IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 86559
District Court Case No. CV22-02015

David McNeely and 5 Alpha Industries, LLC,
Petitioners,

v.

The Second Judicial District Court, State of Nevada, Washoe County, and the Honorable David A. Hardy, District Court Judge, Dept. 15
Respondents,

and

Hillary Schieve; Vaughn Hartung; and John Doe
Real Parties in Interest.

SUPPLEMENT TO PETITIONERS' APPENDIX

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SUPPLEMENT

As referenced in Petitioners' Appendix, the transcript from the hearing on Defendants' Objection to the Discovery Commissioner's Recommendation for Order was not yet available at the time of filing. (*See* Petitioner's Appendix Vol. 1 of 1, p. ii, n. 1). For the sake of providing the Court a complete record from the proceedings below, the hearing transcript is attached hereto and is bates labeled where Petitioner's Appendix left off, specifically starting at page 244.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that I am an employee of Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC and that on June 2, 2023, I filed the foregoing **SUPPLEMENT TO PETITIONERS' APPENDIX** electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the Master service list.

/s/ Cindy Bowman

4185

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE DAVID A. HARDY, DISTRICT JUDGE

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HILLARY LOUISE SCHIEVE, et al., Plaintiff, vs. 5 ALPHA INDUSTRIES, LLC, et al., Defendants.	Case No. CV22-02015 Dept. No. 15 TRANSCRIPT OF PROCEEDINGS

OBJECTION TO REPLY - ORAL ARGUMENTS

MAY 1, 2023, RENO, NEVADA

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RENO, NEVADA; MONDAY, MAY 1, 2023; 1:30 P.M.

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THE COURT: This is CV22-02015, it's captioned as Hillary Shieve versus David McNeely and others. Joining Ms. Shieve as plaintiff is Mr. Hartung. In a moment, counsel, I would like you to make your appearances.

I'm required by Supreme Court Rule to comment upon the various media requests that have been tendered to the court through last week and I believe even until this morning.

I begin by reference to Supreme Court Rule 2, a series of rules beginning with Rule 229 but I focus upon rule 230. I acknowledge that there is a presumption of access to all court proceedings, however, that access must be balanced with the dignity that we enjoy within this branch of government. I'm required to make specific findings on the record, particularized findings as described by rule on the record. The clerk's minute order will constitute this court's written form after the oral pronouncement.

I wish to share my inclinations and then I'll invite counsel if they want to be heard on the presence

of media. I am to consider the following factors under Rule 230, Subparagraph 2(a) "The impact of coverage upon the right of any party to a fair trial". I don't believe that is relevant and is so compelling in this hearing. This is not trial. There will be no jurors or witnesses. It is limited in scope to 60 minutes. It is not a multi-day event, and I perceived no impact upon the right to fairness.

Subparagraph (b) "Impact upon rights to privacy", which I pause with the irony a little bit because the issues are grounded in privacy interests. But again, there is no party or witness that would be impacted by the presence of media. Similarly, I do find that there's an impact upon safety and well being of any party, witness, juror or attorney.

And finally, under Subparagraph (d) I do not find that the presence of media would be a distracting presence, that it would somehow influence the proceeding or diminish the dignity of the proceedings. There is a preference in the rule for cooling media cameras if this were not a 60-minute oral arguments on objection to the discovery commissioner's recommendation and instead with a multi-day event, I would enforce the cooling requirement. I didn't think it was necessary here. It

is important under the code of conduct that I manage the order, the decorum, the dignity of these proceedings.

While allowing public access to strike that balance, I will require that media remain in place during the entire arguments. I'm not going to have equipment moving back and forth while counsel are speaking or while the court is speaking.

Also, I will not allow any contemporaneous oral summaries or commentary upon what's happening. Should the media wish to take contemporaneous notes beyond the cameras they'll do so in writing. And I've instructed Deputy Grovatt to somehow manage the appearance of all media members so that they appear consistent with Rule 236 in an appearance keeping the dignity of proceedings.

Counsel, do you wish to make any record on the presence of media beginning with the objecting party who is the defense in the underlying dispute?

MR. GORMLEY: Thank you, your Honor. Ryan Gormley here for the defendant, David McNeely and 5 Alpha Industries. We have no objection to the media presence here. I would just remark for the record maybe in the future there could be hearings or proceedings where maybe we would have an objection under district

court rules, but for today I thought it made sense. I only hope not to pursue with these try legal issues but other than that.

THE COURT: I agree with you, counsel, if there were any durational evidence based proceeding in which there would be other rights impacted I would convene a conversation with counsel in advance.

MR. GORMLEY: Okay.

THE COURT: And we could jointly manage the public's right to access with your rights as trial participants --

MR. GORMLEY: Very well.

THE COURT: -- so that I agree.

MR. GORMLEY: Thank you, your Honor.

THE COURT: Plaintiff's counsel?

MR. HOSMER-HENNER: Adam Hosmer-Henner for the plaintiffs. And we have no objection, your Honor.

THE COURT: All right. I'm going to speak for a moment about relationships. I wish to be accountable on our record for all that occurs. Within judicial proceedings the only thing that remains nondisclosed is really the deliberative process. What I undertake on my own through research and writing and thinking, except for the deliberative process there should be full

disclosure. Because the code of conduct directs that a prime directive for the judiciary is to preserve and to enhance the independent integrity of the judiciary.

From time to time some cases implicate public's consciousness and involve parties of some notoriety. I use that word neutrally. They are known to the public. The code of judicial conduct speaks to the relationship a judge may have with litigants, with witnesses and attorneys. I'm speaking specifically of Rule 2.11 in the duties of disqualification. The code of conduct acknowledges that the court will interact with people who are within its orbit.

For example, City Councilman Reese is an attorney in our community, and is trying a case, a bench trial that is of some significance to the parties involved. We've been in bench trial, evidentiary hearings since about September. Counsel member Reese was once a former neighbor. I have marginally professional -- a personal relationship with him, but I don't allow that to interrupt the processing, orderly processing of cases, so I will rule for or against Mr. Reese's clients as the facts and law compel.

Last year I presided over a case during the campaign involving a Commissioner Lucey, and Assessor

Clark. I have a professional relationship with Commissioner Lucey, is personally fond of Commissioner Lucey. I made a decision wherein wearing this robe that I felt compared to make. It's possible that Commissioner Lucey or others would be aggrieved upon my decision, maybe even ascribed as an electro defeat to my involvement, but it is my role as judge to act without fear of criticism or public calamity.

Turning to the parties in this case, I have a professional De minimis relationship with Mr. Hartung, who I knew as a commissioner. For years I was chief judge of this district, he was a sitting commissioner, and I interacted with Commissioner Hartung four to six to eight times a year probably always in a professional setting involving issues of the court. To the best of my recollection, I spoke to him about -- among many court business about his interests in photography and antique clocks. I've never been to his home or met his family and neither he to mine. I will rule for or against Commissioner Hartung, former Commissioner Hartung as the facts and law compel.

To the best of my recollection, I have not had a personal interaction with Mayor Shieve. I might have and I just don't remember it. I don't have any

recollection of any conversation with her, though I'm somewhat removed from the political square at the time.

Those are the sources I wish to make. Counsel, if you have different information consult with your client and correct the record.

You've made your appearances, counsel.

I have notes, as I have read and reread Commissioner Ayres' recommendation. I have read the statutes that are implicated in the moving papers and by recommendation specifically NRS 49.325 the trade secrets privilege statute. I can hear counsel say there is not a privilege for private investigators. I'm referring specifically to the trade secrets privilege, NRS 648.200, embedded within the statutes governing private investigators, and then NRS 600 alpha .030 which defines trade secrets.

I have read decisional authority cited by Commissioner Ayres, in particular, the decision out of Iowa, Meardon, I believe, is the pronunciation. I've gone to great lengths to unpack the U.S. District Court decision, which I've left on my bench. Everyone remain seated and at ease, please.

U.S. District Court for the District of Nevada is decision in Ringelberg it is cited by the plaintiffs

in the complaint, it is referenced in the moving papers. Because it's unpublished there are a series of orders entered in that case that I have read because the premise asserted is important to the court in that the use of GPS tracking devices on vehicles can violate privacy and be tortious. I was particularly intrigued by the Ringelberg decision because in the 2023 legislative session there is a proposed statute working its way through the process, we can never guarantee what the legislature will pass and the government will sign, but it appears that AB 356 is on a faster track without controversy to enactment and in the legislative counsel's digest of AB 356 it specifically references the Ringelberg decision for the following proposition "United States District Court for the District of Nevada has held that using a GPS tracking device to monitor the movements of a person implicates the tort of invasion of privacy because a person has a reasonable expectation of privacy with respect to his or her daily movements, in a motor vehicle." That is the LSV's summary of the decision which apparently inspires a bill that may be enacted into law.

I appreciate counsel's moving papers. They were very well written, well researched. In fact,

defense counsel went so far as to read the appellate briefs, underline the real -- the only decision, essentially, in the state of Nevada, I'm going to mispronounce this but DeChant.

MR. GORMLEY: Yeah.

THE COURT: So I would acknowledge the thoroughness of both your interstate and intra-Nevada research. And I have confirmed defense's candor in setting forth the review authority this court has. It's problematic, counsel, I'm going to invite you to comment to this during oral arguments. It's problematic to look at every discovery commissioner's decision de novo because that just increases costs, creates delays, if there were any two-step de novo analysis of every recommendation in here so I have to confine my review to some sort of standard, and I agree with the defense standard as set forth in NRC 316 and local rule. Please -- excuse me. Please focus on that narrow standard during your arguments. That's all I wish to say.

Oh, no, it's not. I am aware of the pending Motion to Dismiss. I have read it, it's fully briefed. I've read it in its entirety along with opposition reply a few times. I note that Commissioner Ayres was urged to delay a decision in his recommendation based upon

either dispositive motion and summary adjudication or to dismiss. And I agree that if the dismissal motion gets any traction, not dispose of the entire case, this case will continue regardless of the Court's decision on dismissal.

All right. And with that, Mr. Gormley, good afternoon. You may begin.

MR. GORMLEY: Thank you, your Honor. And I appreciate you giving us that rundown of everything you've reviewed and where you're coming into this matter. And I'll try to be -- my hope is I don't end up using the entire 30 minutes of the record, I can be more precise than that.

So talking about the standard, to me really what we're here today is about the correct legal test, not necessarily the application of that test here, but identifying the correct test, not just for this case, but for cases moving forward that may involve these types of claims against a private investigator and their unknown client. And so from my perspective that makes pretty much all these arguments fall under the contrary to law standard that we set forth in the objection.

And so with that said, just to take a step back and sort of focus on, like, the 30,000 foot level,

it might sound reductive, but we're talking about a private investigator. There's a common expectation of privacy and confidentiality that comes inherent with reaching out to a private investigator to perform work for somebody.

Our general position is at the guardrails of relevancy and proportionate under Rule 26 B are not enough to provide the protection for that interaction given that expectation. And we're obviously not here arguing for an absolute privilege. We recognize that Chapter 49 does not recognize an absolute private investigator privilege. But our position is that something more should be required. There should be something between discoverability under Rule B and an absolute privilege, and we feel like that's where the discovery commissioner sort of missed the mark and we believe that there's room in the law to allow, and we recognize we can't point to an exact case where that's being created, but we think and believe that there's room in the law to allow for the creation of that intermediate attempt at protecting that information in a nonabsolute manner.

THE COURT: I really like the way you said that because that goes to the core of my concern as I

read your objection. And that is there is not a specific objectively identified statute that controls the relief you request. You're asking the court to kind of reach into something from various sources that doesn't exist and to blend them together into an outcome. And I think as I reflect that if the law -- if the law required that middle ground between proportionality and relevance, up to absolute privilege, it should specify. In the same way your Motion to Dismiss really took out the position on the anti-doxing statute and says because it's not there, Judge, don't find where it is absent. And I feel that you're doing that a little bit in your reference to trade secrets and Chapter 648.

MR. GORMLEY: I appreciate those questions, your Honor, I'll try to address those in turn. First with the Anti-Doxing statute that you reference from the Motion to Dismiss, I think that is an apt analogy, but I would submit, your Honor, that we are being consistent in our position.

The trade secret misapp -- the definition of trade secret says information -- this is NRS 600(a).0305, it provides information including without limitation. Nevada Supreme Court cases normally when

they quote it they leave that part out. But when you look at the actual statute it says information including without limitation. We believe in our position here we're relying on that to include the identity of a client. Plaintiffs are attempting to sort of write out that without limitation aspect of it. So then you turn to the Anti-Doxing statute which under the definition of personal identifying information has simply broad language. Our position in that is not to ignore it but to -- for the court to enforce it in the way that plaintiffs are submitting, it would bring the constitutionality of that statute --

THE COURT: Sure.

MR. GORMLEY: -- into question which is a rule of statutory construction which would instruct the court to avoid that interpretation. Here --

THE COURT: Parenthetically I might agree with you on the vagueness of this Constitutional argument as relates to Doxxing, but we've addressed that in the --

MR. GORMLEY: Yes, your Honor, but here the broad interpretation and broad treatment including without limitation does not end up going down that same road, it would not be unconstitutionally vague to afford protection because what's happening in the Anti-Doxxing

is you are enforcing a penalty, and that's unconstitutionally vague. People reading that would not know they can be penalized under that statute for that conduct.

But here you're enforcing protection so it's removed from the concept of the unconstitutionally vague arguments. So I -- right, that's very good observation, your Honor, but we believe we're being consistent in our interpretation of those that -- with language in both of those statutes.

THE COURT: Wouldn't it be just a lot easier for the Court and for counsel if that's what the trade secrets statute included? Because -- I'm not here on a first impression de novo review the moving papers. I'm to determine if there is a clearly erroneous application of law. Clearly erroneous. I have to have a firm conviction that Commissioner Ayres misapplied the law.

Question is not whether I would have done the same thing kind of similarly or kind of dissimilarly, it's whether there's a clear error. And it seems to me that your interpretation of the trade secrets statute this idea that the intrinsic value is really embedded in a one-off relationship between an investigator and his or her single client, it's -- it's not as apparent to me

the trade secret definition is.

MR. GORMLEY: I understand, your Honor. And respectfully, your Honor, I would submit that the standard we submitted it consistent with the review standard that goes between the federal magistrate and the federal district court judge is clearly erroneous or contrary to law. And the clearly erroneous one is one that focuses on the clearly erroneous nature of the application. And I believe the contrary to law is when you're looking at a legal question effectively de novo review, very similar to abusive discretion standard where discretion is given -- I mean, a discretionary decision is given leeway, but you still can be reversed under error of law regardless of discretion. I think it's worded differently but in my view it's effectively the same standard and so we've tried to keep our arguments to the legal questions for that reason.

THE COURT: Thank you for that reminder.

MR. GORMLEY: And just following up on that, and we were talking about trade secret but just with the general principal talking about is -- can there be an intermediate form of treatment between Rule 26 B and absolute privilege if it's not provided for by the legislature? And the Supreme Court has recognized as

much. They did so in the header 1994 decision for punitive damages which I'm sure has been argued many times to your Honor. They basically said that this type of discovery, tax information from defending parties, is just not up for the taking. You can't just plead punitive damages and then request someone's financial information, which would be discoverable under Rule 26 B, it's relevant, it's proportional, it's not privileged, there's no statutory protection. But they found that there was a public policy innate that warranted the plaintiffs having to make a heightened showing of some facts giving rise to the basis for punitive damages, and in my experience that usually means discovery goes forward until at some sort of later date, maybe at the summary judgment briefing stage where the court is deciding whether there's a basis or not for punitive damages to reach the trial level.

THE COURT: But doesn't that really go into Rule 26 protective order against preventing annoyance, embarrassment, oppression, expense, undue burden? It seems to me that protecting privileged financial information or tax returns falls within those enumerated causes for protection that I don't see in this case.

MR. GORMLEY: I agree with that, your Honor.

I would say that in Header I do not believe they linked their reasoning to that.

THE COURT: I don't think they did either. But I'm trying to understand as you explore this --

MR. GORMLEY: Right.

THE COURT: -- intellectually --

MR. GORMLEY: Right.

THE COURT: -- what is the basis --

MR. GORMLEY: Connection.

THE COURT: -- and 26 comes to mind.

MR. GORMLEY: Right. I would say, your Honor, trying to make that comparison between financial information and the identity of someone that hires a private investigator, I think in determining the rule that applies it's important to view it not in the context of this case, but in any case it could be alleged against a private investigator. I don't know your Honor's view on the merits of this case. I'm -- you know, all we have are allegations right now and not here to comment on the merits of the case at all.

THE COURT: I agree with Commissioner Ayres' Footnote Number 27.

MR. GORMLEY: I don't have that. I'll have to look at that.

THE COURT: I know you don't have it, I just have the benefit of writing it down that he specifically disavows any opinion about the merits or the demerits of the case but instead relies upon the pleading and affirmative defenses.

MR. GORMLEY: And that just goes to the idea that people have an expectation of privacy in their financial information, in their tax returns, and there's a public policy for why that should be protected, right? I'll also submit there's a general public policy and expectation of privacy and you hire a private investigator in the communications between that relationship. And if nothing else there's the other statute we've relied heavily on, which is NRS 648.200, which where the legislative did make it unlawful for a private investigator to disclose such information without a court order or as authorized by the law.

And yes, that's not a privilege under NRS Chapter 49. And yes, I'm sure plaintiff's counsel will say if they want it to be a privilege the legislature could have enacted the privilege. But that is a statute that is affording an extra sort of protection reflecting an expectation of privacy, and I think the existence of that sort of speaks to why the identity or any

information that follows within its protection, whether that's documents have been passed back -- passed back and forth, whether that's the identity of the client, it's fairly broad what can fall within its scope. Anything that falls within its scope should rise above that general Rule 26 B to discoverability standard. Discovery commissioner took the DeChant case to mean that the Nevada Supreme Court had already foreclosed that argument. And that's really the focus of our objection is that respectfully they had not. The court in that case the district court found that the information was absolutely privileged under NRS 648.200. The Nevada Supreme Court came in and said that's wrong, it's not absolutely privileged, it's discoverable. They never went into a balancing test. There was no argument about an intermediate standard. They never rejected the type of test that later implemented important punitive damages. So I think he went one step too far in sort of saying the Nevada Supreme Court has already spoken on this. I think it's an open question of law that even at this stage can be reviewed de novo, and in the Court's judgment, if they view that the treatment of that type of information between investigator and a client that falls within 648.200 warrant some level of extra

protection besides the basic ground rules for discoverability, it's free to implement that type of protection at this stage.

And just briefly I want to touch on the idea of a trade secret again because as you know our argument's at 648, and then the trade secret protection. Trade secret really breaks down into two elements.

THE COURT: Hold on, I'm sorry. I'm still thinking about 648 trade secrets so let me explore 648 for a moment. 648 clearly contemplates that the court may order its disclosure information without the client's consent.

MR. GORMLEY: Correct.

THE COURT: Under what circumstance, what hypothetical can construct that would cause a court to order an investigator to disclose information?

And I'm sorry, I don't mean to put you on the spot. I'm wrestling with it. I'm not sure I have the answer.

MR. GORMLEY: I understand. No, I want to try to get it right so I want to try to think about it and not just speak off the cuff.

THE COURT: I clearly have authority to order an investigator to disclose.

MR. GORMLEY: Right.

THE COURT: And you're telling me Judge, be careful before you do, think about intermediate steps. So I'm trying to construct in my mind what would cause me to order the investigator's disclosure.

MR. GORMLEY: Well, obviously you have the facts of this case where a plaintiff would be trying to discover the identity of maybe an alleged co-conspirator or maybe documents that were exchanged. Maybe the case doesn't have where the parties are not the private investigator or the private investigator's client. Maybe it's a suit between two spouses or an employer and an employee, and they want to use what an investigator did for one of those parties as information.

I think that the DeChant case sort of gives a more dramatic example of a murder investigation where the person who was murdered was alleged of being involved with -- with organized crime, and there was an investigator on the side who was doing an investigation, the police thought the victim's wife had arranged for the murder, and the victim's wife was the one seeking discovery of the investigator's notes, presumably in an attempt to prove her innocence, I assume. And that's when the court came in and said you can't discover them

at all. I agree that ruling is incorrect, that's not provided for by 648.200, but I don't think it would have been incorrect for the district court at that point to at least require some type of heightened showing or implemented some type of balancing test or test similar to that for the financial tax returns discovery for the accused to discover those communications.

THE COURT: So you are inviting me to consider the distinction between the private investigator is this corollary nonparty participant and whatever the facts were as opposed to being the alleged tortfeasor.

MR. GORMLEY: And I think regardless -- the test would be the same regardless of the private investigator standing in the case. Maybe then its application would change, maybe the arguments as to the application would change, but the test would be the same regardless of positioning in relation to litigation.

THE COURT: Go ahead and trade secrets. I'm thinking about what I want to say in my --

MR. GORMLEY: I'll be ready for some more on that.

THE COURT: I'm going to listen to my own voice for a moment.

MR. GORMLEY: Just trade secrets -- I want to

try to be quick. There's really two elements to what a trade secret is. In the case law we write it as one sentence. When you look at the statute there is a 1 and a 2. In the first is information that derives from independent economic value or potential from not being generally known.

The second one is subject of effort that are reasonable under the circumstances to maintain its secrecy.

From my review it seems like that second element not really in dispute. We set forth a declaration of how my client maintained his client's confidentiality.

Clearly we're here because it's a secret we're trying to -- the plaintiffs want to identify the identity of the client, who hired my client. And there's criteria set forth in Nevada Supreme Court case law, Finkel, for one, that relate directly to that like extent to which information is known outside the business, whether the information was confidential or secret, all of those things, we believe those were satisfied and I believe those were sort of outside the purview of the arguments and what the discovery commissioner was focused on so that makes me now want to

focus on the first element, independent economic value actual potential. And this is whether the -- keeping the identity of the private investigator's client's secret deprives independent economic value from not being generally known to the public.

The first point I want to make is that as I point out in our reply brief in support of the objection, in Finkel in Footnote 2, the Nevada Supreme Court discusses the -- whether client relationships can constitute a trade secret.

And in that discussion it suggests then they said you need to look at each one and under those circumstances which suggests to us that under Nevada's view of the trade secret law that a single client relationship can qualify for trade secret protection.

The second point is all the analysis really has been focused on comparing this relationship to the cases that focus on client lists in general. And that was the discussion in really and mirrored in the Iowa case that you reference, and in most of the cases cited because that's a common issue that arises in the law. This is not a common issue. And in those cases the common law is clear that it requires you to make a showing of all the efforts that went into accumulating

all those clients, getting them, retaining them. And that's because the value, the independent value there is that aggregation of the information.

Starbucks has a client list with a hundred million people on it. The fact that they've aggregated that over 40, 50 years, that has significant value and deserves to be protected. They don't care about protecting a one-off relationship with one person that goes in and buys a Starbucks coffee. They actually want people to know that person has a relationship with Starbucks and likes their product.

Here because the context is different there is an independent value that derives from the secrecy, not only in that maybe another private investigator could recruit the person, that sort of applies to every business, so it's actually broader than that, is that if the secrecy is not giving independent economic value, then they won't even go to the private investigator, and they may not even go to any private investigator. It could effectively have a chilling effect against the whole profession because there's an expectation of we thought it was there was secrecy here and there was anonymity in hiring someone, and now that's gone. An analogy that came to mind in preparing for the day is

that between a journalist in their source. Now, that's specifically recognized as a privilege under Nevada law. I wrote it's 49.275. But a journalist with their source derives economic value from that information, in publication, sales, things of that nature. And if that seek the ability to keep that secret went away, not only would the source maybe not go to them, they wouldn't to go another journalist, they just wouldn't go to any journalist, so it's a little bit different than the general sort of client list analysis. And I think given that broad definition of trade secret including without limitation that we started off talking about, that this can fall within that definition.

And as we pointed out, and I want to be candid, I mean, the weakest point on our -- both of our arguments is I can't cite to another case that's reached this exact same conclusion. If I had found one I would like to be able to stand up here and argue for you.

But on the flip side I would say for the plaintiffs their weakest point is they, too, can not point to a case on under the same circumstances that reaches the exact opposite conclusion.

THE COURT: Let me assure you that I respond normally to candor. I know that in your reply brief you

gently complained that the plaintiff was using your own candor against you. I won't do that. I think that an attorney contests everything and concedes nothing is an attorney I need to more carefully look at and so you have essentially just acknowledge what is apparent before us. So there's no fault in that.

MR. GORMLEY: Thank you, your Honor. Oftentimes that's something that you're hesitant to say in oral argument, but I thought if it's just and it's undisputably true. And really, that's what I had on those main issues, your Honor, unless you have any other questions?

THE COURT: I have decided to ask the question that I thought about, and wondered if I should ask.

Just as there's no single decision on all four supporting plaintiff's position or the defense position, I am aware of any single decision that makes the alleged conduct in this case tortious. We've got a lot of US Supreme Court, Federal jurisprudence about the right to privacy as a Constitutional matter in criminal cases.

And then we have this decision in -- I left the bench to go get it. Here it is. We have this decision in Ringelberg, which by its very nature is not controlling upon the court. It's not published. It's

not filtered through appellate review, but it seems to create a cause of action for the civil use of the tracking device.

And while it is not law, at least the Nevada Legislative Counsel Bureau has read the Ringelberg decision to create a cause of action for the use of a tracking device.

I don't want you to make any concessions in this case that you're not prepared to make or might not ever make. But would you agree with me conceptually that in some fact pattern, the use of a GPS tracking device could create a privacy claim for relief?

MR. GORMLEY: It's a difficult question. The--

THE COURT: I'm not -- you know, I pause about whether I should ask it, and I can tell by your response. I don't need your answer. I'm asking the question as predicate for my next question.

MR. GORMLEY: Okay.

THE COURT: So let me just of my own accord assume that the use of a GPS tracking device under some fact pattern could be actionable as a tort, okay?

Now, if that is the case, the conclusion you urge this court to reach would create unfettered

immunity for a joint tortfeasor. And I want you to think about that and respond to it. It's problematic for the court that if the use of GPS tracking device could be tortious. But a joint tortfeasor is undisclosed and immunized by this kind of hodgepodge creation of law landing on the conclusion you see, it doesn't feel just to me.

And then I look at the privilege statute because if I accept your hypothetical, or not hypothetical, your argument that the single relationship between private investigator and client is a trade secret because of the enhanced confidentiality nature of that relationship, let me just accept your argument yes, it is a trade secret. I still have to go to the privilege that then exists for trade secrets, 49.325. And I see that as the court I can order the penetration of the privilege that would otherwise work in justice. And it seems to me that if a tortfeasor could remain undisclosed and immunized, that might, quote, work in justice, closed quote. So how do I reconcile that?

MR. GORMLEY: I understand your -- your point, your Honor. I would say going back to your initial question I don't think we could ever agree based on your exact wording that there's a creation of liability, but

if additional facts were added in I could see a world where that could potentially happen where there could be a like, a viable for surviving a Motion to Dismiss or moving toward a claim. But for moving forward in terms of looking at that, the exception to trade secret protection, it's not our argument to immunize anyone or keep them absolutely disclosed. I recognize that under I think that's Chapter 49.325 that there are exceptions and that trade secrets can and should be disclosed in cases. I would focus on Section 2 which says that the court then should take such protective measures as the interests of the holder of the privilege and of the party the justice may require.

So I don't dispute the idea may was up here saying it's a trade secret and so you never get to know who that person is and he's immune, I wouldn't dispute that that would work in justice. But I would say that if it's a trade secret, then it becomes more of the sort of delicate balancing of the protection of that trade secret with how do you let the case also go forward in a way that's true to how trade secrets are supposed to be protected. And we suggest that what you see in trade secret misappropriation litigation from time to time is stagger discovery to allow discovery as to the merits of

the claims against my client, and then depending if those have merits, which goes to the question of could there be a claim, then that could result in disclosure of the name later. That's something that happens this with trade secret misappropriation litigation. I understand that's not as efficient as all discovery happening at the same time. But sometimes precautions actions like that are taken for one trade secret are the law products.

THE COURT: I want to focus that because under my authority in reviewing the discovery commissioner I can modify or remand whatever I want. So without conceding you acknowledge that if I conclude it's a trade secret I can still order the disclosure, but I should take protective measures.

MR. GORMLEY: Correct.

THE COURT: One protective measure you asserted was await summary adjudication because the motion is pending.

The other that you propose is to allow the client to participate in litigation anonymously until further order of court, and that difference between -- that time line between identifying internally anonymously who that client is and public disclosure

through court order, then the plaintiff gets a chance to perform discovery to examine if there is merit to the allegations, and then if there is, ask the court to release the name?

MR. GORMLEY: I think that would be the idea. And as I said in the moving papers as the to go treatment, I don't think that that's my argument to make or that my client has standing to make it, but I would ask if you find a trade secret to give the opportunity for the unknown client to be able to make that argument on their behalf.

THE COURT: And the policy purpose inspiring your request is that the disclosure of a private investigator's client would be, number one, ruliness to your client's reputation and business, and then somehow impair the fundamental relationships in the industry itself.

MR. GORMLEY: I think that's fair to say, yeah.

THE COURT: Is that fair?

MR. GORMLEY: Yeah.

THE COURT: I want to think about that for a moment.

How do you respond to kind of the curb appeal

view that some may have about this posture, whether shared by court or not, that it's ironic that -- that your client's agreement to use the tracking device resulting in the public dissemination of his two -- I'm not sure how to target, his two subject's whereabouts, all that information was broadcast publicly kind of without filter, without censorship of any type, but now, despite what is alleged to be a horrific, frightening invasion of privacy, your client's entitled to privacy because otherwise, his business in 2019 might not be impaired, how do I balance that?

MR. GORMLEY: I understand the irony that you're pointing out, your Honor. I mean, I think for another day there will be disputes about some of the facts of what --

THE COURT: Sure.

MR. GORMLEY: -- what he said, but based on the allegations, I would say, though, that that irony under the allegations in this case should not control what the legal test becomes for this case and future cases.

THE COURT: I agree. Anything else?

MR. GORMLEY: Nothing further, your Honor. Thank you.

THE COURT: Well done. Plaintiff's counsel.

MR. HOSMER-HENNER: Good afternoon, your Honor. Adam Hosmer-Henner, McDonald Carano for plaintiffs. With me counsel today is Chelsea Latino and Jane Susskind who is sitting behind the bar.

Your Honor, I appreciate an academic discussion any time, but the only question for the court today is whether the identity of a single customer of defendants is a trade secret. It is not. And there's no case anywhere that's been presented by defendants would identify this as a trade secret. But as I've been allocated 30 minutes I'd like to use those to discuss the academic issues that we've addressed.

And starting with that, the standard that your Honor identified and was discussed by defendants is really one of clearer error or contrary to law or clearly erroneous. And the issue is how can the decision by Commissioner Ayres be clearly erroneous contrary to law when there's no law on the other side that he could potentially violated. All of the issues that have been brought up by defendants today are ones of first impression that no court in Nevada has ever recognized. This balancing test, this kind of vague and morphous heightened privilege standard is not one that

existed. So we think on that basis alone the standard can't be met for reversal.

But we've also had a slightly difficult time understanding exactly it is we're responding to. Because at first in the briefing before Commissioner Ayres, the issue was whether NRS 648 creates an absolute privilege or a privilege for the disclosure of the identity of anything a private investigator held. That position has been retreated from.

The next issue is that this actually is a trade secret that can't be disclosed under Nevada's trade, Uniform Trade Secret law. That position has been created from. So we're left now with the argument that maybe we will disclose it but there should be some protections with regard to that disclosure, and those protections exist because of some balancing test that Commissioner Ayres was supposed to know about and was supposed to employ. But the balancing test, based on what? There's no case law. There's no authority that provides any instruction to Commissioner Ayres or this court in terms of what to balance and how.

Before I get into these substantive merits of the case, your Honor, I do want to specifically talk about the reasons why urgency is compelling here. And

that's that the anonymity defendant's clients remains a continuing source of anxiety and consternation for plaintiffs. Your Honor recently just used the word horrific. In terms of the invasion of privacy and without --

THE COURT: I was repeating allegations without impugning my own.

MR. HOSMER-HENNER: And I didn't get that caveat out in time, but without impugning --

THE COURT: You know I do interrupt, I'm sorry.

MR. HOSMER-HENNER: Providing weight to what the court said we think that that word is appropriate because when Ms. Shieve and Mr. Hartung discovered that their vehicles were being tracked their first step wasn't to contact attorneys to initiate the civil, it wasn't to hold a press conference, it was go directly to the police and find out what happened and whether anything that existed -- an existent criminal law could be used to protect them. And we've seen a few citations in the news articles in this case. That the surveillance was not intended to be a threat, there was no risk, and that it was done for political purposes only. We certainly hope that's true. But without that

confirmation we can not have any certainty.

THE COURT: I should say as a matter of disclosure I have not read one news account of this except what was attached as Exhibit 3. That's the only thing I've read.

MR. HOSMER-HENNER: Referring specifically to that exhibit, your Honor. And I believe that was a Business Reno article talking about the quotes from Defendant McNeely that was introduced directly by Defendant McNeely himself.

I'm going to try to be a little faster with my caveats going forward, with all due respect to the court reporter.

But now public officials are receiving a unimaginable volume of threats and abuse. And if this client turned out to be someone who was sending those daily messages, those threats, those antagonistic comments, those messages coupled with the identity of that client, who then obtained real-time information about the locations of plaintiffs, would be especially concerning and potentially warrant additional protection or a restraining order, but until we know that information we can't confirm that or even make that analysis.

THE COURT: Is that the type of information you seek before formally presenting injunctive relief? I'm pivoting to the Motion to Dismiss, not resolving it, not actually being prepared on it, but summarizing what you essentially said in opposition to dismissal, the injunctive relief was when we acquired information in discovery, we will formally present a Rule 65. Is that the type of information that you were referring to?

MR. HOSMER-HENNER: Well, precisely, your Honor. I mean, we could have approached this case very differently, and immediately identified potential defendants who could have hired them and then left it to the court to decide who was innocent and who is guilty, but we proceeded instead in a very professional, very deliberate manner to seek that relief, that preanswer relief in the form of an extremely limited subpoena just for the identity of this client.

THE COURT: I want to explore that a little bit. Are you suggesting that you have some information about who the customer is that would satisfy Rule 11, or whatever good-faith claim standing there is?

MR. HOSMER-HENNER: As this is a public case a lot has been written, and there's been a lot of speculation, but we do not have the information that

could confirm this with any degree of certainty to present to the court.

But even in the best case where there's not a threat of violence from this client, and it's simply political dirty trick or some sort of action like that, it's still an outrageous invasion of privacy that at least at this point doesn't represent even a good-faith argument for the extension or modification of law, but at least is found, and whether it's a Supreme Court Fourth Amendment jurisprudence or the District of Nevada decision, there are at least opinions out there saying that this exact conduct significantly implicates the tort of privacy. For that reason we would ask this court not to delay any further and to expeditiously affirm the recommendation.

THE COURT: You just told me that there's assertive decisions that say the use of GPS tracking device is civilly tortious. Did I hear you right?

MR. HOSMER-HENNER: I said implicates privacy concerns.

THE COURT: Implicates privacy concerns.

MR. HOSMER-HENNER: And it's not referenced in this briefing, I don't want to go too far afield of this narrow decision. But whether it's Justice Sotomayor's

concurrence in Jones, or the Supreme Court later decision in Carpenter which is, again, a Fourth Amendment case, but it discusses the use of cell phone data. There has been a dramatic shift in the case law from the idea that these individual electronic pieces of information don't constitutes invasion of privacy into one where the United States Supreme Court and other jurisdictions have found that this chronicle of someone's daily activity is so intrusive that it does implicate privacy. And because it implicates a privacy interest, then it becomes a civil cause of action to potentially become a tortious invasion of that privacy and interests.

Turning to the merits specifically of this case, we do have to start with the sentence that there is not a private investigator to the client privilege in Nevada. That's beyond Cavell. And what we think is specifically important is this idea that it would be damaging to a private investigator to have to turn over information that they acquired in the course of their investigation.

Well, it can't have been a surprise to any private investigator, at least not since 2000 when the DeChant decision was decided where the court found, the

Nevada Supreme Court found that there was no privilege, and that a lawfully-issued subpoena could compel the disclosure of that private investigator's notes. Defendants are not at any different competitive standing vis-a-vis any other private investigator in Nevada who also clearly has to comply with that provision of DeChant. And as there's no recognized Nevada privilege, then it's unreasonable to believe that these private investigators or their client believed their communications would be protected in the same way that a client that goes through an attorney might realistically believe their communications are protected, the same can't be said for someone who hires a private investigator.

THE COURT: Mr. Hosmer-Henner, I also know you to be candid with this court. Are you aware of any authority, anywhere in this country, where a private investigator has successfully concealed the name of his or her customer? I'm thinking about DeChant, DeChant, who we know, we know from the published decision who the client was. And we know from the Ringelberg decision who the client was, it was Vanguard. And it just -- the identity of the client didn't seem to be an issue, and you've surveyed a lot of cases' decisions and

selectively presented to me those that are the strongest possible your position. Are you aware of any case, though, that would preserve the consummate?

MR. HOSMER-HENNER: There certainly are. And one was cited, Rafferty v. Reid from Michigan. But as the discovery commissioner noted that was from a state that had a private investigator privilege. So these cases exist but in states where this is a recognized statutory privilege.

And we point you back to decision in Flynn from California. That has a very similarly worded statute where the court in Flynn specifically said it would be inconceivable for this statue to conceal the identity of a client. And that court went further than discovery commissioner went and further than DeChant did, but in the absence of a privilege it's difficult for me to argue against that negative. So as there is no privilege in Nevada, I can not find a decision in Nevada saying that the absence of a privilege doesn't mean that you can't disclose the information. So that double negative is difficult to evince and I'll get to it soon, that issue in a little bit. But there absolutely are cases where the identity of a private investigator's information or client has been refused to

be disclosed.

But I'll cite to one which was Quinlan from an intermediate court of appeals in Ohio. And in that case there was a balancing test concerning the information obtained by the private investigator, but it was in the context of an administrative disciplinary proceeding involving a licensing investigation. And in that case the court said there should be a balancing test between the administrative agency's investigation because what they acquired became a public records, become the public record that could be disclosed to the public. So the test wasn't really between a private litigant and the obligations or needs of civilly or criminal disclosure, it was to what extent does the government's action in the context of that disciplinary proceeding require that those documents then became public just because they were trying to determine whether one of the investigative employees by that private investigator was properly licensed. So that didn't necessitate the disclosure of all the underlying information in that employee's file.

As there's not a privilege in Nevada, and there is also another decision from the Southern District of Florida, I believe, recognizing there is not

a common law federal investigative privilege, then there must be some reason to avoid disclosure.

And then there's this reference to NRS 648(a).200's creating some sort of statutory protections. Those initial arguments have shifted since the initial briefing in this case, but that issues was already resolved by the Supreme Court.

And in other cases where they found that the -- unless required by law clearly contemplated that you could not withhold those documents in response to a civil process for civil discovery.

The California Supreme -- the California -- excuse me. I believe it was intermediate appellate court said "Considering the potential for harm to the public from the activities of private investigators and those providing security services, ellipses, it is inconceivable that the legislature intended to enact a privilege whereby the licensee could refuse to identify a client or employer thereby potentially shielding the employer from any responsibility or liability. If the legislature had intended such a result, it would have done so by explicit language".

We think that same provision applies in Nevada, but I do need to reference exactly what we're

discussing here because if it is a protection, it's sealing or redacting the record to prevent the disclosure of this potential defendant's name, we think that that is potentially not permitted under the Nevada rules of sealing the record or redacting the record under the SRCR. So that's going to be a difficult question to consider.

THE COURT: So you're making a distinction between the selective disclosure of some private information typically protected by Rule 26, tax returns, financial solvency, you're making the distinction between that category of cases and the named party.

MR. HOSMER-HENNER: Very much. And I think those category of cases can be discussed in that exact framework that your Honor presented was not -- is under NRS 26(b)1 and 26(c)1 concerning protective order, and that is done all the time. And if this information falls in that heightened standard in that kind of intermediate area of protection where it does have to be disclosed but it may disclosed subject to conditions. IF it falls within that, just like in any case, you didn't need to establish that something is a trade secret before you mark it confidential. Certainly causes more work for the court and your staff when we're

filing these documents confidential under seal but that's the recognized process.

But when it comes to the identity of a client, I refer you to SRCR 3, Subsection 5, Subsection C, it says "Under no circumstances shall the court seal an entire court file".

And then it goes on to say "At a minimum, the following information must be available for public viewing". And it includes the names of the parties, counsel of record, and the assigned judge.

Now, we could proceed under a -- under an anonymous situation where one of the defendants here is given that extreme protection reserved to a limited category of cases, and despite being co-conspirator they're allowed to proceed anonymously, but this would effectively from just a practical level require effectively sealing the entire file, or at least in a redacting every single document multiple times anywhere the identity or the potential identity of this client could be discovered.

As a practical matter we don't think that's necessary given the lack of privilege in Nevada but, again, that's within the court's discretion in terms of whether you modify the discovery commissioner's

recommendation to allow some additional protections for the identity of this client, again, despite the absence of any recognized privilege and despite the expectation of privacy that would result for a private investigator.

THE COURT: Well, the defense is suggesting not a -- not anonymity in perpetuity but, instead, temporary anonymity while further discovery is conducted. And that seems to be one step away from sealing the case file, it's just a finite period of time that anonymity would be allowed.

MR. HOSMER-HENNER: If I could respond to that specifically, you know, that -- that anonymity isn't there for the mere asking. And what we're concerned about here is the kind of language that was put into the declarations that reasonable steps were to maintain the confidentiality of the client, but never sworn declaration saying the confidentiality of the client was actually preserved. So what we would hate to find out later on is that all of this motion practice was to protect a client that actually ended up admitting that they had hired private investigators, or Mr. McNeely having shared the information that he had been hired by someone else with other people. And if that was revealed through discovery, we certainly have spent a

lot of time and paper arguing over something that wasn't factually justified in the first place.

THE COURT: So the last part of what you said, are you implying a waiver concept that if Mr. McNeely discloses to others, not his client, that that constitutes a waiver of who the confidentiality of his client?

MR. HOSMER-HENNER: Defendants have blurred so many different concepts it's hard for us all to keep straight, but under the trade secret law, absolutely that would mean that that information was not a trade secret. Again, their position is that the identity of a single client constitutes a trade secret under the second part of definition concerning the reasonable steps to maintain that secrecy of that information. That information wasn't kept secret, and there's actually no evidence in this record that it was kept secret. If it wasn't, then certainly trade secret argument would fall, although we believe it falls under the first prong in any event.

THE COURT: Sure.

MR. HOSMER-HENNER: The balancing test, your Honor, is one that would be novel, and it would be one that's not supported by any case law that we're aware

of.

And the discovery commissioner noted that district courts are not generally required to engage in a balancing of interests and decide whether to permit discovery. The authority relied upon by defendants doesn't provide any tests or any kind of analysis for how you can weigh the harm compared to the disclosure. And we think that if this was -- if this were similar to the financial records that were discussed, kind of an anomaly situation where those records and tax information are not there for the mere asking, even if we were to agree that that applies in this situation, what the tax -- the case law in the tax records and the financial information say if that's your only way of obtaining something's relevant in the case, that information is absolutely disclosable.

Here the only way for us to confirm who hired defendants is from defendants. There may be another way, but the only way for us to confirm within the confines of this discovery is to ask defendants who hired them. And because of that any balancing test, no matter what you put on the other side of the scale, would mean that we would be affecting an injustice to not permit us to obtain that information that allows us

to prosecute our case and move forward.

With respect to trade secrets, your Honor. Again, there's not an authority identifying that a single customer constitutes a trade secret. And as the discovery commissioner pointed out, if that were accepted, that means that every company, every customer, every company would be considered a protectable trade secret because you kept that information relatively secret, you didn't disclose it, and it provides some generic sort of independent economic value.

What the discovery commissioner correctly recognized, including from all the case law, is that that is not the test for a trade secret that something is valuable to the trade secret or owner has to be independently economically valuable, meaning that another competitor of theirs would pay money for trade secret, and that's why the relationship between a single customer and a single provider of services is so important. What we don't have is a declaration saying Mr. McNeely spent a significant amount of time developing this customer, that he expected any repeat business. This is someone who routinely engages in the procurement of service of private investigator services. We don't know any of that information to actually allow

a factual determination that this is a trade secret.

It is like a Starbucks example where one customer goes to Starbucks don't constitute a trade secret compared to Starbucks doing my coffee, not that I -- that's the reason these protections are so they would be so extreme and have never been recognized in the case law.

We have two hypotheticals for your Honor to consider at the conclusion of our remarks on trade secrets. And the first is it's one thing to make this unsupported argument in the abstract and to say because this is similar to a trade secret and there's some economic value to me, that it should be considered a trade secret in Nevada for the first time and protected. But the practical effect of that is so extreme that I don't think it's been properly considered when being advanced because what it would mean to recognize that a single customer of a company constituted a protectable trade secret would mean that every employee would have an automatic implied noncompete and nonsolicitation agreement.

THE COURT: Hold on. Let me just figure out where you are. Plus I want the reporter to just.

Every employee would then have an implicit

covenant not to compete. I don't follow that.

MR. HOSMER-HENNER: So when an employee signs an agreement with their business which say it's a generic manufacturing business. And they say I promised you that for a period of two years I won't compete with you or solicit any of your customers. That agreement's a contract and it's subject to all sorts of case law and restrictions and limitations.

What defendant's position would mean is that because the identity of every customer that that employee at the manufacturer dealt with was a trade secret, that simply by contacting them after leaving employment, that would constitute the misappropriation of a trade secret and be a de facto nonsolicitation of a noncompete agreement.

THE COURT: Okay.

MR. HOSMER-HENNER: It's a radical position. It would change Nevada employment law significantly and it's never been adopted. So I would think that this is not a case where you can develop new law without kind of any support, without considering these affects where you can interpose these intermediate protections without truly wreaking some significant consequences on the Nevada economy and the Nevada employment laws.

And the second, your Honor already alluded to this about the irony of defendant's position. Now, their position, I think they have to answer that there are factual circumstances who constitute an invasion of privacy to install a GPS tracking on someone's car. The reason they actually should have and have to answer that is because they didn't move to dismiss that cause of action on our complaint.

But what they're actually saying in their moving paper is that is not tortious at all, it's a normal practice, a private investigator can do this, and that it is absolutely lawful for a private investigator to install a GPS device in someone's car, monitor every single place they go. If that were the case, then plaintiffs could have installed a GPS tracker on McNeely's car, followed him everywhere, found out every client he went to, found that information, compiled it and disclosed it publicly, in violation of what he's saying are his trade secrets. Because our argument could just have easily been that's public information which clients he met with, and we're happy to disclose all of those publicly. Position's obviously absurd but it's established the issue with the legal errors and the legal stretches that defendants are trying to make in

order to make this information nonpublic, and protectable.

We think the court is not need to address any unsettled area of law. We don't think the court needs to strike or develop any novel balancing tests that haven't already been recognized in Nevada. We think all the court needs to do at this stage is affirm the decision of the discovery commissioner and order that this limited piece of information be disclosed to the plaintiffs.

THE COURT: Hang on a second. Let me just think. Have you been tracking AB 356?

MR. HOSMER-HENNER: Slightly, your Honor. I'm aware of it.

THE COURT: My initial thought that persists is that I should not in any way allow AB 356 to enter my decision making formula. Do you agree or disagree?

MR. HOSMER-HENNER: I agree for this reason, your Honor, that that is a criminal statute. And whether the State of Nevada chooses to specifically criminalize that conduct should have no bearing on whether that conduct separately represents civil liability for tortious invasion of privacy.

THE COURT: I paused when you began with the

continuing consequences your clients -- you have represented that your clients experience by not knowing the client. You say there is some urgency, Judge, because they continue to experience injury as alleged in the complaint.

And then I think about what happens after I make a decision. Either way, if I revisit what Commissioner Ayres did, you might choose to seek writ relief, and I would welcome that. If I affirm Commissioner Ayres, defense might choose to writ relief because once the bell has been rung it can't be unrung and so there should be some finality whether one side or the other is aggrieved.

I'm thinking about a motion for stay and how, hypothetically, I affirm Commissioner Ayres' recommendation, and the next thing the defendant does is asks me to stay the proceedings pending review. What will be your response to that?

MR. HOSMER-HENNER: Your Honor, even though there is urgency we can not make the machinery of the legal system move any faster than it does. And under the factors outlined in NRS aptly, perhaps the stay is warranted because the bell can't be unrung. But at the same time there's no reason to delay that -- delay any

decisions now because writ relief may follow.

THE COURT: Well, yeah, there's no reason to delay my decision. I appreciate your candor on that. Thank you.

MR. HOSMER-HENNER: I finally had something to concede.

THE COURT: Just thinking about this finite period of anonymity that the defense seeks. I understand your legal response to it. I do. But I want to make sure that I kind of focus on everything that is presented to me.

If I order the affirmance of Commissioner Ayres, and there is not a stay pending appellate review, and the disclosure is made, do you immediately amend your DOE defendants or do you take that information and conduct discovery before deciding who to replace that DOE defendant with?

MR. HOSMER-HENNER: We would immediately amend our complaint.

THE COURT: You don't need any additional information discovery would provide.

MR. HOSMER-HENNER: Assuming that that is the individual that hired defendants in order to surveil Ms. Shieve and Mr. Hartung, we think all along we're just

substituting the DOE defendants for the actual client.

I will absolutely say, though, that there's a possibility that more plaintiffs get added to this case as we continue to learn things. I don't think we set a record for number of times a complaint is amended but we may get close because this is something that does a far reaching -- far reaching implications and affect a lot of people in the community. And so we are trying to learn the most narrow category of information that we could. And we could have subpoenaed all sorts of information and we didn't. And sent one targeted credit which is just tell us the person that you acted jointly to affect this action against our clients. We're still waiting on that one answer.

THE COURT: Well done. Thank you, counsel.

I saw you taking notes, you anticipated you'd been given some re automatic time.

MR. GORMLEY: Am I allowed as the objecting party?

THE COURT: Yeah. I didn't make it clear. Counsel go ahead.

MR. GORMLEY: Thank you, your Honor. I'll try to be quick. I'm sorry.

THE COURT: Please don't be brief and don't

reargue what has already been argued.

MR. GORMLEY: Yes, your Honor. If you get bored of me just cut me off, so.

THE COURT: I have an oral habit of interrupting, it's what I do.

MR. GORMLEY: The first part about the moving target, I would just point back at our earlier briefing papers. Our position has always and this is a quote. Given this issue is when and how such confidentiality information should be disclosed and used, or if there's any way to render such disclosure unnecessary, I think we're still being consistent in that way.

I want to focus on going to the end of the argument, this idea of the slippery slope argument of fall-out argue related to trade secrets. That this was found to be a trade secret, then I think it was stated that all client -- it would create -- every client customer business relationship to be a trade secret and there would be a slippery slope with employees leaving the employers and being able to disclose that information, if I'm saying that correctly, but I think here that ignores the unique circumstances of the private investigator client relationship. And I think there could be a trade secret where if you were some

business, and you had some secret type of relationship, I mean, I'm just speculating like in the defense contracting industry maybe there was a relationship there was completely highly confidential that no one knew this business had with that business, I think that one-off could provide -- could stand for trade secret protection, and I think that's that Footnote Number 2 in Finkel sort of recognizes that. And that's why we need to look at these business relationships on a one-off basis.

Then in terms of the timing and the rush, I agree that if a writ petition was taken, that likely a stay would be appropriate just under the first test alone being the object of the appeal being defeated.

But here we have to -- and I completely appreciate what Mr. Hosmer-Henner is saying in the circumstances, but we're not here on a temporary restraining order. We're not here on a preliminary injunction. Those allegations are not in the complaint. There's no present ongoing-type allegations in the complaint. And if there were things, thoughts, concerns about safety like that going on that were alleged and presented to the court, I could see that sort of factoring in to the court's analysis of maybe how this

would go. But again, I would reiterate that the circumstances still shouldn't determine what actual -- the actual test should be, that I could see the rush in the urgency being different and sensitive to that in our work.

THE COURT: Conceptually I agree with you that the court should not be outcome determined or be influenced by the consequences of the decision.

MR. GORMLEY: And then I would just that I quoted the inconceivable language was quoted from Flynn, which I think is the California intermediate decision. And I believe when it was talking about inconceivable that was referring to absolute protection, which is different than what we've been advocating for.

THE COURT: It's interesting you ended on Flynn because I -- you saw me flip through Flynn through the reply and I wanted to get the quote from Flynn. I do want to hear you respond to the plaintiff's reference to Flynn, applying a similar rule of law.

MR. GORMLEY: It's similar. I think the main dispute and the main discussion in Flynn in all the briefs was whether the identity even falls under the protection of 648.200. Because in Flynn the California court determined that it did not.

Here the discovery commissioner, albeit without affirmatively deciding, I would quote his exact language, but he operated under the assumption that it did and also gave support under the idea that it did because he thought it would be somewhat absurd if it didn't. So it wasn't -- he viewed it as not necessary for his decision making maybe to reach a holding on that, but that -- in Flynn to me that was always the big issue of Flynn of going towards whether the identity falls within that statutory protection or not.

And so in the objection it's been premised on assuming that it falls under it just as the discovery commissioner assuming, and that wasn't challenged in a cross objection. So we've sort of operated, thought it was safe that that assumption would be honored moving forward. But that to me was sort of the crux of the Flynn dispute.

And then one of the last points I think I want to make is this idea of trying to remember the exact context it came in, but that they could have put a tracking device on my client legally and then sort of gather all his clients and reveal them and that would be a sort of a misappropriation of trade secrets or -- to me those would be the type of facts when I said your

question about the hypothetical maybe needed more context if someone did something like that, right, if two businesses hired a private investigator, hires one to secretly sort of intercept communications or track somebody to steal trade secret information so that they could release a product earlier or, you know, reveal trade secrets ruining their, like, competitor's business, that would give rise to different causes of action besides just invasion of privacy. That would be misappropriation, trade secrets, conversion and probably various other business torts of that nature. And so here there's no allegation of that here. And so I just don't think that hypothetical really furthers their argument.

You know, at the end of the day it's -- I think you understand our position, your Honor, that we believe that there should be something between Rule 26(b) and absolute privilege. Whether that comes out of the NRS 648.200 line of reasoning or the trade secret reasoning, we think there's both public policy and sort of sound legal reasoning in support of both.

But unless you have any questions that's all I have.

THE COURT: Thank you.

MR. GORMLEY: Thank you.

THE COURT: Counsel, my intention is to enter an order in short order. I don't intend to delay this. I want to reflect upon what I've read and what I've heard.

My thought is that I won't delay my order by rewriting from a blank slate. I don't know if I'll affirm, reverse, modify or remand. But what I don't intend to do is start at the beginning.

Plaintiff described Commissioner Ayres' work as methodically dismantling each of the arguments presented by the defense. I offer that frame work. I found Commissioner Ayres' work to be thorough, exhaustive in his attempts. Whether there's errors in matters of law is something that I'll decide soon but I don't intend to issue a long order.

I also intend to include in my order a resolution of the Motion to Dismiss, without oral arguments. And so that might take another day or two just so I can finalize.

You should know that there are a few arguments in the Motion to Dismiss that have captured this Court's attention, and I just want to make sure that I went through that entirely in my mind. I don't want to

revisit this case preparing for it today and then returning to it on the Motion to Dismiss, I'm going to resolve the two submitted matters at the same time. My best guess is it will be probably a week or less before I issue this one.

Plaintiff's counsel, it's always nice to see you in Department 15. Mr. Gormley, you're also welcome to Department 15, you did a good job.

MR. GORMLEY: Thank you.

THE COURT: To those of you behind the bar, thank you for the way you've conducted yourselves.

The court will be in recess.

(Proceedings concluded.)

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STATE OF NEVADA)
COUNTY OF WASHOE)

I, JULIE ANN KERNAN, official reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify:

That as such reporter I was present in Department No. 15 of the above court on Monday, May 1, 2023, at the hour of 1:30 p.m. of said day, and I then and there took verbatim stenotype notes of the proceedings had and testimony given therein upon the Oral Arguments of the case of HILLARY LOUISE SCHIEVE, et al., Plaintiffs, vs. 5 ALPHA INDUSTRIES, LLC, et al., Defendants, Case No. CV22-02015.

That the foregoing transcript, consisting of pages numbered 1 through 66, both inclusive, is a full, true and correct transcript of my said stenotype notes, so taken as aforesaid, and is a full, true and correct statement of the proceedings of the above-entitled action to the best of my knowledge, skill and ability.

DATED: At Reno, Nevada, this 24th day of May, 2023.

/s/ Julie Ann Kernan

JULIE ANN KERNAN, CCR #427

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