IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No.
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.

PETITION FOR WRIT OF PROHIBITION OR MANDAMUS

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NRAP 26.1 DISCLOSURE

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

David McNeely is an individual. 5 Alpha Industries, LLC has no parent corporation and no publicly held company owns 10% or more of its stock.

Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC and Marquis Aurbach Chtd. are the only law firms that have appeared for Petitioners in the case or are expected to appear on behalf of Petitioners in this Court.

DATED: May 12, 2023

/s/ Ryan T. Gormley
Attorney for Petitioners

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ROUTING STATEMENT

This writ is presumptively assigned to the Court of Appeals because it is a pretrial writ proceeding challenging a discovery order. *See* NRAP 17(b)(13). Yet, because this writ concerns questions of first impression involving the common law and of statewide public importance regarding the private investigator-client relationship and the correct standard for a district court to review a discovery commissioner's recommendation, it would be appropriate for the Supreme Court to retain this writ under NRAP 17(a)(11)-(12).

I. ISSUE PRESENTED AND RELIEF SOUGHT

This writ petition concerns issues of first impression regarding the treatment of information shared within the private investigator-client relationship and the proper standard for reviewing a discovery commissioner's recommendation. Plaintiffs Hillary Schieve and Vaughn Hartung allege that Defendants David McNeely and 5 Alpha Industries, LLC ("5 Alpha") (collectively "Defendants") invaded their privacy and otherwise caused them damage by using a GPS device to monitor the location of their vehicles as part of investigations performed on behalf of a presently unidentified third party. (*See* 1-PA-103). Schieve is the current Mayor of Reno, Nevada. Hartung is a recently former Washoe County Commissioner. McNeely is a licensed private investigator in the State of Nevada and owner of 5 Alpha. In Nevada, the use of a GPS device to monitor the location of a person's vehicle, a practice used by investigators in the State, is not prohibited by law, although recently the Legislature has proposed such a bill. *See* A.B. 356, 82nd Leg. (March 20, 2023) (noting that "[e]xisting law does not expressly prohibit a person from installing a tracking device on the motor vehicle of another person").

Prior to service of process, Plaintiffs obtained *ex parte* leave to serve subpoenas on Defendants seeking documents sufficient to identify the individuals or entities that hired 5 Alpha to investigate Plaintiffs ("Confidential Client"). (*See* 1-PA-53). The discovery commissioner ordered Defendants to comply with the

subpoenas, finding that (1) even if the identity of the Confidential Client falls within the scope of NRS 648.200, it must be disclosed because it is relevant and proportional to the needs of the case and (2) the information did not constitute a trade secret. (*See* 1-PA-166). On objection, the district court affirmed the discovery commissioner's decisions, concluding that they were not clearly erroneous, and ordered Defendants to produce documents sufficient to reveal the identity of the Confidential Client. (*See* 1-PA-225).

Thus, the issue presented is whether the district court erred by affirming the discovery commissioner's recommendation. As explained below, confidential information shared between private investigators and clients, including the identity of a client, warrants further protection than the guardrails of relevancy and proportionality. While Nevada law does not provide an absolute privilege for the private investigator-client relationship, NRS 648.200 protects information acquired by private investigators related to their services by making it "unlawful" for the private investigator to divulge such information, except at the direction of the employer or client for whom the information was obtained. Given this statute, the confidential nature of the private investigator-client relationship, and policy considerations underlying the private investigation industry, the discovery of information within the scope of NRS 648.200, while not absolutely privileged,

should be subject to a more rigorous standard, such as a heightened showing or balancing test.

These same considerations, in conjunction with the steps that Defendants took to preserve the confidentiality of the identity of the Confidential Client, qualify the identity of the Confidential Client as a trade secret under Nevada law deserving of provisional protection under NRS 49.325 and NRS 600A.070.

Lastly, in evaluating Defendants' arguments in the objection, the district court erred by reviewing the discovery commissioner's recommendation under a clearly erroneous standard. Defendants submit here, as they did below, that the correct standard of review is "clearly erroneous or contrary to law." As such, the district court should have determined whether the discovery commissioner's interpretation and application of common law and statutes, as challenged in the objection, were contrary to law—deference is not owed to legal error.

Under the circumstances, writ relief is appropriate. All three issues present questions of first impression, have significant public policy implications, and concern the disclosure of confidential and privileged information that warrants protection. Accordingly, Defendants respectfully request that the Court issue a writ of prohibition or mandamus directing the district court to vacate the ordered disclosure and comply with further instructions regarding the standard for discovery of such information.

II. STATEMENT OF PERTINENT FACTS

A. The Subpoenas

On December 15, 2022, Plaintiff Schieve filed the Complaint. (1-PA-1). She asserted eight causes of action against Defendants: (1) invasion of privacy – intrusion upon seclusion; (2) invasion of privacy – public disclosure of private facts; (3) violation of NRS Chapter 200, anti-doxxing; (4) negligence; (5) trespass; (6) civil conspiracy; (7) aiding and abetting; and (8) declaratory relief. (*See id.*).

Prior to service of process, Schieve moved *ex parte* for leave to issue subpoenas to Defendants seeking documents sufficient to identify the individual or entity that hired Defendants to investigate her. (1-PA-10). Specifically, the subpoenas to McNeely and 5 Alpha sought the following:

> Produce documents, including but not limited to engagement agreements, contracts, invoices, or payments, sufficient to identify each and every individual or entity that hired David McNeely and/or 5 Alpha Industries, LLC to conduct surveillance upon Hillary Schieve, to track Hillary Schieve's location, or to take any other action with respect to Hillary Schieve.

(1-PA-21, 30). A week later, the district court granted the *ex parte* motion. (1-PA-53).

B. The Discovery Commissioner's Recommendation

Defendants objected to the subpoenas, leading to Schieve filing a motion to compel. (*See* 1-PA-60). Defendants opposed the motion and moved for a protective

order. (*See* 1-PA-75). Defendants argued that the identity of the Confidential Client is confidential and protected information under NRS 648.200, as a trade secret under NRS 49.325 and NRS 600A.070, and/or as confidential commercial information under NRCP 26(c)(1)(G). (*See id.*). Defendants further argued that the information should not be ordered disclosed at this time and, alternatively, other means could be implemented to prevent immediate and public disclosure, such as staggered discovery or "Doe" pleading. (*See id.*). A declaration from McNeely was included, which provided, *inter alia*, that he maintained the confidentiality of the identity of the Confidential Client through various precautions and that, based on his experience in the industry, understanding of client expectations, the size of the Reno community, and publicity associated with this lawsuit, that if he discloses the identity of the Confidential Client that he and 5 Alpha will face significant negative business repercussions, including losing clients and being unable to obtain new clients, which could be ruinous for 5 Alpha and his practice as a private investigator. (*See* 1-PA-93-94).

Shortly thereafter, Plaintiffs filed an Amended Complaint, adding Vaughn Hartung as a plaintiff. (*See* 1-PA-103). Hartung joined in the motion to compel. (1-PA-117). The district court referred the motion and countermotion to the discovery commissioner. (1-PA-127, 164).

On March 15, 2023, the discovery commissioner issued a Recommendation for Order. (*See* 1-PA-166). The discovery commissioner granted Plaintiffs' motion to compel, denied Defendants' countermotion for protective order, and ordered Defendants to comply with the subpoenas by March 28, 2023. (*See id.*). With respect to NRS 648.200, the discovery commissioner found, albeit without affirmatively deciding, that the identity of the Confidential Client falls within the scope of NRS 648.200. (*See* 1-PA-179-80). However, he further concluded that in deciding whether to order disclosure of information that falls within the scope of NRS 648.200, a court may only consider the discoverability of the information under NRCP 26(b)(1) and the identity of the Confidential Client was both relevant and proportional to the needs of the case; and, thus, discoverable. (*See* 1-PA-177-82). With respect to NRS 49.325 and NRS 600A.070, the discovery commissioner concluded that the identity of the Confidential Client did not qualify for protection because the information did not qualify as a trade secret. (*See* 1-PA-170-76).

C. The District Court's Order

Defendants filed an objection to the discovery commissioner's recommendation. (1-PA-195). Defendants argued that the discovery commissioner's decision was contrary to law because, for information that falls within the scope of NRS 648.200, a court's inquiry is not, and should not be, limited to the discoverability of the information under NRCP 26(b)(1). (*See id.*). A more restrictive

standard should be imposed. (*See id.*). With respect to NRS 49.325, Defendants argued that the discovery commissioner's decision was contrary to law because he misconstrued the test for what type of information can qualify as a trade secret—and that the identity of a private investigator's client can, and here does, satisfy Nevada's trade secret test. (*See id.*).

Following a hearing, on May 4, 2023, the district court issued an order denying the objection and affirming the discovery commissioner's recommendation. (1-PA-225). The district court concluded that the discovery commissioner's decisions were not clearly erroneous. (*See id.*). With respect to trade secret protection, the district court further concluded that even if the identity was a trade secret, "the protection Mr. McNeely seeks could create unfettered immunity for a tortfeasor who acted through an investigator;" and, thus, would "work an injustice" to Plaintiffs. (1-PA-227).[1] This writ petition followed. The disclosure at issue is stayed pending resolution of this writ petition.

[1] In the same order, the district court partially granted Defendants' motion to dismiss, dismissing three of Plaintiffs' causes of action against Defendants. (*See* 1-PA-227-29).

III. REASONS WHY THIS WRIT SHOULD ISSUE

The requested writ should be issued because: (A) writ relief is appropriate under the circumstances and (B) the district court erred by affirming the discovery commissioner's recommendation.

A. Writ Relief Is Appropriate Under The Circumstances.

A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station, NRS 34.160, or to control an arbitrary or capricious exercise of discretion. *See Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Writ relief is not available, however, when the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. *See* NRS 34.170.

This Court has previously determined that it is appropriate to entertain writ petitions on the merits that challenge orders that require the disclosure of information arguably protected from disclosure on grounds of privilege, confidentiality, or privacy, present an important issue of law that needs clarification, concern public policy, or may evade later review. *See Rock Bay, LLC v. Eighth Judicial Dist. Court*, 129 Nev. 205, 210, 298 P.3d 441, 445 (2013) (providing that the writ was "necessary to prevent improper post-judgment disclosure of private information, the issues are novel and important to Nevada jurisprudence, and those issues might avoid appellate review were we not to consider them now"); *see also Seibel v. Eighth Judicial Dist.*

Court, 138 Nev. Adv. Op. 73, 520 P.3d 350, 353 (2022) (entertaining a writ petition on the merits for similar reasons and noting that a writ of "prohibition, not mandamus," is the "appropriate remedy to correct an order that compels disclosure of privileged information") (internal quotation omitted); *Canarelli v. Eighth Judicial Dist. Court*, 136 Nev. 247, 250, 464 P.3d 114, 119 (2020) (entertaining a writ petition on the merits for similar reasons); *Valley Health Sys., LLC v. Eighth Judicial Dist. Court*, 127 Nev. 167, 171, 252 P.3d 676, 679 (2011) ("if the discovery order requires the disclosure of privileged material, there would be no adequate remedy at law that could restore the privileged nature of the information because once such information is disclosed, it is irretrievable.").

Here, all the foregoing reasons support consideration of this writ petition on the merits. This petition seeks to prevent the improper disclosure of confidential and privileged (NRS 49.325) information and presents issues of first impression that concern public policy and will evade later review. Further, as in *Canarelli*, where this Court intervened, in part, to "serve public policy by helping trustees and attorneys understand the extent to which their communications are confidential;" intervention here, will serve public policy by helping private investigators and clients understand the extent to which their communications are confidential and protected from disclosure. 136 Nev. at 251, 464 P.3d at 119. Thus, Defendants respectfully submit that this writ should be entertained on the merits.

B. The District Court Erred By Affirming The Discovery Commissioner's Recommendation.

1. Standard of Review

Discovery orders are reviewed for an abuse of discretion. *See Canarelli*, 136 Nev. at 251, 464 P.3d at 119. Yet conclusions of law are reviewed de novo. *Id.*; *see AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010) (noting that under an abuse of discretion standard, deference is "not owed to legal error").

2. The district court applied the wrong standard in reviewing the recommendation.

It does not appear that this Court has set forth the standard of review of an objection to a discovery commissioner's recommendation. In the objection, Defendants submitted that the district court should review the discovery commissioner's recommendation under the "clearly erroneous or contrary to law" standard. (1-PA-197-98). The "clearly erroneous or contrary to law" standard is the standard that governs a federal district court's review of a federal magistrate judge's recommendation on a non-dispositive issue. *See* 28 U.S.C. § 636(b)(1)(A); *United States v. Desage*, 229 F. Supp. 3d 1209, 1212 (D. Nev. 2017). Given that this Court has previously analogized the district court-discovery commissioner relationship to the federal district court-magistrate judge relationship, this standard of review appears appropriate. *See Valley Health Sys., LLC v. Eighth Judicial Dist. Court*, 127

Nev. 167, 172, n. 8, 252 P.3d 676, 679, n. 8 (2011) (citing *United States v. Howell*, 231 F.3d 615 (9th Cir. 2000)).

A decision is "clearly erroneous" if the reviewing court has a "definite and firm conviction that a mistake has been committed." *Desage*, 229 F. Supp. at 1212 (citation omitted). A decision is "contrary to law," when it "fails to apply or misapplies relevant statutes, case law, or rules of procedure." *Id.* (citation omitted).

Here, after discussion of the standard at the hearing, the district court applied only a "clearly erroneous" standard, even to issues that should have been reviewed without deference as "contrary to law." (*See* 1-PA-226). This distinction aligns with the abuse of discretion standard—the typical standard this Court applies for discovery orders—where decisions are afforded deference but deference is not owed to legal error. *See BMW v. Roth*, 127 Nev. 122, 133, 252 P.3d 649, 657 (2011) ("While review for abuse of discretion is ordinarily deferential, deference is not owed to legal error" and "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence") (internal quotation and citation omitted); *Canarelli*, 136 Nev. at 251, 464 P.3d at 119 (noting that under an abuse of discretion review of a discovery matter, conclusions of law are still reviewed de novo).

In the objection, Defendants' arguments focused on errors of law that were not entitled to deference because they concerned the misapplication of statutes and

case law. (*See* 1-PA-201-03) (arguing that the discovery commissioner erred by concluding that *DeChant v. State*, 116 Nev. 918, 10 P.3d 108 (2000) foreclosed him from using or adopting a more restrictive standard for discovery of information within the scope of NRS 648.200 because *DeChant* did not address, much less decide, that issue); (*see* 1-PA-198-200) (arguing that the discovery commissioner misapplied the test for determining a trade secret under NRS 600A.030(5) and Nevada common law). Thus, the district court considered these arguments through the wrong lens.

The district court supported its decision to review the recommendation solely under a "clearly erroneous" standard by citing to WDCR 24(6), (*see* 1-PA-226), which provides the deadline by which a party must file an objection and that "[w]hen an objection or motion has been filed, the district judge shall have discretion to determine the manner in which the master's recommendation will be reviewed." WDCR 24(6). At the outset, "manner" of "review[]" in the context of WDCR 24(6) does not appear to relate to the standard of review—it would be odd to replace the word "standard" in the term of art, standard of review, with "manner." Nevertheless, to the extent it is found to relate to the standard of review, Defendants submit that due process and principles of fairness would be better served by having a consistent standard of review set forth by this Court, rather than a standard of review that can change from county to county, department to department, or matter to matter. *See*

also NRCP 16.3(c)(3) (not providing any guidance as to the standard a district court should apply when evaluating a discovery commissioner's recommendation, except to say that the district court can affirm, reverse, modify, set a hearing, or remand).

Candidly, Defendants agree with the district court that "a deferential standard of review is warranted" to avoid district courts from becoming "a de facto second Discovery Commissioner for every dispute in which a litigant is aggrieved." (*See* 1-PA-226). But whether under the "clearly erroneous or contrary to law" or the "abuse of discretion" standard, deference can only go so far. A uniform standard of review, with clarification of how it is to be applied, is warranted.

3. Information within the scope of NRS 648.200 warrants protection beyond that afforded it by NRCP 26(b).

NRS Chapter 648 governs the licensing and practice of private investigators in the State of Nevada. In enacting such regulations, the Legislature recognized the "vital" nature of the work performed by private investigators. *See* Minutes of the Assembly Committee on State, County, and City Affairs, 3-31-1967 ("At the present time there is no control over [private investigators] and when it is considered how

vital their work can be to an individual citizen it is desirable that some controls be established.").[2]

NRS 648.200 protects information acquired by private investigators related to their services by making it unlawful for the private investigator to divulge such information, except at the direction of the employer or client for whom the information was obtained. Specifically, the statute provides the following:

> It is unlawful for any licensee or any registered employee or other employee, security guard, officer or member of any licensee:
>
> 1. To divulge to anyone, except as he or she may be so required by law to do, any information acquired by him or her except at the direction of the employer or client for whom the information was obtained.
>
> 2. To make a false report to his or her employer or client.

NRS 648.200.

While this Court has confirmed that NRS 648.200 does not create an absolute privilege for information that falls within the scope of the statute, it has not addressed under what standard such information should be ordered disclosed. *See DeChant*,

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[2](available at https://www.leg.state.nv.us/Division/Research/Library/LegHistory/Minutes/1967/Assembly/StateCountyCityAffairs/3-31-67.pdf) (last accessed May 11, 2023).

116 Nev. at 926, 10 P.3d at 113. Thus, the treatment to afford the discovery of information within the scope of NRS 648.200 is an open question of law.

This Court has previously recognized that certain documents and information can warrant special protection from disclosure in the form of a heightened showing or balancing test, regardless of the existence of a privilege. In *Hetter*, the Court noted that Nevada "does not recognize a privilege for tax returns," but still imposed a heightened showing of "some factual basis for [ ] punitive damage[s]" before they could be discovered because "public policy suggests that tax returns or financial status not be had for the mere asking." *Hetter v. Eighth Judicial Dist. Court*, 110 Nev. 513, 520, 874 P.2d 762, 766 (1994). Similarly, in *Rock Bay*, the Court held that in the context of post-judgment discovery, a "nonparty's privacy interests must be balanced against the need of the judgment creditor for the requested information." *Rock Bay, LLC v. Eighth Judicial Dist. Court*, 129 Nev. 205, 213, 298 P.3d 441, 447 (2013); *see Walker v. N. Las Vegas Police Dep't,* No. 214CV01475JADNJK, 2015 WL 8328263, at *4 (D. Nev. Dec. 8, 2015) (discussing considerations for a balancing test related to disclosure of information within "the official information privilege"); *see also Saini v. In'l Game Tech.*, 434 F. Supp. 2d 913, 919 (D. Nev. 2006) (providing that "[d]isclosure of non-trade secret confidential information is similarly recognized as a serious harm").

So too here—information within the scope of NRS 648.200 should not be "had for the mere asking." *Hetter*, 110 Nev. at 520, 874 P.2d at 766. Common sense supports the conclusion that such information is confidential and sensitive. The party hiring a private investigator expects confidentiality. Indeed, in a typical private investigator-client engagement, even awareness of the fact that a private investigator was hired and, more importantly, by whom could have obvious significant consequences. Think an employer investigating an employee for possible workplace misfeasance or a spouse investigating a spouse for suspected infidelity.

Other jurisdictions have recognized as much. In fact, the Michigan Legislature enacted a private investigator-client privilege. *See Ravary v. Reed*, 415 N.W.2d 240, 242 (Mich. App. 1987) (concluding that the privilege applied to the identity of the private investigator's client) (citing Mich. Comp. Laws § 338.840). While the Nevada Legislature has not adopted such a privilege, the fact that Michigan has speaks to the policy considerations in support of at least a heightened standard for discoverability. Moreover, an Ohio court has referenced the use of a balancing test under similar circumstances. *See Quinlan v. Ohio Dep't of Com., Div. of Consumer Fin.*, 678 N.E.2d 225, 230 (Ohio App. 1996). There, under a regulation featuring a "unless required by law" disclosure exception, similar to NRS 648.200's language, the Ohio court explained that "a balance must be struck between the confidentiality interests of a private investigator's clients and the division's interest in pursuing

effective regulation of the private investigation industry." *Id.* at 230 (citing Ohio Adm. Code 1301:4-5-17).

In light of these policy considerations, this Court should impose a heightened showing requirement or balancing test on the disclosure of information within the scope of NRS 648.200. As in *Hetter*, "some factual basis" for information within the scope of NRS 648.200 should be required before such information can be discovered. 110 Nev. at 520, 874 P.2d at 766. Alternatively, a balancing test should be adopted, where a court should consider whether the information that falls within the scope of NRS 648.200 is in fact secret or confidential; the steps taken to maintain the confidentiality of the information; the impact upon the client of having the confidential information disclosed; the potential chilling effect on the private investigative industry that the disclosure would have; whether the lawsuit is non-frivolous and brought in good faith; and the importance of the information sought to the case of the party seeking disclosure. *See Walker*, 2015 WL 8328263, at *4 (relying on similar considerations for a balancing test).

The decision of the discovery commissioner, which the district court affirmed as not clearly erroneous, did not fully consider this argument because it found that this Court's prior decision in *DeChant* foreclosed the argument. (1-PA-177-78). The reasoning went that under *DeChant*, this Court's reference to "discretion" meant that information within the scope of NRS 648.200 must be disclosed if requested in

litigation if it "falls within the scope of discovery under NRCP 26(b)(1)." (1-PA-181). The scope of discovery under NRCP 26(b)(1) includes "any nonprivileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case." NRCP 26(b)(1).

Yet the issue addressed in *DeChant* was whether the district court correctly decided that information within the scope of NRS 648.200 was "privileged" and not discoverable. 116 Nev. at 920, 10 P.3d at 109 ("DeChant also attempted to subpoena Wysocki's investigative notes, but her request was denied by the district court, which concluded that the notes were privileged under Nevada law."). The Nevada Supreme Court found that decision erroneous. *Id.* ("the district court erred in concluding that Wysocki's notes were privileged."). A review of the underlying briefing in *DeChant* confirms that the issue of a balancing test, heightened showing, or the standard for discoverability for information within the scope of NRS 648.200 was never even raised, much less addressed or decided. As such, the district court's affirmance of the discovery commissioner's reliance on *DeChant's* silence on the issue at-hand to determine that *DeChant* foreclosed such an argument was erroneous. *See W. Landscape Constr. v. Bank of Am.*, 67 Cal. Rptr. 2d 868, 870 (Cal. App. 1997) (providing that only the holding of a decision is stare decisis); *Consumers Lobby Against Monopolies v. Pub. Utilities Com.*, 603 P.2d 41, 47 (Cal. 1979) (providing

that decisions are not precedent for points not raised and adjudicated), disapproved of on other grounds by 838 P.2d 250 (1992).

At bottom, with the issue properly viewed as open, the weight of policy supports the imposition of a balancing test or heightened showing. The artful pleading of claims that can survive Nevada's liberal notice pleading standard and a showing of relevance and proportionality should not be all that is required to justify such discovery, particularly in a pre-discovery procedural posture, as is the case here. More should be required. The district court's decision not to require more should be vacated with instruction as to what standard should be applied to the discovery of such information.

4. The identity of the Confidential Client warrants protection as a trade secret.

In concluding that the identity of the Confidential Client does not warrant protection as a trade secret, the district court erred by affirming the discovery commissioner's decision that the information does not constitute a trade secret and abused its discretion by determining that, even if the information does, anything except for full disclosure at this time would immunize the Confidential Client from liability and work an injustice. (*See* 1-PA-226-27).

a. The identity of the Confidential Client satisfies the criteria for trade secret protection under Nevada law.

Under Nevada law, a trade secret is "[b]roadly defined," as "information that '[d]erives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public,' as well as information that '[i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy.'" *Finkel v. Cashman Pro., Inc.*, 128 Nev. 68, 74, 270 P.3d 1259, 1264 (2012) (quoting NRS 600A.030(5)(a)-(b)). The factors to consider in determining whether information qualifies as a trade secret include: (1) the extent to which the information is known outside of the business and the ease or difficulty with which the acquired information could be properly acquired by others; (2) whether the information was confidential or secret; and (3) the extent and manner in which the employer guarded the secrecy of the information. *Id.*

It is undisputed that a customer or client list can qualify as a trade secret. *See, e.g., Frantz v. Johnson*, 116 Nev. 455, 467, 999 P.2d 351, 359 (2000) (concluding that a customer list qualified as a trade secret because the evidence showed that it was "extremely confidential, its secrecy was guarded, and it was not readily available to others").

The issue here is whether the identity of the Confidential Client can qualify as a trade secret. The district court found that the discovery commissioner's conclusion that it did not and *could not* was not clearly erroneous, merely stating

that "[t]he identity of a private investigator's single client (in contrast to voluminous customer lists) is not embedded within the definition of a trade secret." (1-PA-226) (citing NRS 600A.030). This was error.

The identity of a single client can fit within the definition of a trade secret. In *Finkel*, this Court suggested as much. There, the appellant recognized that "customer lists" constituted confidential trade secrets, but argued that certain customer "relationships" did not qualify as trade secrets because the identities of the customers were "well-known." *Id.* at 75, n. 2, 270 P.3d at 1264, n. 2. In response to this argument, the Court's reasoning reflects that individual relationships can qualify as trade secrets, depending on their secrecy. *Id.* ("we instruct the district court on remand to specify *which* business relationships are to be afforded trade-secret status") (emphasis added).

Further, there is no limitation in the plain language of NRS 600A.030(5) that would exclude the identity of a single client. *See McGrath v. State Dep't of Pub. Safety*, 123 Nev. 120, 123, 159 P.3d 239, 241 (2007) ("When a statute's language is plain and unambiguous, we will give that language its ordinary meaning."). As mentioned, for information to qualify as a trade secret, the statute only imposes two criteria: (1) "[d]erives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other persons who can obtain commercial or economic value from

its disclosure or use" and (2) "[i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy." NRS 600A.030(5). Here, both criteria are satisfied.

First, the identity of the Confidential Client derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other persons who can obtain commercial or economic value from its disclosure. *See* NRS 600A.030(5)(a)(1). The independent economic value, actual or potential, from the secrecy goes beyond merely preventing recruitment from a competing private investigator. Clients of private investigators expect confidentiality. Without that confidentiality, the business will fail. Thus, the protection of client identity creates significant economic value for both Defendants and the private investigation industry as a whole.

In response to this reasoning, the discovery commissioner countered that the secrecy of the relationship cannot create independent economic value: "As explained in the preceding paragraph, while the personal relationship between a business and its customer has value, the secrecy of that relationship is not what makes it valuable to the business." (1-PA-174).

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.

This differs from a typical business. For instance, Starbucks may have a list identifying millions of customers for which they spent countless resources finding, developing, and retaining. That list may qualify for trade secret protection under the traditional framework for protection of a client list. But the identity of a single Starbucks customer would not qualify as a trade secret because "the secrecy of that relationship is not what makes it valuable to the business." (1-PA-174). Indeed, Starbucks wants its customers to publicly visit its stores, publicly consume its goods, and publicly reveal their preference and relationship with Starbucks. Keeping the relationship "secret" would actually harm Starbucks.

The same is not true for a private investigator and client. There, a client seeking a private investigator expects confidentiality. If a private investigator does not maintain that confidentiality, then the client will use a different private investigator who does, which could also prevent the private investigator from obtaining new clients. The ability to maintain confidentiality is a distinguishing competitive feature between private investigators. Moreover, if such confidential information is readily discoverable from any private investigator, then a potential client may just opt against using a private investigator at all. In the private investigative industry, that is the "independent economic value" derived from client

confidentiality—the confidentiality is the secret sauce. Accordingly, without "the secrecy of that relationship," there is no relationship or other relationships, thus, the "secrecy" is "what makes it valuable to the business." (1-PA-174).

Turning to the second factor, the identity of the Confidential Client was and is the subject of efforts that are reasonable under the circumstances to maintain secrecy. *See* NRS 600A.030(5)(a)(2). The declaration from McNeely readily made this showing and satisfied the three factors set forth in *Finkel*. (*See* 1-PA-93-94). *First,* the information is not known outside the business, and could not be properly acquired by others; *second*, the information is confidential and secret; and, *third*, Defendants took significant steps to guard the secrecy of the information. (*See id.*); *see Finkel*, 128 Nev. at 74, 270 P.3d at 1264. Indeed, no evidence to the contrary has been submitted. And, as further evidenced by the nature of this discovery dispute, there can be no credible argument that the information is not subject to reasonable efforts to maintain its secrecy.

In concluding that these two criteria were not met, the discovery commissioner's reasoning, which the district court affirmed, strayed from the requisite inquiry. The discovery commissioner first looked to case law from other jurisdictions regarding protection of client lists, which have generally held that client lists are only subject to protection if they were the product of great expense and effort. (*See* 1-PA-170-76). The discovery commissioner reasoned that, consistent

with that standard, there was no evidence that Defendants "incurred any expense or exerted any effort to obtain this client." (1 PA-174). This reasoning, however, misconstrues the nature of the "independent economic value" at issue. As explained above, the value does not derive from the obtainment of the client and protecting that client from merely being recruited by a competitor. In the context of the private investigator-client relationship, the independent economic value derives out of maintaining the confidentiality of the client.

To that end, the discovery commissioner found that, even if the law does not limit the "economic value" to the more traditional "cost of acquiring a client," the information at issue is not "the kind of information the law has traditionally viewed as warranting protection as a trade secret." (1-PA-173). Defendants concede the uniqueness of the argument. But NRS 600A.030(5) does not limit a trade secret to only those things that have been "traditionally viewed" as a trade secret. Rather, the statute encompasses information "without limitation," subject to the two criteria. Here, the criteria are satisfied; that is enough. The district court's decision to the contrary should be vacated.

b. Provisional protection under NRS 49.325 and NRS 600A.070 would not work an injustice.

If the identity of the Confidential Client is a trade secret, Defendants have a "privilege" under NRS 49.325, "to refuse to disclose and to prevent other persons from disclosing [the trade secret], if the allowance of the privilege will not tend to

conceal fraud or otherwise work injustice." NRS 49.325(1). The statute further directs that even where "disclosure is directed, the judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require." NRS 49.325(2). Similarly, NRS 600A.070 provides that the "court *shall* preserve the secrecy of an alleged trade secret by reasonable means," and lists several means for doing so. NRS 600A.070 (emphasis added).

The district court concluded that any protection for the identity of the Confidential Client, even if a trade secret, would "work an injustice to plaintiffs" because it would "create unfettered immunity for a[n] [alleged] tortfeasor who acted through an investigator—either as a tacit, unknowing participant or intentional co-conspirator." (1-PA-226-27). This conclusion constitutes an abuse of discretion.

Only absolute protection, thereby preventing Plaintiffs from being able to name the client as a party in the case could, logically, result in "unfettered immunity." Defendants, however, never sought that form of relief. And such a risk is particularly inapposite now, considering that following the entry of the district

court's order, the Confidential Client made an appearance in the case as an anonymous "John Doe" defendant. (*See* 1-PA-240).[3]

Thus, any provisional form of relief, such as requiring a showing of "some factual basis" for Plaintiffs' claims or allowing the Confidential Client to participate in the case anonymously would not result in immunity, or otherwise work an injustice under the district court's reasoning. The injustice would be to require public and immediate disclosure of a trade secret based on unsubstantiated allegations and the ability to state claims under Nevada's liberal notice pleading standard. *See* The Sedona Conference, *Commentary on Protecting Trade Secrets in Litigation About Them*, 23 Sedona Conf. J. 741, 793 (2022) (providing in Principle 5 that "a court does not need to make a conclusive determination as to whether a party's information qualifies as a trade secret before ordering appropriate protections . . .")). If the identity of the Confidential Client is found to constitute a trade secret, this conclusion from the district court should be reversed with instructions to further

[3] To be sure, the "John Doe" appearance by the Confidential Client does not moot any of the issues raised in this writ petition because Plaintiffs still seek to discover the identity of the client through enforcement of the Court's order requiring disclosure of documents sufficient to identify the Confidential Client.

consider what form of provisional relief would best serve the interests of justice, consistent with NRS 49.325 and NRS 600A.070.

IV. CONCLUSION

Based on the foregoing, Defendants respectfully request that the Court grant this petition and issue a writ of prohibition or mandamus, providing the following: (1) directing the district court to vacate the its order requiring Defendants to disclose the identity of the Confidential Client; (2) providing further instruction for the district court as to the test to apply when it comes to the discoverability of information that falls within the scope of NRS 648.200; (3) concluding that the identity of the Confidential Client constitutes a trade secret and instructing the district court to further consider what form of provisional relief to implement to protect said trade secret; and (4) setting forth the district court's standard of review of an objection to a discovery commissioner's recommendation.

DATED: May 12, 2023

/s/ Ryan T. Gormley
WEINBERG, WHEELER, HUDGINS,
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AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED: May 12, 2023

/s/ Ryan T. Gormley
Attorney for Petitioners

VERIFICATION

1. I, the undersigned, declare as follows:

2. I am a lawyer duly admitted to practice before the courts of this State and represent Petitioners in this proceeding.

3. I verify that I have read the foregoing Petition for Writ of Prohibition or Mandamus and that the same is true to my own knowledge, except for those matters stated on information and belief, and as to those matters, I believe them to be true.

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

DATED: May 12, 2023

/s/ Ryan T. Gormley
Attorney for Petitioners

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition complies with the formatting requirements of NRAP 32(a)(4)–(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-sized font Times New Roman.

2. I further certify that this petition complies with the type-volume limitations of NRAP 21(d) because it contains 6,292 words.

3. I further certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: May 12, 2023

/s/ Ryan T. Gormley
Attorney for Petitioners

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 May 12, 2023, I filed the foregoing **Petition for Writ of Prohibition or Mandamus** with the Clerk of the Nevada Supreme Court and served a copy of the Petition to the persons shown below (in the manner indicated below). The accompanying **Petitioners' Appendix** will be electronically filed in the court under NRAP 30(f)(2).

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