

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

Appellate Court No. 80816-COA
District Court Case No. A-18-772761-C

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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

PETITIONERS' REPLY BRIEF

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MEMORANDUM OF POINTS AND AUTHORITIES¹

I. GENERAL REPLY TO SEKERA'S ANSWERING BRIEF

Real-Party-in-Interest Joyce Sekera's Answering Brief is devoid of any substantive discussion of why she needs the private information of Venetian guests involved in prior wholly unrelated incidents to establish the elements of negligence in this matter. Also missing from Sekera's response is why her asserted right to Venetian guest information is superior to the privacy rights of those persons having nothing to do with the subject incident and litigation. Sekera also fails to explain why she is entitled to not only have access to the private information of Venetian guests involved in incidents unrelated to this litigation, but why she should be empowered to freely disseminate it to any other person in any form or fashion of her choosing without limitation.

Instead, Sekera's Answering Brief baselessly dismisses the pending petition as a legal strategy "to undermine the substance of a meritorious claim," "to block Plaintiff from accessing the discovery altogether", and proclaims that "Defendants

¹ On May 14, 2020 Petitioners received this Court's order in action no. 79689-COA granting the petition and remanding the matter to the district court with instructions to fully consider the issues of proportionality under NRCP 26(b)(1) and whether "good cause" exists for a protective order under NRCP 26(c)(1) with a newly adopted list of factors. (*See* Appendix, Vol. 15, Tab 63, VEN 3007-20). Accordingly, it may now **be the law of the case** that this petition should be granted with similar direction. Petitioners are filing this reply to reserve their rights in this action.

only desire to withhold relevant discovery from Plaintiff to delay this litigation.”²

These are specious and unfounded assertions with no support in the record.

Sekera has also introduced a novel argument not previously presented in the court below or in the companion petition pending before this Honorable Court as 79689-COA; *to wit*: that Petitioners do not qualify for protection under NRCP 26(c), and NRCP 26(b)(1) does not apply, because there was not an assertion of privilege and no privilege log was provided with the previous production of redacted security incident reports as no such requirement was imposed by the Court. This is an empty and irrelevant argument. Sekera never demanded a privilege log and the lower court never ordered petitioners to prepare a privilege log. It would have been a pointless exercise. Petitioners previously produced a total of sixty-eight (68) prior incident reports redacting contact information related to guests of the Venetian Resort Hotel Casino (“Venetian”). That is obvious from the face of the reports. It was obvious to Sekera and to the court below. Moreover, this argument is irrelevant in connection with the current writ petition, as no records have yet been produced pursuant to the District Court’s March 13, 2020 order. Since no prior incident reports from November 4, 2011 to November 4, 2013 have been produced to Plaintiff (with a pending stay as to the

² See RAB at 1, 3 and 11-12.

March 13, 2020 order), there are no privileges to be logged. Sekera also wrongly asserts that Petitioners did not make proper objections to discovery requests below.

Sekera has avoided any substantive analysis under NRCP 26(b)(1). That is likely because a fair reading of the applicable rules, related case law, and plain common sense supports Petitioners' position that the privacy rights of guests involved in other unrelated incidents deserve protection and must be given consideration when a plaintiff, such as Sekera, makes a *carte blanche* request to obtain, use and freely distribute the information outside the pending litigation.

The facts related to completely different incidents, occurring in different areas of the Venetian property, which involve different circumstances and mechanisms of injury have no tendency whatsoever to prove or disprove whether Sekera fell on November 4, 2016 due to a foreign substance. Sekera omitted from the "facts" portion of her answering brief that Petitioners dispute that there was any foreign substance on the floor causing her to fall on November 4, 2016. Indeed, the objective evidence that the floor was dry at the time of Sekera's fall is quite compelling.³ Sekera avoided reference to these facts because they do not agree with her assertion here that the Venetian floor where Sekera fell "continually and repeatedly injures people."⁴ Sekera refers to the Venetian floor as "wet marble."⁵

³ See Appendix, Vol. 10, Tab 44 at VEN 1724-28; 1804.

⁴ See RAB at 5.

⁵ *Id.* at 5-6.

While that is a disputed fact - unless Sekera has evidence that the Venetian floor was “continually” wet (and she does not), then this is by definition a temporary transitory condition as contemplated by *Eldorado Club, Inc. v. Graff*, 78 Nev. 507, 511, 377 P.2d 174, 176 (1962). Sekera’s own experts agree that the floor is safe when dry.⁶

There is simply nothing about this slip-and-fall case that compels the production of the private information of individuals wholly unassociated with the subject accident. A proper analysis of NRCP 26(b)(1) in discovery disputes similar to the instant matter requires Sekera to demonstrate both the relevance and proportionality of the information sought, with a balance test applied. Sekera did not address that in the District Court below or her answering brief. Petitioners suspect that this is because it would lead directly to a conclusion which supports Petitioners’ request to protect the private information of the unaffiliated individuals.

Instead of addressing the merits of the important privacy issues at hand and the need for balancing of interests, Sekera has chosen to provide a misleading and distorted view of the litigation – such as suggesting this argument was never presented to the court below (which is completely inaccurate). Sekera’s claim that

⁶ See Appendix, Vol. 10, Tab 44 at VEN 1807:10-21; 1808:8-22 (Sekera expert Tom Jennings stating that if the subject floor was dry it would not have been the cause of her fall).

Petitioners ignored court orders and acted in some kind of disrespectful, evasive and/or abusive manner is entirely without merit.

Petitioners' writ is narrowly tailored to address the privacy rights of persons involved in prior incidents occurring on Venetian property. This writ was necessitated by the fact that the exact same issue is presently pending before this Honorable Court in case no. 79689-COA, and Sekera was unwilling to stipulate for Petitioners to produce prior incident reports from November 4, 2011 to November 4, 2013 in redacted form with NRCP 26(c) protection (*i.e.* for use only in this litigation, not to be shared with persons outside the litigation). Because this petition relates to the same parties, the same factual issues, the same issues of law, and even the same evidence (differing only in two additional years to be produced), Petitioners will move to consolidate this writ with case no. 79689-COA once briefing is completed.

II. RESPONSE TO SEKERA'S GIVEN PROCEDURAL HISTORY

While Petitioners previously presented a detailed summation of the procedural history in case no. 79689-COA, it is necessary to review some key facts in response to those presented by Sekera in the answering brief.

First, Sekera rightly notes that her initial request for prior incident reports from Venetian covered a three year period of time preceding the subject incident; however, Sekera fails to clarify that that her request extended from November 4

2013 “to the present.”⁷ Sekera then, inaccurately claims Petitioners’ did not object to this request for documents.⁸ Sekera is aware that Petitioners objected to her request for prior and subsequent incident reports in a response served upon her on October 9, 2018 and later by way of supplemental response on January 4, 2019.⁹ While these discovery responses were not part of the original Appendix filed by Petitioners with the pending petition, the Discovery Commissioner’s Report and Recommendation, filed December 2, 2019, unequivocally provides the following:

On January 4, 2019, Venetian produced to Plaintiff copies of sixty-four (64) prior incident reports from November 4, 2013 to November 4, 2016, redacted by Venetian to protect the identification of non-employees, responsive to Plaintiffs Production Request No. 7 requesting other incident reports on the Venetian property from November 4, 2011 to the present. (**Venetian objected to producing incident reports occurring subsequent to the November 4, 2016 incident.**)¹⁰

Sekera also fails to note in her given procedural history that she took the redacted incident reports provided to her by Petitioners in good faith with the

⁷ See RAB at 6, citing to *Appendix* Vol. 1, Tab 1 at VEN 40, emphasis added.

⁸ See *id.*

⁹ See Appendix, Vol. 11, Tab 48 at VEN 1966 (“**Venetian objected to producing incident reports occurring subsequent to the November 4, 2016 incident.**”) See also Appendix, Vol. 14, Tab 57, *Responses to Plaintiff’s Requests for Production of Documents and Materials to Defendant*, served October 9, 2018, Response No. 7 at VEN 2668-69; see also *id.*, Tab 58, *Supplemental Responses to Plaintiff’s Requests for Production of Documents and Materials to Defendant*, served January 4, 2019, Response No. 7, at VEN 2675-76.

¹⁰ See Appendix, Vol. 11, Tab 48 at VEN 1966 (emphasis added). See also *id.*, Vol. 7, Tab 42 at VEN 1009:1-21.

understanding that a motion for protective order would be timely filed, and then produced them to another attorney in an unrelated case while the motion was pending.¹¹

Sekera did not move to compel an order from the Court for Petitioners to produce copies of subsequent incident reports until August 5, 2019,¹² and the District Court agreed with Petitioners that Sekera is not entitled to them, nor is she entitled to any prior incident reports occurring outside the Grand Lux rotunda dome area of the Venetian property from November 4, 2011 to November 4, 2016.¹³ Accordingly, based on the District Court's latest ruling, the fact that Petitioners previously produced redacted copies of sixty-eight (68) prior incident reports occurring in areas both within and outside the Grand Lux rotunda dome area of the Venetian property is not germane to the pending petition.¹⁴

Sekera falsely asserts in her answering brief that Petitioners "concealed responsive incident reports which should have been produced" in January 2019.¹⁵ While Sekera makes reference to a document in the Appendix to support this false

¹¹ See Appendix, Vol. 1, Tab 9, VEN 054-083; Vol. 1, Tab 10 at VEN 084:21-25; Tab 12 at VEN 141:15-26, VEN 147:12-13, VEN 173; Tab 13 at VEN 186-200; Tab 14 at VEN 201-06; Vol. 2, Tab 15 at VEN 207-66.

¹² See Appendix, Vols. 6-7, Tab 40 at VEN 938-1005.

¹³ See Appendix, Vol. 13, Tab 56 at VEN 2661-64; See Appendix, Vols. 6-7, Tabs 38-39 at VEN 750-937 and Tab 40-41 at VEN 938-1006.

¹⁴ See Appendix, Vol. 1, Tab 1 at VEN 074-81.

¹⁵ See RAB at 6.

assertion, the actual record upon which she relies provides no such information.¹⁶

Sekera's claim that Petitioners "concealed" any documents in some kind of improper or sinister way is without the slightest support.

Sekera next writes that "Defendants also did not produce a privilege log **or explain the redactions in any way.**"¹⁷ Sekera does not cite to the record in support of this statement, because it is yet another allegation invented out of thin air to promote Sekera's false narrative. Petitioners filed Defendants' Motion for Protective Order on February 1, 2019.¹⁸ In the supporting *Declaration of Michael A. Royal, Esq.*, filed as part of the motion, paragraph seven (7), the following is provided: "That Venetian produced a total of sixty-four (64) prior incident reports in response to Plaintiff's request on or about January 4, 2019, **with names, contact information, personal information (i.e. DOB/SSN), and scene photographs redacted to protect the privacy of prior guests involved in these incidents since Plaintiff would not agree to a protective order.**"¹⁹ It is clear from the February 1, 2019 motion and all documents related thereto what information was redacted by Petitioners and why it was done. There was no need for a privilege log to be produced. Indeed, Sekera never previously suggested a privilege log was

¹⁶ Sekera cites to 11 PA 1966.

¹⁷ See RAB at 6 (emphasis added).

¹⁸ See *Appendix*, Vol. 1, Tab 1 at VEN 054-83.

¹⁹ See *Appendix*, Vol. 1, Tab 9 at VEN 056-57 (emphasis added).

necessary until raising it for the first time in her answering brief. Regardless, this writ has nothing to do with the sixty-eight (68) prior incident reports previously produced to Sekera by Petitioners and no documents have been produced pursuant to the March 13, 2020 order based on the present stay of relief granted by this Honorable Court.

Sekera presented a review of the procedural history related to the pending case before the Nevada Court of Appeals, identified as case no. 79689-COA, which is not directly applicable to the present issue before the Court, and then concludes: “Defendants ignored the District Court’s order and did not produce the unredacted documents,” noting only the hearing date of May 14, 2019.²⁰ Sekera failed to note that the District Court did not file its order until July 31, 2019 and that Petitioners filed a motion for reconsideration on an order shortening time on August 12, 2019, which was heard and denied on September 17, 2019, with the writ petition filed on September 27, 2019.²¹ Therefore, Sekera’s suggestion to this Honorable Court that the Petitioners “ignored” orders of the court below is false.

²⁰ See RAB at 7.

²¹ See *Appendix*, Vol. 2, Tab 16 at VEN 267-70 and Tab 17 at VEN 271-488, Vol. 3, Tab 20 at VEN 456-83, Vol. 5, Tab 27 at VEN 518-32, Tab 29 at VEN 538-606 and Tab 30 at VEN 607-25. Note that the hearing on Petitioners’ motion for reconsideration was initially set for August 27, 2019. See *id.*, Vol. 2, Tab 17 at VEN 271-72. See also *Appendix*, Vol. 14, Tab 59, *Email Correspondence Between Keith Galliher, Esq., and Michael Royal, Esq.*, dated August 16, 2019, VEN 2679-80; Tab 60, *Stipulation and Order* (filed August 30, 2019), at VEN 2683-87.

Sekera also omitted from her given procedural history that the motion she filed on July 2, 2019, with all accompanying filings, was never heard by the Discovery Commissioner.²² The Discovery Commissioner refused to hear her motion to compel because she failed to comply with the requirements of EDCR 2.34.²³

Finally, Sekera inaccurately represents that Petitioners “did not argue” below that guest information provided in prior incident reports “was private.”²⁴ Sekera then adds: “Defendants filed their petition for extraordinary relief based on the notion that there are generalized privacy concerns in the documents to be produced, **even though this argument was not presented in their opposition to Plaintiff’s motion to compel.**”²⁵ The documents from the record cited by Sekera, in fact, provide just the opposite. Under Section B.1 of its opposition to Sekera’s motion to compel production of records from May 1999 to the present, Petitioners presented argument under the heading: “**Privacy Rights of Non-Party**

²² See RAB at 7.

²³ See Appendix, Vol.14, Tab 61, *Opposition to Plaintiff’s Motion to Compel* (filed July 12, 2019) at VEN 2700:24-28; 2701:3-22); Tab 62, *Register of Actions*, at VEN 3006 (the red colored boxed information represents vacating of the July 2, 2019 motion and the blue colored boxed information represents refiled motions by the parties on August 5, 2019 related to the production of prior incidents from May 1999 to the present); The document Sekera references in the record is actually the August 5, 2019 motion. See RAB at 7 (Sekera citing to *6PA 938 through 7 PA 1005*).

²⁴ See RAB at 7 (citing to *7 PA 1007 through 9 PA 1486*).

²⁵ See RAB at 8 (citing to *7 PA 1007 through 9 PA 1486*) (emphasis added).

Individuals in Unrelated Matters Are Worthy of NRCP 26(c) Protection”, with related discussion.²⁶ Section B.2 of the same document presents argument supporting the following heading: “**Venetian Has Business Interests to Protect Private Guest Information.**”²⁷

The bottom line is that Petitioners wish to protect the dissemination of private information obtained from Venetian guests involved in other incidents. Sekera has not even attempted to demonstrate that her right to acquire and freely share the private information of Venetian guests is outweighed by the privacy rights of these persons unaffiliated to this litigation and the potential harm to Venetian’s business relationship with these guests. Sekera’s real intent is to obtain unredacted records for the purpose of “mining information.”²⁸ She has not substantially met the requirements of NRCP 26(b)(1) and has instead manufactured new arguments here not previously presented to the court below.²⁹

²⁶ See Appendix, Vol. 7, Tab 42 at VEN 1021:11-12 (emphasis added).

²⁷ See *id.* at VEN 1024:1 (emphasis added).

²⁸ See Appendix, Vol. 2, Tab 17 at VEN 275:5-9.

²⁹ Sekera’s assertion that Petitioners are seeking to delay this litigation is without merit, it is Sekera who moved in July 2019 for a trial continuance of 270 days, which motion was opposed by Petitioners but granted by the District Court. (See RAB at 12; *see also Appendix*, Vol. 2, Tab 19 at VEN 453-55.)

III. LEGAL ARGUMENT

A. SEKERA'S NOVEL PRIVILEGE ARGUMENT IS WITHOUT MERIT

The demand for production of incident reports involving Venetian guests has been a matter of dispute between the parties since Petitioners issued their initial response to discovery on October 9, 2018.³⁰

There have been five hearings addressing the issue of the production of prior and subsequent incident reports and protection sought by Venetian under NRCP 26(c). The first hearing was held on March 13, 2019, which was before the Discovery Commissioner on Petitioners' motion for protective order regarding Sekera's demand for production of other incident reports from November 4, 2013 "to present".³¹ The second hearing on May 14, 2019 was before the District Court on Sekera's objection to the Discovery Commissioner's Report and Recommendation to grant Venetian's motion for protection.³² The third such hearing was held September 17, 2019 on Venetian's motion for reconsideration before the District Court related to the July 31, 2019 order.³³ The fourth hearing

³⁰ See Appendix, Vol. 14, Tab 57, *Responses to Plaintiff's Requests for Production of Documents and Materials to Defendant*, served October 9, 2018, Response No. 7 at VEN 2668-69; see also *id.*, Tab 58, *Supplemental Responses to Plaintiff's Requests For Production of Documents and Materials to Defendant*, served January 4, 2019, No. 7 at VEN 2675-76.

³¹ See Appendix Vol. 1, Tab 13 at VEN 186-200.

³² See *id.*, Vol 2, Tab 15 at VEN 207-66.

³³ See *id.*, Vol. 3, Tab 20 at VEN 456-83.

was held before the Discovery Commissioner on September 18, 2019 related to the production of other incident reports from May 1999 to “the present”.³⁴ The fifth and final such hearing was held on January 21, 2020 before the District Court on Petitioners’ objection to the Discovery Commissioner’s Report and Recommendation to deny Venetian’s motion for protection.³⁵ In addition, the issue presently before this Honorable Court has been fully briefed by the parties in case no. 79689-COA.³⁶

The above history is relevant here given the issue of “privilege” asserted by Sekera in the answering brief.³⁷ It is a novel argument not presented by Sekera to either the Discovery Commissioner or the District Court Judge below, nor was it raised in the answering brief she filed in case no. 79689-COA. Specifically, Sekera references NRS 49.015(1)(b) and (c) to suggest that Petitioners have no valid basis to withhold the private information of Venetian guests unrelated to Sekera’s incident based on “privilege”.³⁸

Quoting from Sekera’s answering brief: “this Court should not allow [Sekera] to make one argument at the Discovery Commissioner and District Court level, then pivot to a different argument to this Court after the initial argument

³⁴ See *id.*, Vol. 3, Tab 21 at VEN 484-85; Vol. 10, Tab 47 at VEN 1922-64.

³⁵ See *id.*, Vol. 13, Tab 55 at VEN 2617-60.

³⁶ See Appendix, Vol. 5, Tabs 27-37 at VEN 518-749.

³⁷ See RAB at 10.

³⁸ *Id.*

fails.”³⁹ Sekera has not cited to anywhere in the record where Petitioners raised the issue of “privilege” or where she asserted entitlement to a privilege log related to the subject prior incident reports, much less that she moved the court to compel production of the same. It simply did not happen.

In fact, Petitioners did not file for a protective order under NRCP 26(c) related to the production of prior incident reports based on an asserted privilege. It is therefore no wonder that Sekera never requested the production of a privilege log. It was obvious both from the documents and representations of Venetian counsel what information had been redacted from the documents.⁴⁰ Sekera’s claim that “Defendants have not identified a substantive right and have not described the unknown information in a way that would allow Plaintiff and this Court to evaluate the substantive right” is baseless.⁴¹ Petitioners identified a guest privacy right, a right to protect its hotel/guest relationship, and specifically identified the kind of information deemed worthy of protection.

Sekera’s argument that the issue now before this Honorable Court cannot be heard because the issue of privilege was not raised below is without merit. However, Sekera’s issue of “privilege” was not raised by her below and should not be considered here.

³⁹ See RAB at 12 (citations omitted).

⁴⁰ See *Appendix*, Vol. 1, Tab 9 at VEN 056-57.

⁴¹ See RAB at 10. See also *Appendix*, Vol. 1, Tab 9 at VEN 056-57.

B. REQUESTED PROTECTION OF PRIVATE GUEST INFORMATION UNDER NRCP 26(c) IS SUPPORTED BY SEKERA'S FAILURE TO MEET THE CRITERIA OF NRCP 26(b)(1)

1. SEKERA HAS FAILED TO SHOW ANY RELEVANT NEED FOR THE PRIVATE INFORMATION OF NON-PARTY/NON-WITNESS GUESTS

Having briefed and argued this same issue on five occasions below, and also having briefed it before this Honorable Court in case no. 79689-COA, Sekera still has not explained why she should have “unfettered access to personal and sensitive information from non-parties to this action, which is not relevant to any claims or defenses in this matter.”⁴² Now, having what amounts to a sixth opportunity to argue before a Nevada court, Sekera still has not explained why her right to obtain the private data of Venetian guests and begin “mining information” while sharing it with whomever she pleases and however she desires meets the criteria of NRCP 26(b)(1). Rule 26(b)(1), Nevada Rules of Civil Procedure, provides that the information sought by Sekera must be “relevant” to her claims and “proportional to the needs of the case”, which includes (among other things) “the importance of the discovery in resolving the issues” and “whether the burden or expense of the proposed discovery outweighs its likely benefit.”

If Sekera is provided information related to prior unrelated incident reports within the scope provided by the District Court, identifying the date, time, area of

⁴² See RAB at 13.

incident, accident facts and Venetian employees responding to the scene, how does having the names of the non-party persons involved in an unrelated event forward Sekera's case? Sekera fails to provide a substantive response. Sekera's reference to *Rocker v. KPMG LLP*, 122 Nev. 1185, 1187, 148 P.3d 703, 704 (2006) *overruled on other grounds by Buzz Stew, Ltd. Liab. Co. v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008), is not helpful as she has not alleged fraud.⁴³ Sekera has instead presented a negligence claim based on a simple slip and fall from an alleged transient condition, where the underlying facts are contested by Petitioners, who dispute the existence of any foreign substance on the floor causing Sekera's fall. Sekera's claim that she should have access the names of persons involved in other incidents "who witnessed **the same dangerous condition** that injured her" is simply not enough to demonstrate that her need for the information outweighs the right to privacy of these unrelated Venetian guests and to interfere with Venetian's business relationship with other guests.⁴⁴

What does Sekera expect a guest who had a slip and fall on some prior occasion to say and how will that help her prove up something related to her incident? She has been provided with the prior incident facts in redacted form.

⁴³ *See id.*

⁴⁴ *See id.* (Emphasis added.)

What more does she need? In reality, Sekera's desire for this additional contact data is to "mine information" and freely circulate it as she wishes.

If Sekera gets what she wants here, she will receive unredacted incident reports from November 4, 2011 to November 4, 2016 without the slightest restriction. She can use the information not only for this litigation, but share it with the world, passing around the witness contact information for attorneys and others to use indiscriminately in other litigation or even for some other purpose.

Sekera has yet to articulate to this Honorable Court how her interest in having that kind of access and power meets the criteria of NRCP 26(b)(1). Sekera unabashedly embraces the fact that she presently has "unfettered access to personal and sensitive information from non-parties to this action" which she can use however she pleases.⁴⁵

Sekera's entire premise that she needs absolute, uncontrolled and unprotected access to personal information of other Venetian guests involved in prior incidents to "contact ... people who witnessed the same dangerous condition that injured her."⁴⁶ But, Sekera does not identify any "dangerous condition" that these people could have witnessed. Sekera cannot be referring to a dry marble floor, since her own expert concluded that such a walking surface does not present

⁴⁵ *Id.*

⁴⁶ *Id.*

a “dangerous condition”.⁴⁷ Moreover, Sekera does not claim that these individuals involved in prior slip-and-fall incidents have any information related to facts of her November 4, 2016 accident – because they do not. Even if the door is opened for Sekera to obtain discovery in the form she desires - to contact Venetian guests involved in prior incidents to begin “mining information” - **she has still not explained why her right extends to freely sharing the private data in any way, fashion or form to anyone and everyone** – even though she has had every opportunity to do so here and also in case no. 79689-COA.

2. SEKERA HAS NOT MET HER BURDEN ESTABLISHING RELEVANCE

Sekera asserts that she “met her burden for proving relevance” of the need to have unredacted information of Venetian guests involved in prior incidents to share freely with persons and forums outside this litigation.⁴⁸ Unfortunately, Sekera fails to either cite to the record before this Honorable Court or to even present some salient argument here for consideration. Instead, she attacks Petitioners’ reference to and reliance on *Eldorado Club v. Graff*, 78 Nev. 507, 377 P.2d 174 (1962).⁴⁹ However, Petitioners assert that Sekera did not meet her burden of proof below, that the District Court ruled incorrectly and that the order of March 13, 2020 is an

⁴⁷ See Appendix, Vol. 10, Tab 44 at VEN 1807:10-21; 1808:8-22.

⁴⁸ See RAB at 14.

⁴⁹ See *id.*

abuse of discretion properly presented to this Honorable Court for review.⁵⁰ Of note, nowhere in the subject order of March 13, 2020 does the Court make a specific finding or determination on the issue of relevance or proportionality under NRCP 26(b)(1).⁵¹

In the January 21, 2020 hearing on this matter, the District Judge, referring to the July 31, 2019 order, stated: **“I don’t know that when we previously ordered it we anticipated it being fully unprotected”**⁵² Yet, that was the District Court’s order – that all information related to Venetian guests found in prior incident reports are to be produced **without any protection** under NRCP 26(c).⁵³ It seems even the District Judge questioned the wisdom of providing Sekera with “unfettered access to personal and sensitive information from non-parties to this action.”⁵⁴

At its very core, the discovery of prior incident reports sought by Sekera is “to establish notice of a dangerous condition.”⁵⁵ Sekera’s repeated references to the disputed condition she claims to have caused her fall as one which has **“continued and persisted”** is tantamount to a claim that any business proprietor

⁵⁰ See Petition at 8-9.

⁵¹ See Appendix, Vol. 13, Tab 55 at VEN 2661-64.

⁵² See *id.*, Vol. 13, Tab 55 at VEN 2623:21-22 (emphasis added).

⁵³ See Appendix, Vol. 13, Tab 55 at VEN 2661-64.

⁵⁴ See RAB at 13.

⁵⁵ See *Eldorado Club, Inc. v. Graff*, 78 Nev. 507, 510, 377 P.2d 174, 176 (1962).

which has experienced guest slip and fall incidents before and after a particular matter would fall into the category of having “an unsafe condition which **continually and repeatedly injures people.**”⁵⁶

In *Eldorado Club, Inc.*, the plaintiff fell due to a temporary transitory condition introduced to the floor (a lettuce leaf) where he was walking while carry two sacks of potatoes.⁵⁷ There, Mr. Graff sought to introduce evidence of prior incidents “to establish notice of a dangerous condition.”⁵⁸ The *Eldorado Club, Inc.* court notes: “No contention is made that the ramp was dangerous per se; that there was a structural, permanent or continuing defect. Rather, the contention is that the ramp **became dangerous because of** the presence of a lettuce leaf on it. Thus, the instrumentality causing the slip and fall was claimed to be, and in fact was, the lettuce leaf.”⁵⁹ The court noted that evidence of prior incidents “is generally confined to situations where there are conditions of permanency.”⁶⁰

Sekera has not alleged that the Venetian flooring in the area where she fell is **continually** wet. Sekera’s claim that her circumstances are different from those in *Eldorado Club, Inc.*, is unfounded. While it is vigorously contested by Petitioners, Sekera’s claim is that she slipped on a temporary wet spot on the floor. This is the

⁵⁶ See RAB at 5, 15 (emphasis added) (citing *Eldorado Club, Inc.*, *supra*.)

⁵⁷ See *Eldorado Club, Inc.*, *supra* at 508, 377 P.2d at 175.

⁵⁸ See *id.* at 510, 377 P.2d at 176.

⁵⁹ See *id.* at 511, 377 P.2d at 176.

⁶⁰ *Id.*

same type of transient argument made in *Eldorado Club, Inc.* Moreover, Sekera's own expert opined that the subject floor is safe when dry.⁶¹ Regardless, Petitioners have produced sixty-eight (68) prior incident reports to Sekera in redacted form, which, if shown to be relevant, she can present as evidence at trial to establish notice. She does not need the private, personal information of all guests in any way identified within a prior incident report to make her case of constructive notice.

3. SEKERA HAS NOT ADDRESSED THE PROPORTIONALITY REQUIREMENT

Sekera has virtually ignored any discussion of the proportionality requirement under NRCP 26(b)(1) in the answering brief. She makes no effort whatsoever to show her needs for unfettered access outweigh the guests' privacy interests as required by NRCP 26(b)(1). Instead, she has dismissed it as a non-issue. Yet, it is at the very crux of this petition as well as the petition previously filed in case no. 79689-COA. Perhaps Sekera did not address it here because she recognizes the lack of any credible argument to justify her alleged right to own, use and distribute the private information of Venetian guests as she desires.

⁶¹ See Appendix, Vol. 10, Tab 44 at VEN 1807:10-21; 1808:8-22.

Sekera's dismissal of *Schlatter v. Eighth Judicial Dist. Court*, 93 Nev. 189, 192, 561 P.2d 1342, 1343-44 (1977), is misdirected.⁶² The *Schlatter* decision does not make specific reference to documents as being protected by privacy laws, as Sekera argues,⁶³ but focused on an order of "carte blanche discovery of all information contained in these materials without regard for relevancy."⁶⁴ Here, the District Court has ordered the "carte blanche" production of the private information of every Venetian guest involved in a prior incident report without any protection or limitation "without regard for relevancy" or for proportionality under NRCP 26(b)(1). The *Schlatter* decision most certainly applies here. It is consistent with the balancing test required under NRCP 26(b)(1). Sekera's pivot back to the novel "privilege" argument she is making here for the first time only highlights the weakness her position.⁶⁵

Sekera prefaces her discussion of *Izzo v. Wal-Mart Stores, Inc.*, 2016 U.S. Dist. LEXIS 12210; 2016 WL 409694, with the following: "For their position on **privilege**, Defendants cite a federal case"⁶⁶ (*Id.*) Yet, as Sekera well knows, Petitioners did not present the *Izzo* case to this Honorable Court to support a

⁶² See RAB at 15-16.

⁶³ See *id.* at 16.

⁶⁴ *Schlatter v. Eighth Judicial Dist. Court*, 93 Nev. 189, 192, 561 P.2d 1342, 1343-44 (1977).

⁶⁵ See RAB at 16 (emphasis added).

⁶⁶ *Id.*

privilege claim. The *Izzo* case is, in fact, on point, as the federal district court applied the relevancy and proportionality principles of FRCP 26(b)(1) to reach a decision in favor of protecting the prior incident information sought by the plaintiff. Sekera's reference to "privilege" here is simply a clever way of bolstering her novel "privilege" argument, raised for the first time in her answering brief, attempting to make it appear to be not so novel.

Sekera's attempt to differentiate *Rowland v. Paris Las Vegas*, 2015 U.S. Dist. LEXIS 105513; 2015 WL 4742502, in the answering brief also falls short.⁶⁷ The only argument Sekera presents here is that Petitioners have not asserted that NRCP 26(b)(1) requires a "balancing test" or that there is "a constitutionally-based right of privacy."⁶⁸ As this Honorable Court will recall, Petitioners offered the *Rowland* case as an example of how NRCP 26(b)(1) should be applied in the instant litigation, where the privacy rights of third parties are at issue.⁶⁹ In *Rowland*, the court noted that "Federal courts ordinarily recognize a constitutionally-based right to privacy that can be raised in response to discovery requests."⁷⁰ The *Rowland* court, in fact, provides that a "balancing test" is required when weighing issues such as the one at hand under NRCP 26(b)(1).⁷¹ Sekera's

⁶⁷ *Id.* at 17.

⁶⁸ *See id.*

⁶⁹ *See* Pet. at 24-25.

⁷⁰ *See Rowland, supra* at *7.

⁷¹ *See id.*

suggestion that Petitioners never previously argued that “balancing test” be used here is wholly inaccurate.⁷² Sekera’s assertion that there are no Constitutionally protected privacy rights involved here is entirely contrary to the holding in *Rowland*.⁷³

4. PETITIONERS HAVE AN INTEREST IN PROTECTING GUEST PRIVACY RIGHTS

Petitioners have asserted an interest in protecting the privacy rights of Venetian guests. They referenced NRS 603A.010 *et seq.* in the petition to advise this Honorable Court that the Nevada Legislature has expressed a general desire to protect private personal information of non-parties to litigation such as we have here. Sekera claims that reference to this statute was not raised before the District Court below is incorrect.⁷⁴ The only novel argument brought before this Honorable Court between the parties is that of “privilege” proffered by Sekera.

Sekera dismisses Petitioners’ argument that production of private information surrounding its guests involved in prior incidents may subject them to litigation.⁷⁵ Bear in mind, however, that Sekera has demanded that she not only be

⁷² See RAB at 17. See, *i.e.*, Appendix, Vol. 7, Tab 42 at VEN 1021-22.

⁷³ See *id.* at 18.

⁷⁴ See *id.*, compare Appendix, Vol. 11, Tab 49 at VEN 2155-56; Vol. 12, Tab 49 at VEN 2211-12 (included in Exhibits J and K of *Defendants’ Limited Objection to Discovery Commissioner’s Report and Recommendations Dated December 2, 2019*, filed December 12, 2019).

⁷⁵ See RAB at 19-21.

allowed to obtain names, addresses, phone numbers and other identifying information of Venetian guests for her to use in this litigation, but also to freely circulate to anyone she desires outside this litigation, however she desires. As previously noted, that is something Sekera avoided addressing entirely in the answering brief. Petitioners have no alternative but to oppose such an overreaching, unnecessary, unfair and untenable result.

The incident reports at issue contain the sensitive and private information of individuals who are not parties to this lawsuit, who did not witness Sekera's incident, and would not have any information of facts or circumstances related to Sekera's unique incident. The incident reports are prepared by emergency medical technicians and contain HIPAA related information surrounding a person's health, from a given medical history to vitals taken on scene. Sekera has altogether ignored the fact that Petitioners have a recognized interest in protecting the disclosure of personal client information, as unauthorized disclosure would likely damage the Petitioners' guest relationships.⁷⁶ Disclosure of the Venetian guest information to Sekera and allowing her to disseminate it in perpetuity would most certainly damage the Venetian/guest relationship. That would be not only unfair to

⁷⁶ See *Gonzales v. Google, Inc.*, 234 FRD 674, 684 (N.D. CA 2006) (disclosing client information "may have an appreciable impact on the way which [the company] is perceived, and consequently the frequency with which customers use [the company]").

Venetian, but to all its guests who had no expectation that their personal information would be shared freely on attorney forums for the purpose of “mining information” to promote litigation.

This petition for relief relates directly to the privacy rights of guests involved in other incidents reported by owners and innkeepers, to protect them from the dissemination of personal information (*i.e.* incident facts, physical condition, health history, etc.), attached to their names and contact information. Sekera’s claim that she needs this private information, with the right to share it with impunity outside the litigation, “is necessary to properly adjudicate her claim” is unfounded.⁷⁷

Contrary to her claim within the answering brief, Sekera is not the victim in this dispute. Petitioners are not hiding information from Sekera, as she claims.⁷⁸ To the contrary, Sekera has received sixty-eight (68) prior incident reports in redacted form from November 4, 2013 to November 4, 2016. No documents from November 4, 2011 to November 4, 2013 have been produced, pending resolution of this present dispute, for which Petitioners have received a stay. Sekera claims she “will be prejudiced” if she does not receive unlimited access to and use of the private information she seeks;⁷⁹ yet, she never explains how her right to both

⁷⁷ See RAB at 21.

⁷⁸ See RAB at 21.

⁷⁹ See *id.*

obtain the private guest information and then share it as she pleases balances in her favor after considering the factors in NRCP 26(b)(1).

IV. CONCLUSION

Sekera did nothing below to demonstrate her right to private guest information balanced with the rights of Venetian guests involved in other incidents. Sekera did not meet the required criteria of NRCP 26(b)(1) once Petitioners demonstrated the “good cause” required under NRCP 26(c). Sekera’s novel “privilege” claim has no basis whatsoever, as it was never raised before and not documents have been produced per the March 13, 2020 order due to the pending stay granted by this Honorable Court. Petitioners respectfully submit that the relief requested should be granted not just for Venetian guests, but for all like situated persons sharing personal information following an incident on the location of a Nevada property owner.

DATED this 14 day of May, 2020.

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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:

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

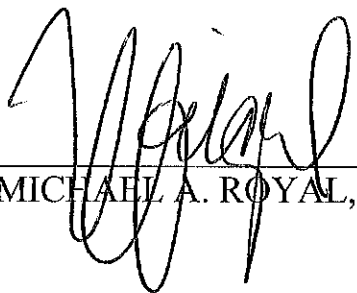
3. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains **6,427 words** in compliance with NRAP 32(a)(1)(A)(ii) (having a word count of less than 7,000 words).

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

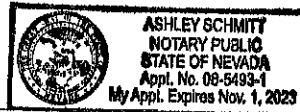


MICHAEL A. ROYAL, ESQ.

SUBSCRIBED AND SWORN to before
me by Michael A. Royal, Esq., on this
14 day of May, 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 15 day of May, 2020, I served true and correct copy of the foregoing PETITIONERS' REPLY BRIEF, by delivering the same via the Court's CM/ECF system which will send notification to the following:

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