IN THE SUPREME COURT OF THE STATE OF NEVADA

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



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

**APPENDIX TO PETITIONERS' EMERGENCY PETITION FOR WRIT OF MANDAMUS AND/OR WRIT OF PROHIBITION UNDER NRAP RULES 21(a)(6) AND 27(e) AND ALTERNATIVE EMERGENCY MOTION TO STAY UNDER NRAP RULES 8 AND 27(e)**

**Volume 5 (Exhibits 27-37)**

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Petitioners, VENETIAN CASINO RESORT, LLC and LAS VEGAS SANDS, LLC, by and through their counsel of record, Royal & Miles LLP, hereby submit is Appendix in compliance with Nevada Rule of Appellate Procedure 30.

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The Appendix shall be contained in 13 separate volumes in accordance with NRAP 30(c)(3) (2013), each volume containing no more than 250 pages.

DATED this 13 day of March, 2020.

ROYAL & MILES LLP

By: _____

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Counsel for Petitioners

## 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 17 day of March, 2020, I served true and correct copy of the foregoing APPENDIX TO PETITIONERS' EMERGENCY PETITION FOR WRIT OF MANDAMUS AND/OR WRIT OF PROHIBITION UNDER NRAP RULES 21(a)(6) AND 27(e) AND ALTERNATIVE EMERGENCY MOTION TO STAY UNDER NRAP RULES 8 AND 27(e) Volume 5 (Exhibits 27-37), by electronically filed with the Clerk of the Court by using ECF service which will provide copies to all counsel of record registered to the receive CM/ECF notification and by delivering the same via U.S. Mail addressed to the following::

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*Respondent*

Ashley Schmitt
An employee of Royal & Miles LLP

#79689-COA



IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court No.
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VENETIAN CASINO RESORT, LLC, a Nevada limited liability company;
LAS VEGAS SANDS, LLC, a Nevada limited liability company,
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Respondent,
JOYCE SEKERA, an individual,
Real Party in Interest

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**Volume 1 of 3 (Exhibits 1-14)**

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19-40386

Petitioners, VENETIAN CASINO RESORT, LLC and LAS VEGAS SANDS, LLC, by and through their counsel of record, Royal & Miles LLP, hereby submit is Appendix in compliance with Nevada Rule of Appellate Procedure 30.

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The Appendix shall be contained in 3 separate volumes in accordance with NRAP 30(c)(2) (2013), each volume containing no more than 250 pages.

DATED this 11 day of September, 2019.

ROYAL & MILES LLP

By _____

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## 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 26 day of September, 2019, I served true and correct copy of the foregoing APPENDIX TO PETITIONERS' EMERGENCY PETITION FOR WRIT OF MANDAMUS AND/OR WRIT OF PROHIBITION UNDER NRAP RULES 21(a)(6) AND 27(e) AND EMERGENCY MOTION UNDER NRAP 8 STAYING EXECUTION OF ORDER DIRECTING PETITIONERS TO DISCLOSE PRIVATE, PROTECTED INFORMATION OF GUESTS NOT INVOLVED IN UNDERLYING LAWSUIT Volume 1 of 3 (Exhibits 1-14), by delivering the same via U.S. Mail addressed to the following:

Keith E. Galliher, Jr., Esq.
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*Attorneys for Real Party in Interest*

Honorable Kathleen Delaney
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*Respondent*

Ashley Schmidt
An employee of Royal & Miles LLP

#79689-COA

FILED

SEP 27 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

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Sep 26 2019 02:57 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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Petitioners,

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JOYCE SEKERA, an individual,
Real Party in Interest

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**Volume 2 of 3 (Exhibits 15-19)**

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19-40388

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DATED this 26 day of September, 2019.

ROYAL & MILES LLP

By _____

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*Counsel for Petitioners*

## 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 26 day of September, 2019, I served true and correct copy of the foregoing APPENDIX TO PETITIONERS' EMERGENCY PETITION FOR WRIT OF MANDAMUS AND/OR WRIT OF PROHIBITION UNDER NRAP RULES 21(a)(6) AND 27(e) AND EMERGENCY MOTION UNDER NRAP 8 STAYING EXECUTION OF ORDER DIRECTING PETITIONERS TO DISCLOSE PRIVATE, PROTECTED INFORMATION OF GUESTS NOT INVOLVED IN UNDERLYING LAWSUIT Volume 2 of 3 (Exhibits 15-19), by delivering the same via U.S. Mail addressed to the following:

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Honorable Kathleen Delaney
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Las Vegas, NV 89155
*Respondent*

An employee of Royal & Miles LLP

tt 79689-02A



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**Volume 3 of 3 (Exhibits 20-22)**

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DATED this 26 day of September, 2019.

ROYAL & MILES LLP

By _____

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Gregory A. Miles, Esq. (SBN 4336)
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*Counsel for Petitioners*

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Respondent,
JOYCE SEKERA, an individual,
Real Party in Interest

---

**APPENDIX TO PETITIONERS' REPLY BRIEF**
**Volume 4 (Exhibits 23-26)**

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| 18 | Findings of Fact, Conclusions of Law and Order Granting Petitioners' Motion for Partial Summary Judgment on Mode of Operation Theory of Liability (filed July 23, 2019) | VEN 449-452 | 2 |
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| 22 | Privacy Policy, The Venetian Resort Las Vegas (July 7, 2019), https://www.venetian.com/policy.html | VEN 486-495 | 3 |
| 23 | Order Regarding Plaintiff's Motion for Terminating Sanctions for Willful Suppression of Evidence Pursuant to Rule 37; and Defendant's Related Motion(s) to Strike | VEN 496-498 | 4 |
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| 25 | Documents Related to Termination of Gary Shulman | VEN 509-514 | 4 |
| 26 | Notice of Taking Deposition (Gary Shulman) (April 1, 2019) | VEN 515-517 | 4 |

The Appendix shall be contained in 4 separate volumes in accordance with NRAP 30(c)(3) (2013), each volume containing no more than 250 pages.

DATED this 28 day of October, 2019.

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 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 28 day of October, 2019, I served true and correct copy of the foregoing APPENDIX TO PETITIONERS' REPLY BRIEF Volume 4 (Exhibits 23-26), by delivering the same via the Court's CM/ECF system which will send notification to the following:

Keith E. Galliher, Jr., Esq.
THE GALLIHER LAW FIRM
1850 E. Sahara Avenue, Suite 107
Las Vegas, NV 89014
*Attorneys for Real Party in Interest*

Honorable Kathleen Delaney
Eighth Jud. District Court, Dept. 25
200 Lewis Avenue
Las Vegas, NV 89155
*Respondent*

Ashley Schmitt
An employee of Royal & Miles LLP

#79689-COA

FILED

SEP 27 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Electronically Filed
Sep 26 2019 02:49 p.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

EMERGENCY PETITION UNDER NRAP 27(e)

PETITIONERS' EMERGENCY PETITION FOR WRIT OF MANDAMUS AND/OR WRIT OF PROHIBITION UNDER NRAP RULES 21(a)(6) AND 27(e)

ACTION IS NEEDED IMMEDIATELY BEFORE PETITIONER IS REQUIRED TO DISCLOSE THE CONFIDENTIAL INFORMATION

ALTERNATIVE EMERGENCY MOTION TO STAY UNDER NRAP RULES 8 AND 27(e) IS BEING FILED CONCURRENTLY WITH THIS PETITION

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
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gmiles@royalmileslaw.com

19-40385

## 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 disclose. 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 26 day of September, 2019.

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

## ROUTING STATEMENT

This case is presumptively assigned to the Court of Appeals to hear and decide pursuant to NRAP Rule 17(b). NRAP Rule 17(b)(13) provides the Court of Appeals is presumptively assigned to hear and decide: "Pretrial writ proceedings challenging discovery orders ...." The instant writ petition challenges a discovery order denying Petitioners request to protect the information of non-litigant individuals from disclosure. This statement is made pursuant to NRAP 28(a)(5).

**AFFIDAVIT OF MICHAEL A. ROYAL, ESQ. IN SUPPORT OF PETITIONERS' EMERGENCY PETITION FOR WRIT OF MANDAMUS AND/OR WRIT OF PROHIBITION AND *NRAP 27(E) CERTIFICATE***

STATE OF NEVADA )
) ss:
COUNTY OF CLARK )

1. I am an attorney licensed to practice in the State of Nevada and am an attorney at the law firm of Royal & Miles LLP, Attorneys for Petitioners VENETIAN CASINO RESORT, LLC and LAS VEGAS SANDS, LLC, in support of this PETITIONERS' EMERGENCY PETITION FOR WRIT OF MANDAMUS AND/OR WRIT OF PROHIBITION UNDER NRAP RULES 21(a)(6) AND 27(e).

2. The telephone numbers and office addresses of the attorneys for the Real Party in Interest are listed as follows:

Keith E. Galliher, Jr., Esq.
THE GALLIHER LAW FIRM
1850 E. Sahara Avenue, Suite 107
Las Vegas, NV 89014
(702) 735-0049
Attorneys for Real Party in Interest

3. Counsel for Real Party in Interest was served with this Petition via electronic service as identified on the proof of service in this document. Prior to filing this Petition and Motion my office contacted, by telephone, the clerk of the Supreme Court, the Clerk of the Eight Judicial District Court of the State of Nevada, and Real Party in Interest's attorney to notify them that Petitioners were

filing the instant Petitioners' Emergency Petition for Writ of Mandamus and/or Writ of Prohibition Under NRAP Rules 21(A)(6) And 27(E).

4. Petitioners will be required to divulge confidential information of non-party litigants immediately, if this Court does not take action. Concurrently with this Petition, Petitioner is filing an Emergency Motion for Stay pursuant to Rules 8 and 27(e). If this Court grants that motion, then this Petition may be considered on a non-emergency basis.

5. This case is set to begin trial on August 3, 2020. Plaintiff has alleged that she sustained injuries in a slip and fall due to the presence of a foreign substance on a marble floor within the Venetian on November 4, 2016.

6. On January 4, 2019, in response to a request for production from Plaintiff, Petitioners produced redacted documents regarding reports of other incidents occurring on property from November 4, 2013 to November 4, 2016. Petitioners had redacted the identity and personal information of the individuals identified in these reports. Plaintiff's attorney objected to the redactions. Accordingly, on February 1, 2019, Petitioners filed a motion for protective order under NRCP 26(c) to protect the identities of Venetian patrons involved in the reports produced to Plaintiff. The motion was granted by the Discovery Commissioner in a Report and Recommendation filed April 4, 2019, providing that

reports produced by Petitioners should be in redacted form and be restricted to use only for purposes of the present litigation.

7. Plaintiff filed an objection with the District Court, which issued an order dated July 31, 2019 reversing the Discovery Commissioner and ordering the production of prior incident reports in unredacted form, without any protection related to the circulation of information obtained by Plaintiff in the instant litigation (such that the documents would divulge the names, addresses, telephone numbers, dates of birth, social security number, and driver's license/identification card numbers of individuals who are not parties or witnesses to the instant tort action and such information could be freely shared with third-parties who are not involved in the instant litigation). Petitioners learned that all the redacted documents produced by Petitioners to Plaintiff have been shared with attorneys and persons outside this litigation, and that Plaintiff's attorney plans to share the unredacted reports as well.

8. Petitioners filed a motion for reconsideration and stay of the District Court's order which was heard on September 17, 2019. The District Court denied the Petitioners' motion. On September 18, 2019, the Discovery Commissioner ruled that Petitioners now have to produce incident reports from November 4, 2011 to the present, representing three years of post-incident guest related reports of slip and fall events occurring on the Venetian marble floor from a foreign substance.

All such reports must be produced in unredacted form, per the Discovery Commissioner, based on the District Court's order of July 31, 2019 and its forthcoming ruling denying reconsideration. Production of this information will result in irreparable harm to the privacy of the individuals identified in the reports, the Venetian, and its guests.

9. The relief sought in this Writ Petition is not available by the District Court. Petitioners made a written Motion for Stay with the District Court on August 12, 2019 and again orally on September 17, 2019. The District Court denied the Motion for Stay and indicated that relief would need to be obtained from the appellate court pursuant to NRAP 8. It is imperative this matter be heard at the Court's earliest possible convenience.

10. I certify that I have read this petition and, to the best of my knowledge, information and belief, this Petition complies with the form requirements of Rule 21(d) and is not frivolous or interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

11. I further certify that this brief complies with all Nevada Rules of Appellate Procedure, including the requirements of Rule 28(e) every assertion in the brief regarding matters in the record be supported by a reference to the appendix where the matter relied upon is to be found. I understand I may be

subject to sanctions in the event the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

12. I have discussed the PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS with my Client, and have obtained authorization to file this Writ Petition.

Further affiant sayeth naught.

MICHAEL A. ROYAL, ESQ.

SUBSCRIBED AND SWORN to before me by Michael A. Royal, Esq., on this 26 day of September, 2019.

ASHLEY SCHMITT
NOTARY PUBLIC
STATE OF NEVADA
Appt. No. 08-5498-1
My Appt. Expires Nov. 1, 2019

NOTARY PUBLIC in and for said County and State

## PETITION

COMES NOW, Petitioners, VENETIAN CASINO RESORT, LLC, and LAS VEGAS SANDS, LLC ("Petitioners"), by and through their counsel of record, ROYAL & MILES LLP, and hereby petition this Court for a Writ of Prohibition and/or Mandamus under NRAP 21(a) ordering the Eighth Judicial District Court to vacate the July 31, 2019 order compelling Petitioners to produce unredacted reports of other incidents occurring on the property of the Venetian Resort Hotel Casino ("Venetian"). Petitioners further request that this relief be granted on an emergency basis pursuant to NRAP 27(e) and NRAP 21(a)(6). This matter involves the compelled disclosure of non-litigants private personal information and if the emergency relief is not granted irreparable harm will result.

Alternatively, Petitioners are filing concurrently with this petition a motion for an emergency stay of the order pursuant to NRAP 8(a) and NRAP 27(e). This motion requests a stay of the July 31, 2019 order. If this Court grants that motion then this writ petition may be considered on a non-emergency basis.

Pursuant to NRAP Rule 17(b)(13) this writ petition challenges a discovery order and should presumptively be assigned to the Court of Appeals.

This Petition and Motion are based on the following Memorandum of Points and Authorities, the Appendix of record and such oral arguments as presented to this Honorable Court.

DATED this 26 day of September, 2019.

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

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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. STATEMENT OF THE CASE

This case arises from an alleged slip and fall at the Venetian that occurred on November 4, 2016, involving JOYCE SEKERA ("Sekera"). More specifically, Sekera alleges that as she was walking through the Grand Lux rotunda area of the Venetian property, she slipped on water and fell, resulting in bodily injuries.

In the course of discovery, Sekera requested that Petitioners produce incident reports related to slip and falls from November 4, 2013 to the present. Petitioners responded by producing sixty-four (64) redacted prior incident reports from November 4, 2013 to November 4, 2016. When Sekera objected to the production of redacted reports, 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 with an attorney representing a plaintiff in unrelated litigation against Petitioners also in the Eighth Judicial District Court. One day prior to the March 13, 2019 hearing on Petitioners' motion for protective order, the subject documents were filed with the district court in a different department on a different matter.

Following the hearing on March 13, 2019, the Discovery Commissioner issued a Report and Recommendation granting Petitioners' motion for protective order noting the need to protect the privacy interests of the uninvolved third-parties and potential HIPAA related information. Sekera filed an objection to the

Discovery Commissioner's Report and Recommendation on April 4, 2019, which was heard by the Honorable Kathleen Delaney in Department XXV of the Eighth Judicial District Court on May 14, 2019. Judge Delaney, having been advised of the circumstances surrounding Sekera's sharing of information, nevertheless reversed the Discovery Commissioner and ordered Petitioners to produce prior incident reports in unredacted form without any restrictions related to dissemination of private guest information.

The order reversing the Discovery Commissioner's Report and Recommendation of April 4, 2019 was filed on July 31, 2019. Pursuant to the order, Sekera is to receive unredacted incident reports involving other Venetian guests, including those guests' names, addresses, telephone numbers, dates of birth, social security numbers, and driver's license/identification card numbers. Under the current order Sekera has no restrictions whatsoever on how the private information of Venetian guests will be used and shared. Petitioners filed a motion for reconsideration on an order shortening time with a request to stay the order allowing sufficient time to file a writ of mandamus and/or writ of prohibition with the Nevada Supreme Court, which was not heard until September 17, 2019. Judge Delaney denied Petitioners' motion for reconsideration and their request for a stay.

The motion for protective order filed by Petitioners was intended to protect the privacy of Venetian guests. Information related to prior incidents, such as the

date, time, place and circumstances, identifying Venetian employees involved, is already available to Sekera via the initial production. While Judge Delaney expressed some trepidation regarding the potential misuse of the subject private information, she did not provide any protection, concluding that she could not find a legal basis upon which to protect the private information at issue. Yet, when this issue was again before Judge Delaney on September 17, 2019, she expressed a belief that the unredacted incident reports were "for attorney eyes only." The District Judge was mistaken; yet, she still would not revisit the order and provide the requested protection. Petitioners assert that once this information is produced in unredacted form, it will be immediately shared with others outside the litigation and the harm will be irreparable. Accordingly, circumstances necessitate the filing of this writ in order to clarify important issues of law and right the injustice to Petitioners as well as any other property owners or innkeepers concerned with the protection of patron privacy.

## II. RELIEF SOUGHT

Pursuant to Nev. Const. Art. 6, § 4, NRS § 34.320 or NRS § 34.160 and NRAP 21, Petitioners request that this Court issue a Writ of Mandamus and/or Writ of Prohibition instructing Respondent, the Eighth Judicial District Court of the State of Nevada and the Honorable Judge Delaney to:

1. Vacate the July 31, 2019 Order directing Petitioners to produce unredacted other incident reports to Sekera without any protections requested under NRCP 26(c); and

2. Provide clarification on the issue of privacy rights of guests and non-employees identified in other incident reports obtain and retained by Petitioners and other like property owners and innkeepers.

Petitioner is requesting this relief on an emergency basis as irreparable harm will be caused to individuals who are not involved in this litigation if there private personal information is released before this Court rules on this writ petition. Concurrently with this writ petition Petitioner is filing an emergency motion to stay the July 31, 2019 Order. If this Court grants that motion, then this writ may be considered on a non-emergency basis.

## III. ISSUES PRESENTED

ISSUE ONE: Whether the District Court erred, as a matter of law, in denying Petitioners' motion for a protective order under NRCP 26(c) related to the privacy of guest information within other incident reports having nothing to do with the subject incident.

ISSUE TWO: Whether the District Court erred, as a matter of law, in denying Petitioners' motion for reconsideration related to the July 31, 2019 order denying Petitioners' motion for protective order under NRCP 26(c), failing to

weigh the issues of relevance and proportionality required under NRCP 26(b)(1) in refusing to provide protection of personal information of guests involved in other incidents on Venetian property.

## IV. STANDARD OF REVIEW

### A. Standards for Write Review and Relief.

The Nevada Supreme Court has original jurisdiction to issue writs of prohibition and mandamus. Nev. Const. Art. 6, § 4. Mandamus is available to compel performance of an act which the law especially enjoins as a duty resulting from an office, trust or station, or to control an arbitrary or capricious exercise of discretion. *Ivey v. Dist. Ct.*, 299 P.3d 354 (2013). *See also* NRS 34.160. "[W]here an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction, our consideration of a petition for extraordinary relief may be justified." *Mineral County v. State, Dep't of Conserv.*, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001) (internal citations omitted).

Writ relief is warranted where the Petitioners do not have a plain, speedy, and adequate remedy at law. *Millen v. District Court*, 122 Nev. 1245, 1250-1251 (2006). Special factors favoring writ relief include status of underlying pleadings, types of issues raised by the writ petition, and whether a future appeal will permit this court to meaningfully review the issues presented. *D.R. Horton v. District Court*, 123 Nev. 468, 474-75 (2007). An appellate court generally will address

only legal issues presented in a writ petition. *See, Poulos v. Eighth Jud. Dist. Ct.*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982). "[T]he standard" in the determination of whether to entertain a writ petition is '[t]he interests of judicial economy." *Smith v. Eighth Jud. Dist. Ct.*, 113 Nev. 1343, 1355, 950 P.2d 280, 281 (1997). When the parties raise only legal issues on appeal from a district court order, the Court reviews the matter de novo. *St. James Village, Inc. v. Cunningham*, 125 Nev. 211, 216 (2009).

Petitioners contend that if they are forced to reveal private information of guests involved in other Venetian incidents without requested protections, "the assertedly [private and confidential] information would irretrievably lose its [private and confidential] quality and petitioners would have no effective remedy, even later by appeal." *Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 350, 891 P.2d 1180, 1183-84 (1995). Guests involved in other incidents, who are adversely impacted by the present district court order, are not parties to the district court proceedings, and are themselves are not aggrieved parties within the meaning of NRAP 3A(a) rendering this the only forum for which relief can be granted. *Watson Rounds, P.C. v. Eighth Judicial Dist. Court*, 358 P.3d 228, 231 (Nev. 2015). In addition, the Supreme Court of Nevada is the proper forum to assess whether Petitioners are entitled to the relief being sought. Therefore, Petitioners

seek to protect the privacy rights of Venetian guests wholly unaffiliated with the present litigation.

Petitioners moved for a stay of execution in district court, which was denied. Due to the exigent circumstances, and the potential violation of NRS § 34.320, where privacy rights for hundreds of individuals wholly unconnected to the subject litigation are at issue, this Emergency Petition being filed with this Court pursuant to NRAP Rules 21(a)(6) and 27(e) asking this Court to grant the relief requested in less than 14 days. Alternatively, Petitioners herein move for an immediate stay pursuant to NRAP 8(a) so that the ordered discovery can be withheld until this Court can review the legal issues at hand in a non-emergency writ proceeding. Petitioners have no other available avenue for relief. This is a matter of great importance to Petitioners not only as to this litigation, but as to all future litigation, as there are presently no restrictions placed on Sekera regarding what she is allowed to do with the personal information ordered produced. Accordingly, without immediate relief or a stay, once Petitioners comply with the order by providing unredacted incident reports of unrelated matters to Sekera without any restrictions, there is no reasonable means of repairing the damage associated with Sekera's stated intent to distribute the information.

### B. This Petition Presents Extraordinary Circumstances Calling for Extraordinary Relief

The subject litigation arises from a slip and fall incident allegedly occurring due to a foreign substance on the Venetian marble floor on November 4, 2016. Petitioners argue that these prior incident reports have only marginal relevance to the case in light of prevailing Nevada law. *See, Eldorado Club, Inc. v. Graff*, 78 Nev. 507, 511, 377 P.2d 174, 176 (1962) ("where a slip and fall is caused by the temporary presence of debris or foreign substance on a surface, which is not shown to be continuing, it is error to receive "notice evidence" of the type here involved for the purpose of establishing the defendant's duty"). Given the questionable relevance of this discovery, Petitioners contend there is no need for the discovery to include personal information on non-litigants. On the other hand, the irreparable damages of providing this unredacted information to Sekera without any of the requested protection under NRCP 26(c), where Sekera has acknowledged an intent to share the information with persons outside the litigation, will cause irreparable harm to the identified individuals and Petitioner. Therefore Petitioners argue that it is clearly erroneous to require the production of this private guest information.

Absent intervention by this Court, Petitioners, and others similarly situated will suffer irreparable harm. In issuing its Order, the District Court created an avenue through which plaintiffs, in all premises liability negligence claims, can obtain reports of other unrelated incidents in unredacted form and not only use

them for purposes of the pending litigation, but to circulate them widely without restriction, thereby subjecting the private information of non-party former guests to abuse.

This case is set to commence trial on August 3, 2020. This Petition for Writ contains an important issue of law that will most certainly reoccur absent immediate direction from the Supreme Court. While Judge Delaney's rulings in this case are not controlling authority in other cases, it is common practice within the Eighth Judicial District Court for an attorney to attach rulings from other judges to motions as persuasive or suggestive of how a particular judge should handle a similar issue.

A substantial risk exists that Judge Delaney's ruling will be adopted by other judges in the Eighth Judicial District Court, and will result in an increase in cases in which plaintiffs seek unredacted other incident reports in similar cases without any privacy consideration or protection. Moreover, deciding this issue on Writ will promote judicial economy, as it will avert the expenditure of increased time associated with Sekera (and like plaintiffs) repeatedly contacting potentially hundreds of non-parties involved in matters wholly unaffiliated with the subject litigation to engage in a prolonged fishing expedition to obtain information not admissible at trial. The issue is compounded by the fact that Sekera has already shared information provided to her by Petitioners with numerous other litigants in

unrelated matters, which sharing began even while the initial motion for protective order was pending.

Moreover, on September 18, 2019, the Discovery Commissioner ordered that Petitioners must now produce incident reports for slip and falls occurring on Venetian premises following the November 4, 2016 incident. Because of the Court's prior July 31, 2019 order the referee felt compelled to also order that these records be produced in unredacted form, without any requested protections to address privacy. While this latter ruling is not the subject of this Writ, it highlights the scope of privacy issues now presented not only to Petitioners and their guests, but to all similarly positioned business owners and innkeepers.

Accordingly, Petitioners respectfully request that this Court grant the emergency petition vacating the District Court's July 31, 2019 order and issue an order directing the District Court to protect the private information of non litigant individuals.

## V. RELEVANT FACTS

This litigation arises from a slip and fall allegedly occurring from a foreign substance on the floor on November 4, 2016. The underlying case was filed on April 12, 2018 by Sekera, who alleged that on November 4, 2016 at approximately 1:00 pm, "Petitioners negligently and carelessly permitted a pedestrian walkway to be unreasonably dangerous in that they allowed liquid on the floor causing the

Sekera to slip and fall."[1] Sekera related to Venetian security personnel at the scene following the incident that "she was walking through the area when she slipped in what she believed was water on the floor."[2]

Sekera worked at a kiosk located in the Grand Canal Shops within the Venetian premises for nearly a year prior to the subject incident and testified in deposition that she walked through the subject fall area ("Grand Lux rotunda") hundreds of times prior to the subject fall without incident.[3] Sekera asserts that the condition which made the marble floors unsafe, causing her to slip and fall, was the presence of a liquid substance.[4] On June 28, 2019, Sekera filed a First Amended Complaint after receiving leave of court to include a claim for punitive damages.[5] In the First Amended Complaint, Plaintiff specifically alleged: "On or about November 4, 2016 at approximately 1:00 p.m. Defendants negligently and

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[1] Appendix, Vol. 1, Tab 1, VEN 001-04, *Complaint* (filed April 12, 2018) at VEN 002, ln 25-28.
[2] Appendix, Vol. 1, Tab 2, VEN 005-06, *Venetian Security Narrative Report, No. 1611V-0680* (November 4, 2016); Appendix Vol 1, Tab 3, VEN 007, *Acknowledgment of First Aid Assistance & Advice to Seek Medical Care, No. 1611V-0680*; Appendix Vol 1, Tab 4, VEN 008-014, *Venetian Security Scene Photos.*
[3] Appendix, Vol. 1, Tab 5, VEN 015-32, *Transcript of Joyce Sekera Deposition* (taken March 14, 2019) at VEN 021-025.
[4] *Id.* at VEN 018, ln 13-25; VEN 019, ln 1-4; VEN 026, ln 23; VEN 030, ln 10-25; VEN 031, ln 1-20.
[5] Appendix, Vol. 1, Tab 6, VEN 033-037, *First Amended Complaint* (filed June 28, 2019).

carelessly permitted a pedestrian walkway to be unreasonably dangerous in that they allowed liquid on the floor causing the Plaintiff to slip and fall."[6]

## VI. RELEVANT PROCEDURAL HISTORY

In the course of discovery, Sekera requested that Petitioners produce incident reports related to slip and falls on the Venetian marble floors from November 4, 2013 to the present.[7] Petitioners responded by producing sixty-four (64) incident reports related to events from November 4, 2013 to November 4, 2016, redacting the names, addresses, phone numbers, dates of birth and other personal information of the individuals identified in the reports.[8] When Sekera objected to the redactions, Petitioners filed Defendants' Motion for Protective Order with the Discovery Commissioner, seeking an order protecting the personal information of prior guests.[9] While the motion for protective order was pending, unbeknownst to Petitioners or the Discovery Commissioner, Sekera provided a copy of the redacted prior incident reports to another attorney involved in a

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[6] *Id.* at VEN 035, ln 4-7.
[7] Appendix, Vol. 1, Tab 7, , VEN 038-041, *Plaintiff's Request for Production of Documents and Materials to Defendant* (served August 16, 2018) at VEN 040, Request No. 7
[8] Appendix, Vol. 1, Tab 8, VEN 042-053, *Fifth Supplement to Defendants' 16.1 List of Witnesses and Production of Documents For Early Case Conference* (served January 4, 2019) at VEN 045, ln 9. .
[9] Appendix, Vol. 1, Tab 9, VEN 054-083, *Defendants' Motion for Protective Order* (filed February 1, 2019).

different lawsuit.[10] Petitioners became aware of this sharing after the motion for protective order was filed and thereafter moved to keep the documents in redacted form for attorney eyes only.[11] One day prior to the March 13, 2019 hearing on the motion for protective order, also unbeknownst to Petitioners or the Discovery Commissioner, the redacted prior incident reports were filed in another department of the Eighth Judicial District Court in separate litigation against Venetian.[12]

At the March 13, 2019 hearing on Petitioners' motion for protective order, Sekera did not advise the court or Petitioners' counsel that the redacted prior incident reports had been shared with counsel outside the litigation and then filed

[10] Appendix, Vol. 1, Tab 10, VEN 084-085, *Declaration of Peter Goldstein, Esq.* (date February 13, 2019) at VEN 084, ln 21-25, indicating that the subject prior incident reports were produced to Mr. Goldstein by Sekera counsel on February 7, 2019.

[11] Appendix, Vol. 1, Tab 11, VEN 086-096, *Defendants' Reply to Plaintiff's Opposition to Motion for Protective Order* (filed March 5, 2019). (At this time, Petitioners were unaware that redacted copies of prior incident reports produced on January 4, 2019 in this matter had been provided to Peter Goldstein, Esq., on February 7, 2019, after the motion for protection had been filed with the Court and before it was heard on March 13, 2019, only that some kind of sharing between counsel in other involving Venetian was occurring.)

[12] Appendix, Vol. 1, Tab 12, VEN 140-85, *Sekera's Reply to Defendant Venetian Casino Resort, LLC's Opposition to Sekera's Motion for Terminating Sanctions, in the matter of Smith v. Venetian, case no. A-17-753362-C* (filed March 12, 2019), at VEN 141, ln 15-26, VEN 147, ln 12-13, VEN 173.

with the district court in another department.[13] The Discovery Commissioner granted Petitioners' motion for protective order.[14]

Sekera filed an objection to the April 4, 2019 Discovery Commissioner's Report and Recommendation, which was heard by the district judge on May 14, 2019. The district judge, being apprised of Sekera's past conduct and her intention to freely share unredacted information with others outside the litigation, wholly reversed the Discovery Commissioner's Report and Recommendation.[15] Judge Delaney relayed that she could not identify a legal basis in which to protect the identity of Petitioners' guests in prior incident reports or to grant a protective order preventing Sekera's counsel from distributing them as he desires to persons wholly unaffiliated with the subject litigation.[16] However, Judge Delaney added the following:

> I struggle with the decision in all candor because I do think because of the sheer volume of the amount of people involved here, that it could become something that's problematic. It could be viewed as something that would be something, like, a -- you know, a marketing list that's out there on the loose that somebody could get their hands on and tie into, but I can't just because of that qualm tie it up.

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[13] Appendix, Vol. 1, Tab 13, VEN 186-200, *Recorder's Transcript of Hearing [On] Defendant's Motion for Protective Order* (March 13, 2019).
[14] Appendix, Vol. 1, Tab 14, VEN 201-06, *Discovery Commissioner's Report and Recommendation* (filed April 4, 2019), VEN 201-206.
[15] Appendix, Vol. 2, Tab 15, VEN 207-66, *Transcript of Hearing on Objection to Discovery Commissioner's Report* (May 14, 2019).
[16] *See id.* at VEN 251, ln 22-25; VEN 252, ln 1-25; VEN 253, ln 1-2.

* * *

> ... I would caution Mr. Galliher that, you know, how you share this information who gets ahold (sic) of it and who has what information doesn't necessarily protect folks from being upset and coming after and wanting to attack this. . . . but it is potentially problematic to the extent that this information could be shared and could contain personal identifying information. There is -- there is statutory law out there that talks about those who come into possession of large quantities of information that contain personal identifying information and do not handle it carefully and disseminate it or do other things with it.[17]

Despite the caution given by the Court to Sekera counsel, the Order of July 31, 2019 does not preclude counsel from freely distributing information obtained in this litigation.[18] The July 31, 2019 Order addressing the prior incident reports merely provides: "the Court strongly cautions Plaintiff to be careful with how she shares and uses this information"; however, no actual protection of the subject guest information was provided.[19]

Upon receipt of the Court's order on July 31, 2019, Petitioners filed a motion for leave to file a motion for reconsideration on the issue of the required production of unredacted incident reports on an order shortening time, with a motion to stay pending application of a writ on the issue in the alternative.[20] The

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[17] *See id.* at VEN 254, ln 10-16, 24-25; VEN 255, ln 1-3, 14-22.
[18] Appendix, Vol. 2, Tab 16, VEN 267-70, *Order* (filed July 31, 2019).
[19] *Id.* at VEN 269, ln 11-14.
[20] Appendix, Vol. 2, Tab 17, VEN 271-448, *Motion for Leave to File Motion for Reconsideration on Order Reversing Discovery Commissioner's Report and Recommendation and Motion to Stay Order Until Hearing On Reconsideration or,*

hearing was initially set for August 27, 2019, but was moved to September 17, 2019 at the request of Sekera counsel.[21]

At the September 17, 2019 hearing, Judge Delaney stated at the outset that she was under the mistaken impression that the order related to production of other Venetian incident reports was for attorney eyes only.[22] Consider the following exchange from the hearing:

> [MR. ROYAL]: I think, Your Honor, that the thing that we want to point out is as it relates to the -- the privacy concerns that my client has, once -- once these documents are produced and in unredacted form, they're out there. There's nothing in the present order that prevents plaintiff's counsel from sharing them with anyone and everyone. Even though the Court has expressed, in the Order, some concerns or at least Your Honor

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*Alternatively, Motion to Stay All Proceedings Pending Application for Writ of Mandamus On Order Shortening Time* (filed August 12, 2019).

[21] After the requested expedited hearing date was set, Sekera requested an extension of the hearing to accommodate counsel's trial schedule. On July 23, 2019, the district court entered an order granting Petitioners' motion for partial summary judgment on Sekera's claim that the mode of operation doctrine of liability applies under the given set of circumstances. (Appendix, Vol. 2, Tab 18, VEN 449-52, *Findings of Fact, Conclusions of Law and Order Granting Petitioners' Motion for Partial Summary Judgment on Mode of Operation Theory of Liability* (filed July 23, 2019). On August 28, 2019, the district court issued an order granting a continuance of discovery and the trial. (*See* Appendix, Vol. 2, Tab 19, VEN 453-55, *Order Granting in Part and Denying in Part Sekera's Motion to Extend Discovery Deadlines and Continue Trial (Second Request) on Order Shortening Time* (filed August 28, 2019).) The new discovery cut-off is now April 6, 2020. (*Id.* at VEN 455, ln 9-10.) Accordingly, the hearing on Petitioners' motion for reconsideration was held on September 17, 2019.

[22] Appendix, Vol. 3, Tab 20, VEN 456-83, *Transcript of Hearing on Motion for Leave to File Motion for Reconsideration* (September 17, 2019), at VEN 460, ln 4-25; VEN 461, ln 1-7.

kind of admonished them to be a little careful, I mean, there's no teeth in any –

THE COURT: Well, and it's funny, and I don't mean to interrupt you, but I want to share this point with you. It's funny as I was reading the briefings I'm like, we didn't do that? Because it felt to me like when we talked about it, that I made it clear that this was to be for attorneys to have for -- because I felt they were entitled to this evidence, but not necessarily -- and we know coming in that, yes, Mr. Galliher has some of the information he has because someone else in plaintiffs' bar has shared with him things, **but I thought we had a discussion about, you know, while we maybe numbers or circumstances or things, you know, would somehow be public record or known that anything that was private or personal to these individuals really is not – that would be personal identifiers, but otherwise would need to be redacted out of litigation, maybe, you know, the attorneys would need to see to have some ability to contact or follow up, but it would not be something that could be circulated to others. We didn't clarify any of that?**

MR. ROYAL: We did not, and I appreciate the Court bringing that up. That was our primary concern in the first place when we filed our motion before the Discovery Commissioner. Our concern was that this was – all this information would be for Attorneys Eyes Only. And, of course, the Discovery Commissioner granted that, and she also granted that we would leave the prior Incident Reports in redacted form.[23]

Petitioners argued that Plaintiffs did not meet the requirements of NRCP 26(b)(1) to demonstrate relevance and proportionality in light of the privacy rights of guests involved in unrelated other incidents on Venetian property and *Eldorado*

[23] *Id.* at VEN 460, ln 4-25; VEN 461, ln 1-13 (emphasis added).

*Club, Inc., supra.*[24] Judge Delaney agreed that there is merit to looking at case holdings by the United States District Court where it has addressed this issue and ruled under near identical circumstances.[25] However, Judge Delaney determined that she would not reconsider the issue, finding the July 31, 2019 order to be in agreement with Nevada law, finding that "the Court's prior decision was sound [and] ... supported by the case law."[26] Judge Delaney expressly denied Petitioners' request for a stay pending the filing of this writ.[27] In so doing, Judge Delaney added:

> And we understand that this information is going to be not only received by the plaintiff, but it's going to potentially be shared with others, but we think that that unbalance (sic) is something that is a natural perhaps circumstance or consequence of what we have in these cases, but it is allowed in this case because it is relevant to the actual case that the plaintiffs have brought, and it is calculated to not only be relevant information, but lead to discovery of relevant information.[28]

However, Judge Delaney also stated: "Because there is something here that could cause them [the appellate court] to take a look at it and make a decision, I certainly believe that this [a writ] is a viable option for the Venetian to pursue if they so

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[24] *See* Appendix, Vol. 2, Tab 17, VEN 271-448, Appendix, Vol. 3, Tab 20, VEN 456-83, *generally*.
[25] *See* Appendix, Vol. 3, Tab 20, at VEN 474, ln 6-16.
[26] *Id.* at VEN 475, ln 4-9.
[27] *Id.* at VEN 476, ln 24-25; VEN 477, ln 1-13.
[28] *Id.* at VEN 476, ln 7-15 (emphasis added).

choose."[29] In so doing, the district court judge relayed that she welcomes some guidance on this issue.[30] That stated, the judge stated: "if you are going to get relief on this point, Mr. Royal, it is going to have to come from Mandamus relief, because I think we have fully flushed out, fully vetted and fully considered the matters at this level, and that the Court's ruling that was previously made is sound and is going to stand."[31] Petitioners therefore have no other avenue for seeking relief and, accordingly, this emergency petition for stay is properly before this Honorable Court.

This writ is filed prior to the filing of the order on Petitioners' motion for reconsideration, which was the subject of the September 17, 2019 hearing, since reconsideration was denied and the July 31, 2019 order is the controlling order at issue.

On a related note, on September 18, 2019, the Discovery Commissioner, based on Judge Delaney's prior rulings, ordered that Petitioners to now produce unredacted incident reports from November 4, 2013 to the present (which includes nearly three years of post incident information).[32] While this latter ruling is not before the Court, as Petitioners have not yet had the opportunity to bring it before

[29] *Id.* at 475, ln 18-23.
[30] *Id.* at VEN 458, ln 12-18; VEN 475, ln 18-25; VEN 477, ln 21-23.
[31] *Id.* at VEN 477, ln 15-20.
[32] See Appendix, Vol. 3, Tab 21, VEN 484-85, *Court Minutes, Discovery Commissioner* (September 18, 2019) (indicating production of unredacted incident reports for the five years preceding and the three years after the subject incident)

Judge Delaney (*i.e.* specifically challenging the production of post incident reports for a slip and fall incident), it highlights the need for Petitioners to have the present issue reviewed by the Nevada Supreme Court and provide relief in an emergency fashion.

## VII. LEGAL ARGUMENT

### A. ISSUE ONE: WHETHER THE DISTRICT COURT ERRED IN ORDERING PETITIONERS TO PRODUCE UNREDACTED OTHER INCIDENT REPORTS WITHOUT REQUESTED PROTECTIONS PURSUANT TO NRCP 26(C)

#### 1. Sekera Did Not Meet Her Burden of Proof Under NRCP 26(b)(1) to Establish the Need for Unredacted Prior Incident Reports

This litigation arises from a slip and fall occurring from a temporary transitory condition on November 4, 2016 in the Venetian Grand Lux rotunda.[33] Although Sekera walked through the Grand Lux rotunda area hundreds of times previously, on the day of the incident Sekera encountered a foreign substance for the first time, which caused her to slip and fall.[34]

In *Eldorado Club, Inc., supra,* 78 Nev. at 511, 377 P.2d at 176, the Nevada Supreme Court held that evidence of prior incident reports in cases involving the temporary presence of debris or foreign substances on a walking surface is not

[33] *See* Appendix, Vol. 1, Tabs 1-6, VEN 001-037, *generally.*
[34] *See* Appendix, Vol. 1, Tab 5, at VEN 021-025. *See also* Appendix, Vol. 1, Tabs 1-4, VEN 001-014, Tab 6, VEN 033-037, *generally.*

admissible for the purpose of establishing notice. Rule 26(b)(1), Nevada Rules of Civil Procedure, reads as follows:

> 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.)

Accordingly, Sekera has the burden of establishing that the production of unredacted prior incident reports is both **relevant** to issues surrounding the November 4, 2016 incident and that the production of this discovery is **proportional** to the needs of the case in light of five factors: 1) importance of issues at stake; 2) amount in controversy; 3) parties' relative access to relevant information; 4) parties' resources; the importance of the discovery in resolving contested issues; and 5) the burden of proposed discovery vs. the likely benefit.

Sekera claims to have sustained injuries primarily to her neck and back. Her known treatment is approximately $80,000, to date, thus far all conservative in nature nearly three (3) years post incident. Petitioners have produced evidence of other slip/fall incidents from a foreign substance occurring at Venetian occurring

prior to Sekera's incident of November 4, 2016. The information for each such report identifies the date of incident, area of the incident, and the facts surrounding the incident. Sekera argued this information was insufficient and she needed the personal information of the guests involved in each incident. Her only purported need for obtaining this private information was to contact these people in the event Petitioners will present arguments at trial related to comparative fault.[35] Sekera provided no other reason for needing the non litigant guests' private information. Sekera also argued she has an unqualified right to share the guests' private information with anyone she desires.

Sekera's argument claiming there is no law restricting her use of confidential information is an inaccurate analysis of Nevada laws. Rule 26(b)(1), Nevada Rules of Civil Procedure, places restrictions on her ability to obtain this information. Sekera is required to show this information is relevant and that her need for this information outweighs the guests' need to protect their private information. Sekera utterly failed to make this showing in the District Court.

2. Personal, Private Information of Guests Identified in Prior Incident Reports is Entitled to NRCP 26(c) Protection

Pursuant to the July 31, 2019 Order, the District Court has herein provided Sekera with unfettered access to personal and sensitive information from non

[35] *See* Appendix, Vol. 2, Tab 15, at VEN 214, ln 12-25; VEN 215, ln 1-14; VEN 222, ln 14-25; VEN 223, ln 1-11; VEN 234, ln 3-25; VEN 235, ln 1-18; Appendix, Vol. 3, Tab 20, at VEN 469, ln 16-25; VEN 470, ln 1-12.

parties to this action, which is not relevant to any claims or defenses in this matter. She has already been provided with redacted prior incident reports to establish issues associated with notice.

The Nevada Supreme Court has found that writ relief is appropriate when a District Court's ruling exceeds the scope of NRCP 26(b)(1) and requires the production of private information. *Schlatter v. Eighth Judicial Dist. Court In and For Clark County*, 93 Nev. 189, 192, 561 P.2d 1342, 192-93 (1977). While Petitioners have not found Nevada case law applying the rule to protecting the privacy rights of persons involved in other incidents, the United States District Court for the District of Nevada has dealt with this issue and found in favor of protecting the privacy rights of third parties by redacting personal information.

In *Izzo v. Wal-Mart Stores, Inc.*, 2016 U.S. Dist. LEXIS 12210; 2016 WL 409694, the plaintiff, who slipped and fell on a clear liquid within a Las Vegas Wal Mart store on May 18, 2013, filed a motion to compel the defendant to produce evidence of prior claims and incidents for the three (3) years preceding the subject incident. The court evaluated the claim under the federal equivalent of NRCP 26(b)(1) and Nevada law as set forth in *Eldorado Club, Inc., supra* at 511, 377 P.2d at 176. In *Izzo*, the defense had previously produced a list of prior reported slip and falls. The plaintiff sought the incident reports including personal information of the other Wal Mart customers. The federal district court found that

the burden on defendant and the privacy interests of the non litigants outweighed the tangential relevance of the information to the issues in the lawsuit. (*Id.* at 4, 2016 U.S. Dist LEXIS at *11.) Similarly, in the instant matter, Sekera has shown no compelling reason under NRCP 26(b)(1) for the production of non litigant individual's private information. Accordingly, the District Court should have granted Petitioner's motion for a protective order.

In *Rowland v. Paris Las Vegas*, 2015 U.S. Dist. LEXIS 105513; 2015 WL 4742502, the federal district court applying the federal equivalent of NRCP 26(b)(1) found that third parties have a protected privacy interest in their identities, phone numbers and addresses. In *Rowland,* Plaintiff sued the defendant for injuries after slipping and falling on a recently polished tile floor. The plaintiff sought to compel the defendant to identify by name (with phone numbers and addresses) any person who had previously complained about the subject flooring. The court not only found the request to be overly broad, but also determined that it violated the privacy rights of the persons involved. It explained as follows:

> Further, the Court finds that requiring disclosure of the addresses and telephone numbers of prior hotel guests would violate the privacy rights of third parties. "Federal courts ordinarily recognize a constitutionally-based right of privacy that can be raised in response to discovery requests." *Zuniga v. Western Apartments*, 2014 U.S. Dist. LEXIS 83135, at *8 (C.D. Cal. Mar. 25, 2014) (citing *A. Farber & Partners, Inc. v. Garber*, 234 F.R.D. 186, 191 (C.D. Cal. 2006)). However, this right is not absolute; rather, it is subject to a balancing test.

> *Stallworth v. Brollini*, 288 F.R.D. 439, 444 (N.D. Cal. 2012). "When the constitutional right of privacy is involved, 'the party seeking discovery must demonstrate a compelling need for discovery, and that compelling need must be so strong as to outweigh the privacy right when these two competing interests are carefully balanced.'" *Artis v. Deere & Co.*, 276 F.R.D. 348, 352 (N.D. Cal. 2011) (quoting *Wiegele v. Fedex Ground Package Sys.*, 2007 U.S. Dist. LEXIS 9444, at *2 (S.D. Cal. Feb. 8, 2007)). "Compelled discovery within the realm of the right of privacy 'cannot be justified solely on the ground that it may lead to relevant information.'" *Id.* Here, Plaintiff has not addressed these privacy concerns, much less demonstrated that her need for the information outweighs the third party privacy interests. Therefore, the Court will not require Defendant to produce addresses or telephone numbers in response to Interrogatory No. 5.
>
> (*Id.* at *7. Emphasis added.)

Based upon the foregoing it is clear that the non litigant individuals have a protected privacy interest and Sekera has done nothing to demonstrate a "compelling need" to violate that protected interest. Given the Nevada Supreme Court's finding that prior incident information is irrelevant to establish notice in the facts at issue here before the Court (*i.e. Eldorado Club, Inc., supra*), Plaintiff necessarily cannot demonstrate a need outweighing the third party guests' privacy interest. Accordingly, the District Court's July 31, 2019 order denying Petitioner's request for a protective order is clearly in error. (*See also, Bible v. Rio Props., Inc.*, 246 F.R.D. 614, 620-21, 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).)

The above cases support Petitioners' position in this case - that protection of sensitive personal information of anyone not a party to this suit should be redacted. Certainly, under *Eldorado Club, Inc., supra,* which provides the prior incident reports in circumstances such as those present here are not admissible, it is questionable whether Sekera has a right to them at all.

The incident reports at issue here contain the sensitive, and private information of individuals who are not parties to this lawsuit, and who are not believed to have any information, facts or circumstances surrounding Sekera's allegations. There is a recognized interest in protecting the disclosure of personal client information, as unauthorized disclosure would likely damage the Petitioners' guest relationships.[36] Guests who stay at the Venetian do so with an expectation that their personal information will not be disclosed or disseminated without their

[36] *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]").

consent. There is simply no legitimate discovery interest which outweighs these third party privacy concerns in light of *Eldorado Club, Inc., supra.* Moreover, Sekera has not demonstrated a compelling need for this information. Furthermore, as discussed further below, it could subject Petitioners to liability for privacy violations.

3. Petitioners Should Not Be Required to Re-Produce Venetian Incident Reports Without the Existing Redactions of Confidential and Private Information Relating to Defendant's Guests as it Exposes Petitioners to Liability

The Nevada Legislature has demonstrated a desire to protect the personal data in the possession of business entities in NRS § 603A.010, *et seq.*, which relates to the Venetian's duty to securely maintain and protect the information collected from its guests and customers. By disclosing personal information of potentially hundreds of guests, Petitioners may be required under NRS § 603A.220 to contact each non-employee identified within every prior incident report to advise of the disclosure. The information contained within the incident reports at issue includes names, phone numbers, addresses, dates of birth, Social Security numbers, health information (*i.e.* handwritten notes from EMT evaluations, and typewritten summaries of alleged injuries, prior health related conditions, etc.) The mass dissemination of Venetian's guests' private information is the equivalent to a data breach, thereby exposing Venetian to additional third-party claims arising from the leaking of this information. There is simply no good reason to provide

this information to Sekera, much less to allow her to provide it to anyone else she desires outside the litigation.

As established below, good-cause exists to support an order providing that the personal, private information of Venetian's guests contained in the Incident Reports remain redacted.

Petitioners have a published policy to protect the privacy of their guests. The **Venetian's Data Privacy Policy** ("Privacy Policy") states in relevant part, as follows:

> This is the Data Privacy Policy ("Privacy Policy") of Venetian Casino Resort, LLC and its parent, affiliate and subsidiary entities (collectively, the "Company") located in the United States. ... This Privacy Policy applies to activities the Company engages in on its websites **and activities that are offline or unrelated to our websites**, as applicable. We are providing this notice to explain our information practices and the choices you can make about the way your information is collected and used.
>
> This Privacy Policy sets forth the principles that govern our treatment of personal data. We expect all employees and those with whom we share personal data to adhere to this Privacy Policy.
>
> The Company is committed to protecting the information that our guests, prospective guests, patrons, employees, and suppliers have entrusted to us.
>
> This Privacy Policy applies to all personal data in any format or medium, relating to all guests, prospective guests, patrons,

employees, suppliers and others who do business with the Company.[37]

Venetian's Privacy Policy describes to Venetian's guests (and prospective guests) that Venetian collects its guests' personal data or information, stating in relevant part as follows:

> We only collect personal data that you provide to us, or that we are authorized to obtain by you or by law. For example, we obtain credit information to evaluate applications for credit, and we obtain background check information for employment applications. The type of personal data we collect from you will depend on how you are interacting with us using our website, products, or services. For example, we may collect different information from you when you make reservations, purchase gift certificates or merchandise, participate in a contest, or contact us with requests, feedback, or suggestions. The information we collect may include your name, title, email address, mailing information, phone number, fax number, credit card information, travel details (flight number and details, points of origin and destination), room preferences, and other information you voluntarily provide.[38]

Venetian's Privacy Policy includes offering Venetian's guests an opportunity to choose what personal information, if any, they wish to share and/or with whom Venetian may share information. Venetian provides guests with the ability to control what information Venetian maintains and to whom it is disseminated. For example, Venetian's Privacy Policy provides the following:

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[37] Appendix, Vol. 3, Tab 22, VEN 486-95, *Privacy Policy, The Venetian Resort Las Vegas* (July 7, 2019), https://www.venetian.com/policy.html at VEN 486-87 (emphasis added).
[38] *Id.* at VEN 488.

> **Access, Correct, Update, Restrict Processing, Erase:** You may have the right to access, correct, and update your information. You also may request that we restrict processing of your information or erase it. To ensure that all of your personal data is correct and up to date, or to ask that we restrict processing or erase your information, please contact us using the methods in the Contact Us section below.[39]

Petitioners' guests are promised and expect the Venetian to protect their confidential information. The District Court's order currently compels Petitioners to utterly disregard this promise to protect guest's confidential information. The wide dissemination of this information intended by Sekera may very well result in claims by those guests for the disclosure of this information without their consent or notice.

Petitioners contend that if the July 31, 2019 order is not vacated and the privacy rights of the innocent individuals protected, then Venetian may face further claims from aggrieved guests. Moreover, it will cause irreparable damage to Petitioners' relations with its guests and prospective guests. Therefore Petitioners respectfully request that this Court issue an order vacating the District Court's July 31, 2019 order and directing the District Court to issue an order protecting the private information on the third party individuals.

### B. ISSUE TWO: WHETHER THE DISTRICT COURT ERRED IN DENYING PETITIONERS' MOTION FOR RECONSIDERATION OF THE JULY 31, 2019 ORDER RELATED TO THE PRODUCTION OF UNREDACTED

[39] *Id.* at VEN 492.

**OTHER INCIDENT REPORTS WITHOUT REQUESTED PROTECTION PURSUANT TO NRCP 26(C)**

Petitioners moved the District Court for reconsideration of its July 31, 2019 Order on August 12, 2019.[40] At the hearing on September 18, 2019, the District Court refused to reconsider its Order of July 31, 2019, finding fully in compliance and accordance with Nevada law.[41] Petitioners moved for relief from the July 31, 2019 order by requesting a stay until a writ could be filed, which was denied,[42] rendering Petitioners without any other means of relief beyond filing this writ and requesting a stay until this important legal issue can be reviewed and determined by this Honorable Court. Respectfully, Petitioners have met the requirements of NRAP Rules 21(a)(6), 27(e) and 8(a) and have set forth the need for an emergency stay under the circumstances, having no other speedy, and adequate remedy at law other than to seek relief from this Honorable Court.[43]

Finally, as noted earlier, the Discovery Commissioner recently ordered that Petitioners must now produce unredacted subsequent incident reports (*i.e.* from November 4, 2016 to the present) based on Judge Delaney's ruling of July 31, 2019, and Sekera's new claim for punitive damages. While the issue of having to

[40] *See* Appendix, Vol. 2, Tab 17, VEN 271-448, *generally.*
[41] Appendix, Vol. 3, Tab 20, at VEN 475, ln 4-6; VEN 476, ln 4-6; VEN 477, ln 15-20.
[42] *Id.* at VEN 476, ln 19-25; VEN 477, ln 1-20.
[43] Petitioners have met the requirements set forth under NRAP 8(a)(1) by requesting a stay in the District Court below, and herein requesting a stay in this emergency request under NRAP 8(a)(2).

produce subsequent incident reports is not presently at issue before this Court, this latest ruling demonstrates the position Petitioners and their guests have now been placed, which highlights the need for requested protections sought herein.[44]

## VIII. CONCLUSION

This petition seeks relief from this Court surrounding an important issue of law; *to wit*: whether property owners and innkeepers can be compelled to produce the private information of individuals who are not involved in a slip and fall tort lawsuit when the party seeking this confidential information has failed to make the showing required by NRCP 26(b)(1). This matter requires resolution on an emergency basis because once the confidential information is provided to plaintiff's attorney it will be freely distributed with impunity to third parties that are not involved in the instant litigation. This will effectively result in the Court sanctioning a widespread violation of individual's confidential information. If the requested relief is not granted on an emergency basis, or alternatively a stay ordered, then innocent third parties will have their privacy rights irreparably damaged. Petitioners herein respectfully move for the following:

1. That this Court issue an **immediate order vacating the District Court's July 31, 2019 order** directing Venetian to provide Sekera with unredacted

[44] *See* Appendix, Vol. 3, VEN 484-85.

copies of prior incident reports related to guests involved in other incidents occurring on the Venetian premises.

2. That this Court clarify the subject issue of law regarding the protection of private information produced in the course of discovery pursuant to NRCP 26(b)(1) and issue an order directing the District Court to protect the private information of guests contained in the incident reports at issue.

In the interests of judicial economy and the administration of justice, reversal is required in order to avoid severe prejudice to Petitioner, innocent individuals, and any future defendants in similar cases as this.

DATED this 26 day of September, 2019.

ROYAL & MILES LLP

By _____

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Counsel for Petitioners

## CERTIFICATE OF COMPLIANCE

STATE OF NEVADA )
) ss:
COUNTY OF CLARK )

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 Word Perfect 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 **7,403 words** in compliance with NRAP 32(a)(1)(A)(ii) (having a word count of less than 14,000 words).

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 26 day of September, 2019.

ASHLEY SCHMITT
NOTARY PUBLIC
STATE OF NEVADA
Appt. No. 08-5493-1
My Appt. Expires Nov. 1, 2019

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 26 day of September, 2019, I served true and correct copy of the foregoing PETITIONERS' EMERGENCY PETITION FOR WRIT OF MANDAMUS AND/OR WRIT OF PROHIBITION UNDER NRAP RULES 21(a)(6) AND 27(e), by delivering the same via U.S. Mail addressed to the following:

Keith E. Galliher, Jr., Esq.
THE GALLIHER LAW FIRM
1850 E. Sahara Avenue, Suite 107
Las Vegas, NV 89014
*Attorneys for Real Party in Interest*

Honorable Kathleen Delaney
Eighth Jud. District Court, Dept. 25
200 Lewis Avenue
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*Respondent*

An employee of Royal & Miles LLP

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SEP 27 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

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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

EMERGENCY MOTION UNDER NRAP 27(e)

EMERGENCY MOTION UNDER NRAP 8 STAYING EXECUTION OF ORDER DIRECTING PETITIONERS TO DISCLOSE PRIVATE, PROTECTED INFORMATION OF GUESTS NOT INVOLVED IN UNDERLYING LAWSUIT

ACTION IS NEEDED BY OCTOBER 2, 2019 BEFORE PETITIONER IS REQUIRED TO DISCLOSE THE CONFIDENTIAL INFORMATION

THIS MOTION IS BEING FILED CONCURRENTLY WITH AN EMERGENCY PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION

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Gregory A. Miles, Esq. (SBN 4336)
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19-40792

**AFFIDAVIT OF MICHAEL A. ROYAL, ESQ. IN SUPPORT OF PETITIONERS' EMERGENCY MOTION FOR STAY AND *NRAP 27(E) CERTIFICATE***

STATE OF NEVADA )
) ss:
COUNTY OF CLARK )

1. I am an attorney licensed to practice in the State of Nevada and am an attorney at the law firm of Royal & Miles LLP, Attorneys for Petitioners VENETIAN CASINO RESORT, LLC and LAS VEGAS SANDS, LLC, in support of this PETITIONERS' EMERGENCY PETITION FOR WRIT OF MANDAMUS AND/OR WRIT OF PROHIBITION UNDER NRAP RULES 21(a)(6) AND 27(e).

2. The telephone numbers and office addresses of the attorneys for the Real Party in Interest are listed as follows:

Keith E. Galliher, Jr., Esq.
THE GALLIHER LAW FIRM
1850 E. Sahara Avenue, Suite 107
Las Vegas, NV 89014
(702) 735-0049
Attorneys for Real Party in Interest

3. The facts showing the existence and nature of Petitioners' emergency are as follows: An order was entered on July 31, 2019 directing Venetian to produce unredacted reports of other incidents involving Venetian guests without providing requested protection under NRCP 26(c). The motion for reconsideration brought on an order shortening time was thereafter denied. Venetian's motion for stay by the district court to allow for filing of a writ of mandamus and/or writ of

prohibition was denied. Therefore, immediate action is required to prevent Venetian and its guests from suffering irreparable harm.

4. Counsel for Real Party in Interest was served with Petitioners' Petition and this Motion via electronic service as identified on the proof of service in this document. Prior to filing this Petition and Motion my office contacted, by telephone, the clerk of the Supreme Court, the Clerk of the Eight Judicial District Court of the State of Nevada, and Real Party in Interest's attorney to notify them that Petitioners were filing the instant Emergency Motion and Petitioners' Emergency Petition for Writ of Mandamus and/or Writ of Prohibition Under NRAP Rules 21(A)(6) And 27(E).

5. Petitioners will be required to divulge confidential information of non-party litigants immediately, if this Court does not take action. Concurrently with this Motion, Petitioner is filing an Emergency Petition for Writ of Mandate and/or Prohibition. If this Court grants this motion, then the emergency will be abated and the concurrently filed Petition may be considered on a non-emergency basis.

6. The relief sought in the Writ Petition is not available by the District Court. Petitioners made a written Motion for Stay with the District Court on August 12, 2019 and again orally on September 17, 2019. The District Court denied the Motion for Stay and indicated that relief would need to be obtained

from the appellate court pursuant to NRAP 8. It is imperative this matter be heard at the Court's earliest possible convenience.

7. I certify that I have read this motion and, to the best of my knowledge, information and belief, this motion complies with the form requirements of Rule 21(d) and is not frivolous or interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

8. I further certify that this brief complies with all Nevada Rules of Appellate Procedure, including the requirements of Rule 28(e) every assertion in the brief regarding matters in the record be supported by a reference to the appendix where the matter relied upon is to be found. I understand I may be subject to sanctions in the event 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 20 day of September, 2019.

ASHLEY SCHMITT
NOTARY PUBLIC
STATE OF NEVADA
Appt. No. 08-5493-1
My Appt. Expires Nov. 1, 2019

NOTARY PUBLIC in and for said County and State

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## MEMORANDUM OF POINTS AND AUTHORITIES

## I. STATEMENT AS TO RELIEF SOUGHT IN DISTRICT COURT

COMES NOW Petitioners VENETIAN CASINO RESORT, LLC, and LAS VEGAS SANDS, LLC, by and through their counsel of record, ROYAL & MILES LLP, and respectfully petition this Court for the following immediate relief related to Eighth District Court Case A-18-772761-C ("Case A772761"), JOYCE SEKERA ("Sekera") v. VENETIAN CASINO RESORT, LLC and LAS VEGAS SANDS, LLC ("Venetian").

Petitioners moved for a stay of execution in district court, which was denied. Due to the exigent circumstances, and the potential violation of privacy rights for hundreds of individuals wholly unconnected to the subject litigation, this Emergency Motion is being filed with this Court. It has been brought in good faith. In addition, Petitioners have no other available avenue for relief. This is a matter of great importance to Petitioners not only as to this litigation, but as to all future litigation, as there are presently no restrictions placed on Sekera regarding what she is allowed to do with the personal information of guests ordered produced. Accordingly, once Petitioners comply with the order, there is no reasonable means of repairing the damage.

## II. BASIS FOR RELIEF

1. The District Court failed to fairly consider the privacy rights of individual non-parties to the litigation by reversing the April 4, 2019 Discovery

Commissioner's Report and Recommendation granting Petitioners' motion for protective order under NRCP 26(c).

2. The district court failed to weigh the issues of relevance and proportionality required under NRCP 26(b) (1) in refusing to provide protection of personal information of guests involved in other incidents on Venetian property.

Petitioners will be irreparably harmed without the issuance of a stay of the order directing Venetian to provide unredacted incident reports to Sekera. In discovery, Sekera requested reports of prior slip-and-fall incidents. Petitioners produced such reports with redactions to protect guests' personal private information. The July 31, 2019 District Court order requires Petitioner to produce these reports without redactions. Under the circumstances of the accident at issue in this matter, these prior incident reports have marginal relevance to the case in light of prevailing Nevada law.[1] Therefore, providing this unredacted information to Sekera without any of the requested protection under NRCP 26(c) will cause Petitioners (and the identified guests) irreparable harm. Accordingly, Petitions respectfully request that this Court **grant the emergency motion and issue an immediate order staying the production of unredacted incident reports** until such time as the Court can rule on the writ of mandamus and/or prohibition that will be filed in this case.

[1] *Eldorado Club, Inc. v. Graff*, 78 Nev. 507, 511, 377 P.2d 174, 176 (1962).

## III. STATEMENT OF FACTS

This case arises from an alleged slip and fall at the Venetian that occurred on November 4, 2016, involving JOYCE SEKERA ("Sekera"). More specifically, Sekera alleges that as she was walking through the Grand Lux rotunda area of the Venetian property, she slipped on water and fell, resulting in bodily injuries.

In the course of discovery, Sekera requested that Petitioners produce incident reports related to slip and falls from November 4, 2013 to the present. Petitioners responded by producing sixty-four (64) redacted prior incident reports from November 4, 2013 to November 4, 2016. When Sekera objected to the production of redacted reports, Petitioners filed a motion for protective order pursuant to NRCP 26(c) on February 1, 2019 with the Discovery Commissioner.

Following a hearing on March 13, 2019, the Discovery Commissioner issued a Report and Recommendation granting Petitioners' motion for protective order. (*See* Appendix, Vol. 1, Tab 14, VEN 201-06, *Discovery Commissioner's Report and Recommendation* (filed April 4, 2019).) Sekera filed an objection to the Discovery Commissioner's Report and Recommendation on April 4, 2019, which was heard by the Honorable Kathleen Delaney in Department XXV of the Eighth Judicial District Court on May 14, 2019. Judge Delaney reversed the Discovery Commissioner and ordered Petitioners to produce prior incident reports in unredacted form without any restrictions related to dissemination of private guest

information. (*See* Appendix, Vol. 2, Tab 15, VEN 207-66, *Transcript of Hearing on Objection to Discovery Commissioner's Report* (May 14, 2019); Appendix, Vol. 2, Tab 16, VEN 267-70, *Order* (filed July 31, 2019).)

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*Minutes, Discovery Commissioner* (September 18, 2019.) While the Discovery Commissioner's latest ruling is not directly related to this motion, it highlights the emergent nature of the circumstances.

## IV. LEGAL ARGUMENT

### A. Sekera Did Not Meet Her Burden of Proof under NRCP 26(b)(1) to Establish the Need for Unredacted Prior Incident Reports

This litigation arises from a slip and fall occurring from a temporary transitory condition on November 4, 2016 in the Venetian Grand Lux rotunda.[2] Although Sekera walked through the Grand Lux rotunda area hundreds of times previously, on the day of the incident Sekera encountered a foreign substance for the first time, which caused her to slip and fall.[3]

In *Eldorado Club, Inc., supra,* 78 Nev. at 511, 377 P.2d at 176, the Nevada Supreme Court held that evidence of prior incident reports in cases involving the temporary presence of debris or foreign substances on a walking surface is not admissible for the purpose of establishing notice. Rule 26(b)(1), Nevada Rules of Civil Procedure, reads 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

[2] *See* Appendix, Vol. 1, Tabs 1-7, VEN 001-41, *generally*.
[3] *See* Appendix, Vol. 1, Tab 5, VEN at VEN 021-025. *See also* Appendix, Vol. 1, Tab 1, VEN 001-06, Tab 2, VEN 038-41, *generally*.

> **importance of the discovery** in resolving the issues, and whether **the burden or expense of the proposed discovery outweighs its likely benefit**. . . . (Emphasis added.)

Accordingly, Sekera has the burden of establishing that the production of unredacted prior incident reports is both **relevant** to issues surrounding the November 4, 2016 incident and that the production of this discovery is **proportional** to the needs of the case in light of the above stated five factors. Petitioners have produced evidence of other slip/fall incidents from a foreign substance occurring at Venetian occurring prior to Sekera's incident of November 4, 2016. The information for each such report identifies the date of incident, area of the incident, and the facts surrounding the incident. Sekera argued this information was insufficient and she needed the personal information of the guests involved in each incident. Her only purported need for obtaining this private information was to contact these people in the event Petitioners will present arguments at trial related to comparative fault.[4] Sekera also argued she has an unqualified right to share the guests' private information with anyone she desires.

Sekera's argument claiming there is no law restricting her use of confidential information is an inaccurate analysis of Nevada laws. Rule 26(b)(1), Nevada Rules of Civil Procedure, places restrictions on her ability to obtain this

[4] *See* Appendix, Vol. 2, Tab 15 at VEN 214, ln 12-25; VEN 215, ln 1-14; VEN 222, ln 14-25; VEN 223, ln 1-11; VEN 234, ln 3-25; VEN 235, ln 1-18; Appendix, Vol. 3, Tab 20, VEN at VEN 469, ln 16-25; VEN 470, ln 1-12.

information. Sekera is required to show that her need for this information outweighs the guests' need to protect their private information. Sekera failed to make this showing in the District Court.

### B. Personal, Private Information of Guests Identified in Prior Incident Reports is entitled to NRCP 26(c) Protection

Pursuant to the July 31, 2019 Order, the District Court has herein provided Sekera with 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. She has already been provided with redacted prior incident reports to establish issues associated with notice.

The Nevada Supreme Court has recognized that individuals have privacy interests that are protected from disclosure in discovery under NRCP 26(b)(1). *Schlatter v. Eighth Judicial Dist. Court In and For Clark County*, 93 Nev. 189, 192, 561 P.2d 1342, 192-93 (1977). While Petitioners have not found Nevada case law applying the rule to individuals involved in prior incidents, the United States District Court for the District of Nevada has dealt with this issue and found in favor of protecting the privacy rights of third parties by redacting personal information.

In *Izzo v. Wal-Mart Stores, Inc.*, 2016 U.S. Dist. LEXIS 12210; 2016 WL 409694, the plaintiff, who slipped and fell on a clear liquid within a Las Vegas Wal- Mart store, filed a motion to compel the defendant to produce evidence of

prior claims and incidents for the three (3) years preceding the subject incident. The court evaluated the claim under the federal equivalent of NRCP 26(b)(1) and Nevada law as set forth in *Eldorado Club, Inc., supra* at 511, 377 P.2d at 176. In *Izzo*, the defense had previously produced a list of prior reported slip and falls. The plaintiff sought the incident reports including personal information of the other Wal-Mart customers. The federal district court found that the burden on defendant and the privacy interests of the non-litigants outweighed the tangential relevance of the information to the issues in the lawsuit. (*Id.* at 4, 2016 U.S. Dist LEXIS at *11.) Similarly, in the instant matter, Sekera has shown no compelling reason under NRCP 26(b)(1) for the production of non-litigant individual's private information. Accordingly, the District Court should have granted Petitioner's motion for a protective order.

In *Rowland v. Paris Las Vegas*, 2015 U.S. Dist. LEXIS 105513; 2015 WL 4742502, the federal district court applying the federal equivalent of NRCP 26(b)(1) found that third parties have a protected privacy interest in their identities, phone numbers and addresses. In *Rowland,* Plaintiff sued the defendant for injuries after slipping and falling on a recently polished tile floor. The plaintiff sought to compel the defendant to identify by name (with phone numbers and addresses) any person who had previously complained about the subject flooring.

The court not only found the request to be overly broad, but also determined that it violated the privacy rights of the persons involved. It explained as follows:

> Further, the Court finds that requiring disclosure of the addresses and telephone numbers of prior hotel guests would violate the privacy rights of third parties. ... "When the constitutional right of privacy is involved, 'the party seeking discovery must demonstrate a compelling need for discovery, and that compelling need must be so strong as to outweigh the privacy right when these two competing interests are carefully balanced.'" *Artis v. Deere & Co.*, 276 F.R.D. 348, 352 (N.D. Cal. 2011) (quoting *Wiegele v. Fedex Ground Package Sys.*, 2007 U.S. Dist. LEXIS 9444, at *2 (S.D. Cal. Feb. 8, 2007)).
>
> (*Id.* at *7.)

Based upon the foregoing it is clear that the non-litigant individuals have a protected privacy interest and Sekera has done nothing to demonstrate a "compelling need" to violate that protected interest. Given the Nevada Supreme Court's finding that prior incident information is irrelevant to establish notice in the facts at issue here before the Court (*i.e. Eldorado Club, Inc., supra*), Plaintiff cannot demonstrate a need outweighing the third party guests' privacy interest. Accordingly, the District Court's July 31, 2019 order denying Petitioner's request for a protective order is clearly in error.

### C. An Emergency Stay is Necessary to Prevent Irreparable Harm

As set forth in more detail above, Petitioners have met the requirements of NRAP 8(a) and have set forth the need for an emergency stay under the

circumstances, having no other speedy and adequate remedy at law other than to seek relief from this Honorable Court.

## V. CONCLUSION

The order by the District Court to compel Petitioners to provide private information of individuals who are not involved in the underlying action shocks the conscience. In a world where privacy of personal information is placed at a premium, it is difficult to comprehend that Nevada would be unwilling to protect this kind of information in a case where it has no relevance. Therefore, Petitioners hereby move for emergency relief as requested herein so that this Court may consider Petitioners' Writ of Mandamus and/or Prohibition on a non-emergency basis. If the requested relief is not granted on an emergency basis then innocent third parties will have their privacy rights irreparably damaged.

DATED this 24 day of September, 2019.

ROYAL & MILES LLP

By _____

Michael A. Royal, Esq. (SBN 4370)
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:

[X] This brief has been prepared in a proportionally spaced typeface using Word Perfect 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:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains **2,212 words** in compliance with NRAP 32(a)(1)(A)(ii) (having a word count of less than 14,000 words).

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

## 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 26 day of September, 2019, I served true and correct copy of the foregoing EMERGENCY MOTION UNDER NRAP 8 STAYING EXECUTION OF ORDER DIRECTING PETITIONERS TO DISCLOSE PRIVATE, PROTECTED INFORMATION OF GUESTS NOT INVOLVED IN UNDERLYING LAWSUIT, by delivering the same via U.S. Mail addressed to the following:

Keith E. Galliher, Jr., Esq.
THE GALLIHER LAW FIRM
1850 E. Sahara Avenue, Suite 107
Las Vegas, NV 89014
*Attorneys for Real Party in Interest*

Honorable Kathleen Delaney
Eighth Jud. District Court, Dept. 25
200 Lewis Avenue
Las Vegas, NV 89155
*Respondent*

Ashley Schmitt
An employee of Royal & Miles LLP

79689-UA



IN THE SUPREME COURT OF THE STATE OF NEVADA

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



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Further affiant sayeth naught.

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ASHLEY SCHMITT
NOTARY PUBLIC
STATE OF NEVADA
Appt. No. 06-6103-1
My Appt. Expires Nov. 1, 2019

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information. (*See* Appendix, Vol. 2, Tab 15, VEN 207-66, *Transcript of Hearing on Objection to Discovery Commissioner's Report* (May 14, 2019); Appendix, Vol. 2, Tab 16, VEN 267-70, *Order* (filed July 31, 2019).)

The order reversing the Discovery Commissioner's Report and Recommendation of April 4, 2019 was filed on July 31, 2019. Pursuant to the order, Sekera is to receive unredacted incident reports involving other Venetian guests, including those guests' names, addresses, telephone numbers, dates of birth, social security numbers, and driver's license/identification card numbers. Under the current order Sekera has no restrictions whatsoever on how the private information of Venetian guests will be used and shared. Petitioners filed a motion for reconsideration on an order shortening time with a request to stay the order allowing sufficient time to file a writ of mandamus and/or writ of prohibition with the Nevada Supreme Court, which was not heard until September 17, 2019. Judge Delaney denied Petitioners' motion for reconsideration and their request for a stay. (*See* Appendix, Vol. 3, Tab 20, VEN 456-83, *Transcript of Hearing on Motion for Reconsideration* (September 17, 2019.) On a related note, on September 18, 2019, the Discovery Commissioner ordered that Petitioners must now produce unredacted copies of incident reports **after** November 4, 2016 to the present, without redacting personal information or limitations on sharing of the documents to others outside the litigation. (*See* Appendix, Vol 3, Tab 21, VEN 484-85, *Court*

*Minutes, Discovery Commissioner* (September 18, 2019.) While the Discovery Commissioner's latest ruling is not directly related to this motion, it highlights the emergent nature of the circumstances.

## IV. LEGAL ARGUMENT

### A. Sekera Did Not Meet Her Burden of Proof under NRCP 26(b)(1) to Establish the Need for Unredacted Prior Incident Reports

This litigation arises from a slip and fall occurring from a temporary transitory condition on November 4, 2016 in the Venetian Grand Lux rotunda.[2] Although Sekera walked through the Grand Lux rotunda area hundreds of times previously, on the day of the incident Sekera encountered a foreign substance for the first time, which caused her to slip and fall.[3]

In *Eldorado Club, Inc., supra,* 78 Nev. at 511, 377 P.2d at 176, the Nevada Supreme Court held that evidence of prior incident reports in cases involving the temporary presence of debris or foreign substances on a walking surface is not admissible for the purpose of establishing notice. Rule 26(b)(1), Nevada Rules of Civil Procedure, reads 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

[2] *See* Appendix, Vol. 1, Tabs 1-7, VEN 001-41, *generally.*
[3] *See* Appendix, Vol. 1, Tab 5, VEN at VEN 021-025. *See also* Appendix, Vol. 1, Tab 1, VEN 001-06, Tab 2, VEN 038-41, *generally.*

> **importance of the discovery** in resolving the issues, and whether **the burden or expense of the proposed discovery outweighs its likely benefit**. . . . (Emphasis added.)

Accordingly, Sekera has the burden of establishing that the production of unredacted prior incident reports is both **relevant** to issues surrounding the November 4, 2016 incident and that the production of this discovery is **proportional** to the needs of the case in light of the above stated five factors. Petitioners have produced evidence of other slip/fall incidents from a foreign substance occurring at Venetian occurring prior to Sekera's incident of November 4, 2016. The information for each such report identifies the date of incident, area of the incident, and the facts surrounding the incident. Sekera argued this information was insufficient and she needed the personal information of the guests involved in each incident. Her only purported need for obtaining this private information was to contact these people in the event Petitioners will present arguments at trial related to comparative fault.[4] Sekera also argued she has an unqualified right to share the guests' private information with anyone she desires.

Sekera's argument claiming there is no law restricting her use of confidential information is an inaccurate analysis of Nevada laws. Rule 26(b)(1), Nevada Rules of Civil Procedure, places restrictions on her ability to obtain this

[4] *See* Appendix, Vol. 2, Tab 15 at VEN 214, ln 12-25; VEN 215, ln 1-14; VEN 222, ln 14-25; VEN 223, ln 1-11; VEN 234, ln 3-25; VEN 235, ln 1-18; Appendix, Vol. 3, Tab 20, VEN at VEN 469, ln 16-25; VEN 470, ln 1-12.

information. Sekera is required to show that her need for this information outweighs the guests' need to protect their private information. Sekera failed to make this showing in the District Court.

### B. Personal, Private Information of Guests Identified in Prior Incident Reports is entitled to NRCP 26(c) Protection

Pursuant to the July 31, 2019 Order, the District Court has herein provided Sekera with 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. She has already been provided with redacted prior incident reports to establish issues associated with notice.

The Nevada Supreme Court has recognized that individuals have privacy interests that are protected from disclosure in discovery under NRCP 26(b)(1). *Schlatter v. Eighth Judicial Dist. Court In and For Clark County*, 93 Nev. 189, 192, 561 P.2d 1342, 192-93 (1977). While Petitioners have not found Nevada case law applying the rule to individuals involved in prior incidents, the United States District Court for the District of Nevada has dealt with this issue and found in favor of protecting the privacy rights of third parties by redacting personal information.

In *Izzo v. Wal-Mart Stores, Inc.*, 2016 U.S. Dist. LEXIS 12210; 2016 WL 409694, the plaintiff, who slipped and fell on a clear liquid within a Las Vegas Wal- Mart store, filed a motion to compel the defendant to produce evidence of

prior claims and incidents for the three (3) years preceding the subject incident. The court evaluated the claim under the federal equivalent of NRCP 26(b)(1) and Nevada law as set forth in *Eldorado Club, Inc., supra* at 511, 377 P.2d at 176. In *Izzo*, the defense had previously produced a list of prior reported slip and falls. The plaintiff sought the incident reports including personal information of the other Wal-Mart customers. The federal district court found that the burden on defendant and the privacy interests of the non-litigants outweighed the tangential relevance of the information to the issues in the lawsuit. (*Id.* at 4, 2016 U.S. Dist LEXIS at *11.) Similarly, in the instant matter, Sekera has shown no compelling reason under NRCP 26(b)(1) for the production of non-litigant individual's private information. Accordingly, the District Court should have granted Petitioner's motion for a protective order.

In *Rowland v. Paris Las Vegas*, 2015 U.S. Dist. LEXIS 105513; 2015 WL 4742502, the federal district court applying the federal equivalent of NRCP 26(b)(1) found that third parties have a protected privacy interest in their identities, phone numbers and addresses. In *Rowland*, Plaintiff sued the defendant for injuries after slipping and falling on a recently polished tile floor. The plaintiff sought to compel the defendant to identify by name (with phone numbers and addresses) any person who had previously complained about the subject flooring.

The court not only found the request to be overly broad, but also determined that it violated the privacy rights of the persons involved. It explained as follows:

> Further, the Court finds that requiring disclosure of the addresses and telephone numbers of prior hotel guests would violate the privacy rights of third parties. ... "When the constitutional right of privacy is involved, 'the party seeking discovery must demonstrate a compelling need for discovery, and that compelling need must be so strong as to outweigh the privacy right when these two competing interests are carefully balanced.'" *Artis v. Deere & Co.*, 276 F.R.D. 348, 352 (N.D. Cal. 2011) (quoting *Wiegele v. Fedex Ground Package Sys.*, 2007 U.S. Dist. LEXIS 9444, at *2 (S.D. Cal. Feb. 8, 2007)).
>
> (*Id.* at *7.)

Based upon the foregoing it is clear that the non-litigant individuals have a protected privacy interest and Sekera has done nothing to demonstrate a "compelling need" to violate that protected interest. Given the Nevada Supreme Court's finding that prior incident information is irrelevant to establish notice in the facts at issue here before the Court (*i.e. Eldorado Club, Inc., supra*), Plaintiff cannot demonstrate a need outweighing the third party guests' privacy interest. Accordingly, the District Court's July 31, 2019 order denying Petitioner's request for a protective order is clearly in error.

### C. An Emergency Stay is Necessary to Prevent Irreparable Harm

As set forth in more detail above, Petitioners have met the requirements of NRAP 8(a) and have set forth the need for an emergency stay under the

circumstances, having no other speedy and adequate remedy at law other than to seek relief from this Honorable Court.

## V. CONCLUSION

The order by the District Court to compel Petitioners to provide private information of individuals who are not involved in the underlying action shocks the conscience. In a world where privacy of personal information is placed at a premium, it is difficult to comprehend that Nevada would be unwilling to protect this kind of information in a case where it has no relevance. Therefore, Petitioners hereby move for emergency relief as requested herein so that this Court may consider Petitioners' Writ of Mandamus and/or Prohibition on a non-emergency basis. If the requested relief is not granted on an emergency basis then innocent third parties will have their privacy rights irreparably damaged.

DATED this 24 day of September, 2019.

ROYAL & MILES LLP

By _____

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

## CERTIFICATE OF COMPLIANCE

STATE OF NEVADA )
) ss:
COUNTY OF CLARK )

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 Word Perfect 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:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains **2,212 words** in compliance with NRAP 32(a)(1)(A)(ii) (having a word count of less than 14,000 words).

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

## 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 26 day of September, 2019, I served true and correct copy of the foregoing EMERGENCY MOTION UNDER NRAP 8 STAYING EXECUTION OF ORDER DIRECTING PETITIONERS TO DISCLOSE PRIVATE, PROTECTED INFORMATION OF GUESTS NOT INVOLVED IN UNDERLYING LAWSUIT, by delivering the same via U.S. Mail addressed to the following:

Keith E. Galliher, Jr., Esq.
THE GALLIHER LAW FIRM
1850 E. Sahara Avenue, Suite 107
Las Vegas, NV 89014
*Attorneys for Real Party in Interest*

Honorable Kathleen Delaney
Eighth Jud. District Court, Dept. 25
200 Lewis Avenue
Las Vegas, NV 89155
*Respondent*

Ashley Schmitt
An employee of Royal & Miles LLP

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

VENETIAN CASINO RESORT, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND LAS VEGAS SANDS, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE KATHLEEN E. DELANEY, DISTRICT JUDGE,
Respondents,
and
JOYCE SEKERA, AN INDIVIDUAL,
Real Party in Interest.

No. 79689-COA

FILED

OCT 01 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

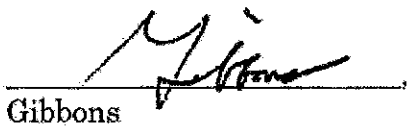
*ORDER DIRECTING ANSWER AND IMPOSING TEMPORARY STAY*

This original, emergency petition for a writ of mandamus or prohibition challenges a July 31, 2019, district court order directing petitioners to provide in discovery unredacted prior incident reports. Petitioners have also moved for a stay of the district court order pending our consideration of this writ petition.

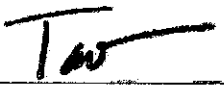
Having reviewed the petition and supporting documents, we conclude that an answer may assist this court in resolving the petition. Therefore, real party in interest, on behalf of respondents, shall have 28 days from the date of this order within which to file and serve an answer, including authorities, against issuance of the requested writ. NRAP 21(b)(1). Petitioners shall have 14 days from service of the answer to file

and serve any reply. We temporarily stay the district court's July 31, 2019, order pending our receipt and consideration of any opposition to the stay motion and further order of this court. Any opposition to the stay may be filed and served within 7 days from the date of this order.

It is so ORDERED.



_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Bulla

cc: Hon. Kathleen E. Delaney, District Judge
Royal & Miles, LLP
The Galliher Law Firm
Eighth District Court Clerk

IN THE COURT OF APPEALS FOR THE STATE OF NEVADA

| | |
|---|---|
| VENETIAN CASINO RESORT, LLC; LAS VEGAS SANDS, LLC,<br><br>Appellants,<br><br>v.<br><br>EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA; THE HONORABLE KATHLEEN DELANEY,<br><br>Respondents,<br><br>JOYE SEKERA,<br><br>Real Party in Interest | Court of Appeals Case No.:<br>79689-COA<br><br>District Court Case No.:<br>A788379 |



**JOYCE SEKERA'S MOTION FOR EXTENDED BRIEFING**

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*Attorneys for Real Party in Interest Joyce Sekera*

Real Party in Interest, JOYCE SEKERA. ("Ms. Sekera"), by and through her attorneys, The Galliher Law Firm, hereby submits the following Motion for Extended Briefing. This Motion is based upon and supported by the following memorandum of points and authorities, the pleadings and papers on file, the exhibits attached hereto, and any argument that the Court may allow at the time of hearing.

DATED this 8th of October, 2019

THE GALLIHER LAW FIRM

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*Joyce Sekera*

## MEMORANDUM AND POINTS OF AUTHORITIES

### I. LEGAL ARGUMENT

Appellants moved for a stay in this case pending the Court's decision on Appellants' Writ. In deciding whether to issue a stay the Court must consider a list of factors including "whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition." NRAP 8(c). Thus, in order to defeat Appellants'

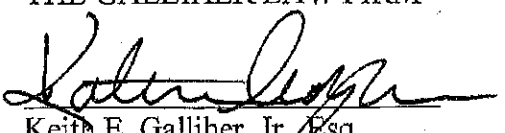
Motion for Stay Ms. Sekera must show that Appellants are not likely to prevail on the merits. In other words, Ms. Sekera must respond to all the arguments in Appellants' 36-page Writ which Ms. Sekera is unable to do in the 10-page limit proscribed in NRAP 27(d)(10).

## II. CONCLUSION

Based on the foregoing, Ms. Sekera respectfully requests this Court grant her Motion for Extended briefing for her Opposition to Appellant's Motion for Stay.

DATED this 8th day of October, 2019

THE GALLIHER LAW FIRM



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## CERTIFICATE OF SERVICE

I hereby certify that I am an employee of The Galliher Law Firm and that on the 8 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 **MOTION FOR EXTENDED BRIEFING** 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, addressed to the following:

Michael A. Royal, Esq.
Gregory A. Miles, Esq.
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*Attorneys for Appellants*

Honorable Kathleen Delaney
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Las Vegas, Nevada 89155
*Respondent*

An employee of The Galliher Law Firm

IN THE COURT OF APPEALS FOR THE STATE OF NEVADA

| | |
|---|---|
| VENETIAN CASINO RESORT, LLC; LAS VEGAS SANDS, LLC,<br><br>Appellants,<br><br>v.<br><br>EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA; THE HONORABLE KATHLEEN DELANEY,<br><br>Respondents,<br><br>JOYE SEKERA,<br><br>Real Party in Interest | Court of Appeals Case No.:<br>79689-COA<br><br>Electronically Filed<br>Oct 08 2019 05:29 p.m.<br>Elizabeth A. Brown<br>Clerk of Supreme Court<br><br>District Court Case No.:<br>A788379 |

**JOYCE SEKERA'S OPPOSITION TO APPELLANTS' EMERGENCY MOTION FOR STAY UNDER NRAP 27(e)**

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*Attorneys for Real Party in Interest Joyce Sekera*

Real Party in Interest, JOYCE SEKERA. ("Ms. Sekera"), by and through her attorneys, The Galliher Law Firm, hereby submits the following Opposition to Appellants' Emergency Motion Under NRAP 27(e). This Opposition is based upon and supported by the following memorandum of points and authorities, the pleadings and papers on file, the exhibits attached hereto, and any argument that the Court may allow at the time of hearing.

DATED this 8th of October, 2019

THE GALLIHER LAW FIRM

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## MEMORANDUM AND POINTS OF AUTHORITIES

## I. FACTUAL BACKGROUND

This is a case arises out of a slip and fall in the Venetian Casino at 12:30 p.m on November 4, 2016. (VEN005.) 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.*) Appellants however, contend "Plaintiff's fall had nothing to do with a foreign substance being on the floor." (VEN061:27-28.) On the way down Ms. Sekera struck her skull and left elbow on the pillar and her left hip on the ground. 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, Ms. Sekera's doctor recommended a fusion back surgery which Ms. Sekera will undergo in the near future. (APP125-26.)

During discovery Ms. Sekera's requested Appellants produce incident reports from the three years prior to the Ms. Sekera's fall to present. (VEN040.) In response, Appellants produced 64 redacted incident reports. (VEN056:2-057:2.) These reports redacted phonebook information (name, address and phone) plus dates of birth. (APP127-39.) The redacted incident reports contain spaces for social security numbers and drivers' licenses, however, Appellants did not redact this information because they do not collect it. (APP127-39.) Guests completing forms also did not fill in this information. (VEN007, APP127, APP128, APP136.)

Ms. Sekera asked Appellants to provide unredacted incident reports so she could identify witnesses to rebut the 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 reports and filed for a protective order. (*Id.*)

The Discovery Commissioner recommended ("April 4, 2019 DCRR") granting the Motion for a Protective Order and ordering the unredacted incident reports be withheld. (VEN203.) Ms. Sekera objected to the April 4, 2019 DCRR because she needed the contact information for potential witnesses in her case and because Appellants' fear of collaborative discovery is not sufficient grounds for a protective order. (APP161:18-27.) The District Court overruled the April 4, 2019 DCRR because there was no legal basis for the protective order. (APP193.)

## II. LEGAL ARGUMENT

### A. Legal Standard for NRAP 8 Emergency Motion

A party may move for a stay of an order "pending appeal or resolution of a petition to the Supreme Court or Court of Appeals for an extraordinary writ [.]" NRAP 8(a)(1)(A). In deciding whether to issue a stay the Court must consider the following factors:

> (1) whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied; (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay or injunction is denied; (3) whether respondent/real party in interest will suffer irreparable or serious injury if the stay or injunction is granted; and (4) whether

appellant/petitioner is likely to prevail on the merits in the appeal or writ petition.

NRAP 8(c). Appellants have the burden to show the factors in favor of a stay. *Aspen Fin. Servs. v. Dist. Ct.,* 128 Nev. 635, 642, 289 P.3d 201, 206 (2012).

In relation to discovery appeals, the Supreme Court held "Absent a clear abuse of discretion, we 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) (*citing Diversified Capital v. City N. Las Vegas*, 95 Nev. 15, 23, 590 P.2d 146, 151 (1979)). Thus, to receive a stay, Appellants must show the District Court abused its discretion when it denied Appellants' Motion for a Protective Order.

### B. Appellants Are Not Likely to Prevail on the Merits in the Writ

#### 1. 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 was to prevent the collaborative sharing of information. (*See* Writ at e, 1, 2, 3, 8, 9, 13, 14, 15, 17, 18, 22, 28 (complaining of collaborative discovery.)) Courts nationwide however uniformly agree that a concern of the risk of public disclosure or collaborative sharing of information does not constitute good cause for a protective order. *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).[1] "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 the Federal and 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* FRCP 1; *see also* NRCP 1. Collaborative discovery fosters the goals of Rule 1 by eliminating the time and expense involved in re-discovery.[2] "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

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[1] *See also Wauchop v. Domino's Pizza,* 138 F.R.D. 539, 546 (N.D. Ind. 1991); *Ericson v. Ford Motor*, 107 F.R.D. 92, 94 (E.D. Ark. 1985); *Baker v. Liggett Group,* 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.*, 366 N.W.2d 160, 165 (Wis. App. 1985); *Nestle Foods 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); *Am. Tel. and Tel. Co. v. Grady*, 594 F.2d 594 (7th Cir. 1979); *Johnson Foils v. Huyck,* 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*, 85 F.R.D. 724, 726 (N.D. Ga. 1980); *Deford v. Schmid Prod. Co.*, 120 F.R.D. 648, 654 (D. Md. 1987);

[2] *Williams*, 50 F.R.D. at 32; *Wauchop*, 138 F.R.D. at 546; *Wilk v. Am. Med. Ass'n*, 635 F.2d 1295, 1299 (7th Cir.1980); *Grady*, 594 F.2d at 597; *Phillips Petroleum v. Pickens*, 105 F.R.D. 545, 551 (N.D.Tex.1985); *Carter-Wallace v. Hartz Mountain Indus.*, 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,* 93 F.R.D. 579, 580 (D.Colo.1982); *Baker*, 132 F.R.D. at 126; *Patterson v. Ford Motor,* 85 F.R.D. 152, 154 (W.D.Tex.1980).

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).

A protective order in this case violates Rule 1 by increasing the time and expense of litigation by forcing plaintiffs to re-discover information. This is especially true 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 costs for individual plaintiffs to bring their claims.

More important than decreasing the costs of litigation "[s]hared discovery is an effective means to insure full and fair disclosure." *Garcia v. Peeples*, 734 S.W.2d 343, 347 (Tex. 1987). "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 four pending lawsuits and violated a court order in *Smith v. Venetian.* Appellants' failure to secure a protective order before disclosing incident reports is the only reason these four plaintiffs discovered Appellants violations. A protective order in this case could only serve the improper purpose of giving Appellants peace of mind future plaintiffs will not catch their discovery violations. This is not a legitimatize purpose for a protective order.

Because the District Court properly determined Appellants could not receive a protective order to prevent Ms. Sekera from sharing discovery, Appellants are unlikely to prevail on the merits on this argument and a stay is thus improper.

### 2. Appellants Apply the Incorrect Legal Standard for Review of 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").

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. (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 Appellants' Writ asks the Court to analyze the wrong standard in reviewing a

motion for a protective order, which the Appellate Court will not do, Appellants are unlikely to prevail on the merits on this argument and a stay is thus improper.

### 3. The Information 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 – phonebook information (name, address, phone) plus date of birth. Appellants agree they only redacted "names, addresses, phone numbers and dates of birth." (Writ at 12.) Although the CR-1 and Acknowledgement of First Aid Assistance forms leave space for social security and drivers' licenses' numbers, Appellants do not collect this information. It is clear Appellants also instruct their guests not to fill out the social security # line on the accident reports because the written responses place "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.) Appellants also cannot establish a protectable interest over this information (names, addresses and phone numbers) because it is public and published in the phonebook. *See, e.g. Khalilpour v. CELLCO P'ship*, 2010 WL 1267749, at *2, 2010 U.S. Dist. LEXIS 43885, at *6–*7 (N.D.Cal.2010); *Busse v. Motorola, Inc.*, 351 Ill. App. 3d 67, 72, 813 N.E.2d 1013, 1018 (2004); *Keel v. Quality Med. Sys.*,

*Inc.*, 515 So. 2d 337 (Fla. Dist. Ct. App. 1987); *Brignola v. Home Properties, L.P.*, No. CIV.A. 10-3884, 2013 WL 1795336, at *12 (E.D. Pa. Apr. 26, 2013).

The Writ cites a myriad of California cases, which at first glance appear to support Appellants' position. However, upon closer examination these cases are rogue or do not support Appellants' arguments. For example, the *Izzo* court did not grant a protective order on privacy interests as Appellants claim. *Izzo v. Wal-Mart Stores, Inc.*, No. 215CV01142JADNJK, 2016 WL 409694, at *4 (D. Nev. Feb. 2, 2016); *see also* Writ at 23-24. 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, the unreported *Rowland v. Paris Las Vegas* case, that ordered a protective order on information phonebook information (name, address and phone number) appears to be a rogue decision resulting from the parties' embarrassing lack of briefing. *See* Joint Motion to Compel, *Rowland v. Paris Las Vegas*, No. 13CV2630-GPC DHB, 2015 WL 4742502 (S.D. Cal. Aug. 11, 2015) (APP368-73); *see also* Writ at 24-25. The parties in *Rowland* submitted a 5-page joint motion to compel on 23 discovery requests summarizing the requests and objections but failed to cite any legal authority, rules or statutes. (APP368-73.)

More importantly, the federal and state California cases which Appellants so eagerly urge the Court to follow support Ms. Sekera position because they hold a plaintiff's need to identify potential witnesses outweighs any privacy concerns a defendant may have about disclosing those witnesses' information. *See, e.g. Henderson v. JPMorgan Chase,* No. CV113428PSGPLAX, 2012 WL 12888829 (C.D. Cal. July 31, 2012); *Tierno v. Rite Aid,* 2008 WL 3287035 (N.D. Cal. July 31, 2008); *McArdle v. AT&T,* No. C 09-1117 CW (MEJ), 2010 WL 1532334 (N.D. Cal. Apr. 16, 2010); *Pioneer Elecs. (USA) v. Superior Court,* 40 Cal. 4th 360, 371, 150 P.3d 198, 205 (2007). The California Court of Appeals even held it was an abuse of discretion to require an opt-in notification system to secure the consent of identified potential witnesses before their contact information could be disclosed 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. The California courts, which Appellants urge the Court to follow, support Ms. Sekera's position she is entitled to the contact information for these potential witnesses. Because Appellants have provided no case law that states they can withhold contact information for potential witnesses, they are unlikely to prevail on their Writ and a stay is thus improper.

//

### 4. Appellants Have No Potential Liability under NRS 603A

Appellants' allege dissemination of their guests' private information is the equivalent to a data breach which will exposed to claims under NRS 603A. (Writ at 27.) Based upon the legislative history and the statute itself, there are three major reasons NRS 603A does not apply to the circumstances of this case.

First, NRS 603A was created to address large scale identity theft by criminals. (APP376.) Neither Ms. Sekera nor her counsel are identity thieves, and thus applying this statute under these circumstances would be contrary to the purposes of the statute's creation.

Second, providing unredacted incident reports is not within the meaning of "breach of the security of system data" defined by NRS 603A.020 as "unauthorized acquisition of computerized data that materially compromises the security, confidentiality or integrity of personal information maintained by the data collector." A Court order by definition authorizes conduct and has been understood to authorize conduct for nearly a century.[3] Thus, even if the information in the incident reports came within the reach of NRS 603A, disclosure of the incident reports in compliance with the Court's July 31, 2019 Order would be "authorized" acquisition. Because providing Ms. Sekera with the unredacted incident reports is

[3] *See, e.g. In re Troyer's Estate,* 48 Nev. 72, 227 P. 1008, 1008 (1924) ("authorized by court order"); *Club Vista Fin. Servs. v. Dist. Ct.,* 128 Nev. 224, 228, 276 P.3d 246, 248 (2012) ("the district court's order authorizing...").

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."

Third, the incident reports do not contain "personal information" as defined by NRS 603A.040. NRS 603A.040(1) defines "personal information" as a first and last name in combination with a: (a) social security number, (b) driver's license number, (c) account, credit or debit card number with the pin or access code, (d) a health insurance or medical ID number, (e) a username with a passcode. NRS603A cannot apply to Appellants unless the incident reports contain one of these categories of information. Appellants' incident reports are devoid of any account numbers, credit/debit card numbers, medical ID numbers and usernames and passwords. Although the redacted incident reports leave spaces for social security and drivers' license numbers, Appellants apparently do not collect this information and thus never redacted these lines. Because Appellants do not collect the information necessary to come within the purview of NRS 603A, Appellants are unlikely to prevail on the merits on this argument and a stay is therefore improper.

**5. Appellants' Privacy Policy Can't Subject Them to Liability**

Finally, Appellants are unlike to succeed on the Writ because their Privacy Policy cannot subject them to liability. Appellants' drafted their Privacy Policy to absolve them of liability related to personal information: your "provision of

information to us is at your own risk." (VEN493.) As individuals provide their information at their "own risk" Appellants cannot be liable to them under this policy.

The Privacy Policy also lacks basic contract elements. *See May v. Anderson*, 119 P.3d 1254, 1257, 121 Nev. 668, 672 (2005). There was no offer or acceptance because this online only Privacy Policy was not offered to individuals before their information was collected. There was no meeting of the minds because the individuals did not know of the Privacy Policy when Appellants collected their information. Finally, the individuals did not provide return consideration for Appellants' promise to protect their information. *See Pink v. Busch*, 100 Nev. 684, 691 P.2d 456 (1984). This analysis is consistent with decisions nationwide holding these privacy policies unenforceable against the companies who issue them.[4]

Finally, the Privacy Policy states Appellants may use the information "to comply with applicable laws and regulations" and may share the information to third-parties when Appellants are "required to respond to legal requests." (VEN490-91.) The Privacy Policy permits Appellants to share the information collected to comply with laws and respond to legal requests. Ms. Sekera's request

[4] *See, e.g. In re Google Privacy Policy Litig.*, 58 F. Supp. 3d 968, 986 (N.D. Cal. 2014); *In re Pharmatrak Privacy Litig*, 329 F.3d 9, 19-20 (1st Cir. 2003); *In re Jetblue Airways Privacy Litig.*, 379 F. Supp. 2d 299 (E.D.N.Y. 2005); *Johnson v. Nat'l Beef Packing*, 220 Kan. 52, 551 P.2d 779 (1976); *In re Am. Airlines Privacy Litig.*, 370 F. Supp. 2d 552 (N.D. Tex. 2005); *In re Northwest Airlines Privacy Litig.*, No. Civ.04-126(PAM/JSM), 2004 WL 1278459 (D. Minn. June 6, 2004).

for production is a "legal request." Additionally, once the Court signed the Court's July 31, 2019 directing disclosure, Appellants' failure to comply constituted contempt. *See* NRS 22.010(3). Thus, providing the unredacted incident reports would be "complying with applicable laws." As Appellants Privacy Policy (1) absolves them of liability, (2) does not meet contract formation requirements, and (3) excludes privacy to comply with court orders Appellants' are unlikely to prevail on this argument and a stay is therefore improper.

### C. The District Court Properly Denied Appellants' Motion for Reconsideration

Under established practice, a litigant may not re-argue matters considered in the court's initial opinion or raise new legal points for the first time on rehearing. *In Re Ross,* 99 Nev. 657,668 P.2d 1089, 1091 (1983). The failure to make arguments in the first instance constitutes waiver. *Chowdry v. NLVH, Inc.,* 111 Nev. 560, 893 P.2d 385 (1995).

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, Appellants previously argued many of the cases cited in their Motion for Reconsideration in their Motion for a Protective Order and Response to Ms. Sekera's Objection to the April 4, 2019 DCRR. Appellants also included a pre-dated Privacy Policy "last updated: May

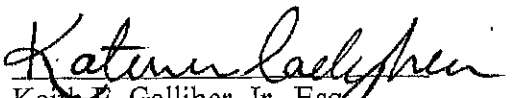
2018" a year before Appellants filed their Motion for a Protective Order. (VEN486.) Nevada law is clear: "points or contentions not raised, or passed over in silence on the original hearing, cannot be maintained or considered" on rehearing. *Chowdhry,* 111 Nev. at 562, 893 P.2d at 387. Appellants' choice to not include these arguments is not a valid reason for reconsideration. Appellants' are not likely to prevail on their argument the District Court's erred when it declined to consider their Motion for Reconsideration because the Motion impermissibly re-argued the same cases and points and raised new arguments which could have been raised in the initial motion, and as such a stay is improper.

## III. CONCLUSION

Based on the foregoing, Ms. Sekera respectfully requests that the Court deny Appellants Motion for a Stay.

DATED this 8th day of October, 2019

THE GALLIHER LAW FIRM



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## CERTIFICATE OF SERVICE

I hereby certify that I am an employee of The Galliher Law Firm and that on the 8 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 OPPOSITION TO APPELLANTS' EMERGENCY MOTION FOR STAY UNDER NRAP 27(e)** 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, addressed to the following:

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An employee of The Galliher Law Firm

No. 79689-COA

In The

# Court of Appeals of the State of Nevada



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

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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

[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)

[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

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[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:

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*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.

//

//

## 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

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Kathleen H. Gallagher, Esq.
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Las Vegas, Nevada 89104
*Attorney for Appellants*

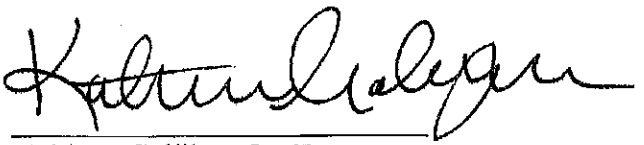
**NRAP 26.1 DISCLOSURE STATEMENT**

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



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*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

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

Court of Appeals Case No. 79689-COA
District Court Case No. A-18-772761-C



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

**REPLY TO JOYCE SEKERA'S OPPOSITION TO PETITIONERS' EMERGENCY UNDER NRAP 27(e)**

Michael A. Royal, Esq. (SBN 4370)
Gregory A. Miles, Esq. (SBN 4336)
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Petitioners VENETIAN CASINO RESORT, LLC, and LAS VEGAS SANDS, LLC, by and through their counsel, Royal & Miles LLP, hereby submits the following Reply to Joyce Sekera's Opposition to Petitioners' Emergency Motion for Stay Under NRAP Rules 8 & 27(e). This Reply is based upon and supported by the following memorandum of points and authorities, the pleadings and papers on file, the exhibits attached hereto, and any argument that the Court may allow at the time of hearing.

DATED this 14 day of October, 2019.

ROYAL & MILES LLP

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Gregory A. Miles, Esq. (SBE 4336)
1522 W. Warm Springs Rd.
Henderson, Nevada 89014
*Attorneys for Petitioners*
*VENETIAN CASINO RESORT, LLC,*
*LAS VEGAS SANDS, LLC*

## MEMORANDUM AND POINTS OF AUTHORITIES

COMES NOW Petitioners VENETIAN CASINO RESORT, LLC, and LAS VEGAS SANDS, LLC, by and through their counsel of record, ROYAL & MILES LLP, and respectfully file this reply to Joyce Sekara's opposition to Petitioners' motion for emergency stay filed on October 8, 2019, pertaining to Eighth District Court Case A-18-772761-C ("Case A772761"), JOYCE SEKERA ("Sekera") v. VENETIAN CASINO RESORT, LLC and LAS VEGAS SANDS, LLC ("Venetian").

The basis for Petitioners' motion for emergency stay is that the privacy rights of persons involved in other incidents will be irreparably violated and damaged if the stay is not granted until this Honorable Court can review the issues presently before it. By her own admission, Sekera has made it clear that upon receiving this unredacted information she will share it with multiple attorneys wholly unaffiliated with the present litigation, thereby subjecting these uninvolved individuals to untold intrusions into their privacy.

Sekera failed to explain in the Opposition how she will be harmed by the Court granting the motion to stay the production of unredacted other incident reports until this matter can be fully briefed and adjudicated. Further, Sekera further failed to explain how her alleged need for the unredacted information outweighs the right to privacy by those persons involved in prior incidents. If this

Court were to deny the request for stay, it would irreparably damage the privacy interests of these other guests and would render the issues now before the Court moot; the damage would be done and there would be no unringing of the proverbial bell.

Sekera has not even attempted to weigh her alleged need for the information at issue (much less her right to share it freely with everyone) against the need for Petitioners and/or their guests to be protected from having this personal information released to Sekera without the slightest limitation. Sekera wrongly dismisses some of the cases cited by Petitioners as "California" cases. The case of Izzo v. Wal-Mart Stores, Inc., 2016 U.S. Dist. LEXIS 12210; 2016 WL 409694 is a Nevada case where the U.S. District Court weighed similar issues and applied Nevada law in light of FRCP 26(b)(1). Further, Schlatter v. Eighth Judicial Dist. Court In and For Clark County, 93 Nev. 189 561 P.2d 1342 (1977), is a Nevada case cited in support of Petitioners' emergency motion to stay. There are other like cases citing to Izzo, *supra*, which will be presented in Petitioners' Response Brief, providing that the burden of proof in this circumstance is on the party seeking the discovery to demonstrate both relevancy and proportionality based on the needs of the case, with a greater emphasis on proportionality under FRCP 26(b)(1), which is now mirrored by NRCP 26(b)(1). (*See, i.e.* RKF Retail Holdings, LLC v. Tropicana Las Vegas, Inc., 2017 U.S. Dist. LEXIS 104850 at *19 - *22.)

Sekera has made multiple references to the private data of persons identified in Venetian's other incident reports as "only slightly more revealing or invasive than information contained in a phonebook." (*See, e.g.* Opposition at 9.) This trivializes, demeans and grossly understates the privacy rights at issue here. While a person's contact information may indeed be found in a phone book, that information does not include Social Security Numbers, dates of birth, driver's license information, narratives about a particular incident and potential injuries, information related to an EMT examination, such as blood pressure, pulse, past medical history, current/past medications, etc. The phone book also would not identify other non-employee witnesses connected to a given incident, with their contact information, thereby subjecting them to privacy intrusions by Sekera or anyone with whom she shares the information. The issue is not whether contact information can be found in a phone book, but protecting personal information connecting persons to a specific event where health information and other identifying data can be connected to the personal, private information.

It is no small thing that Sekera has freely acknowledged intent to share unredacted information with the world without the slightest regard for the privacy rights of the persons so identified. Sekera's opposition focuses primarily (if not solely) on her right to obtain and distribute the information as she so desires,

without providing any substantive discussion about how her needs and rights outweigh those of the persons wholly uninvolved with the subject lawsuit.

Sekera has made other representations in the Opposition which are without foundation, such as her assertion that Petitioners do not collect driver's license information and Social Security information, nor does she address her need for unredacted information in light of Eldorado Club, Inc. v. Graff, 78 Nev. 507, 511, 377 P.2d 174, 176 (1962).

In short, Petitioners will address the substance of issues in detail by the October 25, 2019 deadline for filing Petitioners' Answering Brief. The stay should remain in place until this matter has been fully considered; otherwise, irreparable harm will result. Sekera, on the other hand, has not demonstrated that she will suffer any harm with the stay temporarily in place.

DATED this 14 day of October, 2019.

ROYAL & MILES LLP

By _____

Michael A. Royal, Esq. (SBN 4370)
Gregory A. Miles, Esq. (SBN 4336)
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(702) 471-6777
Counsel for Petitioners

## CERTIFICATE OF COMPLIANCE

STATE OF NEVADA )
) ss:
COUNTY OF CLARK )

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 reply has been prepared in a proportionally spaced typeface using Word Perfect 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:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains **827 words** in compliance with NRAP 32(a)(1)(A)(ii) (having a word count of less than 14,000 words).

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

## 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 October, 2019, I served true and correct copy of the foregoing REPLY TO JOYCE SEKERA'S OPPOSITION TO PETITIONERS' EMERGENCY UNDER NRAP 27(e), by delivering the same via the Court's CM/ECF system which will send notification to the following:

Keith E. Galliher, Jr., Esq.
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1850 E. Sahara Avenue, Suite 107
Las Vegas, NV 89014
*Attorneys for Real Party in Interest*

Honorable Kathleen Delaney
Eighth Jud. District Court, Dept. 25
200 Lewis Avenue
Las Vegas, NV 89155
*Respondent*

Ashley Schmitt
An employee of Royal & Miles LLP

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

VENETIAN CASINO RESORT, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND LAS VEGAS SANDS, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE KATHLEEN E. DELANEY, DISTRICT JUDGE,
Respondents,
and
JOYCE SEKERA, AN INDIVIDUAL,
Real Party in Interest.

No. 79689-COA

FILED

OCT 17 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

*ORDER GRANTING STAY*

This original, emergency petition for a writ of mandamus or prohibition challenges a July 31, 2019, district court order directing petitioners to provide in discovery unredacted prior incident reports. Petitioners have moved for a stay of the district court order pending our consideration of this writ petition. On October 1, 2019, we ordered an answer to the petition and granted a temporary stay pending our receipt and consideration of any opposition to the stay motion. Real party in interest has timely filed an opposition to the stay motion,[1] and petitioners have filed a reply.

[1]Real party in interest's motion for leave to file an opposition in excess of the NRAP 27(d)(2) page limit is granted; the 16-page opposition was filed

When considering whether to grant a stay pending writ proceedings, we consider the following factors: whether (1) the object of the writ petition will be defeated absent a stay, (2) petitioners will suffer irreparable or serious harm without a stay, (3) real parties in interest will suffer irreparable or serious harm if a stay is granted, and (4) petitioners are likely to prevail on the merits of the petition. NRAP 8(c); *see Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000). Having considered the parties' arguments for and against the stay under these factors, we conclude that a stay is warranted pending our consideration of this writ petition. Accordingly, we grant petitioners' motion and stay the July 31 district court order, pending further order of this court.

It is so ORDERED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Kathleen E. Delaney, District Judge
Royal & Miles, LLP
The Galliher Law Firm
Eighth District Court Clerk

---

on October 8, 2019. Additionally, the clerk of this court shall detach from the opposition and separately file volume 1 of the appendix to real party in interest's responding brief.

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

Appellate Court No. 79689-COA
District Court Case No. A-18-772761-C



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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## TABLE OF AUTHORITIES

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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. General Reply to Sekera's Answering Brief

Real-Party-in-Interest Joyce Sekera's Answering Brief is all noise with no signal, "full of sound and fury, signifying nothing" (Macbeth, Act 5, Scene 5, Lines 25-27). Petitioners' position is quite simple: the privacy rights of individuals wholly unaffiliated with the present litigation were not given the proper consideration by the District Court. The majority of the discussion in Sekera's Answering Brief is focused on irrelevant mudslinging; she devotes precious little discussion to explaining how her alleged need for this information outweighs the privacy interests of these unaffiliated individuals. Her only stated reason for desiring the private information of these unaffiliated individuals is to refute any claims of comparative fault. However, on its face this argument fails. Sekera does not provide a cogent rationale to explain why individuals who are not witnesses to the alleged slip-and-fall, or the circumstances leading up to the fall, will have any relevant information regarding any argument that she is comparatively at fault. It appears that the only reason Sekera is seeking the private information of these unaffiliated individuals is to disseminate it to other attorneys pursuing claims against Petitioners. This is not valid reason for violating the privacy rights of these unaffiliated individuals.

Sekera has taken the untenable position that NRCP 1 provides her with absolute rights to both obtain the private information of persons wholly unaffiliated with the present litigation and to share it with anyone of her choosing, whenever and however she pleases, without the slightest limitation or regard for the privacy rights of those persons. In so doing, Sekera has entirely avoided any analysis under NRCP 26(b)(1), determining that critical and fundamental discovery rule to be "irrelevant." (*See* RAB at 20.) Sekera is mistaken. Indeed, 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 – having provided Petitioners with information such as names, addresses, phone numbers, driver's license, dates of birth, medical history and other health related information associated with an EMT examination, etc. – deserve protection and must be given consideration when a plaintiff, such as Sekera, makes a carte blanch request for such information.

Sekera's argument to support her alleged need for the private information of perhaps hundreds of persons entirely unrelated to her November 4, 2016 incident is that it is necessary for her to defend against an affirmative defense of comparative fault – suggesting she needs persons involved in unrelated other incidents to testify that they likewise did not see anything on the floor prior to their alleged events occurring somewhere else on the property of Venetian Resort Hotel Casino

("Venetian"). This purported need is clearly without merit. The facts of completely different incidents, involving different circumstances, different locations, and different accident mechanisms have no tendency whatsoever to prove or disprove whether Sekera was comparatively negligent at the time of her accident.

Sekera also rightly notes that Petitioners dispute her claim that there was a foreign substance on the floor at all. (*See* RAB at 2.) Indeed, Petitioners are not asserting that Sekera should have seen a foreign substance on the floor; instead, Petitioners deny the existence of a foreign substance. Thus, Sekera's claim that she needs the other incident reports to defend against an affirmative defense of comparative fault is disingenuous and without merit.[1]

As nearly every case cited by both parties herein provides, a proper analysis of Rule 26(b)(1) in discovery disputes similar to the instant matter requires Sekera to demonstrate both the relevance and proportionality of the information sought. Sekera has not done that in either the District Court or her Answering Brief. Petitioners posit that this is because it would lead directly to a conclusion that

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[1] Sekera also argues she needs other incident information so "the public" will "know the magnitude of the problem of Venetian's floors." (See RAB at 7.) However, this argument appears to be solely directed to the challenge against Sekera circulating the redacted incident reports. While Petitioners dispute that this is a valid reason to permit discovery, it is clear that the redacted incident reports already produced by Petitioners, and already disseminated by Sekera's attorney, are sufficient to satisfy this "public notice" argument.

supports Petitioners' request to protect the private information of the unaffiliated individuals.

Instead of addressing the merits of the important privacy issues at hand, Sekera has chosen to provide a misleading and distorted view of the litigation and attack the character of Petitioners and their counsel. As discussed below, these are red herrings designed to mislead this Honorable Court by presenting Petitioners as bad actors unworthy of relief. While Petitioners believe these topics are not relevant to the issue before this Honorable Court, in an abundance of caution Petitioners will address these topics at the end of this brief. Suffice to say that while Sekera has repeatedly made improper reference to other cases presently litigated against Venetian, she has not produced one court order supporting her claim that there has been any kind of discovery abuse by Petitioners or Venetian. As for the assertion related to disgruntled former Venetian employee Gary Shulman, that is a matter presently pending before the District Court. It has nothing to do with any issue at hand. That stated, a full reading of the Shulman deposition transcript attached by Plaintiff, as explained briefly below, demonstrates that the facts are not as presented by Sekera in her Answering Brief.

This writ is not about alleged past discovery issues involving the parties, but the right of privacy by those persons involved in other incidents, which Sekera repeatedly demeans and grossly mischaracterizes as "**phonebook** ... plus date of

birth information." (*See* RAB 4. Emphasis added.) This misleading characterization completely fails to account for the context of the individual's private information being included in an accident report. The inclusion of the personally identifiable information in the context of an incident report maintained by the Venetian is clearly not the same as the information found in a "phonebook." Moreover, there is much more personal information within the subject incident reports than contact information, each of which note on every CR-1 form that they include "Protected Health Information." (*See* RAB, Appendix Vol. 1, APP129,-35, 37-38.) These documents also contain medical history information which, of course, is not found in a "phonebook." (*See id.* at APP 136.)[2]

Accordingly, Petitioners hereby implore this Honorable Court to focus on the privacy issues at hand, and not be distracted by Sekera's tactics.

## II. Response to Sekera's Given Procedural History

Petitioners brought a motion for protective order under NRCP 26(c) before the Discovery Commissioner which was appropriately granted by way of recommendation. (*See* Petitioners' Appendix, Vol. 1, Tab 14, VEN 201-06.)

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[2] Sekera enclosed only twelve (12) pages of more than 660 pages produced by Petitioners, which include many more examples of Acknowledge of First Aid Assistance & Advice to Seek Medical Care forms with completed medical history information, along with notes provided by the responding emergency medical technician. (*See* RAB, Appendix Vol. 1, APP127-38.) Also, contrary to Sekera's representation that driver's license information is not collected by Venetian, that is inconsistent with documents Sekera produced herein. (*See, i.e., id.* at APP130.)

During the March 13, 2019 hearing, the Discovery Commissioner weighed Sekera's alleged need for the private information of persons involved in other incidents against the privacy rights of these unrelated third parties and recommended protection. (*See* Petitioners' Appendix, Vol. 1, Tab 13, VEN 186-200.)

At the March 13, 2019 hearing, the Discovery Commissioner considered Sekera's argument that she needs the ability to contact persons involved in other incidents to respond to a comparative fault affirmative defense. However, the Discovery Commissioner stated: ". . . the comparative negligence of another party versus your own party wouldn't be relevant to this action." (*See id.* at VEN 194, ln 9-11.) The Discovery Commissioner further noted: "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." (*See id.* at VEN 197, ln 24-25; 198, ln 1.) She further stated: "I am going to issue a protective order that the reports that are disclosed in this case are not to be circulated outside of this case and for use only in this case." (*See id.* at VEN 198, ln 1-5.)

In her answering brief, Sekera's counsel admits that the prior incident reports at issue were provided to another attorney, Peter Goldstein, Esq., who was involved in another case against the Venetian property, on February 7, 2019, after

the motion for protective order was filed with the Discovery Commissioner. (*See* RAB at 6.) To Petitioners' knowledge, this is the first time such an admission has occurred.

At the March 13, 2019 hearing before the Discovery Commissioner, Sekera did not advise the court that the information deemed protected was shared with Mr. Goldstein on February 7, 2019 or that it had already all been filed as an exhibit with the court in another proceeding by Mr. Goldstein. (*See id.* at VEN 186-200; Petitioners' Appendix, Appendix, Vol. 1, Tab 12, VEN 140-85 at VEN 141, ln 15-26, VEN 147, ln 12-13, VEN 173.) When the issue of sharing these documents was before the District Court at a hearing held on May 14, 2019, the following exchange between Sekera's counsel and the court occurred:

> MR. GALLIHER: .What happened when I got my redacted reports, I exchanged them with him (Attorney Peter Goldstein). He sent them to me -- **and by the way, there was no Protective Order in place. <u>There was no motion practice in place</u>, despite what's being represented.**
>
> THE COURT: I was going to say because I do have a counter motion for you --
>
> MR. GALLIHER: Yeah. I know.
>
> THE COURT: -- to comply with the Court order and a counter motion for sanctions related --
>
> MR. GALLIHER: This was done right upfront. **The minute I got the information, I -- I exchanged it with counsel.** George Bochanis also got a set. He exchanged

a set. (Appendix, Vol. 2, Tab 15 at VEN 218, ln 2-13, emphasis added.)

Accordingly, while Sekera counsel now admits prior incident reports were, in fact, shared with Mr. Goldstein after the motion for protective order was filed and pending before the Discovery Commissioner, no explanation has been given as to why there was a complete failure by Sekera counsel to advise the court below as counsel has here. More importantly, what was the purpose behind Sekera's sharing of the information provided? How did it advance any interests of Sekera in her litigation against Petitioners? The District Judge below, after being advised by Petitioners of the actions taken by Sekera counsel, did not consider the conduct of counsel after determining that the documents at issue are unworthy of any protection whatsoever. (*See id.* at VEN 254, ln 17-23.) In so doing, the judge found that the persons identified in other incident reports have no privacy rights.

At the September 17, 2019 hearing on Petitioners' motion for reconsideration, the District Court judge opened the hearing by stating a belief that some kind of protection was already in place. (*See* Petitioners' Appendix, Vol. 3, Tab 20 at VEN 460, ln 4-25; VEN 461, ln 1-7.) Unfortunately, it was not. The motion for reconsideration was not granted, and this petition followed.

## III. Petitioners Demonstrated "Good Cause" for a Protective Order under NRCP 26(c) and the District Court Failed to Consider NRCP 26(b)(1) and Applicable Case Law When It Reversed the Discovery Commissioner's Report and Recommendation of April 4, 2019

Petitioners respectfully submit that they presented ample evidence that the privacy rights of third parties identified in incident reports regarding other alleged accidents are worthy of protection under NRCP 26(c) below. The District Court overruled the Discovery Commissioner's granting of a protective order, knowing full well that Sekera had already shared the deemed protected information and that she intends to continue doing so however she chooses, being unable to find any law in support of such protection. However, there is sufficient law in support of the protection recommended by the Discovery Commissioner.

In *RKF Retail Holdings, LLC v. Tropicana Las Vegas, Inc.*, 2017 U.S. Dist. LEXIS 104850 (D. Nev. July 6, 2017) (*19-*22) (quoting *In re Bard IVC Filters Prods. Liab. Litig.*, 317 F.R.D. 562, 563 (D.Ariz. 2016)), the court related the following in regards to the application of Rule 26(b)(1) to such issues:

> **Relevancy alone is no longer sufficient—discovery must also be proportional to the needs of the case.** The Advisory Committee Note makes clear, however, that the amendment does not place the burden of proving proportionality on the party seeking discovery. The amendment "does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations." Rule 26, Advis. Comm. Notes for 2015 Amends. **Rather, "[t]he parties**

> **and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes."** Bard, 317 F.R.D. at 564.
>
> Generally, the party opposing discovery has the burden of showing that it is irrelevant, overly broad, or unduly burdensome. Graham v. Casey's General Stores, 206 F.R.D. 251, 253-4 (S.D.Ind. 2000); Fosbre v. Las Vegas Sands Corp., 2016 U.S. Dist. LEXIS 1073, 2016 WL 54202, at *4 (D.Nev. Jan. 5, 2016); Izzo v. Wal-Mart Stores, Inc., 2016 U.S. Dist. LEXIS 17701,.2016 WL 593532, at *2 (D. Nev. Feb. 11, 2016). **When a request is overly broad on its face or when relevancy is not readily apparent, however, the party seeking discovery has the burden to show the relevancy of the request.** Desert Valley Painting & Drywall, Inc. v. United States, 2012 U.S. Dist. LEXIS 145771, 2012 WL 4792913, at *2 (D.Nev. Oct. 9, 2012) (citing Marook v. State Farm Mut. Auto. Ins. Co. 259 F.R.D. 388, 394-95 (N.D. Iowa 2009)). **The 2015 amendments to Rule 26(b) have not changed these basic rules, although they must now be applied with a greater degree of analysis and emphasis on proportionality.** (Emphasis added.)

Petitioners argued below that the requested information is irrelevant, overly broad and unduly burdensome – based in large part on the privacy issues presented. At that point, under Rule 26(b)(1), the burden then shifted and Sekera had to demonstrate relevance and proportionality. Sekera did not do that below, and has not attempted to do that here. She merely dismissed it as "irrelevant." (*See* RAB at 20.)

Keep in mind that Sekera's repeated use of "phonebook" to trivialize and marginalize the privacy rights of persons involved in other incidents in favor of her alleged absolute right to obtain the information is not limited to this litigation, but extends to her right to freely share it. Petitioners respectfully submit that Sekera is wrong, and that the district judge abused her discretion by reversing the Discovery Commissioner and ordering the production of unredacted information to be disclosed to Sekera without recognizing any privacy rights or granting any protection.

## IV. Nevada Favors the Protection of Private Information of Guests Identified in Other Incident Reports under NRCP 26(c)

Sekera's repeated use of "phonebook" to refer to the information at issue is inappropriate. A phonebook provides a name, address and phone number; however, it does not provide dates of birth, driver's license information, social security information, health history and medical examination information, nor does it connect the name, address and phone information to a specific event to be freely shared, without limitation.

Sekera asserts that Petitioners are mostly concerned with Sekera's unfettered interest in sharing the private information of Venetian guests. (*See* RAB at 15.) That is an incorrect characterization of the issue. Petitioners are concerned with protecting the privacy rights of Venetian guests involved in other incidents where they have provided information pertaining to injury related events, examination of

their physical condition, documentation of their medical history, etc. These guests have a reasonable expectation of privacy, which rights have not been fairly considered by the lower court.

Sekera asserts that there is no Nevada law protecting the information at issue. (*See* RAB at 21.) That is not only unfounded, but is belied by many of the cases Sekera relies upon in her Answer Brief.

First, in *Eldorado Club, Inv. v. Graff*, 78 Nev. 507, 377 P.2d 174 (Nev. 1962), the Nevada Supreme Court held that the use of prior incident reports in slip and fall cases such as this are inadmissible as evidence of constructive notice.[3] Therefore, the relevance of the information sought is questionable. Second, *Schlatter v. Eighth Judicial Dist. Court In and For Clark County*, 93 Nev. 189, 192, 561 P.2d 1342, 192-93 (1977), provides that discovery must be carefully tailored to protect privacy interests while meeting the needs of the party requesting the information. That is consistent with the balancing test required under NRCP 26(b)(1).

Sekera suggests that Petitioners did not fairly represent *Izzo v. Wal-Mart Stores, Inc.*, 2016 U.S. Dist. LEXIS 12210; 2016 WL 409694 (D. Nev. February 2,

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[3]*See Lologo v. Wal-Mart Stores, Inc.*, U.S. Dist. LEXIS 100559 (D.Nev July 29, 2016), the plaintiff (who slipped/fell at a Wal-Mart) sought to introduce evidence of prior incidents. Defendant's motion to exclude the evidence (citing *Eldorado Club, Inc.*, and FRE 402) was granted.

2016), to the Court in the petition. (*See* RAB at 23.) In *Izzo*, the plaintiff sought prior incident reports in slip/fall litigation. The Court, based in part on the defendant's desire to protect the privacy interests of guests, determined that the information previously produced to the plaintiff, which did not identify individuals involved in prior incidents, was sufficient. Similarly, here, Sekera already has the information she seeks. Petitioners argued below and again here that Venetian is likewise unduly burdened by the prospect of having prior guests being contacted not only by Sekera's counsel but by untold others litigating unrelated matters against Venetian. In fact, Plaintiff is now seeking unredacted subsequent incident reports where she likewise plans to contact witnesses and circulate information to other counsel all in the name of NRCP 1.[4]

Sekera also discredits *Bible v. Rio Props., Inc.*, 246 F.R.D. 614, 620-21 (C.D. Cal. 2007), by suggesting the decision is based on the California Constitution. While that is referenced in the body of the decision, the decision is based on a broader review of privacy under the Rule 26(b)(1) analysis:

> Finally, defendant objects that 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 (despite claiming Nevada law applies). *See* Defendant's Supp.

[4] A Report and Recommendation granting Sekera's motion to compel unredacted subsequent incident reports to Sekera has been issued by the Discovery Commissioner and an objection will be filed once the Report and Recommendation is filed.

> Memo. at 4:11-12. However, **privacy is not an absolute right, but a right subject to invasion depending upon the circumstances.** *Heller v. Norcal Mut. Ins. Co., 8 Cal. 4th 30, 43-44, 32 Cal. Rptr. 2d 200, 207-08, 876 P.2d 999 (1994)*, cert. denied, *513 U.S. 1059, 115 S. Ct. 669, 130 L. Ed. 2d 602 (1994)*. **Thus, "the privilege is subject to balancing the needs of the litigation with the sensitivity of the information/records sought."** *Davis v. Leal, 43 F. Supp. 2d 1102, 1110 (E.D. Cal. 1999)*; see also *Pioneer Elecs. v. Superior Court, 40 Cal. 4th 360, 371-75, 53 Cal. Rptr. 3d 513, 520-24, 150 P.3d 198 (2007)* **[**17]** (balancing privacy rights of putative class members with discovery rights of civil litigants). **Here, 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.** With the limitations set forth herein, the Court grants plaintiff's motion to compel, in part, and denies it, in part. (*Id.* at 620-21. Emphasis added.)

The *Bible* decision, therefore, is on point. It imposed the kind of balancing test under FRCP 26(b)(1) that should have been utilized below under NRCP 26(b)(1).

Sekera likewise dismisses *Rowland v. Paris Las Vegas*, 2015 U.S. Dist. LEXIS 105513; 2015 WL 4742502 (S.D. Cal. Aug 11, 2015), as a "rogue decision." (*See* RAB at 22, note 7.) However, the holding in *Rowland* is consistent with *Izzo* and *Bible* in its application of Nevada law on this issue. The following language is directly on point in support of Petitioners:

> Further, **the Court finds that requiring disclosure of the addresses and telephone numbers of prior hotel**

> **guests would violate the privacy rights of third parties**. "Federal courts ordinarily recognize a constitutionally-based right of privacy that can be raised in response to discovery requests." *Zuniga v. Western Apartments, 2014 U.S.Dist. LEXIS 83135, at *8 (C.D. Cal. Mar. 25, 2014)* (citing *A. Farber & Partners, Inc. v. Garber, 234 F.R.D.186, 191 (C.D. Cal. 2006))*. However, this right is not absolute; rather, it is subject to a balancing test. *Stallworth v. Brollini, 288 F.R.D. 439, 444 (N.D. Cal.2012)*. "**When the constitutional right of privacy is involved, 'the party seeking discovery must demonstrate a compelling need for discovery, and that compelling need must be so strong as to outweigh the privacy right when these two competing interests are carefully balanced.'**" *Artis v. Deere & Co., 276 F.R.D. 348, 352 (N.D. Cal. 2011)* (quoting *Wiegele v. Fedex Ground Package Sys., 2007 U.S. Dist. LEXIS 9444, at *2 (S.D. Cal. Feb. 8, 2007))*. "**Compelled discovery within the realm of the right of privacy 'cannot be justified solely on the ground that it may lead to relevant information.'**" *Id.* **Here, Plaintiff has not addressed these privacy concerns, much less demonstrated that her need for the information outweighs the third party privacy interests.** Therefore, the Court will not require Defendant to produce addresses or telephone numbers in response to Interrogatory No. 5. Defendant is directed to file a supplemental response to Interrogatory No. 5, as limited by the Court. (*See id.* at *7-8. Emphasis added.)

Sekera further incorrectly suggests that the case of *Shaw v. Experian Info. Solutions, Inc.*, 306 F.R.D. 293 (SD. Cal. March 18, 2015), cited by Petitioners, does not support the petition before the Court. (*See* RAB at 23.) In so doing, Sekera writes: "The *Shaw* Court actually required the defendants disclose the 'names, addresses, and telephone number' of third-parties without a protective

order on the same." (*See id.*) To the contrary, the *Shaw* court held as follows: "the plaintiffs met the defendant's stated privacy concerns **by stating that they would accept the information in redacted form**." (*Shaw*, *supra*, at 299, emphasis added.) In other words, the *Shaw* court ensured that the privacy rights of third parties, such as those at issue here, were protected, something Sekera failed to note.

Petitioners refer the court to *Caballero v. Bodega Latina Corp.*, 2017 U.S. Dist. LEXIS 116869 (D. Nev. July 25, 2017). There, the plaintiff argued that her real issue for a slip/fall on a foreign substance was not just that the foreign substance was present, but that the floor was itself slippery and not appropriate for its intended use. Therefore, plaintiff argued that *Eldorado Club, Inc.* did not apply (as Sekera is arguing here). In *Caballero*, the court denied plaintiff's motion to compel the production of prior incidents, even in unredacted form, because she did "not meet her threshold burden to show the discovery she seeks to obtain is 'relevant to any party's claim or defense" under Rule 26(b)(1); therefore, the court did not even get to the proportionality part of the balancing test under the rule. (*See id.* at *22-23.) Here, the district court found the information to be relevant, but did not weigh the proportionality based on Plaintiff's invented need for the information to counter any potential comparative fault argument.

A review of some cases cited by Sekera is necessary. Sekera's reference to *Wauchop v. Domino's Pizza, Inc.*, 138 F.R.D. 539 (N.D. Ind. 1991), for example, misses the mark. There, the defendant sought protection of certain information to protect its own reputation, not because it desired to protect the privacy rights of customers. Further, the *Wauchop* case did not involve the dissemination of protected health information. Here, Petitioners desire to protect Venetian guests from being contacted and harassed not only by Sekera, but by multiple others in connection with some other incident. Petitioners are moving to protect the valued privacy of Venetian guests. That was not an issue in *Wauchop*. As it presently stands, this privacy interest is neither valued nor protected by the District Court below. Sekera has not presented any Nevada case law supporting such a result, nor has Sekera cited any Nevada law supporting the proposition that NRCP 1 trumps all arguments related to the protection of private information.

Sekera also cites to *Khalilpour v. Cellco P'ship*, 2010 U.S. Dist. LEXIS 43885* (N.D. Cal. April 1, 2010), which relates to a class action where information was sought to identify the class members. This case actually supports the pending petition. What Sekera failed to relay in citing to *Khalilpour* is that there was already a protective order in place. Pursuant to this extant protective order the information at issue was to be used strictly within the litigation.

Accordingly, the *Khalilpour* court recognized a protectable privacy interest. (*See id.* at *10-11.)

Sekera's reference to *Busse v. Motorola, Inc.*, 351 Ill. App. 3d 67, 813 N.E.2d 1013 (2004), oddly does not even address the discovery issues at hand, but instead considered a motion for summary judgment on a claim of privacy invasion in a tort action. (*See* RAB at 22.) The *Busse* court held that "Private facts must be alleged" by a plaintiff to meet the elements of the tort, noting: "Without private facts, the other three elements of the tort need not be reached." (*See id.* at 72, 813 N.E.2d at 1017.) The instant matter does not involve any claim for invasion of privacy or its needed elements. Here, the privacy issues involve the production of the private information of individuals unaffiliated with the present litigation, including personal events and health related information tied to each name with contact information, which are by their very nature "private."

The case of *Keel v. Quality Medical System, Inc.*, 515 So.2d 337 (Fla. Dist. Ct. App. 1987), cited by Sekera, is likewise inapplicable. (*See* RAB at 22.) The *Keel* decision (actually consisting of a single paragraph) relates to a restraining order preventing a former employee from contacting customers of his former employer. It has nothing to do with any issues presently before the court here.

The case of *Brignola v. Home Props., L.P.*, 2013 U.S. Dist. LEXIS 60282 (E.D. Pa. April 25, 2013), cited by Sekera, relates to a motion to dismiss filed by

the defendant in a cause of action related to debt collection. (*See* RAB at 22.) It does not address a discovery issue at all and contains no analysis under Rule 26(b)(1).

Sekera's reference to *Mount Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 2013 U.S. Dist. LEXIS 88239 (D.C. N.J. June 24, 2013), also supports Petitioners' position. (*See* RAB at 22.) While Sekera represents the case to stand for the proposition that concerns about protecting the privacy of contact information were "overblown", Sekera fails to relay that there was already a **confidentiality order** in place; therefore, the court recognized a protectable interest. It should be further noted that the *Mount Holly* case did not involve sensitive private health information provided by guests involved in an incident while visiting a business.

In *Henderson v. JPMorgan Chase Bank*, No. CV113428PSGPLAX, 2012 WL 12888829, at *4 (C.D. Cal. July 31, 2012), also cited by Sekera, the information at issue related to employees, not private party guests, and did not involve the dissemination of any private health information; therefore, it is not at all helpful. (*See* RAB at 24.) Also, Sekera fails to note that in *Henderson* there was already a working protective order in place regarding protection of personal contact information to address privacy concerns. Further, the court there noted that the plaintiff met the balancing test of Rule 26(b)(1) demonstrating a need for this

protected private information. (*See id.* at *16-17, citing *Knoll v. American Tel. & Tel. Co*, 176 F.3d 359, 365 (6th Cir 1999) (approving protective orders to protect non-parties from "the harm and embarrassment potentially caused by nonconfidential disclosure of their personnel files.")[5] Sekera has not done that here.

Sekera's reference to *Tierno v. Rite Aid Corp.*, 2008 U.S. Dist. LEXIS 58748 (N.D. Cal. July 31, 2008), is likewise misplaced. (See RAB at 24.) In citing to this case, Sekera again fails to advise the Court that there was already a protective order in place "to ensure that information is not misused". (*See id.* at *8-9, citing *Pioneer Electronics, Inc. v. Superior Court*, 40 Cal 4th 360, 371 (2007) ["privacy intrusion is minimized where safeguards that shield information from disclosure are in place"].) No such safeguards were provided by the District Court herein to protect against the misuse of private information.

In citing to *McArdle v. AT&T Mobility LLC*, 2010 U.S. Dist. LEXIS 47099 *10 (N.D. Cal. April 16, 2010), Sekera once again failed to advise that the private information at issue there was subject to a protective order "limited to Plaintiff and his counsel in this case." (*See* RAB at 24-25.) Again, no such order is in place protecting the privacy rights of Venetian guests here.

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[5]The court in *Knoll* upheld the district court's issuance of a protective order to protect the privacy of nonparty personnel files sought by the plaintiff.

The case of *Puerto v. Superior Court*, 158 Ca. App. 4th 1242, 70 Cal.Rptr. 3d 701 (2008), cited by Sekera, is also supportive of Petitioners' position. (*See* RAB at 25.) There, the California court acknowledged the privacy rights of persons identified in disclosures, stating that "the trial court was well within its discretion in concluding that the witnesses had a reasonable expectation of privacy in their addresses and phone numbers" and that the trial court was free to order protection of the information at issue. (*See Puerto* at 1252, 1259, 70 Cal.Rptr.3d at 708, 714.)

In reality, Sekera has not cited to any case law supporting her position that rights under NRCP 1 are superior to any privacy rights of persons involved in other incidents on Venetian property. Further, Sekera has failed entirely to establish why she needs contact information of persons involved in other incidents at all – other than to rebut a comparative fault defense by Petitioners. Again, since Petitioners deny there was any foreign substance on the floor at the time of Sekera's fall (something she insists is "important to note" at RAB 2), the other incident reports would not be relevant at all to her stated purpose, as Petitioners are not asserting Sekera should have seen something on the floor that did not exist. Regardless, Sekera has not established relevance or proportionality for this unredacted information under NRCP 26(b)(1), and most certainly has not justified

her alleged right to share this private information to whomever she desires, however and whenever she so desires.

Petitioners have demonstrated that the Nevada legislature has expressed an interest in protecting the privacy rights of private parties, referencing NRS § 603A. Further, Senate Bill 220 was recently signed into law, which relates to internet privacy rights, generally prohibiting website and online services from selling of personal data of users against a user's will.[6] This, again, demonstrates a desire by the Nevada legislature to protect private contact information of individuals, such as the information at issue in this writ proceeding. Most certainly, Sekera's alleged right to share personal data with anyone, anywhere, and in any way she desires is wholly inconsistent with the growing trend to protect this information.

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[6] SB 220, effective October 1, 2019, grants consumers the right to direct operators not to sell their covered information. The operator must honor the request only if the operator can reasonably verify the authenticity of the request and the identity of the consumer using commercially reasonable means. borrows the definition of "covered information" from existing Nevada law. "Covered information" under SB 220 includes the following: (1) a first and last name; (2) a physical address which includes the name of a street and the name of a city or town; (3) an e-mail address; (4) a telephone number; (5) a social security number; (6) an identifier that allows a specific person to be contacted; or (7) any other information concerning a person collected from the person through the Internet website or online service of the operator and maintained in combination with an identifier in a form that makes the information personally identifiable. (NV SB 220.)

## V. Sekera's References to Irrelevant and Misleading "Facts" Should be Wholly Disregarded

Sekera has introduced information which is not only irrelevant to the present writ, but which has been used for the sole purpose of distracting the Court from the issue at hand, and to unfairly malign both Petitioners and their counsel, suggesting that Petitioners are unworthy of fair adjudication here. Petitioners will respond to these allegations as briefly as possible.

### A. Sekera's references to other pending Venetian matters is inappropriate

Sekera has provided the Court with a false assertion that Venetian is somehow a bad actor because there were variances in incident reports produced in other cases occurring in different areas of the property on different dates and under different circumstances. (*See* RAB 10-11.) In so doing, Sekera has included a copy of a motion filed by Peter Goldstein, Esq., on February 13, 2019. (*See* RAB at 11.) Sekera failed to advise the Court that the motion filed by Mr. Goldstein, attached as APP224-35, was denied. (*See* Petitioners' Appendix, Vol. 4, Tab 23, VEN 496-98.)[7] In fact, as noted earlier, Sekera has not presented this Honorable Court with one order supporting her contention that Petitioners have been in any

[7] In attaching this motion, Sekera also failed to advise the Court that Mr. Goldstein filed all 660 pages of documents provided to him by Sekera's counsel on March 12, 2019, which were produced by Sekera counsel on February 7, 2019, after Petitioners' motion for protective order was filed and pending. (*See* Petitioners Appendix, Vol. 1, Tab 12, VEN 140-46.)

way sanctioned or admonished by the court below for alleged discovery abuses. Further, Sekera fails to note that in all other Venetian cases she has referenced, there are protective orders in place protecting the same type of information at issue here. This litigation is, in fact, the anomaly.

### B. Sekera's reference to Gary Shulman's testimony is inappropriate

For reasons Sekera cannot articulate or justify, she has dedicated space in her Answering Brief to falsely assert that witness Gary Shulman was instructed "to lie" by Venetian's counsel during a meeting on June 28, 2018. (*See* RAB at 11.) First, this allegation is untrue and is presently the subject of a motion before the District Court. It is therefore improper to raise it in response to this petition. Second, it has nothing to do with the privacy rights at issue before the Court. It is disappointing that Sekera would make this outrageous claim and force Petitioners to address it before this Honorable Court. However, Petitioners will do so out of necessity.

Venetian's counsel first met with Mr. Shulman in his capacity as a Venetian Table Games Supervisor on Venetian property on June 28, 2018. (*See* RAB Appendix 1, APP032, deposition at 21:6-25; 22:1-5; 51:3-25; 52-53; 55:3-25; 56-62.)[8] On June 29, 2018, Venetian's counsel sent correspondence to Mr. Shulman

[8] Mr. Shulman initially testified that his meeting with Venetian defense counsel was November 28, 2018. (*See* RAB Appendix 1, APP033, deposition at 21:6-25.)

confirming what Mr. Shulman related regarding his recollection of events during the June 28, 2018 meeting; *to wit:* that he had not identified a foreign substance on the floor, among other things. (*See id.* APP041-42, deposition at 57:8-25; 58-61; 62:1-15.) Mr. Shulman communicated with Venetian's counsel on numerous occasions following the June 28, 2018 meeting and never conveyed to defense counsel or anyone affiliated with Venetian any understanding that he had been told "to lie" in this litigation. (*See id.* APP042, deposition at 62:5-15.)

To Petitioners' knowledge, the first time Mr. Shulman alleged that he was told "to lie" by Venetian's counsel (and thereafter harassed, intimidated and terminated by Venetian for an alleged failure to comply) was in his private conference with Sekera's counsel one week preceding his April 17, 2019 deposition. (*See* deposition at APP040-42, deposition at 51:3-25; 52-61; 62: 1-15.) The first time Mr. Shulman related his scandalous claim to anyone affiliated with the Venetian was, by his own admission, in the April 17, 2018 deposition. (*See id.* APP041, deposition at 55:21-25; 56:1-12; 65:5-15.)

Indeed, Mr. Shulman had received the detailed correspondence of June 29, 2018 confirming defense counsel's understanding of his recollection of events, and despite multiple communications between June 28, 2018 and April 17, 2019, he failed to relay any concerns or convey any assertions to Venetian or its counsel

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He later acknowledged that the meeting was, in fact, in June 2018. (*Id.* APP040, deposition at 51:3-25; 52:1-25; 53:1-19.)

regarding his claim that he was told "to lie". (*See id.* at APP042, deposition at 59:3-25; 60:1-25; 61:1-25; 62:1-15.)[9]

Mr. Shulman was suspended by Venetian on or about November 20, 2018 for threatening a female supervisor. (*See* Petitioners Appendix, Vol. 4, Tab 25, VEN 510-12.) He was terminated on January 23, 2019. (*See id.*) On February 22, 2019, Mr. Shulman filed a complaint with the Nevada Equal Rights Commission ("NERC") asserting he was wrongfully terminated by Venetian. (*See* Petitioners Appendix, Vol. 4, Tab 25, VEN 513-14.) Interestingly, there is no mention in Mr. Shulman's NERC complaint of having been told "to lie" by Venetian's counsel at any time, nor is there any reference to the subject litigation at all. (*See id.*)[10]

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[9] Note further that the June 28, 2018 meeting occurred before Petitioners identified any witnesses pursuant to NRCP 16.1 (in which Mr. Shulman was named as a witness), approximately one month prior filing the Joint Case Conference Report. (*See* Petitioners Appendix, Vol. 4, Tab 24, VEN 499-508.)

[10] Mr. Shulman testified in deposition that he had a stellar record at Venetian prior to his meeting with Venetian defense counsel, but that shortly after his June 2018 meeting he was harassed at work and received multiple warnings leading to his termination. (*See* RAB Appendix 1, APP033-34, deposition at 23:2-25; 24:1-25; 25:20-25; 26:1-25; 27:1-25. *See also* Petitioners Appendix, Vol. 4, Tab 25, VEN 509.) Later in the deposition, Mr. Shulman recanted and said he had received a series of warnings prior to his one and only meeting with Venetian's counsel on June 28, 2018 – therefore completely discrediting his earlier claim of harassment and warnings occurring only after the June 28, 2018 meeting. (*See id.* APP040, deposition at 51:7-25; 52:1-25; 53:1-12.) Mr. Shulman ultimately blamed his termination on Venetian's alleged failure to appropriately deal with his chronic health issues and time he had taken off work under the Family and Medical Leave Act. (*See id.*, APP034, deposition at 28:1-22.) It should further be noted that Mr.

Sekera well knows that Mr. Shulman's assertion that he was told "to lie" by Venetian's counsel is spurious. Mr. Shulman is a disgruntled former employee who Sekera counsel met with privately to elicit arguably privileged information a week prior to Mr. Shulman's deposition without advising Venetian's defense counsel. This allegation has no place here.

It is very clear from a full and fair reading of the very deposition transcript Sekera produced with her Answering Brief that there is no merit these allegations. Yet, Sekera continues to use it as a weapon whenever possible in an effort to distort the issues and discredit Petitioners. It is off topic and manipulative. Petitioners have given it more attention that it deserves; however, salacious allegations of this nature sadly require a response. This assertion by Sekera should be wholly disregarded as having nothing to do with protecting the privacy rights of Venetian guests having absolutely no knowledge about Sekera's incident.

### C. The District Court's granting of leave to amend under NRCP 15 to add a punitive damages claim is irrelevant

Sekera's reference to having received leave to add a claim for punitive damages has nothing to do with the issue of protecting the privacy rights of individuals identified in other incident reports. The fact is that the District Court

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Shulman's suspension of November 20, 2018 occurred nearly five months prior to his April 17, 2019 deposition and his termination of January 23, 2019, occurred more than two months before his deposition was noticed by Sekera counsel. (*See* Petitioners Appendix, Vol. 4, Tab 26, VEN 515-17.)

judge granted leave under the low bar of NRCP 15. This amendment to the Complaint was not before the District Court on the underlying discovery motion and is irrelevant to the matter before this Honorable Court on this Writ Petition. To the extent Sekera introduces a new argument at any hearing on this Writ Petition, claiming she needs information for her punitive damages claim, that argument will not be well taken as the redacted incident reports already produced in this matter provide any information Sekera may need regarding other incidents.

## VI. CONCLUSION

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. This is not "phonebook" information, as Sekera asserts. It is much more than that. Sekera did nothing below to demonstrate her right to this information balanced with the rights of non-employee 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). The case law cited by both Petitioners and Sekera support protecting the information at issue. The Discovery Commissioner's recommendation of producing the other incident reports in redacted form with NRCP 26(c) protection by limiting the use of this information

to the present case was consistent with Nevada law and the interests of protecting individual privacy rights. 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 28 day of October, 2019.

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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 28 day of October, 2019.

ASHLEY SCHMITT
NOTARY PUBLIC
STATE OF NEVADA
Appt. No. 06-5493-1
My Appt. Expires Nov. 1, 2019

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 28 day of October, 2019, 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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