

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court No. 79689
District Court Case No. A-18-772761-C

Electronically Filed
Oct 09 2020 11:49 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

VENETIAN CASINO RESORT, LLC, a Nevada limited liability company,
LAS VEGAS SANDS, LLC, a Nevada limited liability company,
Petitioners,

v.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN
AND FOR THE COUNTY OF CLARK, AND THE HONORABLE KATHLEEN
DELANEY in her capacity as District Judge,
Respondent,
JOYCE SEKERA, an individual,
Real Party in Interest

ANSWER TO REAL PARTY IN INTEREST'S PETITION FOR REVIEW

Michael A. Royal, Esq. (SBN 4370)
Gregory A. Miles, Esq. (SBN 4336)
ROYAL & MILES LLP
1522 W. Warm Springs Rd.
Henderson, Nevada 89014
Telephone: (702) 471-6777
Facsimile: (702) 531-6777
Email: mroyal@royalmilesllp.com
gmiles@royalmilesllp.com

*Attorneys for Petitioners Venetian Casino Resort, LLC,
and Las Vegas Sands, LLC*

NRAP 26.1 DISCLOSURE

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

VENETIAN CASINO RESORT, LLC, Nevada limited liability company licensed to do business in the State of Nevada, active since 1997, doing business as the Venetian Resort Hotel Casino.

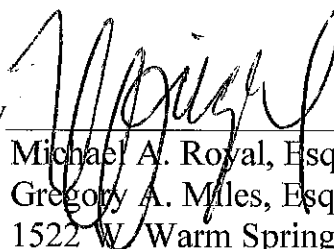
LAS VEGAS SANDS, LLC, Nevada limited liability company licensed to do business in the State of Nevada since 2005.

VENETIAN CASINO RESORT, LLC and LAS VEGAS SANDS, LLC is represented in the District Court and in this Court by Michael A. Royal, Esq., and Gregory A. Miles, Esq., of the law firm of Royal & Miles LLP.

DATED this 9th day of October, 2020.

ROYAL & MILES LLP

By



Michael A. Royal, Esq. (SBN 4370)

Gregory A. Miles, Esq. (SBN 4336)

1522 W Warm Springs Rd.

Henderson, NV 89014

(702) 471-6777

*Attorneys for Venetian Casino Resort,
LLC, and Las Vegas Sands, LLC*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. RESPONSES TO QUESTIONS PRESENTED FOR REVIEW	1
II. RESPONSE TO SEKERA’S STATED “REASONS FOR REVIEW”	1
III. RELEVANT PROCEDURAL HISTORY	3
IV. LEGAL ARGUMENT	5
A. THE COURT OF APPEALS PROPERLY HELD THAT THE DISTRICT COURT FAILED TO CONSIDER PROPORTIONALITY (AS REQUIRED BY NRCP 26(b)(1)) WHEN IT DENIED DEFENDANTS’ MOTION FOR PROTECTIVE RELIEF UNDER NRCP 26(c)	5
1. THE COURT OF APPEALS PROPERLY HELD THAT THE DISTRICT COURT NEEDS TO CONSIDER THE PROPORTIONALITY REQUIREMENTS OF NRCP 26(b)(1) WHEN RULING ON VENETIAN’S MOTION FOR PROTECTIVE ORDER	5
2. SEKERA’S INFORMATION ASYMMETRY ARGUMENT IS INACCURATE AND AN ISSUE MORE PROPERLY CONSIDERED BY THE DISTRICT COURT ON REMAND	8
B. THE ISSUE OF NRCP 26(b)(5) AND “BLANKET PRIVILEGE” RAISED BY SEKERA IN THE PETITION IS A NOVEL ARGUMENT NOT PRESENTED TO THE DISTRICT COURT OR THE NEVADA COURT OF APPEALS PRIOR TO ISSUANCE OF ITS OPINION IN THIS MATTER	11
V. CONCLUSION	19

TABLE OF AUTHORITIES

Cases

<u>Bible v. Rio Props., Inc.</u> 246 F.R.D. 614 (C.D. Cal. 2007)	18
<u>Caballero v. Bodega Latina Corp.</u> U.S. Dist. LEXIS 115072 (D. Nev. July 21, 2017)	17, 18
<u>Clark County Coroner v. Las Vegas Review-Journal</u> 136 Nev. Adv. Op. 5, 458 3d 1048 (2020)	16
<u>Dowell v Griffin</u> 275 F.R.D. 613 (S.D. Cal. 2011)	18
<u>Eldorado Club v. Graff</u> 78 Nev. 507, 377 P.2d 174 (1962)	18
<u>Gonzales v. Google, Inc.</u> 234 FRD 674 (N.D. Cal. 2006)	18
<u>In re Bard IVC Filters Prod. Liab. Litig.</u> 317 F.R.D. 562 (D. Ariz. 2016)	6, 8
<u>Izzo v. Wal-Mart Stores, Inc.</u> 2016 U.S. Dist. LEXIS 12210; 2016 WL 409694	18
<u>Nelson v. Heer</u> 121 Nev. 832, 122 P.3d 1253 (2005)	16
<u>Rowland v. Paris Las Vegas</u> 2015 U.S. Dist. LEXIS 105513; 2015 WL 4742502	18
<u>Samsung Elecs. Am., Inc. v. Yang Kun Chung</u> 321 F.R.D. 250 (N.D. Tex. 2017)	6, 8
<u>Shaw v. Experian Info. Sols., Inc.</u> 306 F.R.D. 293 (S.D. Cal. 2015)	18

Statutes

NRS 49.015(1)(b)	11, 15, 18, 19
------------------------	----------------

Rules

FRCP, Rule 26 (b)(1)	6, 7, 17, 18
FRCP, Rule 26(b)(2)(C)(iii)	7
NRAP, Rule 40(c)(1)	12
NRAP, Rule 40(c)(2)	12, 13

NRAP, Rule 40B(a)	2
NRCP, Rule 26	2, 5
NRCP, Rule 26(b)(1)	2, 6, 7, 8, 12, 15, 19
NRCP, Rule 26(b)(5)	2, 11, 12, 13, 14, 15, 18, 19
NRCP, Rule 26(c)	3, 4, 5, 7, 10, 14, 18, 19

Other Authorities

Advisory Committee on Civil Rules Report, May 2, 2014	7
FRCP 26 advisory committee notes to 2015 amendment	6, 17
NRCP 26 advisory committee notes to 2019 amendment	6

I. RESPONSES TO QUESTIONS PRESENTED FOR REVIEW

- A. THE COURT OF APPEALS PROPERLY HELD THAT THE DISTRICT COURT FAILED TO CONSIDER PROPORTIONALITY (AS REQUIRED BY NRCP 26(b)(1)) WHEN IT DENIED DEFENDANTS' MOTION FOR PROTECTIVE RELIEF UNDER NRCP 26(c)**
- B. THE ISSUE OF NRCP 26(b)(5) AND "BLANKET PRIVILEGE" RAISED BY SEKERA IN THE PETITION IS A NOVEL ARGUMENT NOT PRESENTED TO THE DISTRICT COURT OR THE NEVADA COURT OF APPEALS PRIOR TO ISSUANCE OF ITS OPINION IN THIS MATTER**

II. RESPONSE TO SEKERA'S STATED "REASONS FOR REVIEW"

Sekera has moved this Honorable Court to review Nevada Court of Appeals Case Nos. 79789 and 80816 related to her demanded entitlement to private contact information of Venetian guests identified in prior incident reports to not only use in this litigation, but to share the same with the world at large.¹ Venetian filed a motion in the District Court to protect its guests from the indiscriminate dissemination of their private personal information. The information in question is unnecessary to this litigation. Venetian's action to protect the privacy of its guests is not some kind of ruse "to maintain the information advantage"² as wrongfully portrayed by Sekera.

¹ Sekera filed two identical Petitions in Case Nos. 79789 and 80816 and requested the matters to be consolidated. Venetian does not believe the matters have been consolidated. So, identical Answers to Sekera's Petitions are being filed in each case.

² See *Real Party in Interest's Petition for Review* ("Sekera Petition"), case no. 79689, at 1.

The Court of Appeals decision at issue suggests this case involves a question of first impression; namely, the proper interpretation of the proportionality requirement in NRCP 26(b)(1). Interestingly, Sekera takes a position that undermines her claim that this is a question of first impression properly subject to review pursuant to NRAP 40B(a). Specifically, Sekera inaccurately argues that the 2019 amendments to NRCP 26 were meaningless scrivener changes. The Court of Appeals properly held these amendments were significant and, in concert with relevant prior authority, found that the District Court failed to consider the proportionality of Sekera's request to obtain private information of other Venetian guests.

Sekera's claim that the Nevada Court of Appeals "failed to consider NRCP 26(b)(5)" in its opinion is not surprising, since Sekera failed to raise that issue before either the District Court below or the Nevada Court of Appeals prior to issuance of its opinion.³ In fact, as discussed further below, it was Sekera's original position that NRCP 26(b)(1) was not at all relevant to Venetian's motion for protection. Sekera is now moving the proverbial goal posts.

³ See Venetian Casino Resort, LLC et al v. Eighth Judicial District Court, 136 Nev. Adv. Opinion 26 (May 14, 2020) (attached as Exhibit B to *Real Party In Interest's Petition for Review*) (hereinafter "May 14, 2020 Opinion Case No. 79689-COA")

Venetian also notes Sekera's assertions that "the Venetian [] unilaterally [withheld] discovery" from her⁴ is grossly misleading. Venetian will review the procedural history with this Honorable Court so the facts surrounding the issues presented are clear.

III. RELEVANT PROCEDURAL HISTORY

In its presentation of the procedural history, the Nevada Court of Appeals did not specifically address some facts Venetian deems relevant to the pending petition for review, which it will highlight herein below for this Honorable Court's consideration.⁵

On December 17, 2018, Venetian sent email correspondence to Sekera in response to a previous request from Sekera for three years of prior incident reports, wherein Venetian advised that it had documents ready to produce subject to a stipulation and order for protection under NRCP 26(c).⁶ After discussions over the next five weeks failed, with Venetian having produced redacted copies of the incident reports as a good faith gesture, the parties agreed that Venetian would file a motion for protective order.⁷

⁴ *Id.* at 2.

⁵ *See id.* at 2-4.

⁶ *See Appendix to Petitioners' Emergency Petition For Writ of Mandamus and/or Writ of Prohibition Under NRAP Rules 21(b)(6) and 27(c) and Emergency Motion Under NRAP Staying Execution of Order Directing Petitioners to Disclose Private, Protected Information of Guests Not Involved In Underlying Suite* ("Venetian Appendix"), Vol. 1, Tab 9, VEN 074-77.

⁷ *See id.*, Vol. 1, Tab 9, VEN 079-83.

Venetian filed Defendants' Motion For Protective Order under NRCP 26(c) on February 1, 2019.⁸ Venetian thereafter discovered that on February 7, 2019, six days after the motion for protection was filed, Sekera, unilaterally and without advising either Venetian or the District Court below, produced the documents at issue to Las Vegas attorney Peter Goldstein, Esq., who was prosecuting a separate case against Venetian styled Smith v. Venetian, case no. A-17-753362-C.⁹ At the March 13, 2019 hearing before the Discovery Commissioner on Venetian's motion for protective order under NRCP 26(c), Sekera also failed to advise either Venetian or the court that the same documents she "unilaterally" provided to Mr. Goldstein at issue in the motion for protective order were filed with the District Court on March 12, 2019, and had therefore become part of the public record.¹⁰

The Discovery Commissioner ruled in Venetian's favor, finding that it demonstrated good cause for protection under NRCP 26(c) based on a legitimate privacy interest.¹¹ Sekera filed an objection to the Discovery Commissioner's Report and Recommendation of April 4, 2019, which was adjudicated by the District Court on May 14, 2019.¹²

⁸ See id., Vol. 1, Tab 9, VEN 054-66.

⁹ See id., Vol. 1, Tab 10, VEN 084-85. See also id., Vol. 1, Tab 11, VEN 086-97.

¹⁰ See id., Vol 1, Tab 12, VEN 140-48; Tab 13, VEN 186-200.

¹¹ See id., Vol. 1, Tab 14, VEN 201-06.

¹² See id., Vol. 1, Tab 15, VEN 207-66.

From the time Sekera improperly provided Mr. Goldstein with the prior incident reports on February 7, 2019 until May 14, 2019 (or at any time thereafter), Sekera took no known steps to prevent the disclosure of the prior incident reports which were the subject of Venetian's motion for protection on February 1, 2019. Further, Sekera did not raise the issue of "privilege" until after the Nevada Court of Appeals issued its decision on May 14, 2020.

IV. LEGAL ARGUMENT

A. THE COURT OF APPEALS PROPERLY HELD THAT THE DISTRICT COURT FAILED TO CONSIDER PROPORTIONALITY (AS REQUIRED BY NRCP 26(b)(1)) WHEN IT DENIED DEFENDANTS' MOTION FOR PROTECTIVE RELIEF UNDER NRCP 26(c)

1. THE COURT OF APPEALS PROPERLY HELD THAT THE DISTRICT COURT NEEDS TO CONSIDER THE PROPORTIONALITY REQUIREMENTS OF NRCP 26(b)(1) WHEN RULING ON VENETIAN'S MOTION FOR PROTECTIVE ORDER

In her petition, Sekera's silence concedes, as she must, that the District Court failed to consider proportionality in ruling on Venetian's NRCP 26(c) motion for protective order. Instead, Sekera inaccurately argues that under the prior version of the Nevada Rules of Civil Procedure she was not required to show proportionality and that the 2019 amendments to NRCP 26(b) made no substantive changes to prior law. The Court of Appeals properly held that while proportionality was required by prior law, the 2019 amendments to NRCP 26(b) were meant to emphasize its importance and required the District Court to consider proportionality when ruling on Venetian's motion.

The Court of Appeals analyzed the present discovery dispute in terms of the provisions of NRCP 26(b)(1) as amended effective March 1, 2019.¹³ The amendment is significant in that it modified the permissible scope of discovery:

(1) **Scope.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claims or defenses and *proportional to the needs of the case*, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable. [Emphasis added]

This change to NRCP 26(b)(1) was modeled after and followed a similar amendment to FRCP 26(b)(1) made in 2015. Citing the advisory committee's notes to the 2019 amendment, the advisory committee's notes to the 2015 federal amendment, and federal case law interpreting the 2015 amendment, the Court of Appeals properly found that a court must consider proportionality when determining whether a particular discovery request is within the scope of permissible discovery.¹⁴

¹³ May 14, 2020 Opinion Case No. 79689-COA fn. 4.

¹⁴ May 14, 2020 Opinion Case No. 79689-COA Pgs. 7-8; see also NRCP 26 advisory committee notes to 2019 amendment, FRCP 26 advisory committee notes to 2015 amendment, In re Bard IVC Filters Prod. Liab. Litig., 317 F.R.D. 562, 564 (D. Ariz. 2016); Samsung Elecs. Am., Inc. v. Yang Kun Chung, 321 F.R.D. 250, 279 (N.D. Tex. 2017).

The Court of Appeals found that the District Court in this matter, when ruling on Venetian's NRCP 26(c) motion for protective order, failed to give any consideration to the proportionality of the information sought by Sekera. Accordingly, the Court of Appeals properly granted Venetian's petition and ordered the matter remanded to the District Court to reconsider Venetian's motion by giving the required due consideration to the proportional needs of the case.

Sekera argues that, contrary to the authority relied upon by the Court of Appeals, she is not required to show that the private information of individuals wholly uninvolved with her personal injury action is in anyway proportional to her needs in this case. In so doing, Sekera engages in a tortured recitation of the FRCP 26 advisory committee notes to 2015 amendment to argue that moving the proportionality requirement from FRCP 26(b)(2)(C)(iii) to FRCP 26(b)(1) was a simple scrivener's change with no substantive effect. However, the authority cited by Sekera does not support her position, considering the following advisory committee note:

The purpose of moving these factors explicitly to Rule 26(b)(1) is to make them more prominent, encouraging parties and **courts alike to remember them and take them into account in pursuing discovery and resolving discovery disputes.**¹⁵

¹⁵ Advisory Committee on Civil Rules Report, May 2, 2014, at 7-8; *Sekera Petition* at 7. (Emphasis added.)

As noted in the federal case authority cited by the Court of Appeals, addressing these proportionality requirements is precisely what is now required by a party seeking to obtain discovery and a court considering a dispute on whether certain discovery is properly within the scope of discovery.

When FRCP 26(b)(1) was amended, federal district courts noted that relevance was no longer enough for allowing discovery. *In re Bard IVC Filters Prod. Liab. Litig.*, 317 F.R.D. 562, 564 (D. Ariz. 2016) (“Relevancy alone is no longer sufficient – discovery must also be proportional to the needs of the case”); *Samsung Elecs. Am., Inc. v. Yank Kun Chang*, 321 F.R.D. 250, 279 (N.D. Tex. 2017) (“[D]iscoverable matter must be both relevant and proportional to the needs of the case – which are related but distinct requirements.”)¹⁶

Sekera has presented no authority in her petition that contradicts the holding of the Court of Appeals remanding this matter to the District Court with instructions that the District Court consider the proportionality requirements of NRCP 26(b)(1) in ruling on Venetian’s motion for protective order.

2. SEKERA’S INFORMATION ASYMMETRY ARGUMENT IS INACCURATE AND AN ISSUE MORE PROPERLY CONSIDERED BY THE DISTRICT COURT ON REMAND

In her petition, Sekera claims that Venetian “unilaterally” withheld the information at issue in the underlying discovery motion. As discussed more fully below, this claim is inaccurate. Moreover, the argument does not provide a basis for overturning the holding of the Court of Appeals. In fact, it provides further

¹⁶ May 14, 2020 Opinion Case No. 79689-COA at 7-8.

support for the Court of Appeals' holding requiring the District Court to consider proportionality issues in connection with Venetian's motion for protective order. Sekera is free to, and should, advance any claim of "information asymmetry" in opposition to Venetian's motion before the District Court.

To the extent this Honorable Court is inclined to consider these arguments, Venetian contends that Sekera has misrepresented the record in this matter. Sekera's claim that Venetian has "unilaterally" withheld discovery from her is simply unfounded. She is not a victim as portrayed in the petition. Of note, Sekera does not present this Honorable Court with facts supporting her assertion. She has simply made the unsupported, accusatory statement followed by a legal analysis. However, Venetian respectfully submits that these omitted facts matter, as Sekera has provided an unfairly distorted factual premise supporting her pending petition for review of the order issued by the Nevada Court of Appeals on May 14, 2020.

Sekera's assertion that "Venetian did not identify a legitimate legal basis for refusing to disclose the information in its incident reports" or that it failed to present evidence before the Discovery Commissioner demonstrating "a legitimate legal basis for a protective order" is without merit.¹⁷ This statement ignores the Discovery Commissioner's Report and Recommendation of April 4, 2019, which recognized a right of privacy associated with the prior incident reports and granted

¹⁷ See *Sekera Petition* at 8-9.

Venetian's motion for protection under NRCP 26(c).¹⁸ The Discovery

Commissioner stated the following during the March 13, 2019 hearing:

The motion for protective order is granted in part as follows -- The Venetian may continue to provide redacted reports as previously done. ... With regard to the reports that are produced, they are to be redacted for the names and the contact information for all witnesses and individuals who reported incidents.¹⁹

The Discovery Commissioner added: **"I do believe . . . there are privacy and HIPAA issues that are to be considered,** and so my inclination is not to disclose the names and contact information for all people on all reports."²⁰ In ordering that the private information remain in redacted form as previously produced to Sekera by Venetian, the Discovery Commissioner concluded: **"I am going to issue a protective order that the reports that are disclosed in this case are not circulated outside of this case** and for use only in this case."²¹ However, as noted above, by that time Sekera had already violated the recommended order and failed to advise either Venetian or the Discovery Commissioner of that important fact. Regardless, it is clear from the record below that Venetian presented the Discovery Commissioner with sufficient "good cause" under NRCP 26(c) to support its motion for protection. In fact, the record demonstrates that the only "unilateral" action taken by either of the parties below was Sekera's

¹⁸ See *Venetian Appendix*, Vol. 1, Tab 15, VEN 201-06.

¹⁹ See *id.* at Vol. 1, Tab 13, VEN 197.

²⁰ See *id.* at Vol. 1, Tab 13, VEN 198 (emphasis added).

²¹ *Id.* (Emphasis added.)

surreptitious distribution of the prior incident reports, produced to her in good faith by Venetian in redacted form, while the motion for protection was pending.

B. THE ISSUE OF NRCP 26(b)(5) AND “BLANKET PRIVILEGE” RAISED BY SEKERA IN THE PETITION IS A NOVEL ARGUMENT NOT PRESENTED TO THE DISTRICT COURT OR THE NEVADA COURT OF APPEALS PRIOR TO ISSUANCE OF ITS OPINION IN THIS MATTER

Sekera did not raise the issue of “privilege” under NRCP 26(b)(5) or NRS 49.015(1)(b) in Plaintiff’s Opposition to Defendant’s Motion for Protective Order, filed February 13, 2019 (six days after Sekera had already produced the subject prior incident reports to Mr. Goldstein).²² Given a second opportunity to raise the issue of “privilege” in Plaintiff’s Objection to Discovery Commissioner’s Report and Recommendations Dated April 2, 2019, filed April 16, 2019, Sekera again failed to do so.²³ Given a third opportunity to raise the issue of “privilege” under 26(b)(5) in Joyce Sekera’s Answering Brief before the Nevada Court of Appeals in case no. 79689-COA, filed October 11, 2019, Sekera once again did not raise the issue of “privilege”. Given a fourth opportunity to raise the issue of “privilege” under NRCP 26(b)(5) in Sekera’s Answer to Petition for Writ of Mandamus or Prohibition filed before the Court of Appeals in case no. 80816-COA on April 24, 2020, Sekera also failed to do so.

²² See *Appendix to Joyce Sekera’s Responding Brief* (filed October 8, 2019), Vol. 1, Tab 10, APP140-51.

²³ See *id.* at Vol. 1, Tab 12, APP152-63.

In fact, Sekera took the position before the Nevada Court of Appeals that Venetian's arguments in reliance on NRCP 26(b)(1) were "irrelevant" and "should be disregarded," having nothing to do with the pending issue presented in Venetian's emergency writ.²⁴ However, after the Nevada Court of Appeals rendered its order of May 14, 2020, Sekera's focus shifted and she thereafter raised the issue of "privilege" under NRCP 26(b)(5) for the first time.²⁵

Rule 40(c)(1), Nevada Rules of Appellate Procedure, provides as follows: "Matters presented in the briefs and oral arguments may not be reargued in the petition for rehearing, **and no point may be raised for the first time on rehearing.**" (Emphasis added.) NRAP 40(c)(2) provides the following exceptions:

- (A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case; or
- (B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case.

As Sekera did not raise the issue of NRCP 26(b)(5) prior to filing a petition for rehearing before the Court of Appeals, she is precluded from doing so now in this

²⁴ See *Joyce Sekera's Answering Brief*, case no. 79689-COA, at 20 see also *Answer to Petition for Writ of Mandamus or Prohibition*, case no. 80816-COA, filed April 24, 2020) at 14 (providing that the Court of Appeals "does not need to consider [Venetian's] argument because it did not allege that the District Court's order was issued without regard to relevance").

²⁵ See *Petition for Rehearing*, case no. 79689-COA, filed June 15, 2020 at 11 (Sekera arguing for the first time that "Venetian did not identify a legitimate legal basis for refusing to disclose the information in its incident reports").

petition for review without having met the given exceptions presented in NRAP 40(c)(2). Sekera has not attempted to meet any exceptions because she failed to advise this Honorable Court that she is raising a novel argument for the first time in the petition for rehearing.

Rule 26(b)(5), Nevada Rules of Civil Procedure, presents as follows in pertinent part:

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that it is **privileged or subject to protection** as trial preparation material, the party must:

- (i) expressly make the claim; and
- (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed -- and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) Information Produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. **After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified;** and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved. (Emphasis added.)

Venetian did not present a claim of “privilege” below under NRCP 26(b)(5), but asserted that its guests involved in prior incident reports have a Constitutional right to privacy related to their personal information which must be

protected under NRCP 26(c). To the extent this Honorable Court considers Sekera's NRCP 26(b)(5) argument, Venetian respectfully notes that the record below demonstrates the following:

1. Venetian sent correspondence to Sekera on December 18, 2018 advising that prior incident reports were prepared for disclosure to Sekera subject to NRCP 26(c) protection;²⁶
2. Venetian filed a motion for protective order upon agreement with Sekera that the issue of protection needed to be presented to the court for adjudication, which was fully brief and considered by the Discovery Commissioner;²⁷ and
3. The Discovery Commissioner agreed with Venetian that the private guest information within prior incident reports is worthy of protection under NRCP 26(c) and granted the motion.²⁸

Sekera did not previously assert that Venetian failed to comply with NRCP 26(b)(5)(i) because she knew such a claim would be frivolous. In fact, Venetian provided Sekera with the contested prior incident reports in redacted form prior to filing a motion with the good faith understanding that Sekera would

²⁶ *Venetian Appendix*, Vol. 1, Tab 9 at VEN 073-77.

²⁷ *Id.*, Vol. 1, Tab 9 at VEN 079-83; see also *id.* at VEN 054-65; *Appendix to Joyce Sekera's Responding Brief* (filed October 8, 2019), Vol. 1, Tab 10 at APP140-145; *Venetian Appendix*, Vol. 1, Tab 11, at VEN 086-97; *id.*, Tab 13 at VEN 186-200.

²⁸ *Venetian Appendix*, Vol. 1, Tab 14 at VEN 201-06.

accept and respect Venetian's assertion of guest privacy and the need for protection while the motion was pending before the Discovery Commissioner. However, as noted, Sekera shared them with others outside the litigation before the matter could be heard in direct violation of NRCP 26(b)(5)(B).

The Nevada Court of Appeals properly set forth Venetian's argument that that the District Court, in later reversing the Discovery Commissioner's Report and Recommendation of April 4, 2019, "abused its discretion when it did not consider and apply proportionality under NRCP 26(b)(1) prior to allowing the discovery."²⁹ The Court of Appeals rightly recognized that the District Court only considered relevance without weighing the proportionality factors presented in NRCP 26(b)(1).³⁰ Without question, the reason the Court of Appeals did not address NRCP 26(b)(5)(i) is because it was never presented by Sekera as an issue.³¹ Now, Sekera seeks a second bite of the apple with a novel argument.

Venetian's petition for writ of mandamus was founded on the premise that the District Court did not properly evaluate the circumstances under NRCP 26(b)(1). In fact, the District Court simply determined that the guest information Venetian sought to protect was wholly unworthy of any protection

²⁹ See May 14, 2020 Opinion Case No. 79689-COA at 5.

³⁰ Id. at 6.

³¹ It should be further noted that Sekera also failed to raise the issue of NRS 49.015(1)(b) in the court below prior to the Nevada Court of Appeals' ruling in May 14, 2020 Opinion Case No. 79689-COA.

whatsoever; the judge therefore granted Sekera *carte blanche* authority to produce the private, personal information of Venetian guests to anyone at any time in any form for any purpose.³² Venetian found that result untenable. It filed a writ of prohibition and mandamus which was accepted, as Venetian had no other available remedy with damages that would be immediate and irreparable. Venetian's request for a stay was granted. That stay remains in effect today. Thus, Venetian has not "unilaterally" done anything to harm Sekera as she has asserted.

Sekera's representation in the pending petition for review that "Venetian did not identify a legitimate basis for refusing to disclose the information in its incident reports" is not accurate.³³ Certainly, the Discovery Commissioner felt otherwise. Moreover, Sekera ignores this Honorable Court's ruling in Clark County Coroner v. Las Vegas Review-Journal, 136 Nev. Adv. Op. 5, 458 3d 1048, 1058-59 (2020), cited by the Nevada Court of Appeals in footnote 12 of the *Venetian* order which references "nontrivial privacy interest[s]" in juvenile autopsy reports "due to the social and medical information they reveal, which may require redaction before their release."³⁴

In Nelson v. Heer, 121 Nev. 832, 834, 122 P.3d 1253 (2005), cited by Sekera in the present petition, this court noted it has "previously recognized that

³² See *Venetian Appendix*, Vol. 2, Tab 15 at VEN 253:3-25; 254:1-23; *id.* Tab 16 at VEN 267-70.

³³ See *Sekera Petition* at 8.

³⁴ May 14, 2020 Opinion Case No. 79689-COA at 12-13, note 12.

federal decision involving the Federal Rules of Civil Procedure provide persuasive authority when examining its rules.”³⁵ Venetian provided the Nevada Court of Appeals with numerous cases from the United States District Court for the District of Nevada in support of its position.

In Caballero v. Bodega Latina Corp., U.S. Dist. LEXIS 115072 (D. Nev. July 21, 2017), the court considered a motion to compel discovery brought by the plaintiff in a slip and fall accident occurring at Bodega’s El Super grocery store in North Las Vegas. There, the plaintiff sought production of prior guest incident reports. In that decision, the federal court reviewed the December 2015 changes to FRCP 26(b)(1) and carefully chronicled them, some of which are addressed by Sekera in the pending petition, including the required prongs of relevance and proportionality.³⁶ Regarding the proportionality prong, the court noted that “the amendment imposes a collective burden on ‘[t]he parties and the court . . . to consider the proportionality of all discovery and consider it in resolving discovery disputes.’”³⁷

In Caballero, the plaintiff sought five years of prior incident reports, which the defendant refused to produce pursuant to Eldorado Club v. Graff, 78 Nev. 507,

³⁵ See Sekera’s Petition at 5.

³⁶ See id. at *3-*8.

³⁷ Id. at *6 (quoting FRCP 26 Advisory Committee Notes for 2015 Amendments).

377 P.2d 174 (1962).³⁸ In applying the FRCP 26(b)(1) analysis, the federal court denied the plaintiff's motion to compel by finding that the request for prior incident reports was not relevant, based on application of Nevada law.³⁹ Of note, nowhere in the federal court's analysis in Caballero is there any reference to FRCP 26(b)(5) or NRS 49.015(1)(b) (as cited by Sekera in the pending petition).

Venetian previously cited to other federal cases applying FRCP 26(b)(1) to similar facts associated with the privacy issues asserted here, all of which supported its position that the information of Venetian guests involved in prior incidents are worthy of protection under NRCP 26(c).⁴⁰

³⁸ Id. at *9-*12.

³⁹ Id. at *10-*23 (the court did not reach the proportionality prong of the analysis after finding prior slip/fall incident reports to be irrelevant to the case under Nevada law).

⁴⁰ See Izzo v. Wal-Mart Stores, Inc., 2016 U.S. Dist. LEXIS 12210; 2016 WL 409694 (burden on the defendant to produce prior incident reports together with privacy interests of non-litigants outweighed tangential relevance to plaintiff's case); Rowland v. Paris Las Vegas, 2015 U.S. Dist. LEXIS 105513; 2015 WL 4742502 (recognizing a Constitutional right to privacy pertaining to the information of guests in prior incident reports); Bible v. Rio Props., Inc., 246 F.R.D. 614, 620-21 (C.D. Cal. 2007); 2007 U.S. Dist. LEXIS 80017 at *16-17 ("the rights of third parties can be adequately protected by permitting defendant to redact the guest's complaints and staff incident reports to protect the guest's name and personal information, such as address, date of birth, telephone number, and the like"); Dowell v Griffin, 275 F.R.D. 613, 620 (S.D. Cal. 2011) (ruling that the plaintiff was not entitled to identity, phone number, address, date of birth, social security number, or credit card number of unrelated third parties); Shaw v. Experian Info. Sols., Inc., 306 F.R.D. 293, 299 (S.D. Cal. 2015) (redaction is appropriate to protect private information); Gonzales v. Google, Inc., 234 FRD 674, 684 (N.D. Cal. 2006) (disclosing client information "may have an appreciable

V. CONCLUSION

Venetian respectfully submits that the Court of Appeals' orders and opinions in case numbers 79689 and 80816 finding that the District Court failed to properly consider the proportionality requirements of NRCP 26(b)(1) and remanding this matter to the District Court with instructions to do so is proper and supported by the applicable authority. Sekera's suggestion that the Court of Appeals' order and opinion allows Venetian and like defendants "to unilaterally withhold requested discovery based upon an unreasonable proportionality argument" is without basis.

Venetian disputed the production of prior incident reports to protect a right of privacy associated with personal guest information, appropriately attempted to resolve the dispute with Sekera, then produced redacted reports pending a motion for protection in a good faith effort to move the case along. Sekera was aware of the basis upon which Venetian asserted protection under NRCP 26(c), which was set out in correspondence preceding the motion for protection and thereafter in its pleadings, and then "unilaterally" shared it.

The issue of "privilege" under NRCP 26(b)(5) and NRS 49.015(1)(b) is frankly a red herring. It was not raised until Sekera sought rehearing and review. Even if this Court considers it now, although Venetian does not concede NRCP 26(b)(5) applies under the given circumstances, it complied to the extent it made

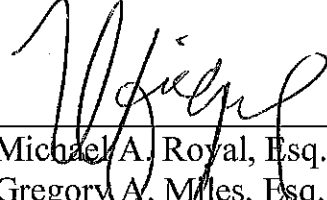
impact on the way which [the company] is perceived, and consequently the frequency with which customers use [the company]").

Sekera aware of what information was redacted in the prior incident reports and the purpose thereof. The only “unilateral” action taken below was Sekera’s intentional dissemination of the prior incident reports, allowing them to become part of the public record in another case without advising either Venetian or the District Court below.

Respectfully, the Court of Appeals has provided Nevada courts with sound direction of how to address this dispute and similar reoccurring issues. It did not err and the opinion provided should be affirmed by this Honorable Court. Sekera’s petition for rehearing should be denied and this case remanded to the District Court to fully consider this dispute pursuant to the guidelines provided by the Nevada Court of Appeals in its well drafted opinion.

DATED this 9th day of October, 2020.

ROYAL & MILES LLP

By 
Michael A. Royal, Esq. (SBN 4370)
Gregory A. Miles, Esq. (SBN 4336)
1522 W. Warm Springs Rd.
Henderson, NV 89014
(702) 471-6777
Counsel for Petitioners

CERTIFICATE OF COMPLIANCE

STATE OF NEVADA)
COUNTY OF CLARK } ss:

I, Michael A. Royal, 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 a member of the law firm of Royal & Miles LLP, attorneys for Petitioners VENETIAN CASINO RESORT, LLC, and LAS VEGAS SANDS, LLC.

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

☒ This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times Roman 14 point font.

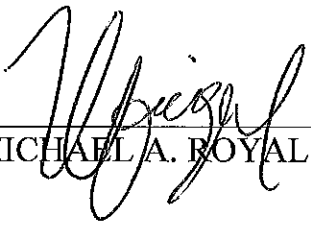
3. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ Proportionately spaced, has a typeface of 14 points or more, and contains **4,061 words** in compliance with NRAP 32(a)(7)(A)(ii) (having a word count of less than 14,000 words); or

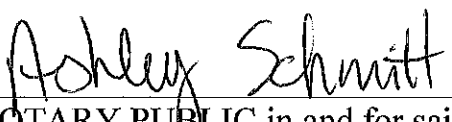
☐ Does not exceed **10** pages

4. Finally, I hereby certify that I have read this Writ, 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.

Further affiant sayeth naught.


MICHAEL A. ROYAL, ESQ.

SUBSCRIBED AND SWORN to before
me by Michael A. Royal, Esq., on this
9th day of October, 2020.

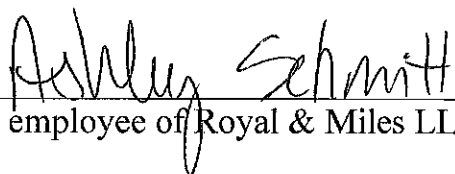

NOTARY PUBLIC in and for said
County and State



CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the law firm of Royal & Miles LLP, attorney's for Petitioners, VENETIAN CASINO RESORT, LLC and LAS VEGAS SANDS, LLC, and that on the 9th day of October, 2020, I served true and correct copy of the foregoing ANSWER TO REAL PARTY IN INTEREST'S PETITION FOR REVIEW for filing via the Court's e-Flex electronic filing system which will send electronic notification to the following:

Keith E. Galliher, Jr., Esq.
THE GALLIHER LAW FIRM
1850 E. Sahara Avenue, Suite 107
Las Vegas, NV 89014
and
Sean K. Claggett, Esq.
William T. Sykes, Esq.
Geordan G. Logan, Esq.
CLAGGETT & SYKES LAW FIRM
4101 Meadows Lane, Suite 100
Las Vegas, NV 89107
Attorneys for Real Party in Interest



An employee of Royal & Miles LLP