IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

DAVID MCNEELY; 5 ALPHA INDUSTRIES, LLC; and JOHN DOE
Petitioners,
vs.
THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; AND THE HONORABLE DAVID A. HARDY, DISTRICT JUDGE,
Respondent,
and,
HILLARY SCHIEVE; and VAUGHN HARTUNG,
Real Parties in Interest.

Case No.: 86559

District Court Case No.: CV22-02015

ANSWER TO PETITION FOR WRIT OF PROHIBITION OR MANDAMUS

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NRAP 26.1 DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

There are no parent corporations for Hillary Schieve or Vaughn Hartung or publicly held companies owning 10% or more stock.

Undersigned counsel have represented Hillary Schieve and Vaughn Hartung throughout this action.

DATED: July 6, 2023.

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INTRODUCTION

Private investigators David McNeely and 5 Alpha Industries, LLC (the "McNeely Defendants") and their client, John Doe, surreptitiously installed GPS tracking devices on the private vehicles of Hillary Schieve and Vaughn Hartung ("Respondents"), monitoring and tracking their every trip for weeks or months. John Doe admits hiring the McNeely Defendants to surveil Respondents but denied specifically requesting the installation of the GPS tracking devices via an anonymous declaration. The McNeely Defendants have already admitted to installing and using the tracking devices and the fruit of this surveillance is online for public viewing. This type of misconduct is so serious that it was expressly criminal in over twenty-five states and the State of Nevada criminalized this conduct in 2023.[1] Moreover, the installation of GPS tracking devices on private vehicles has already been recognized in Nevada as a potential ground for the tortious invasion of privacy. *Ringelberg v. Vanguard*

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[1] *See* Ben Margiott, *Nevada bill banning GPS tracking devices on cars get bipartisan support in legislature,* News 4 & Fox 11, Mar. 23, 2023, https://mynews4.com/news/local/nevada-bill-banning-gps-tracking-devices-on-cars-gets-bipartisan-support-in-legislature-mayor-hillary-schieve; *see also* Assembly Bill 356 (2023).

Integrity Pros.-Nev., Inc., No. 2:17-cv-01788-JAD-PAL, 2018 WL 6308737, at *8–9 (D. Nev. Dec. 3, 2018).

Nevertheless, the McNeely Defendants and John Doe have taken the extreme position, for a variety of unpersuasive reasons, that the identity of John Doe can be concealed not just under seal and from the public, but from Respondents, the district court, and the jury for the entirety of the lawsuit. No authority or evidence supports such a result. Even if their position were legally sound, the disclosure of a co-defendant and co-conspirator's identity is of such importance for the integrity of the litigation that any balancing test would resolve in favor of Respondents.

STATEMENT OF THE ISSUES

Whether the district court correctly compelled the disclosure of the identity of a co-defendant, John Doe, as there is not a private investigator privilege in Nevada and John Doe's identity was not a trade secret.

STATEMENT OF THE CASE AND FACTS

After discovering that a GPS tracking device had been placed on her personal vehicle without her knowledge or consent, Respondent Schieve sued the McNeely Defendants and unnamed co-defendants. 1-PA-1. Shortly thereafter, Schieve moved for leave to issue subpoenas to

the McNeely Defendants seeking documents sufficient to identify the individual or entity that hired the private investigator. 1-PA-10. On January 20, 2023, the district court granted Schieve's request, finding "good cause to permit early discovery for the limited purpose of identifying the "Doe" defendant(s)." 1-PA-53.

After repeatedly avoiding service, the McNeely Defendants were ultimately served with the subpoenas, and two days later, objected on the basis that the identity of their client is a trade secret. 1-PA-74. After a meet-and-confer, on February 2, 2023, Schieve moved to compel compliance with the subpoenas. 1-PA-60. During the briefing, an Amended Complaint was filed to add Vaughn Hartung as a plaintiff as he had learned of similar misconduct and also he joined the motion to compel. 1-PA-103. After full briefing by the parties, the motion was referred to the discovery commissioner. 1-PA-60-75, 116-29, 152-66.

On March 15, 2023, the Discovery Commissioner issued a Recommendation for Order ("Recommendation"). 1-PA-166. As the Discovery Commissioner correctly noted in the Recommendation, the McNeely Defendants failed to identify any statute that protects the identity of a private investigator's client, or any case law in any

jurisdiction where the identity of a client was protected in similar circumstances. As a result, and in a thoroughly reasoned order, the Discovery Commissioner recommended that Plaintiffs' Motion to Compel be granted, the McNeely Defendants' Countermotion for Protective Order be denied, and that the Court order the McNeely Defendants to produce the documents described in the subpoenas by March 28, 2023. 1-PA-193.

The McNeely Defendants objected to the Recommendation. 1-PA-195. On May 4, 2023, and after full briefing and oral argument on the matter, the district court issued an order affirming the Recommendation because, among other reasons, "Mr. McNeely urges this Court to find protection where it is not clearly provided by law." 1-PA-226 ('Order").

As the above shows, the dispute over the disclosure of the McNeely Defendants' client(s) began in January 2023. Despite clearly being aware of the proceedings – and refusing to contend otherwise – John Doe waited until May 5, 2023, nearly five months after this dispute arose, to appear in this case. That appearance was made the day after the Court ordered the disclosure of the identity of the client that hired the McNeely Defendants. Since that date, John Doe has tried to actively insert himself into the district court proceedings by filing a number of improper filings,

without any authorization to do so and all while maintaining complete anonymity.

On May 5, 2023, and before any discovery had taken place, John Doe filed a procedurally and substantively improper motion for summary judgment on Schieve's and Hartung's claims. 1-SA-1.[2] The only evidence on which the motion relied was a declaration from the still unidentified "John Doe," the statements of which cannot be verified or challenged without knowledge of his identity. 1-SA-17-18. Schieve and Hartung opposed the rogue filing because it was submitted anonymously by a technical non-party without any authentication or evidentiary support, which precludes the parties and the district court from verifying the facts asserted in the anonymous declaration. Schieve and Hartung also argued that the motion rests on the repeated premise that Schieve and Hartung have "no evidence" in support of their claims, even though discovery just opened in the case and to date, the defendants below have objected to and indeed withheld the discovery already requested. 1-RPA-29.[3]

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[2] To maintain consistent designations, "SA" refers to John Doe's Appendix (though this bates label does not appear on the "Appendix Attachments" submitted by John Doe).

[3] "RPA" refers to Respondents/Real Parties in Interest Schieve's and Hartung's Appendix.

After filing his motion and improperly inserting himself into this action, John Doe continued to participate as if he were a party. As a result of John Doe's continued and improper participation, Respondents moved to strike the rogue filings. 1-RPA-184. While limited circumstances warrant protection of a party's identification from the public realm, John Doe is attempting to be a party – filing an answer, engaging in discovery, and submitting sworn statements under oath – while remaining anonymous even to the parties and the Court. 1-RPA-35-36. This leaves the parties, the district court, and now this Court no way of verifying or confirming any of the positions he advances in these proceedings.

STANDARD OF REVIEW

The McNeely Defendants ask this Court to intervene in a discovery dispute over which the district court has "sound discretion." *Club Vista Fin. Servs. v. Dist. Ct.*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012). For this reason, "extraordinary writs are generally not available to review discovery orders." *Valley Health Sys., LLC v. Eighth Jud. Dist. Ct.*, 127 Nev. 167, 170–71, 252 P.3d 676, 678 (2011). The burden is on the petitioner to demonstrate that extraordinary relief is warranted. *Pan v. Dist. Ct.,* 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). If the Court decides

to nonetheless exercise its discretion to entertain the writ petition, it reviews the at-issue discovery order for an abuse of discretion. *Id.* Under this deferential standard, this Court reviews legal questions de novo and "gives deference to the district court's findings of fact, *Cotter v. Eighth Jud. Dist. Ct.*, 134 Nev. 247, 249, 416 P.3d 228, 232 (2018) (internal quotation marks and citations omitted), which will not be set aside unless they are clearly erroneous or not supported by substantial evidence. *Seibel v. Eighth Jud. Dist. Ct.*, 138 Nev. Adv. Op. 73, 520 P.3d 350, 354 (2022) (internal quotation marks and citations omitted).

SUMMARY OF ARGUMENT

Respondents issued subpoenas to the McNeely Defendants attempting to determine the identity of the individual or entity that hired Defendants to place a GPS tracking device on Respondents' private vehicles ("Subpoenas"). The Subpoenas only sought limited information: the identity of the co-defendant and co-conspirator who hired the McNeely Defendants.

This litigation has now completely stalled as the McNeely Defendants and now John Doe have refused to provide this information based on a series of shifting defenses and objections that are contrary to

law. "Firmly embedded in the American judicial system is a presumption of openness in judicial proceedings." *Doe No. 1 v. Wynn Resorts Ltd.*, No. 2:19-cv-01904-GMN-VCF, 2022 WL 3214651, at *3 (D. Nev. Aug. 9, 2022) (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569-574 (1980)). Parties are only allowed to use pseudonyms in the "unusual case when nondisclosure of the party's identity is necessary . . . to protect a person from harassment, injury, ridicule or personal embarrassment." *Wynn Resorts Ltd.*, 2022 WL 3214651, at *3 (quotations omitted).

Regardless of what John Doe now says in this proceeding, the reality is that continued anonymity prevents Respondents, or this Court, from verifying his statements, arguments, positions, or even his existence. John Doe states that his reasons were related to non-violent political goals, but revealing his true identity could establish that he is a clear and present danger to Respondents instead that would warrant additional injunctive relief. As no absolute privileges are in play, this Court cannot properly balance interests – even if it were to adopt a balancing test – based on the unverifiable representations of a fictitious party. Given that such a decision would verge on being a purely advisory

opinion, it is unsurprising that the McNeely Defendants and John Doe have failed to introduce any supporting authority.

The specific arguments now presented in an effort to reverse the district court's reasoned analysis are unpersuasive. First, Nevada does not have a private investigator-client privilege. *DeChant v. State*, 116 Nev. 918, 926-27, 10 P.3d 108, 113 (2000). Accordingly, there is no basis to create a unique balancing test for such situations. Second, the identity of a private investigator's client is not a confidential trade secret. The McNeely Defendants' proposition that a single client's identity is intrinsically a protected trade secret is untenable as this same point could be made about any customer or client or virtually any business. 1-PA-174. Third, the First Amendment does not protect non-expressive, unlawful conduct such as the installation and use of a GPS tracking device on a private vehicle. John Doe and the McNeely Defendants could not break into Respondents' houses to look for political information and they could not invade their privacy by attaching a device to their vehicles.

The surreptitious installation of GPS tracking devices is an incredibly intrusive act that destroys an individual's privacy and sense of safety: "GPS monitoring generates a precise, comprehensive record of

a person's public movements that reflects a *wealth of detail about her familial, political, professional, religious, and sexual associations*." *United States v. Jones,* 565 U.S. 400, 404-05 (2012) (Sotomayor, J., concurring) (emphasis added). Permitting John Doe to remain anonymous is unwarranted and exacerbates these privacy consequences and fears.

ARGUMENT

I. The Standard of Review for a Discovery Commissioner Recommendation is a Non-Issue.

The McNeely Defendants' discussion of the appropriate standard of review for reviewing a discovery commissioner's recommendation appears abstracted from this case and does not warrant writ relief. While their arguments are straightforward, there appears to be no actual grievance by the McNeely Defendants or basis for error. The district court analyzed the discovery commissioner's Recommendation – together with the McNeely Defendants' Objection – but did not find any error of law. In their Objection, the McNeely Defendants argued that the district court should review the Objection under a "clearly erroneous or contrary to law" standard of review. 1-PA-197-98; Pet. 10. Respondents did not dispute this standard. 1-PA-210. The district court then cited *Valley*

Health Sys. LLC v. District Court, 127 Nev. 167, 252 P.3d 676 (2011), and effectively agreed with the McNeely Defendants by applying the "clearly erroneous" standard referenced in *Valley Health*.

The McNeely Defendants' complaint seems to be that the district court omitted the phrase "contrary to law." Pet. 12-13.[4] Yet the district court clearly did independently review the discovery commissioner's legal determinations. The parties fully briefed the legal arguments and presented them to the district court during a lengthy hearing. Then, in its written Order, the district court held that McNeely's "position is well-researched and persuasively presented. But in the final analysis, Mr. McNeely asks this Court to collate existing law and create protection by an extension of law not previously acknowledged by statute or decisional authority." 1-PA-227. The district court never determined that the discovery commissioner had made any error of law or that the

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[4] Respondents agree that courts have differentiated between the clearly erroneous standard, which applies to findings of fact and requires a definite and firm conviction that a mistake has been committed, and the contrary of law standard, which permits independent review of purely legal determinations by the magistrate judge. *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 970–71 (C.D. Cal. 2010) (internal quotations omitted). The district court certainly did not indicate that it was ignoring legal errors in the Recommendation.

Recommendation was contrary to law. Nor did the district court indicate that it was obligated to overlook decisions that were contrary to law due to the applicable standard of review.

The McNeely Defendants' concede, as they did below, that the appropriate standard of review should be deferential to the discovery commissioner. Pet. 13. The discovery commissioner's effort would be wasted if the district court had to start from scratch. *PlayUp, Inc. v. Mintas*, No. 2:21-cv-02129-GMN-NJK, 2022 WL 10967692, at *4 (D. Nev. Oct. 18, 2022) (discussing the magistrate judge's "broad discretion" and the appropriate standard of review as "clear error," which requires "great deference"). Here, the district court specifically "reference[d] and incorporate[d] the recommendation in its entirety." 1-PA-227 n.2. Thus, the Recommendation was not merely reviewed by the district court, but explicitly adopted as an order of the district court.

Finally, the McNeely Defendants have failed to identify any aspect of the Recommendation or of the Order that is "contrary to law." They concede that no existing authority supported the positions they were advancing. And regardless of the standard of review employed, the outcome would be the same as the legal analysis in the Recommendation

is correct. Finally, there is no basis to grant writ relief or to remand due to the district court's purported analysis under a different standard of review because this Court would analyze the legal issues under a de novo standard in any event. *Cotter v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 134 Nev. 247, 250, 416 P.3d 228, 232 (2018) (holding that when "considering a writ petition, this court reviews legal questions de novo").

II. Nevada Does Not Recognize a Private Investigator Privilege, So There is Nothing to Balance Against Disclosure.

The McNeely Defendants concede that Nevada does not recognize a confidential private investigator–client relationship or protect communications between a private investigator and client as privileged. There can be no argument that NRS 648.200 or any other statute or rule creates an absolute evidentiary privilege, as this position was rejected in *DeChant*. *See* 116 Nev. at 926–27, 10 P.3d at 113 (citing NRS 648.200 and concluding that a district court can "compel disclosure of documents in possession of a private investigator that are relevant to trial and not covered by any other privilege."). Thus, the McNeely Defendants pivot to the position that this Court should adopt a new balancing test and then remand so the district court can then balance the competing interests.

A. NRS 648.200 Is Not a Barrier to Disclosure.

As their arguments concerning a private investigator privilege fell through, the McNeely Defendants now lack a rationale to hide their clients. NRS 648.200 was intended to protect against misconduct by private investigators, not to effect an injustice by shielding their clients. Information acquired by a private investigator is subject to NRS 648.200, which is a regulatory provision that was "not intended to hamper the administration of justice but simply to provide for the licensing and regulation of private detectives and to protect them . . . from faithless employees" *DeChant,* 116 Nev. at 927 (quoting *Attorney General v. Pelletier*, 240 Mass. 264, 134 N.E. 407, 418 (1922)). In one of the only decisions analyzing NRS 648.200, this Court found that the disclosure of client information by a private investigator was grounds for discipline, not that there was a basis to deem this information privileged. *Bryant v. Priv. Investigators' Licensing Bd.*, 92 Nev. 278, 279–80, 549 P.2d 327, 327–28 (1976) ("This report contained personal derogatory information on Iris Saxton which Ms. Bryant acquired as a result of the employment relationship. Without obtaining Iris Saxton's permission, Ms. Bryant furnished the report to Iris Saxton's former husband, contrary to the provisions of NRS 648.200."). As *Bryant* supports, the purpose of NRS

648.200 was to prevent private investigators from misusing client information, not to prevent parties from obtaining this information through proper discovery or from tipping the balance against disclosure.

This Court has emphasized NRS 648.200 contains a clear exception allowing private investigators to disclose information as required by law, including through lawful discovery. *DeChant,* 116 Nev. at 927. Similarly, California courts have also rejected the premise that a client of a private investigator can be concealed.[5] *Flynn v. Superior Ct.*, 57 Cal. App. 4th 990, 996, 67 Cal. Rptr. 2d 491, 494 (1997) (addressing a similar statute to NRS 648.200 and concluding that "it is inconceivable 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"); *see also* 1-PA-181 (agreeing with *Flynn* and

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[5] The McNeely Defendants cite to two cases from Michigan and Ohio but neither supports their arguments. Michigan has a statute that expressly deems communications between a private investigator and client "privileged with the same authority and dignity as are other privileged communications." *Ravary v. Reed*, 415 N.W.2d 240, 243 (Mich. App. 1987). Contrary to the McNeely Defendants' arguments, this shows that a similar privilege should not be extended to Nevada where the Legislature is silent. The Ohio case was a public records and administrative matter that is irrelevant. *Quinlan v. Ohio Dep't of Com., Div. of Consumer Fin.*, 678 N.E.2d 225, 229 (Oh. App. 1996).

finding that "no argument or evidence has been presented to show or suggest that NRS 648.200(1) was ever intended to allow a private investigator to withhold a client's identity and thereby potentially shield the client from any responsibility or liability in a civil action").

B. Even a Balancing Test Would Support Disclosure of the Identity of a Client.

The Recommendation and the Order more or less engaged in the type of balancing requested by the McNeely Defendants. In particular the Recommendation recognized that such balancing occurs within the "scope of discovery set forth at NRCP 26(b)(1)" such as when proportionality is considered. 1-PA-177. The Discovery Commissioner seriously considered Defendants' proposal to adopt a new balancing test, but ultimately relied on the plain language of NRCP 26(b)(1), which governs this discovery dispute and on the district court's broad discretion to resolve discovery disputes, citing *Seibel v. Dist. Court*, 138 Nev., Adv. Op. 73, 520 P.3d 350, 354 (2022). The Recommendation also cited *Hetter v. Eighth Judicial Dist. Court*, 110 Nev. 513, 520, 874 P.2d 762, 766 (1994), and *Rock Bay, LLC v. Eighth Judicial Dist. Court,* 129 Nev. 205, 213, 298 P.3d 441, 447 (2013), to demonstrate that when the Nevada

Supreme Court wants to impose a different discovery standard, it expressly says so. 1-PA-178.

Under Nevada law, a party can obtain discovery of "any nonprivileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." NRCP 26(b)(1). The McNeely Defendants ask this Court to impose another balancing test on top of this rule, which would be counterproductive. When important information is not privileged, it should be disclosed without burdensome balancing analysis, otherwise every profession or business could claim a similar requirement. Yet this does not occur even when there is a statutory privilege in play. *See, e.g., Exobox Techs. Corp. v. Tsambis*, No. 2:14-cv-501-RFB-VCF, 2014 WL 4987903, at *4 (D. Nev. Oct. 7, 2014) (recognizing the "general rule is that identity of an attorney's clients is not a matter within the attorney-client privilege").

The McNeely Defendants do not provide the Court with any basis to find that their interest in concealing the identity of one of their clients outweighs the interests of Respondents in knowing the identity of a party that wronged them. The Recommendation correctly stated that "Plaintiffs must be permitted to know the identity of all potentially liable parties at this time." 1-PA-192; *see also Starr v. Lash,* 2017 WL 1400114, at *2 (S.D. Cal. Apr. 19, 2017) ("When evidence is particularly important to a claim or defense, a party's right to discovery of that evidence is more likely to outweigh competing privacy claims."). The Recommendation found the McNeely Defendants' representations of interest unpersuasive for multiple reasons. 1-PA-187 (noting that to "allow the Court to properly assess the credibility of his statements, Defendant McNeely needed to describe at least some of the experience supporting his conclusion, and to provide the specific information upon which his understanding of client expectations is based"). The McNeely Defendants did not even declare that the identity of the client had been maintained confidentially or was unknown to others, stating instead only that "to the best of my recollection, I acted consistent with these precautions to maintain the confidentiality of the client(s)' identity." 1-RPA-19-20.

Finally, the McNeely Defendants' arguments about the need for confidentiality and the effect on the private investigator industry are illogical. As Nevada does not have a private investigator privilege *and* the Supreme Court expressly held in *DeChant* that such information could be disclosed in litigation, it would be entirely unreasonable for the industry to expect confidentiality. 116 Nev. at 927; *see also* 1-PA-187 ("In addition, while Defendant McNeely's belief is plausible in connection with a private investigator who voluntarily discloses the identity of a client, the Court is not persuaded that his belief is reasonable in connection with compelled disclosure.").

III. John Doe's Identity is Not a Trade Secret.

The McNeely Defendants' trade secrets arguments continue to depend on the premise that the identity of a private investigator's client is confidential in Nevada. Pet. 22-23 ("Yet, in the context of the private investigator-client relationship, the secrecy of the relationship between the private investigator and client is precisely what makes the relationship valuable to the business. Because, without the secrecy, there would be no relationship.") It is not. NRS 648.200; *DeChant*, 116 Nev. at 926–27. Absent this faulty premise that conflates competition with trade

secrets, they contend that a single one-off client is a trade secret, even without any independent economic value or supporting information as to the importance of the identity of that client. "[N]ot every customer and pricing list will be protected as a trade secret." *Frantz v. Johnson*, 116 Nev. 455, 467, 999 P.2d 351, 359 (2000). Further, as the existence of a trade secret "is a question for the finder of fact," the McNeely Defendants cannot identify any abuse of discretion by the district court. *Id.* at 466.

The Subpoenas did not seek any information about the nature or extent of the McNeely Defendants' relationship with their client, the prices charged, the client's prior or future engagement of Defendant, or any information compiled about the client that might be independently valuable. Unlike a client list that has been compiled over a period of time and is the "product of great expense and effort," the identity of a single client is not protectable in most if not all situations. 1-PA-171-72 (quoting *Bridgestone Hosepower, LLC v. Eismann*, No. 2:21-cv-02121-GMN-EJY, 2022 WL 18108430, at *8 (D. Nev. Apr. 28, 2022)); *id.* at 6-9 (listing cases that analyze when a customer list constitutes a trade secret and contrasting these situations with the identity of a single customer or client).

The relevant inquiry is the expense and effort the business incurred in obtaining and protecting the information. As the Discovery Commissioner noted, "Defendants do not present evidence that they incurred any expense or exerted any effort to obtain this client. Instead, they argue that this information derives economic value from not being generally known because disclosure would permit competing private investigators to recruit this client. But that same point could be made about any customer or client of virtually any business—once competitors are aware that a person may need certain goods or services, they can try to recruit that individual as a customer or client." 1-PA-174 (emphasis in original). The identity of a single customer in the private investigator industry cannot be a trade secret as everyone in Nevada could potentially be a customer. And specifically in the private investigator context, the McNeely Defendants are simply wrong that the "ability to maintain confidentiality is a distinguishing competitive feature between private investigators." Pet. 24. Current law in Nevada (and California for that matter) does not allow *any* private investigator to refuse to disclose the identity of their clients in a civil case. Even if this Court were to overrule

DeChant, all private investigators would still be treated equally, resulting in no competitive advantage.

Finally, the law simply does not permit the McNeely Defendants to totally shield their client from liability by invoking trade secret protection. This superficial objection would result in a manifest injustice as it would prevent Respondents from fully litigating their claims against John Doe; even a trade secret must be disclosed if its concealment would "work injustice." NRS 49.325(1).

IV. The First Amendment Does Not Require John Doe's Anonymity.

The issue before the Court is limited to whether the district court correctly compelled the disclosure of John Doe's identity. The new First Amendment arguments advanced by John Doe, which were not presented to or considered by the district court, posit that John Doe has a constitutionally protected right to engage in anonymous political activity and that this right allows him to proceed under a fictitious pseudonym. That Respondents are political figures does not automatically bring this case into the scope of the First Amendment. John Doe's assertion, made behind a veil of anonymity, that his actions were intended to investigate

the conduct of elected officials does not automatically warrant First Amendment protection even if credited as true.

Nevada has not identified the standard for when an anonymous speaker can resist discovery. *See e.g., In re Anonymous Online Speakers*, 661 F.3d 1168, 1175 (9th Cir. 2011) ("The many federal district and state courts that have dealt with this issue have employed a variety of standards to benchmark whether an anonymous speaker's identity should be revealed."). John Doe argues that this Court should use a balancing test akin to *Perry v. Schwarzenegger*, 591 F.3d 1147, 1157 (9th Cir. 2010). While *Perry* did not involve anonymous speakers and rested on the importance of political association and political expression, it did articulate a test where John Doe would have to make a "prima facie case of arguable First Amendment infringement" and Respondents then would have to "demonstrate a sufficient need for the discovery to counterbalance that infringement." *Perry*, 591 F.3d at 1157.

Under this, or any similar balancing test, there is no justification for concealing John Doe's identity. First, this matter involves non-expressive conduct – the installation of a GPS surveillance device via trespass – that does not warrant First Amendment protection. Moreover,

John Doe denies having taken this action, so from his perspective, there is not even actual speech to protect. Second, even if John Doe has a First Amendment right to anonymity, this does not outweigh the need for Respondents to obtain redress for the tortious invasion of their privacy. John Doe preposterously claims that his anonymous participation in the litigation is enough and that his identity is not relevant to the claims and defenses in this case. Without his identity, Respondents cannot depose him, verify his statements, or conduct third-party discovery using his identity. No court has ever authorized such restrictions in similar circumstances.

A. The First Amendment is Not Implicated or Infringed.

The premise that individuals have an unchecked right to exercise their First Amendment rights whenever and however they please has been "vigorously and forthrightly rejected." *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 568 (1972). Individuals do "not generally have a First Amendment right to access private property for expression." *Wright v. Incline Vill. Gen. Improvement Dist.*, 665 F.3d 1128, 1137 (9th Cir. 2011); *S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 414, 23 P.3d 243, 250 (2001) (concluding that "the district court did not err in making a

preliminary finding that the sidewalks in question are private property and therefore not subject to the reach of the First Amendment").

Here, John Doe was not sued for criticizing public officials or even for hiring a private investigator to gather information about public officials. He was sued for the surreptitious installation and use of a GPS tracking device on Respondents' private vehicles, which is recognized tortious conduct. *Ringelberg*, 2018 WL 6308737, at *8–9. If political protesters can be held liable for trespass without running afoul of the First Amendment, then John Doe certainly should have to disclose his name so that civil litigation against him for much more serious conduct can proceed. It is further immaterial whether John Doe trespassed directly to install the GPS devices or merely conspired with the McNeely Defendants. "It is consistent with the First Amendment to impose tort liability where, as here, the defendant personally directs the activities of others such that he creates a foreseeable risk of injury to others." *Doe v. Mckesson*, No. 17-30864, 2023 WL 4044558, at *17, n. 12 (5th Cir. June 16, 2023) (considering situation where the defendant allegedly "organized the protest such that he knew, or should have known, that violence would likely ensue. Doe says that Mckesson arranged for the

protesters to meet in front of the Baton Rouge police station, blocking entry to the station and access to the adjacent streets" and further noting that "Doe failed to offer sufficient evidence to justify his proceeding anonymously").

John Doe claims in a declaration that "I did not ask or authorize Mr. McNeely and/or 5 Alpha Industries to place a tracking device on Mayor Schieve's vehicle, nor did I ask or authorize them to place a tracking device on Mr. Hartung's vehicle" and that "I also have never had access to any of the tracking information Mr. McNeeely and/or 5 Alpha Industries obtained." 1-SA-17-18, at ¶¶ 12-13. If John Doe did not engage in these activities, then what anonymous speech is he attempting to protect? John Doe does not actually identify any of his political speech that would warrant protection. Further, if his identity remains anonymous then how can Respondents challenge or rebut his assertions of innocence?

1. No Favorable Precedent Supports Anonymous Political Investigations.

John Doe strangely references "malfeasance" by Reno-area officials as somehow justifying his conduct. Supp. Pet. 5. Any such anecdotes are irrelevant as there is no dispute that a citizen or journalist can lawfully

gather information about elected officials. But John Doe cites to several additional examples of private investigators as supporting his position. None does.

First, John Doe cites Sen. Kennedy's investigation of Sen. Romney but the included source identifies both the client, Sen. Kennedy, and the investigator, Investigative Group, Inc. Supp. Pet. 10. Second, John Doe cites to investigation by a mayoral candidate in 2022, but again the source identifies the client, John McCann, and the investigator, Lawrence Hamilton. *Id.* Third, John Doe identifies both the client and investigator, James T. Callendar, who was a well-known muckraking journalist. *Id.* Fourth, John Doe references the investigation of Clark County Commissioner Lynette Boggs-McDonald and actually asks the Court to take judicial notice of the facts of this matter. Supp. Pet. 11. In that case, both the clients – the Culinary Union and the Las Vegas Police Protective Association – and the investigator, private detective David Groover, were matters of public record. "*More trouble on horizon for Boggs?*", Las Vegas Sun, June 6, 2007. John Doe is not the only person who has used a private investigator for political purposes, but based on

his own authority appears to be the only one who lacks the courage to identify himself.

2. Campaign Finance Law Cuts Against a Right to Anonymity.

To the extent that John Doe claims to have been acting for political reasons, there is a very strong possibility that he would have been required to disclose the payment to the McNeely Defendants as a campaign contribution. *See* NRS 294A.362 (requiring the reporting of "goods and services provided in kind for which money would otherwise have been paid"); NRS 294A.0075 (defining expenditures).

John Doe's actions were taken during the election season and around the time of a mooted recall campaign related to Hartung and a mayoral election for Schieve. If he was acting on behalf of a political action committee or on behalf of candidates opposing Schieve, then this campaign contribution could be considered an in-kind contribution requiring disclosure. *See, e.g., The Law of a "Thing of Value*,' October 2019 Guidance from the Chair of the Federal Election Commission.[6] The Federal Election Commission considers expenditures such as "opposition

[6] Available at: https://www.fec.gov/resources/cms-content/documents/2019-10-ELW-the-law-of-a-thing-of-value.pdf.

research" to potentially be an in-kind contribution that could require disclosure by the contributor. Given John Doe's anonymity, Respondents cannot establish that campaign finance law would apply, but neither can John Doe rebut this possibility.

B. The First Amendment Does Not Outweigh Plaintiffs' Interests.

Disclosure of anonymous speakers can be readily outweighed by competing interests. *Wirt v. Twitter, Inc.*, No. 21-MC-80166-JSC, 2021 WL 5919846, at *3 (N.D. Cal. Dec. 15, 2021) ("Given the nature of the challenged speech, @Deus_Abscondis's central role in the alleged events, and Dr. Wirt's interest in redressing allegedly defamatory accusations against him, @Deus_Abscondis's right to engage in anonymous speech "give[s] way" to Dr. Wirt's "need to discover the speaker's identity in order to pursue [his] claim."). Similarly, Schieve and Hartung need John Doe's identity to pursue their claims and complete discovery and any minimal First Amendment privilege pales in comparison.

The identity of a defendant is relevant in this case. Respondents need more than that a "client" hired the McNeely Defendants as they still may need to seek a protective order depending on the identity and motivations of this "client." *See, e.g., Farmland Partners Inc. v. Fortunae,*

No. 18-cv-02351-KLM, 2020 WL 12575073, at *5 (D. Colo. May 18, 2020) ("The Court finds that Rota's identity and the identity of others allegedly involved in the "short and distort" scheme . . . are clearly relevant to FPI's claims . . . Absent the ability to identify the alleged malefactors, [the plaintiff] is left with no ability to vindicate its rights, and legal process is rendered meaningless."). John Doe cannot even introduce evidence that his First Amendment rights are even implicated. *Diamond Pleasanton Enter., Inc. v. City of Pleasanton*, No. 12-cv-00254-WHO, 2015 WL 74946, at *1 (N.D. Cal. Jan. 5, 2015) ("Absent extraordinary circumstances, witnesses do not testify anonymously under our system of laws."). Accordingly, this Court cannot find that John Doe has a compelling interest in the First Amendment or his privacy because the Court has no competent evidence on which to base that determination.

John Doe argues that his participation in this case moots the need for discovery. Supp. Pet. 15. Not so. The judicial authority is clear that concealing a party's identity from the opposing party results in significant prejudice. *Doe No. 1 v. Wynn Resorts Ltd.*, No. 2:19-cv-01904-GMN-VCF, 2022 WL 3214651, at *3 (D. Nev. Aug. 9, 2022) ("Plaintiffs' request to conceal their identities from Steve Wynn, the named

perpetrator, and other non-parties, will greatly prejudice the defendants once discovery opens."). When anonymity is granted, it is usually *because* the identity of the party is known to the other party. *Doe v. Mozer*, No. 2:16-cv-00210-KJD-VCF, 2016 WL 3536857, at *1 (D. Nev. June 27, 2016) ("The Defendant knows the true identity of the Plaintiff, as shown by Defendant's subsequent filings using Plaintiff's name, and a pseudonym will not affect Defendant's procedural or discovery efforts."). The Subpoenas were not just served to add "John Doe" to the case, but to begin to prosecute the case against this party in a full and fair manner. It is not enough to have an unidentified defendant in this case who cannot be deposed. John Doe must be named and must be subject to full discovery.

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CONCLUSION

For all of the foregoing reasons, this Court should deny extraordinary relief to the McNeely Defendants and to John Doe.

DATED: July 6, 2023.

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CERTIFICATE OF COMPLIANCE

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

I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) and the Order Directing Answer because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 6176 words.

I further certify that I have read this brief, that it is not frivolous or interposed for any improper purpose and that it complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e).

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I understand that I may be subject to sanctions in the event that the brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of McDONALD CARANO LLP and that on July 6, 2023, I served the foregoing document on the parties in said case by electronically filing via the Court's e-filing system, as follows:

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