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

9 TARA KELLOGG, A/K/A TARA
10 KELLOGG-GHIBAUDO,

11 Appellant,

12 vs.

13 ALEX B. GHIBAUDO,

14 Respondent.

No. 84778

**Appellant's Reply to
Respondent's Response to
Motion for Leave to Amend
Docketing Statement**

&

**Response to Counter-Motion
for Sanctions Against Mr.
Schwab**

17 Appellant Tara Kellogg a/k/a Tara Kellogg-Ghibaudo files her Reply to
18 Respondent's Response to Motion for Leave to Amend Docketing Statement
19 ("Reply") and Response to Counter-Motion for Sanctions Against Mr.
20 Schwab ("Response").

21 This Reply and Response is based upon the papers and pleadings on file
22 herein as well as any oral argument permitted by the Parties and/or their
23 Counsel at the time of hearing.

24 **Points and Authorities**

25 **Introduction and Statement of Facts**

1 **A. District Court Proceedings and Pertinent Background**

2 The instant action arises from a Complaint for Divorce filed by Appellant
3 in the Clark County District Court on October 1, 2015.¹ The Parties had one
4 Minor Child at the time of filing for divorce, but there are no now Minor
5 Children. The District Court entered the Decree of Divorce on February 1,
6 2017.² The Decree of Divorce granted the Parties the legal status of divorce
7 and set Husband's spousal support obligation. On November 10, 2020, the
8 Court entered Findings of Fact, Conclusions of Law and Judgment ("11-10-
9 2020 FFCL") adjudicating a number of post-decree of divorce issues. This
10 matter was appealed by both Parties in Nevada Court of Appeals Case No.
11 82248-COA and is pending a Petition for Review before the Nevada
12 Supreme Court.³

13 Prior to 11-10-2020 FFCL, the Parties entered into a Stipulated
14 Confidentiality Agreement and Protective Order ("Protective Order").⁴ The
15 Protective Order in no way shape or form contemplated hearing videos or
16 matters outside of discovery and was entered into "to facilitate the
17 disclosure of information..." as "this action involves or may involve the
18 disclosure of documents, and information potentially entitled to protection

19 ¹ Docketing Statement ("Docketing Statement"), filed on 7-7-2022, on
20 file herein in Nevada Supreme Court Case No. 84778.
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22 ² Docketing Statement.
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24 ³ Respondent/Cross Appellant's Petition for Review, filed on 8-22-202 in
25 82248.

26 ⁴ Docketing Statement.
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1 under N.R.C.P. Rule 16.2 and Rule 26(c)".⁵ The Protective Order was meant
2 for the purpose of discovery and not to be used as a sword post-litigation to
3 silence public access to the Courts or first amendment rights. Respondent
4 makes much ado in his July 9, 2022 Respondent's Motion to Dismiss this
5 Appeal for Lack of Jurisdiction ("Motion to Dismiss") about how he is being
6 irreparably harmed by alleging postings by Appellant and discussion of
7 Court proceedings. Much of these Court discussions deal with behaviors by
8 Respondent that he himself would admit do not cast him in the best light.
9 Appellant and Appellant's Counsel merely point out that apparently
10 Respondent is not all that concerned with the information he puts out there
11 regarding behavior and Court issues as Respondent gave an interview to at
12 least one media outlet in Clark County, Nevada. Appellant is even kind
13 enough to label the content of the interview "prior alleged indiscretions" and
14 largely addresses this issue in passing. Appellant nor her Counsel
15 particularly care about what Respondent does or does not do in his private
16 life. It is fair to point out that one cannot maintain clean hands by crying
17 foul about what is being posted out there about you while having given press
18 of your own on the same very issue.

19 The Clark County District Court held an evidentiary hearing on
20 contempt issues as they pertain to Respondent's failure to pay family
21 support on February 15, 2022. In retaliation, Respondent caused a hearing
22 to be held on Respondent's claims of hearing video disclosures on March 21,
23 2022. On April 14, 2022, the District Court entered the Findings of Facts,
24 Conclusions of Law, and Order ("4-14-2022 FFCL") dealing with hearing
25 video posting issues. This 4-14-2022 FFCL marked a rapid departure from
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27 ⁵ NRCP 16.2 and NRCP 26© are discovery rules.
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1 any rights and obligations ever contemplated by the Parties in the
2 Protective Order.⁶

3 Appellant filed a timely appeal of the 4-14-2022 FFCL on May 13, 2022.⁷

4 **B. The Docketing Statement is Thoroughly and Accurately Plead**

5 Respondent makes the incorrect claim that the docketing statement was
6 not completed “fully and accurately” and that this somehow warrants a
7 sanction as to the attorney. On July 7, 2022, Appellant filed the Docketing
8 Statement in this matter. The Docketing Statement is quite thorough and
9 carefully put together. Respondent certainly disagrees with the facts and
10 characterizations alleged in the Docketing Statement, but it is hardly
11 uncommon for opponents in an appellate or litigation matter to disagree on
12 most anything.

13 Appellant is fine with the Docketing Statement as filed, but believes that
14 judicial economy, due diligence and handling appellate matters on the
15 merits warrants permitting Appellant to file an Amended Docketing
16 Statement in this matter that addresses appellate grounds for special orders
17 under NRAP 3A(b)(8) as it is a point that the Court could benefit from
18 further clarification. Appellant did not just go and file an Amended
19 Docketing Statement, but showed respect to the Court and sought leave to
20 do the same. Out of respect for the Court and in compliance with NRAP 14,
21 Appellant respectfully requests leave of the Court in lieu of merely filing an
22 Amended Docketing Statement. The basis for such grounds is set forth in
23 the Docketing Statement, but an Amended Docketing Statement would help

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26 ⁶ Docketing Statement.

27 ⁷ Docketing Statement.

1 Court appreciate the matters at issue and administer the case more
2 efficiently.

3 The 4-14-2022 FFCL constitutes an appealable order under the
4 additional grounds of NRAP 3A(b)(8) as a special order entered after final
5 judgment. Appellant is not attacking the Protective Order after the fact but
6 asserts that the 4-14-2022 FFCL is an “order affecting the rights of some
7 party to the action, growing out of a judgment previously entered.” Nobody
8 disputes that the Protective Order was previously entered. Appellant’s
9 claim is that the Protective Order afforded certain rights and
10 responsibilities that did not include video posting and now the District
11 Court has expanded those responsibilities beyond what was in the original
12 order. Any discussion of this issue is a courtesy to the Court, politely
13 requested, and the Court is welcome to deny leave to amend if it wishes.

14 Legal Analysis

15 A. The 4-14-2022 FFCL is an Appealable Determination Pursuant 16 to NRAP 3A(b)(1)

17 The July 7, 2022 Docketing Statement discusses in elaborate detail why
18 the 4-14-2022 FFCL is an Appealable Determination Pursuant to NRAP
19 3A(b)(1) as a “final judgment entered in an action proceeding commenced in
20 the court in which judgment is rendered.”⁸ Likewise, the August 1, 2022
21 Appellant’s Opposition to Respondent’s Motion to Dismiss this Appeal for
22 Lack of Jurisdiction (“Response to Motion to Dismiss”) contains an extensive
23 discussion as to why the 4-14-2022 FFCL is an appealable Order under
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25 ⁸ Section on Substantive Appealability in Docketing Statement contains
26 nearly a half page of discussion.
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1 NRAP 3A(b)(1). Respondent will certainly disagree with whether the issue
2 is appealable under NRAP 3A(b)(1), but opponents in litigation disagree all
3 the time. Likewise, the Court can certainly decide what it thinks, but the
4 argument is presented in good faith and with good basis.

5 **B. The 4-14-2022 FFCL is an Appealable Determination Pursuant**
6 **to NRAP 3A(b)(8) as a Special Order**

7 The Response to the Motion to Dismiss also acknowledges there is
8 another basis for appealability that would help clarify things and assist the
9 Court, namely appealing a Special Order under NRAP 3A(b)(8). This
10 argument does not take away anything from the fact that the 4-14-2022
11 FFCL is appealable under NRAP 3A(b)(1). Appellant came humbly before
12 the Court and indicated that Appellant would like to file an Amended
13 Docketing Statement but would only do so with consent of the Court. The
14 August 2, 2022 Motion for Leave Amend Docketing Statement as well as the
15 Response to Motion to Dismiss give the Court the argument/statement and
16 legal authorities supporting it that would be made in an Amended
17 Docketing Statement in order that the Court can evaluate whether it wishes
18 to grant such leave. If the Court is not inclined to grant such leave,
19 Appellant is comfortable in their first argument about the basis for
20 appealability.

21 NRAP 3A(b)(8) provides for the appealability of a “special order entered
22 after final judgment...”⁹ Where a post-judgment Order substantially
23 changes what was agreed to, ordered, or otherwise bargained for that post-
24 judgment Order is most certainly appealable.¹⁰ In the instant matter, the

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26 ⁹ NRAP 3A(b)(8).

27 ¹⁰ *Gumni v. Mainor*, 118 Nev. 912, 920, 59 P.3d 1220 (Nev. 2002).

1 Parties bargained for a Protective Order that pertained to discovery and the
2 Protective Order cited discovery rules e.g. NRCP 16.2 and NRCP 26. The
3 Protective Order never contemplated nor indicates hearing videos. Now
4 Respondent seeks to use the Protective Order as a shield outside of litigation
5 for any future matters. The modification of the Protective Order made by
6 the District Court in the 4-14-2022 FFCL is akin to modifying the terms of
7 a Decree of Divorce property distribution after six months.¹¹ The concept of
8 a Special Order is discussed somewhat in depth in the Docketing Statement,
9 but Appellant has filed a separate Motion for Leave to Amend Docketing
10 Statement to clarify the matter and assist the Court with judicial economy.

11 **C. Pursuant to NRAP 14 and NRAP 27, Appellant is Requesting**
12 **Leave of the Court to File an Amended Docketing Statement**

13 NRAP 1(c) provides that “These Rules shall be liberally construed to
14 secure a proper and efficient administration of the business and affairs of
15 the courts and to promote and facilitate the administration of justice by the
16 courts.” NRAP 14 provides for the filing of a Docketing Statement. Appellant
17 was diligent and prepare a thorough docketing statement that contained a
18 detailed but concise discussion of the issues in somewhat of a procedurally
19 complicated appeal. The interests of justice, judicial economy, and the
20 facilitation of a clean briefing and appellate process would be served by
21 permitting Appellant leave of the Court to file an Amended Docketing
22 Statement discussing appellate grounds under NRAP 3A(b)(8) for special
23 orders in slightly more depth. There is no prejudice to Respondent as they
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25 ¹¹ See e.g. *Sorenson v. Radel-Sorenson*, 134 Nev. 1013 (Nev. App. 2018)
26 (citing: *Kramer v. Kramer*, 96 Nev. 759, 762, 616 P.2d 395 (Nev. 1980)).
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1 would be free under the rules to file an Amended Response to the Amended
2 Docketing Statement or take other appropriate action as within the rules.

3 Courts across the Country including Nevada have acknowledged that
4 Amended Docketing Statements are permitted.¹² If the Nevada Supreme
5 Court does not want to grant leave for an Amended Docketing Statement
6 the Nevada Supreme Court is free to simply deny the Motion. The Motion
7 was, however, brought out of respect for the Court versus just filing an
8 Amended Docketing Statement.

9 **D. Sanctions are Inappropriate in the Instant Matter**

10 Respondent has attempted to devolve the briefing into issues of
11 Respondent's alleged past and tangential matters. Appellant and
12 Appellant's attorney do not care what Respondent does or does not do in his
13 private life nor allegations about what other people do or do not. Respondent
14 should keep the briefing focused on the issues and not tabloid journalism.
15 The frequency at which Respondent and his law firm request sanctions in
16 their civil practice is also telling that the requests are not perhaps serious.

17 The Nevada Supreme Court issued caution with regard to the use of
18 sanctions, stating that sanctions are "not intended to chill an attorney's
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20 ¹² See e.g. *Patin v. Lee*, 2017 Nev. Unpub. LEXIS 306, 394 P.3d 210
21 (Nev. 2017). *Reif v. Aries Consultants Inc.*, 2020 Nev. Unpub. LEXIS 12,
22 454 P.3d 1277 (Nev. 2020). *State v. Benavidez*, 2013 N.M. App. Unpub.
23 LEXIS 8, 2013 WL 597037 (New Mexico App. 2013). *Perry v. Attorney*
24 *General of New Mexico*, 2019 U.S. Dist. Lexis 401513 (D. New Mexico
25 2019). *Stirling Bridge, L.L.C. v. Cementos de Amigos, L.L.C.*, 2007 Airz.
26 App. Unpub. LEXIS 771 (Arizona App. 2007). Texas Rules of Appellate
27 Procedure 32.
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1 enthusiasm or creativity in reasonably pursuing factual or legal theories,
2 and a court should avoid employing the wisdom of hindsight in analyzing
3 an attorney's actions at the time of the pleading."¹³ In other words, a legal
4 theory that does not prevail or fails is not a sanctionable event in and of
5 itself. Sanctions are typically more appropriate for severely and habitually
6 missed appellate deadlines and the like.¹⁴ In the instant case, Appellant and
7 her Counsel have complied with all deadlines and provided fair advocacy.
8 The Court is welcome to disagree with Appellant on the issues but sanctions
9 are not appropriate.

10 **Conclusion**

11 Appellant respectfully requests that the Court grant the following relief:

- 12 1. Enter an Order allowing Appellant leave to file an Amended Docketing
13 Statement.
- 14 2. For other such relief as the Court deems fair and equitable under the
15 circumstances.

16 Dated this 23rd day of August 2022

17 Schwab Law Firm PLLC

18 /s/ *Evan Schwab*

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24 ¹³ *Lewis v. Second Judicial District Court*, 113 Nev. 106, 113, 930 P.2d
25 770, 775 (1997) (internal citations omitted).

26 ¹⁴ See e.g. *State v. Gomez*, 2018 Nev. App. Unpub. LEXIS 209, 134 Nev.
27 1015 (Nev. App. 2018).

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Lansford W. Levitt, Settlement Judge
Schwab Law Firm PLLC
JK Nelson Law LLC
Alex B. Ghibauda, P.C.

An Employee of Schwab Law Firm PLLC