IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 81764

JOHN BORGER and SHERRI BORGER
Appellants

v.

POLARIS INDUSTRIES, INC.
Respondent

On Appeal from the Eighth Judicial District Court
Clark County, Nevada, Dept. No. XXV
No. A-17-751896-C

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in Nevada Rule of Appellate Procedure (NRAP) 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

Polaris Industries, Inc. is a wholly owned subsidiary of Polaris Inc. (previously known as Polaris Industries Inc.), a publicly traded Minnesota corporation. No publicly traded corporation owns 10% or more of Polaris Inc.'s stock.

The following law firms have appeared for Polaris Industries, Inc. in this matter: Faegre Drinker Biddle & Reath LLP (formerly Faegre Baker Daniels LLP); Johnson, Trent & Taylor, LLP; Neal & Harwell, PLC; Sgro & Roger; and Wilson, Elser, Moskowitz, Edelman & Dicker LLP.

Dated this 15th day of March, 2021.

/s/ Jennifer Willis Arledge

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this matter under NRAP 3A(b)(1) because the District Court's August 9, 2020 Order is a final judgment entered in an action commenced in that court. Appellant's Appendix at 344. Pursuant to NRAP 4(a)(1), Appellants timely filed their notice of appeal on September 4, 2020. Appellant's Appendix at 349. This appeal is from a final judgment, therefore, this Court has appellate jurisdiction over this appeal.

ROUTING STATEMENT

Under NRAP 17(b)(11), this case should be routed to the Court of Appeals because it involves deferential review of a discretionary decision regarding venue that was made under established law.

The decision on review is an order dismissing this suit without prejudice under the doctrine of *forum non conveniens*. Nevada law on *forum non conveniens* is established and requires district courts to consider: (1) the level of deference owed to the plaintiff's choice of forum; (2) whether an adequate alternative forum exists; and (3) whether the public and private interest factors weigh in favor of dismissal. *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 131 Nev. 296, 300-301 (2015). Here, the District Court correctly considered each of these factors.

On appeal, an "order dismissing an action for *forum non conveniens*" is reviewed only "for an abuse of discretion." *Placer Dome, Inc.*, 131 Nev. at 300; *Mountain View Rec. v. Imperial Commercial*, 129 Nev. 413, 418 (2013).

Because this appeal involves deferential review of the District Court's application of established law regarding venue, it is properly routed to the Court of Appeals.

STATEMENT OF THE ISSUES

Did the District Court abuse its discretion by dismissing Plaintiffs' personal-injury suit without prejudice under the *forum non conveniens* doctrine in favor of an Arizona forum, when it is undisputed that: (1) Plaintiffs rented the subject vehicle in Arizona; (2) the rental company bought the vehicle in Arizona; (3) Plaintiffs signed a rental agreement invoking Arizona law; (4) Arizona law applies; (5) Plaintiffs received training, instructions, and warnings in Arizona; (6) Plaintiffs rode the vehicle in Arizona; (7) the accident and injuries occurred in Arizona; (8) all the fact witnesses to the accident reside in California and Arizona; and (9) the vehicle is located in Arizona.

STATEMENT OF THE CASE

This case arises out of an accident that occurred near Lake Havasu, Arizona. (App. 24.[1])

In their initial complaint filed in March 2017, Plaintiffs alleged that they had rented a Polaris RZR off-road vehicle from Sandbar Powersports, LLC ("Sandbar") in Arizona, and that the vehicle had unexpectedly rolled onto its right side and injured Plaintiff Sherri Borger's right arm. (*Id.*) Plaintiffs claimed that Sandbar had negligently breached its duty to Plaintiffs by failing to (a) install or offer proper equipment and safeguards; (b) adopt known and feasible safety measures; (c) conduct a proper inspection of the vehicle; (d) train all occupants on the use of the vehicle; (e) warn about the possibility of partial ejection during tip-overs or rollovers; and (f) provide a safe vehicle. (App. 25.)

Plaintiffs amended their Complaint in November 2017 to add Polaris as a defendant. (App. 82.) In the Amended Complaint, Plaintiffs

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[1] Pursuant to NRAP 30(b)(4), Polaris has cited Appellants' Appendix ("App.") where possible. Additional documents relied on by Polaris but not included in Appellants' Appendix have been included in Respondent's Appendix ("Resp. App.").

retained their negligence claim against Sandbar but added strict product liability, breach of warranty, and negligent design and marketing claims against Polaris. (App. 85-86.)

As the case proceeded, almost no discovery was completed regarding Polaris. Polaris did not produce documents because an appropriate Protective Order was not entered until January 17, 2019. (Resp. App. 020.) The only people who were deposed were Plaintiffs John and Sherri Borger, their children Jade and Foster Borger, and Sandbar personnel. Plaintiffs did not seek any deposition of a Polaris representative or witness. Moreover, Plaintiffs did not disclose any expert regarding their design-defect claim against Polaris.

At a January 2019 mediation, Plaintiffs settled their claims against Sandbar. Polaris filed its motion to dismiss for *forum non conveniens* on February 1, 2019. (Resp. App. 021.) The District Court heard oral argument on Polaris's motion on February 19, 2019 and granted the motion at the hearing. (App. 281, 335-336). The Order granting Polaris's motion was issued on August 9, 2020. (App. 344-345.) Plaintiffs filed their notice of appeal on September 4, 2020 (App. 349), and their Opening Brief on January 12, 2021.

STATEMENT OF THE FACTS

Plaintiffs allege that on October 18, 2016, they rented a Polaris RZR off-road vehicle from Sandbar near Lake Havasu, Arizona. (App. 83.) The vehicle was designed, tested, and manufactured in Minnesota by Polaris Industries, Inc., a Minnesota-headquartered company. (App. 247.) Polaris sold the vehicle to an Arizona dealership, which in turn sold it to Sandbar. (App. 247.)

When they rented the RZR, Plaintiffs were Minnesota residents on vacation in Arizona with their children. (Resp. App. 053-054.) They remained Minnesota residents through the filing of their Amended Complaint in November 2017 and now reside in California. (App. 82; Resp. App. 051.) **They have never resided in Nevada.**

To rent the RZR, Plaintiffs signed a "Participant Agreement, Release and Assumption of the Risk" with an Arizona choice-of-law clause. (App. 56-59.) In the Agreement, Plaintiffs expressly assumed all risks of injury associated with using the vehicle. (App. 56-59.) They also agreed to abide by the "Driver/Rider Usage Rules," which set a minimum driver age of 25 years. (App. 59.)

Shortly after renting the RZR, Plaintiffs allowed their seventeen-year-old son to drive it. While he was driving, the vehicle rolled onto its right side, trapping and severely injuring Ms. Borger's right arm. (App. 83, Resp. App. 121.)

Officials from the Lake Havasu City Fire Department, the Lake Havasu City Police Department, and the Mohave County Sheriff's Office—all from Arizona—responded to the accident. (Resp. App. 088-089.) Ms. Borger was airlifted to Havasu Regional Medical Center for initial treatment and stabilization. (Resp. App. 099.) According to the Native Air Incident Report, Ms. Borger was conscious and "recall[ed] all events of the accident." (Resp. App. 101.) On arrival, it was determined that Ms. Borger should be transferred to University Medical Center (UMC) – Las Vegas, which could better treat her injury. (Resp. App. 103.) Ms. Borger received treatment at UMC – Las Vegas for eleven days before returning home to Minnesota (Resp. App. 108), where she continued to receive treatment. (Resp. App. 056.)

SUMMARY OF THE ARGUMENT

The District Court acted within its discretion in dismissing Plaintiffs' suit without prejudice under Nevada's established test for *forum non conveniens*.

The established test required the District Court to consider three factors, *see Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 131 Nev. 296, 300-301 (2015), which it properly did.

First, it considered how much deference to give Plaintiffs' choice of forum and properly concluded that less deference was due because Plaintiffs are not now, and have never been, Nevada residents, and Nevada lacks a significant connection to their claims.

Second, the District Court considered whether an adequate alternative forum exists and properly concluded that, yes, Arizona is an adequate alternative forum because Polaris consents to jurisdiction there, and its courts can provide Plaintiffs with an adequate remedy for their claims, which arise under Arizona law.

Finally, the District Court considered whether the public and private interest factors favor dismissal and properly concluded that they do. As to the public-interest factors, Nevada has little or no local

interest in the case, given that Arizona law applies, the rental and accident occurred in Arizona, the remaining defendant is a Minnesota company, and the plaintiffs were Minnesota residents at the time and now reside in California. There is no reason for Nevada to take on the substantial burden of adjudicating this case, when the interests lie elsewhere. The private-interest factors likewise point away from Nevada and toward Arizona. The scene of the accident, the Sandbar witnesses, and the first responders are all located in Arizona and are beyond the subpoena power of a Nevada court. Neither party is located in Nevada. And there are no merits witnesses in Nevada.

This Court reviews an "order dismissing an action for *forum non conveniens*" only "for an abuse of discretion." *Placer Dome*, 131 Nev. at 300. The order below was not an abuse of discretion. This Court should affirm.

ARGUMENT

The District Court properly applied Nevada's established, three-factor test for dismissing an action for *forum non conveniens*. Plaintiffs do not acknowledge either the three-factor test or the deference that the trial court receives in applying it. Instead, they cite primarily out-of-

state cases and make groundless attacks on the District Court's analysis. These arguments do not show an abuse of discretion in dismissing Plaintiffs' claims without prejudice to be litigated in the more convenient forum of Arizona.

A. Nevada Law Establishes A Discretionary, Three-Factor Test For Dismissing A Case Without Prejudice For *Forum Non Conveniens.*

Sometimes plaintiffs file suit in a forum that is not convenient for the other party and the court. When this happens, the doctrine of *forum non conveniens* allows courts to dismiss the case without prejudice upon confirming it can be pursued in a more convenient forum. This doctrine is codified in Nevada Revised Statutes 13.050(c), which authorizes district courts to grant a motion to change forum "[w]hen the convenience of the witnesses and the ends of justice would be promoted by the change." NEV. REV. STAT. § 13.050(c).

District courts have "wide discretion" in deciding whether to dismiss a case for *forum non conveniens*. *Mountain View Rec. v. Imperial Commercial*, 129 Nev. at 418. In exercising that discretion, a district court must consider three factors. First, the court must "determine the level of deference owed to the plaintiff's forum choice."

Placer Dome, 131 Nev. at 300-301 (citing *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 70 (2d Cir. 2003)). Second, the court must determine "whether an adequate alternative forum exists." *Id.* at 301(citing *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1142 (9th Cir. 2001)). Finally, if an adequate alternative forum does exist, the court must weigh public and private interest factors to determine whether dismissal is warranted. *Id.* The public interest factors "include the local interest in the case, the district court's familiarity with applicable law, the burdens on local courts and jurors, court congestion, and the costs of resolving a dispute unrelated to the plaintiffs [sic] chosen forum." *Id.* at 302. The private interest factors include "the location of a defendant corporation, access to proof, the availability of compulsory process for unwilling witnesses, the cost of obtaining testimony from willing witnesses, and the enforceability of a judgment." *Id.* at 304.

Because the decision to grant a *forum non conveniens* motion is committed to the district court's discretion, appellate courts review such a decision only for an abuse of discretion. *Placer Dome*, 131 Nev. at 300. "An abuse of discretion can occur when the district court bases its decision on a clearly erroneous factual determination or it disregards

controlling law." *MB America, Inc. v. Alaska Pac. Leasing*, 132 Nev. 78, 88 (2016).

B. Plaintiffs Do Not Identify Any Abuse Of Discretion In The District Court's Decision.

The District Court properly applied Nevada's three-part test to the facts and exercised its discretion to dismiss the case, without prejudice, in favor of an Arizona forum because "there are so few, if any, factors in favor of keeping the case here and all the factors, with only a few exceptions or a few that maybe have balance, weigh in favor of dismissal." (App. 328.) Plaintiffs, who never acknowledge either the District Court's discretion or this Court's deferential review, have shown no abuse in the District Court's decision.

1. The District Court properly gave less deference to Plaintiffs' choice of a Nevada forum because it is not their home.

First, the District Court properly gave less deference to Plaintiffs' choice of a Nevada forum because Plaintiffs are not, and have never been, Nevada residents, and Nevada has little, if any, local interest in this lawsuit.

The rule is that, "[w]hile a plaintiff's selection of forum is generally due heavy deference, deference is reduced for both foreign

plaintiffs ***and U.S. plaintiffs who sue in other than their home forums***." *Takiguchi v. MRI Int'l, Inc.*, 2015 WL 6661479, at *3 (D. Nev. Oct. 29, 2015) (emphasis added); *see also Quixtar Inc. v. Signature Management Team, LLC*, 566 F. Supp. 2d 1205, 1207 (D. Nev. 2008) ("Some courts have afforded less deference to a plaintiff's choice of forum where the plaintiff has not chosen its home forum.").

Plaintiffs were Minnesota residents when they filed this suit and now are California residents. (Resp. App. 051-052.) They have never been Nevada residents. The District Court therefore properly applied *less* deference to Plaintiffs' chosen forum:

> I think with this not being the Plaintiff's residence that they are entitled to less deference to their choice. It doesn't mean they have no deference to their choice, but the great deference typically applicable to the Plaintiff's choice is, I think, one that is lesser in this case.

(App. 324.)

Deference is also reduced when the plaintiff's chosen forum lacks a significant connection to the basis of the action. *Editorial Planeta Mexicana, S.A. de C.V. v. Argov*, 2012 WL 3027456, at *5 (D. Nev. July 23, 2012). That is the case here, where Nevada has no relevant connection to Plaintiffs' claims. The state with the greatest connection

is Arizona. The accident occurred there. (App. 83). The vehicle was rented there. (App. 53-54.) Arizona law applies. And nearly every fact witness with relevant information about the accident works or resides in Arizona, including the rental company's owners and employees and the first responders from the local police and fire departments. The other state with relevant, although lesser, connections is Minnesota. Polaris designed and manufactured the RZR off-road vehicle in Minnesota, so all material evidence and witnesses relating to Plaintiffs' design-related claims are located there. (App. 246-247.)

Nevada's only connection to this case is that Ms. Borger was treated for her injuries here for the first 11 days after the accident. This connection is immaterial to the *forum non conveniens* analysis because Ms. Borger's medical treatment is not the basis for Plaintiffs' claims. Their claims are based on an accident that occurred in Arizona and alleged design defects that occurred (if at all) in Minnesota. Polaris does not dispute the nature or extent of Ms. Borger's injuries or the medical treatment she received. While it may dispute Plaintiffs' computation of damages, it does not intend to dispute the fact of her injuries or the

treatment she received in Nevada. Nevada thus does not have any significant connection to Plaintiffs' claims.

Plaintiffs argue that their choice of forum was entitled to great deference despite these facts because "American citizens are always entitled to enhanced deference." (Opening Brief 10.) This incorrect argument is based on federal opinions addressing the different legal analysis that applies when suits are filed in federal courts by foreign plaintiffs or by U.S. plaintiffs to address foreign events. (Opening Brief 19-20.) In *Pollux Holding Ltd. v. Chase Manhattan Bank*, the Second Circuit affirmed the **dismissal** of a lawsuit filed by a foreign Liberian corporation in New York. *See* 329 F.3d at 68. In discussing why the foreign corporation's choice received less deference, the Court noted in dictum that "a choice of *home forum* by an American citizen is given substantial deference," based on "the *bona fide* connection the plaintiff has with that forum." *Id.* at 71 (emphasis added). Here, of course, Plaintiffs did not choose their home forum, and they have no bona fide connection to Nevada. In *Iragorri v. United Techs. Corp.*, the Second Circuit held that U.S. residents who filed suit against two U.S. companies in the companies' home district over events that occurred in

Colombia were entitled to greater deference than a foreign litigant, because they were U.S. citizens suing the defendants at the defendants' home. *See* 274 F.3d 65, 71 (2d Cir. 2001); *cf. Mercier v. Sheraton Int'l., Inc.*, 981 F.2d 1345, 1354 (1st Cir. 1992) (same). Here, Plaintiffs did not sue Polaris at its home in Minnesota, and the accident did not occur outside the United States, but in Arizona.

The District Court took a properly nuanced approach to the facts of this case and applied less deference to Plaintiff's chosen forum. (App. 324.) There was no abuse of discretion in this analysis, especially given that other courts applying Nevada law have reached similar conclusions. *See Takiguchi v. MRI Int'l, Inc.*, 2015 WL 6661479, at *3.

2. The District Court properly found that Arizona is an adequate alternative forum because it has jurisdiction and provides a remedy.

The District Court also properly concluded that Arizona is an adequate alternative forum. Plaintiffs have not challenged this aspect of the District Court's analysis in their Opening Brief, and hence any challenge is waived. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3 (2011) (stating that issues not raised in an appellant's opening brief are waived).

Regardless, the District Court's conclusion is plainly correct. Under Nevada law, an alternative forum is adequate if (1) the defendant is amenable to process there, and (2) the forum provides the plaintiff with some remedy for his wrong. *Placer Dome*, 131 Nev. at 300-301.

Here, both factors are met. First, jurisdiction exists in Arizona because Polaris has consented to it for this case and the District Court incorporated that consent as a requirement into its order. (App. 345.) Second, Arizona can provide a remedy because Polaris agreed to waive any statute of limitations defense, and the District Court incorporated that waiver into its order. (App. 345.) Moreover, Plaintiffs do not dispute that their claims will be governed by Arizona law regardless of where they are litigated (Opening Brief 20), and Arizona has a product-liability statute addressing Plaintiffs' design-defect claims. *See* ARIZ. REV. STAT. § 12-681(5); *see also General Motors Corp. v. Eighth Judicial Dist. Court of Nev.*, 122 Nev. 466, 474 (2006) (applying the Second Restatement's most-significant-relationship test to choice of law for tort claims); Restatement (Second) of Conflict of Laws, § 145 (listing as key contacts "(a) the place where the injury occurred, (b) the place where

the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered").

Hence, Arizona is undisputedly an adequate, alternative forum for Plaintiffs' claims.

3. The District Court properly found that the public and private interest factors favor dismissal.

Finally, the District Court properly applied the public and private interest factors and did not abuse its discretion in finding that those factors favored dismissal.

a. The public interest factors favor having an Arizona court decide a case that involves Arizona facts and Arizona law.

The public interest factors clearly favored sparing Nevada the expense of adjudicating a dispute centered in Arizona. *See Placer Dome*, 131 Nev. at 302 (listing factors).

First, there is little, if any, **local Nevada interest in this case**. The accident occurred in Lake Havasu, Arizona, and the product was designed and manufactured in Minnesota and sold to an Arizona

dealership. Nothing gives Nevada courts or jurors any significant interest in hearing this case.

Second, **Arizona law** governs Plaintiffs' claims, and an Arizona court will undoubtedly be more familiar with that law than a Nevada court.

Third, this case will be a **significant burden to and impose significant costs on** Nevada courts and jurors. Because the case involves design-defect allegations, each party will likely present multiple experts, including engineers, regulatory experts, and human factors experts. Polaris will likely also produce multiple fact witnesses to testify about the RZR off-road vehicle's design and testing, its component parts, its warnings, its manufacturing, and its post-sale monitoring and regulatory reporting. Moreover, because of the nature of Ms. Borger's injuries, each party will likely present a life care planner and economist, and potentially a vocational rehabilitation specialist. All these witnesses are in addition to the first responders and initial treating physicians. In short, the Nevada court system will incur significant costs managing the discovery and dispositive motion practice in this case, potentially culminating in a multi-week trial.

This burden would be unreasonable for Nevada to bear given its lack of a significant connection to Plaintiffs' claims. *See Placer Dome,* 131 Nev. at 303 (affirming dismissal where the burden of resolving a matter that would include "extensive expert testimony" was too great compared to any real Nevada connection). The time and energy of Nevada courts and jurors can be better spent on cases brought by Nevada residents involving claims arising in Nevada. As the District Court noted, Clark County is a "very busy forum," and "there is little, if any, connection overall to the case to the State of Nevada." (App. 326.) There was no abuse of discretion in this analysis of the public interest factors.

b. The private interest factors favor an Arizona forum that has access to the local facts and compulsory process over the key witnesses.

The District Court also correctly concluded that the private interest factors weighed in favor of allowing Plaintiffs to pursue their claims in Arizona. *See Placer Dome*, 131 Nev. at 304 (listing factors).

First, **Polaris is located in Minnesota**, and it designed and manufactured the RZR vehicle there. Because Polaris is located in neither Arizona nor Nevada, this factor is neutral.

Second, considerations of **access to proof** strongly favor Arizona. As discussed above, Plaintiffs' accident occurred in Arizona. The scene is in Arizona. The rental-company witnesses, who can testify about the RZR vehicle at issue and the details of the Borger's rental, are located in Arizona. The first responders are all from Arizona, including the Lake Havasu City Fire Department, the Lake Havasu City Police Department, and the Mohave County Sheriff's Office. Polaris needs to call those witnesses for two important reasons. First, they can tell the jury what they observed upon arriving at the scene and report what Ms. Borger told them. The report from Ms. Borger's airlift to Havasu Regional Medical Center states that she was conscious and "recall[ed] all events of the accident." (Resp. App. 101.) Thus, individuals from the air ambulance and Havasu Regional Medical Center will likely have key information regarding Ms. Borger's contemporaneous recollections of the accident. Second, the first responders' testimony will be vital for assessing Plaintiffs' credibility. Judging from the interviews and official reports, it appears that the Borger family attempted to conceal who was driving. At the scene, Mr. Borger said that *he* was driving. (Resp. App. 089.) But days later, after several conversations with the Sheriff, Mr.

Borger admitted that his son Foster was driving. (Resp. App. 096.) Access to proof strongly favors Arizona.

Third, the **availability of compulsory process over witnesses** also strongly favors Arizona. The first responders, as non-party witnesses, would be beyond the subpoena power of the Nevada courts if a trial were held here. *See Quinn v. Eighth Judicial District Court in and for County of Clark*, 134 Nev. 25, 29 (2018) ("NRCP 45(b)(2) restricts the service of a subpoena on a nonparty to 'any place within the state.' Thus, as is evident from this rule, the subpoena power of Nevada courts over nonparty deponents does not extend beyond state lines."). Moreover, now that Sandbar has been dismissed from this case, Polaris cannot compel Sandbar's employees to attend trial in Nevada either. That would be a big loss, because they are the ones who rented the RZR to the Borgers, gave them safety instructions and orientation, and told them their children were not old enough to drive the vehicle—and their testimony contradicts that of the Borgers. For example, Mr. Borger testified in his deposition that his son Foster was present for the safety instructions given by Sandbar (Resp. App. 068), whereas Sandbar employees testified that Foster received no safety instructions.

(Resp. App. 080-081.) Another Sandbar employee testified that she explained to Foster that he was not old enough to drive the RZR. (Resp. App. 114-115.)

The alternative to live testimony would be depositions, but courts have long held that depositions are "only second-best." *Planned Parenthood of Columbia/Williamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1118 (9th Cir. 2002) (Berzon, J., dissenting). "[L]ive testimony better enables the jury to adjudge the credibility of a witness and therefore to determine the weight and import ascribed to the witness's testimony." *Id.* Jurors prefer to see and hear witnesses in person. *In re Funeral Consumers Antitrust Litig.*, 2005 WL 2334362, at *5 (N.D. Cal. Sept. 23, 2005). Depositions also may not fully address points that are later revealed to be important, or even decisive, to jurors, because they are taken before the record is complete. *Id.*

Fourth, the **enforceability of a judgment** is a neutral factor, as a judgment could be equally enforced against Polaris in Arizona.

In short, the District Court did not abuse in discretion in concluding that the private interest factors on balance favored dismissing the case without prejudice in favor of Arizona.

4. Plaintiffs' criticisms of the District Court based on matters outside the three factors do not demonstrate any abuse of discretion.

Rather than address Nevada's three factors, Plaintiffs primarily criticize the District Court's decision on other grounds. But none of their arguments show that the District Court abused its discretion by sending this Arizona-focused case to Arizona.

a. The District Court granted the motion because of Nevada's three factors, not because of a "routine settlement."

Plaintiffs' lead argument is that a routine settlement with a forum co-defendant does not automatically justify a dismissal based on *forum non conveniens*. (Opening Brief 9-10.) But Polaris has never argued that it does, and the District Court did not hold that it does. The basis for Polaris's motion and the District Court's ruling was that Nevada's three factors point to Arizona as a more convenient forum for this litigation. The settling out of the only defendant that had even an arguable connection to Nevada[2] supported that conclusion, but it was not necessary to it.

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[2] Sandbar's corporate citizenship was arguably in Nevada, although it operated in Arizona.

Plaintiffs argue that, for Sandbar's settlement to be relevant, Polaris must show that Plaintiffs' claim against Sandbar was a sham. (Opening Brief 10.) Plaintiffs cite no Nevada law in support of this proposition, only Pennsylvania cases that address the inapposite situation of transferring cases from one district to another *within the same state*. *See Fessler v. Watchtower Bible and Tract Society of New York, Inc.,* 131 A.3d 44 (Pa. Super. 2015) (requesting a transfer from Philadelphia County to Chester County); *Zappalla v. James Lewis Group,* 982 A.2d 512 (Pa. Super. 2009) (same). Plaintiffs' position also makes no sense. Regardless of why a defendant is originally named to the case, its dismissal may affect the three-factor analysis of convenience, and if it does, courts should be able to consider it. The doctrine of *forum non conveniens* is not like federal diversity jurisdiction, where detecting shams is important because jurisdiction is measured at the outset and is usually not affected by later changes in the parties. *See Harris v. Bankers Life and Cas. Co.*, 425 F.3d 689, 695 (9th Cir. 2005) ("Diversity jurisdiction is based on the status of the parties at the outset of the case."). Rather, *forum non conveniens* is a pragmatic doctrine that can be considered at any time.

b. The District Court did not abuse its discretion by considering the motion when it did.

This leads to Plaintiffs' second criticism, which is that the case was too far advanced for the District Court to consider dismissing the remaining claims for *forum non conveniens*. (Opening Brief 13.)

Plaintiff cites no basis in Nevada law for this argument, and Polaris is aware of none. The statute does not set a time limit for bringing a motion to dismiss for *forum non conveniens*. *See* NEV. REV. STAT. 13.050. Timing also is not listed as a "factor to be considered" under Nevada's cases. *See Placer Dome, Inc.*, 131 Nev. at 300-301.

Moreover, consistent with the doctrine's pragmatic nature, courts outside Nevada have held that no time limit exists. As the U.S. Court of Appeals for the Tenth Circuit explained, "there is generally no time limit on when a motion to dismiss for *forum non conveniens* must be made, which differentiates it from the time limits on a motion to dismiss for improper venue." *Yavus v. 61 MM, Ltd.*, 576 F.3d 1166, 1173 (10th Cir. 2009) (citing Wright & Miller's Federal Practice and Procedure (3d. Ed. 2008)). Similarly, the Model Forum Non Conveniens Act says that *forum non conveniens* motions may be brought "at a reasonable time prior to commencement of the trial," and "no later than

30 days prior to trial." FORUM NON CONVENIENS ACT § 1(D) (AM. LEGIS. EXCH. COUNCIL 2013).

Plaintiffs' argument that the status of discovery made it an abuse to invoke *forum non conveniens* is also unsupported. Courts across the county have granted *forum non conveniens* motions after *extensive* merits discovery, including in cases where everything was finished but trial. *See, e.g., Amur Sp. Z.O.O. v. FedEx Corp.,* 684 Fed. Appx. 554, 555 (6th Cir. 2017) (affirming dismissal that was granted after a year of discovery); *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283, 1296-97 (11th Cir. 2009) (affirming dismissal of an action that had been pending for six years); *Sigalas v. Lido Mar., Inc.*, 776 F.2d 1512, 1520 (11th Cir. 1985) (affirming dismissal at the pre-trial conference "after lengthy discovery when [the case] was ready to be tried on the merits"); *Empresa Lineas Maritimas Argentinas, S.A. v. Schichau–Unterweser, A.G.*, 955 F.2d 368, 373 (5th Cir. 1992) (holding that the case's stage of development did not weigh against dismissal even though the suit was filed eight years before and "much work ha[d] been done on th[e] case").

Here, although Plaintiffs claim that discovery is nearly complete, the reality is otherwise, and only minimal discovery has been conducted on Plaintiffs' claims against Polaris. Up through the dismissal, the focus of discovery was on the *negligence* claims against the *rental company*, Sandbar, not the *product liability* claims against *Polaris*. The only people deposed were Plaintiffs John and Sherri Borger, their two children, and several Sandbar witnesses. No Polaris representatives or witnesses have been deposed. Moreover, Polaris has not produced any confidential documents because a Protective Order was not entered until January 17, 2019, a few weeks before the case was dismissed. (Resp. App. 020.) Plaintiffs also have not produced any expert disclosures, and no experts have been deposed. In short, it was an ideal time for the District Court to move this case to Arizona.

In addition, Plaintiffs do not argue that they will have to redo any of the completed discovery, and no such argument would be possible, because the District Court ordered that "interrogatories, request[s] for admission, and depositions taken and documents produced during the pendency of this case in Nevada may be used by the parties in the re-

filed case." (App. 345.) No wasted effort will accompany changing the forum to Arizona.

Finally, Plaintiffs' conclusory assertions that they developed "evidence and testimony for use in a Nevada courtroom" and retained experts "with the expectation of a Nevada trial" do not hold water. As just noted, Plaintiffs have not deposed any Polaris witnesses or disclosed any experts. In addition, the merits of Plaintiffs' claims will be governed by Arizona law no matter where the case is adjudicated, so the elements of their claims are not changing. Finally, to the extent it matters, Nevada law on the admissibility of expert testimony is generally the same as Arizona law. *Cf. Hallmark v. Eldridge,* 124 Nev. 492, 498-199 (2008) *with* Arizona Rule of Evidence 702.

c. The factual record supports the District Court's decision.

Plaintiffs' last argument is a technical one: They contend that the District Court lacked an adequate record because Polaris did not submit an extensive enough affidavit establishing the inconvenience of litigating in Nevada. (Opening Brief, 22-24.)

As Plaintiffs note, however, the convenience to a *party* is not relevant to the inquiry (*id.* at 22), so Plaintiffs' objection is a matter of form over substance.

Moreover, the District Court had all the facts it needed to decide the motion. As described above, the record already contained most of the facts speaking to Nevada's three-part test, as articulated in *Placer Dome*, 131 Nev. at 301. Any facts that were missing, Polaris supplied with an affidavit (App. 246-247), as is proper. *See Mountain View*, 129 Nev. at 419. Between the existing facts and the Polaris affidavit, the record was complete.

Plaintiffs further argue that Polaris has presented no evidence that Arizona witnesses "would refuse to appear at trial." (Opening Brief, 22.) But Plaintiffs do not dispute that, if this case remained in Nevada, there would not be compulsory process to secure the presence of any of the Arizona witnesses at trial, including first responders from the Lake Havasu City, Arizona Fire Department, the Lake Havasu City, Arizona Police Department, and the Mohave County, Arizona Sheriff's Office, as well as Sandbar's current and former employees. Moreover, the record was sufficient to show to the District Court's satisfaction that these

witnesses possess critical knowledge going to some of the most important questions in this case. Did the Borgers' own recklessness and misuse of the vehicle cause Ms. Borger's injuries? Did Plaintiffs know their son was not supposed to be driving? Are Plaintiffs not credible because they originally told the Sheriff that their son *was not* driving? Allowing jurors to hear the competing testimony live and evaluate the witnesses' body language and non-verbal clues will be critical. *See IGT v. Alliance Gaming Corp., et al.*, 2008 WL 11451148, *2 (D. Nev. Oct. 21, 2008) ("[I]t is highly preferred for the jury to experience live testimony than a videotape.").

In sum, Plaintiffs have failed to show any abuse of discretion by the District Court.

CONCLUSION

This Court should affirm the judgment below because the District Court did not abuse its discretion in dismissing this action without prejudice in favor of the more convenient forum of Arizona, on terms that will allow Plaintiffs to refile without formal service, with waiver of any statute of limitations, and with the ability to use there any discovery that was conducted here.

Dated this 15th day of March, 2021.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Century Schoolbook font.

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 proportionally spaced, has a typeface of 14 points of more, and contains 5,835 words.

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 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.

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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2021, a copy of Respondent's Answering Brief was served via electronic service by way of the Nevada Courts E-Filing Portal as follows:

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