of its Petition for Writ of Mandamus (“Petition”).

I. INTRODUCTION

As Justice Neil Gorsuch has observed, “[t]o this day, one of the surest proofs any nation enjoys an independent judiciary must be that the government can and does lose in litigation before its ‘own’ courts like anyone else.” *In re Renewable Energy Dev. Corp.*, 792 F.3d 1274, 1278 (10th Cir. 2015) (Gorsuch, J.). This observation is especially poignant in this matter. In its Answer to the Petition (“Answer”), Respondent Nevada Department of Employment, Training and Rehabilitation – Employment Security Division (“DETR”) has asserted a series of new and spurious arguments. As a consequence, DETR has utterly failed to meet its burden to overcome the presumption that the public records requested by The Love Ranch are open to disclosure. If

1 credited, DETR's obstructionism would result in the precise type of governmental secrecy,
2 unaccountability, and capriciousness the Nevada Public Records Act ("NPRA") was intended to
3 root out. The Petition should be granted in its entirety.

4 **II. ARGUMENT**

5 **A. DETR Waived the Vast Majority of the Arguments Raised in its Answer**

6 DETR's Answer consists almost entirely of newly-raised arguments that it failed to assert
7 in its Response to The Love Ranch's Public Records Request. In DETR's terse, one-page
8 Response, it based its blanket denial of the Request solely on two grounds: (1) the Request
9 allegedly did not sufficiently identify specific records; and (2) DETR is not required to create
10 Records to satisfy the request. *See* Petition at Ex. 3.

11 Now, however, DETR takes a kitchen-sink approach, asserting a host of new arguments
12 for the first time in its Answer. For instance, DETR argues that The Love Ranch "has a plain,
13 speedy and adequate remedy under the NRS Chapter 612 administrative process" and "failed to
14 exhaust its administrative remedies." DETR raises several other new arguments, including: The
15 Love Ranch was "less than candid with the Court regarding the discovery it had already received
16 in the pending administrative proceeding"; the NPRA "was not intended for use after the start of
17 litigation"; the requested records are "confidential by state and federal law"; and the Request
18 sought "privileged material."

19 DETR did not raise any of these arguments in its Response to the Public Records
20 Request, as required. *See Reno Newspapers, Inc. v. Gibbons*, 266 P.3d 623, 629 (Nev. 2011)
21 (even prior to the initiation of an NPRA lawsuit, the agency withholding records has a legal
22 obligation to provide citation to legal authority "that justifies nondisclosure," and "merely
23 pinning a string of citations to a boilerplate declaration of confidentiality" does not suffice); *see*
24 *also* NRS 239.0107(1)(d). Accordingly, DETR waived these arguments. Notably, DETR does
25 not contend otherwise in its Answer. Even if not waived, DETR's newly-raised arguments are
26 unavailing, as detailed below.

27 **B. Mandamus is the Proper Vehicle to Challenge the Denial of an NPRA Request**

28 One of the new arguments in DETR's Answer is procedural, namely, that mandamus

1 relief is not available because there is allegedly a plain, speedy, and adequate remedy available
2 under the unemployment compensation statutes set forth in NRS Chapter 612. *See* Answer at 4-
3 5. According to DETR, The Love Ranch is seeking to “short-circuit” the administrative process,
4 which, DETR says, supplies the exclusive means to seek records associated with such disputes.
5 *See id.* DETR is mistaken.

6 The Nevada Legislature has expressly declared that a party who has been denied access
7 to public records may proceed with an action before the district court:

8 If a request for inspection, copying or copies of a public
9 book or record open to inspection and copying is denied, *the*
10 *requester may apply to the district court* in the county in which the
book or record is located for an order:

11 (a) Permitting the requester to inspect or copy the book or
record; or

12 (b) Requiring the person who has legal custody or control
13 of the public book or record to provide a copy to the requester, as
applicable.

14 NRS 239.011(1) (emphasis added).

15 It is undisputed that The Love Ranch’s request for public records was denied. Thus,
16 under the plain language of NRS 239.011(1), The Love Ranch has a statutory right to bring this
17 action. Nowhere does this statute exempt public records that may also be relevant in
18 administrative proceedings under the unemployment compensation statutory scheme set forth in
19 NRS Chapter 612. Moreover, the Nevada Supreme Court has held that mandamus is the
20 appropriate procedural vehicle to compel production of public records. *DR Partners v. Bd. of*
21 *County Comm’rs*, 6 P.3d 465, 468 (Nev. 2000). In fact, the law has been settled on this point for
22 nearly thirty years. *See Morrow v. LeGrand*, 2017 WL 1397335, at *1, Case No. 68768 (Nev.,
23 April 14, 2017) (unpublished disposition) (“This court has repeatedly recognized that mandamus
24 is the appropriate procedural remedy to compel the production of public records under NRS
25 Chapter 239.”).¹

26
27 ¹*See, e.g., Las Vegas Metro. Police Dep’t v. Blackjack Bonding, Inc.*, 343 P.3d 608 (Nev. 2015) (affirming
28 writ of mandamus compelling the disclosure of public records); *Reno Newspapers, Inc. v. Gibbons*, 266 P.3d 623
(Nev. 2011) (“mandamus was the appropriate procedural vehicle” to seek access to public records and a log
regarding records withheld by the government); *PERS v. Reno Newspapers*, 313 P.3d 221 (Nev. 2013) (affirming

1 The Nevada Supreme Court recently reaffirmed the validity of this principle in *City of*
2 *Sparks v. Reno Newspapers*, 399 P.3d 352 (2017). There, much like DETR in the instant case,
3 the City of Sparks argued that mandamus relief was not available because it had denied a public
4 records request by invoking a confidentiality regulation which could have been challenged by
5 way of a declaratory judgment proceeding under NRS 233B.110 of the Administrative Procedure
6 Act. *Id.* at 354. The court disagreed, observing “a writ of mandamus is generally the appropriate
7 means for pursuing the disclosure of public records pursuant to NRS 239.011.” *Id.* at 355. In
8 addition, the newspaper was challenging the denial of its records request, not merely seeking to
9 determine its rights regarding the confidentiality regulation invoked by the City. *Id.* Thus, NRS
10 239.011 specifically applied, and took precedence over a separate statute generally providing an
11 alternate avenue of relief. *Id.*

12 Here, as in *City of Sparks v. Reno Newspapers*, DETR fundamentally mischaracterizes
13 the records at issue and relief sought by the Love Ranch. To be sure, some of the records sought
14 by The Love Ranch may ultimately prove relevant in its pending administrative appeal. But
15 many of the records sought may also expose DETR’s systematically biased and arbitrary
16 practices.² The public undoubtedly has an interest in rooting out such activity, and the NPRA
17 provides citizens an avenue to do so. *See, e.g., DR Partners*, 6 P.3d at 467 (approving of an
18 NPRA request made in connection with investigation into governmental waste and the extent of
19 influence over public officials by private lobbyists); *Donrey*, 798 P.2d at 145 (approving of an
20 NPRA request to obtain a report generated by the Reno Police Department regarding bribery of a
21 public official).

22 Most importantly, the remedial process The Love Ranch is entitled to pursue to enforce

23
24 writ of mandamus requiring production of public records); *Donrey of Nevada v. Bradshaw*, 798 P.2d 144, 148 (Nev.
1990) (directing district court to issue a writ of mandamus compelling disclosure of public records).

25 ²As The Love Ranch detailed in its Petition, DETR has been well-aware of The Love Ranch’s classification
26 of its tenants as independent contractors. Despite conducting audits of The Love Ranch and affiliated brothels over
27 the years, DETR did not object to the classification of the tenants as independent contractors, let alone request that
28 contributions be made into the State Unemployment Fund based upon the tenants’ earnings. DETR does not dispute
any of this in its Answer. Nor could it. As recently as December 2016—in the midst of its purportedly random
audit of the Love Ranch—DETR’s Board of Review affirmed its view that that The Love Ranch’s tenants are
independent contractors, not employees. *See* Board of Review Order, attached as “Exhibit A.”