NO. 81764

IN THE SUPREME COURT OF NEVADA

JOHN BORGER and SHERRI BORGER
Appellants

v.

POLARIS INDUSTRIES, INC.
Respondent

SANDBAR POWERSPORTS, LLC, DOES I through X;
and ROE CORPORATIONS XI through XX, inclusive
Defendants

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

APPELLANTS' SUPPLEMENTAL APPENDIX

VOLUME 3

Chad A. Bowers
Nevada Bar No. 007283
CHAD A. BOWERS, LTD
3202 W. Charleston Blvd.
Las Vegas, NV 89102
702-457-1001

Kyle W. Farrar
(*Pro Hac Vice*)
Kaster, Lynch, Farrar & Ball, LLP
1117 Herkimer
Houston, TX 77008
713-221-8300

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Kyle W. Farrar, Esq.
KASTER, LYNCH, FARRAR & BALL, L.L.P.
1010 Lamar, Suite 1600
Houston, TX 77002
Tel: (713) 221-8300
Fax: (713) 221-8301
Admitted Pro Hac Vice
Email: kyle@fbtrial.com

Attorneys for Plaintiffs

IN THE JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

JOHN BORGER and SHERRI BORGER,

Plaintiffs,

v.

SANDBAR POWERSPORTS LLC., DOES I through X; and ROE CORPORATIONS XI through XX, inclusive, and POLARIS INDUSTRIES, INC.

Defendants.

Case No. A-17-751896-C
XXV

PLAINTIFFS' RESPONSE TO POLARIS' MOTION TO DISMISS FOR *FORUM NON CONVENIENS*

For the Plaintiffs, the choice of where to bring suit was obvious. While Arizona may have been the site of the accident, none of the parties were residents of that state. Yet Nevada was not only the residence of the only initial Defendant, Sandbar and the site of Plaintiffs' major medical care, but it was relatively convenient for Plaintiffs, who now reside in California, as well as the Arizona first responders. At the time of filing, Minnesota, the headquarters of Polaris, was not an option as Polaris was not a party. However, if even it were an original party, Minnesota is an inconvenient forum for literally everyone except Polaris. In the end, the choice of forum made itself.

Now, upon the routine settlement of a co-defendant, Polaris has filed a grossly late motion to dismiss based on *forum non conveniens.* This unorthodox motion should be denied for four reasons:

1) The routine settlement of a forum co-defendant does not create good cause for a *forum non conveniens* motion. The dismissal of a co-defendant can only support a *forum non conveniens* motion if it is shown that the co-defendant was a sham and sued in bad faith as forum shopping device.

2) *Forum non conveniens* motions are heavily disfavored when brought after the Parties have engaged in merits discovery. Once the court and the parties have expended substantial time and resources towards the case, the granting of such a motion only aggravates the inefficiencies and inconvenience it was designed to cure.

3) Polaris failed to meet its evidentiary burden. In Nevada, a party must support a *forum non conveniens* motion with affidavits demonstrating unjust inconvenience. The Nevada Supreme Court has held that an affidavit from a party claiming the inconvenience of its own employees cannot support a *forum non conveniens* motion. Yet such an affidavit is all that Polaris provided.

4) The Court owes deference to Plaintiffs' initial forum choice. Polaris is incorrect that the Court owes no deference to the forum choice of out-of-state U.S. citizens. Unlike foreign litigants, Plaintiffs enjoy the same access to U.S. courts as all citizens. Authority on this point makes it clear that this Court owes substantial deference to their forum choice given their legitimate basis for bringing the suit in Nevada.

For all of these reasons, set forth more fully below with authority, the Court should deny Polaris' motion.

ARGUMENT

I. The Routine Settlement of a Forum Co-Defendant do not Create Good Cause for a *Forum Non Conveniens* Motion.

"A plaintiff's selected forum choice may only be denied under exceptional circumstances strongly supporting another forum." *Mountain View Rec. v. Imperial Commercial,* 129 Nev. 413, 419, 305 P.3d 881, 884–85 (2013). A routine settlement with a forum defendant is not an "exceptional circumstance" justifying a *forum non conveniens* motion. Otherwise, multiparty litigation would be routinely upended in the wake of settlements. Dismissing multiparty injury cases after a settlement with a forum defendant would pose a massive disruption to orderly and efficient resolution of these claims. Polaris did not present this Court with any authority in which a *forum non conveniens* motion was granted based on a routine settlement with a co-defendant. To the contrary, a *forum non conveniens* motion based on a dismissed defendant is inappropriate unless it can be shown that the plaintiff only sued the dismissed defendant as a sham to place the case in the wrong forum in bad faith.

In *Fessler,* a consolidated appeal, the Philadelphia Superior Court examined this issue. In that case, Scott sued for an auto accident at WaWa gas station, and filed his suit in Philadelphia, the headquarters of WaWa, though neither Scott nor co-defendant Menna were residents of the forum. Eighteen months into the case, Scott "entered into a monetary settlement with WaWa and discontinued his action against WaWa." *Fessler v. Watchtower Bible and Tract Society of New York, Inc*., 131 A.3d 44, 47 (Pa.Super. 2015). Immediately thereafter, Menna, the lone remaining defendant, filed a *forum non conveniens* motion. Menna argued the forum was inappropriate because Menna, Scott, and the accident scene were located outside the forum, "and Wawa, the only Philadelphia defendant, has been dismissed from the case." *Id.* The trial court granted the motion, but that ruling was reversed on appeal.

The *Fessler* court held that the dismissal of a co-defendant cannot form the basis of a *forum non conveniens* motion unless it can be shown that the plaintiff engaged in improper forum shopping. "When the plaintiff engages in improper forum shopping, the trial court may interfere with the plaintiff's choice of forum on *forum non conveniens* grounds." *Id.* at 53. If "the defendants that provided the basis for plaintiff's choice of forum are subsequently dismissed from the case, the remaining defendants…have the burden of proving that the plaintiff's inclusion of the dismissed defendants in the case was designed to harass the remaining defendants." *Id.*

The court noted that Scott did not bring a frivolous suit against WaWa. "To the contrary, the fact that WaWa paid Scott a monetary settlement indicates that Scott had a good faith basis for suing WaWa and thus had a legitimate reason for selecting Philadelphia as the forum for litigation." *Id., citing Zappala v. James Lewis Group*, 982 A.2d 512, 521, 2009 PA Super 179, ¶ 14 (Pa.Super. 2009) (Even the dismissal of co-defendant on summary judgment does not provide a basis for *forum non conveniens* motion absent improper forum shopping).

Here, the Court is faced with the same facts. Plaintiffs' settlement with Sandbar shows they had a legitimate reason for selecting Clark County for their suit. As stated in Sandbar's Motion for Determination of Good Faith Settlement, "[t]he settlement was reached after arm's length negotiation between Plaintiff's counsel and counsel for Sandbar. There was no collusion or fraud in reaching the settlement. There was also no intent to hard the interests of Polaris in reaching the settlement."[1] Under these facts, Polaris is not entitled to disrupt the case far into the merits upon the routine settlement of a co-defendant.

II. *Forum Non Conveniens* Motions are Heavily Disfavored when Brought After the Parties have Engaged in Merits Discovery.

[1] *See* Sandbar's Motion for Determination of Good Faith Settlement, p. 10.

Polaris is correct that, in a theoretical sense, there is no deadline to file a *forum non conveniens* motion or a specific time at which the motion is waived. But "while untimeliness will not effect a waiver, it should weigh heavily against the granting of the motion because a defendant's dilatoriness promotes and allows the very incurrence of costs and inconvenience the doctrine is meant to relieve." *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1165, 1987 A.M.C. 2735 (5th Cir. 1987). "Motions to dismiss based on *forum non conveniens* usually should be decided at an early stage in the litigation, so that the parties will not waste resources on discovery and trial preparation in a forum that will later decline to exercise its jurisdiction over the case." *Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 614 (3d Cir. 1991). "Once the litigation has progressed significantly…a different factor enters into the equation." *Id.*

In *Lony*, the Third Circuit rejected a *forum non conveniens* argument where the parties had been conducting "merits discovery for nearly six months." *Id.* at 613. Noting that it must "consider the extent of merits activity already completed and underway," the court rejected a strategy in which "new facts…are used to initiate reconsideration of what should be a preliminary motion." *Id.* The court stressed the importance of private factors such as "the parties' investment in time and money in discovery." *Id.* at 614.

Here, that investment has been substantial. Plaintiffs are pleasantly surprised to learn that Polaris believes "the discovery conducted in this case has not been focused on Plaintiffs' claims against Polaris,"[2] since it means that Polaris was oblivious to the damning evidence regarding its defective vehicle developed during the depositions of Sandbar personnel and the Plaintiffs themselves. Suffice to say, Plaintiffs have not limited their discovery efforts to any one claim. Were the case dismissed and refiled in another jurisdiction, the depositions and discovery

[2] *See* Affidavit of Jennifer Willis Arledge in Support of Order Shortening Time, para. 6.

completed to date would need to be redone. Most importantly, Plaintiffs have developed this evidence and testimony for use in a Nevada courtroom. Likewise, experts have been retained with the expectation of a Nevada trial.

The court in *Lony* also emphasized the importance of public factors, such as whether "the district court and court personnel already have expended resources in connection with this litigation." *Id.* at 614. In addition, the analysis "cannot overlook as a highly significant factor the district court's familiarity with the litigation." *Id.* Finally, "similar considerations of judicial efficiency and expediency counsel that the extent of discovery on the merits already completed must be weighed in favor of retention of jurisdiction in the forum." *Id.*

Here, in addition to extensive discovery, substantial judicial resources have already been devoted to the case. The court has made rulings which affect the parties' rights. For example, Polaris cites "the recent entry of a protective order,"[3] but this fact weighs heavily against the motion. It is wasteful to dismiss this case after the Court and the parties spent substantial time and resources litigating over a protective order. The alternative out-of-state forums have their own rules and statutes governing the entry of protective orders and the sealing of documents. Even Polaris' counsel agrees that if the motion is granted "and this case is brought in another jurisdiction, that other jurisdiction's discovery rules would apply."[4] Not only is this process wasteful for this Court, but the issues relating to the protective order and confidentiality would have to be relitigated in the new forum, causing additional expense and significant delay. Similarly, the protective order requires the return of all documents within thirty days of the "termination of this action." Accordingly, all confidential documents would have to be returned, new discovery requests served, and documents reproduced.

[3] *Id.,* para. 7
[4] *Id.*

In sum, not only have the parties and this Court devoted significant resources to this case, but a variety of related problems threaten to arise if a case in its advanced stages is transferred to a new jurisdiction. Therefore, even if Polaris had been able to produce evidence showing substantial prejudice from inconvenience, it would not be "sufficient to overcome the strong ground for retention of jurisdiction in [Nevada] in light of the substantial merits discovery already underway." *Id.*

III. Polaris Failed to Meet its Evidentiary Burden.

In Nevada, "a motion for change of venue based on *forum non conveniens* must be supported by affidavits so that the district court can assess whether there are any factors present that would establish such exceptional circumstances." *Mountain View Rec. v. Imperial Commercial,* 129 Nev. 413, 419, 305 P.3d 881, 885 (2013). "General allegations regarding inconvenience or hardship are insufficient because a specific factual showing must be made." *Id.*

Here, Polaris submitted a single affidavit from its employee Blake Anderson. His affidavit states three facts:

- Polaris is headquarters are in Medina, Minnesota.
- Polaris manufactured the vehicle at issue in Minnesota.
- Polaris employees and documents are in Minnesota.

Mr. Anderson's affidavit does not contain any statements regarding any inconvenience. This Court cannot presume that Polaris -- a manufacturer with multi-national operations and multi-billion-dollar revenues -- will be inconvenienced by emailing its documents into Nevada, having its employees deposed in Minnesota, or bringing whatever Polaris witnesses it desires to appear at the time of trial.

In any case, Mr. Anderson's affidavit is plainly irrelevant under a *forum non conveniens* analysis. In *Mountain View,* the Nevada Supreme Court warned that "neither the convenience of a party nor an employee of a party is to be considered in determining a [*forum non conveniens*]

motion." *Mountain View*, 129 Nev. at 419. Likewise, "convenience of counsel is not an appropriate consideration." *Id.* Yet Polaris offered no other evidence.

Most importantly, there is no evidence from Polaris supporting any inconvenience to any Arizona witnesses, which consist of "Sandbar's owners, Sandbar's employees, and first responders."[5] With respect to Sandbar personnel, Polaris has already secured testimony from these witnesses, and even if Polaris desired to call them at trial, there is no evidence in the record showing that Sandbar witnesses would refuse to appear at trial. Nor can it be presumed to be inconvenient for Sandbar witnesses to appear in the state of Sandbar's incorporation. With no evidence in the record, a dismissal cannot be granted due to their inconvenience.

With respect to first responders, Polaris' counsel admits in an affidavit that testimony is readily available, and that "depositions of first responders and other percipient witnesses are soon to be set (in Arizona)."[6] Video depositions of first responders are typically used at trial, and even assuming Polaris could show it was unreasonably oppressive to lack live testimony, Polaris has not provided any evidence showing that any witness will not appear at trial voluntarily.

Here, "[t]he record is devoid of affidavits from either percipient or expert witnesses or other evidence to demonstrate how the witnesses would be inconvenienced." *Id.* at 420. In fact, Polaris admits in its brief that these witnesses may "agree to travel to Nevada for trial."[7] In any event, an argument focused on travel "provides little, if any, support for [defendant's] position even if such evidence were provided in the record." *Mountain View*, 129 Nev. at 419, *citing Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1336 (9th Cir.1984) (noting that "a district court should keep in mind that the increased speed and ease of travel and communication ... makes, especially

[5] *See* Polaris' Motion, p. 12.
[6] *See* Affidavit of Jennifer Willis Arledge in Support of Order Shortening Time, para 8.
[7] *See* Polaris' Motion, p. 18.

when a key issue is the location of witnesses, no forum as inconvenient [today] as it was [in years past].").

Polaris failed to meet its burden seeking "a change of venue based on *forum non conveniens*" because Polaris did not "submit affidavits to demonstrate exceptional circumstances supporting a venue change on this basis." *Flannery v. Shaw*, 71440, 2016 WL 7635453, at *1 (Nev. App. Dec. 28, 2016). By failing to meet its evidentiary burden, Polaris has prevented this Court from engaging in "the fact-intensive inquiry the doctrine of *forum non conveniens* requires." *Pound for Pound Promotions, Inc. v. Golden Boy Promotions, Inc.*, 432 P.3d 201 (Nev. 2018). "In the absence of such evidence as to why a venue change is warranted, the supreme court has concluded that a venue change under NRS 13.050(2)(c) is improper." *Flannery*, 2016 WL 7635453 at *1.

IV. The Court Owes Deference to Plaintiff's Initial Forum Choice.

Polaris cites unpublished federal district court authority which held that less deference is afforded to U.S. plaintiffs who do not sue in their home states, and Polaris later claims this Court owes them no deference at all. However, there is no support for this proposition in Nevada law, and the Nevada Supreme Court has cited contrary Second Circuit authority. In *Provincial Gov't*, the Court noted that "a plaintiff's choice of forum is entitled to great deference, but a foreign plaintiff's choice of a United States forum is entitled to less deference." *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 131 Nev. Adv. Op. 35, 350 P.3d 392, 396 (2015). The Court cited *Pollux Holding Ltd.*, which noted that "when a foreign plaintiff sues in a United States forum such choice is entitled to less deference." *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 71 (2d Cir. 2003). However, *Pollux* only ruled that foreign nationals could "be treated on terms no less favorable than those applicable to U.S. nationals." *Id.* at 72. The

deference is lowered because a non-citizen is not "entitled to access American courts on the same terms as American citizens." *Id.* at 73.

The Second Circuit also discussed the issue in *Iragorri,* in which it examined "a fact pattern not directly addressed by the Supreme Court: a United States resident plaintiff's suit in a U.S. district other than that in which the plaintiff resides." *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 71 (2d Cir. 2001). The court held that a U.S. resident is entitled to greater deference than a foreign litigant, and that "[t]he more it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiff's forum choice." *Id.* at 71-72. Here, Plaintiffs' forum was valid and sensible, and as American litigants, their forum choice is entitled to substantial deference.

In sum, Plaintiffs were fully justified in filing suit in Nevada, and there is no compelling reason to disturb the case. There have always been and remain even now Nevada connections to this litigation. There is no evidence of a docket congestion problem unique to Clark County that is absent in the alternate forums, and a single-defendant injury lawsuit does not impose any special burden. Nor do any potential choice of law issues pose significant challenge. Assuming Arizona law would apply, Nevada courts are frequently called upon to apply neighboring law, and there is nothing unique or complex about Arizona law that makes its local application inconvenient or oppressive. "The fact that the Court might have to apply the law of another jurisdiction is not particularly significant. This Court is frequently called upon to apply the law of other jurisdictions and should be presumed capable of carrying out such a function" *Cropper v. Peninsula Bank,* NO. 1989-05-125, 1990 WL 964522, at *1 (Del. Com. Pl. Apr. 27, 1990). With no compelling basis for transfer, and given the fatal defects discussed above, Polaris invites this Court to commit plain error.

CONCLUSION

Polaris' highly unorthodox motion should be denied on timeliness alone. The court and parties have expended substantial resources on the case, and granting the motion would increase rather than decrease inconvenience. Polaris' motion is also improper because it is based solely on the routine settlement of a co-defendant, which does not create the "exceptional circumstances" required by the Nevada Supreme Court in *Mountain View*. On top of these defects, Polaris' motion also fails to meet the evidentiary burden because it includes only a single affidavit from its employee which merely states the location of the company and its employees. For these reasons, the Court should give deference to Plaintiffs' valid forum choice and deny Polaris' Motion.

Dated: February 8, 2019

By_____

KYLE W. FARRAR, ESQ.
KASTER, LYNCH, FARRAR & BALL, LLP
1010 Lamar, Suite 1600
Houston, TX 77002
713.221.8300
ADMITTED PRO HAC VICE

&

CHAD A. BOWERS, ESQ.
Nevada Bar #: 007283
CHAD A. BOWERS, LTD.
3202 West Charleston Blvd
Las Vegas, NV 89102
702-457-1001

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of February, 2019, I served a true and correct copy of the foregoing **PLAINTIFFS' RESPONSE TO POLARIS' MOTION TO DISMISS FOR *FORUM NON CONVENIENS,*** by sending a copy of the same via Odyssey E-File NV, the Court's electronic filing/service program to the following:

Griffith H. Hayes, Esquire
Keivan A. Roebuck, Esquire
LITCHFIELD CAVO, LLP
3993 Howard Hughes Parkway, Suite 100
Las Vegas, Nevada 89169
hayes@litchfieldcavo.com
roebuck@litchfieldcavo.com

Attorneys for Sandbar Powersports LLC

Jennifer Willis Arledge, Esquire
WILSON ELSER MOSKOWITZ EDELMAN & DICKER, LLP
300 South 4th Street, 11th Floor
Las Vegas, Nevada 89101
Jennifer.arledge@wilsonelser.com

Attorney for Polaris Industries, Inc.

Chad A. Bowers, Esquire
CHAD A. BOWERS, LTD.
3202 West Charleston Blvd.
Las Vegas, NV 89102
bowers@lawyer.com

Attorney for Plaintiffs

An employee of KASTER, LYNCH, FARRAR & BALL, LLP

RIS
JENNIFER WILLIS ARLEDGE
Nevada Bar No.: 8729
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
300 South 4th Street, 11th Floor
Las Vegas, NV 89101
(702) 727-1400; FAX (702) 727-1401
Jennifer.Arledge@wilsonelser.com
Attorneys for Defendant/Cross-Defendant
POLARIS INDUSTRIES, INC.

DISTRICT COURT

CLARK COUNTY, NEVADA

JOHN BORGER and SHERRI BORGER, Plaintiffs, vs. SANDBAR POWERSPORTS, LLC, DOES I through X; ROE CORPORATIONS XI through XX, inclusive, and POLARIS INDUSTRIES, INC., Defendants, And Related Claims.	CASE NO: A-17-751896-C DEPT NO: XXV **DEFENDANT POLARIS INDUSTRIES, INC.'S REPLY IN SUPPORT OF MOTION TO DISMISS FOR *FORUM NON CONVENIENS***

COMES NOW Defendant Polaris Industries, Inc., ("Polaris") by and through counsel and hereby submits its reply in support of motion to dismiss for *forum non conveniens*. This Reply is made and based upon the pleadings and papers on file herein, the attached Memorandum of Points

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and Authorities, and any argument adduced by counsel at the hearing hereof.

Dated this 14th day of February, 2019.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

By: Jennifer W. Arledge

JENNIFER WILLIS ARLEDGE
Nevada Bar No.: 8729
300 South 4th Street, 11th Floor
Las Vegas, NV 89101
Attorneys for Defendant
POLARIS INDUSTRIES, INC.

FAEGRE BAKER DANIELS, LLP

By: per authority gwh 2-14-19

Matthew T. Albaugh, Esq. – *pro hac vice*
Lexi C. Fuson, Esq. – *pro hac vice*
300 N. Meridian St., Suite 2700
Indianapolis, IN 46204
Attorneys for Defendant
POLARIS INDUSTRIES, INC.

MEMORANDUM OF POINTS AND AUTHORITIES

OVERVIEW

Plaintiffs' Response Brief does not, and cannot, contest the key grounds supporting Polaris's *forum non conveniens* motion, including that: (1) Arizona law applies to Plaintiffs' claims; (2) the subject vehicle was purchased in Arizona; (3) Plaintiffs rented the vehicle in Arizona; (4) Plaintiffs executed a rental agreement subject to Arizona law; (5) Plaintiffs received training, instructions, and warnings in Arizona; (6) Plaintiffs drove the vehicle on Arizona trails; (7) the accident and ensuing injuries allegedly occurred in Arizona; (8) all the fact witnesses to the accident reside in Arizona and California; and (9) the allegedly defective vehicle is in Arizona. Moreover, if this case remains in Nevada following Sandbar's settlement with Plaintiffs, it is likely that none of the key first responders or Sandbar employees who rented the vehicle to Plaintiffs can be compelled to attend trial and testify in person in front of the jury. Put simply, Nevada has no interest in this lawsuit, and Arizona is a far more convenient forum to litigate Plaintiffs' product liability claims against Polaris.

Tellingly, Plaintiffs ignore Nevada's three-part test when analyzing a *forum non conveniens* motion. As explained in Polaris's motion, when a party makes a forum challenge, Nevada courts (a) determine the level of deference owed to the plaintiff's forum choice, (b) analyze whether an adequate alternative forum exists, and (c) balance various factors, such as Nevada's interest in the case, its familiarity with applicable law, the burdens on local courts and jurors, court congestion, the defendant's location, access to proof, and the availability of compulsory process for unwilling witnesses. This test overwhelmingly counsels in favor of dismissing this case and allowing it to move forward in Arizona. Here, this Court owes Plaintiffs' forum choice little deference and Arizona is a far more convenient alternative forum with a strong connection to and interest in this case.

I. Dismissal Now Is Reasonable Because Limited Discovery Has Been Conducted on Plaintiffs' Claims Against Polaris – No Polaris Documents Have Been Produced, No Polaris Employees or First Responders Have Been Deposed, No Experts Have Been Identified, and No Expert Reports Have Been Produced.

Plaintiffs' primary argument against dismissal is that Polaris waited too long to bring this motion. Plaintiffs assert that "depositions and discovery completed to date would need to be redone" and "all confidential documents would have to be returned, new discovery requests served, and documents reproduced." (Pltfs. Resp. at 5-6.) Plaintiffs also assert they have "developed this evidence and testimony for use in a Nevada courtroom" and "experts have been retained with the expectation of a Nevada trial." (Id. at 6.) Those arguments are nonsense.

As Plaintiffs acknowledge in their response, "there is no deadline to file a *forum non conveniens* motion or a specific time at which the motion is waived." (Pltfs. Resp. at 5.) In fact, a dismissal under forum non conveniens is at the discretion of the court and may be made at any time. *See Abiola v. Abubakar*, 267 F. Supp. 2d 907, 918 (N.D. Ill. 2003). Limitations on the time period for moving to dismiss only bar a defendant from making the objection at an unreasonable time. *See, e.g.,* Model Forum Non Conveniens Act § 1(D) (establishing timeliness of *forum non conveniens* motions "at a reasonable time prior to commencement of the trial," and "no later than 30 days prior to trial").

In fact, numerous courts across the county have granted *forum non conveniens* motions after *extensive* merits discovery, including cases where the case was ready for trial. *See, e.g., Amur Sp. Z.O.O. v. FedEx Corp.,* 684 Fed. Appx. 554, 555 (6th Cir. 2017) (affirming trial court's dismissal of the case based on *forum non conveniens* where trial court allowed discovery for a year before granting dismissal); *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 based on *forum non conveniens*); *Sigalas v. Lido Mar., Inc.*, 776 F.2d 1512, 1520 (11th Cir. 1985) (affirming dismissal

based on *forum non conveniens* 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 underlying suit was filed eight years before and even though "much work ha[d] been done on th[e] case").

A. Polaris's motion is timely and reasonable because the limited discovery already completed will not need to be redone.

The limited discovery conducted to date – namely, some written discovery, depositions of the two plaintiffs, and four depositions of Sandbar representatives – occurred *before* the Court's entry of this case's Protective Order. None of that discovery was deemed confidential by the parties producing it or subject to the Court's Protective Order. Thus, nothing needs to be "destroyed" or "reproduced." As such, Plaintiffs can use the discovery it has already conducted in any future proceeding in Arizona.

The Court entered the Protective Order in this case on January 22, 2019. Although Polaris's production is forthcoming and will be made pursuant to that Protective Order, no other discovery in this case is subject to the Protective Order. Polaris will permit Plaintiffs to retain Polaris's production during the period between dismissal and re-filing in Arizona, assuming Plaintiffs agree to the same protections and limitations as currently set forth in the Protective Order and the entry of a similar protective order in Arizona.

This Court also has broad powers and discretion under Rule 26 to direct the course of discovery. The Court can condition its dismissal of this case on the parties' ability to utilize discovery already conducted in an Arizona proceeding. The Court could even retain jurisdiction over the case before dismissal while Plaintiffs refile to ensure compliance with its orders. *See, e.g., Bank of Credit & Commerce Int'l (Overseas) Ltd. v. Bank of Pak.*, 273 F.3d 241, 247-48 (2d Cir.

2001); *Zekic v. Reading & Bates Drilling Co.*, 680 F.2d 1107 (5th Cir. 1982) (encouraging the use of conditional dismissals); *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 350 P. 3d 392, 399 (Nev. 2015) (entering a conditional dismissal).

Plaintiffs' conclusory assertions that they have developed "evidence and testimony for use in a Nevada courtroom" and "experts have been retained with the expectation of a Nevada trial" simply don't hold water. Whatever courtroom Plaintiffs' lawsuit is resolved in will apply Arizona law. *See Gen. Motors Corp. v. Eighth Judicial Dist. of State of Nev. ex rel. Cty. Of Clark*, 122 Nev. 466, 474 (2006) ("the rights and liabilities of the parties are governed by the 'local law of the state where the injury occurred'") (internal citation omitted). Plaintiffs' evidence must establish the elements of Arizona law, not Nevada law. Similarly, and notwithstanding the fact that no experts have been disclosed, Nevada law on the admissibility of expert testimony is generally the same as Arizona. *Cf. Hallmark v. Elridge*, 189 P.3d 646, 651 (Nev. 2008) (setting forth considerations for assessing expert testimony that largely track those set forth in *Daubert*) *with* Arizona Rule of Evidence 702 (setting forth similar considerations for expert testimony admissibility).

Accordingly, Plaintiffs' contentions that the timing of Polaris's motion is unreasonable and that they will have to re-do the limited discovery conducted to date is nothing more than a red herring.

B. Polaris's motion is timely and reasonable because minimal fact discovery against Polaris has occurred, and no expert discovery has been conducted.

Plaintiffs argue that Sandbar's settlement is not "good cause" for dismissal. (Pltfs. Resp. at 3-4.) Plaintiffs also assert that "Polaris is not entitled to disrupt the case *far into the merits* upon the routine settlement of a co-defendant." (*Id.* at 4) (emphasis added.)

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Plaintiffs overstate the extent of discovery to date, particularly as to their claims against Polaris. Polaris has yet to produce *any* documents in response to Plaintiffs' discovery requests.[1] Not a single Polaris representative has been deposed.[2] In fact, Plaintiffs have not even *requested* the deposition of a single Polaris employee or representative.[3] Expert disclosures are still months away, with expert depositions likely to happen many months later. Trial, which is currently scheduled for October 2019, has been repeatedly re-set in this case.

Plaintiffs' conduct prior to and after the parties' mediation illustrates the current status of this case. Before mediation, Plaintiffs had never lodged a single demand upon Polaris.[4] When Polaris's counsel phoned Plaintiffs' counsel after the mediation, Plaintiffs' counsel stated that Plaintiffs needed discovery from Polaris before their settlement discussions with Polaris could progress meaningfully.[5]

In response to Plaintiffs' argument, Polaris agrees that Sandbar's settlement, *alone*, is not the "grounds" for its motion.[6] Rather, Polaris's grounds are a combination of all circumstances in this case, including that:

- The accident occurred in October 2016, and Plaintiffs filed suit in March 2017 naming o*nly* Sandbar as a defendant;
- Plaintiffs waited until November 2017 to add Polaris as a party, and Polaris answered in December 2017;

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[1] *See* Exhibit A, Affidavit of Matthew Albaugh, ¶ 5.
[2] *Id.* ¶ 6.
[3] *Id.* ¶ 7.
[4] *Id.* ¶ 8.
[5] *Id.* ¶ 10.
[6] Plaintiffs site *Fessler v. Watchtower Bible & Tract Society of N.Y., Inc.*, 131 A.2d 44, 47 (Pa. Super. 2015), to argue that Polaris cannot "disrupt the case far into merits upon the routine settlement of a co-defendant." (Pltfs. Resp. at 3-4.) *Fessler* is easily distinguishable because Pennsylvania has a significantly higher standard of review for *forum non conveniens* motions. The Pennsylvania standard applied in *Fessler* was whether the plaintiff's forum choice was vexatious and intended to harass the defendant. As explained herein, Nevada does not apply that standard of review.

- Polaris's *forum non conveniens* objection was preserved in Polaris's affirmative defenses; thus, there is no surprise that Polaris filed the instant motion;
- Polaris has no business or contractual relationship with Sandbar and its first notice of the accident was when it was served with the summons and complaint in late 2017;[7]
- Polaris has no first-hand knowledge of what happened and must rely entirely upon the testimony of others as to the facts of the accident;[8]
- Polaris needed time and discovery to corroborate its understanding of the facts and details of the accident;
- Plaintiffs John and Sherri Borger were not deposed until October 2018;
- Once the facts were established to support its motion, Polaris moved within a reasonable time thereafter and promptly after the parties' settlement efforts failed;
- As a result of Sandbar's settlement with Plaintiffs, Sandbar employees are no longer subject to compulsory process to attend trial in Nevada;
- No other non-party fact witnesses are located in Nevada; and
- Nevada now has no material connection to Plaintiffs' remaining claims.

Plaintiffs' upcoming focus on their product liability claims against Polaris, which have yet to be developed, presents an ideal time to dismiss this case. Moreover, until the settlement with Sandbar, Plaintiffs had a colorable argument that the case should remain in Nevada because Sandbar is a Nevada Limited Liability Company. Polaris chose not to file the instant Motion earlier, anticipating that argument, in an effort to conserve judicial resources. Now that Sandbar has settled with Plaintiffs, the threadbare connection to the State of Nevada has been cut and the instant Motion was filed.

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[7] Exhibit A, ¶ 11.
[8] *Id.* ¶ 12.

II. Polaris Has Presented Adequate Proof of the Inconvenience of Nevada

Plaintiffs urge the Court to deny Polaris's motion because Polaris has not shown that the many Arizona-based witnesses "would refuse to appear at trial." (Pltfs. Resp. at 8.) Plaintiffs do not dispute that ***none*** of these essential fact witnesses, 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, can be compelled to attend a trial in Nevada.

Regarding the First Responders, Polaris's counsel has attempted to reach them multiple times to inquire about their cooperation and availability for either deposition or trial attendance.[9] Despite multiple efforts to reach them, only one of the Arizona-based first responders have returned any of Polaris's phone calls and advised of the difficulty and need for "special permission" for officers with the Mohave County Sheriff's Office to appear in Las Vegas. In fact, the Mohave County Sheriff's Office stated that it would be "almost impossible" for the main investigator, Sgt. Kole, and any officer to travel to Las Vegas for deposition or trial testimony.[10] Similarly, the Lake Havasu City Fire Department, who also responded to the scene of the accident, informed Polaris's counsel that they could not agree to make any of the first responders available to appear for deposition or trial in Nevada.[11] Because these witnesses are in Arizona, Polaris will not be able to compel their attendance at trial. Moreover, Polaris cannot provide an affidavit from those first responders because they refuse to return Polaris's calls. Logic and their current conduct should lead the Court to conclude that they will not voluntarily attend trial in a separate state.

As explained in Polaris's opening brief (pp. 5, 9) and Sandbar's Motion for Good Faith Settlement (pp. 19-21), the Arizona first responders' testimony will be vital for a trier-of-fact in this

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[9] *See* Exhibit B, Declaration of Jennifer Arledge, ¶¶ 3, 4, 5.
[10] *See id.* ¶ 3.
[11] *See id.* ¶ 4.

case. Based on the first responders' interviews and official reports, it appears there was a concerted effort by the entire Borger family to lie about who was driving. Similarly, Mrs. Borger informed first responders (according to their reports) that she "recalled all the events of the accident," but at her deposition she asserted few if any memories about what occurred.[12]

While Polaris may eventually be able to subpoena the first responders' deposition testimony, it will be significantly prejudiced if it is unable to present their testimony live to a jury. The Plaintiffs' credibility will be front and center in this case. Did their own recklessness and misuse of the vehicle cause Mrs. Borger's injuries? Did they know that Foster Borger was not supposed to be driving? And did they knowingly fabricate a story after the accident to portray Mr. Borger as the driver? Allowing jurors to hear the competing testimony live and evaluate the witnesses' body language and non-verbal clues will be paramount. *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.").

Moreover, testimony from various Sandbar employees will be similarly vital to this case. Sandbar employees will provide information regarding the Polaris RZR that Plaintiffs rented on the day of the accident, the warnings and instructions that were provided to Plaintiffs and their family that morning, and the extent to which the Plaintiffs and their family members were present and attentive to those warnings and instructions, as well as testimony regarding what they saw and observed at the scene of the accident and the state of the vehicle immediately following the accident. Counsel for Sandbar, Griffith Hayes, Esq., informed counsel for Polaris that he did not think Sandbar employees would want to fly to Las Vegas, but they "might" be willing to testify by

[12] *Cf.* Exhibit C, Native Air Incident Report, Borger001361-001373, with Exhibit D, Deposition of S. Borger, 156:10-17 (stating that she does not recall the motion of the vehicle immediately before it tipped over); 157:5-11 (stating that she does not recall why the vehicle tipped over).

videoconference.[13] Testimony by videoconference cannot be likened to live testimony, as the witness's testimony, body language, and non-verbal clues will not be as evident to the jury on video as it would be live.

III. The Court Owes Little to No Deference to Plaintiffs' Choice of Forum.

Plaintiffs' final argument in opposition to Polaris's motion is that "as American litigants, their forum choice is entitled to substantial deference." (Pltfs. Resp. at 10.) In support, Plaintiffs cite a totally irrelevant federal appellate decision, which held that a U.S. resident who files suit in federal district court other than the district in which he resides is entitled to greater deference than a foreign litigant. (*Id.*) (citing *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 71 (2d Cir. 2001)).

Plaintiffs confuse the federal court system with Nevada's *state* court system. While the United States federal court system, by its nature, is open and available to all United States citizens, Plaintiffs chose to file in Nevada state court. Plaintiffs do not dispute that they were Minnesota residents at the time of the accident and are now California residents. Plaintiffs have never resided in Nevada.

Nevada courts applying similar fact patterns have concluded that a forum choice like the one the Borgers made is entitled to less deference. "While 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); *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.").

Deference to Plaintiffs' choice of forum is further reduced where Nevada lacks a significant connection to the activities alleged in the complaint. *See Editorial Planeta Mexicana, S.A. de C.V. v.*

[13] *See* Ex. B, ¶ 6.

Argov, 2012 WL 3027456, at *5 (D. Nev. July 23, 2012). Without elaboration, Plaintiffs argue summarily that "[t]here have always been and remain even now Nevada connections to this litigation." (Pltfs. Resp. at 10.) Tellingly, Plaintiffs do not (and cannot) argue that Nevada has a *significant* connection to their lawsuit.

Because Plaintiffs have never resided in Nevada and because Nevada lacks any significant connection to the Plaintiffs' lawsuit, Plaintiffs' decision to file in Nevada is entitled little to no deference.

IV. The Court Should Exercise Its Broad Discretion and Dismiss Plaintiffs' Lawsuit So It Can Be Refiled in Arizona.

This Court is vested with broad discretion to dismiss Plaintiffs' lawsuit on *forum non conveniens* grounds. The Court should exercise that discretion and dismiss Plaintiffs' case so that it can be refiled in the far more convenient forum of Arizona. Nevada courts and jurors have little interest in hearing a case based on the claims of California residents (formerly Minnesota residents) for an injury that occurred in Arizona and involves product liability claims under Arizona law applicable to a product designed and manufactured in Minnesota. Put simply, burdening Nevada courts with such a complex case, likely to require many weeks of trial, makes no sense.

Dated this 14th day of February, 2019.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

By: Jennifer W. Arledge

JENNIFER WILLIS ARLEDGE
Nevada Bar No.: 8729
300 South 4th Street, 11th Floor
Las Vegas, NV 89101
Attorneys for Defendant
POLARIS INDUSTRIES, INC.

FAEGRE BAKER DANIELS, LLP

By: per authority JWA 2-14-19

Matthew T. Albaugh, Esq. – *pro hac vice*
Lexi C. Fuson, Esq. – *pro hac vice*
300 N. Meridian St., Suite 2700
Indianapolis, IN 46204
Attorneys for Defendant
POLARIS INDUSTRIES, INC.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP, and that on this 14th day of February, 2019, I served a true and correct copy of the foregoing **DEFENDANT POLARIS INDUSTRIES, INC.'S REPLY IN SUPPORT OF MOTION TO DISMISS FOR *FORUM NON CONVENIENS*** as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;

☒ via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk; and pursuant to Rule 9 of the N.E.F.C.R.

Chad Bowers, Esq.
CHAD A. BOWERS, LTD.
3202 W. Charleston Blvd.
Las Vegas, NV 89102
Attorneys for Plaintiff

Kyle W. Farrar
KASTER, LYNCH, FARRAR & BALL, LLP
1010 Lamar, Suite 1600
Houston, TX 77002
Attorneys for Plaintiff

Griffith H. Hayes, Esq.
Marisa A. Pocci, Esq.
Keivan A. Roebuck, Esq.
LITCHFIELD CAVO, LLP
3753 Howard Hughes Parkway, Suite 100
Las Vegas, NV 8919
Attorneys for Defendant
SANDBAR POWERSPORTS, LLC

BY _____
An Employee of
Wilson Elser Moskowitz Edelman & Dicker LLP

EXHIBIT "A"

EXHIBIT "A"

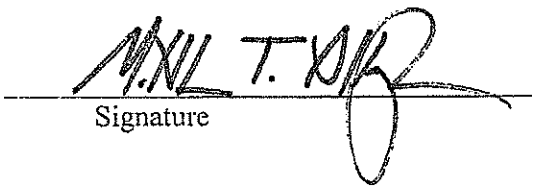
DECLARATION OF MATTHEW T. ALBAUGH, ESQ.,
IN SUPPORT OF POLARIS INDUSTRIES, INC.'S
MOTION TO DISMISS FOR *FORUM NON CONVENIENS*

I, Matthew T. Albaugh, Esq., declare as follows:

1. I am attorney in good standing, licensed to practice law in the State of Indiana.
2. I am admitted *pro hac vice* in the State of Nevada.
3. I am Partner with the law firm of Faegre Baker Daniels LLP, attorneys of record for Polaris Industries, Inc. ("Polaris") in this case.
4. I am over eighteen (18) years old, and I make this Declaration based on my own personal knowledge, information, and belief.
5. Polaris had not produced any documents in response to Plaintiffs' Requests for Production.
6. No representative or employee of Polaris has been deposed in this case.
7. Plaintiffs have not requested the deposition of a Polaris representative or employee in this case.
8. Before the January 8, 2019 mediation in this case, Plaintiffs had not made a demand upon Polaris.
9. I contacted Plaintiffs' counsel after the mediation in an effort to continue the settlement discussions.
10. Plaintiffs' counsel informed me that Plaintiffs needed discovery from Polaris before their settlement discussions with Polaris could progress meaningfully.
11. Polaris has no business or contractual relationship with Sandbar and its first notice of the accident was when it was served with the summons and complaint in late 2017.
12. Polaris has no first-hand knowledge of what happened and must rely entirely upon the testimony of others as to the facts of the accident.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Executed on February 11, 2019



Signature

EXHIBIT “B”

EXHIBIT “B”

DECLARATION OF JENNIFER WILLIS ARLEDGE, ESQ.

STATE OF NEVADA)

COUNTY OF CLARK)

I, Jennifer Willis Arledge, Esq., do hereby state:

1. I am a partner in the law firm of Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, and counsel of record for Defendant Polaris Industries, Inc., in the case Borger v. Sandbar Powersports, LLC, et al., case number A-17-751896-C, filed in the Eighth Judicial District Court, Clark County, Nevada.

2. In conducting discovery for the above-referenced case, an associate in my office was instructed to contact the first responders to the subject accident to coordinate depositions. The associate reported to me that she had left several messages, but had been unable to reach anyone. The associate is no longer employed by this law firm and is unavailable to execute a declaration.

3. To follow up on the above, on February 14, 2019, I spoke to Kim Aune, Special Counsel to Mohave County, Arizona Sheriff. I explained to Ms. Aune that I was trying to secure deposition and trial appearances of the officers involved in investigating the subject incident. Ms. Aune told me that the main investigator, Sgt. Kole, is a Detective/Sergeant. Their department is short staffed and Sgt. Kole is required to be in an upcoming murder trial and trainings that limit his availability. In addition, it would take "special permission" and would be "almost impossible" for him and any officer to travel to Las Vegas for deposition or trial testimony.

4. On February 14, 2019, I called the Lake Havasu City Fire Department to discuss securing the testimony of the EMTs who responded to the subject accident. The assistant who answered the phone told me that the lead EMT, Jared Sison, was no longer employed by the Fire Department. She then took a message about the other three EMTs I was calling about and stated that she would talk to someone and return my call. Later, I received a call from Kelly Garry, counsel for

the City of Lake Havasu. Ms. Garry told me that the employees would have to be subpoenaed to appear in Arizona and that she could not agree to make them available to appear for deposition or trial in Nevada.

5. On February 14, 2019, I made several attempts to call Native Air, the company that provided life flight services for Plaintiff Sherri Borger. Victoria Jenkins, RN, was the Registered Nurse on the flights. I was unable to contact anyone at Native Air to discuss and was unable to leave a message because the phone number I called did not appear to be working.

6. On February 11, 2019, I asked counsel for Sandbar, Griffith Hayes, Esq., if Sandbar employees/owners would voluntarily appear at trial in Nevada. He responded that he would have to check and get back to me. He further stated that he did not think they would want to fly to Las Vegas but that they "might" be willing to testify by videoconference or Skype.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 14, 2019

Jennifer W. Arledge

Jennifer Willis Arledge, Esq.