slip-and-fall events within that referenced time period at that same approximate area as Plaintiff's slip-and-fall.

Q. Did you bring that with you today?

A. I don't believe so. It was sent to me via e-mail.

Q. Okay. If you relied on that, why didn't you make reference to that document, that information at the outset of your report of May 30th, 2019?

A. Just seemed the appropriate place to put it was at the end of the report.

Q. I mean, this is a rebuttal report.

A. Yes.

Q. And so as a rebuttal report, it is intended to rebut, as you're understanding --

A. Yes.

Q. -- opinions provided by Dr. Hayes; correct?

A. Yes.

Q. This information of 196 slip-and-fall events was not provided in Dr. Hayes' initial report; correct? That's not where you got the information?

A. Correct. That is true.

Q. This is additional information that you received from Mr. Galliher; correct?

A. Yes, sir.

Q. You didn't look at the actual reports, you just saw a spreadsheet?

A. Correct.

Q. Is that a spreadsheet that you can produce? You can produce it, right, after this deposition today?

A. If it has not auto-erased itself, yes, sir, I can do that.

Q. Okay. I'm going to ask you to do that --

A. Okay.

Q. -- since it's referenced in your report.

A. Sure.

Q. You make the comment here, "same approximate area."

A. Yes, sir.

Q. What are you talking about? What area? Is it the whole property or is it just in the Grand Lux rotunda? Where is it?

A. Within the Grand Lux area, based on what I reviewed in the details of each recorded incident.

Q. So you're -- I'm sorry. You say, "The details of each recorded incident."

Tell me what the spreadsheet looks like.

A. Well, a spreadsheet is a typical spreadsheet. It starts at a certain date and month, year. It specifies a location. It shows a slip-and-fall and it

just continues on like that within that same general location. That's how it was arranged as a spreadsheet.

Q. Okay. So did it identify people by name?

A. That, I don't recall. I think it was more event oriented, but it could have.

Q. Would it have included Lobby 1, Lobby 2, Lobby 3, that kind of information?

A. Yes, sir, I believe it did.

Q. Would it have included areas like the Grand Hall, the front desk, the porte-cochère?

A. No. It was simply addressed to the marble flooring, and as I recall, the vast majority were in the same general areas as Plaintiff's fall. I would have to pull the spreadsheet out to refresh my memory.

Q. Would you consider the Carol Smith fall to be in the same general area as Plaintiff's fall?

A. Yes, sir.

Q. So in your opinion, at least, based on your testimony, so I understand, when you say "same approximate area," the area where Carol Smith fell would be within this Grand Lux rotunda area?

A. Yes, sir.

Q. Okay. So you're saying, then, as I understand it, you received information from Mr. Galliher that there were 196 slip-and-fall events between January 1st,

2012, and August 5th, 2016, occurring in the vicinity of the Grand Lux rotunda?

A. Essentially that's correct, yes, sir.

Q. Okay. So I'm clear, do you know where the Grand Hall is, the entryway to the property?

A. To the property, yes, sir.

Q. So when you enter the property, there's a fountain, there's the front desk --

A. Yes, sir.

Q. -- there's a concierge desk to the right, and then if you go to the left as you enter, there's a huge grand hall with paintings on the ceiling.

A. There is, sir.

Q. Right?

A. Yep.

Q. All right. So when you say "same approximate area," if there were slip-and-falls there, they would be separate from the 196 slip-and-falls.

Would that be right?

A. I believe that's accurate.

Q. And if somebody slipped and fell somewhere in the front desk area, that would not be part of this 196 --

A. I believe --

Q. -- number?

A. I believe that's accurate, yes, sir.
Q. And if somebody slipped and fell at the Palazzo on a marble floor, that's not part of the 196?
A. That would be correct.
Q. And if somebody slipped and fell at a convention area on a marble floor, that would not be part of the 196?
A. As I recall. I'm going back on memory reading line after line. I believe that would be correct.
Q. Okay. Did you ask Mr. Galliher where he got this information?
A. No, sir. He said it was just provided to him under discovery and that was it.
Q. Okay. Are they numbered 1 through 96?
A. No. They're by date. I think I testified to that to start with. You have to start out with the date and then work your way out.
Q. Did you count them?
A. Yes, I did.
Q. Okay. So this is something you counted?
A. Yes, sir.
Q. All right. And did you see -- did you notice that all of these 196 slip-and-fall events, did they occur due to foreign substances on the floor?
A. Mostly that was the case, yes, sir. As I

recall, they were all due to liquid contaminants.

Q. Okay. No trip-and-falls, nobody fainting, no drunks, you know, swaying and falling to the floor that you can recall?

A. No, sir.

Q. And that's something that if you still have it, you will produce?

A. Yes, sir.

Q. When is the last time that you looked at that?

A. It would have been about a month ago prior to preparing the rebuttal report.

Q. All right. So you would have received it, what, about five to six weeks ago?

A. That's fair.

Q. Okay. Why would you think it would be erased?

A. Well, I have an auto-erase on my computer that after a certain period of time, the e-mails are discarded.

Q. What's it set for?

A. Usually 30 days.

Q. Okay. Is there any other information that Mr. Galliher's provided you with that you think may have been erased by your auto-erase?

A. No, sir.

Q. Is there any other information that you've been

EXHIBIT “J”

In the Matter Of:

LIVIA FARINA vs DESERT PALACE, INC.

A542232

DAVID A. ELLIOTT, P.E.

February 13, 2009

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foreseeable conditions are there.

Q. How about ANSI? First of all, the 0.6, is that a recommendation in ANSI or a requirement?

A. They don't mention .6 at all in ANSI.

Q. So they don't even have a measurement, a required measurement, for the friction rating?

A. No, sir. It just has to be slip resistant under the foreseeable conditions.

Q. And is there anything in ANSI that you believe mandates that the floor pass a wet test at 0.5 as opposed to a dry test?

MR. ZIMMERMAN: This is the floor in the vestibule?

BY MR. McGRATH:

Q. Any marble flooring in a public accomodation.

A. You know, I think we're just beating a dead horse here. I understand the definition of slip resistance, and what is slip resistant.

Being a pedestrian safety professional, I can tell you exactly what number, in my opinion, and the same opinion of everybody else that does this, is slip resistant.

It wouldn't do you any good to test a floor dry, because I can already tell you it's going to

be slip resistant when it's dry, but it's not going to do you any good, again, to take that same floor and run sprinklers on it all the time and tell people to walk across it, because we tested it dry. It makes no sense.

Q. Have you ever tested marble flooring in a casino in the Las Vegas area using the wet test where the marble flooring passed the 0.6 standard?

A. Never.

Q. How about the 0.5 standard?

A. No, sir. Marble is a horrible choice.

Q. Essentially if you don't have carpet down, it's slippery when it's wet, right?

A. No, sir. There's other tile that you can use that is very aesthetically pleasing that will meet that standard.

Q. Give me some examples, if you don't mind.

A. You can go into the Venetian. I do a lot of work for the Venetian and consulting and litigation, and their tile is slip resistant when wet, and it looks good.

Q. But it's not marble flooring?

A. No, it's not marble flooring.

Q. Is it tile?

A. It's a ceramic tile.

Q. Any other properties that you can give me a specific example of where they don't use marble?

A. Well, no pool deck uses marble, obviously, and sidewalks accessing pool decks are concrete, and they usually have a very rough surface on them.

Whenever I've had a client that has had marble in their casino and I'm working for the defense, I've just told them that "Hey, this is slippery when it's wet. You shouldn't be using it. If you want to continue using it, you got to take certain things into account. You have to take other preventive measures to prevent slipping."

And sometimes they're receptive to those ideas and sometimes they're not. These are just my opinions as a pedestrian safety consultant.

Q. What are you assuming in terms of how far in terms of feet the plaintiff slipped -- withdraw the question.

I'm trying to ask you about the location of the slip-and-fall incident. How far into the property past the entrance door are you assuming that it occurred?

A. Well, if I remember right, the depth of that vestibule is about 12 feet, and it looks like she's maybe halfway, maybe a hair over halfway, so

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DISTRICT COURT

CLARK COUNTY, NEVADA

JOYCE SEKERA, an Individual, Plaintiff, v. VENETIAN CASINO RESORT, LLC, d/b/a THE VENETIAN LAS VEGAS, a Nevada Limited Liability Company; LAS VEGAS SANDS, LLC d/b/a THE VENETIAN LAS VEGAS, a Nevada Limited Liability Company; YET UNKNOWN EMPLOYEE; DOES I through X, inclusive, Defendants.	CASE NO.: A-18-772761-C DEPT. NO.: XXV **Hearing Requested** **PLAINTIFF'S RESPONSE TO DEFENDANT'S LIMITED OBJECTION TO DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS DATED DECEMBER 2, 2019**

Pursuant to NRCP 16.3, Plaintiff JOYCE SEKERA submits her Response to Defendant's Limited Objection to Discovery Commissioner's Report and Recommendations from December 2, 2019.

DATED this 23rd day of December 2019.

CLAGGETT & SYKES LAW FIRM

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

On August 5, 2019, Plaintiff filed a Motion to Compel Testimony and Documents, and on the same day, Defendants filed a Motion for Protective Order as to Plaintiff's Request for Production of Incident Reports from May 1999 to Present. The Discovery Commissioner heard these matters on September 18, 2019. On December 16, 2019, both Plaintiff and Defendant filed objections in response to the Discovery Commissioner's recommendations regarding discoverable material. Defendant made

two objections to the Discovery Commissioner's recommendations. Defendant objects to producing records of prior similar incidents outside of the Grand Lux Rotunda and also objects to producing records of similar incidents from the date of the subject incident forward to the present.

It should be noted that Plaintiff's Objection to Discovery Commissioner's Report and Recommendations Dated December 2, 2019 was filed on December 16, 2019, and the arguments presented there are fully incorporated in Plaintiff's Response to Defendant's Limited Objection to Discovery Commissioner's Report and Recommendations Dated December 2, 2019.

II.

LEGAL ARGUMENT

Plaintiff opposes Venetian's objection in its entirety. Venetian's reluctance to produce documents is little more than a calculated attempt to frustrate the Plaintiff and subvert this Court. Generally, a party "may obtain discovery regarding any . . . matter that is relevant to any party's claims or defenses and proportional to the needs of the case."[1] The Nevada rule on scope of discovery is modeled after the Federal rule, and federal interpretations are considered strongly persuasive.[2] Documents may be considered relevant for discovery purposes even if they will be inadmissible as not relevant for evidentiary purposes.[3]

Accordingly, Plaintiff argues that Venetian should produce reports of all similar incidents occurring on all marble flooring in public areas of the Venetian's premises. The marble flooring extends well beyond the arbitrarily defined borders encircling the Grand Lux Rotunda, and the marble on one side of the border does not lose its dangerous nature simply by virtue of its location. Furthermore, the extent of Venetian's knowledge as to the dangerous quality of its marble floors arises from its experiences with the marble flooring throughout the Venetian. This extensive knowledge is central to this case. What is more, reports should be produced up to the present because Plaintiff alleges that the floors are a dangerous condition.

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[1] NRCP 26(b)(1).

[2] See Fed. R. Civ. P. 26(b)(1); Exec. Mgmt. v. Ticor Title Ins. Co., 118 Nev. 46, 53, 38 P.3d 872, 876 (2002).

[3] Renfrow v. Redwood Fire & Cas. Ins. Co., 288 F.R.D. 514, 521 (D. Nev. 2013).

A. DEFENDANT'S PRODUCTION OF INCIDENT REPORTS MUST NOT BE CONFINED TO THE GRAND LUX ROTUNDA BECAUSE THE ADDITIONAL REPORTS ESTABLISH DEFENDANT'S FULL KNOWLEDGE OF THE DANGEROUS CONDITION OF ITS MARBLE FLOORING.

Venetian cites Eldorado Club, Inc. v. Graff for the proposition that requesting prior incidents in areas outside of the Grand Lux Rotunda is "overly broad and unnecessary."[4] Venetian misconstrues the holding in Eldorado Club. The issue there was whether it was an error to allow testimonial evidence at trial.[5] Furthermore, the hazard in Eldorado Club was the uncommon presence of a lettuce leaf on a loading ramp.[6] Here, Plaintiff alleges the hazard is a marble floor which becomes unreasonably and unnecessarily dangerous when it is wet, and as a result, people routinely slip and fall and injure themselves on the wet marble floor. Yet, even knowing of this dangerous condition, the Venetian persists in maintaining its marble floors in the same manner that it always has—indifferent to the floor's dangerous nature. It is Plaintiff's position that a reasonable property owner would either put in place policies and procedures to eliminate the hazard or change the floors so that they would be safe for the foreseeable capacity and type of traffic consistently navigating the property.

Plaintiff needs access to incident reports beyond the narrowly defined area of the Grand Lux Rotunda because the full extent of Venetian's knowledge of the dangerous condition of its polished marble flooring is a central issue in this case. Plaintiff needs incident reports of the slip and fall incidents which occurred on all marble floors in Venetian's public areas because Plaintiff needs to know what level of notice Venetian had with regard to the dangerous nature of its marble flooring. By limiting discovery to only one narrow area of the casino, the extent of Venetian's knowledge of its dangerous marble flooring would be confined to an illogical area near the subject incident. This arbitrary boundary presumes marble flooring within the boundary has dissimilar properties when wet than marble flooring outside the boundary. Consequently, this arbitrary boundary does not allow Plaintiff or the court to consider the full extent to which Venetian was aware of the danger created by either its choice of flooring or its policies and procedures to maintain the marble floors.

---

[4] Def.'s Objection, p. 11:2–8.

[5] Eldorado Club v. Graff, 78 Nev. 507, 509, 377 P.2d 174, 175 (1962).

[6] Id.

Therefore, given the strong public policy of this State,[7] the Ninth Circuit,[8] and the United States Supreme Court[9] to hear cases on their merits, this Court should compel production of records of similar incidents occurring on the Venetian's premises in public areas with marble flooring.

B. DEFENDANT'S PRODUCTIONS MUST EXTEND TO THE PRESENT BECAUSE PLAINTIFF ALLEGES THAT THE MARBLE FLOORS ARE A DANGEROUS CONDITION.

Plaintiff should have access to incident reports through the present because Plaintiff alleges that the polished marble floors at Venetian are a dangerous condition. The Nevada Supreme Court has held that evidence of subsequent similar incidents may be admissible in premise liability cases when that evidence shows the existence of a dangerous defective condition.[10] While past incident reports establish a property owner's knowledge of the hazard, subsequent incidents can be used to show the existence of a defective and dangerous condition.[11] Plaintiff alleges that the marble flooring at Venetian presents a dangerous condition. She will need subsequent similar incidents to prove the extent and nature of the dangerous condition.

In its objection, Venetian makes a point of emphasizing Plaintiff's status as a "pseudo-employee" who walked the area "many hundreds of times without incident" until the day she slipped and fell on the wet marble floor.[12] Venetian seemingly argues that Plaintiff's good luck in not having previously encountered a slick marble floor at the Venetian somehow demonstrates that Venetian's marble flooring is not a hazard. The subsequent incident reports for the slip and falls occurring on the marble flooring in Venetian's public areas will likely refute Venetian's claim that one person's good

---

[7] See, e.g., Yochum v. Davis, 98 Nev. 484, 487, 653 P.2d 1215, 1217 (1982) (noting the strong public policy favoring resolution of disputes on their merits).

[8] See, e.g., Allen v. Bayer Corp., 460 F.3d 1217, 1248 (9th Cir. Wash. 2006) (recognizing the public policy in favor of deciding disputes on the merits).

[9] See, e.g., Foman v. Davis, 371 U.S. 178, 181–82 (1962) (stating that it is "entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of mere technicalities").

[10] Reingold v. Wet 'n Wild Nev., Inc., 113 Nev. 967, 969–70, 944 P.2d 800, 802 (1997) *overruled on other grounds by* Bass-Davis v. Davis, 122 Nev. 442, 454, 134 P.3d 103, 110 (2006).

[11] Id. (citing Ginnis v. Mapes Hotel Corp., 86 Nev. 408, 415, 470 P.2d 135, 139 (1970)).

[12] Def.'s Objection, p. 7:12–18.

luck in traversing Venetian's marble floor without injury establishes that the Venetian's marble flooring is not dangerous.

Furthermore, the scope of discovery in Nevada is broader than the standard for admissibility at trial.[13] Therefore the production of subsequent incident reports recommended by the Discovery Commissioner is reasonable and likely to produce admissible evidence to the extent that it shows the dangerous condition of the marble flooring at Venetian.

III.

CONCLUSION

Based upon the foregoing, Plaintiff requests that the Court deny Defendant's Limited Objection to Discovery Commissioner's Report and Recommendations.

DATED THIS 23rd day of December 2019.

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[13] Renfrow v. Redwood Fire & Cas. Ins. Co., 288 F.R.D. 514, 521 (D. Nev. 2013).

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of December 2019, I caused a true and correct copy of the foregoing **PLAINTIFF'S RESPONSE TO DEFENDANT'S LIMITED OBJECTION TO DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS DATED DECEMBER 2, 2019** on the following person(s) by the following method(s) pursuant to NRCP 5(b):

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LAS VEGAS SANDS, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

JOYCE SEKERA, an Individual;

Plaintiff,

v.

VENETIAN CASINO RESORT, LLC, d/b/a THE VENETIAN LAS VEGAS, a Nevada Limited Liability Company; LAS VEGAS SANDS, LLC d/b/a THE VENETIAN LAS VEGAS, a Nevada Limited Liability Company; YET UNKNOWN EMPLOYEE; DOES I through X, inclusive,

Defendants.

CASE NO.: A-18-772761-C
DEPT. NO.: XXV

DEPARTMENT XXV
NOTICE OF HEARING
DATE 1/21/20 TIME 9:00 AM
APPROVED BY JG

Hearing Date: September 18, 2019
Hearing Time: 9:00 a.m.

ORDER

The Court, having reviewed the above report and recommendations prepared by the Discovery Commissioner and,

_____ No timely objection having been filed,

_____ After reviewing the objections to the Report and Recommendations and good cause appearing,

* * *

AND

_____ IT IS HEREBY ORDERED the Discovery Commissioner's Report and Recommendations are affirmed and adopted.

_____ IT IS HEREBY ORDERED the Discovery Commissioner's Report and Recommendations are affirmed and adopted as modified in the following manner. (attached hereto)

_____ IT IS HEREBY ORDERED this matter is remanded to the Discovery Commissioner for reconsideration or further action.

✓ IT IS HEREBY ORDERED that a hearing on the Discovery Commissioner's Report is set for January 21, 2020 at 9:00 a.m.

DATED this 27th day of Dec., 2019.

DISTRICT COURT JUDGE

DCRR
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DISTRICT COURT

CLARK COUNTY, NEVADA

JOYCE SEKERA, an Individual; Plaintiff, v. VENETIAN CASINO RESORT, LLC, d/b/a THE VENETIAN LAS VEGAS, a Nevada Limited Liability Company; LAS VEGAS SANDS, LLC d/b/a THE VENETIAN LAS VEGAS, a Nevada Limited Liability Company; YET UNKNOWN EMPLOYEE; DOES I through X, inclusive, Defendants.	CASE NO.: A-18-772761-C DEPT. NO.: XXV

DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATION

Date of Hearing: September 18, 2019
Time of Hearing: 9:00 a.m.

Appearance: Keith E. Galliher, Jr., Esq., for Plaintiff, JOYCE SEKERA

Michael A. Royal, Esq., Royal & Miles LLP, for Defendants VENETIAN CASINO RESORT, LLC and LAS VEGAS SANDS, LLC (collectively "*Venetian*)

I.

PROCEDURAL HISTORY

1. Venetian filed DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S SUBPOENA DUCES TECUM IMPROPERLY SERVED PURSUANT TO NRCP 45(A)(4)(A) AND MOTION FOR PROTECTIVE ORDER UNDER NRCP 26(c) RELATED TO PLAINTIFF'S DEMAND DEPOSITION AND DOCUMENTS FROM DEFENDANTS UNDER NRCP NRCP 30(B)6) AND NRCP 34 AND MOTION TO COMPEL PLAINTIFF TO PRODUCE ALL EVIDENCE OF PRIOR INCIDENTS AT VENETIAN NOT RECEIVED FROM DEFENDANTS IN THIS LITIGATION on August 5, 2019.

2. Plaintiff filed PLAINTIFF'S MOTION TO COMPEL TESTIMONY AND DOCUMENTS on August 5, 2019.

3. Venetian and Plaintiff filed oppositions which included countermotions for sanctions; the Discovery Commissioner refused to consider the countermotions pursuant to EDCR 2.20(f) as being insufficiently related to the subject matter of the pending motions.

II.

FINDINGS

1. Plaintiff claims to have fallen on Venetian premises on November 4, 2016 due to a temporary transitory condition which caused her to slip.

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

3. On February 1, 2019, Venetian filed a motion for protective order as to the redacted prior incident reports produced on January 4, 2019, which was granted by the Discovery Commissioner in a Report and Recommendation filed April 4, 2019, with reports to remain redacted and to be protected under NRCP 26(c).

4. The District Court entered an order reversing the Discovery Commissioner's Report and Recommendation of April 4, 2019 in an order filed July 31, 2019, directing Venetian to provide Plaintiff with unredacted copies of all prior incident reports, with no protections requested by Venetian under NRCP 26(c). Venetian filed a motion for reconsideration, heard on September 17, 2019, which Judge Delaney denied.

5. The District Court's ruling related to Venetian's request for protection under NRCP 26(c) is the law of the case; therefore, no relief requested related to the protection of Venetian prior incident reports can be further considered by the Discovery Commissioner in this matter.

6. Plaintiff was granted leave by the District Court to file a First Amended Complaint to add a claim of punitive damages, which was filed on June 28, 2019.

7. Venetian filed a motion for protective order and Plaintiff filed a motion to compel on August 5, 2019 regarding Plaintiff's request for the production of certain information and documents from May 1999 to the present.

8. On May 31, 2019, Plaintiff served her sixth request for production with the following requests:

> REQUEST NO. 23: True and correct copies of any and all reports, documents, memoranda, or other information describing or referring to slip testing performed on the marble floors at the Venetian Hotel and Casino by any Plaintiff, or the Venetian, from January 1, 2000 to date.
>
> REQUEST NO. 24: Any and all communications, including correspondence, emails, internal communication, or other memoranda which refers to the safety of marble floors located within the Venetian Hotel and Casino from January 1, 2000 to date.

REQUEST NO. 25: Any and all transcripts, minutes, notes, emails, or correspondence which has as a subject matter, any meetings held by and between Venetian personnel, including management personnel, where the subject of the safety of the marble floors at the Venetian was discussed and evaluated from January 1, 2000 to date.

REQUEST NO. 26: Any and all correspondence, emails, memoranda, internal office correspondence, or other documents directed to the Venetian from a Contractor, Subcontractor, Flooring Expert, or similar entity which discusses or refers to the safety of marble floors located within the Venetian Hotel and Casino from January 1, 2000 to date.

REQUEST NO. 29: Any and all complaints submitted by guests or other individuals regarding safety of the marble floors.

REQUEST NO. 30: Any and all quotes and estimates and correspondence regarding quotes and estimates relating to the modification of the marble floors to increase their slip resistance.

9. On June 20, 2019, Plaintiff served Plaintiff's First Set of Interrogatories to Defendants with the following request:

INTERROGATORY NO. 1: Please identify by Plaintiffs name, case number and date of filing all complaints filed against the Venetian Casino Resort, LLC d/b/a The Venetian Las Vegas and/or Las Vegas Sands, LLC d/b/a The Venetian Las Vegas in the Clark County District Court for any and all slip and fall and/or trip and fall incidents occurring on marble flooring anywhere within The Venetian Casino Resort, LCC d/b/a The Venetian Las Vegas and/or Las Vegas Sands, LLC d/b/a The Venetian Las Vegas from January 1, 2000 to the present.

10. On July 17, 2019, Plaintiff served Plaintiff's Ninth Request for Production of Documents and Materials to Venetian. Request No. 35 sought the following production from Venetian:

REQUEST NO. 35: 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 from the May 3, 1999 to the present.

11. On July 19, 2019, Plaintiff served Plaintiff's Tenth Request for Production of Documents and Materials to Defendant with the following request:

REQUEST NO. 36: True and correct copies of any and all entries and information contained in the Venetian's Alliance System regarding injury falls on marble flooring within the Venetian Las Vegas from January 1, 2000 to present.

12. On July 22, 2019, Plaintiff served Plaintiff's Second Set of Interrogatories to Defendants which reads as follows:

INTERROGATORY NO. 2: Please identify names, addresses and phone numbers of any and all individuals designated as safety engineers who perform(ed) accident checks at the Venetian from the year 2000 to the present.

13. On July 29, 2019, Plaintiff served Plaintiff's Eleventh Request for Production of Documents and Materials to Defendant with the following request.

REQUEST NO. 37: Any and all quotes, estimates, correspondence, emails, memorandums, minutes, file notes and/or other documentation related to Venetian's decision to remove and replace the carpet with marble flooring and Venetian's removal and replacement of carpet with marble flooring as referenced by Christina Tonemah in her deposition. (25: 9-26: 26; 1-6)

14. On July 30, 2019, Plaintiff served notice of an NRCP 30(b)(6) deposition under NRCP 45 issuance of a subpoena with eighteen (18) topics, as follows.

1) Total number of injury falls on marble floors located within The Venetian Las Vegas from November 4, 2013 to present.

2) Actions taken by The Venetian Las Vegas to change the coefficient of friction with respect to the marble floors within The Venetian Las Vegas from November 4, 2013 to present.

3) Measures taken to locate and produce security/incident injury fall reports by The Venetian Las Vegas as requested by Plaintiff in this Litigation.

4) Slip testing performed by The Venetian Las Vegas or it's representatives with respect to the marble floors within The Venetian Las Vegas from November 4, 2013 to present.

5) Any invoices or work orders with respect to the removal of carpet in pedestrian walkways and replaced with marble and/or granite flooring from November 4, 2006 to present.

6) The identity of all employees who were responsible for managing and maintaining Venetian's technology infrastructure.

7) The name, address and phone number of the specific employee(s) tasked with retrieving incident reports from Venetian's system for this litigation, the litigation in Smith v. Venetian (A-17-753362-C), Cohen v. Venetian (A-17-761036-C) and Boucher v. Venetian (A-18-773651-C) and the name address and phone number of the individual who assigned them this task.

8) The identity of all non-employee consultants, consulting firms, contractors or similar entities that were responsible for managing and maintaining Venetian's technology infrastructure.

9) Software used, including dates they were in use and any software modifications.

10) Identity of, description of and policies and procedures for the use of all internal systems for data management, complaint and report making, note keeping, minute/transcript taking and employee e-mail, messaging and other communication systems and description of all employee accounts for said systems.

11) Description of all cell phones, PDAs, digital convergence devices or other portable electronic devices and who they were/are issued to.

12) Physical location of electronic information and hard files and description of what information is kept in electronic form and what is kept in hard files.

13) Description of policies and procedures for performing back-ups.

14) Inventory of back-ups and when they were created.

15) User permissions for accessing, modifying, and deleting data.

16) Utilization of data deletion programs.

17) A listing of current and former personnel who have or had access to network resources, technology assets, back-up, and other systems operations.

18) Electronic records management policies and procedures.

15. Venetian sought relief from the scope of discovery requested by Plaintiff, contending that it was overbroad and unwarranted in a slip and fall case arising from a temporary transitory condition. Venetian further asserted that Plaintiff is not entitled to any incident reports occurring after November 4, 2016 based on the facts plead by Plaintiff in the Complaint and further as evidenced by Plaintiff's testimony, and the testimony of her experts and eyewitness at the scene, all of whom opined that Plaintiff slipped and fell due to a foreign substance on the marble floor. Therefore, Venetian moved for protection.

16. Venetian also moved to compel the production of all incident reports and information related to incident reports obtained by Plaintiff from any source, including but not limited to those produced to expert Thomas Jennings supporting his May 30, 2019 report, which documents were not produced to Venetian by Plaintiff prior to the time of Mr. Jennings' deposition taken July 2, 2019. Venetian further moved for an order compelling Mr. Jennings to appear again for deposition at Plaintiff's cost.

17. Plaintiff argued in her motion to compel that she is entitled to the broad scope of discovery requested because it is necessary to prove up her punitive damages claim allowed by the District Court and therefore moved to compel Venetian to produce the information at issue.

18. The parties also filed countermotions for sanctions which the Discovery Commissioner refused to hear pursuant to EDCR 2.20(f).

After reviewing the papers and pleadings on file, and consideration of arguments presented by counsel for the parties, the following recommendations are made.

III.

RECOMMENDATIONS

IT IS RECOMMENDED that the pending motions and countermotions filed by Plaintiff and Venetian (other than those not adjudicated pursuant to EDCR 2.20(f)), are GRANTED IN PART and DENIED IN PART as set forth specifically herein below.

IT IS FURTHER RECOMMENDED that, regarding Plaintiff's Production Request Nos. 7, 24, 29, 35, and 36, Interrogatory Nos. 1, 2, and NRCP 30(b)(6) Topic 1, based on Plaintiff's pending claim for punitive damages claim arising from the operative facts of a slip and fall on a liquid substance, in accordance with Judge Delaney's July 31, 2019 order, Venetian be ordered to produce to Plaintiff unredacted records related to other incidents involving guests slipping and falling on the Venetian common area marble floor on the casino level of the Venetian property due to the existence of a foreign substance from November 4, 2013 to the present (only as of the date of production).

IT IS FURTHER RECOMMENDED that, as to Plaintiff's request for documents and information from Venetian regarding actions to change the coefficient of friction of the marble flooring, Venetian's motion for protection be GRANTED as this request is vague and overly broad as written in the NRCP 30(b)(6) Topic 2 and Production Request No. 30.

IT IS FURTHER RECOMMENDED that, as to Plaintiff's request for information and documents related to the testing of Venetian marble flooring, as set forth in to NRCP 30(b)(6) Topic 4 and Production Request Nos. 23, 25, 26, Plaintiff's motion to compel be GRANTED to the extent that any testing for coefficient of friction was accomplished in the Grand Lux area of the

Venetian property from November 4, 2011 to November 4, 2016, where such information was disclosed by Venetian pursuant to NRCP 16.1 or which is not otherwise protected in accordance with NRCP 26.

IT IS FURTHER RECOMMENDED that, as to Plaintiff's request for information related to the removal of carpeting on the Venetian casino floor set forth in Production Request No. 37, and NRCP 30(b)(6) Topic 5, Venetian's motion for protection be GRANTED to the extent that the inquiry related the removal of carpeting be limited to the Grand Lux area of the Venetian property from November 4, 2011 to November 4, 2016.

IT IS FURTHER RECOMMENDED that, as to Production Request Nos. 35 and 36, together with NRCP 30(b)(6) Topics and 3, 6-18 regarding information related to computer data at the Venetian, the motion for protection be GRANTED, as this request is vague and overly broad; however, that Plaintiff be allowed to inquire of Venetian generally about the reporting of slip and fall claims on the casino level marble floor from November 4, 2011 to the present, how the information is collected and stored, and how it can be retrieved.

IT IS FURTHER RECOMMENDED that Venetian's motion to compel Plaintiff expert Thomas Jennings to produce all documents and information of prior incidents he has reviewed (as represented by Mr. Jennings in his May 30, 2019 report and in his July 2, 2019 deposition) be GRANTED.

IT IS FURTHER RECOMMENDED that Venetian's motion to retake the deposition of Mr. Jennings upon receipt of the prior incident information be GRANTED to the extent that Venetian is allowed to redepose Mr. Jennings; however, it is DENIED as to Venetian's request that Plaintiff pay the costs associated with the second Jennings deposition.

IT IS FURTHER RECOMMENDED that Venetian's motion to compel Plaintiff's production of all Venetian incident reports in her possession beyond those which have been produced by Venetian to Plaintiff in this litigation be GRANTED.

IT IS FURTHER RECOMMENDED that Venetian be granted relief from production of unredacted documents until fourteen days after Notice of Entry of Order related to the District Court's denial of Venetian's motion for reconsideration of the July 31, 2019 order.

IT IS FURTHER RECOMMENDED that Venetian be granted relief from production of documents related to the issues herein until it becomes a final order of the District Court.

IT IS FURTHER RECOMMENDED that all remaining issues in the pending motions are otherwise DENIED.

DATED this 27th day of November, 2019.

DISCOVERY COMMISSIONER

Submitted by:

Royal & Miles LLP

Michael A. Royal, Esq.
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Henderson, NV 89014
Attorneys for Defendants
VENETIAN CASINO RESORT, LLC and
LAS VEGAS SANDS, LLC

Reviewed by:

THE GALLIHER LAW FIRM

Keith E. Galliher, Jr., Esq.
Nevada Bar No. 220
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Las Vegas, NV 89014
Attorney for Plaintiff

Case Name: Sekera v. Venetian Casino Resort, LLC
Case No.: A-18-772761-C

NOTICE

Pursuant to NRCP 16.3(c)(2), you are hereby notified that within fourteen (14) days after being served with a report any party may file and serve written objections to the recommendations. Written authorities may be filed with objections, but are not mandatory. If written authorities are filed, any other party may file and serve responding authorities within seven (7) days after being served with objections.

Objection time will expire on Dec. 16 **2019.**

A copy of the foregoing Discovery Commissioner's Report was:

_____ Mailed to Plaintiff/Defendant at the following address on the ____ day of _____ 2019:

_____ Electronically filed and served counsel on Dec. 2, 2019, Pursuant to N.E.F.C.R. Rule 9.

Natalie Lee
Commissioner Designee

Register of Actions

Case No. A-18-772761-C

Joyce Sekera, Plaintiff(s) vs. Venetian Casino Resort LLC, Defendant(s) §
§
§
§
§
§

Case Type:	**Negligence - Premises Liability**
Date Filed:	**04/12/2018**
Location:	**Department 25**
Cross-Reference Case Number:	**A772761**

Party Information

		Lead Attorneys
Defendant	**Las Vegas Sands LLC *Doing Business As* Venetian Las Vegas**	**Michael A Royal** *Retained* 7024716777(W)
Defendant	**Venetian Casino Resort LLC *Doing Business As* Venetian Las Vegas**	**Michael A Royal** *Retained* 7024716777(W)
Plaintiff	**Sekera, Joyce**	**Keith E. Galliher, Jr.** *Retained* 7027350049(W)

Events & Orders of the Court

01/21/2020 **Objection to Discovery Commissioner's Report** (9:00 AM) (Judicial Officer Delaney, Kathleen E.)

Minutes

01/21/2020 9:00 AM

- Extensive arguments regarding the Discovery Commissioners recommendation Deft's. provide unredacted and unprotected reports for a period of 8 years, inclusive of reports up to the current date, the sharing of those documents, and ongoing Appeal. Additional arguments regarding subsequent changes to the flooring, testing of the surfaces, and the area to be tested. COURT STATED FINDINGS, and ADVISED, it was an error on the part of the Discovery Commissioner to extend the requirements for reports beyond the date of incident in the case. COURT ORDERS the limitation will be to the date of the incident and FIVE (5) years prior as originally determined by the Discovery Commissioner and not subsequent to that date. ADDITIONAL FINDINGS STATED. The scope of the area will be the Grand Lux Cafe area, that is where the incident occurred. To the extent the Discovery Commissioner's determinations allow for discovery of anything beyond the date of the incident or outside the Grand Lux area, that will be REVERSED. Whatever else the Discovery Commissioner allowed or ruled on, that will REMAIN. Additional argument regarding reports already provided and areas tested. COURT STATED FURTHER FINDINGS, and CLARIFIED, no discovery or reports on the area or timeframe outside what the Court has stated; unredacted, unprotected reports are to be provided, no information regarding testing outside the Grand Lux Cafe dome area to be included. Mr. Royal requested a Stay. COURT FURTHER ORDERED, Mr. Royal's Oral Request for a Stay, DENIED. Mr. Sykes is to prepare the Order, provide a copy to opposing counsel for review as to form and content, and return it back to the Court within 10 days. Competing Orders can be submitted if there is a dispute.

Parties Present

Return to Register of Actions

TRAN

IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

JOYCE SEKERA, Plaintiff, vs. VENETIAN CASINO RESORT, LLC, ET AL, Defendants.	)	Case No. A-18-772761-C Dept. No. 25

OBJECTION TO DISCOVERY COMMISSIONER'S REPORT

Before the Honorable Kathleen Delaney

Tuesday, January 21, 2020, 9:00 a.m.

Reporter's Transcript of Proceedings

REPORTED BY:

BILL NELSON, RMR, CCR #191
CERTIFIED COURT REPORTER

APPEARANCES:

For the Plaintiff: William Sykes, Esq.
George Kunz, Esq.

For the Defendants: Michael Royal, Esq.

Las Vegas, Nevada, Tuesday, January 21, 2020

* * * * *

THE COURT: Page 3, Sekera versus Venetian Casino.

MR. SYKES: William Sykes for the Plaintiff, and George Kunz.

MR. ROYAL: Mike Royal for the Defendants, Your Honor.

THE COURT: Good morning, everybody.

Good to see you.

Thank you.

So I guess I just want to make sure I'm not missing something, and there's not some confusion.

I just realized I probably should have called another matter.

The Discovery Commissioner's report recommendation has been disputed in some degree by both sides, and the concern's over the limitations placed on it on by both counsel on the discovery, and some limitations placed on the protection.

So we need to unpack that and kind of figure out where the dust is going to lay on that.

Obviously the easiest thing would be, you know the Discovery Commissioner did her job all good, especially in this case, but when it comes to these

type of things, these sort of nuances, it helps to have a complete record.

I do think it helps to have an opportunity to be heard from counsel where their concerns were.

But what is happening on the stay side on the appeals, or the appeals side?

MR. ROYAL: Your Honor, everything has been submitted, been briefed, and the Court of Appeals is still considering the issue related to discovery.

THE COURT: No indication of the oral argument or anything like that?

MR. SYKES: Not at this time.

THE COURT: So I should know this answer.

But you don't perceive that has any affect on this, and everything else is going forward?

Because I -- just there was some -- obviously what you're challenging is some overlapping with this.

MR. ROYAL: We certainly think that at least some of the issues at play here definitely are bootstrapping to what we have there.

THE COURT: That was my concern because as I went through the pleadings, as very thorough now as they are in this case, very thorough, I didn't really see a lot of acknowledgment like, oops, we want to

wait on this because the stay's out there, and we have all the arguments about why we shouldn't be more than five years, or should be less than five years, or shouldn't go forward in time, and all of those nuances, but I didn't really see how this might be impacted.

Of course I have no insight as to whether the Appellate Courts might do anything. It would be nice if we had some idea, but we have no idea.

MR. SYKES: Your Honor, with regard to that, I think the main issue that is up on the writ in front of Court of Appeals is whether or not the reports are going to be redacted or not is one of the primary issues.

THE COURT: But the Discovery Commissioner Truman did order unredacted here in response to some of these things.

So would your agreement be to provide them redacted, until it can be decided, or allow them to be -- I guess I'm looking at you -- but allow them to be provided redacted until decided, or hold off on that piece?

That's my concern.

MR. SYKES: It's my understanding, and counsel can correct me if I'm wrong, but there's no

real dispute as to producing unredacted reports, at least some have already been produced, and I think there is a dispute as to whether or not the reports should be provided subsequent to this incident, that is going to be a big issue.

I think we can address that today.

I don't know that we need to wait for the Court of Appeals to rule on the redaction issue.

MR. ROYAL: Your Honor, if I can respond to that.

THE COURT: Okay.

MR. ROYAL: We do not agree that we should produce documents in an unredacted form.

And the other issue before the Court of Appeals is, whether or not they should be protected.

So if we were to -- What the Discovery Commissioner essentially recommended is, that we produce unredacted reports for over a period of eight years, which would include reports up to today in unredacted form --

THE COURT: Right.

MR. ROYAL: -- and in an unprotected form.

So that they would have access to what happened today, or what have you, and do what they have done previously, which is share it with whoever

they want to share it with.

THE COURT: Here's the tricky part about the protection.

I get what you're saying, counsel, but I thought we had had a discussion about how that would be -- that information would be utilized, but maybe we didn't clarify our intent there, but if they get redacted, they can't follow up with the people and can't figure out what really happened in the cases, and that is clearly part of the need for discovery.

If you are just giving them a date and a brief synopsis, or whatever it is you're giving them, and have no way to contact anybody because you have no idea who these people are, it doesn't mean anything to the Plaintiffs.

The Court did allow punitive damages to remain, and these things are arguably relevant to that.

So I mean that is why it was ordered to be unredacted.

I don't know that when we previously ordered it we anticipated it being fully unprotected, but that's a different issue.

I guess my concern is, how do we do this?

One of the ways we could do this is, we

could just make a decision on everything the Discovery Commissioner ordered, and then to the extent that you have a concern about how what we ordered here today impacts what you're challenging, you add that to what is up on appeal.

I mean, that is generally what happens, right, you have your judgment, and that's challenged, and then you get a ruling on the fees and costs and retaxing of costs, and somebody doesn't like that outcome, and then they go and consolidate it, and the Court of Appeals deals with all of it, that almost seems like that is how we should do it just to have the cleanest record, because if I hold out, don't rule on some things waiting to see what the Court of Appeals does, and then I rule on other things, I don't know in practical terms how that is going to work anyway given one of the largest is the redaction.

I can certainly make a determination on the time scope, and certainly make a determination on location of incident scope, that seems to also be in dispute, whether it's limited to The Grand Lux area or casino as well, and make those rulings, but I think if we don't do the whole kit and caboodle, you don't have what you're going to have anything further

if you wish to based on the outcome to challenge, and then we don't really have a full understanding from the Court of Appeals either.

So the last thought on how we might structure today -- or just wait -- but that doesn't serve anybody's purposes I don't think.

You got to keep going forward with what you're doing.

MR. ROYAL: I think, Your Honor, in light of what we're both arguing for, I think the scope is obviously the biggest issue.

MR. SYKES: Yes.

MR. ROYAL: And the Court may determine if the Court -- depending on the Court's ruling today if -- it may not, it may or may not impact the issues that are presently before the Court of Appeals.

THE COURT: Right.

I think we should just go forward and make a decision on all of what is before us today without trying to carve out anything we think may be implicated by a future determination by the Court of Appeals, and if the outcome is such that you feel, counsel, that it should be added to what is before the Court of Appeals, then that would make sense to me and make the cleanest record.

So let's deal with all of it, and as I said, I sort of generalized it as to this time scope, and then the location scope, and that seems to be the biggest arguments the Plaintiff raises, and then with any further objections and response seems to be kind of what we're focusing on.

So you do want to start, counsel?

MR. SYKES: Yes, Your Honor.

Just briefly, we thoroughly briefed this issue, but out objection is fairly limited as to our primary objection to the Discovery Commissioner's report and recommendations is, she limits our ability to obtain coefficient of friction testing to the Grand Lux area, and there was also an issue of where they removed carpet, intentionally put the slick polished marble surface in this area, as well as other areas throughout casino, and she limited that to the Grand Lux area as well.

THE COURT: Let's hit the points as we go along what is being argued in opposition to your objection on that subject as pointed out by counsel.

Is there not some acknowledgment by the experts that different areas have different testing up to this point, and that it doesn't make sense to go beyond the scope of the area where the incident

occurred?

MR. SYKES: Yeah, I wanted to clarify that as well.

So the testimony, at least of our expert, there's a representation that our expert said this was a unique area.

Our expert didn't say that.

Our expert, what he said was, depending on the area, the slip resistance could change depending on different variables.

However, we would at least like the opportunity to determine what type of flooring they have throughout the Venetian. It's my understanding it's all polished marble.

If they want to make a distinction that it's not the same polished marble, has different slip resistance characteristics, coefficient of friction testing would prove or disprove that. I think it would be fairly simple for our expert to go out, do that testing, but it's my understanding the surfaces throughout the Venetian, at least the marble surfaces, if not identical, are substantially similar to the point were similar enough where we could consider slip-and-falls in those areas as well as giving notice to the Venetian, but they had a

hazardous condition, a continuous hazardous condition on their premises, so that was the basis to our objection of the Discovery Commissioner's ruling.

If they, the Venetian, wants to focus specifically on the Grand Lux rotunda area, I think there needs to be some type of showing the marble flooring elsewhere is somehow different, substantively different, with different slip resistance values, and I don't mean within a percentage point, I mean 20 percent different, 30 percent different, something like that, with a substantial difference between the marble because there's marble floors throughout, and I believe slip-and-falls throughout the property would provide notice to the Venetian that this polished marble floor presents a continuous hazard, and a defective condition on the premises.

THE COURT: Okay.

What about the timing?

It is a little hard for at first blush to take a look at this and say, there's any relevance to what occurred subsequent.

If your argument is when this incident occurred, they were on notice that this was a problem, they had been arguably from your perspective

were not acknowledging, not dealing with what they needed to see as a recurring problem, how would what occurred subsequent have anything to do with that argument?

MR. SYKES: Yes, to address that question there's three main issues that go to that issue.

First, the reason why it's relevant, it's a continuous hazard and a defective condition on the premises, and there were slip-and-falls occurring subsequent to our client's slip-and-fall would tend to prove that -- or show it's an ongoing hazard, a continuous hazard, and a defective condition on the premises. So there's that.

Second, it goes to punitive damages as to the reprehensibility of the conduct of the Venetian.

If the Venetian is continuing to allow the dangerous condition to exist, and people are continuing to fall, slip-and-fall on the premises and get injured, and be taken away in an ambulance, or at least report injuries to the EMTs, I think that goes to the reprehensibility of the Venetian's conduct, and we provided case law in support of that in the brief.

THE COURT: Now, were you also asking to go further back in time since five years prior to the

incident?

MR. SYKES: We were.

And the reason for that is, that we did have some testimony from employees of the Venetian, one former EMT said they responded to 150 and 175 falls, and that started in 2008.

Then there was evidence that the floor was changed from carpet to marble I think as early as 2013, maybe a little later than that, and it's my understanding that the slip-and-falls, the amount of slip-and-falls significantly increased, and the Venetian did nothing to fix it, so that was our client's, our concern with that particular issue as well.

THE COURT: Okay.

Anything else you want to highlight?

MR. SYKES: Yes.

The third point, I don't know to the extent this was addressed in the briefing, but I wanted to bring it up, the Venetian seems to have an affirmative defense in this case, Judge, that our client walked through this area hundreds of times before she slipped and fell and never had a problem, and therefore the floor is safe. That is kind of the argument they are making, even include it -- they

reference it a couple times in their briefing.

We should be allowed to rebut that argument and rebut that affirmative defense, and bring up the totality of the falls, not only from before the incident, but after the incident, and show there's a pattern here, a trend here, of people slipping and falling throughout the casino floor, it wasn't just my client just because she didn't -- or slipped once, and in 200 steps, or whatever their argument is, it doesn't mean other people didn't slip in that very same area, or throughout the casino floor.

So it's our position they opened the door, Judge.

If they are going to make that argument at trial, they are going to argue we didn't have actual notice, didn't have constructive notice -- and by the way, the Plaintiffs walked through there hundreds of times and didn't slip and fall before, therefore it's safe.

We should be able to bring up the total number of falls both before and after her incident because they will try to make it sound like she wasn't paying attention, she was being clumsy, and it was just an isolated incident, where I think we can demonstrate it's not an isolated incident, people

slipped before and after, and we don't mean a couple, hundreds before, and probably hundreds after.

THE COURT: Okay.

Counsel.

MR. ROYAL: The representations there was an increase in slip-and-falls after some change in flooring is completely unfounded.

I think what we have to remember is, that the Plaintiff has testified, and we know she worked at the property for almost a year prior to the incident, and yes, she made probably more than a thousand trips through this Grand Lux area successfully, not only without slipping and falling herself, but without ever seeing any kind of a foreign substance on the floor, without seeing anyone slip and fall, without hearing about any kind of slip-and-falls, and yes, that is we certainly want to bring that up.

We also want to bring up the fact that in this particular case all 11 of the people who were present at the scene after the incident -- or rather of the 11 -- Let me say that again.

All 11 of the people present at the scene have been deposed in this case. Of those 11, 10 have verified -- or at least they verified they did not

see anything on the floor.

There's one person who testified there was something on the floor, and his testimony is completely rebutted just by reviewing the video evidence.

Now, as to some of these issues, I think the fact is that the testimony that Plaintiff has given is that she reported to her post daily, she walked through this Grand Lux area back and forth at least twice daily for hundreds of days prior to the incident, that is the area in question.

There's no testimony that she was walking up and down other areas of the property, and so that particular information about other slip-and-falls in other areas of the property is simply from our position not relevant.

Also, the testimony of Tom Jennings in his deposition in the Smith case he performed coefficient of friction testing in an area which he said was within 80 to 100 feet of the area where Miss Sekera fell. His coefficient of friction testing was different, and was significantly different.

He tested dry point 90, tested dry in the area of 0.070, that is a significant difference, and so he testified that -- I asked him what the

differences would be, and he testified there is a lot of them, it could be pedestrian traffic, could be how the floors are cleaned, could be the shoes and so forth that are worn, and he tested this area -- and by the way this their expert has tested the area where the Plaintiff fell, so where -- or where is it going to get us from a relevancy standpoint for expert testing in other areas outside The Grand Lux?

They are going to want testing done on the 10th floor, testing done in the front desk area, testing done wherever, which is not anywhere near where the Plaintiff at least testified she's been in this case.

THE COURT: You brought up Mr. Jennings. There were obviously a couple of aspects of the Discovery Commissioner's report and recommendation dealt with Mr. Jennings being able to be re-deposed, getting additional information.

Is that in dispute here?

I didn't see that being disputed here.

MR. SYKES: Not necessarily, Judge.

And I think what it was, there's a number of incident reports out there we have possession of, some I believe they have possession of, additional reports that have yet to be produced, and so I think

what it was, was once those reports were produced, that they would have an opportunity to depose Mr. Jennings at least on those, that new information is my understanding.

THE COURT: Okay.

MR. SYKES: I don't know if there's a dispute as to that, but that's my understanding.

THE COURT: I didn't see that being really referenced here.

MR. ROYAL: What is supposed to occur under the Discovery Commissioner's report and recommendation is, that the Plaintiff is supposed to produce every single report that they gave -- that they have in their possession, they've obtained, we're supposed to get those, that is not in dispute, there's no objection to that, and we haven't received those yet.

MR. SYKES: That's correct.

MR. ROYAL: We're waiting to get those before we take Mr. Jennings' deposition, but since you brought up Mr. Jennings, he testified that in a four year -- or four-and-a-half year period that there were 196 incidents in The Grand Lux area, that was his testimony.

Now we dispute that, but that's his

testimony, and we don't have those documents yet, and when we get those, we will retake his deposition, but I think that goes to -- again, it goes to our position that the scope should be limited to The Grand Lux area, the scope of all the issues related to the flooring in this case.

You know the Discovery Commissioner actually initially limited the scope of the other incident reports to The Grand Lux area, until she was advised by counsel that in our initial disclosure we produced some reports outside the area of the Grand Lux, which we did as a courtesy to counsel.

We did not feel we had to do that the second time around in this battle, and she changed her mind, she essentially made a waiver kind of an argument, well if you produce some stuff outside before, now you have to produce another five years.

THE COURT: Okay.

Anything else you want to tell us?

MR. ROYAL: I'm sorry, Your Honor.

I just wanted to say, as far as the subsequent incident reports, that is all based on the Discovery Commissioner -- remember this is a transient condition.

Now they keep using the word, defective.

There's nothing defective about it for millions of people that walked through the Venetian that don't slip and fall. But that is what this is.

So the Discovery Commissioner indicated she would not provide or order or recommend subsequent incident reports under circumstances of a transient condition such as what we have here.

The only reason she ordered that is because of the fact there's a punitive damages claim the Court has allowed to be filed, and I just, Your Honor -- there's no -- at least I can't find any -- Nevada Law that supports that.

THE COURT: Okay.

Anything else, counsel?

MR. SYKES: Yes, Your Honor.

Just as a reminder, this was something addressed in prior motion practice, and was stated the Plaintiff should be allowed to conduct discovery to support the punitive damages claim.

Again, it goes back too reprehensibility of conduct of the Venetian.

I don't understand why the Venetian is attempting to hide these additional slip and fall reports, it's quite concerning to me because it tends to indicate to me that they have a lot more actual

constructive notice than they are representing to the Court and will represent to the jury if this goes to a trial. I have a very strong concern with that.

If their question -- or issue is admissibility, that is not the standard.

The standard is, whether it's proportional and whether it's relevant to the case, and it most certainly is, particularly with regard to their argument our client walked through there hundreds of times, and now they are saying thousands of times, and didn't slip before, therefore the floor is safe.

If that's the argument, we should be entitled to rebut that argument, know how many people have slipped and fallen on the casino floor.

If they want to argue the slip resistance is different, we can send experts out to do that testing, it wouldn't be that difficult to perform, and they can argue over whether or not it's similar enough, and we can hash that out.

But this is a case where there was a significant injury. The client is scheduled to have a fusion surgery, she did have a spinal injury, there's an indication she hit her head on a pillar and did sustain significant injuries as a result of this slip-and-fall, so it's not -- we're not arguing

on a sprain/strain here, and at this point this is information that needs to be provided, we need to have the opportunity to rebut their argument.

Otherwise, we go into trial with one arm behind our backs, they get to say our client walked through the area thousands of time, but we don't get to talk about all the slip-and-falls that happened.

So at a minimum it's discovery, whether or not it comes down to being admissible, that depends on what is ultimately discovered, so I think at a minimum we should be entitled to at least see the information.

If the Defendant's asking for some type of protective order, that is something we can address, but at a minimum we should be at least be able to see the information, the slip-and-falls, and go from there.

THE COURT: All right.

I want to make sure I address each of the topics, so I'm going to tell you my thoughts, and if I miss anything, you let me know, so we can get your verification.

I do think that it's an error on the part of the Discovery Commissioner to extend the requirement for reports beyond the date of the

incident in the case. I don't understand coming forward to the present, I really don't.

I understand the argument that we're trying to show that this was, or is, a defective condition, that this is reprehensible conduct, but the reality is your argument about that what was existing prior to your client's incident, what occurred subsequent to that I don't see being relevant, and think it blows this thing up to a different proportion to where we originally argued we were -- as far as all of the instances occurred prior they had not revealed, and arguably again I'm not saying these are the findings made, but the arguments about all these incidents prior to, they knew this condition and should have corrected the condition before my client fell and didn't do that, the subsequent you still get where you need to go counsel for your client with what the Discovery Commissioner or what was allowed in terms of the five years prior to the incident, but the additional up to the present, I think that is in error, so the limitation will be to the date of the incident and five years prior, as originally determined by the Discovery Commissioner, and not subsequent to that date.

To the extent that addresses any other

issues with regard to the arguments about whether testing should be produced, or the concern the Discovery Commissioner granted protection, at least so far as to the vagueness of the coefficient of friction testing, I don't think that that is necessary really to anything subsequent.

The only issue about -- the other issue of scope, which is does it stay in The Grand Lux area, or also implicates the casino, I think it stays in the Grand Lux area, that is where the incident occurred, where the situation is, I don't think they need to prove the other areas are different.

The point is, you got a client fell in a particular area, you got an argument there were lots of other slip-and-falls in that area, it's not addressed, it creates a condition for folks, it's hazardous, and they knew about it, didn't fix it, this case needs to be limited to that area, not the other areas of the casino where they might have put down carpet or similar marble.

I already -- I think it was the right thing to do, so I'm not questioning that, but I already allowed the scope of this case -- I think it is far beyond what other folks might have allowed in the sense of saying, yes, of course you can look at it,

you got a punitive damages claim, you can look at all of these other things in these reports and know they shouldn't have to be redacted because you should be able to contact these folks, find out what occurred in those cases, but it's still a relevant time period that you need to be looking at, and to me that is when the incident occurred, and prior, and in the area where the incident occurred.

So to the extent the Discovery Commissioner determinations -- allows for discovery of anything beyond the date of the incident, or outside of the Grand Lux area, that will be reversed.

Whatever else the Discovery Commissioner allowed to take place or ruled on should remain.

Do you need further clarification on that?

We can go one by one on the report and recommendations.

I think it's understood once I find those limitations what is impacted there.

MR. SYKES: They did produce slip-and-fall reports occurred outside of the Grand Lux area initially in this case.

Are we still allowed to reference those areas?

In their initial disclosures they did

disclose slip-and-falls on marble outside of the Grand Lux area. Are we still allowed to conduct discovery into those incidence?

THE COURT: To what end, counsel?

I'm not likely to revisit this issue, and whether they produced those things or not, I don't think it is a waiver to open the door because again you are still under the umbrella of what is relevant.

If the Court made a determination the only thing relevant is the Grand Lux area, whatever else they produced is irrelevant, I don't see why you should be able to conduct discovery in that area -- or why it would be have some utility to you they produced documentation. I guess arguably you could conduct discovery on whatever it is they produced to you, but at this point seems to me that the Court's determination here in dealing with this Discovery Commissioner's report and recommendation is to say, the relevant areas, and what is even calculated to lead to relevant information is the Grand Lux area only, and that time frame only. I don't see where you get a benefit looking at the others.

If you're looking for me to have a ruling that you can't do discovery on those things, show me in the Discovery Commissioner's report and

recommendation where that is addressed, and I can tell you how I think that should be resolved, but it's not addressed in there.

I know it was addressed in there as perhaps some justification to allow the other discovery, but I'm not allowing that now, but in terms of just dealing with what already is produced, that may need to be like subject to how you conduct your discovery in the future in some requested protection in the future.

I just want to keep this record clean by dealing with the Discovery Commissioner's report and recommendation, not okay, what does this mean to that because that muddies the waters, I think.

MR. SYKES: One other question.

To the extent there's coefficient of friction testing from another part of the casino floor, that is substantially similar or identical to that of the Grand Lux Cafe, are we allowed to conduct discovery into that?

THE COURT: How would you have that?

You mean something they already produced indicates they have done that testing?

Because at this point again if the Court's saying the primary findings if you will is the Grand

Lux area only, and time frame is incident prior only, then would you be saying you would want to do coefficient friction in these other areas as part of your discovery, or have you already been provided evidence that has occurred?

MR. SYKES: Probably a little bit of both.

I don't know the answer at this point in time, but it's possible one of our expert may have access to that information, I don't know, I'd have to go ask.

And we would obviously like the opportunity to conduct full coefficient of friction testing of other parts of the casino to see if the floors are identical or similar.

THE COURT: Let me give counsel an opportunity to say anything you want to say.

MR. ROYAL: Your Honor, we produced -- Obviously I questioned Mr. Jennings about some prior testing he did at the property that was close by the Grand Lux, but it was technically outside it, but beyond that we maybe produced maybe one other report also from the Smith case, but that is all the production we've done.

I should add that -- Strike that.

I won't add that.

The only thing I would add is, as relates to the two years beyond the five years, can I just suggest that they be -- or we can produce those timely to counsel, if they can be produced in redacted form with a protective order, at least temporarily until we get some kind of a ruling from the Court of Appeals?

THE COURT: The way it's going to go is, the time frame that was decided by the Discovery Commissioner, which as I understand it was from the incident, five years prior, but not the time frame forward.

And it's unredacted is how the Court ordered the stuff to go before, and it's I guess you used the term unprotected, it's also that, and -- but it's not the future, it's only from the incident prior.

And I guess to eliminate any -- I guess to try to continue to shape this properly, I will say, no testing of any areas outside the Grand Lux dome area that is irrelevant to this area where the slip-and-fall occurred.

And I would say, no to conducting discovery on what might have been produced related to that area.

Now the Court's making a determination for clarification purposes. Its intent was the discovery be to the area in question.

This idea that we're going to say, wait a minute, they have now placed -- or might have the same or some similar marble in other areas that aren't implicated by this slip-and-fall is part of the thing that stands out, counsel forms my decision, there is a lot of the discussion about like, look, you got fast food areas, and people can go get drinks and are walking through here, and they are spilling things, and you should know all of that, it's very unique to this area that you are asking.

This idea now to go and say, we want to look at marble in the casino, and marble other places, and think it's the same, and would be the same problem, and have issues, and they should have known this, that it's relevant to this, it's too much of a stretch.

I have already given you what you need to have to show of that particular area and those particular circumstances in that particular area why on that particular day you argue it wasn't safe, it was a condition that they should have known and had fixed, and it's a problem because of the marble,

because of spillage, because of whatever, and they knew it because all these things occurred prior and didn't fix it, but it's limited to that.

So I don't see any discovery being relevant or appropriate to any marble areas outside that area, and for any testing to take place to try to show similarity to that marble outside that area.

MR. SYKES: One thing I wanted to clarify, Judge, and I know it was represented in a brief our expert said the Grand Lux was in the area, he did not say that, one thing to keep in mind is that there's no public area in the Venetian I'm aware of where drinks are banned, it's my understanding drinks are served on the casino floor, drinks are served at the tables --

THE COURT: I get all that.

MR. SYKES: -- throughout.

THE COURT: But that is not the point, counsel.

I understand what you want to do, but I have to have some semblance of structure on this thing, and this is not a discovery on the entire Venetian Casino where they might have marble.

This is a discovery of an area of the Venetian Hotel where a slip-and-fall occurred, and

your concerns about that period, because whether or not drinks are served elsewhere, and whether or not there might be similar marble elsewhere, it's the confluence of all of the things unique to that area that matter, not all these other areas.

So I really do think that is a sufficient explanation, goes far beyond the scope of what is necessary, and I think you have more than enough information looking at the five years prior, and in that area, and the unredacted to be able to go and do follow-up with those people to see what that is to try to prove your theory of the case, and I think otherwise it keeps it to a reasonable limitation.

This idea of there's marble other places in the Venetian, and there might have been slip-and-falls other places in the Venetian, and might be drinks served other places, that is really neither here nor there for this incident, and what occurred related to this incident, and where it occurred.

I have to reign it in now for everybody.

MR. SYKES: With regard to the two years, I think the missing reports counsel was mentioning at this point, we would agree to accept the unredacted copies, be willing not to produce those outside of

the case, until we get a ruling from the Court of Appeals.

THE COURT: I think that seems fair.

You can write that up in your order.

I'm going to -- because I mean, I know both sides sort of objected, but I guess at this point I'll put the burden on Plaintiffs to let Mr. Royal have a chance to see the order obviously, an add anything, the reports for the missing time frame that need to be produced unredacted, at least until the Court of Appeals makes a ruling in your case.

Anything else?

MR. ROYAL: Yeah.

Could we just redact them and produce them as they were previously if that's our stipulation?

That way I won't have to ask the Court for a stay and file something --

THE COURT: No.

I understand why you want to redact them, but that is not the ruling in the case, and until the Court of Appeals Court says so, it's not the ruling in the case, and if that's what they say, that's what they say, I'll live with that, but they need to get it, this case needs to move forward.

And if they are not going to go outside the

case, your bigger concern is they are sharing with other members of the Plaintiff's bar they are not going to do that, that will be written in the order, so it needs to be provided.

MR. ROYAL: I just want to for the record ask the Court if we could get like a brief stay from the order allowing us to bring this up --

THE COURT: It's going to take a while for the order to be printed, and I want it in ten days, you got basically ten days, it's not going to take a long time, you have written very voluminous briefings, got a good staff there, know what to do.

If you want to try to dispute it, you can put something together, so the second it's signed you can take something up.

The Court of Appeals already granted the stay related to that stuff.

If you're adding more to it, I'm sure they will do the same thing, but you can put in if you want in the order the Court declined your oral request for a stay at this time, so it already shows because I think that is how Rule 8 or 9, whichever one it is that sort of says, you don't have to come back to the District Court and ask for the stay if there's a futile issue, and it would be basically

futile, you can go get it from them.

Okay. I think we got what we need.

MR. ROYAL: Thank you.

THE COURT: If there are any disputes about the order, send me your competing letter, and we'll take care of it.

MR. SYKES: Thank you, Judge.

THE COURT: Thank you.

(Proceedings concluded.)

REPORTER'S CERTIFICATE

I, Bill Nelson, a Certified Court Reporter in and for the State of Nevada, hereby certify that pursuant to NRS 2398.030 I have not included the Social Security number of any person within this document.

I further Certify that I am not a relative or employee of any party involved in said action, not a person financially interested in said action.

_____/s/ Bill Nelson_____

Bill Nelson, RMR, CCR 191

C E R T I F I C A T E

STATE OF NEVADA)
) ss.
CLARK COUNTY)

I, Bill Nelson, RMR, CCR 191, do hereby certify that I reported the foregoing proceedings; that the same is true and correct as reflected by my original machine shorthand notes taken at said time and place.

/s/ Bill Nelson

Bill Nelson, RMR, CCR 191
Certified Court Reporter
Las Vegas, Nevada

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VENETIAN CASINO RESORT, LLC and
LAS VEGAS SANDS, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

JOYCE SEKERA, an Individual; Plaintiff, v. VENETIAN CASINO RESORT, LLC, d/b/a THE VENETIAN LAS VEGAS, a Nevada Limited Liability Company; LAS VEGAS SANDS, LLC d/b/a THE VENETIAN LAS VEGAS, a Nevada Limited Liability Company; YET UNKNOWN EMPLOYEE; DOES I through X, inclusive, Defendants.	CASE NO.: A-18-772761-C DEPT. NO.: 24 **ORDER ON OBJECTIONS TO THE DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATION DATED DECEMBER 2, 2019**

Plaintiff JOYCE SEKERA by and through her counsel of record, Claggett & Sykes Law Firm and The Galliher Law Firm, filed PLAINTIFF'S OBJECTION TO THE DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS DATED DECEMBER 2, 2019 ON DECEMBER 16, 2019 on December 16, 2019, and Defendants VENETIAN CASINO RESORT, LLC and LAS VEGAS SANDS, LLC (hereinafter collectively referred to as "Venetian"), by and through their counsel of record, Royal & Miles LLP, filed DEFENDANTS' LIMITED OBJECTION TO DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS DATED DECEMBER

ROYAL & MILES LLP
1522 W Warm Springs Road
Henderson, NV 89014
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2, 2019. Both parties timely filed responses to the respective objections. This matter came before the Court for hearing at 9:00 am on January 21, 2020. William T. Sykes, Esq., and Geordan G. Logan, Esq., of the Claggett & Sykes Law Firm, appeared on behalf of the Plaintiff, and Michael A. Royal, Esq., of Royal & Miles LLP appeared on behalf of the Defendants.

The issues raised by the parties in the Discovery Commissioner's Report and Recommendation of December 2, 2019 go to the scope of discovery to be allowed regarding the subject incident of November 4, 2016, which occurred within the Grand Lux rotunda dome of the Venetian property. (The Discovery Commissioner's Report and Recommendation of December 2, 2019 is hereinafter referenced as "DCRR".)

Plaintiff moved the Discovery Commissioner to order that Venetian produce documents related to prior and subsequent incident reports of slip and falls on marble flooring, along with other information related to the installation, care and coefficient of friction testing of marble flooring on the Venetian property (including the alleged removal of carpeting in the casino area and replacement with a marble flooring in 2008), from January 2000 to the present. Plaintiff further moved to expand the scope of other marble floor slip and fall incident reports beyond the casino level of the Venetian property. Plaintiff argued that this broad scope of discovery is necessary for her to establish a case for punitive damages under NRS 42.005 (more specifically to address "the reprehensibility of conduct" by Venetian).

Venetian moved the Discovery Commissioner to limit the scope of all discovery regarding the Venetian marble flooring to the Grand Lux rotunda dome area where the subject incident occurred, and to limit the production of Grand Lux rotunda dome area marble floor guest incident reports to the preceding five years, from November 4, 2011 to November 4, 2016.

The Discovery Commissioner recommended the following pertaining to contested issues raised herein by the parties:

1. Plaintiff's request that Venetian produce evidence of coefficient of friction testing is limited to the Grand Lux rotunda dome area from November 4, 2011 to November 4, 2016 to the extent it was disclosed pursuant to NRCP 16.1 and which is not otherwise protected in accordance with NRCP 26;

2. Plaintiff's request that Venetian produce evidence of changes to the casino level flooring is limited to the Grand Lux rotunda dome area from November 4, 2011 to November 4, 2016;

3. Plaintiff's request for evidence of other incidents extends to all slip and falls on marble flooring on the Venetian casino level and limited in time from November 4, 2011 to the present; and

4. All documents produced by Venetian related to incident reports from November 4, 2011 to the present are to be produced unredacted without protections sought by Venetian under NRCP 26(c).

IT IS HEREBY ORDERED that the Objections filed by the parties are GRANTED IN PART and DENIED IN PART.

IT IS FURTHER HEREBY ORDERED that the DCRR is hereby modified and adopted as follows: Venetian must produce prior incident reports limited to the Grand Lux rotunda dome area from November 4, 2011 to November 4, 2016. Plaintiff's request for documents outside this given scope is hereby DENIED.

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IT IS FURTHER HEREBY ORDERED that the DCRR is otherwise adopted by the Court, including the order requiring that Venetian produce reports of prior incidents in unredacted form without requested NRCP 26(c) protection. Venetian's motion to stay this part of the Order pending a decision by the Nevada Court of Appeals in a writ presently before it to address this issue (case no. 79689-COA) is hereby DENIED.

DATED this 11th day of March, 2020.

DISTRICT COURT JUDGE

JG

Submitted by:

ROYAL & MILES LLP

Michael A. Royal, Esq.
Nevada Bar No. 4370
Gregory A. Miles, Esq.
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Reviewed by:

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#79689-COA

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

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)
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gmiles@royalmileslaw.com

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. 08-6493-1
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)
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Henderson, NV 89014
(702) 471-6777
Counsel for Petitioners

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TABLE OF AUTHORITIES

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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

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[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.

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> ... 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

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[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 _____

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

CERTIFICATE OF COMPLIANCE

STATE OF NEVADA)
COUNTY OF CLARK) ss:

I, Michael A. Royal, hereby affirm, testify and declare under penalty of perjury as follows:

1. I am an attorney licensed to practice in the State of Nevada, and am a member of the law firm of Royal & Miles LLP, attorneys for Petitioners VENETIAN CASINO RESORT, LLC, and LAS VEGAS SANDS, LLC.

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

[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
Las Vegas, NV 89155
Respondent

Ashley Schmitt
An employee of Royal & Miles LLP

Docket Number - 79689-COA

Document Year - 2019

Document Number - 40392

Document Type - 10339

79689-WA **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. 79689
District Court Case No. A-18-772761-C

Electronically Filed
Sep 26 2019 04:59 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 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

Michael A. Royal, Esq. (SBN 4370)
Gregory A. Miles, Esq. (SBN 4336)
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19-40392

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).)

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 SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK

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.

Supreme Court No. 79689
District Court Case No. A772761

NOTICE OF TRANSFER TO COURT OF APPEALS

TO: Hon. Kathleen E. Delaney, District Judge
Royal & Miles, LLP \ Gregory A. Miles, Michael A. Royal
The Galliher Law Firm \ Keith E. Galliher, Jr.
Steven D. Grierson, Eighth District Court Clerk

Pursuant to NRAP 17(b), the Supreme Court has decided to transfer this matter to the Court of Appeals. Accordingly, any filings in this matter from this date forward shall be entitled "In the Court of Appeals of the State of Nevada." NRAP 17(e).

DATE: September 27, 2019

Elizabeth A. Brown, Clerk of Court

By: Lindsey Lupenui
Deputy Clerk

Notification List
Electronic
Royal & Miles, LLP \ Michael A. Royal
Royal & Miles, LLP \ Gregory A. Miles
The Galliher Law Firm \ Keith E. Galliher, Jr.
Eighth Judicial District Court, Chief Judge

Paper
Hon. Kathleen E. Delaney, District Judge
Steven D. Grierson, Eighth District Court Clerk

19-40382

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
Tbe 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, Appellants, v. EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA; THE HONORABLE KATHLEEN DELANEY, Respondents, JOYE SEKERA, Real Party in Interest	Court of Appeals Case No.: 79689-COA District Court Case No.: 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.

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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

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[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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Respondent

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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STATEMENT OF THE ISSUES

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

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

STANDARD OF REVIEW

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

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

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

STATEMENT OF THE FACTS

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

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

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

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

(VEN036.)

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

I. Request for Production and Motion for Protective Order

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

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

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

(VEN040.)

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

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

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

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

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

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

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

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

II. Objection to the April 4, 2019 DCRR

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

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

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

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III. Appellants' History of Hiding Evidence

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

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

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

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

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

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

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

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

IV. Other Concerning Conduct During Discovery

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

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

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

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

(APP337:21-338:10.)

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

(APP352:25-353:9.)

SUMMARY OF THE ARGUMENT

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

[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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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CONCLUSION

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

DATED this 9th day of October, 2019

THE GALLIHER LAW FIRM

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

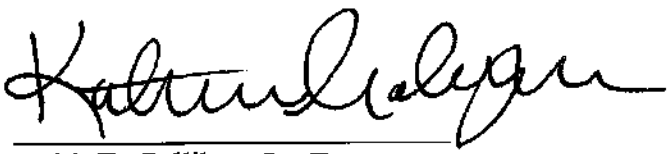
NRAP 26.1 DISCLOSURE STATEMENT

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

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

DATED this 9th day of October, 2019

THE GALLIHER LAW FIRM



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1850 E. Sahara Avenue, Ste. 107
Las Vegas, Nevada 89104
Attorney for for Real Party in Interest
Joyce Sekera

CERTIFICATE OF COMPLIANCE

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

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

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

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

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

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

4. Finally, I hereby certify that I have read this Opposition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires

every assertion in the Opposition regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript of appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying Opposition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 9th day of October, 2019

Further affiant sayeth naught.

Kathleen H. Gallagher, Esq.

Subscribed and Sworn to before me

this 9 day of October, 2019.

NOTARY PUBLIC

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)
ROYAL & MILES LLP
1522 W. Warm Springs Rd.
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Telephone: (702) 471-6777
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gmiles@royalmileslaw.com

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

Michael A. Royal, Esq. (SBE 4370)
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

A

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)
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 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.
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 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

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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.