No. 79689-COA

In The

Court of Appeals of the State of Nevada

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Elizabeth A. Brown
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VENETIAN CASINO RESORT, LLC;
LAS VEGAS SANDS, LLC

Appellants,

vs.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA;
THE HONORABLE KATHLEEN DELANEY

Respondent,

JOYCE SEKERA

Real Party in Interest.

On Appeal from The Eighth Judicial District Court, Clark County Nevada
The Honorable Kathleen Delaney
District Court Case No. A-18-772761-C

JOYCE SEKERA'S ANSWERING BRIEF

Keith E. Galliher, Jr., Esq.
Nevada Bar No. 220
Kathleen H. Gallagher, Esq.
Nevada Bar No. 15043
THE GALLIHER LAW FIRM
1850 E. Sahara Ave., Ste. 107
Las Vegas, NV 89104
Telephone: (702) 735-0049
Facsimile: (702) 735-0204
kgalliher@galliherlawfirm.com
kgallagher@galliherlawfirm.com
Attorneys for Real Party in Interest Joyce Sekera

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STATEMENT OF THE ISSUES

1. Whether the District Court clearly abused its discretion when it denied Appellants' Motion for a Protective Order?

2. Whether the District Court abused its discretion when it denied Appellants' Motion for Reconsideration of the Order Reversing the April 4, 2019 DCRR on the unredacted incident reports?

STANDARD OF REVIEW

As the proponent of the Writ, "Petitioners carry the burden of demonstrating that extraordinary relief is warranted." *Pan v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004) (*citing Mineral County v. State, Dep't of Conserv.*, 117 Nev. 235, 20 P.3d 800 (2001)).

"Absent a clear abuse of discretion, [an Appellate Court] will not disturb a district court's decision regarding discovery." *In re Adoption of a Minor Child*, 118 Nev. 962, 968, 60 P.3d 485, 489 (2002); *see also McClain v. Foothills Partners*, 127 Nev. 1158, 373 P.3d 940, FN 1 (2011) ("a district court's discovery decision will not be disturbed absent a clear abuse of discretion.")

Additionally, "an order denying a motion for reconsideration is reviewable for abuse of discretion." *Shanks v. First 100, LLC*, No. 72802, 2018 WL 6133885, at *3 (Nev. App. Nov. 23, 2018) (internal quotations omitted) (*citing AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010)).

STATEMENT OF THE FACTS

This is a personal injury case arising out of a slip and fall in the Venetian Casino Resort on November 4, 2016 around 12:30 p.m. (VEN005.) On that day, Ms. Sekera was walking past the Grand Lux Café Restrooms in the Venetian when she slipped and fell on water on the slick marble floor. (*Id.*) On the way down Ms. Sekera struck her skull and left elbow on the pillar and her left hip on the ground. (APP012.) The first Venetian employee to come to Ms. Sekera's aid, Gary Shulman, confirmed there was water on the floor where Ms. Sekera fell. (APP029 at 8:6-10; 8:23-9:11; 10:8-17.) It is however, important to note that Appellants contend "Plaintiff's fall had nothing to do with a foreign substance being on the floor." (VEN061:27-28.) Appellants' Counsel has also repeatedly declared under penalty of perjury in affidavits that the floor was dry when Ms. Sekera fell. (*See, e.g.* VEN273:11; APP057:23; APP082:10.)

On April 12, 2018 Ms. Sekera filed a complaint against Venetian Casino Resort, LLC and Las Vegas Sands, LLC ("Appellants") alleging one cause of action for negligence. (VEN001-4.) On April 22, 2019 Ms. Sekera moved to amend her complaint to add a claim for punitive damages on the theory that Appellants knew their marble floors were unreasonably slippery and posed a high risk to guests but nonetheless refused to increase their slip resistance. (APP110-21.) The District Court determined Ms. Sekera presented sufficient evidence and

thus granted her Motion to Amend. (VEN033-37.) Ms. Sekera filed her First Amended Complaint with a claim for punitive damages on June 28, 2019. (VEN033.) The Amended Complaint alleged:

> Defendant knew that the unsafe condition [the marble floors] posed an unreasonable hazard or slip and fall risk to the general public, invitees, patrons and business invitees. Defendant's failure to remedy the situation was knowing, wanton, willful, malicious and/or done with conscious disregard for the safety of Plaintiff and of the public.

(VEN036.)

Over the last three years Ms. Sekera treated for her injuries with low back injections, medial branch blocks and two rounds of radio frequency ablations. (APP122-24.) In June, after Ms. Sekera's most recent set of radio frequency ablations failed, Dr. Smith opined "I do not see how this woman will be able to avoid surgical treatment" "Rhizotomies in my opinion will give her some temporary relief, but certainty not long-term." (APP125-26.) Ms. Sekera will thus undergo L5-S1 surgery in the near future.

I. Request for Production and Motion for Protective Order

On August 16, 2018 Ms. Sekera sent Appellants her first set of requests for production. (VEN038.) Ms. Sekera's asked Appellants to provide:

> True and correct copies of any and all claim forms, legal actions, civil complaints, statements, security reports, computer generated lists, investigative documents or other memoranda which have, as its subject matter, slip and fall cases occurring on marble floors within the subject VENETIAN CASINO RESORT within three years prior

> to the incident described in Plaintiff's Complaint [November 4, 2013], to the present.

(VEN040.)

In response to this request, Appellants produced 64 redacted incident reports between November 4, 2013 and November 4, 2016. (VEN056:25 – VEN057:2.) Appellants produced these reports before moving for a protective order. (VEN056:25-26.) The reports provided contained phonebook (name, address and phone) plus date of birth information. (Excerpts of Redacted Reports, APP127-39.) Although the redacted incident reports produced by Appellants contain spaces for social security numbers and drivers' licenses on the CR-1 and Acknowledgement of First Aid Assistance & Advice to Seek Medical Care forms, no redactions were present because Appellants do not collect this information. (APP127-39.) Appellants apparently instruct guests not to fill in their social security numbers because none of the guest completed forms contain this information either. (VEN007, APP127, APP128, APP136.) The incident reports provided by Appellants also do not contain any fields to fill in account numbers, credit/debit card numbers, medical ID numbers and usernames and passwords. (APP127-39.)

Appellants ignored the portion of Ms. Sekera's request which asked for subsequent incident reports and subsequently misrepresented to the Court that Ms. Sekera had only requested reports "occurring within three years preceding the subject incident." (VEN056:14-16.)

Ms. Sekera requested Appellants provide the unredacted incident reports so she could identify witnesses to counter Appellants' comparative negligence claim that Ms. Sekera should have seen liquid on the floor before she fell. (VEN057:3-14.) Appellants refused to produce the unredacted incident reports and on February 2, 2019 filed a Motion for a Protective Order on the unredacted incident reports only. (*Id.*) (VEN064:23 – VEN065:2.) ("Venetian moves this Honorable Court for a protective order, that the unredacted information sought by Plaintiff not be disclosed for any purpose not directly related to this litigation.") Appellants argued under *Eldorado Club* the unredacted incident reports "have no relevancy to the issue of whether Venetian had notice of any condition contributing to Plaintiffs fall on November 4, 2016." (VEN061:27 – VEN061:2.) Appellants' further argued the privacy interests of the affected individuals, including not having their names, address and dates of birth disclosed, do not outweigh the need for discovery. (VEN061:13 – VEN064:14.)

Ms. Sekera's Opposition argued she needed the unredacted incident reports to identify "witnesses to the conditions of the marble floor at The Venetian and the fact that this flooring is very unsafe when topped with water or some other liquid substance", that no privacy concerns were involved because there are no social security numbers in the incident reports, and that even if there were privacy concerns, Venetian did not have standing to raise them. (APP140-45.)

According to Appellants, Ms. Sekera shared the redacted incident reports another lawyer on February 7, 2019. (VEN280:23.) At the time Ms. Sekera shared the redacted incident reports, Appellants only had a motion pending on the unredacted incident reports. (VEN054.) Appellants only moved for a protective order on the unredacted incident reports in their Addendum to their Reply in Support of Their Motion for a Protective Order filed on March 6, 2019. (APP149:20-23.) Appellants moved for a protective order on the unredacted incident reports in their addendum because Ms. Sekera shared the redacted incident reports with another lawyer. (APP146-51.)[1]

Based upon the briefing and oral argument, the Discovery Commissioner issued a Report and Recommendation ("April 4, 2019 DCRR") recommending

[1] These facts are not particularly helpful for the Court, however, Appellants made numerous misrepresentations in their Writ which Ms. Sekera will correct for the Court in footnotes throughout this brief. Appellants insinuate Ms. Sekera engaged in nefarious conduct because she shared documents that were the subject of a pending motion for protective order. (*See* Writ at 14 "Petitioners filed a motion for protective order pursuant to NRCP 26(c) on February 1, 2019 with the Discovery Commissioner. While the motion was pending, Sekera's counsel shared the redacted prior incident information…") This grossly misrepresents the circumstances: Ms. Sekera shared the redacted incident reports another lawyer on February 7, 2019 when there was only a pending motion on the unredacted reports. (VEN280:23.) Appellants did not request a protective order on the redacted reports until March 6, 2019 – a month after Ms. Sekera shared them. Ms. Sekera's sharing of these redacted incident reports prompted Appellants to request a protective order on them. (APP149:20-23.) Although this seems like a small misrepresentation Ms. Sekera **stresses** to the Court this conduct is intentional and part of a pattern of Appellants behavior in this case. This conduct is intentional because Ms. Sekera repeatedly pointed out this misrepresentation to Appellants, even devoting an entire section of an opposition to it. (APP207:20-208:7.)

"the prior incident reports produced by Venetian… remain in redacted form as originally provided" and that the redacted incident reports be subjected to a protective order. (VEN203.)

II. Objection to the April 4, 2019 DCRR

Ms. Sekera objected to the April 4, 2019 DCRR and argued courts nationwide uniformly agree a risk of public disclosure or collaborative sharing of information is not good cause for a protective order, and that sharing discovery amongst lawyers saves costs, expedites litigation and is an effective means of insuring full and fair disclosure from opposing parties. (APP155:13-156:18.) Ms. Sekera further argued that issuing a protective order in this case undermines the civil justice system because it ensures the public will never know the magnitude of the problem of Venetian's floors and will therefore never be able to encourage Venetian to make their premises safer in the future by holding them accountable. (APP157:19-160:6.) Finally, Ms. Sekera argued she needed the names and contact information on the incident reports because they are potential witnesses in her case (APP161:18-27.) Appellants claimed Ms. Sekera was comparatively negligence, purportedly because she did not see the liquid substance on the floor before she fell. (*Id.*) Ms. Sekera sought the names of other individuals who could counter this claim by testifying "Hey, I walked through the Venetian. The floors are identical, and I didn't see anything on the floor. I fell and got hurt." (*Id.*; *see also* VEN215.)

Appellants opposed Ms. Sekera's Objection and argued the incident reports should remain in redacted form with a protective order preventing them from being shared to "protect the privacy of its [Venetian's] partrons" and to protect Appellants' guests from Ms. Sekera who wishes "to harass, vex, and annoy Defendants and their guests by not only making direct contact themselves, but sharing the personal information of all such guests with the world." (APP175:1-2, APP178:11-13.) Finally, Appellants reiterated their argument that under *Eldorado* the prior incident reports were irrelevant to the issue of notice, and that the policy interests of protecting the private information outweighed Ms. Sekera's need for discovery. (APP179:12-17, APP181:1-185:25.)

The Court heard Ms. Sekera's Objection on May 14, 2019. (APP193.) The Court considered the above arguments of counsel and used her 9 years of experience working for the Mirage Casino and Hotel where she was tasked with responding to similar subpoenas. (VEN250:5 – VEN251:17.) Based upon all this information the Court determined "Commissioner Truman made an error here, it is relevant discovery. Court does not see any legal basis upon which this should have been precluded." (APP193.) Thus, the Court overruled the April 4, 2019 DCRR in its entirety. (*Id.*) The District Court was certain in her decision: the Discovery Commissioner was "flat wrong, she got it wrong." (VEN227:4.)

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III. Appellants' History of Hiding Evidence

Also relevant background information related to the District Court's denial of a protective order on the unredacted incident reports, is Appellants' history of hiding evidence.

To verify Venetian's compliance with the discovery request, in February 2019, the undersigned contacted Mr. Peter Goldstein, Esq., ("Mr. Goldstein") plaintiff's counsel in another pending premise liability action against Venetian. (*Carol Smith v. Venetian Casino Resort, LLC*, Case No. A-17-753362-C.) (APP113:6-9.) From their discussion, the undersigned and Mr. Goldstein realized Venetian provided them each with reports Venetian did not give the other. (APP113:9-12.) After comparing the discovery provided, the undersigned and Mr. Goldstein determined Venetian willfully left out four reports in response to Ms. Sekera's Requests for Production which were disclosed in *Smith v. Venetian,* and willfully left out 35 reports in response to plaintiff's requests for production in Smith v. Venetian. (APP113:15-20.)

In April 2019, Ms. Sekera served a second request for the incident reports from three years before the fall to present. (APP195:21-24.) Appellants responded "As to any such [incidents] reports obtained from November 3, 2013 to November 4, 2016 on the main casino floor level where the subject incident occurred,

Appellants have no documents responsive to this request beyond those which it has disclosed pursuant to NRCP 16.1 and all supplements thereto." (*Id.*)

To verify this response was true, Ms. Sekera pulled a pleading from 5 cases filed against Appellants in the Eighth Judicial District Court and quickly identify additional unproduced responsive incident reports. (APP113:22-114:6.) Of the 5 cases Ms. Sekera's pulled pleadings from 2 of them had corresponding incident reports responsive to Ms. Sekera's request for production which Appellants admitted "should have been included by Venetian in its response to the request for prior incident reports" and that the failure to do so was "inadvertent." (APP067:1-13.)

In July 2019, Ms. Sekera pulled more pleadings from cases filed against Appellants in the Eighth Judicial District Court. (APP204:18-19.) Appellants again admitted they conveniently missed another two incident reports responsive to Ms. Sekera's request including one in the same rotunda where Ms. Sekera fell. (APP089:25-90:4, APP091:1-8.)

Appellants also did not fully and fairly disclose incident reports in three other cases: *Smith v. Venetian, Cohen v. Venetian* and *Boucher v. Venetian.* Significantly in *Smith v. Venetian,* Appellants left out 35 incident reports responsive to Smith's request for production and in *Boucher v. Venetian,*

Appellants left out 32 incident reports responsive to Boucher's request for production. (APP227:7-10, APP228:5; APP237:19-241:19.)

IV. Other Concerning Conduct During Discovery

The following additional facts are necessary for the Court to understand the circumstances in which the District Court denied Appellants Motion for a Protective Order. The first Venetian employee to come to Joyce's aid, Gary Shulman, confirmed there was water on the floor. Mr. Shulman testified that Mr. Royal met with him and asked him to lie. (APP032 at 21:13-25; APP041 at 56:13-57:1; APP042 at 61:5-6.) Mr. Shulman told Mr. Royal he saw water on the floor. (APP032 at 21:13-25.) "At that time he [Mr. Royal] said "No, it wasn't wet. You didn't see anything wet. You are mistaken." " (APP033 at 23:16-17.) Mr. Shulman insisted "I'm pretty sure it was. I mean, that's why I called PAD to clean it up. In 13 years I've never called PAD to clean up a dry spot." (APP033 at 23:18-20.) "And he [Mr. Royal] says, "But, no, no, there was nothing wet there." " (APP033 at 23:21-22.) "[Y]ou [Mr. Royal] just kept refuting me, basically, "No, you are mistaken. It wasn't wet." " (APP042 at 61:5-6.) Mr. Shulman believed Mr. Royal was "intimidating" him, that Mr. Royal "didn't want me to be truthful" and that Mr. Royal wanted him to lie under oath. (APP041 at 56:13-57:1.)

On May 28, 2019 Ms. Sekera won a Motion to Amend her Complaint to add a claim for punitive damages, based partially upon the testimony of Venetian

employees that management informed them the marble floors are "very dangerous" when wet "even with one drop" of liquid like "a tiny spill of coffee." (APP267:1-24; APP288 at 7:23-24; APP303 at 7:15-21.) After Ms. Sekera used this testimony in her motion, Venetian's current employees began testifying the marble floors are not dangerous, and in fact are just as slippery (and thus just as dangerous) as carpet:

> Q: When we talk about the marble floors when wet, versus the carpeted floors when wet, which one is the most slippery?
> ...
> A: It's the same, basically.
> Q: All right. So your testimony is that a carpeted floor, when wet, would be as slippery?
> A: Yeah.

(APP337:21-338:10.)

> Q: So as you testify here today, do you think that a marble floor when wet is any more dangerous than any other surface when wet?
> ...
> A: I would have to say no.
> Q: All right. So the answer to my question is no, you don't believe the marble floor is any more dangerous?
> A: No.

(APP352:25-353:9.)

SUMMARY OF THE ARGUMENT

1. The District Court did not abuse its discretion when it determined, based upon the uniform nationwide holdings, that collaborative discovery is consistent with the Federal and Nevada Rules of Civil Procedure 1 because it

encourages the "just, speedy, and inexpensive determination of every action" and the risk Ms. Sekera would share the information disclosed therefore did not constitute good cause for a protective order.

2. The Writ should be denied because Appellants ask the Court to analyze the wrong legal standard in reviewing a decision on a motion for protective order. Instead of arguing the District Court abused its discretion when it determined Appellants did not show good cause for a protective order, Appellants argue Ms. Sekera did not meet her burden of proof under NRCP 26(b)(1). The standard for a motion for protective order is good cause shown by the proponent, as such analysis by the Court as to whether Ms. Sekera met her burden under NRCP 26(b)(1) is improper.

3. The District Court did not abuse is discretion when it determined the phonebook (name, address, phone) plus date of birth information contained in the incident reports is not protectable under NRCP 26(c) because plaintiff's need to identify potential witnesses in her case outweigh the privacy interest, if any, that exist over this information.

4. Appellants have no potential liability under NRS 603A because (1) the statute was designed to address identity thieves, which neither Ms. Sekera nor her counsel are, (2) the providing the unredacted incident reports to Ms. Sekera is "authorized acquisition" under the statue, and (3) the unredacted incident reports

do not contain "personal information" as defined by NRS 603A.020 because they do not contain social security or driver's license numbers.

5. Appellants have no potential liability under their Privacy Policy because (1) it was drafted to absolve them of liability, (2) it is unenforceable because it lacks the basic elements required for contract formation, and (3) it explicitly informs the public Appellants will use the information collected to comply with laws and court orders.

6. The District Court did not abuse its discretion when it denied Appellants' Motion for Reconsideration because the Motion impermissibly re-argued points and improperly raised new arguments which could have been raised in the initial opposition in an attempt to gain a second bite at the apple.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S MOTION FOR A PROTECTIVE ORDER

A. Appellants Fear of Collaborative Sharing of Information is Not Grounds for a Protective Order

Although not explicitly argued by Appellants, the language of the Writ makes clear the largest, if not sole motivation behind this protective order is to prevent the collaborative sharing of information.[2] Courts nationwide however

[2] (Writ at e, 1, 2, 3, 8, 9, 13, 14, 15, 17, 18, 22, 28.) ("documents produced by Petitioners to Plaintiff have been shared with attorneys"; "Sekera's counsel shared the redacted prior incident information with an attorney"; the information "will be

uniformly agree that Appellants' concern of the risk of public disclosure or collaborative sharing of information does not constitute good cause for a protective order under Rule 26(c). *See, e.g. Olympic Refining Co. v. Carter*, 332 F.2d 260 (9th Cir. 1964); *see also De La Torre v. Swift Transp. Co.*, No. 2:13-CV-1786 GEB, 2014 WL 3695798, at *3 (E.D. Cal. July 21, 2014).[3] "The risk—or in this case, the certainty—that the party receiving the discovery will share it with others does not alone constitute good cause for a protective order." *Wauchop*, 138 F.R.D. at 546. Rule 1 of both the Federal Rules and the Nevada Rules of Civil Procedure require they "be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." *See* Fed. R. Civ. Pro. 1; *see also* Nev. R. Civ. Pro 1.

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used and shared; the information "will be immediately shared"; "Sekera has acknowledged an intent to share the information"; "Sekera has already shared information provided"; "incident reports had been shared with counsel outside the litigation"; Ms. Sekera intends "to freely share unredacted information"; "Sekera also argued she has an unqualified right to share.")

[3] *See also Wauchop v. Domino's Pizza, Inc.,* 138 F.R.D. 539, 546 (N.D. Ind. 1991); *Ericson v. Ford Motor Co.*, 107 F.R.D. 92, 94 (E.D. Ark. 1985); *Baker v. Liggett Group, Inc.,* 132 F.R.D. 123, 125 (D.Mass 1990); *Garcia v. Peeples*, 734 S.W. 2d 343, 347-348 (Tex. 1987); *Earl v. Gulf & Western Mf. Co.*, 366 N.W.2d 160, 165 (Wis. App. 1985); *Nestle Foods Corporation v. Aetna Casualty & Surety*, 129 F.R.D. 483, 484 (D. N.J. 1990); *Farnum v. G.D. Searle & Co.,* 339 N.W.2d 384, 390 (Iowa 1983); *American Telephone and Telegraph Co. v. Grady*, 594 F.2d 594 (7th Cir. 1979); *Johnson Foils, Inc. v. Huyck Corp.,* 61 F.R.D. 405 (N.D.N.Y.1973); *Williams v. Johnson and Johnson*, 50 F.R.D. 31 (S.D.N.Y. 1970); *Parsons v. Gen. Motors Corp.*, 85 F.R.D. 724, 726 (N.D. Ga. 1980); *Deford v. Schmid Prod. Co., a Div. of Schmid Labs.*, 120 F.R.D. 648, 654 (D. Md. 1987).

Collaborative use of discovery material fosters the goals of Rule 1 by eliminating the time and expense involved in "re-discovery." *Williams*, 50 F.R.D. at 32; *Wauchop*, 138 F.R.D. at 546; *Wilk v. American Medical Ass'n.*, 635 F.2d 1295, 1299 (7th Cir.1980); *Grady*, 594 F.2d at 597; *Phillips Petroleum Co. v. Pickens*, 105 F.R.D. 545, 551 (N.D.Tex.1985); *Carter-Wallace v. Hartz Mountain Industries,* 92 F.R.D. 67, 70 (S.D.N.Y.1981); *Parsons*, 85 F.R.D. at 726; *Garcia*, 734 S.W.2d at 347; *Ward v. Ford Motor Co.,* 93 F.R.D. 579, 580 (D.Colo.1982) ("Each plaintiff should not have to undertake to discovery [sic] anew the basic evidence that other plaintiffs have uncovered. To so require would be tantamount to holding that each litigant who wishes to ride a taxi to court must undertake the expense of inventing the wheel."); *Baker*, 132 F.R.D. at 126 ("[T]o routinely require every plaintiff ... to go through a comparable, prolonged and expensive discovery process would be inappropriate."); *Patterson v. Ford Motor Co.,* 85 F.R.D. 152, 154 (W.D.Tex.1980) ("The availability of the discovery information may reduce time and money which must be expended in similar proceedings, and may allow for effective, speedy, and efficient representation."). "It is particularly appropriate that this principle be applied in... cases in which individual plaintiffs must litigate against large, corporate defendants." *Baker*, 132 F.R.D. at 126 "Maintaining a suitably high cost of litigation for future adversaries is not a proper

purpose under Rules 1 or 26." *Wauchop*, 138 F.R.D. at 547; *see also Cipollone v. Liggett Grp., Inc.,* 113 F.R.D. 86, 87 (D.N.J. 1986).

Based upon the universal case authority, the District Court properly determined Appellants could not receive a protective order for the incident reports to prevent Ms. Sekera from sharing the incident reports with anyone who was not directly affiliated with the litigation. Ordering a protective order under such circumstances violates Rule 1 by increasing the time and expense of litigation because it forces parties to re-discovery information in each case. This is especially applicable here because Appellants are large corporations with teams of skilled lawyers who zealously argue on their behalf. Though there is nothing wrong with this, it increases the cost for individual plaintiffs to bring their claims. Rule 1 directs the Court to decrease these plaintiffs' costs of litigation by allowing shared discovery.

More important than decreasing the costs of litigation "[s]hared discovery is an effective means to insure full and fair disclosure." *Garcia*, 734 S.W.2d at 347. "Parties subject to a number of suits concerning the same subject matter are forced to be consistent in their responses by the knowledge that their opponents can compare those responses." *Garcia*, 734 S.W.2d at 347; *Buehler v. Whalen,* 70 Ill. 2d 51, 65, 374 N.E.2d 460, 466 (1977). The improper conduct the *Garcia* and *Buehler* courts guarded against is evident here: Appellants refused to fully disclose

documents in three pending lawsuits and violated a court order regarding incident report disclosures in *Smith v. Venetian*. Appellants' failure to secure a protective order before it disclosed the redacted incident reports is the only reason Mr. Galliher, Mr. Goldstein, Mr. Bochanis and Ms. Banda discovered Appellants selectively disclosed incident reports and violated discovery rules and court orders. Appellants request extraordinary relief from this Court to permit them to continue a pattern[4] of protective orders and prohibit Ms. Sekera from sharing the incident reports so Appellants may have the peace of mind future plaintiffs won't catch their discovery violations. (Writ at e, 1, 2, 3, 8, 9, 13, 14, 15, 17, 18, 22, 28, 29.) This is not a legitimatize purpose for a protective order and the District Court thus properly determined a protective order under these circumstances was improper.

The *Garcia* court also noted "the ultimate purpose of discovery is to seek the truth, so that disputes may be decided by what the facts reveal, not by what facts are concealed" and that shared discovery helps make discovery more truthful. *Garcia*, 734 S.W.2d at 347. Ms. Sekera seeks the truth. The same cannot be said

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[4] Appellants have a lengthy history seeking protective orders via motion or stipulation. *See Maria Potts vs Venetian Casino Resort LLC* (08A568029); *Andrew Gold vs. Las Vegas Sands* LLC (A-09-604694-C); *Judy Sorci vs. Venetian Casino Resort LLC* (A-10-612854-C); *Freida Robinson vs. Venetian Casino Resort, LLC* (A-11-638095-C); *Soloman Cogan vs. Venetian Casino Resort LLC* (A-12-663219-C); *Grace Aye vs. Las Vegas Sands Corp* (A-15-716380-C); *Mui Lim vs. Venetian Casino Resort LLC* (A-15-728316-C); *Eric Cohen vs. Venetian Casino Resort*, LLC (A-17-761036-C); *John Kierce vs. Las Vegas Sands Corp* (A-17-757314-C); *Carol Smith vs. Venetian Casino Resort LLC*, (A-17-753362-C).

for Appellants. Appellants hid significant numbers of incident reports in at least four cases which violated at least one court order. One of Appellants' former employees testified Appellants' counsel attempted get him to lie under oath. Finally, Appellants current employees suddenly began testifying that marble is just as slippery as the carpet after Ms. Sekera supported a motion with testimony from Appellants' employees that marble is extremely dangerous when wet. Appellants' conduct highlights the importance of collaborative discovery and serves as a prime example of why courts nationwide universally hold the risk of sharing is not proper grounds for a protective order.

B. Appellants Apply the Incorrect Legal Standard for Review of a Motion for a Protective Order

The instant Writ and motion relates to a Motion for a Protective Order. Because Appellants filed this Writ on a motion for protective order, Appellants must show District Court abused its discretion when it determined Appellants did not show good cause for a protective order and therefore denied Appellants request for the same. *See* NRCP 26(c) ("for good cause shown" the Court may "make any order which justice requires to protect a party…"); *see also Beckman Indus., Inc., v. Int'l. Ins. Co.,* 966 F.2d 470, 476 (9th Cir. 1992) (to meet the burden of persuasion, "the party seeking the protective order must show good cause by demonstrating a particular need for the protection sought."); *Cipollone,* 785 F.2d at 1121 (discussing the burdens under the analogous FRCP 26(c)).

Section VII.A.1. of Appellants' Writ asks this Court to analyze the wrong legal standard, *to wit,* that the District Court abused its discretion because Ms. Sekera did not meet her burden of proof under NRCP 26(b)(1) to establish the need for the unredacted incident reports.[5] (Wirt at 20.) Ms. Sekera's proof of discoverability of the incident reports under NRCP 26(b)(1) is not at issue in this Writ because it is not part of the burden of proof for a protective order. Because Ms. Sekera's proof of discoverability of the incident reports under NRCP 26(b)(1) is irrelevant, Appellants arguments regarding the same should be disregarded in its entirety. (Writ, Sec. VIII.A.1.)

C. The Phonebook Plus Date of Birth Information Contained in the Incident Reports Is Not Protectable

The incident reports produced by Appellants in this case contain information that is only slightly more revealing or invasive than information contained in a phonebook. These incident reports which Appellant files this Writ over contain phonebook information (name, address, phone) plus date of birth. Appellants agree

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[5] Appellants base this argument on their contention this case involves a temporary transitory condition and under *Eldorado Club v. Graff*, 78 Nev. 507, 510, 377 P.2d 174, 176 (1962) evidence of prior incident reports is thus inadmissible. This is inaccurate. Ms. Sekera's alleges the permanent condition (the lack of slip resistance) of Appellant's marble floors is unreasonably dangerous. More importantly, Appellants' Counsel repeatedly declared under penalty of perjury in affidavits that the floor was dry when Ms. Sekera fell. (VEN273:11; APP057:23; APP082:10; *see also* VEN061:27-28 "Plaintiff's fall had nothing to do with a foreign substance being on the floor.") If someone slips and falls on a dry floor then that is a permeant condition. Appellants can't have it both ways.

they only redacted the "names, addresses, phone numbers and dates of birth." (Writ at 12.) Although, the CR-1 and Acknowledgement of First Aid Assistance & Advice to Seek Medical Care forms leave space for social security numbers and drivers' licenses',[6] Appellants apparently do not collect this information. Appellants also apparently instruct their guests not to fill out the "social security #" line on the accident reports because the hand written responses by guests place an "N/A" or "------" on the "social security #" line.

This phonebook plus date of birth information contained in Appellants' incident reports is not protectable under NRCP 26(b). There is no Nevada case law which supports the contention that this information can be protected. (*See* Writ at 22-27.) More importantly the names, addresses and phone numbers are publicly available information that is published in the phonebook and through online sources, and Appellants therefore cannot establish a protectable interest. *See, e.g. Khalilpour v. CELLCO P'ship,* 2010 WL 1267749, at *2 (N.D.Cal.2010)

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[6] As the proponent of the Writ Appellants have the burden of proof to show the facts necessary for extraordinary relief. The Writ repeatedly represents the incident reports contain social security numbers and driver's licenses. (Writ at e, 2, 27, Mot. at 4.) Appellants have presented no evidence the incident reports contain such information. **Appellants have not presented this information because the incident reports do not contain social security and driver's license numbers.** This is why Appellants did not provide the Court with the redacted incident reports. This is also why Appellants left out the CR-1 form from Ms. Sekera's incident report – which shows they do not collect social security number or driver's license numbers.

(requiring disclosure of names, addresses and phone numbers because they do not involve revelation of personal secrets, intimate activities, or similar private information); *Busse v. Motorola, Inc.*, 351 Ill. App. 3d 67, 72, 813 N.E.2d 1013, 1018 (2004) ("Matters of public record—name, address, date of birth and fact of marriage—have been held not to be private facts."); *Keel v. Quality Med. Sys., Inc.*, 515 So. 2d 337 (Fla. Dist. Ct. App. 1987) (information commonly known in the industry and not unique to allegedly injured party not "confidential" and thus not entitled to protection); *Brignola v. Home Properties, L.P.*, No. CIV.A. 10-3884, 2013 WL 1795336, at *12 (E.D. Pa. Apr. 26, 2013) ("name, address, phone number, etc. These are not private facts..."); *Mount Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly,* No. CIV.A. 08-2584 NLH, 2013 WL 3200713, at *4 (D.N.J. June 24, 2013) (defendant must disclose contact information for potential witnesses of the plaintiff; defendant's concerns about privacy "are overblown.")

The Writ cites a myriad of California federal case law, which at first glance appear to support Appellants' position. However, upon closer examination these cases are irrelevant, rogue[7] or do not support Appellants' argument at all. For

[7] *Rowland v. Paris Las Vegas,* No. 13CV2630-GPC DHB, 2015 WL 4742502 (S.D. Cal. Aug. 11, 2015), an unreported decision, is the only case cited that holds information publicly available in a phone book (name, address and phone number) can be subjected to a protective order. (Writ at 24-25.) This is likely a rouge decision resulting from the parties' embarrassing lack of briefing on the matter.

example, the Writ represents *Izzo v. Wal-Mart Stores,* No. 215CV01142JADNJK, 2016 WL 409694 (D. Nev. Feb. 2, 2016) held "the burden on defendant and privacy interests of the non litigants outweighed the tangential relevance of the information..." (Writ at 23-24.) This is inaccurate. The only mention of "privacy interest" in *Izzo* is a statement that "Defendant also argues that the potential value of other claims evidence is outweighed by... the privacy rights of third parties." *Id.* at *4. The *Izzo* court did not grant a protective order on privacy interests. *Id.* at *4-5. Rather, the *Izzo* court determined the defendant "provided a particularized showing of undue burden" i.e. "hundreds of hours of personnel time" and that plaintiff's request was "overbroad, unduly burdensome, and not relevant to the claims she asserts." *Id.*

Similarly unsupportive of Appellants' argument is *Shaw v. Experian Info. Sols., Inc.*, 306 F.R.D. 293, 301 (S.D. Cal. 2015). (Writ at 26.) The *Shaw* Court actually required the defendants disclose the "names, addresses, and telephone number" of third-parties without a protective order on the same. *Id.*

Similarly irrelevant to Appellants' argument is *Bible v. Rio Properties, Inc.*, 246 F.R.D. 614, 620 (C.D. Cal. 2007). (Writ at 25-26.) The *Bible* court at least

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Joint Motion to Compel Compliance with Discovery, *Rowland,* No. 13CV2630-GPC DHB, 2015 WL 4742502. (Included in appendix at APP368-73 for the Court's convenience.). The plaintiff and defendant in *Rowland* submitted a 5-page joint motion to compel on 23 discovery requests which merely summarized the requests and objections. (APP373:19-23.) This motion cited no legal authority, rules or statutes. (APP368-73.)

partially based its privacy determination on the California Constitution: the "responsive documents invade third parties' privacy rights. In California, the right to privacy is set forth in Article I, Section I of the California Constitution, as defendant cites..." *Id.* However, the California Constitution cannot provide a basis for privacy rights in Nevada.

More important than the fact these cases do not support Appellants' position, is that the federal and state California cases which Appellants so eagerly urge this Court to follow support Ms. Sekera position because they consistently hold a plaintiff's need to identify potential witnesses outweighs any privacy concerns a defendant may have about disclosing information about those witnesses. *See, e.g. Henderson v. JPMorgan Chase Bank,* No. CV113428PSGPLAX, 2012 WL 12888829, at *4 (C.D. Cal. July 31, 2012) ("The Court finds that plaintiffs' interest in identifying potential... witnesses here outweighs defendant's concern regarding its employees' privacy interests in their names and personal contact information."); *Tierno v. Rite Aid Corp.,* 2008 WL 3287035, at *3 (N.D. Cal. July 31, 2008) (plaintiffs' significant interest in identifying potential witnesses outweighed those individuals' privacy interests in their identities and contact information); *McArdle v. AT & T Mobility LLC,* No. C 09-1117 CW (MEJ), 2010 WL 1532334, at *4 (N.D. Cal. Apr. 16, 2010) ("Defendants' complaining customers may be considered percipient witnesses to the relevant" issues and therefore are considered

to be "persons having discoverable knowledge and proper subjects of discovery."); *Pioneer Elecs. (USA), Inc. v. Superior Court,* 40 Cal. 4th 360, 371, 150 P.3d 198, 205 (2007) (plaintiff sought the "names, addresses and contact information" of persons who submitted complaints because they were percipient witnesses, the court ordered this information disclosed because it "would not be particularly sensitive or intrusive"). The California Appellate Court even held the trial court abused its discretion by requiring an opt-in notification system to secure the consent of identified potential witnesses before the defendant could disclose their contact information to the plaintiff. *Puerto v. Superior Court,* 158 Cal. App. 4th 1242, 1256, 70 Cal. Rptr. 3d 701, 712 (2008). Ms. Sekera sought the contact information of the parties in the incident reports because they are potential witnesses in her case to combat Appellants' comparative fault defense. Ms. Sekera needs the contact information for these individuals so she can present rebuttal witnesses to testify "Hey, I walked through the Venetian. The floors are identical, and I didn't see anything on the floor. I fell and got hurt." The California courts, which Appellants so eagerly urge the Court to follow support Ms. Sekera's position that she is entitled to the name and contact information for these potential witnesses. As such, if the Court decides to follow the opinions of the California courts, it must hold the District Court properly denied Appellants' Motion for a

Protective Order because Ms. Sekera's need to identify potential witnesses outweighs any privacy interests at stake.

D. Appellants Have No Potential Liability under NRS 603A[8]

Appellants' allege "mass dissemination of Venetian's guests' private information is the equivalent to a data breach, thereby exposing Venetian to additional third-party claims." (Writ at 27.) NRS 603A was designed "to protect personal information held by certain businesses to address identity theft and to ensure security breaches of business databases containing personal information will be disclosed to the persons affected by the breach." Minutes of the Senate Committee on Commerce and Labor 73rd Leg. (Nev., Apr. 5, 2005). (Included in appendix at APP374-78 for the Court's convenience.) The bill, which later became NRS 603A, was prompted by an incident involving ChoicePoint, Incorporated, a consumer data services company. (APP376.) Criminals posed as legitimate businesses to obtain personal information from ChoicePoint. (*Id.*) The data of 145,000 individuals, including their names, addresses, social security numbers and credit reports, were accessed by criminals who then set up fraudulent accounts. (*Id.*) When this happened, California was the only state which required companies to notify individuals when their personal data was compromised. (*Id.*) ChoicePoint

[8] This argument was not addressed by the District Court because it was improperly raised for the first time in Appellants' Motion for Reconsideration, which was denied on procedural grounds. (*See* Sec. I.)

thus did not notify the Nevadans affected until the State put substantial pressure on them to do so. (*Id.*) Thus SB 435 (aka NRS 603A) – requiring businesses to notify consumers of security breaches of personal data – was born. (*Id.*) Based upon the legislative history and the act itself, there are three major reasons NRS 603A does not apply to the circumstances of this case.

Frist, NRS 603A was clearly designed to address identity theft by criminals. Neither Ms. Sekera nor her counsel are identity thieves and thus applying this statute under these circumstances would be contrary to the purposes of its creation.

Second, providing unredacted incident reports is not within the meaning of "breach of the security of system data." NRS 603A specifically deals with "breach of the security of the system data" which is defined as "unauthorized acquisition of computerized data that materially compromises the security, confidentiality or integrity of personal information maintained by the data collector." NRS 603A.020. A Court order by definition authorizes conduct and has been understood to authorize conduct for nearly a century.[9] As such, even if the information in the

[9] *See, e.g. In re Troyer's Estate,* 48 Nev. 72, 227 P. 1008, 1008 (1924) ("the administrator was authorized by court order to compromise, settle, release, and discharge a claim"); *Bean v. State*, 81 Nev. 25, 25, 398 P.2d 251, 253 (1965) ("defense counsel sought a court order authorizing him to employ, at public expense, two psychiatrists"); *Jones v. Free,* 83 Nev. 31, 36, 422 P.2d 551, 553 (1967) ("the trial court's order authorizing the receiver to enter a compromise agreement"); *Clark Cty. v. Smith*, 96 Nev. 854, 855, 619 P.2d 1217, 1218 (1980) ("Clark County and its Comptroller appeal the district court's order authorizing payment"); *A 1983 Volkswagen, Id. No. IVWC0179V63656, License No.*

incident reports places them within the preview of this statute, Appellants disclosure of the incident reports in compliance with the Court's July 31, 2019 Order would constitute "authorized" acquisition. Because providing Ms. Sekera with the unredacted incident reports is authorized conduct, it does not constitute a "breach of the security of system data" under NRS 603A.020 and therefore cannot subject Appellants to liability for a "breach of the security of system data" under NRS 603A.215(3).

Third, the incident reports do not contain "personal information" as defined by NRS 603A.040. NRS 603A.040 defines "personal information" as:

> 1. "Personal information" means a natural person's first name or first initial and last name **in combination with any one or more of the** following data elements, when the name and data elements are not encrypted:

2AAB574(CA) v. Washoe Cty., Washoe Cty. Sheriff's Dep't Consol. Narcotics Unit, 101 Nev. 222, 223–24, 699 P.2d 108, 109 (1985) ("This is an appeal from the district court's order authorizing forfeiture of a vehicle used in violation of the Uniform Controlled Substances Act."); *Club Vista Fin. Servs. v. Dist. Ct.,* 128 Nev. 224, 228, 276 P.3d 246, 248 (2012) ("the district court's order authorizing the deposition of Morrill"); *City of N. Las Vegas v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark,* No. 66204, 2014 WL 3891680, at *1 (Nev. Aug. 7, 2014) ("challenges a district court order denying a motion for a protective order and authorizing a judgment debtor examination"); *Odin v. State,* No. 66806, 2015 WL 4715074, at *1 (Nev. App. Aug. 5, 2015) ("the deputy would then seek a court order authorizing the test"); *Tower Homes v. Heaton,* 132 Nev. 628, 631, 377 P.3d 118, 120 (2016) ("the bankruptcy court's order authorizing the same resulted in an impermissible assignment"); *Hernandez v. State,* 399 P.3d 333 (Nev. 2017) ("the requesting officer could apply for a court order to authorize the blood draw"); *Matter of Connell,* 422 P.3d 713 (Nev. 2018) ("the district court order appointing the trustee authorizes the trustee to…").

> (a) Social security number.
> (b) Driver's license number, driver authorization card number or identification card number.
> (c) Account number, credit card number or debit card number, in combination with any required security code, access code or password that would permit access to the person's financial account.
> (d) A medical identification number or a health insurance identification number.
> (e) A user name, unique identifier or electronic mail address in combination with a password, access code or security question and answer that would permit access to an online account.

These incident reports are completely devoid of any fields to fill in account numbers, credit/debit card numbers, medical ID numbers and usernames and passwords. Although the redacted incident reports produced by Appellants leave spaces for social security and drivers' license numbers, Appellants apparently do not collect this information because there are no redactions over the social security or drivers' license spaces. The incident reports cannot be subject to the statute unless Appellants collect social security and drivers' license numbers. Thus, because Appellants do not collect social security and drivers' license numbers NRS 603A does not apply.

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E. Appellants Have No Potential Liability under their Privacy Policy[10]

The Writ argues, Appellants disclose of the unredacted incident reports to Ms. Sekera will result in "claims from aggrieved guests" from the disclosure of their information under Appellants' Privacy Policy because Appellants must seek guests' permission to share their information. (Writ at 29-30.) Appellants Privacy Policy cannot subject them to liability for three major reasons.

First and most significantly, Appellants' Privacy Policy states "your use of our products and services and provision of information to us is at your own risk." (VEN493.) Appellants drafted this policy to absolve themselves of all liability related to personal information. Anyone who provides personal information to them does so at their "own risk." Appellants thus cannot be liable guests/visitors under this policy.

Second, even if the Privacy Policy did not absolve Appellants of all liability, the privacy policy is unenforceable because it lacks offer and acceptance, meeting of the minds and consideration. *See May v. Anderson*, 119 P.3d 1254, 1257, 121 Nev. 668, 672 (2005) (a valid and enforceable contract requires "an offer and acceptance, meeting of the minds, and consideration.") Appellants' Privacy Policy is online only. Appellants did not offer this policy to guests/visitors before

[10] This argument was not addressed by the District Court because it was improperly raised for the first time in Appellants' Motion for Reconsideration, which was denied on procedural grounds. (*See* Sec. I.)

collecting their information to compete an incident report. Under these circumstances there is no offer from Appellants and no acceptance from the individuals. Furthermore, because the individuals listed in the incident reports had no knowledge of Appellants' online Privacy Policy at the time their information was collected there can be no "meeting of the minds." Finally, although Appellants may claim they are passing consideration to the individuals (in the form of a promise to keep their information private) there is no return consideration from the individuals to Appellants. *See Pink v. Busch*, 100 Nev. 684, 691 P.2d 456 (1984) (to constitute consideration, a performance or return promise must be bargained for, and a performance or return promise is bargained for if it is sought by the promissor in exchange for his promise and is given by the promisee in exchange for that promise.) This analysis of Appellants' Privacy Policy is consistent with decisions from across the nation holding these privacy policies unenforceable against the companies that issue them. *See, e.g. In re Google, Inc. Privacy Policy Litigation,* 58 F. Supp. 3d 968, 986 (N.D. Cal. 2014) (holding that the plaintiff class adequately stated a claim for breach of contract when Google disclosed user data to third parties in violation of the company's privacy policy); *Trikas v. Universal Card Servs. Corp.*, 351 F. Supp. 2d 37, 46 (E.D.N.Y. 2005) (stating that the court "need not address whether the Privacy Promise constitutes a contract, but broad statements of company policy do not generally give rise to contract claims")

(internal citations and quotations omitted); *Dunn v. First Nat. Bank of Olathe,* 111 P.3d 1076 (Kan. Ct. App. 2005) (rejecting claim for breach of contract based on bank's privacy policy); *In re Jetblue Airways Corp. Privacy Litigation,* 379 F. Supp. 2d 299 (E.D.N.Y. 2005) (denying breach of contract claims under the privacy policy where plaintiffs were unable to prove damages); *In re Yahoo! Inc. Customer Data Sec. Breach Litigation,* No. 16-MD-02752-LHK, 2017 WL 3727318, at *46 (N.D. Cal. Aug. 30, 2017); *Johnson v. Nat'l Beef Packing Co.*, 220 Kan. 52, 551 P.2d 779 (1976); *In re American Airlines, Inc., Privacy Litigation,* 370 F. Supp. 2d 552 (N.D. Tex. 2005); *In re Northwest Airlines Privacy Litigation*, No. Civ.04-126(PAM/JSM), 2004 WL 1278459, at *6 (D. Minn. June 6, 2004); *Kuhn v. Capital One Fin. Corp.,* No. CA015177, 2004 WL 3090707, at *3 (Mass. Super. Nov. 30, 2004); *Crowley v. Cybersource Corp.*, 166 F. Supp. 2d 1263 (N.D. Cal. 2001); *In re Pharmatrak, Inc. Privacy Litigation,* 329 F.3d 9, 19-20 (1st Cir. 2003); *Dyer v. Northwest Airlines Corp.,* 334 F. Supp. 2d 1196 (D.N.D. 2004). As such, even if Appellants Privacy Policy could subject them to liability, individuals could not sue Appellants for breach of the Privacy Policy because essential elements of contract formation are not present.

Third, Appellants are not required to "obtain a waiver" or get "authority to disseminate... personal private information to any other party" because Appellants' Privacy Policy informs readers "we may also use your information in other ways...

including but not limited to the following purposes... to comply with applicable laws and regulations." (VEN490-91.) The Privacy Policy further states "We may share information about you to the third parties as indicated below" when "required to respond to legal requests for your information" and "to comply with laws that apply to us or other legal obligations." (VEN491.) Appellants' Privacy Policy clearly tells readers Appellants may share information collected to comply with the laws and to respond to other legal requests. Ms. Sekera's request for production is a "legal request" within the meaning of this Privacy Policy. As such, Appellants do not need permission to disclose this information. Moreover, once the Court signed the order directing Appellants' to turn over the information, their failure to comply with that order constituted contempt in violation of NRS 22.010(3). *See* NRS 22.010(3) ("The following acts or omissions shall be deemed contempts:... 3. Disobedience or resistance to any lawful writ, order, rule or process issued by the court or judge at chambers.") Providing the unredacted incident reports would thus be "complying with applicable laws." Finally, the Privacy Policy states users' requests regarding privacy will be "accomodat[ed] where your requests meet legal and regulatory requirements." (VEN492.) Thus, even if the individuals requested Appellants withhold their information from Ms. Sekera, Appellants own policy states they will ignore these requests because complying with requests would force Appellants to violate NRS 22.010(3). As Appellants Privacy Policy (1) absolves

them of liability, (2) does not meet contract formation requirements to be enforceable and (3) specifically excludes privacy of individuals to comply with court orders the Privacy Policy does not constitute good cause for a protective order on the unredacted incident reports.

I. THE DISTRICT COURT PROPERLY DENIED APPELLANTS' MOTION FOR RECONSIDERATION

The District Court properly denied Appellants' Motion for Reconsideration because the Motion improperly attempted to re-argue the same points and gain a second bite at the apple by raising issues which could have been raised in the initial motion. Under established practice, a litigant may not raise new legal points for the first time on rehearing. *In Re Ross,* 99 Nev. 657, 668 P.2d 1089, 1091 (1983). Further, a motion for rehearing may not be utilized as a vehicle to re-argue matters considered and decided in the court's initial opinion. *Id.* Rather, a motion for rehearing should direct attention to some controlling matter which the court has overlooked or misapprehended. *Id.* Rehearings are not granted as a matter of right and are not allowed for the purpose to re-argue, unless there is a reasonable probability the Court may have arrived at an erroneous conclusion. *Geller v. McCown,* 64 Nev. 102, 178 P.2d 380 (1947).

It is well-settled that rehearings are appropriate only where "substantially different evidence is subsequently introduced or the decision is clearly erroneous." *Masonry & Tile Contractors v. Jolley, Urga & Wirth*, 113 Nev. 737, 941 P.2d 486

(1997). In order to gain a second bite at the apple the defendant may not raise points or contentions not raised in its initial motion and oppositions. *Edward J. Achrem, Chartered v. Expressway Plaza, Ltd.,* 112 Nev. 373, 917 P.2d 447 (1996). The failure to make the arguments in the first instance constitutes a waiver. *Chowdry v. NLVH, Inc.,* 111 Nev. 560, 893 P.2d 385 (1995).

The District Court properly denied Appellants' Motion for Reconsideration because the Motion impermissibly re-argued points and improperly raised new arguments which could have been raised in the initial opposition in an attempt to gain a second bite at the apple. Appellants' Motion merely made arguments which Appellants could have presented in their original motion. All the cases cited by Appellants in support of their Motion predated their initial Motion for a Protective Order and these arguments were therefore waived. More significantly, many of the cases cited by Appellants were previously argued in their initial Motion for a Protective Order and Response to Ms. Sekera's Objection to the April 4, 2019 DCRR. (VEN054-66; APP164-192.)

CASE	**YEARS DECIDED BEFORE INITIAL MOTION**	**ARGUED IN MOTION FOR RECONSIDERATION AT:**	**ARGUED IN INITIAL MOTION AND RESPONSE TO OBJECTION AT**
Eldorado, 78 Nev. 507, 377 P.2d 174.	**57 years**	VEN279:6-7, VEN281:18, VEN281:23,	VEN061:1; APP180:16

		VEN283:11, VEN283:17, VEN283:19, VEN284:24, VEN285:8, VEN286:11, VEN286:28, VEN287:17, VEN287:28, VEN288:15, VEN292:11	
Southern Pac. Co. v. Harris, 80 Nev. 426, 431, 395 P.2d 767, 770 (1964)	**55 years**	VEN283:11	VEN061:2; App180:16
Schlatter v. Eighth Judicial Dist. Court In & For Clark Cty., 93 Nev. 189, 192, 561 P.2d 1342, 1344-45 (1977)	**42 years**	VEN283:24	VEN061:20-22; APP178:24-25
Ragge v. MCA/ Universal Studios, 165 F.R.D. 601, 605 (C.D. Cal. 1995)	**24 years**	VEN283:25	VEN061:22-VEN062:1; APP181:5-7
Cook v. Yellow Freight Sys., Inc., 132 F.R.D. 548, 551 (E.D. Cal. 1990)	**29 years**	VEN283:25-26	VEN062:1; APP181:8
Mackelprang v. Fid. Nat. Title Agency of Nevada, Inc., No. 2:06-CV-00788-JCM, 2007 WL 119149, at *7 (D. Nev. Jan. 9, 2007)	**12 years**	VEN283:27-28	VEN062:2-4; APP181:9-10
*Izzo, 2016 WL 409694 at *4.*	**13 years**	VEN285:3	
Rowland, 2015 WL 4742502.	**3 years**	VEN285:19, VEN286:17-18	
Bible, 246 F.R.D. 614.	**12 years**	VEN286:14,	

		VEN286:17-18	
Lologo v. Wal–Mart Stores, Inc., No. 2:13-CV-1493-GMN-PAL, 2016 WL 4084035 (D. Nev. July 29, 2016)	**3 years**	VEN286:27	
Caballero v. Bodega Latina Corp., No. 217CV00236JADVCF, 2017 WL 3174931 (D. Nev. July 25, 2017)	**2 years**	VEN286:28-VEN287:28	
Dowell v. Griffin, 275 F.R.D. 613, 620 (S.D. Cal. 2011)	**8 years**	VEN287:1-2	
Shaw, 306 F.R.D. at 299.	**4 years**	VEN287:10-11	
Gonzales v. Google, Inc., 234 FRD 674, 684 (N.D. CA 2006)	**13 years**	VEN288:8-9	VEN064:6-9; APP183:13-16
Beazer Homes, Nev., Inc. v. Dist. Ct., 120 Nev. 575, 97 P.3d 1132 (2004)	**15 years**	VEN293:3	

As set forth in the table above, Appellants' Motion merely re-argued the same cases and presented "new" old cases to make arguments which could have been presented in their original motion. Nevada law is clear: "points or contentions not raised, or passed over in silence on the original hearing, cannot be maintained or considered on petition for rehearing." *Chowdry,* 111 Nev. at 562, 893 P.2d at 387. As all of these cases pre-date Appellants' initial Motion for a Protective Order they could have been raised in that motion but were not and were thus improperly included in Appellants' Motion. Appellants also included a pre-dated "privacy

policy" which was "last updated: May 2018" a year before Appellants filed their initial Motion for a Protective Order on the underacted incident reports and arguments under NRS 603A, a law passed in 2005. (VEN486.) Because the NRS 603A and the Privacy Policy existed at the time of Appellants initial Motion they could have been raised in the Motion and the failure to do so constituted waiver of these argument. Appellants' choice to and later regret of not including these cases and the privacy policy was not a valid reason for reconsideration. Under Nevada law these arguments were an improper attempt a to gain second bite at the apple and the District Court thus properly declined to consider them. *Edward J. Achrem, Chartered,* 112 Nev. 373, 917 P.2d 447.

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CONCLUSION

Based upon the foregoing, the District Court did not abuse its discretion in denying Appellants' Motion for a Protective Order and Motion for Reconsideration. Thus, Ms. Sekera respectfully request this Court deny Appellants' Writ in its entirety.

DATED this 9th day of October, 2019

THE GALLIHER LAW FIRM

Keith E. Galliher, Jr., Esq.
Nevada Bar Number 220
Kathleen H. Gallagher, Esq.
Nevada Bar No. 15043
1850 E. Sahara Avenue, Ste. 107
Las Vegas, Nevada 89104
Attorney for Appellants

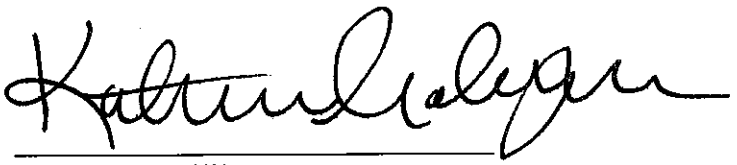
NRAP 26.1 DISCLOSURE STATEMENT

Real Party in interest, Joyce Sekera, by and through her attorneys of record The Galliher Law Firm hereby submits her Disclosure Statement pursuant to NRAP 26.1.

The undersigned counsel of record certifies that there are no parent corporations and/or publicly held company that owns 10% or more of the party's stock

DATED this 9th day of October, 2019

THE GALLIHER LAW FIRM



Keith E. Galliher, Jr., Esq.
Nevada Bar Number 220
Kathleen H. Gallagher, Esq.
Nevada Bar No. 15043
1850 E. Sahara Avenue, Ste. 107
Las Vegas, Nevada 89104
Attorney for for Real Party in Interest
Joyce Sekera

CERTIFICATE OF COMPLIANCE

I, Kathleen H. Gallaher, hereby affirm, testify and declare under penalty of perjury as follows:

1. I am an attorney licensed to practice in the State of Nevada, and am of counsel to The Galliher Law Firm, attorneys for Real Party in Interest, Joyce Sekera.

2. I hereby certify that this Opposition complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirement of NRAP 32(a)(6) because

> [X] this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 point font.

3. I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the part of the brief exempted by NRAP 32(a)(7)(C), it is:

> a. [X] Proportionately spaced, has a typeface of 14 points or more and contains **11,205 words** in compliance with NRAP 32(a)(7)(A)(ii), (having a word count of less than 14,000 words).

4. Finally, I hereby certify that I have read this Opposition, 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 Opposition regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript of 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 Opposition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 9th day of October, 2019

Further affiant sayeth naught.

Kathleen H. Gallagher, Esq.

Subscribed and Sworn to before me

this 9 day of October, 2019.

NOTARY PUBLIC

DEENA P. MOONEY
Notary Public-State of Nevada
Appointment No. 98-4745-1
My Appointment Expires Sept. 21, 2022

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the The Galliher Law Firm and that on the 11 day of October 2019, pursuant to N.E.F.C.R 8, I electronically filed and served a true and correct copy of the above and foregoing **JOYCE SEKERA'S ANSWERING BRIEF** as follows:

[X] by the Court's CM/ECF system which will send notification to the following; and

[ ] by US mail at Las Vegas, Nevada, postage prepaid thereon, with the Appendix on CD, addressed to the following:

Michael A. Royal, Esq.
Gregory A. Miles, Esq.
ROYAL & MILES LLP
1522 W. Warm Springs Road
Henderson, Nevada 89014
Attorneys for Appellants

Honorable Kathleen Delaney
Eighth Judicial District Court, Dept. 25
200 Lewis Avenue
Las Vegas, Nevada 89155
Respondent

An Employee of The Galliher Law Firm