Case No. 80637

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

STATE OF NEVADA EX REL. DEPARTMENT OF TAXATION,

Petitioner,

v.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; and THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE,

Respondents,

NEVADA WELLNESS CENTER, LLC,

Real Party in Interest.

ANSWER BY REAL PARTY IN INTEREST TO EMERGENCY PETITION FOR WRIT OF MANDAMUS OR WRIT OF PROHIBITION UNDER NRAP 21(a)(6)

Respectfully submitted by:

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As directed by this Court, Real Party in Interest, Nevada Wellness Center, LLC (NWC) hereby submits its Answer to the Petitioner's Emergency Petition for Writ relief, on behalf of Respondents.

I.

INTRODUCTION

The Petitioner, the State of Nevada Department of Taxation (the State or Department) asks this Court to "reverse the district court order compelling [the Department] to produce the contents of the personal cell phones" of a government contractor's employees performing services for the Department, which the State deemed "both necessary and in the best interests of the State of Nevada." *See* Writ Petition at 1; APP000001.

As a preliminary matter, this Court's intervention is not necessary. The district court's order, based on the Discovery Commissioner's well-reasoned and limiting recommendations, does not exceed the lower court's jurisdiction or invade any fundamental rights.

To fully address this discovery dispute, which questions the civil discovery procedures followed by the district court and the Discovery Commissioner, a complete record of the proceedings below is necessary. The Department, however, leaves out significant portions of the record in the chronology submitted and only

included a partial record in its appendix. When reviewed in its entirety, the record shows how the Discovery Commissioner and the district court carefully considered the arguments of both sides before making its decision to compel discovery of information on the cell phones of Manpower employees.

II.

ISSUES PRESENTED

The Department's arguments are fatally flawed:

(1) The district court citation to a prior version of NRCP 16.1 does not make its order procedurally erroneous, and the district court did not misapply the rule or abuse its discretion;

(2) Contrary to the Department's claim, under the applicable version of NRCP 16.1, the Department does have "possession, custody or control" of the Manpower employee cell phones;

(3) Nothing in the order for production of the Manpower employee cell phones violated the employees' privacy interests or will cause irreparable harm.[1]

The district court did not abuse its discretion or act arbitrarily or capriciously, as argued by the Department. Nonetheless, to facilitate a resolution of this discovery

[1] The Department's request for a stay is moot in light of this Court's Order Directing Expedited Answer and Imposing Temporary Stay.

dispute, NWC proposes a modification of the district order as follows: the Department's duty to produce is limited to production of only those Manpower employee cell phone records which relate to this case and/or relate to the 2018 recreational marijuana application process. In addition, NWC proposes that the order be modified to permit the Department to first preview the extraction reports from the graders' phones and thereafter produce only relevant, discoverable information as prescribed by the Discovery Commissioner and as done previously by the Department relative to its present and former employees.

III.

STANDARD OF REVIEW

"Mandamus will not lie to control discretionary action unless discretion is manifestly abused or is exercised arbitrarily or capriciously." *Emerson v. Eighth Judicial District Court*, 127 Nev. 672, 676, 263 P.3d 224, 227 (2011) *citing Round Hill Gen. Imp. Dist. v. Newman,* 97 Nev. 601, 603-604, 637 P.2d 534, 536 (1981). *See also Skender v. Brunsonbuilt Constr. & Dev. Co., LLC,* 122 Nev. 1430, 148 P.3d 710 (2006) ("An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law.") "A trial court manifestly abuses its discretion where its application of the law is "clearly erroneous." *State v. Dist. Ct. (Armstrong),* 127 Nev. 927, 932, 267 P.3d 777, 780 (2011).

Here, the district court did not manifestly abuse its discretion or act arbitrarily or capriciously. Instead, the district court and the Discovery Commissioner acted conservatively in fashioning relief that is in line with the Nevada Rules of Civil Procedure.

IV.

BACKGROUND FACTS AND PROCEDURAL HISTORY

A. NWC's Case is Based on the Department's Improper Denial of NWC's 2018 Applications for Recreational Marijuana Retail Licenses

NWC's Application for Licenses

In 2018, NWC submitted applications for recreational marijuana retail licenses to own and operate stores in Clark County, Las Vegas, North Las Vegas and Reno. Pursuant to Nevada law, the State delegated responsibility to the Department of Taxation for allocating licenses to qualified applicants. The Department was tasked with ranking the applications based on a number of factors[2] and to award licenses to the applicants with the highest scores. All of NWC's 2018 license applications were denied by the Department.

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[2] The following criteria factored into ranking the applicants: business experience, diversity of the owners, taxes paid and other indicia of beneficial financial contributions, educational achievements, a plan for care, quality and safekeeping of marijuana from seed to sale, financial plan and resources and experience of personnel and the principals. APP000080.

NWC had previously gone through the licensing process in 2015 when it applied for medical marijuana licenses. In 2015, NWC proved to be a highly qualified applicant, indeed receiving the highest ranking for its Las Vegas application and the seventh highest ranking for its Henderson application. RSA000138-000140. The Department rewarded NWC's high scores with licenses to operate medical marijuana stores in Las Vegas and Henderson.

The ranking process in 2015 utilized evaluation criteria substantially similar to the 2018 process, except that in 2018 an additional factor was added: diversity consideration regarding race, ethnicity or gender of applicants. Despite NWC's status as the only 100% minority owned applicant, the Department denied *all* of NWC's 2018 license applications.

To evaluate the ranking factors, the State delegated responsibility to third-party contractor, Manpower. APP000001-0000063. The State deemed the delegation "both necessary and in the best interests of the State." *See* APP000001, Contract Recitals.

The Contract spells out Manpower's commitments to preserve and make available for inspection documents and information related to Manpower's efforts in completing the scoring process. APP000003, §9, Inspection and Audit. Section 9(A) provides that: "[Manpower] agrees to keep and maintain under generally accepted

accounting principles (GAAP) full, true and complete records, contracts, books, and documents as are necessary to ensure compliance with State and federal law." *Id.* Further, the Contract provides that:

> [Manpower] agrees that the relevant books, records (written, electronic, computer related or otherwise), including, without limitation, relevant accounting procedures and practices of [Manpower] or its subcontractors, financial statements and supporting documentation, and documentation related to the work product shall be subject, at any reasonable time, to inspection, examination, review, audit, and copying at any office or location of [Manpower] where such records may be found.

App000003, §9(B). "[W]ritten, electronic computer related" records includes the data on cell phones.[3]

NWC Sues the Department to Redress the Improper License Denials

On January 15, 2019, NWC sued the Department. APP000078-000080. NWC's Complaint and Petition for Judicial Review or Writ of Mandamus also seeks declaratory relief and presents issues of significant public policy. *Id.*[4]

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[3] *See Riley v. California*, 573, U.S. 373, 393 (2014). In *Riley,* the Supreme Court recognized the pervasive nature of cell phones and that cell phones are computers. According to the Court, "[t]he term 'cell phone' is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers."

[4] On January 8, 2020, NWC filed an Amended Complaint. APP000232-000267. The NWC case was also consolidated with seven other cases challenging the

The Instant Writ Petition Asks this Court to Referee Over a Discovery Issue

The Department's Writ Petition seeks a ruling from this Court regarding the lower courts' enforcement of Nevada's discovery rules. The dispute started just over one year ago when, on February 27, 2019, NWC filed a motion to preserve electronically stored information. RSA000001-0000020. The dispute culminated with the district court entering an order on February 10, 2020 compelling the Department to produce Manpower employee cell phones, and "all information obtained from the cell phones immediately." APP000276.

It is NWC's position that the district court and the Discovery Commissioner followed an orderly, evaluative process and thoughtfully applied discovery procedures and rules in issuing the order to compel production of the Manpower workers' cell phones. The Department, in contrast, asserts the process and the ultimate order reflect an "arbitrary and capricious" decision.

B. The Department Ardently Fights NWC's Efforts to Preserve and Obtain Relevant Electronic Information, Even Though Manpower Agreed to Provide the Information to the State

NWC's Files an Emergency Motion for Preservation of Evidence

On February 27, 2019, NWC filed an Emergency Motion seeking an order directing the Department to preserve "relevant electronically stored information from

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Department's grading process and its improper denial of license applications.

servers, stand-alone computers, and/or cell phones." RSA000001-000020.[5] NWC's motion sought to ensure that potentially critical electronic evidence be preserved and available in this case. NWC had "serious concerns about the preservation of evidence." RSA000010.

The Department filed its opposition on March 7, 2019. RSA000021-000033. The Department's primary argument was that the "Sedona Principles"[6] did not support preserving this potentially critical evidence. The Department argued NWC had not provided any evidence demonstrating the real danger of evidence destruction and that no other remedy was available or that such an order would be appropriate. The Department also argued that the scope of discovery was beyond or not

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[5] NWC directed the Emergency Motion to "SMC [state marijuana consultant], Ms. Karen Cronkita and Mr. Damon Hernandez of Department of Taxation." *Id.*

[6] Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, 19 Sedona Conf. J. 1 (2018). *See also Lawson v. Love's Travel Stops & Country Stores, Inc.,* 2019 U.S. Dist. LEXIS 219687, *1-2 (M.D.Pa. 2019). The *Lawson* court observed that "the Sedona Principles recognize that the technological advances that enable us to store countless pieces of data electronically do not alter the legal obligations of parties in discovery. Therefore, parties must still follow the principles embodied in the Federal Rules of Civil Procedure when preserving, collecting, evaluating, and disclosing ESI." The *Lawson* court also recognized that "[f]oremost among these obligations is a duty to work in a cooperative and collaborative fashion to devise discovery strategies which allow the transparent disclosure of relevant evidence that is not cloaked in any claim of privilege."

proportional to the legitimate discovery purposes of the case under the Sedona Principles and NRCP 26(g)(1)(b)(iii).

The Department also advanced concerns regarding confidentially and claimed that certain financial and other proprietary information was protected pursuant to NRS 360.255. Throughout its opposition, the Department also asserted privacy concerns of the *Department employees*. According to the Department:

> As noted above, the Department employees properly followed the law during the score review. To use these lawful acts and omissions to serve as a basis for requiring the forensic imaging and/or turnover of cell phone data is both absurd and an invasion of personal privacy rights. There is no allegation of wrong-doing, let alone the type of misconduct necessary before a preservation order can be issued.

RSA000031. It appears from this statement that the Department acknowledges that Department of Taxation employees conducted the score review, which it now categorically denies.[7]

The Department also asserted a specious "form over substance" argument that NWC's evidence preservation motion is premature because "discovery does not even begin until a NRCP 16.1 Conference is held and an early case conference is filed."

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[7] While admitting in its opposition that the Manpower employees "did work for the Department through a third-party temp agency [Manpower]" throughout its Writ Petition, the Department now tries to distance itself from Manpower, referring to the Manpower employees as "nonparty former workers."

RSA000031.

NWC filed its reply on March 25, 2019. NWC provided a copy of the contract between the State and Manpower, and directed the Discovery Commissioner to Section 9 regarding the State's rights to "Inspect and Audit" Manpower documents, including electronic data.

NWC also provided evidence that State of Nevada Cybercrime Investigator II, Talova V. Davis, had contacted Manpower employees regarding "forensically imaging cellular telephones and hard drives pursuant to Court Order." RSA000073. Ms. Davis submitted a Declaration detailing her efforts to obtain the cell phone data, which stated the Manpower employees refused to turn over their cell phone data. RSA000068-000074.[8]

In addition, NWC attached an order from Judge Bailus in a sister case,[9] which

[8] As shown by Ms. Davis' Declaration, NWC had a legitimate concern that the phones and the evidence held in those phones would not be available at the time of discovery, much less trial. It should be noted that the depositions of three (3) of the graders have now been taken, Danette Kluever, Richard Elloyan and Duane Lemons. During these depositions, those graders stated they were not asked to preserve their phones and not asked to produce their phones. Thus, the Declaration of Ms. Davis seems inconsistent with some of the testimony received through these depositions. Additionally, one of the graders has stated that the phone used in 2018 is not being used and that a new phone has been purchased.

[9] The MM Development case has been consolidated with this case, along with 5 other cases.

granted another recreational marijuana applicant, MM Development Company, the same preservation order NWC sought in this case.[10] In the MM order, the Department of Taxation graders hired through Manpower were specifically required to preserve electronic data in its possession which related to "the evaluation and rating of marijuana dispensary license applications as part of the September 2018 application period." RSA000063. The MM order also commanded the Department to make available for copying "all cell phones (personal and business) of each such person that assisted in the processing of applications for dispensary licenses and/or evaluated such license applications." RSA000064.

On March 29, 2019, the Discovery Commissioner heard extensive oral argument and granted NWC's motion. RSA000083-000115, APP000114–000008. The Discovery Commissioner's Report and Recommendations parallels the findings and rulings made by Judge Bailus in the MM case. According to the DCRR:

- The Department "used Manpower employees . . . to evaluate and rate marijuana dispensary license applications";
- "The Department's employees trained the Manpower employees regarding the evaluation, grading and scoring of the marijuana

[10] The MM case questions impropriety of the same 2018 recreational marijuana application process NWC questions in this case. Indeed, the MM Development Company case has been consolidated with this case, as are other similar cases. *See* NWC's Amended Complaint, APP000232-000267. The same rules should apply to all the consolidated cases.

dispensary license applications"; and

- NWC "has stated sufficiently to satisfy the Sedona Principles, that there is a real danger of evidence destruction, based on unidentified Manpower employees with regard to the evidence."

APP000115.

The DCRR ordered the Department to:

- preserve server, any standalone computers . . . or cellular devices in its possession or in the possession of a State employee used in the evaluation and rating process for marijuana license applications as part of the September 2018 application period; and

- make available for copying "all cell phones (personal - only if used for work purposes - and/or business) of each such person that assisted in the processing of applications for dispensary licenses and/or evaluated such license applications. . . ."

APP000116.

The DCRR also followed the Sedona Principle fostering "a cooperative and collaborative" effort "to devise discovery strategies which allow the transparent disclosure of relevant evidence that is not cloaked in any claim of privilege." According to the DCRR:

> [N]either Plaintiff's counsel nor the Plaintiff or their agents or employees shall access the cell phone data until the State and the Plaintiff agrees (sic) to a procedure to protect non-discoverable confidential data or the Court allows such access by subsequent order. The State is authorized to inform any such persons whose cell phone data is copied that any and all personal information will either be

> returned or destroyed at a later date. Plaintiff's counsel and Plaintiff and their agents or employees are restricted from accessing ESI data except as authorized by a confidentiality order or other order of the Court.

APP000117.

The Department Objects to the Discovery Commissioner's Report and Recommendations

On May 24, 2019, the Department filed written objections to the DCRR. APP000119-000148.[11] The Department primarily argued that: (1) the Manpower employees are not employees of the State (i.e., the employees are not under State control) and for that reason, NWC must serve "third-party" subpoenas under NRCP 45. APP000122-000124; (2) the DCRR erroneously found that "there was a real danger that evidence in the hands of the Department was going to be destroyed before a preservation order could be issued," as required by the Sedona Principles. APP000124-000125; and (3) the DCRR is overly broad and vague and did not comply with the Sedona Principle requiring that the order be "narrowly tailored to

[11] The Department asserted seven objections: 1) the Department is properly preserving relevant evidence; 2) Manpower employees are employees of Manpower, an independent contractor; 3) the Discovery Commissioner improperly used the actions of Manpower employees as the basis to order intrusive electronic discovery of State employees and their personal property; 4) the Discovery Commissioner's Report and Recommendation is unduly broad and vague; 5) the evidence did not show that the Manpower employees threatened to destroy evidence; 6) the Manpower employees are not State employees; and 7) the Department should not be required to serve a copy of any Order on the Manpower employees.

preserve only the evidence 'relevant to the claims and defenses.'" APP000125-000128.

The district court carefully considered the arguments of both sides and on December 2, 2019, the Honorable District Court Judge Elizabeth Gonzalez held a hearing and denied the Department's Objection. APP0000149.

NWC Files a Motion to Compel

Because the Department still refused to produce the phones of the graders, NWC filed a Motion to Compel on January 8, 2020. APP000150-000160. The Motion to Compel limited its request to production of the Manpower employee cell phones. NWC specifically argued, as it had argued before, that NRCP 16.1(a)(1(B) required the Department to provide "all documents, data compilations and tangible things in the possession, custody or control" of the Department. Although NWC had not made a "formal" NRCP 34 document request, NWC argued that NRCP 34 and the cases discussing "control" applied. NWC has made a NRCP 34 document request to the Department. The Department has refused to provide the graders' telephones for purposes of an extraction report.

When the Department filed its opposition on January 10, 2020, the Department never raised the principal argument it now relies upon: that the district court applied

the wrong version of NRCP 16.1. APP000161-000231.[12] The Department's opposition, however, did include legal arguments based upon NRCP 37(a), NRCP 26(b) and NRCP 34. The Department argued those rules are inapplicable, and asserted that upholding "a preservation order . . . is not the same thing . . . as a discovery request" under Rule 34. APP000164. The Department asserted the Manpower employee cell phones must be subpoenaed pursuant to NRCP 45 because, according to the Department, it does not have *control* over them.

The Department disregarded Section 9 of the Contract between the State and Manpower, and instead focused its argument on the independent contractor language, concluding that "Manpower employees are independent contractors and not employees of the State." APP000123. But, as argued in NWC's response, the issue is not whether the State is shielded from *liability* for Manpower's actions, as argued by the Department; but rather, what documents and information did Manpower agree to permit the Department to review and copy under its agreement with the State? APP000150-000160. Section 9 unequivocally gave the State control over the Manpower employees' electronic information, including cell phone data, which

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[12] *See Valley Health System, Inc. v. Eighth Jud. Dist. Ct.*, 127 Nev. 167, 252 P.3d 676 (2011) ("[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.")

relates to marijuana license applications.

The District Court Grants NWC's Motion to Compel

On February 7, 2020, the district court agreed with NWC and granted the motion to compel. APP000268-000277. The order did not include the specific limiting language in the DCRR, which directed the State to obtain the phones from the graders, copy the phones, review the information prior to production, remove any privileged information and protect any private information unrelated to this case or the 2018 recreational marijuana application process.[13]

However, the order discusses NRCP 34 interpretations regarding "possession, custody or control." APP000273. In doing so, the district court tacitly recognized that the process NWC followed, by seeking protection and production in its moving papers, is akin to a NRCP 34 request for production.

The Department acknowledges that NWC "should [not] be categorically barred

[13] The Department has complied with this directive, in part, by producing the phone records of employees or former employees Damon Hernandez and Karalin Cronkhite, which was also subject to the original motion filed by NWC before the Discovery Commissioner. The Department has also produced the phone records for Steve Gilbert and Jorge Pupo, who are also employees or former employees of the Department. The Department's suggestion that they would not have an opportunity to preview the phone records, exclude or redact personal information completely unrelated to this case or the 2018 recreational marijuana application process is unfounded. It is believed that this argument is being used simply to bolster an otherwise unpersuasive position.

from obtaining discoverable information on the phones (if there is any)." But requiring NWC to serve NRCP 45 subpoenas on Manpower and the Manpower employees, and putting the onus on Manpower to produce the information - which Manpower contractually agreed to provide to the State - will likely trigger another round of motions raising the same or similar issues the Discovery Commissioner and the district court have already addressed.[14]

V.

ARGUMENT

A. The Order to Compel is Not Arbitrary or Capricious

In its Writ Petition, the Department asserts the district court applied the wrong version of NRCP 16.1 and, if the district court had applied the correct version, the Department would not be required to produce the cell phone data. The Department asserts the new NRCP 16.1 supports this result for the following reasons:

- The cell phones are not in the "possession, custody or control of the governmental entity that had directed the worker" which the Department

[14] Indeed, the Department's offer to NWC that it may still serve Rule 45 subpoenas and that doing so is "an action [NWC] is free to take at any time" [*See* Writ Petition at 23] ignores the reality that requiring a Rule 45 subpoena would likely derail the April 20, 2020 trial date - and not only affect the interests of those involved in this case - but also affect the interests of the other parties in the consolidated case.

claims is a "predicate for the NRCP 16.1 disclosure obligations."[15];

Writ Petition at 1, 8;

- The Manpower employees are not employees of the State.

Writ Petition at 1-2; and

- "The only permissible basis for the district court granting the motion to compel was Rule 16.1."

Writ Petition at 11 n.3.

The Department's arguments are flawed for several reasons.

1. The Department Never Raised the NRCP Issue Below

First, the Department's argument that the district court applied the wrong version of NRCP 16.1 was never raised in the district court. Admittedly, NWC quoted the previous version of NRCP 16.1 in its Motion to Compel, but the Department did not question the purported error until the instant Writ Petition. As the Department raises this issue for the first time on appeal, this Court's consideration of the issue is improper. *Peke Resources, Inc. v. Fifth Judicial Dist. Court,* 113 Nev. 1062, 1068 n.5, 944 P.2d 843, 848, n.5.

This pervasive rule applies unless there is "plain error" that affects "substantial

[15] The Department also argued that the district court applying the "wrong standard . . . in and of itself constitutes an abuse of discretion." Writ Petition at 23. However, as discussed herein, the two NRCP 16.1 provisions are not materially different and the result is the same under both versions.

rights," or to correct a jurisdictional defect, none of which are asserted in the Department's Writ Petition. *See Valley Health System, Inc. v. Eighth Jud. Dist. Ct.*, 127 Nev. 167, 252 P.3d 676 (2011) *and Cordova v. State,* 116 Nev. 664, 666, 6 P.3d 481, 482-83 (2000).

2. The Two Versions of NRCP 16.1 are not Materially Different

Second, the Department's argument ignores that the old version of NRCP 16.1 is not materially different than the new version and does not compel a different result than the result in the district court's order.

The rule cited by the district court, NRCP 16.1(a)(1)(B), provides that a party:

> must, without awaiting a discovery request, provide to the other parties: (B) A copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody or control of the party and which are discoverable under NRCP 26(b).

NRCP 16.1(a)(1)(B).

The rule cited by the Department provides:

> [A] copy – or a description by category and location – of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, including for impeachment or rebuttal, and, unless privileged or protected from disclosure, any record, report, or witness statement, in any form, concerning the incident that gives rise to the lawsuit.

NRCP 16.1(a)(1)(A)(ii).

The Department's argument - that omitting the reference to "any relevant information that would be discoverable under NRCP 26(b)" narrows a party's obligations - is a red herring because both rules require disclosure of relevant information. Indeed, even though the rule changed, relevant discoverable information is, and has always been, required to be disclosed under NRCP 16.1. The district court limited its order to only relevant information, in line with the thrust of both versions of the rule.

3. The State Has Possession, Custody and Control Over the Manpower Employees' Cell Phone Data

The real basis for the Department's argument that NRCP 16.1 does not apply is that it does not have "possession, custody or control" of the Manpower cell phones. *See* Writ Petition at 8. The Department's argument overlooks the facts and the law.

It is black letter law that "documents sought in discovery motions must be within the 'possession, custody, or control' of the party upon whom the request is served. . . ." *Kiser v. Pride Comm., Inc.,* 2011 U.S. Dist. LEXIS 124124, *8-11, 2011 WL 5080162 (D.Nev. 2011) (interpreting FRCP 34 language). But, *actual possession* is not required. Rather, a "party may be ordered to produce a document in the possession of a non-party entity if that party has a legal right to obtain the document or has control over the entity who is in possession of the document." *Id.* Thus, the

"term 'control' includes the *legal right* of the producing party *to obtain documents from other sources* on demand." *Soto v. City of Concord,* 162 F.R.D. 603, 619 (N.D.Cal. 1995) (emphasis added). *See also Camden Iron & Metal, Inc. v. Marubeni Am. Corp.,* 138 F.R.D. 438, 441 (D.N.J. 1991) ("control is the legal right, authority or ability to obtain documents upon demand).

The Department cites two cases to support its position that "a company does not possess or control the text messages from the personal phones of its employees and may not be compelled to disclose text messages from employees' personal phones." Writ Petition at 13. While this is an accurate quote out of the *Lalumiere* case, the Department omits a key point from both cases: that a company has a right to personal cell phone information *if* the information on the personal phone is relevant to the case (*Lalumiere*) or *if* the company has a legal right to the information. *See Lalumiere v. Willow Springs Care, Inc.,* 2017 U.S. Dist. LEXIS 216041 *5 ("text messages [from] personal phones or emails [from] personal accounts on . . . personal computers or phones" are discoverable if they relate to "the incidents alleged [the complaint]"; and *Cotton v. Costco Wholesale Corp.,* 2013 U.S. Dist. LEXIS 103369 *17-18 (propounding party did not contend it had "any legal right to obtain employee text messages on demand" and therefore, the district court denied the motion to compel).

In this case, Manpower specifically agreed that relevant records, including "electronic, computer related or otherwise" were subject to "inspection, examination, review, audit and copying" by the State "at any reasonable time." APP000003.

According to the contract, securing Manpower's services was "both necessary and in the best interests of the State of Nevada." APP000001. While it is true that the propounding party *usually* has the "burden to show that a given document is within the propounding party's possession," as argued by the Department,[16] because the contract with Manpower is "both necessary and in the best interests of the State of Nevada" [APP000001] the Department bears the burden to show that the information sought is protected or is otherwise not discoverable. *See Comstock Residents Ass'n v. Lyon Cnty. Bd. of Commissioners*, 414 P.3d 318, 322, 134 Nev. Adv. Op. 19 (March 29, 2018).

4. The Department Cannot Claim it Never Employed the Manpower Workers

The Department also tries to distance itself from these graders by suggesting that they are not employees of the Department. Throughout the hearings in this matter the Department's counsel has conceded that they were agents of the Department for purposes of the 2018 recreational marijuana application process.

[16] *See* Writ Petition at 12.

Indeed, this finding is part of the DCRR. APP000115.

Discovery has yielded documentation wherein these graders were interviewed and selected by the Department. The Department decided the graders' hourly pay rate. They were then referred to Manpower so that the Department could pay their agreed upon salaries via Manpower. Therefore, unlike a situation where you are simply asking for temporary employee through a similar hiring service, in this case the Department did its own outreach, interviewed the individuals, made a decision to hire these individuals, made a determination of how much they would be paying these individuals per hour, and then directed them to Manpower for purposes of issuing checks.

Additionally, these graders were trained by the Department. The Department representatives testified during the preliminary injunction hearing as well as in deposition that they trained these graders to grade the 2018 recreational marijuana applications. Manpower did not train these graders and once the two to three-week training period was concluded, these graders who graded the 2018 applications ended their relationship with the State and with Manpower.

Manpower was nothing more than a conduit utilized by the Department because it had an open and existing account arranged with Manpower. Manpower was simply a convenience for purposes of issuing checks. It had nothing to do with

and took no responsibility in selection and/or training of the graders.

B. There is no Irreparable Harm Because the Manpower Employees' Privacy Interests Are Not Infringed

According the Department, the Manpower employees' "privacy concerns . . . become constitutional problems where, as here, the party ordered to seize the phones is a government agency." Writ Petition at 16. The Department suggests this constitutional problem is heightened because "[m]odern cell phones do not contain merely a few threads of a person's life - they contain the entire quilt." Writ Petition at 11. That may be a true statement, but if this Court follows the Department's premise that discovery of cell phone information is a "startling invasion of privacy" [*See* Writ Petition at 11] then what is to prevent the unscrupulous from using cell phones as vaults to hide electronic information?

The Department suggests this case is like *Riley v. California*, 573, U.S. 373, 393 (2014), a criminal Fourth Amendment search and seizure case, and that *Comstock,* a civil case involving civil discovery "has no bearing on this case." Writ Petition at 15-17, 19.

Riley is a classic criminal Fourth Amendment search and seizure case. In *Riley,* a police officer saw a car with expired license plates and stopped the car. Without obtaining a warrant, the officer seized the driver's cell phone and, while accessing its

contents, found some gang-related references which were later used to prosecute the driver for a shooting incident. Chief Justice Roberts made the correct decision when ruling the officer's actions violated the driver's Fourth Amendment rights. The Chief Justice recognized that cell phones contain a plethora of information that many would not want exposed. The Chief Justice ruled the driver had an expectation of privacy that required the police to obtain a warrant.

In this case, the Manpower employees may have an expectation regarding their cell phone information, but the expectancy is not the same as in a criminal case. Here, the Manpower employees gave up a certain level of privacy protection by using their cell phones for work purposes. In *Comstock,* the Nevada Supreme Court recognized this factor, holding that "where a private entity possesses records of a governmental entity performing 'a service' rendered in the public interest,' those records constitute public records and must be disclosed pursuant to the NPRA." *Comstock,* 414 P.3d at 321. *See also Las Vegas Metropolitan Police Department v. Blackjack Bonding, Inc.,* 343 P.3d 608, 613, 131 Nev. Adv. Rep. 10 (2015) (CenturyLink contract with LVMPD gave LVMPD "legal control" over "call detail records for use in administrative and investigative purposes" and therefore "requested information could be generated by the inmate telephone system that CenturyLink provides and could be obtained by LVMPD.") This case, like *Comstock,* involves

employment incident to services performed "both necessary and in the best interests of the State of Nevada." APP000001.

The cell phone information is properly discoverable under the district court's order.

VI.

CONCLUSION

The electronically stored information from the phones of the Department employees has been important in the discovery efforts of NWC, as well as the several other Plaintiffs involved in the consolidated case. The cell phones of the Manpower employees who performed services as graders on the 2018 recreational marijuana license applications are likely to contain similar relevant evidence.

This Court does not have to intervene to resolve this discovery dispute. In the alternative, to facilitate a resolution of this matter, NWC proposes that this Court affirm the district court's order to produce the Manpower employees' cell phone records, which are relevant to this case, but such records shall not be produced until

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the Department previews the phones for records related to this case and/or related to the 2018 recreational marijuana application process.

Respectfully submitted, this 2nd day of March, 2020.

PARKER, NELSON & ASSOCIATES, CHTD.

/s/ Theodore Parker III

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VERIFICATION

I, Theodore Parker, III, declare as follows:

1. I am currently employed in the Law Office of Parker, Nelson & Associates, Chtd. as the Managing Partner. I am counsel for the Respondent/Real Party in Interest named herein.

2. I verify that I have read the foregoing Answering Brief and that the same is true of my own knowledge, except for matters stated on information and belief, and as to those matters, I believe them to be true.

3. I declare under penalty of perjury under the law of Nevada that the foregoing is true and corrected.

Executed this 2nd day of March, 2020, in Las Vegas, Nevada.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

☒ This brief has been prepared in a proportionally spaced typeface using WordPerfect X5 2010 in 14 pt. font and Times New Roman; or

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2. I further certify that this brief complies with the page- or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any

improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 2nd day of March, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court by using the electronic filing system on the 2nd day of March, 2020.

I certify that some of the participants in the case are not currently registered electronic filing system users. For those parties service was made by depositing a copy of the above-referenced document for mailing in the United States Mail, first-class postage prepaid, at Las Vegas, Nevada to the following unregistered participants:

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