IN THE COURT OF APPEALS OF THE STATE OF NEVADA

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

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

v.

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

PETITIONERS' REPLY BRIEF

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MEMORANDUM OF POINTS AND AUTHORITIES

I. General Reply to Sekera's Answering Brief

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

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

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

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

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

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

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

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

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

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

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

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

II. Response to Sekera's Given Procedural History

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Finally, defendant objects that responsive documents invade third parties' privacy rights. In California, the right to privacy is set forth in Article I, Section I of the California Constitution, as defendant cites (despite claiming Nevada law applies). *See* Defendant's Supp.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. CONCLUSION

This petition for relief relates directly to the privacy rights of guests involved in other incidents reported by owners and innkeepers, to protect them from the dissemination of personal information (*i.e.* incident facts, physical condition, health history, etc.), attached to their names and contact information. This is not "phonebook" information, as Sekera asserts. It is much more than that. Sekera did nothing below to demonstrate her right to this information balanced with the rights of non-employee guests involved in other incidents. Sekera did not meet the required criteria of NRCP 26(b)(1) once Petitioners demonstrated the "good cause" required under NRCP 26(c). The case law cited by both Petitioners and Sekera support protecting the information at issue. The Discovery Commissioner's recommendation of producing the other incident reports in redacted form with NRCP 26(c) protection by limiting the use of this information

to the present case was consistent with Nevada law and the interests of protecting individual privacy rights. Petitioners respectfully submit that the relief requested should be granted not just for Venetian guests, but for all like situated persons sharing personal information following an incident on the location of a Nevada property owner.

DATED this 28 day of October, 2019.

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
Cousnel 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 Microsoft Word in Times Roman 14 point font.

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

[X] Proportionately spaced, has a typeface of 14 points or more, and contains **6,356 words** in compliance with NRAP 32(a)(1)(A)(ii) (having a word count of less than 7,000 words).

4. Finally, I hereby certify that I have read this Reply, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any

improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Further affiant sayeth naught.

MICHAEL A. ROYAL, ESQ.

SUBSCRIBED AND SWORN to before me by Michael A. Royal, Esq., on this 28 day of October, 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 28 day of October, 2019, I served true and correct copy of the foregoing PETITIONERS' REPLY BRIEF, by delivering the same via the Court's CM/ECF system which will send notification to the following:

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

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 BY MARCH 30, 2020 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, Rule 26.l(a) and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

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

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

VENETIAN CASINO RESORT, LLC and LAS VEGAS SANDS, LLC ("Petitioners") are 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 17 day of March, 2020.

ROYAL & MILES LLP

By: _____

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

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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, Rule 28(a)(5).

NOTICE OF RELATED PROCEEDING

The issues raised in this Petition for Writ of Mandamus and/or Writ of Prohibition arise from a March 13, 2020 discovery order issued in District Court Case No. A-18-772761-C. There is currently pending a writ proceeding in the Court of Appeals of the State of Nevada, Case Number 79689-COA arising from a July 31, 2019 discovery order issued in the same District Court case involving substantively identical issues.

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).

CONTACT INFORMATION FOR ATTORNEYS FOR THE PARTIES

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.
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1850 E. Sahara Avenue, Suite 107
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Sean K. Claggett, Esq.
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4101 Meadows Lane, Suite 100
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(702) 333-7777

NOTICE TO THE PARTIES

3. Counsel for Real Party In Interest, Joyce Sekera (hereinafter "Sekera"), was served with this Petition via electronic service as identified on the

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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).

FACTS SHOWING EXISTENCE AND NATUE OF EMERGENCY

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. The facts showing the existence and nature of Petitioners' emergency are as follows: There is presently a writ pending before the Court of Appeals of the State of Nevada, Case Number 79689-COA, addressing an order by the District Court of July 31, 2019 that Venetian produce unredacted prior incident reports from November 4, 2013 to November 4, 2016 to the Plaintiff in the course of discovery without any requested protection under NRCP, Rule 26(c). An Order Directing Answer and Imposing Temporary Stay was filed by the Court of Appeals on October 1, 2019, which provided Petitioners with requested relief from the July

31, 2019 discovery order until the issue is adjudicated by the appellate court. An order granting the stay pending review of the petition was filed on October 17, 2019.

6. Following the entry of the above-referenced orders, the District Court considered a new and different motion regarding the same type of records for a different period of time. During a hearing before the District Court on January 21, 2020, District Court Judge Kathleen Delaney ordered that Petitioners must produce unredacted records of prior guest incidents from November 4, 2011 to November 4, 2013, without requested protections under NRCP, Rule 26(c). This order addresses the very same issue presently before the Nevada Court of Appeals on the earlier writ. Given that this was the same issue, Petitioners, in open court, requested the District Court to stay the production pending adjudication by the Nevada Court of Appeals on the prior writ petition. This request was denied.

7. An order was entered on March 13, 2020 directing Venetian to produce unredacted reports of other incidents involving Venetian guests from November 4, 2011 to November 4, 2013 without providing requested protection under NRCP, Rule 26(c). In denying Petitioners' request for a stay, Judge Delaney suggested at the January 21, 2020 hearing that Petitioners may file a second writ of mandamus and/or writ of prohibition and obtain a stay from the appellate court. Therefore, immediate action is required to prevent Venetian and its guests from

suffering irreparable harm. Inasmuch as this petition address the identical issues being reviewed by the Court of Appeals of the State of Nevada, Case Number 79689-COA; Petitioners move to have this writ consolidated therewith.

8. The relief sought in the Writ Petition is not available by the District Court. Petitioners moved to stay the March 13, 2020 order during the January 21, 2020 hearing. 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.

9. 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.

10. 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.

F

11. 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 17 day of March, 2020.

ASHLEY SCHMITT
NOTARY PUBLIC
STATE OF NEVADA
Appt. No. 08-3493-1
My Appt. Expires Nov. 1, 2023

NOTARY PUBLIC in and for said County and State

AFFIDAVIT OF MICHAEL A. ROYAL, ESQ. IN SUPPORT OF PETITIONERS' EMERGENCY PETITION FOR WRIT OF MANDAMUS AND/OR WRIT OF PROHIBITION PURSUANT TO NRAP, RULE 21(a)(5)

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. 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.

3. The facts showing the need for extraordinary writ relief are as follows: There is presently a writ pending before the Court of Appeals of the State of Nevada, Case Number 79689-COA, addressing an order by the District Court of July 31, 2019 that Venetian produce unredacted prior incident reports from November 4, 2013 to November 4, 2016 to the Plaintiff in the course of discovery without any requested protection under NRCP, Rule 26(c). An Order Directing

Answer and Imposing Temporary Stay was filed by the Court of Appeals on October 1, 2019, which provided Petitioners with requested relief from the July 31, 2019 discovery order until the issue is adjudicated by the appellate court. An order granting the stay pending review of the petition was filed on October 17, 2019.

4. Following the entry of the above-referenced orders, the District Court considered a new and different motion regarding the same type of records for a different period of time. During a hearing before the District Court on January 21, 2020, District Court Judge Kathleen Delaney ordered that Petitioners must produce unredacted records of prior guest incidents from November 4, 2011 to November 4, 2013, without requested protections under NRCP, Rule 26(c). This order addresses the very same issue presently before the Nevada Court of Appeals on the earlier writ. Given that this was the same issue, Petitioners, in open court, requested the District Court to stay the production pending adjudication by the Nevada Court of Appeals on the prior writ petition. This request was denied.

5. An order was entered on March 13, 2020 directing Venetian to produce unredacted reports of other incidents involving Venetian guests from November 4, 2011 to November 4, 2013 without providing requested protection under NRCP, Rule 26(c). In denying Petitioners' request for a stay, Judge Delaney suggested at the January 21, 2020 hearing that Petitioners may file a second writ of mandamus and/or writ of prohibition and obtain a stay from the appellate court.

I

Therefore, immediate action is required to prevent Venetian and its guests from suffering irreparable harm. Inasmuch as this petition address the identical issues being reviewed by the Court of Appeals of the State of Nevada, Case Number 79689-COA; Petitioners move to have this writ consolidated therewith.

6. The relief sought in the Writ Petition is not available by the District Court. Petitioners moved to stay the March 13, 2020 order during the January 21, 2020 hearing. 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 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.

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.

J

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

10. I declare under penalty of perjury that the above and foregoing is true an accurate. Executed on this 17th day of March, 2020 in Henderson, Nevada.

Further affiant sayeth naught.

MICHAEL A. ROYAL, ESQ.

SUBSCRIBED AND SWORN to before me by Michael A. Royal, Esq., on this 17 day of March, 2020.

ASHLEY SCHMITT
NOTARY PUBLIC
STATE OF NEVADA
Appt. No. 03-5493-1
My Appt. Expires Nov. 1, 2023

NOTARY PUBLIC in and for said County and State

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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 Rule 21(a) ordering the Eighth Judicial District Court to vacate the March 13, 2020 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 pursuant to NRAP, Rules 27(e) and 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 to stay the underlying proceedings pursuant to NRAP Rules 8(a) and 27(e). This motion requests a stay of the March 13, 2020 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 is 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 17 day of March, 2020.

ROYAL & MILES LLP

By: _____

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

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF CASE

A. SUMMARY

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 other slip and falls at the Venetian. The first such request sought reports from November 4, 2013 to November 4, 2016. Petitioners produced reports responsive to this request with the private information of other customers redacted. These redactions were challenged in the District Court and resulted in a July 31, 2019, order requiring Petitioners to disclose the confidential information of these customers. The propriety of the July 31, 2019, order is currently being reviewed by the Court of Appeals of the State of Nevada in writ proceeding Case Number 79689-COA.

The current writ petition arises from a subsequent discovery request by Sekera in which she sought additional incident reports from 1999 to the present. This discovery request was also challenged in the District Court and resulted in a March 13, 2020 Order requiring petitioners to produce additional incident reports from November 4, 2011 to November 4, 2013. Despite the pending writ petition

on the confidential information issue, the Eighth Judicial District Court again ordered Petitioners to produce the incident reports without redacting consumer's confidential information.

The only difference between the order at issue in the instant petition and the order at issue in the prior writ petition is the timeframe of the records. Accordingly, as both petitions deal with the exact same issue and seek the exact same relief, Petitioners will seek to consolidate this proceeding with the prior writ proceeding.

B. PROCEDURAL HISTORY

The discovery request at issue in writ proceeding number 79689-COA sought 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. Sekera objected to the production of redacted reports. So, on February 1, 2019, Petitioners filed a motion for protective order pursuant to NRCP, Rule 26(c) 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 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 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. The order reversing the Discovery Commissioner's Report and Recommendation of April 4, 2019 was filed on July 31, 2019.

Petitioners filed a petition for writ of mandamus and/or writ of prohibition with the Nevada Supreme Court on September 26, 2019 and a motion to stay the July 31, 2019 order on September 27, 2019. That writ proceeding is presently pending before the Court of Appeals of the State of Nevada, Case No. 79689-COA. On October 17, 2019,the Court of Appeal issued an order staying, the July 31, 2019 District Court order until the issue could be fully adjudicated.

Subsequent to the discovery request at issue in case number 79689-COA, Sekera requested that Petitioners produce records of incident reports from 1999 to the present, which matter was brought before the Discovery Commissioner on September 18, 2019. In a December 2, 2019 Report and Recommendation, the Discovery Commissioner ordered that Petitioners must produce records from November 4, 2011 to the present, among other things. Both parties filed objections, which were heard by Judge Delaney on January 21, 2020.

Judge Delaney ordered that the Discovery Commissioner's Report and Recommendation would be reversed as follows: Petitioners are to produce only prior incident reports occurring in the area of Sekera's fall, known as the Grand Lux Rotunda, limited to the time period of November 4, 2011 to November 4, 2016. Judge Delaney also ordered that production of prior incident reports not yet produced, from November 4, 2011 to November 4, 2013, be in unredacted form without requested protections under NRCP, Rule 26(c). Petitioners reminded Judge Delaney that the issue of privacy related to this very kind of production is presently before the Nevada Court of Appeals and, therefore, moved the District Court to stay the order of unredacted/unprotected production until the issue is resolved by the Nevada Court of Appeals. Judge Delaney denied Petitioners' motion to stay, requiring them to file this second petition with the higher court for relief.

Judge Delany's order was entered March 13, 20202. Pursuant to that order Petitioners will again be required to produce 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 this order, Sekera again has no restrictions whatsoever on how the private information of Venetian guests will be used and shared.

Concurrently with this writ petition Petitioner is filing an emergency motion to stay the March 13, 2020 Order. If this Court grants that motion, then this writ may be considered on a non-emergency basis.

Petitioners will also be filing a motion seeking to consolidate this writ proceeding with case number 79689-COA.

III. ISSUES PRESENTED

Whether the District Court erred, as a matter of law, in denying Petitioners' motion for a protective order under NRCP, Rule 26(c) related to the privacy of guest information within other incident reports having nothing to do with the subject incident, failing to weigh the issues of relevance and proportionality required under NRCP, Rule 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 WRIT 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." (See, *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 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 and/or the Court of Appeals of Nevada are 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 is 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 protections 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 October 5, 2020. This Petition for Writ contains an important issue of law that has already occurred once, and will certainly reoccur absent immediate direction from this 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 authority.

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.

This Honorable Court has previously determined that the privacy issue presently before it regarding the production of prior incident reports is worthy of a stay (see Court of Appeals of the State of Nevada, case no. 79689-COA, Order of October 17, 2019). Now, Petitioners are in the identical position of having to produce two more years of prior incident reports in unredacted form without requested protection under NRCP, Rule 26(c). Petitioners respectfully submit that an immediate ruling overturning the March 13, 2020 order is necessary as they and their guests will suffer irreparable harm once this information is disclosed to Sekera.

Alternatively, Petitioners have concurrently filed a Motion for Stay of the March 13, 2020 order. If this honorable Court grants that motion for a stay, then this petition may be considered on a non-emergency basis.

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

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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.

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 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

As set forth in Petitioners' prior petition filed in case number 79689-COA, 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

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[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).
[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. .

Defendants' Motion for Protective Order with the Discovery Commissioner, seeking an order protecting the personal information of prior guests.[9] The Discovery Commissioner granted Petitioners' motion for protective order.[10]

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 reversed the Discovery Commissioner's Report and Recommendation.[11] In a July 31, 2019, order Judge Delany ordered Petitioners to produce the subject reports unredacted.[12] Petitioners then filed a motion for reconsideration, which was denied at the September 17, 2019 hearing.[13]

Petitioners filed a petition for writ of mandamus and/or writ of prohibition with the Nevada Supreme Court on September 26, 2019, and it was assigned for adjudication by the Nevada Court of Appeals.[14] A stay was ordered by the Nevada Court of Appeals on October 17, 2019.[15] The exact same issue has been fully

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[9] Appendix, Vol. 1, Tab 9, VEN 054-083, *Defendants' Motion for Protective Order* (filed February 1, 2019).
[10] Appendix, Vol. 1, Tab 14, VEN 201-06, *Discovery Commissioner's Report and Recommendation* (filed April 4, 2019), VEN 201-206.
[11] Appendix, Vol. 2, Tab 15, VEN 207-66, *Transcript of Hearing on Objection to Discovery Commissioner's Report* (May 14, 2019).
[12] Appendix, Vol. 2, Tab 16, VEN 267-70, *Order* (filed July 31, 2019).
[13] Appendix, Vol. 3, Tab 20, VEN 456-83.
[14] Appendix, Vol 5, Tab 27, VEN 518-32; Tab 28, VEN 533-37; Tab 29, VEN 538-606; Tab 30. *See also* Court of Appeals of the State of Nevada, case no. 79689-COA.
[15] Appendix, Vol 5, Tab 31, VEN 626-27; Tab 36, VEN 711-12. *See also* Court of Appeals of the State of Nevada, case no. 79689-COA.

briefed by the same parties herein and is presently pending before the Nevada Court of Appeals.[16]

Following the discovery at issue in case number 79689-COA Sekera served Petitioners with a further request for production seeking incident reports from 1999 to the present. Petitioners filed a motion for protective order that was heard on September 18, 2019. During a hearing on September 18, 2019, the Discovery Commissioner, based on Judge Delaney's prior rulings, ordered that Petitioners to produce unredacted incident reports from November 4, 2011 to the present (which includes nearly three years of post-incident information).[17] Both parties timely filed Objections to the Discovery Commissioner's Report and Recommendation, filed December 2, 2019 and responses thereto, with a hearing set for January 21, 2020 before the District Court.[18]

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[16] Appendix, Vol 5, Tab 29, VEN 538-606; Tab 34, VEN 649-701; Tab 35, VEN 702-10. *See also* Court of Appeals of the State of Nevada, case no. 79689-COA.
[17] 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); *see also* Appendix, Vol 6, Tab 38, VEN 750-936; Tab 39, VEN 937; Tab 40, VEN 938-88; Vol 7, Tab 40, VEN 989-1005; Tab 41, VEN 1006; Tab 42, VEN 1007-1228; Vol 8, Tab 42, VEN 1229-1476; Vol 9, Tab 42, VEN 1477-86; Tab 43, VEN 1487-1719; Vol 10, Tab 44, VEN 1720-1896; Tab 45, VEN 1897-1917; Tab 46, VEN 1918-21; Tab 47, VEN 1922-64.; Vol 11, Tab 48, VEN 1965-75.
[18] Appendix, Vol 11, Tab 49, VEN 1976-2204; Vol 12, Tab 49, VEN 2205-22; Tab 50, VEN 2223-2391; Tab 51, VEN 2392-2444; Vol 13, Tab 51, VEN 2445-2595; Tab 52, VEN 2596-2602; Tab 53, Vol 2603-15.

At the January 21, 2020 hearing, Judge Delaney again ordered that Petitioners must produce unredacted copies of prior incident reports – this time for the time period of November 4, 2011 to November 4, 2013.[19] The following exchange occurred during the January 21, 2020 hearing:

> [MR. ROYAL]: 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.[20]

Petitioners moved the District Court to order that the production of these additional years of prior incident reports be in redacted form with protections afforded under NRCP Rule 26(c):

> MR. ROYAL: . . . 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 –

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[19] Appendix, Vol. 13, Tab 54, *Reporter's Transcript of Proceedings on Hearing of January 21, 2020*, VEN 2617-60, Tab 55 at VEN 2646:1-17; 2649:22-25; 2650:1-4,14-25; 2651:1-25; 2652:1-3; Tab 56, *Order On Objections to the Discovery Commissioner's Report and Recommendation Dated December 2, 2019* (filed March 13, 2020), VEN 2661-64. (Note that the issue of case no. 79689-COA, Nevada Court of Appeals, relates to the production of prior incident reports for time period of November 4, 2013 to November 4, 2016.)

[20] Appendix, Vol. 13, Tab 55 at VEN 2646:1-15.

> 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.[21]

The District Court denied Petitioners' request, inviting them to file a separate writ with this Honorable Court and again seeking protection under NRAP, Rule 8.[22] Accordingly, Petitioners respectfully submit that they have presented sufficient cause for requested relief from the March 13, 2020 order as set forth herein in emergency fashion.[23]

VII. LEGAL ARGUMENT

A. WHETHER THE DISTRICT COURT ERRED AS A MATTER OF LAW IN ORDERING PETITIONERS TO PRODUCE UNREDACTED OTHER INCIDENT REPORTS WITHOUT REQUESTED PROTECTIONS PURSUANT TO NRCP, RULE 26(C)

1. SEKERA DID NOT MEET HER BURDEN OF PROOF UNDER NRCP, RULE 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.[24] Although Sekera walked through the Grand Lux rotunda area hundreds of times

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[21] Appendix, Vol. 13, Tab 55 at VEN 2650:14-24; *see also id.* at VEN 2650:25; 2651:1-4; Tab 56, VEN 2661-64.
[22] Appendix, Vol. 13, Tab 55 at VEN 2651:5-25; 2652:1-3; *see also* Tab 56 at VEN 2663-64.
[23] Appendix, Vol. 13, Tab 54 at VEN 2616; Tab 55 at VEN 2646:1-17; 2649:22-25; 2650:1-4,14-25; 2651:1-25; 2652:1-3; Tab 56 at VEN 2661-64.
[24] *See* Appendix, Vol. 1, Tabs 1-6, VEN 001-037, *generally.*

previously, on the day of the incident Sekera encountered a foreign substance for the first time, which caused her to slip and fall.[25]

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:

> 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

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[25] *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.*

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.[26] 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.[27]

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[26] *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.

[27] Appendix, Vol. 1, Tab 10, VEN 084-085, *Declaration of Peter Goldstein, Esq.* (dated 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; Tab 12, VEN 140-85, *Sekera's Reply to Defendant Venetian Casino Resort,*

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 IN PRIOR INCIDENT REPORTS IS ENTITLED TO NRCP, RULE 26(c) PROTECTION

Pursuant to the March 13, 2020 Order, the District Court has 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.[28] She has already been provided with redacted prior incident reports from November 4, 2013 to November 4, 2016. Moreover, Petitioners are prepared to produce redacted versions of incident reports from November 4, 2011to November 4, 2013. These records are sufficient 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, Rule 26(b)(1) and requires the

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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.

[28] Appendix, Vol 13, Tab 56, *Order On Objections to the Discovery Commissioner's Report and Recommendation Dated December 2, 2019* (filed March 13, 2020) at VEN 2661-64.

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, Rule 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, Rule 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, Rule 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 March 13, 2020 order once again denying Petitioner's request for a protective order is in error (especially under circumstances where the same issue related to the same kind of evidence is presently pending before the Nevada Court of Appeals as case no. 79689-COA).[29] (*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,

[29] Appendix, Vol 13, Tab 56, VEN 2661-64.

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.[30] Guests who stay at the Venetian do so with an expectation that their personal information will not be disclosed or disseminated without their consent. There is simply no legitimate discovery interest which outweighs these

[30] *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]").

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 PRODUCE VENETIAN INCIDENT REPORTS WITHOUT REDACTIONS OF CONFIDENTIAL AND PRIVATE INFORMATION RELATING TO PETITIONER'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 and in the proceedings on the prior discovery motion, good-cause exists to support an order providing that the personal, private information of Venetian's guests contained in the Incident Reports should be 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.[31]

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.[32]

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:

[31] 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).
[32] *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.[33]

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 March 13, 2020 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 March 13, 2020 order and directing the District Court to issue an order protecting the private information on the third party individuals.

[33] *Id.* at VEN 492.

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, Rule 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 March 13, 2020 order** directing Venetian to provide Sekera with unredacted 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, Rule 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 17 day of March, 2020.

ROYAL & MILES LLP

By _____

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

CERTIFICATE OF COMPLIANCE

STATE OF NEVADA)
) 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 Microsoft Word in Times Roman 14 point font.

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

[X] Proportionately spaced, has a typeface of 14 points or more, and contains **6,575 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 17 day of March, 2020.

ASHLEY SCHMITT
NOTARY PUBLIC
STATE OF NEVADA
Appt. No. 08-5493-1
My Appt. Expires Nov. 1, 2023

NOTARY PUBLIC in and for said County and State

PROOF OF SERVICE

The undersigned does hereby declare that I am over the age of eighteen (18) years and not a party to the within entitled action. I am employed by Royal & Miles LLP, 1522 W. Warm Springs Rd., Henderson, NV 89014. I am readily familiar with Royal & Miles LLP's practice for collection and processing of documents for delivery by way of the service indicated below. On March 17, 2020, I served the following document(s): PETITIONERS' EMERGENCY PETITION FOR WRIT OF MANDAMUS AND/OR WRIT OF PROHIBITION UNDER NRAP RULES 21(a)(6) AND 27(e) on the interested party in this action as follows:

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

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

Sean K. Claggett, Esq.
William T. Sykes, Esq.
Geordan G. Logan, Esq.
CLAGGETT & SYKES LAW FIRM
4101 Meadows Lane, Suite 100
Las Vegas, NV 89107
(702) 333-7777

Attorneys for Real Party in Interest

X By Hand Delivery. By placing said document(s) in an envelope or package or collection and hand delivery, addressed to the person(s) at the address(es) listed above, following our ordinary business practices. I am readily familiar with the firm's Practice for hand delivering and processing of documents.

X By Electronic Mail/Service. Pursuant to Administrative Order 14-2 and Rule 9 of the NEFCR, I caused said documents(s) to be transmitted to the person(s) identified in the E-Service List for this captioned case in Odyssey E-File & Serve of the Eighth Judicial District Court, County of Clark, State of Nevada. The E-Mail transmission confirmation and the e-service transmission report reported service as complete and a copy of the service transmission report will be maintained with the document(s) in this office.

I declare under penalty of perjury under the laws of the State of Nevada that 1e foregoing is true and correct.

Executed on March 17, 2020, at Las Vegas, Nevada.

Ashley Schmitt
An employee of Royal & Miles LLP

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 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 MARCH 30, 2020 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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gmiles@royalmileslaw.com

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

CONTACT INFORMATION FOR ATTORNEYS FOR THE PARTIES

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.
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1850 E. Sahara Avenue, Suite 107
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Sean K. Claggett, Esq.
William T. Sykes, Esq.
Geordan G. Logan, Esq.
CLAGGETT & SYKES LAW FIRM
4101 Meadows Lane, Suite 100
Las Vegas, NV 89107
(702) 333-7777

NOTICE TO THE PARTIES

3. Counsel for Real Party In Interest, Joyce Sekera (hereinafter "Sekera"), was served with this Motion via electronic service as identified on the proof of service in this document. Prior to filing this Motion and the Petition 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).

FACTS SHOWING EXISTENCE AND NATUE OF EMERGENCY

4. The facts showing the existence and nature of Petitioners' emergency are as follows: There is presently a writ pending before the Court of Appeals of the State of Nevada, Case Number 79689-COA, addressing a July 31, 2019 order by the District Court requiring Venetian to produce unredacted prior incident reports from November 4, 2013 to November 4, 2016 to the Plaintiff in the course of discovery without any requested protection under NRCP, Rule 26(c). An Order Directing Answer and Imposing Temporary Stay was filed by the Court of Appeals on October 1, 2019, which stayed the July 31, 2019 discovery order until the issue is adjudicated by the appellate court. An order granting the stay pending review of the petition was filed on October 17, 2019.

5. Following the entry of the above-referenced orders, the District Court considered a new and different motion regarding the same type of records for a different period of time. During a hearing before the District Court on January 21, 2020, District Court Judge Kathleen Delaney ordered that Petitioners must produce unredacted records of prior guest incidents from November 4, 2011 to November 4, 2013, without requested protections under NRCP, Rule 26(c). This order addresses the very same issue presently before the Nevada Court of Appeals on the earlier writ. Given that this was the same issue, Petitioners, in open court, requested the District Court to stay the production pending adjudication by the Nevada Court of Appeals on the prior writ petition. This request was denied.

6. An order was entered on March 13, 2020 directing Venetian to produce unredacted reports of other incidents involving Venetian guests from November 4, 2011 to November 4, 2013 without providing requested protection under NRCP, Rule 26(c). In denying Petitioners' request for a stay, Judge Delaney suggested at the January 21, 2020 hearing that Petitioners may file a second writ of mandamus and/or writ of prohibition and obtain a stay from the appellate court. Therefore, immediate action is required to prevent Venetian and its guests from suffering irreparable harm.

7. 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.

8. The relief sought in the Writ Petition is not available by the District Court. Petitioners moved to stay the March 13, 2020 order during the January 21, 2020 hearing. 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.

9. 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.

10. 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.

D

Further affiant sayeth naught.

MICHAEL A. ROYAL, ESQ.

SUBSCRIBED AND SWORN to before me by Michael A. Royal, Esq., on this 17 day of March, 2020.

ASHLEY SCHMITT
NOTARY PUBLIC
STATE OF NEVADA
Appt. No. 06-5493-1
My Appt. Expires Nov. 1, 2023

NOTARY PUBLIC in and for said County and State

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MOTION

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 issue an order for the immediate stay of execution on a March 13, 2020 order issued by the Eighth District Court directing Venetian to provide Sekera with unredacted copies of prior incident reports related to guests involved in other incidents occurring on the Venetian premises.

The March 13, 2020 order issued by the district court in Sekera v. Venetian Casino Resort, LLC, et al. Case No. A772761 is based on Judge Delaney's incorrect determination that there is no legal basis under NRCP 26(c) to protect the privacy interests of persons involved in other incidents occurring on Venetian property. The order not only allows for Sekera to identify all guests involved in other unrelated incidents on Venetian property, but allows for the free distribution of that information by Sekera to anyone, anywhere at any time. Venetian will suffer irreparable harm if a stay is not granted, allowing this Court time to review the merits of Venetian's petition for writ of mandamus and/or writ of prohibition. Petitioner is seeking relief in the concurrently filed Petition for Writ of Mandamus and/or Prohibition on an emergency basis. The emergency is the compelled immediate disclosure of confidential private information. If this Court grants this

motion for a stay, then the emergency will be abated and the Petition for Writ of Mandate and/or Prohibition may be considered on a non-emergency basis.

This Motion is 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 17 day of March, 2020.

ROYAL & MILES LLP

By _____

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

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT AS TO RELIEF SOUGHT IN DISTRICT COURT

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 ordered produced. Accordingly, once Petitioners comply with the order, there is no reasonable means of repairing the damage.

On October 1, 2019, the Nevada Court of Appeals in case no. 79689-COA granted Petitioners a stay of a July 31, 2019 District Court order in this matter addressing the exact evidence and issues pending again here. Following the issuance of that stay the District Court issued another order covering incident reports from a different time period than the July 31, 2019 order. Again, in this March 13, 2020 order the District Court is requiring Petitioners to produce unredacted prior incident reports without protection under NRCP 26(c). At the January 21, 2020 hearing on the discovery motion giving rise to the March 13, 2020 order, petitioners moved for a stay of execution, which was denied.

II. BASIS FOR RELIEF

The District Court failed to fairly consider the privacy rights of individual non-parties to the litigation by ordering the production of unredacted prior incident reports from November 4, 2011 to November 4, 2013, without requested NRCP 26(c) protection. This is especially troubling since the Nevada Court of Appeals previously stayed execution of the July 31, 2019 order which addresses the exact same kind of evidence from November 4, 2013 to November 4, 2016.

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. The March 13, 2020 District Court order requires Petitioner to produce these reports without redactions to protect non-parties' private personal information. 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.

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.

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

In the course of discovery, Sekera requested that Petitioners produce incident reports related to other slip-and-falls from November 4, 2013 to the present. Petitioners produced redacted copies of incident reports from November 4, 2013 to November 4, 2016. Sekera objected to the production of redacted reports. This dispute ultimately resulted in the July 31, 2019, order requiring Petitioners to produce unredacted incident reports, which included non-party guests' names, addresses, telephone numbers, dates of birth, social security numbers, and driver's license/identification card numbers. On October 17, 2019, the Court of Appeals in Case Number 79689-COA issued an order staying the July 31, 2019 order pending a review of the petition challenging the underlying court order.

Subsequent to the discovery request at issue in case number 79689-COA, Sekera requested that Petitioners produce records of incident reports from 1999 to the present. This led to another dispute that resulted in a January 21, 2020 hearing before Judge Delany.

Judge Delaney issued an order covering many topics in dispute, including that Petitioners produce prior incident reports from November 4, 2011 to November 4, 2013 and that the reports be in unredacted form without requested protections under NRCP, Rule 26(c). Petitioners reminded Judge Delaney that the issue of privacy related to this very kind of production is presently before the

Nevada Court of Appeals and moved the District Court to stay the portion of the order on the production until the issue is resolved by the Nevada Court of Appeals. Judge Delaney denied Petitioners' motion to stay.

Judge Delany's order was entered on March 13, 2020. Pursuant to that order Petitioners will again be required to produce 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 this order, Sekera again has no restrictions whatsoever on how the private information of Venetian guests will be used and shared.

Petitioners once again hereby 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 and this request for a stay of the March 13, 2020 order.

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

The Nevada Supreme Court has held that in slip-and-fall cases involving the temporary presence of debris or foreign substance, such as the instant matter, evidence of prior incidents is not admissible to establish notice. (*Eldorado Club, Inc., supra,* 78 Nev. at 511, 377 P.2d at 176)

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 **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. Sekera has failed to do so. Her only argument for the production of the private information of non-parties is to protect against any arguments of comparative fault at trial. Private information on non-party individuals who did not witness the accident is clearly not relevant to comparative fault arguments. 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. NRCP 26(b)(1) places restrictions on her ability to obtain this 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 March 13, 2020 Order, the District Court has provided Sekera with unfettered access to personal and sensitive information of individuals who are not parties to this action. This private information is not relevant to any claims or defenses in this matter. Pursuant to the earlier discovery, she has already been provided with redacted prior incident reports to establish issues associated with notice. Petitioners are willing to provide the 2011-2013 reports as well, with appropriate redactions to protect private information of other guests.

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)) Moreover, the United States District Court for the District of Nevada applying Nevada law to the federal equivalent of of NRCP 26(b)(1) has found that non-party information is subject to privacy protection.

In *Izzo v. Wal-Mart Stores, Inc.*, 2016 U.S. Dist. LEXIS 12210; 2016 WL 409694, a slip-and-fall plaintiff filed a motion to compel the defendant to produce evidence of prior claims and incidents. The court evaluated the claim under Nevada law as set forth in *Eldorado Club, Inc., supra* at 511, 377 P.2d at 176. 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 *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. 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.'" [Citations omitted].
>
> (*Id.* at *7.)

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's March 13, 2020 order requiring Petitioner to produce unredacted prior incident reports 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 17 day of March, 2020.

ROYAL & MILES LLP

By _____

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PROOF OF SERVICE

The undersigned does hereby declare that I am over the age of eighteen (18) years and not a party to the within entitled action. I am employed by Royal & Miles LLP, 1522 W. Warm Springs Rd., Henderson, NV 89014. I am readily familiar with Royal & Miles LLP's practice for collection and processing of documents for delivery by way of the service indicated below. On March 17, 2020, I served the following document(s): EMERGENCY MOTION UNDER NRAP 8 STAYING EXECUTION OF ORDER DIRECTING PETITIONERS TO DISCLOSE PRIVATE, PROTECTED INFORMATION OF GUESTS NOT INVOLVED IN UNDERLYING LAWSUIT on the interested party in this action as follows:

Keith E. Galliher, Jr., Esq.
THE GALLIHER LAW FIRM
1850 E. Sahara Avenue, Suite 107
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(702) 735-0049

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

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Attorneys for Real Party in Interest

X By Hand Delivery. By placing said document(s) in an envelope or package or collection and hand delivery, addressed to the person(s) at the

address(es) listed above, following our ordinary business practices. I am readily familiar with the firm's Practice for hand delivering and processing of documents.

X By Electronic Mail/Service. Pursuant to Administrative Order 14-2 and Rule 9 of the NEFCR, I caused said documents(s) to be transmitted to the person(s) identified in the E-Service List for this captioned case in Odyssey E-File & Serve of the Eighth Judicial District Court, County of Clark, State of Nevada. The E-Mail transmission confirmation and the e-service transmission report reported service as complete and a copy of the service transmission report will be maintained with the document(s) in this office.

I declare under penalty of perjury under the laws of the State of Nevada that 1e foregoing is true and correct.

Executed on March 17, 2020, at Las Vegas, Nevada.

Ashley Schmitt
An employee of Royal & Miles LLP

IN THE SUPREME COURT OF THE STATE OF NEVADA

VENETIAN CASINO RESORT, LLC; LAS VEGAS SANDS, LLC,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE KATHLEEN DELANEY, DISTRICT JUDGE,

Respondents,

and

JOYCE SEKERA,

Real Party in Interest.

Electronically Filed
Mar 24 2020 01:17 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No.: 80816

OPPOSITION TO PETITIONERS' EMERGENCY MOTION FOR RELIEF UNDER NRAP 27(e)

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NRAP 26.1 DISCLOSURE

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

Joyce Sekera is an individual.

Claggett & Sykes Law Firm and the Galliher Law Firm have appeared on behalf of Joyce Sekera in this matter.

DATED this 24th day of March, 2020

CLAGGETT & SYKES LAW FIRM

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I. INTRODUCTION

This is the third motion for emergency stay relief that Petitioners/Defendants ("Defendants") have filed in this case. In all three motions Defendants have not explained why an emergency stay is appropriate. Plaintiff/Real Party in Interest ("Plaintiff") asks that this Court deny Defendants' motion for stay. In reviewing Defendants' writ petition, the Court should also consider declining Defendants' writ petition because appellate courts generally decline to review discovery orders by extraordinary writ relief, and Defendants have not met their burden. Notably, it is Defendants' burden to move for a protective order under NRCP 26(c), despite their attempts within their NRAP 27(e) motion to shift the burden to Plaintiff. Moreover, it is Defendants' burden to demonstrate a privacy interest that they are allegedly protecting. *See* NRCP 49.015 (Privileges recognized only as provided). Yet, Defendants have not identified any substantive right of privacy.

Defendants request stay relief for this Court to review a discovery order mandating the production of similar incident reports. Defendants allege that its motion was filed to avoid the "violation of privacy rights for hundreds of [third-party] individuals." Mot. at 2. Yet, appellate courts generally do not review discovery orders since an appeal from a final judgment is an available and appropriate remedy. *Valley Health Sys., Ltd. Liab. Co. v. Eighth Judicial Dist. Court of Nev.*, 127 Nev. 167, 171, 252 P.3d 676, 678 (2011). An appellate court

will review a discovery order when it is made without regard to relevance or if it requires disclosure of privileged information. *Id.* at 252 P.3d at 678-79. Yet, Defendants have not alleged that the subject discovery order was issued without regard to relevance. Defendants also have not alleged that the discovery is subject to a privilege, which is their burden to invoke this Court's original jurisdiction. The only allegation Defendants have made is that disclosure would allegedly and generally violate privacy rights of unknown third parties. Yet, Defendants do not provide any legal authority which would confer standing to allow them to assert the privacy rights of unknown third parties. Similarly, Defendants do not identify any substantive legal authority to demonstrate privacy rights held by unknown third parties. Defendants also cannot explain how they will be harmed by producing the required information. Thus, Defendants have wholly failed to satisfy the NRAP 8(c) factors for this Court to enter a stay, particularly on an emergency basis.[1]

[1] In fact, Defendants have not even attached the order to their motion for which they seek emergency stay relief. And, they fail to demonstrate that they first presented the arguments in their motion to the District Court, which violates the requirements of NRAP 27(e)(4): "If the relief sought in the motion was available in the district court, the motion shall state whether all grounds advanced in support of the motion in the court were submitted to the district court, and, if not, why the motion should not be denied."

II. LEGAL ARGUMENT

A. DEFENDANTS HAVE NOT SATISFIED THE LEGAL STANDARDS FOR GRANTING A MOTION FOR STAY.

When considering a motion for a stay, this Court generally considers four factors: (1) Whether the object of the writ petition will be defeated if the stay is denied; (2) whether petitioner will suffer irreparable or serious injury if the stay is denied; (3) whether real party in interest will suffer irreparable or serious injury if the stay is granted; and (4) whether petitioner is likely to prevail on the merits in the appeal or writ petition. *See Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000) (citing NRAP 8(c); *Kress v. Corey*, 65 Nev. 1, 189 P.2d 352 (1948)).

First, the object of the writ petition will not be defeated if Defendants' stay request is denied. The object of Defendants' writ petition is to conceal information about the third parties who had incidents on Defendants' marble floors. If a stay is not granted, then Defendants will be required to produce incident reports by March 30, 2020. Tellingly, however, Defendants have not presented any legal authority demonstrating that they have standing to assert privacy interests of unknown third parties. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (appellate courts do not consider arguments not cogently argued). Similarly, Defendants have not demonstrated that such unknown third parties have a substantive legal reason to withhold incident reports. *Id.*

Second, Defendants will not suffer irreparable harm or injury if the stay is denied. Defendants argue that they will be required to divulge "confidential" information of third parties. However, Defendants do not explain how they will be injured by the production of the information or under what legal basis the information is confidential. Very simply, Defendants have not articulated a procedural or substantive legal reason for withholding evidence. Thus, Defendants' position amounts to nothing more than delaying the release of relevant evidence in an attempt to defeat Plaintiff's claim.

Third, Plaintiff will suffer irreparable or serious injury if the stay is granted. Plaintiff will suffer by being forced to relitigate a discovery order that was correctly decided. Defendants' attempt at relitigation and mere delay is inappropriate for a writ petition and wasteful of judicial resources. Plaintiff will be unable to achieve justice if Defendants succeed in their delay campaign by continuing to conceal incident reports from Plaintiff.

B. DEFENDANTS ARE UNLIKELY TO PREVAIL ON THE MERITS BECAUSE THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION AND THIS COURT DOES NOT GENERALLY REVIEW PRETRIAL DISCOVERY ORDERS.

A writ of mandamus is an inappropriate vehicle for addressing Defendants' grievance. *See Valley Health* at 171, 252 P.3d at 678 "[Writs of mandamus] are generally not available to review discovery orders." "[T]here have been two main situations where this court has issued a writ to prevent improper discovery: blanket

discovery orders with no regard to relevance, and discovery orders compelling disclosure of privileged information." *Id.* at 171, 252 P.3d at 679.

The subject discovery was not ordered under a blanket order without regard to relevance, nor does it contain privileged information. Instead, Defendants argue that some of the information has an unspecified privacy interest. Therefore, as is the case with most discovery orders, the appropriate vehicle for redress is an appeal from a final judgment, not a petition for a writ of mandamus. *Id.* Defendants are inappropriately and wastefully attempting to relitigate their relevance argument, which is not a noted exception in Nevada law for appellate review of pretrial discovery orders. In other words, it is improper for this Court to review the factual issues of relevancy in the context of Defendants' writ petition. *See State v. Garaventa Land & Livestock Co.*, 61 Nev. 407, 411, 131 P.2d 513, 514 (1942) (this Court does not disturb findings even where there is conflict evidence).

1. <u>Plaintiff met her burden for proving relevance.</u>

Defendants make numerous accusations of how Plaintiff supposedly fell short on her burden to establish relevance but do not cite the record as to how Plaintiff's argument was inadequate. Instead, Defendants cite *Eldorado Club v. Graff*, 78 Nev. 507, 377 P.2d 174 (1962), for the contention that prior incidents are generally not admissible to establish notice in slip and falls involving a temporary substance. Mot. at 6. Defendants misuse *Eldorado Club* to accuse Plaintiff of

failing to establish the relevance and proportionality of the discovery at issue. But relevance and proportionality are only considered in a writ petition of a blanket order made without consideration of relevance. As such, this Court does not need to consider Defendants' argument because it did not allege that the District Court's order was issued without regard to relevance.

Alternatively, Defendants' reliance on *Eldorado Club* is inaccurate. The defendant in *Eldorado Club* argued that the court could not admit a prior incident to establish his knowledge of the dangerous condition because that condition (a foreign substance) was not permanent. *Eldorado Club v. Graff*, 78 Nev. 507, 509, 377 P.2d 174, 175 (1962). However, this Court held that prior similar incidents could be admitted when "the conditions surrounding the prior occurrences have continued and persisted." *Id.* at 511, 377 P.2d at 176. In the instant case, Plaintiff believes that the incidents surrounding the falls on Venetian's slippery marble floors have continued and persisted, which entitles her to receive the discovery and determine for herself the relevancy according to NRCP 26(b)(1) which states, "Information within [the] scope of discovery need not be admissible in evidence to be discoverable." However, Defendants are requesting that Plaintiff be kept from investigating the conditions surrounding the prior occurrences by blocking the incident reports altogether or redacting the witness contact information.

2. Defendants have no viable argument that the information contained in the incident reports is private.

Defendants do not argue that any part of the discovery ordered includes privileged information. Instead, Defendant generally argues that the District Court has provided Plaintiff with "unfettered access to personal and sensitive information of individuals who are not party to this action." Mot. at 8. Plaintiff believes that the information contained in the incident reports includes evidence of similar incidents and contact information of potential witnesses. In *Schlatter v. Eighth Judicial Dist. Court*, 93 Nev. 189, 192, 561 P.2d 1342, 1343-44 (1977), the discovery order was overturned because it included carte blanche discovery of all information in tax returns and medical records without regard to relevance. The issue in *Schlatter* is supported by law because medical and financial information is protected by privacy laws such as HIPAA, and the discovery order was made without regard to relevance. However, in the instant case, the District Court considered the relevance of the information and the subject incident reports are records kept in the regular course of business without any privacy laws that restrict disclosure. When a victim adds information to the Defendants' incident report, they do so voluntarily, to a private third-party business for the Defendants' benefit. Thus, Defendants have failed to demonstrate a privilege. According to NRS 49.015(1)(b) and (c), no person, including Defendants, "[have] a privilege to . . . [r]efuse to disclose any matter . . . [or] [r]efuse to produce any object or writing."

Defendants also cite a federal case where particularized information about the prior slip and falls had already been produced to the plaintiff. The plaintiff in *Izzo v. Wal-mart Stores, Inc.*, requested "facts and circumstances surrounding any other slip and fall." No. 2:15-cv-01142-JAD-NJK, 2016 U.S. Dist. LEXIS 12210, at *11 (D. Nev. Feb. 2, 2016). The court reasoned that further discovery on prior slip and falls was unduly burdensome because plaintiff had the list of prior incidents and the discovery would require weeks or months of work to prepare. *Id.* at *13. *Izzo* is distinguishable from the instant case because that defendant was asserting privilege for their protectable interest and the requesting party was asking for far more than the incident reports that Plaintiff has requested.

In another federal case cited by Defendants, a court addressed the privacy of hotel guests who gave their addresses and phone numbers to secure a room. *See Rowland v. Paris Las Vegas*, No. 13CV2630-GPC (DHB), 2015 U.S. Dist. LEXIS 105513, at *6-7 (S.D. Cal. Aug. 11, 2015). In that case, the plaintiff requested the names addresses and phone numbers of all prior hotel guests "who complained, reported or otherwise informed" the defendant of slippery floors. *Id.* at *6. This request broadly requested the defendant to go through their hotel guest records and provide all information linked with those guests. The defendant raised a concern over the guest's constitutional right to privacy, and the court held that "[f]ederal courts ordinarily recognize a constitutionally-based right of privacy that **can be**

raised in response to discovery requests." *Id.* at *7 (emphasis added). The court goes on to explain that the right is not absolute and is subject to a balancing test. *Id.* In this case, the information was given voluntarily for the Defendants' benefit in connection with the incidents, as opposed to being mandated at registration for a hotel room. Importantly, Defendants have not raised a constitutionally based right of privacy, nor has it suggested the Court apply a federal balancing test. Without articulating the claimed right, or even identifying the legal authority that would supposedly create a constitutional right of privacy, Defendants have not demonstrated the right to extraordinary relief or emergency stay relief. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

Individuals do have a right to protect "private facts" from being released by government entities in accordance with the Fourth Amendment of the United States Constitution. *See Montesano v. Donrey Media Grp.*, 99 Nev. 644, 650-51, 668 P.2d 1081, 1085 (1983). However, information freely given to a non-public entity during an investigation of incidents is not considered private and does not invoke the Constitution. The statements and incidents to be produced were given voluntarily without privacy implication. *See* NRS 49.385(1) (Waiver of privilege by voluntary disclosure) ("A person upon whom these rules confer a privilege against disclosure of a confidential matter waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents

to disclosure of any significant part of the matter."). Thus, it is unclear how the unknown third parties have any privacy interest in voluntarily provided information. Particularly because Defendants have failed to identify any legal authority to support their generalized arguments, they have not satisfied NRAP 8(c) to demonstrate that they are likely to success on the merits of their writ petition. Instead, Defendants have only demonstrated that they have filed a third writ petition and a third emergency motion to delay this litigation and continue to conceal relevant discovery.

III. CONCLUSION

In summary, this Court should deny Defendants' emergency motion because they have simply failed to carry their burden under the NRAP 8(c) factors for a stay or the NRAP 27(e) factors for emergency relief.

Dated this 24th day of March, 2020.

CLAGGETT & SYKES LAW FIRM

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CERTIFICATE OF SERVICE

I certify that I am an employee of Claggett & Sykes Law Firm and that on the 24th day of March, I submitted the foregoing **OPPOSITION TO PETITIONERS' EMERGENCY MOTION FOR RELIEF UNDER NRAP 27(e)** for filing via the Court's e-Flex electronic filing system which will send electronic notification to the following:

Michael A. Royal, Esq.
Gregory A. Miles, Esq.
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Attorneys for Petitioner

/s/ *Anna Gresl*
An Employee of
CLAGGETT & SYKES LAW FIRM

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court No. 80816
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 MOTION FOR RELIEF UNDER NRAP 27(e)

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

DATED this 25th day of March, 2020.

ROYAL & MILES LLP

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VENETIAN CASINO RESORT, LLC,
and LAS VEGAS SANDS, LLC

MEMORANDUM OF POINTS AND AUTHORITIES

COMES NOW Petitioners VENETIAN CASINO RESORT, LLC and LAS VEGAS SANDS, LLC (collectively "Venetian"), by and through their counsel of record, ROYAL & MILES LLP, and respectfully file this reply to Joyce Sekera's Opposition to Petitioners' Emergency Motion for Relief Under NRAP, Rule 27(e), filed on March 17, 2020, 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.

The basis for Venetian's motion for emergency stay relates to certain privacy issues of Venetian and its guests which are the subject of a pending writ assigned to the Nevada Court of Appeals, Case No. 79689-COA, filed on September 26, 2019, relating to the production of Venetian guest prior incident reports from November 4, 2013 to November 4, 2016. There, the Nevada Court of Appeals **granted** Petitioners' motion for stay on October 17, 2019.

The instant petition arises from an order by the District Court that Petitioners produce an additional two years of Venetian guest prior incident reports - from November 4, 2011 to November 4, 2013 - without the same protections under NRCP 26(c) requested in the writ presently pending as Case No. 79689-COA. It is the exact same issue relating to the same evidence in the same litigation; only the timeframe is different.

This Honorable Court has already been presented with the privacy issues at hand and determined that Petitioners met the requirements for an emergency stay. It is therefore disingenuous of Sekera to argue that Petitioners "have not explained why an emergency stay is appropriate."[1] Certainly, Venetian did so to the Court's satisfaction in Case No. 79689-COA. It has likewise done so here.

[1] *See* Opposition to Motion For Stay at 1.

As presented in the Petition filed on March 17, 2020, Venetian is moving to stay the District Court order of March 13, 2020, which provides that Petitioners must produce records of prior incident reports from November 4, 2011 to November 4, 2013 without the same protections at issue in Case No. 79689-COA.[2] It is therefore a bit misleading for Sekera to write: "This is the third motion for emergency stay relief" requested by Venetian,[3] as though the pending motion should not be considered simply because there have been prior requests – one of which was granted and remains in effect.[4] Venetian has included the Order of March 13, 2020 with its Appendix, filed on March 17, 2020.[5]

Since there is already a stay in place with respect to the same evidence at issue in the present petition, Sekera has failed to explain in the Opposition how she will be harmed by the Court granting the motion to stay the March 13, 2020 order until this matter can be fully adjudicated together with Case No. 79689-COA. Once these two writ proceedings are consolidated, there will be a single ruling from the Court of Appeal, and it will not result in any further delay.

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[2] *See* Appendix, Vol. 13, Tab 56, VEN 2661-64.
[3] *See* Opposition to Motion For Stay at 1.
[4] Other than Case No. 79689-COA, which also relates to the production of unredacted and unprotected prior guest incident reports, Venetian filed a writ to address a denied motion for summary judgment on the issue of statutory immunity under the Nevada Industrial Insurance Act on January 22, 2020, Case No. 80450. The Nevada Supreme Court issued an *Order Denying Petition For Writ Of Mandamus Or Prohibition* on January 2020.
[5] *See* Appendix, Vol. 13, Tab 56, VEN 2661-64.

In summary, Sekera demanded production of Venetian guest prior incident reports from November 4, 2013 to November 4, 2016, which the District Court ordered to be produced in unredacted form and without protections requested by Venetian under NRCP 26(c). Venetian filed for emergency relief and received a stay of the July 31, 2019 order by the Nevada Court of Appeals on October 17, 2019 in Case No. 79689-COA. When Sekera subsequently demanded additional Venetian guest prior incident reports from November 4, 2011 to November 13, 2013, Petitioners reminded the District Court of the pending stay addressing the same exact evidence and issues in Case No. 79689-COA, and requested a stay of the March 13, 2020 order until the Court of Appeals rules on the matter. That request was denied.[6] Venetian had no avenue but to petition this Honorable Court for relief, and then move to consolidate this with Case No. 79689-COA.

At the January 21, 2020, hearing on this matter, Judge Delaney agreed that a stay by this Honorable Court was likely under the circumstances, offering the following:

> *The Court of Appeals already granted the stay related to that stuff [Venetian guest prior incident reports].* ***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*

[6] *See* Appendix, Vol. 13, Tab 56, VEN 2661-64.

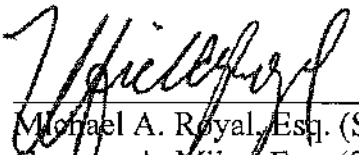
Court and ask for the stay if there's a futile issue, and it would be basically [be] futile, you can go get it from them.[7]

Granting the present motion for stay and consolidating this petition with the pending petition in Case No. 79689-COA will not harm Plaintiff at all. However, denying this motion for stay and requiring Venetian to produce the information at issue would instead result in irreparable harm to Venetian and its guests.[8]

Based on the foregoing, Venetian respectfully submits that its motion for emergency relief to stay the order of March 13, 2020 related to the production of unredacted and unprotected Venetian prior guest incident reports should be granted.

DATED this 25th day of March, 2020.

ROYAL & MILES LLP



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[7] *See* Appendix, Vol. 13, Tab 55, VEN 2651:16-25; 2652:1 (emphasis added).
[8] Sekera has previously taken prior incident reports and shared them freely with others wholly unaffiliated with the litigation and her counsel has expressed an absolute right to do so, which issue is set forth in detail in Case No. 79689-COA.

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 25 day of March, 2020, I served true and correct copy of the foregoing REPLY TO JOYCE SEKERA'S OPPOSITION TO PETITIONERS' EMERGENCY MOTION FOR RELIEF UNDER NRAP 27(e), by delivering the same via the Court's CM/ECF system which will send notification to the following:

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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. 80816-COA

FILED

MAR 27 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DIRECTING ANSWER AND GRANTING STAY

This original, emergency petition for a writ of mandamus or prohibition challenges a March 13, 2020, 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. Real party in interest has filed an opposition, and petitioners have filed a reply.

Having reviewed the petition and supporting documents, we conclude that an answer may assist this court in resolving the petition.[1] Therefore, real party in interest, on behalf of respondents, shall have 14

[1]As this case and the related case in Docket No. 79689-COA are at different procedural stages, we decline petitioners' request to consolidate the two cases at this time.

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 7 days from service of the answer to file and serve any reply.

With regard to the opposed stay motion, we consider the following factors when deciding whether to grant a stay pending writ proceedings: 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 party 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 March 13 district court order, pending further order of this court.

It is so ORDERED.

_____, C.J.
Gibbons

_____, J.
Tao

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

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

VENETIAN CASINO RESORT, LLC; LAS VEGAS SANDS, LLC,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE KATHLEEN DELANEY, DISTRICT JUDGE,

Respondents,

and

JOYCE SEKERA,

Real Party in Interest.

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Apr 24 2020 11:34 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No.: 80816-COA

ANSWER TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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NRAP 26.1 DISCLOSURE

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

Joyce Sekera ("Plaintiff") is an individual.

Claggett & Sykes Law Firm and the Galliher Law Firm have appeared on behalf of Joyce Sekera in this matter.

DATED this 24th day of April, 2020.

CLAGGETT & SYKES LAW FIRM

By /s/ Micah S. Echols
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I. ISSUES PRESENTED FOR REVIEW

A. WHETHER THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION TO DENY DEFENDANTS' MOTION FOR PROTECTIVE ORDER, AND WHETHER THEY HAVE WAIVED ANY PRIVILEGE ISSUES.

B. WHETHER THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION TO ORDER SIMILAR INCIDENTS TO BE PRODUCED IN AN UNREDACTED FORM.

II. STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

This original petition filed by Venetian Casino Resorts, LLC and Las Vegas Sands, LLC (hereinafter "Defendants") is an example of defendants utilizing procedural rules and wasting resources to try to undermine the substance of a meritorious claim. This petition is made under a narrow exception for seeking extraordinary writ relief for discovery orders; i.e., the discovery order would require the disclosure of privileged information. *See Valley Health Sys., Ltd. Liab. Co. v. Eighth Judicial Dist. Court of Nev.,* 127 Nev. 167, 171, 252 P.3d 676, 678-79 (2011). Yet, Defendants fail to identify any statute, court rule, or case law that would make names of individuals with similar incidents of injuries privileged. For this reason alone, this Court should decline to intervene into this case.

A writ of mandamus is an inappropriate vehicle for addressing Defendants' arguments. *Id.* at 171, 252 P.3d at 678 ("[Writs of mandamus] are generally not available to review discovery orders."). The subject discovery was not ordered under a blanket order without regard to relevance, nor does it contain privileged

information. *See id.* at 171, 252 P.3d at 679 ("[T]here have been two main situations where this court has issued a writ to prevent improper discovery: blanket discovery orders with no regard to relevance, and discovery orders compelling disclosure of privileged information."). In fact, Defendants have not alleged that the order was made without regard to relevance, and, importantly, Defendants have not identified a privilege for the information to be withheld from discovery. Instead, Defendants argue that the District Court misapplied the relevance standard and that some of the information has a privacy interest. Therefore, as is the case with most discovery orders, the appropriate avenue for redress is an appeal from a final judgment, not a petition for a writ of mandamus or prohibition.

Defendants also failed to present this argument to the Discovery Commissioner. Defendants did this so they could focus on their argument that reports of similar incidents are supposedly not relevant and, therefore, not discoverable in this case. Defendants' argument is improper because discovery issues are generally limited by burden [on the producing party] and proportionality [to the needs of the case]. Relevance in the discovery phase is difficult to ascertain, which is why the standard is wider than relevance for admissibility at trial. Yet, Defendants ask this Court to relitigate a tight adherence to pre-trial relevance, while they retain the requested discovery, for this Court to hypothetically determine whether discovery will be relevant to Plaintiff's case.

Undoubtedly, Defendants have spent much more energy, time, and money trying to not produce the requested discovery than it would have spent just producing the reasonable discovery requested. Defendants' argument that the incident reports are not necessary to the case is not reviewable because the District Court will have the opportunity to disallow evidence at trial on the way to a final judgment. And, an appeal from a final judgment is an adequate remedy, such that this Court to elect to not intervene in this discovery dispute.

Defendants have never given Plaintiff or the Court a reasonable way of determining if the disputed information is worthy of protection. Defendants say that they only redacted the "private information of other customers." Pet. at 3. However, a plain viewing of the redactions shows that at least some of the information is public, some of the information has nothing to do with the victims, and some victims were not customers. A more in-depth analysis of exactly what the Defendants want to protect is not possible because Defendants have never produced a privilege log, nor any description of the redacted information. According to NRS 49.015(1)(b) and (c), no person, including Defendants, "has a privilege to . . . [r]efuse to disclose any matter . . . [or] [r]efuse to produce any object or writing." Defendants have not produced this information because their goal is not to protect any privileged information, but instead to block Plaintiff from accessing the discovery altogether.

Alternatively, this Court should either refuse to intervene or deny Defendants' writ petition because the District Court weighed the issues and information presented, and acted within its discretion to deny Defendants' motion for protective order in ordering that the similar incidents must be produced. The District Court did not address a protective order regarding the alleged confidentiality of the information contained in the subject incident reports because Defendants did not make such a request. As such, the District Court properly ordered the incident reports to be produced.

Defendants have not made a compelling argument for any redactions. Instead, Defendants ask this Court to enter a blanket protective order, but they do not demonstrate why a protective order is necessary or outline any specific information that should be protected. Despite Defendants' broad arguments of privilege or private information within the incident reports, they have never prepared a privilege log. As such, the Court should reject Defendants' generalized, blanket request for a protective order. For any of these reasons, Plaintiff respectfully requests that this Court deny Defendants' writ petition.

III. FACTUAL AND PROCEDURAL BACKGROUND

This petition arises from a discovery dispute in a slip and fall case. The slip and fall occurred on November 4, 2016, at around 12:30 p.m. 1 Petitioners' Appendix ("PA") 2. On that day, Plaintiff Joyce Sekera slipped on the wet marble

floor near the Grand Lux Cafe restrooms in the Venetian Casino Resort. *Id.* at 2-3. The highly-polished marble floor that Plaintiff slipped on is accessible by members of the public of every age at all hours of the day and night. *Id.*

On April 12, 2018, Plaintiff filed her complaint against Defendants. 1 PA 1-4. On June 28, 2019, Plaintiff amended her complaint to include a claim for punitive damages, alleging that Defendants "knew that its marble floors caused unreasonable amount of injury slip and falls and thus were dangerous to pedestrians." 1 PA 35.

Plaintiff also alleged that despite Defendants' notice of the dangerous condition, its "marble floors were significantly more slippery than is safe for pedestrians [and] Defendant failed to take any appropriate precautions to prevent injury." 1 PA 36.

When Plaintiff slipped, she struck her skull and elbow on a marble pillar and her left hip on the ground sustaining serious injuries. Plaintiff contends that the highly-polished marble floors are an unsafe condition which continually and repeatedly injures people. The Venetian has many guests walking in multiple directions and much of their navigating signage is head height or higher. As a result, a person must often keep their eyes up to navigate, increasing the risk posed by the extremely slippery marble floors.

On August 15, 2018 Plaintiff requested all security reports and investigative documents relating to slip and falls on Venetian's marble floors from the approximately five years from November 2013 to August 2018. 1 PA 40. The record does not reflect that Defendants asserted any objection to this request for documents. Accordingly, Defendants responded by producing 64 redacted incident reports that only spanned 2013-2016. 11 PA 1966. Within the time frame that Defendants chose to give a response, they concealed responsive incident reports which should have been produced. *Id.* Defendants also did not produce a privilege log or explain the redactions in any way. The redactions appear to include necessary witness information, such as victim's contact information and the names and titles of Venetian employees who attended the incidents.

Defendants did not supplement their production and instead moved for a protective order while claiming that Plaintiff only requested three years of incident reports. 1 PA 54-83. Defendants argued that the policy interests of protecting confidential personal information outweigh the need for discovery in the case. 1 PA 61. The Discovery Commissioner recommended that a protective order be issued, citing generalized privacy concerns and HIPAA-related information. 1 PA 201-06. On May 14, 2019, the District Court rejected Defendants' argument and reversed the Discovery Commissioner's recommendation holding "that there is no legal basis to preclude plaintiff from knowing the identity of the individuals

contained in the incident reports as this information is relevant discovery." 2 PA 269.

Defendants ignored the District Court's order and did not produce the unredacted documents. On July 2, 2019, Plaintiff filed a motion to compel Defendants to produce the unredacted documents, as well as the requested subsequent incident reports. 6 PA 938 through 7 PA 1005. On July 12, 2019, Defendants opposed Plaintiff's motion to compel and filed a counter-motion for a protective order, arguing that incident reports outside of what Defendants had already produced were irrelevant and burdensome. 7 PA 1007 through 9 PA 1486. Yet, Defendants did not argue that the information was private. *Id.*

The Discovery Commissioner heard arguments regarding Plaintiff's motion to compel and recommended that Defendant produce unredacted incident reports from November 2013 to the present (the date of production). 11 PA 1965-75. Defendants filed the prior writ petition regarding the District Court's rejection of their motion for protective order on September 26, 2019, which is docketed before this Court as Case No. 79689-COA.

The District Court heard objections to the Discovery Commissioner's recommendation on the Plaintiff's motion to compel and required Defendants to produce unredacted incident reports from November 2013 to the date of the subject incident, but reversed the recommendation that subsequent incident reports be

produced. 13 PA 2661-64. Defendants filed their petition for extraordinary relief based on the notion that there are generalized privacy concerns in the documents to be produced, even though this argument was not presented in their opposition to Plaintiff's motion to compel. 7 PA 1007 through 9 PA 1486. Plaintiff now urges this Court to deny Defendants' writ petition for any of the procedural or substantive reasons presented, or any other reason supported by the record. *See Hotel Riviera, Inc. v. Torres*, 97 Nev. 399, 403, 632 P.2d 1155, 1158 (1981) ("If a decision below is correct, it will not be disturbed on appeal even though the lower court relied upon wrong reasons.").

IV. STANDARDS OF REVIEW

A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station, or to control a manifest abuse of discretion. *See Beazer Homes, Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 579, 97 P.3d 1132, 1135 (2004); NRS 34.160. An abuse of discretion occurs if the district court's decision is arbitrary and capricious or if it exceeds the bounds of law or reason. *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). "An appellate court is not an appropriate forum in which to resolve disputed questions of fact." *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981).

Appellate courts generally do not review discovery orders because an appeal from a final judgment is an available and appropriate remedy. *Valley Health*, 127 Nev. at 171, 252 P.3d at 678. However, an appellate court will review blanket discovery orders issued without regard to relevance and discovery orders that require disclosure of privileged information. *Id.* at 171, 252 P.3d at 678-79. An appellate court will not overturn a discovery order unless it finds a clear abuse of discretion. *Club Vista Fin. Servs. v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012).

A party seeking a protective order must demonstrate good cause under NRCP 26(c) why the requested discovery should not be produced as requested. *Cf. Okada v. Eighth Judicial Dist. Court*, 359 P.3d 1106, 1111 (Nev. 2015) (examining a protective order issue in the context of depositions). An appellate court only considers arguments that were properly preserved by being brought before both the discovery commissioner and the district court. *Valley Health*, 127 Nev. at 173, 252 P.3d at 680.

V. LEGAL ARGUMENT

A. DEFENDANTS HAVE NOT DEMONSTRATED THAT THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING THEIR REQUESTED PROTECTIVE ORDER, NOR HAVE THEY PRESERVED ANY PRIVILEGE ISSUES.

Defendants erroneously rely upon NRCP 26 to claim that information contained in incident reports of victims injured by Venetian's dangerous marble

floors is shielded from disclosure. The problem with Defendants' reliance upon NRCP 26 for this argument, however, is that it is a procedural rule. Procedural rules guide how our state legal system functions, but they do not supply substantive law. *See* BLACK'S LAW DICTIONARY, 1457 (11th ed. 2019) (defining "procedural law" as "[t]he rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves").

In order for NRCP 26 to apply, Defendants must identify a substantive right to which the rule applies. Indeed, the party asserting such a privilege must demonstrate its existence. According to NRS 49.015(1)(b) and (c), no person, including Defendants, "has a privilege to . . . [r]efuse to disclose any matter . . . [or] [r]efuse to produce any object or writing." Defendants have not identified a substantive right and have not described the unknown information in a way that would allow Plaintiff and this Court to evaluate the substantive right. Defendants never offered a privilege log, or any particular description of the information it seeks to redact. Therefore, Plaintiff needs access to each piece of supposedly protectable information along with the specific privilege Defendants would like the Court to apply can fully consider the merit of Defendants' broad privilege assertion.

Defendants claim that HIPAA or a generalized right to privacy should preclude this Court from allowing individual's names from incident reports to be released. But, HIPAA only applies to specific covered entities that are required to handle private information in a specific way. *See* 45 C.F.R. §§ 160.102, 160.104; 42 U.S.C. § 1320d. Defendants are not statutorily-defined covered entities, and HIPAA protections do not apply to any of the information. Defendants do not articulate how a generalized right to privacy argument in this case prevents them from disclosing relevant discovery. Equally as important, Defendants have not presented any legal authority demonstrating that they have standing to assert privacy interests of unknown third parties. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (appellate courts do not consider arguments not cogently argued). Similarly, Defendants have not demonstrated that such unknown third parties have a substantive legal reason to withhold incident reports. *Id.*

Tellingly, the burden was placed upon Defendants to demonstrate good cause for seeking a protective order, identifying a relevant privilege, or preparing a privilege log. *See* NRCP 26(c); *Okada v. Eighth Judicial Dist. Court*, 359 P.3d 1106, 1111 (Nev. 2015) (examining a protective order issue in the context of depositions); NRS 49.015. But, Defendants made no effort to do any of these things. Nevada law does not presume that a privilege exists. Instead, Defendants

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

In any event, Defendants argument regarding private information was not preserved because they did not present this argument to either the Discovery Commissioner or the District Court. Defendants only argued that the production was irrelevant and burdensome, but did not allege that the incident reports contained private information. 1 PA 54-83; 6 PA 750-78. As such, this Court should not allow Defendants to make one argument at the Discovery Commissioner and District Court level, then pivot to a different argument to this Court after the initial argument fails. "All arguments, issues, and evidence should be presented at the first opportunity and not held in reserve to be raised after the [discovery] commissioner issues his or her recommendation. All objections are to be presented to the commissioner so that he or she may consider all the issues before making a recommendation, so as not to frustrate the purpose of having discovery commissioners." *Valley Health*, 127 Nev. at 173, 252 P.3d at 680 (internal quotation marks omitted). Therefore, as in this case, when an issue is first heard by the Discovery Commissioner and then submitted to the District Court for approval, any argument that was not first raised before the Discovery Commissioner should be considered untimely and denied appellate review.

B. DEFENDANTS' ARGUMENTS REGARDING RELEVANCE AND THE CLAIMED IMPROPRIETY OF PRODUCING INCIDENT REPORTS ARE MERITLESS.

1. Defendants cannot preclude Plaintiff from accessing contact information for people who witnessed the same dangerous condition that injured her.

Defendants assert that the subject discovery order gives Plaintiff "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." Pet. at 22. Yet, Defendants admit that they have found no "Nevada case law applying [NRCP 26] to protecting the privacy rights of persons involved in other incidents." Pet. at 23. Defendants essentially want this Court to rule that Plaintiff must prove admissibility at trial before they will release relevant discovery. In this sense, Defendants want to appoint themselves as the gatekeepers of discovery, with an aim to withhold relevant evidence from Plaintiff, unless they are satisfied that Plaintiff can prove the relevance of a document at trial that Defendants have never disclosed. Defendants' erroneous assertion ignores NRCP 26(b)(1) which states, "Information within [the] scope of discovery need not be admissible in evidence to be discoverable."

Defendants' backwards argument is the same kind rejected by the Nevada Supreme Court in *Rocker v. KPMG LLP*, 122 Nev. 1185, 1187, 148 P.3d 703, 704 (2006) *overruled on other grounds by Buzz Stew, Ltd. Liab. Co. v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008): "[I]n certain cases, a plaintiff

cannot plead with particularity because the facts of the fraudulent activity are in the defendant's possession. In those cases, if the plaintiff pleads specific facts giving rise to an inference of fraud, the plaintiff should have an opportunity to conduct discovery and amend his complaint to include the particular facts."

2. Plaintiff met her burden for proving relevance.

Defendants make numerous accusations of how Plaintiff supposedly fell short on her burden to establish relevance but do not cite the record as to how Plaintiff's argument was inadequate. Instead, Defendants cite *Eldorado Club v. Graff*, 78 Nev. 507, 377 P.2d 174 (1962), for the contention that prior incidents are generally not admissible to establish notice in slip and falls involving a temporary substance. Defendants misuse *Eldorado Club* to accuse Plaintiff of failing to establish the relevance and proportionality of the discovery at issue. But, relevance and proportionality are only considered in a writ petition of a blanket order made without consideration of relevance. As such, this Court does not need to consider Defendants' argument because it did not allege that the District Court's order was issued without regard to relevance.

Alternatively, Defendants' reliance on *Eldorado Club* is inaccurate. The defendant in *Eldorado Club* argued that the court could not admit a prior incident to establish his knowledge of the dangerous condition because that condition (a foreign substance) was not permanent. *Eldorado Club v. Graff,* 78 Nev. 507, 509,

377 P.2d 174, 175 (1962). However, the Supreme Court held that prior similar incidents could be admitted when "the conditions surrounding the prior occurrences have continued and persisted." *Id.* at 511, 377 P.2d at 176. In the instant case, Plaintiff believes that the incidents surrounding the falls on Venetian's slippery marble floors have continued and persisted, which entitles her to receive the discovery and determine for herself the relevancy according to NRCP 26(b)(1) which states, "Information within [the] scope of discovery need not be admissible in evidence to be discoverable." However, Defendants are requesting that Plaintiff be kept from investigating the conditions surrounding the prior occurrences by blocking the incident reports altogether or redacting the witness contact information.

Moreover, the standards of review regarding relevancy of discovery are beyond the relief available in this original proceeding. In other words, it is improper for this Court to review the factual issues of relevancy in the context of Defendants' writ petition. *See State v. Garaventa Land & Livestock Co.*, 61 Nev. 407, 411, 131 P.2d 513, 514 (1942) (this Court does not disturb findings even where there is conflict evidence).

3. Defendants have no viable argument that the information contained in the incident reports is private.

In *Schlatter v. Eighth Judicial Dist. Court*, 93 Nev. 189, 192, 561 P.2d 1342, 1343-44 (1977), the discovery order was overturned because it included carte

blanche discovery of all information in tax returns and medical records without regard to relevance. The issue in *Schlatter* is supported by law because medical and financial information is protected by privacy laws such as HIPAA, when a discovery order is made without regard to relevance. However, in the instant case, the District Court considered the relevance of the information, and the subject incident reports are records kept in the regular course of business without any privacy laws that restrict disclosure. When a victim adds information to the Defendants' incident report, they do so voluntarily, to a private third-party business for the Defendants' benefit. Thus, Defendants have failed to demonstrate a privilege. According to NRS 49.015(1)(b) and (c), no person, including Defendants, "[have] a privilege to . . . [r]efuse to disclose any matter . . . [or] [r]efuse to produce any object or writing."

For their position on privilege, Defendants cite a federal case where particularized information about the prior slip and falls had already been produced to the plaintiff. The plaintiff in *Izzo v. Wal-mart Stores, Inc.*, No. 2:15-cv-01142-JAD-NJK, 2016 U.S. Dist. LEXIS 12210, at *11 (D. Nev. Feb. 2, 2016) requested "facts and circumstances surrounding any other slip and fall." The court reasoned that further discovery on prior slip and falls was unduly burdensome because plaintiff had the list of prior incidents and the discovery would require weeks or months of work to prepare. *Id.* at *13. *Izzo* is distinguishable from the instant case

because that defendant was asserting privilege for their protectable interest and the requesting party was asking for far more than the incident reports that Plaintiff has requested.

In another federal case cited by Defendants, a court addressed the privacy of hotel guests who gave their addresses and phone numbers to secure a room. *See Rowland v. Paris Las Vegas*, No. 13CV2630-GPC (DHB), 2015 U.S. Dist. LEXIS 105513, at *6-7 (S.D. Cal. Aug. 11, 2015). In that case, the plaintiff requested the names addresses and phone numbers of all prior hotel guests "who complained, reported or otherwise informed" the defendant of slippery floors. *Id.* at *6. This request broadly requested that the defendant to go through its hotel guest records and provide all information linked with those guests. The defendant raised a concern over the guest's constitutional right to privacy, and the court held that "[f]ederal courts ordinarily recognize a constitutionally-based right of privacy that **can be raised** in response to discovery requests." *Id.* at *7 (emphasis added). The court went on to explain that the right is not absolute and is subject to a balancing test. *Id.* In this case, the information was given voluntarily for the Defendants' benefit in connection with the incidents, as opposed to being mandated at registration for a hotel room. Importantly, Defendants have not raised a constitutionally-based right of privacy, nor has it suggested the Court apply a federal balancing test. Without articulating the claimed right, or even identifying

the legal authority that would supposedly create a constitutional right of privacy, Defendants have not demonstrated the right to extraordinary relief. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

Individuals do have a right to protect "private facts" from being released by government entities in accordance with the Fourth Amendment of the United States Constitution. *See Montesano v. Donrey Media Grp.*, 99 Nev. 644, 650-51, 668 P.2d 1081, 1085 (1983). However, information freely given to a non-public entity during an investigation of incidents is not considered private and does not invoke the Constitution. The statements and incidents to be produced were given voluntarily without privacy implication. *See* NRS 49.385(1) (Waiver of privilege by voluntary disclosure) ("A person upon whom these rules confer a privilege against disclosure of a confidential matter waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter."). Thus, it is unclear how Defendants or unknown third parties have any privacy interest in voluntarily-provided information.

Defendants cites NRS 603A.010 et seq. for the purpose of arguing that the Nevada Legislature desires the protection of personal information by business entities. However, this statute does not apply to the basic contact information that

Plaintiff seeks. *See* NRS 603A.040(1).[1] Moreover, the information protected by that statute is nonpublic information used in a transaction (generally financial in nature), not information given freely to a private party in description of an incident. Regardless, Defendants did not raise this statute in either the Discovery Commissioner or the District Court proceedings.

Defendants also claim that releasing the subject discovery would expose them to liability. Pet. at 27. Defendants did not provide any authority for their feared liability, and Plaintiff is unable to find law which supports that assertion. In fact, the penalties imposed by NRS Chapter 603A are imposed against parties that "unlawfully obtained or benefitted from" the information. *See* NRS 603A.270. Plaintiff's discovery requests do not alter the manner in which Defendants obtained or benefitted from the information. Therefore, Defendants' bare assertion that they will face liability is unfounded.

[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:
(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.

Defendants' final argument is that they will incur liability for the release of information because they promised to keep the information private according to their own policy. This argument is flawed for several reasons, primarily the fact that Venetian explicitly states that it may change the policy and how it uses the information unilaterally: "This Privacy Notice may be updated periodically and without prior notice to you to reflect changes in our information practices." 3 PA 486-95. However, unilateral change will not be necessary for Defendants to comply because the Venetian policy explicitly states that Defendants reserve the right to release the information in connection with defending themselves in a court case, and to comply with a court order. Under "How We Share Your Personal Information," Venetian describes how it uses personal information: "Venetian may disclose personal information about you (1) **if we are required or permitted to do so by applicable law, regulation, or legal process (such as a court order or subpoena)**; (2) to law enforcement authorities and other government officials to comply with a legitimate legal request; (3) when we believe disclosure is necessary to prevent physical harm or financial loss to the Company, our guests, patrons, employees, or the public as required or permitted by law; (4) **to establish, exercise, or defend our legal rights**; and (5) in connection with an investigation of suspected or actual fraud, illegal activity, security, or technical issues." 3 PA 491 (emphases added). Therefore, this Court should disregard Defendants'

misleading and self-argument regarding their own policies.

4. Defendants' assertion that precluding discovery will promote efficiency offends the entire litigation process.

Defendants argue that judicial economy will be served by denying identifying information of witnesses because Plaintiff will not have to contact those witnesses. Pet. at 13. Plaintiff has repeatedly requested and argued for this witness information because it is necessary to properly adjudicate her claim. Yet, when Defendants are allowed to hide information from Plaintiff, Defendants' gamesmanship does not make that information unnecessary, it makes it more difficult to find, especially given the interminable delays. *See Foster v. Dingwall*, 126 Nev. 56, 66, 227 P.3d 1042, 1049 (2010) ("holding that, with respect to discovery abuses, '[p]rejudice from unreasonable delay is presumed' and failure to comply with court orders mandating discovery 'is sufficient prejudice'") (citing *In re Phenylpropanolamine (PPA) Prods.*, 460 F.3d 1217, 1236 (9th Cir. 2006)). Therefore, if Defendants are permitted to hide the identity of potential witnesses and other information in concealed incident reports, Plaintiff will be prejudiced.

VI. CONCLUSION

In summary, this Court should deny Defendants' request for extraordinary relief because the District Court properly exercised its discretion to deny Defendants' motion for protective order. Indeed, Defendants' unsupported request for a blanket protective order presented to this Court was not properly preserved

and should be rejected on this basis alone. Even if this Court were to reach the merits of Defendants' argument, they cannot demonstrate any legal reason to withhold discovery from Plaintiff. Therefore, Plaintiff respectfully requests that this Court deny Defendants' writ petition.

Dated this 24th day of April, 2020.

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CERTIFICATION OF COMPLIANCE

I hereby certify that I have read this answer, 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 answer 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.

Dated this 24th day of April, 2020.

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CERTIFICATE OF SERVICE

I certify that I am an employee of Claggett & Sykes Law Firm and that on the 24th day of April, I submitted the foregoing **ANSWER TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION** for filing via the Court's e-Flex electronic filing system which will send electronic notification to the following:

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IN THE COURT OF APPEALS OF THE STATE OF NEVADA

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

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

v.

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

PETITIONERS' REPLY BRIEF

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MEMORANDUM OF POINTS AND AUTHORITIES[1]

I. GENERAL REPLY TO SEKERA'S ANSWERING BRIEF

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

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

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

only desire to withhold relevant discovery from Plaintiff to delay this litigation."[2] These are specious and unfounded assertions with no support in the record.

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

[2] *See* RAB at 1, 3 and 11-12.

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

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

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

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[3] *See* Appendix, Vol. 10, Tab 44 at VEN 1724-28; 1804.
[4] *See* RAB at 5.
[5] *Id.* at 5-6.

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

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

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

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

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

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

II. RESPONSE TO SEKERA'S GIVEN PROCEDURAL HISTORY

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

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

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

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

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

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[7] *See* RAB at 6, citing to *Appendix* Vol. 1, Tab 1 at VEN 40, emphasis added.
[8] *See id.*
[9] See Appendix, Vol. 11, Tab 48 at VEN 1966 ("Venetian **objected to producing incident reports occurring subsequent to the November 4, 2016 incident.**) *See also* Appendix, Vol. 14, Tab 57, *Responses to Plaintiff's Requests for Production of Documents and Materials to Defendant*, served October 9, 2018, Response No. 7 at VEN 2668-69; *see also id.*, Tab 58, *Supplemental Responses to Plaintiff's Requests for Production of Documents and Materials to Defendant*, served January 4, 2019, Response No. 7, at VEN 2675-76.
[10] See Appendix, Vol. 11, Tab 48 at VEN 1966 (emphasis added). *See also id.*, Vol. 7, Tab 42 at VEN 1009:1-21.

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

Sekera did not move to compel an order from the Court for Petitioners to produce copies of subsequent incident reports until August 5, 2019,[12] and the District Court agreed with Petitioners that Sekera is not entitled to them, nor is she entitled to any prior incident reports occurring outside the Grand Lux rotunda dome area of the Venetian property from November 4, 2011 to November 4, 2016.[13] Accordingly, based on the District Court's latest ruling, the fact that Petitioners previously produced redacted copies of sixty-eight (68) prior incident reports occurring in areas both within and outside the Grand Lux rotunda dome area of the Venetian property is not germane to the pending petition.[14]

Sekera falsely asserts in her answering brief that Petitioners "concealed responsive incident reports which should have been produced" in January 2019.[15] While Sekera makes reference to a document in the Appendix to support this false

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[11] *See* Appendix, Vol. 1, Tab 9, VEN 054-083;Vol. 1, Tab 10 at VEN 084:21-25; Tab 12 at VEN 141;15-26, VEN 147;12-13, VEN 173; Tab 13 at VEN 186-200; Tab 14 at VEN 201-06; Vol. 2, Tab 15 at VEN 207-66.
[12] See Appendix, Vols. 6-7, Tab 40 at VEN 938-1005.
[13] *See Appendix*, Vol. 13, Tab 56 at VEN 2661-64; See Appendix, Vols. 6-7, Tabs 38-39 at VEN 750-937 and Tab 40-41 at VEN 938-1006.
[14] *See Appendix*, Vol. 1, Tab 1 at VEN 074-81.
[15] *See* RAB at 6.

assertion, the actual record upon which she relies provides no such information.[16] Sekera's claim that Petitioners "concealed" any documents in some kind of improper or sinister way is without the slightest support.

Sekera next writes that "Defendants also did not produce a privilege log **or explain the redactions in any way.**"[17] Sekera does not cite to the record in support of this statement, because it is yet another allegation invented out of thin air to promote Sekera's false narrative. Petitioners filed Defendants' Motion for Protective Order on February 1, 2019.[18] In the supporting *Declaration of Michael A. Royal, Esq.*, filed as part of the motion, paragraph seven (7), the following is provided: "That Venetian produced a total of sixty-four (64) prior incident reports in response to Plaintiff's request on or about January 4, 2019, **with names, contact information, personal information (*i.e.* DOB/SSN), and scene photographs redacted to protect the privacy of prior guests involved in these incidents since Plaintiff would not agree to a protective order.**"[19] It is clear from the February 1, 2019 motion and all documents related thereto what information was redacted by Petitioners and why it was done. There was no need for a privilege log to be produced. Indeed, Sekera never previously suggested a privilege log was

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[16] Sekera cites to 11 PA 1966.
[17] *See* RAB at 6 (emphasis added).
[18] *See Appendix*, Vol. 1, Tab 1 at VEN 054-83.
[19] *See Appendix*, Vol. 1, Tab 9 at VEN 056-57 (emphasis added).

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

Sekera presented a review of the procedural history related to the pending case before the Nevada Court of Appeals, identified as case no. 79689-COA, which is not directly applicable to the present issue before the Court, and then concludes: "Defendants ignored the District Court's order and did not produce the unredacted documents," noting only the hearing date of May 14, 2019.[20] Sekera failed to note that the District Court did not file its order until July 31, 2019 and that Petitioners filed a motion for reconsideration on an order shortening time on August 12, 2019, which was heard and denied on September 17, 2019, with the writ petition filed on September 27, 2019.[21] Therefore, Sekera's suggestion to this Honorable Court that the Petitioners "ignored" orders of the court below is false.

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[20] *See* RAB at 7.

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

Sekera also omitted from her given procedural history that the motion she filed on July 2, 2019, with all accompanying filings, was never heard by the Discovery Commissioner.[22] The Discovery Commissioner refused to hear her motion to compel because she failed to comply with the requirements of EDCR 2.34.[23]

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

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[22] *See* RAB at 7.

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

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

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

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

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

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[26] See Appendix, Vol. 7, Tab 42 at VEN 1021:11-12 (emphasis added).
[27] *See id.* at VEN 1024:1 (emphasis added).
[28] See Appendix, Vol. 2, Tab 17 at VEN 275:5-9.
[29] Sekera's assertion that Petitioners are seeking to delay this litigation is without merit, it is Sekera who moved in July 2019 for a trial continuance of 270 days, which motion was opposed by Petitioners but granted by the District Court. (*See* RAB at 12; *see also Appendix*, Vol. 2, Tab 19 at VEN 453-55.)

III. LEGAL ARGUMENT

A. SEKERA'S NOVEL PRIVILEGE ARGUMENT IS WITHOUT MERIT

The demand for production of incident reports involving Venetian guests has been a matter of dispute between the parties since Petitioners issued their initial response to discovery on October 9, 2018.[30]

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

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[30] See Appendix, Vol. 14, Tab 57, *Responses to Plaintiff's Requests for Production of Documents and Materials to Defendant*, served October 9, 2018, Response No. 7 at VEN 2668-69; *see also id.*, Tab 58, *Supplemental Responses to Plaintiff's Requests For Production of Documents and Materials to Defendant*, served January 4, 2019, No. 7 at VEN 2675-76.
[31] *See Appendix* Vol. 1, Tab 13 at VEN 186-200.
[32] *See id.*, Vol 2, Tab 15 at VEN 207-66.
[33] *See id.*, Vol. 3, Tab 20 at VEN 456-83.

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

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

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

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[34] *See id.*, Vol. 3, Tab 21 at VEN 484-85; Vol. 10, Tab 47 at VEN 1922-64.
[35] *See id.*, Vol. 13, Tab 55 at VEN 2617-60.
[36] See Appendix, Vol. 5, Tabs 27-37 at VEN 518-749.
[37] *See* RAB at 10.
[38] *Id.*

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

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

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

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[39] *See* RAB at 12 (citations omitted).
[40] *See Appendix*, Vol. 1, Tab 9 at VEN 056-57.
[41] *See* RAB at 10. *See also Appendix*, Vol. 1, Tab 9 at VEN 056-57.

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

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

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

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

[42] *See* RAB at 13.

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

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

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[43] *See id.*

[44] *See id.* (Emphasis added.)

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

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

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

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

[45] *Id.*
[46] *Id.*

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

2. SEKERA HAS NOT MET HER BURDEN ESTABLISHING RELEVANCE

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

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[47] *See* Appendix, Vol. 10, Tab 44 at VEN 1807:10-21; 1808:8-22.
[48] *See* RAB at 14.
[49] *See id.*

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

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

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

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[50] *See* Petition at 8-9.
[51] *See Appendix*, Vol. 13, Tab 55 at VEN 2661-64.
[52] *See id.*, Vol. 13, Tab 55 at VEN 2623:21-22 (emphasis added).
[53] *See Appendix*, Vol. 13, Tab 55 at VEN 2661-64.
[54] *See* RAB at 13.
[55] *See Eldorado Club, Inc. v. Graff*, 78 Nev. 507, 510, 377 P.2d 174, 176 (1962).

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

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

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

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[56] *See* RAB at 5, 15 (emphasis added) (citing *Eldorado Club, Inc., supra.*)
[57] *See Eldorado Club, Inc., supra* at 508, 377 P.2d at 175.
[58] *See id.* at 510, 377 P.2d at 176.
[59] *See id.* at 511, 377 P.2d at 176.
[60] *Id.*

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

3. SEKERA HAS NOT ADDRESSED THE PROPORTIONALITY REQUIREMENT

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

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

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

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

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[62] *See* RAB at 15-16.
[63] *See id.* at 16.
[64] *Schlatter v. Eighth Judicial Dist. Court*, 93 Nev. 189, 192, 561 P.2d 1342, 1343-44 (1977).
[65] *See* RAB at 16 (emphasis added).
[66] *Id.*

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

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

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[67] *Id.* at 17.
[68] *See id.*
[69] *See* Pet. at 24-25.
[70] *See Rowland, supra* at *7.
[71] *See id.*

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

4. PETITIONERS HAVE AN INTEREST IN PROTECTING GUEST PRIVACY RIGHTS

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

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

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[72] *See* RAB at 17. *See, i.e.,* Appendix, Vol. 7, Tab 42 at VEN 1021-22.
[73] *See id.* at 18.
[74] *See id., compare* Appendix, Vol. 11, Tab 49 at VEN 2155-56; Vol. 12, Tab 49 at VEN 2211-12 (included in Exhibits J and K of *Defendants' Limited Objection to Discovery Commissioner's Report and Recommendations Dated December 2, 2019*, filed December 12, 2019).
[75] *See* RAB at 19-21.

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

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

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

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

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

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

[77] *See* RAB at 21.
[78] *See* RAB at 21.
[79] *See id.*

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

IV. CONCLUSION

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

DATED this 14 day of May, 2020.

ROYAL & MILES LLP

By _____

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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 Microsoft Word in Times Roman 14 point font.

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

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

4. Finally, I hereby certify that I have read this Reply, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any

improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Further affiant sayeth naught.

MICHAEL A. ROYAL, ESQ.

SUBSCRIBED AND SWORN to before me by Michael A. Royal, Esq., on this 14 day of May, 2020.

ASHLEY SCHMITT
NOTARY PUBLIC
STATE OF NEVADA
Appt. No. 06-5493-1
My Appt. Expires Nov. 1, 2023

NOTARY PUBLIC in and for said County and State

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the law firm of Royal & Miles LLP, attorney's for Petitioners, VENETIAN CASINO RESORT, LLC and LAS VEGAS SANDS, LLC, and that on the 15 day of May, 2020, I served true and correct copy of the foregoing PETITIONERS' REPLY BRIEF, by delivering the same via the Court's CM/ECF system which will send notification to the following:

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Electronically Filed
May 22 2020 09:00 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

VENETIAN CASINO RESORT, LLC; LAS VEGAS SANDS, LLC,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE KATHLEEN DELANEY, DISTRICT JUDGE,

Respondents,

and

JOYCE SEKERA,

Real Party in Interest.

Case No.: 80816-COA

REAL PARTY IN INTEREST'S MOTION TO HOLD DECISION IN ABEYANCE

Docket 80816-COA Document 2020-19522

REAL PARTY IN INTEREST'S MOTION TO HOLD DECISION IN ABEYANCE

Real Party in Interest, Joyce Sekera ("Sekera"), respectfully moves this Court to hold any decision as to Petitioners' emergency petition for writ of mandamus and/or writ of prohibition under NRAP 21(a)(6) and 27(e) in abeyance pending the outcome of further litigation of related case, *Venetian Casino Resort, LLC, et al. v. Dist. Ct., et al.,* Case No. 79689-COA.

On May 14, 2020, this Court issued an opinion granting Petitioners' writ of mandamus or prohibition in Case No. 79689-COA that is not yet binding because of the extension for the petition for rehearing and the further litigation regarding that opinion. *See* NRAP 41(b)(1) (the timely filing of a petition for rehearing stays the remittitur). To the extent that all the legal issues raised in this separate proceeding will be addressed by relying wholly upon the Court's opinion issued in Case No. 79689-COA, it is appropriate to hold this appeal in abeyance. Of course, if the Court is inclined to deny the writ petition, a decision does not need to be held in abeyance. A "court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case." *Mediterranean Enters., Inc. v. Ssangyong Corp.,* 708 F.2d 1458, 1465 (9th Cir. 1983) (citing *Leyva v. Certified Grocers of California, Ltd.* 593 F.2d 857, 863–864 (9th Cir. 1979)). Factors a court

may consider when deciding whether to issue a stay of proceedings include the interests of the parties, the efficient use of judicial resources, and the interests of the public and persons not parties to the litigation. *See, e.g.*, *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324–325 (9th Cir. 1995).

In this case, the ultimate resolution of Case No. 79689-COA will likely bear heavily upon this matter. Holding this original proceeding in abeyance will avoid unnecessary expense of judicial resources and the resources of the parties. To the extent that any harm might be suffered by the parties as a result of a stay, such harms are outweighed by the avoidance of the expense on the part of the parties and the outlay of judicial resources. Any prejudice that may result from a stay will weigh approximately equally upon the parties.

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CONCLUSION

Based upon the foregoing, Sekera respectfully requests that the Court hold any decision as to the instant Petitioners' emergency petition for writ of mandamus and/or writ of prohibition in abeyance pending the outcome of further litigation of related case, *Venetian Casino Resort, LLC, et al. v. Dist. Ct., et al.*, Case No. 79689-COA.

DATED this 21st day of May, 2020.

CLAGGETT & SYKES LAW FIRM

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CERTIFICATE OF SERVICE

I certify that I am an employee of Claggett & Sykes Law Firm and that on the 21st day of May 2020, I submitted the foregoing **REAL PARTY IN INTEREST'S MOTION TO HOLD DECISION IN ABEYANCE** for filing via the Court's electronic filing system with the Nevada Court of Appeals, which will send electronic notification to the following:

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/s/ *Anna Gresl*
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136 Nev., Advance Opinion 26

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

MAY 14 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

Original petition for a writ of mandamus or prohibition challenging a district court order requiring petitioners to produce unredacted prior incident reports in discovery and refusing to impose requested protections related to those reports.

Petition granted.

Royal & Miles LLP and Gregory A. Miles and Michael A. Royal, Henderson, for Petitioners.

The Galliher Law Firm and Keith E. Galliher, Jr., Las Vegas, for Real Party in Interest.

BEFORE GIBBONS, C.J., and TAO, J.[1]

OPINION

By the Court, GIBBONS, C.J.:

The Nevada Rules of Civil Procedure were recently amended, including significant portions of NRCP 26—the seminal rule governing discovery. These amendments have changed the analysis that district courts must conduct. In this writ proceeding, we discuss the proper process courts must use when determining the scope of discovery under NRCP 26(b)(1). We also provide a framework for courts to apply when determining whether a protective order should be issued for good cause under NRCP 26(c)(1). Because respondents did not engage in this process or use the framework we are providing, we grant the petition and direct further proceedings.

FACTS AND PROCEDURAL HISTORY

Real party in interest, Joyce Sekera, allegedly slipped and fell on the Venetian Casino Resort's marble flooring and was seriously injured. During discovery, Sekera requested that the Venetian produce incident reports relating to slip and falls on the marble flooring for the three years preceding her injury to the date of the request. In response, the Venetian provided 64 incident reports that disclosed the date, time, and circumstances of the various incidents. However, the Venetian redacted the

[1]The Honorable Bonnie A. Bulla, Judge, voluntarily recused herself from participation in the decision of this matter. In her place, the Honorable Michael L. Douglas, Senior Justice, was appointed to participate in the decision of this matter under an order of assignment entered on February 13, 2020. Nev. Const. art. 6, § 19(1)(c); SCR 10. Subsequently, that order was withdrawn.

personal information of injured parties from the reports, including names, addresses, phone numbers, medical information, and any social security numbers collected. Sekera insisted on receiving the unredacted reports in order to gather information to prove that it was foreseeable that future patrons could slip and fall on the marble flooring and that the Venetian was on notice of a dangerous condition.[2] Further, Sekera wanted to contact potential witnesses to gather information to show that she was not comparatively negligent, as the Venetian asserted. Sekera's counsel disseminated all 64 redacted reports to other plaintiffs' counsel in different cases, who also were engaged in litigation against the Venetian for slip and fall injuries.

Unable to resolve their differences regarding redaction, the Venetian moved for a protective order, which Sekera opposed. The discovery commissioner found that there was a legitimate privacy issue and recommended that the court grant the protective order, such that the reports remain redacted, and prevented Sekera from sharing the reports outside of the current litigation. The commissioner further recommended, however, that after Sekera reviewed the 64 redacted reports and identified substantially similar accidents that occurred in the same location as her fall, the parties could have a dispute resolution conference pursuant to EDCR 2.34. At that conference, the parties would have the opportunity to reach an agreement to allow disclosure of the persons involved in the previous similar accidents. If the parties failed to reach an agreement, Sekera could file an appropriate motion.

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[2]Sekera agreed that any social security numbers should remain redacted.

Sekera objected to the discovery commissioner's recommendation. The district court agreed with the objection and rejected the discovery commissioner's recommendation in its entirety, thereby denying the motion for a protective order. The district court concluded (1) there was no legal basis to preclude Sekera from knowing the identity of the persons involved in the prior incidents, as this information was relevant discovery material, and (2) there was no legal basis to prevent the disclosure of the unredacted reports to third parties not involved in the Sekera litigation. Nevertheless, the court strongly cautioned Sekera to be careful with how she shared and used the information.

The Venetian filed the instant petition for writ relief, which was transferred to this court pursuant to NRAP 17. We subsequently granted a stay of the district court's order pending resolution of this petition.

DISCUSSION

Writ consideration is appropriate

This court has original jurisdiction to issue writs of mandamus. Nev. Const. art. 6, § 4(1). But "[t]he decision to entertain a writ petition lies solely within the discretion of" the appellate courts. *Quinn v. Eighth Judicial Dist. Court*, 134 Nev. 25, 28, 410 P.3d 984, 987 (2018). "A writ of mandamus is available to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion." *Humphries v. Eighth Judicial Dist. Court*, 129 Nev. 788, 791, 312 P.3d 484, 486 (2013). Writ relief is not appropriate where a "plain, speedy, and adequate remedy" at law exists. *Id.* "A writ of mandamus may be issued to compel the district court to vacate or modify a discovery order."[3] *Valley*

[3]We recognize that writs of prohibition are typically more appropriate for the prevention of improper discovery. *See, e.g., Club Vista Fin. Servs. v.*

Health Sys., LLC v. Eighth Judicial Dist. Court, 127 Nev. 167, 171, 252 P.3d 676, 678 (2011).

Here, if the discovery order by the district court remained in effect, a later appeal would not effectively remedy any improper disclosure of the Venetian's guests' private information. Because we conclude that the Venetian has no plain, speedy, and adequate remedy at law, we exercise our discretion to entertain the merits of this petition. NRS 34.170.

The district court should have considered proportionality under NRCP 26(b)(1)

The Venetian argues that the district court abused its discretion when it did not consider and apply proportionality under NRCP 26(b)(1) prior to allowing the discovery.[4] Sekera argues that other courts

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Eighth Judicial Dist. Court, 128 Nev. 224, 228 n.6, 276 P.3d 246, 249 n.6 (2012). A writ of prohibition is the "proper remedy to restrain a district judge from exercising a judicial function without or in excess of its jurisdiction." *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991); *see also* NRS 34.320. Here, we are not concluding that the district court's discovery order was outside its jurisdiction. Instead, we are (1) compelling the district court to perform the analysis that the law requires and (2) controlling an arbitrary exercise of discretion. Thus, mandamus relief is more appropriate, and we deny the Venetian's alternative request for a writ of prohibition.

[4]The Nevada Rules of Civil Procedure were amended effective March 1, 2019. *See In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, December 31, 2018) ("[T]his amendment to the [NRCP] shall be effective prospectively on March 1, 2019, as to all pending cases and cases initiated after that date."). Thus, we cite and apply the current version of Rule 26 because the motions and hearings before the district court judge, and the resulting orders at issue in this writ petition, all occurred after March 1, 2019.

have found the information at stake here to be discoverable under rules similar to NRCP 26(b)(1).[5] We agree with the Venetian.

Generally, "[d]iscovery matters are within the district court's sound discretion, and we will not disturb a district court's ruling regarding discovery unless the court has clearly abused its discretion." *Club Vista*, 128 Nev. at 228, 276 P.3d at 249. NRCP 26(b)(1) defines and places limitations on the scope of discovery:

> 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.

NRCP 26(b)(1). Further, "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable." *Id.*

Here, the district court identified only relevance at the hearing and in its order as the legal basis to deny the protective order. Specifically, the court stated at the hearing that the information was relevant to show

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[5]The authority cited by Sekera is unpersuasive, as the cases do not consider proportionality as required by the newly adopted amendments to NRCP 26(b)(1). However, we emphasize that our opinion does not stand for the proposition that the information at stake here is not proportional to the needs of the case and thus not discoverable. Rather, we hold that the district court must conduct the proper analysis under the current version of NRCP 26(b)(1) and consider both relevance *and* proportionality together as the plain language of the rule requires.

notice and foreseeability.[6] Problematically, the district court did not undertake any analysis of proportionality as required by the new rule. The rule amendments added a consideration of proportionality to

> redefine[ ] the scope of allowable discovery consistent with the proportionate discovery provision in FRCP 26(b). As amended, [NRCP] 26(b)(1) requires that discovery seek information "relevant to any party's claims or defenses and proportional needs of the case," departing from the past scope of "relevant to the subject matter involved in the pending action." This change allows the district court to eliminate redundant or disproportionate discovery and reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry.

NRCP 26 advisory committee's note to 2019 amendment; *see also* FRCP 26 advisory committee's note to 2015 amendment ("The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry."). When FRCP 26(b)(1) was amended, federal district courts noted that relevance was no longer enough for allowing discovery. *In re Bard IVC Filters Prod. Liab. Litig.*, 317 F.R.D. 562, 564 (D. Ariz. 2016) ("Relevancy alone is no longer sufficient—discovery must also be proportional to the needs of the case."); *Samsung Elecs. Am.,*

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[6]The Venetian cites *Eldorado Club, Inc. v. Graff*, 78 Nev. 507, 511, 377 P.2d 174, 176 (1962), to demonstrate prior incidents are not relevant to establish notice when it relates to a temporary condition "unless . . . the conditions surrounding the prior occurrences have continued and persisted." Sekera appears to have abandoned the notice and foreseeability arguments proffered in the district court and now only argues in her answering brief that the unredacted reports are relevant to show a lack of comparative negligence.

Inc. v. Yang Kun Chung, 321 F.R.D. 250, 279 (N.D. Tex. 2017) ("[D]iscoverable matter must be both relevant and proportional to the needs of the case—which are related but distinct requirements.").[7]

As noted above, NRCP 26(b)(1) outlines several factors for district courts to consider regarding proportionality:

> [(1)] the importance of the issues at stake in the action; [(2)] the amount in controversy; [(3)] the parties' relative access to relevant information; [(4)] the parties' resources; [(5)] the importance of the discovery in resolving the issues; and [(6)] whether the burden or expense of the proposed discovery outweighs its likely benefit.[8]

See also In re Bard, 317 F.R.D. at 563. Upon consideration of these factors, "a court can—and must—limit proposed discovery that it determines is not proportional to the needs of the case . . . ." *Vallejo v. Amgen, Inc.*, 903 F.3d 733, 742 (8th Cir. 2018) (quoting *Carr v. State Farm Mut. Auto. Ins., Co.*, 312 F.R.D. 459, 468 (N.D. Tex. 2015)).

The district court abused its discretion when it failed to analyze proportionality in light of the revisions to NRCP 26(b)(1) and make findings related to proportionality. Because discovery decisions are "highly fact-

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[7]"[F]ederal decisions involving the Federal Rules of Civil Procedure provide persuasive authority" for Nevada appellate courts considering the Nevada Rules of Civil Procedure. *Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005). Furthermore, the current version of the NRCP is modeled after the federal rules. NRCP Preface, advisory committee's notes to 2019 amendment.

[8]Per the amendments to the Federal Rules of Civil Procedure, these factors specifically apply to proportionality. *See* FRCP 26 advisory committee's note to 2015 amendment ("The present amendment restores the *proportionality factors* to their original place in defining the scope of discovery." (emphasis added)).

intensive," *In re Anonymous Online Speakers*, 661 F.3d 1168, 1176 (9th Cir. 2011), and this court is not positioned to make factual determinations in the first instance, we decline to do so; instead, we direct the district court to engage in this analysis.[9] *See Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines*, 128 Nev. 289, 299, 279 P.3d 166, 172-73 (2012).

The district court should have determined whether the Venetian demonstrated good cause for a protective order under NRCP 26(c)(1)

The Venetian sought a protective order under NRCP 26(c)(1), arguing that it had good cause to obtain one. The district court determined that there was no legal basis for a protective order. We disagree and conclude the district court abused its discretion when it determined that it had no legal basis to protect the Venetian's guests' information without first considering whether the Venetian demonstrated good cause for a protective order based on the individual circumstances before it. As stated above, discovery matters are generally reviewed for an abuse of discretion. *Club Vista*, 128 Nev. at 228, 276 P.3d at 249. A district court abuses its discretion when it "ma[kes] neither factual findings nor legal arguments" to support its decision regarding a protective order. *In re Nat'l Prescription Opiate Litig.*, 927 F.3d 919, 929 (6th Cir. 2019) (quoting *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 (1981)).

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[9]While the district court abused its discretion by not considering proportionality whatsoever in its order or at the hearing, the parties are also responsible for determining if their discovery requests are proportional. "[T]he proportionality calculation to [FRCP] 26(b)(1)" is the responsibility of the court and the parties, and "does not place on the party seeking discovery the burden of addressing all proportionality considerations." FRCP 26, advisory committee's notes to 2015 amendment.

NRCP 26(c)(1) articulates the standard for protective orders, stating that "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ."[10] The United States Supreme Court has interpreted the similar language of FRCP 26(c) as conferring "broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984). The Court continued by noting that the "trial court is in the best position to weigh fairly the competing needs and interests of the parties affected by discovery." *Id.* "The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders." *Id.*

The United States Court of Appeals for the Ninth Circuit has articulated a three-part test for conducting a good-cause analysis under FRCP 26(c). *In re Roman Catholic Archbishop of Portland in Or.*, 661 F.3d 417, 424 (9th Cir. 2011). First, the district court must determine if particularized harm would occur due to public disclosure of the information. *Id.* at 424. ("As we have explained, '[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not

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[10]Although NRCP 26(c), like its federal counterpart, applies to all forms of discovery (including written discovery), the Nevada Supreme Court has defined what constitutes good cause under the rule only in the context of depositions. *See Okada v. Eighth Judicial Dist. Court*, 131 Nev. 834, 842-43, 359 P.3d 1106, 1112 (2015) (articulating factors for courts to consider when determining good cause for a protective order designating the time and place of a deposition). Therefore, Nevada courts do not have firm guidelines to assist their determination of good cause when it comes to written discovery.

satisfy the Rule 26(c) test.'" (quoting *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992))).

Second, if the district court concludes that particularized harm would result, then it must "balance the public and private interests to decide whether . . . a protective order is necessary." *Id.* (internal quotation marks and citation omitted). The Ninth Circuit has directed federal district courts to utilize the factors set forth in a Third Circuit Court of Appeals case, *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995), to help them balance the private and public interests. *Roman Catholic*, 661 F.3d at 424; *see also Phillips v. Gen. Motors*, 307 F.3d 1206, 1212 (9th Cir. 2002). *Glenmede* sets forth the following nonmandatory and nonexhaustive list of factors for courts to consider when determining if good cause exists:

> (1) whether disclosure will violate any privacy interests; (2) whether the information is being sought for a legitimate purpose or for an improper purpose; (3) whether disclosure of the information will cause a party embarrassment; (4) whether confidentiality is being sought over information important to public health and safety; (5) whether the sharing of information among litigants will promote fairness and efficiency; (6) whether a party benefiting from the order of confidentiality is a public entity or official; and (7) whether the case involves issues important to the public.

56 F.3d at 483. The *Glenmede* court further recognized that the district court is in the best position to determine what factors are relevant to balancing the private and public interests in a given dispute. *Id.*

Third, even if the factors balance in favor of protecting the discovery material, "a court must still consider whether redacting portions of the discovery material will nevertheless allow disclosure." *Roman Catholic*, 661 F.3d at 425.

The Venetian sought a protective order pursuant to NRCP 26(c)(1), but the district court summarily concluded that there was no legal basis for issuing the protective order. It did so without analyzing whether the Venetian had shown good cause pursuant to NRCP 26(c)(1).[11] The district court's outright conclusion that there was no legal basis for a protective order and failure to conduct a good-cause analysis resulted in an arbitrary exercise of discretion. NRCP 26(c)(1) grants the district court authority to craft a protective order that meets the factual demands of each case if a litigant demonstrates good cause. Thus, since the court did have the legal authority to enter a protective order if the Venetian had shown good cause under NRCP 26(c)(1), it should have determined whether good cause existed based on the facts before it.

To determine good cause, we now approve of the framework established by the Ninth Circuit in *Roman Catholic* and the factors listed by the Third Circuit in *Glenmede*. District courts should use that framework and applicable factors, and any other relevant factors, to consider whether parties have shown good cause under NRCP 26(c)(1).[12] If

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[11]Sekera argues that the district court did not abuse its discretion by determining the Venetian did not show good cause. We are not convinced. The fact that the district court failed to mention good cause, either in its order or at the hearing, undermines Sekera's argument.

[12]Writ relief is discretionary, and in light of our disposition, we decline to address the other issues argued by the parties in this original proceeding. However, we note that *Glenmede* factors one, three, and five authorize the district court to consider the ramifications of information being disseminated to third parties (i.e., "whether disclosure will violate any privacy interests," "whether disclosure of the information will cause a party embarrassment," and "whether the sharing of information among litigants will promote fairness and efficiency"). 56 F.3d at 483. Importantly, the Nevada Supreme Court has recently stated that disclosing medical

the party seeking the protective order has shown good cause, a district court may issue a remedial protective order as circumstances require. *See* NRCP 26(c)(1). However, we do not determine whether the Venetian has established good cause for a protective order; instead, we conclude that is a matter for the district court to decide in the first instance. *See Ryan's Express*, 128 Nev. at 299, 279 P.3d at 172.

CONCLUSION

In denying the Venetian's motion for a protective order, the district court abused its discretion in two ways. First, it focused solely on relevancy and did not consider proportionality as required under the amendments to NRCP 26(b)(1). Second, it did not conduct a good-cause analysis as required by NRCP 26(c)(1). Because the district court failed to conduct a full analysis, its decision was arbitrarily rendered.

Thus, we grant the Venetian's petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order denying the Venetian's motion for a protective order. The district court shall conduct further proceedings consistent with this opinion to determine whether disclosure of the unredacted reports is relevant and proportional under NRCP 26(b)(1). If disclosure is proper, the district court must conduct a good-cause analysis under NRCP 26(c)(1), applying the framework provided herein to determine whether the Venetian has shown good cause for a protective order. If the Venetian demonstrates good cause,

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information implicates a nontrivial privacy interest in the context of public records requests. *Cf. Clark Cty. Coroner v. Las Vegas Review-Journal*, 136 Nev., Adv. Op. 5, 458 P.3d 1048, 1058-59 (2020) (explaining that juvenile autopsy reports implicate "nontrivial privacy interest[s]" due to the social and medical information they reveal, which may require redaction before their release).

the district court may issue a protective order as dictated by the circumstances of this case.

_____, C.J.
Gibbons

I concur:

_____, J.
Tao

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

MAY 21 2020

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

WRIT OF MANDAMUS

TO: The Honorable Kathleen E. Delaney, Judge of the Eighth Judicial District Court:

WHEREAS, this Court having made and filed its written decision that a writ of mandamus issue,

NOW, THEREFORE, you are instructed to vacate your order denying the Venetian's motion for a protective order and to conduct further proceedings consistent with the court's opinion, in the case entitled Joyce Sekera, an individual, vs. 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, case no. A772761.

RECEIVED
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COURT OF APPEALS
OF
NEVADA

(O) 1947B

20-19468

WITNESS The Honorables Michael Gibbons, Chief Judge, and Jerome Tao, Associate Judge of the Court of Appeals of the State of Nevada, and attested by my hand and seal this 14th day of May, 2020.

Chief Assistant Clerk

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. 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, and JOYCE SEKERA, an individual, Real Party in Interest.	**Supreme Court No. 79689-COA** District Court Case No.: A-18-772761-C

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 18 day of May, 2019, I served true and correct copy of the foregoing **WRIT OF MANDAMUS** by delivering the same via U.S. Mail addressed to the following:

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

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

Ashley Schmitt
An employee of Royal & Miles LLP

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

VENETIAN CASINO RESORT, LLC; LAS VEGAS SANDS, LLC,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE KATHLEEN DELANEY, DISTRICT JUDGE,

Respondents,

and

JOYCE SEKERA,

Real Party in Interest.

Case No.: 79689-COA

PETITION FOR REHEARING

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I. INTRODUCTION

Plaintiff/Real Party in Interest, Joyce Sekera ("Sekera") petitions this Court pursuant to NRAP 40 to rehear its opinion issued on May 14, 2020, which is attached as **Exhibit 1**. Petitioners, Venetian Casino Resort, LLC and Las Vegas Sands, LLC (collectively "Venetian"), presented arguments in its District Court motion for protective order and subsequent writ petition in this Court that were designed to maintain the information advantage that it has against Sekera and similarly-situated plaintiffs. Discovery is supposed to even the information-playing field, without overburdening either party.

When this Court embraced a non-proportionality argument in resolving Venetian's writ petition, the Court overlooked the fact that it was rewarding Venetian's discovery abuses that run contrary to the purposes of discovery and the goal of justice. First, this Court has misapprehended or overlooked the purpose of NRCP 26 and is mandating the District Court to follow a procedure, which this Rule does not intend to be mandatory. Second, this Court has also misapprehended or overlooked that Venetian did not preserve for review an argument that its asserted protective order sought to curtail non-proportional discovery. Third, this Court further misapprehends or overlooks that Venetian's motion for protective order did not identify a legitimate privacy interest. Upon these grounds, Sekera respectfully requests that this Court grant

rehearing and order Venetian to comply with the District Court's discovery orders without any modifications.

A. STANDARDS FOR REHEARING.

NRAP 40(c)(2) provides that the Court may consider rehearing in the following circumstances: (A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or (B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case. *See, e.g., Am. Cas. Co. of Reading, Pa. v. Hotel and Rest. Employees and Bartenders Intern. Union Welfare Fund*, 113 Nev. 764, 766, 942 P.2d 172, 174 (1997). In the instant case, rehearing is necessary to allow the Court to consider several factual and legal points that the Court has misapprehended or overlooked.

II. LEGAL ARGUMENT

A. THIS COURT HAS MISAPPREHENDED OR OVERLOOKED THE PURPOSE OF NRCP 26 AND IS MANDATING THE DISTRICT COURT TO FOLLOW A PROCEDURE, WHICH THIS RULE DOES NOT INTEND TO BE MANDATORY.

In its opinion, this Court provided guidance on how district courts should analyze proportionality when they exercise their discretion. However, this Court interpreted the 2019 amendments to NRCP 26 to include a separate

mandate that this analysis be expressly completed, and findings documented in every discovery dispute. Op. at 5–9. That mandate was not intended by the 2019 amendments. The full intention of Nevada's amendments appears in the history of the 2015 FRCP amendments to which Nevada's 2019 amendments were patterned.

This Court bases its novel mandate upon the 2019 Advisory Committee Note for NRCP 26(b)(1) which states that adding "proportional needs of the case [to the scope of discovery] . . . allows the district court to eliminate redundant or disproportionate discovery and reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry." *See* ADKT 522, Exhibit A at 135–136 https://nvcourts.gov/AOC/Committees_and_Commissions/NRCP/Adopted_Rules_and_Redlines/ (last accessed June 15, 2020).

Yet, the same authority was conveyed by the former version of NRCP 26(b)(2)(iii) prior to the amendments:

> The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that . . . (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c) of this rule.

https://nvcourts.gov/AOC/Committees_and_Commissions/NRCP/Final_Documents/ADKT_522_Redline_NRCP/ (last accessed June 15, 2020).

Nevada's decision to move the authority for limiting non-proportional discovery was made to redefine "the scope of allowable discovery consistent with the proportionate discovery provision in FRCP 26(b)." Advisory Committee Note—2019 Amendment, Section (b). Nevada's intent in conforming NRCP 26(b) to the cognate Federal Rule included this Court's cited change (NRCP 26(b)(1)), as well as a corresponding change to NRCP 26(b)(2)(C)(iii). The Nevada 2019 Advisory Committee Note did not directly address the change to NRCP 26(b)(2)(C)(iii) or how that change should affect procedure in discovery. However, when the change that Nevada's amendment is based on was made to FRCP 26(b), both the Federal Advisory Committee and United States Supreme Court Chief Justice John Roberts offered appropriate guidance under which Nevada's change should be interpreted.

In 2015, FRCP 26(b), on which the Nevada's recent 2019 amendment is based, changed the same two sections of FRCP 26(b) as Nevada. The FRCP amendment deleted the authority for limiting non-proportional discovery from FRCP 26(b)(2)(C)(iii) and placed it in FRCP 26(b)(1). While making that change, the Federal Advisory Committee and the Chief Justice of the U.S. Supreme Court gave guidance to how this change should affect the exchange of

discovery. Nevada's 2019 amendment to NRCP 26(b) clearly and expressly intended to conform to the Federal Rule's corresponding amendment from 2015, and the 2019 Advisory Committee did not express a need to stray from the intention of FRCP 26(b). Therefore, since Nevada has chosen to follow the guidance of the FRCP, this Court should articulate the policy behind that departure in its opinion, as Nevada courts will need guidance. *See Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005) ("We have previously recognized that federal decisions involving the Federal Rules of Civil Procedure provide persuasive authority when this court examines its rules.").

The FRCP adopted the proposed change upon which Nevada's NRCP 26 amendment is based. FRCP 26 contains Advisory Committees Notes on that change which state, in pertinent part:

> The present amendment restores the proportionality factors to their original place in defining the scope of discovery. This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections.
>
> Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations.
>
> Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.

FRCP 26 Notes of Advisory Committee on 2015 Amendments.

The only actual change in the focus on proportionality was the adding of the phrase, "the parties' relative access to relevant information" as a factor bearing on a proportionality consideration. *Id.* In making this change, the Advisory Committee noted that in cases with "information asymmetry," it is proper for the burden of discovery to be heavier on the party with more information. FRCP 26 Notes of Advisory Committee on 2015 Amendments. Therefore, the phrase was added to protect against proportionality being used to shut down discovery against parties with less access to information, such as Sekera in the instant case.

In April 2014, the Advisory Committee on Civil Rules held a conference and considered arguments on all sides of proposed revisions to the Federal Rules of Civil Procedure. Advisory Committee on Civil Rules Report, May 2, 2014 at 1. The Committee advanced several recommended changes, as well as substantial explanation for those changes. *Id.* at 1–2. Among the changes considered at the conference included the "the proposal to transfer the operative provisions of present Rule 26(b)(2)(C)(iii) to Rule 26(b)(1)." *Id.* at 4. The report proposed "that the factors already prescribed by Rule 26(b)(2)(C)(iii), which courts now are to consider in limiting 'the frequency or extent of discovery,' be relocated to Rule 26(b)(1) and included in the scope of

discovery." *Id.* at 5. The Committee further noted that "[a]ll discovery is currently subject to those factors by virtue of a cross-reference in Rule 26(b)(1)." *Id.* The Committee recommended keeping the factors of proportionality in the transfer from 26(b)(2)(C)(iii) because they are "understandable and work well." *Id.*

A principal conclusion of the Advisory Committee's April 2014 conference was that discovery in civil litigation would more often achieve the goal of Rule 1—the just, speedy, and inexpensive determination of every action—through an increased emphasis on proportionality. *Id.* "The purpose of moving these factors explicitly into Rule 26(b)(1) is to make them more prominent, encouraging parties and courts alike to remember them and take them into account in pursuing discovery and resolving discovery disputes." *Id.* at 7–8. Therefore, this Court has misapprehended or overlooked the purpose of the 2019 amendment to NRCP 26 and has interpreted Rule 26 in a way that contravenes the carefully crafted procedure that Nevada intended to establish. Therefore, on this initial basis, the Court should grant rehearing.

B. THIS COURT HAS ALSO MISAPPREHENDED OR OVERLOOKED THAT VENETIAN DID NOT PRESERVE FOR REVIEW AN ARGUMENT THAT ITS ASSERTED PROTECTIVE ORDER SOUGHT TO CURTAIL NON-PROPORTIONAL DISCOVERY.

This Court held that "the district court identified only relevance at the hearing and in its order as the legal basis to deny the protective order." Op. at 6. This Court overlooked or misapprehended that the District Court, which was only presented with a relevancy argument, should not have sua sponte analyzed an unbriefed proportionality argument. Venetian had not identified proportionality as an argument until it did so passively within the subject writ petition.

This Court's entertainment of Venetian's proportionality argument is improper because it violates Nevada law, as outlined in *Valley Health Systems*, 127 Nev. 167, 252 P.3d 676 (2011). Specifically, this Court should not review any issue that should have been raised first with the Discovery Commissioner and the District Court but was not. "All arguments, issues, and evidence should be presented at the first opportunity and not held in reserve." *Id.*, 127 Nev. at 173, 252 P.3d at 680. An argument which was not made "in the trial court . . . is deemed to have been waived and will not be considered on appeal." *Id.*, 127 Nev. at 172, 252 P.3d at 679. All issues should "be presented to the [Discovery] commissioner so that he or she may consider all the issues before

making a recommendation, so as not to frustrate the purpose of having discovery commissioners." *Id.*, 127 Nev. at 173, 252 P.3d at 680.

In this case, the scope of discovery in NRCP 26(b)(1) did not include proportionality when the subject motion for protective order was heard by the Discovery Commissioner and the District Court. 1 Petitioners' Appendix ("PA") 54–83, 201–206. Venetian's motion for protective order was heard by the Discovery Commission on March 13, 2019. 1 PA 186–200. Venetian's motion argued that "Plaintiff cannot reasonably articulate how the identity of individual involved in prior incidents . . . could be relevant to any issue of Plaintiff's claim." 1 PA 54–83. Nowhere in the motion did Venetian argue that the burden of producing the discovery was not proportional to the needs of the case. *Id.* In fact, Venetian stipulated to bearing the burden of "providing Plaintiff with unredacted copies of the prior incident reports." *Id.* Venetian's argument was that a protective order should keep Sekera from sharing the information with counsel for other plaintiffs facing Venetian in similar cases. The basis for Venetian's argument was that sharing the information from this discovery with other plaintiffs would violate a generalized privacy interest that the victims of the incidents have. *Id.*

When the motion for protective order was brought to the District Court Venetian once again argued that the "guests'" personal information created a

privacy right. 2 PA 271–448. For the first time, Venetian argued that the privacy concern outweighed the need for discovery in the case. *Id.* As an argument not previously raised, the District Court was not obligated to consider it. *See Valley Health.* However, the District Court decided that the privacy concern was not legally supported and never reached the weighing argument Venetian had raised because it was predicated on the existence of a legitimate privacy interest. 2 PA 207–270. Thus, the entire non-proportional discovery issue discussed in the Court's opinion was not properly preserved at all stages and should not have been considered by this Court. On this secondary basis, the Court should grant rehearing.

C. THIS COURT FURTHER MISAPPREHENDS OR OVERLOOKS THAT VENETIAN'S MOTION FOR PROTECTIVE ORDER DID NOT IDENTIFY A LEGITIMATE PRIVACY INTEREST.

"[N]o person has a privilege to . . . [r]efuse to disclose any matter . . . [or] produce any object or writing" except as provided by the U.S. Constitution or Nevada law. NRS 49.015(1)(b). Accordingly, Venetian had no right to refuse to disclose the information in its incident reports unless it could identify a legal basis to do so. "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning" are not sufficient to support a protective order. *Beckman Indus. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992). "The party must make a particular request and a specific demonstration of facts

in support of the request as opposed to conclusory or speculative statements about the need for a protective order and the harm which would be suffered without one." *Brittain v. Stroh Brewery Co.*, 136 F.R.D. 408, 412 (M.D.N.C. 1991). This is the same direction outlined in NRCP 26(b)(5) (Claiming Privilege or Protecting Trial Preparation Materials): "Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must: (i) expressly make the claim; and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." Yet, Venetian did not identify a legitimate legal basis for refusing to disclose the information in its incident reports. As the moving party, Venetian bore the burden of presenting the Discovery Commissioner and the District Court with a legitimate legal basis for a protective order.

Despite Venetian's failure to articulate any privilege for withholding the requested discovery, this Court now places the burden on the District Court to analyze an unknown privilege or consider ordering redacted documents for unknown privileges. Op. at 9–13. Indeed, the Court's opinion does not identify any privilege that was actually raised but instead presumes that there was some

privileged information. This Court misapprehended or overlooked that NRCP 26(b)(5) and the commenting case law to create an unfair situation in its opinion where Venetian does not actually have to identify a privilege but instead shifts the burden for Sekera to disprove an unknown privilege. On this this basis, Sekera urges the Court to grant rehearing.

III. CONCLUSION

In summary, this Court has misapprehended or overlooked the purpose of NRCP 26 and is mandating the District Court to follow a procedure, which this Rule does not intend to be mandatory. This Court has also misapprehended or overlooked that Venetian did not preserve for review an argument that its asserted protective order sought to curtail non-proportional discovery. This Court further misapprehends or overlooks that Venetian's motion for protective order did not identify a legitimate privacy interest. Upon these grounds, Sekera respectfully requests that this Court grant rehearing and order Venetian to comply with the District Court's discovery orders without any modifications.

Dated this 15th day of June, 2020.

CLAGGETT & SYKES LAW FIRM

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Attorneys for Real Party in Interest, Joyce Sekera

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

2. I further certify that this petition complies with the page- or type-volume limitations of NRAP 40 or 40A because it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 2,972 words; or

☐ does not exceed _____ pages.

Dated this 15th day of June, 2020.

CLAGGETT & SYKES LAW FIRM

/s/ Micah S. Echols
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Las Vegas, Nevada 89107
Attorney for Real Party in Interest, Joyce Sekera

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PETITION FOR REHEARING** was filed electronically with the Nevada Supreme Court on the 15th day of June, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Michael A. Royal, Esq.
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Attorneys for Petitioner

/s/ *Anna Gresl*
An employee of
CLAGGETT & SYKES LAW FIRM

EXHIBIT 1

136 Nev., Advance Opinion 26

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

MAY 14 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

Original petition for a writ of mandamus or prohibition challenging a district court order requiring petitioners to produce unredacted prior incident reports in discovery and refusing to impose requested protections related to those reports.

Petition granted.

Royal & Miles LLP and Gregory A. Miles and Michael A. Royal, Henderson, for Petitioners.

The Galliher Law Firm and Keith E. Galliher, Jr., Las Vegas, for Real Party in Interest.

BEFORE GIBBONS, C.J., and TAO, J.[1]

OPINION

By the Court, GIBBONS, C.J.:

The Nevada Rules of Civil Procedure were recently amended, including significant portions of NRCP 26—the seminal rule governing discovery. These amendments have changed the analysis that district courts must conduct. In this writ proceeding, we discuss the proper process courts must use when determining the scope of discovery under NRCP 26(b)(1). We also provide a framework for courts to apply when determining whether a protective order should be issued for good cause under NRCP 26(c)(1). Because respondents did not engage in this process or use the framework we are providing, we grant the petition and direct further proceedings.

FACTS AND PROCEDURAL HISTORY

Real party in interest, Joyce Sekera, allegedly slipped and fell on the Venetian Casino Resort's marble flooring and was seriously injured. During discovery, Sekera requested that the Venetian produce incident reports relating to slip and falls on the marble flooring for the three years preceding her injury to the date of the request. In response, the Venetian provided 64 incident reports that disclosed the date, time, and circumstances of the various incidents. However, the Venetian redacted the

[1]The Honorable Bonnie A. Bulla, Judge, voluntarily recused herself from participation in the decision of this matter. In her place, the Honorable Michael L. Douglas, Senior Justice, was appointed to participate in the decision of this matter under an order of assignment entered on February 13, 2020. Nev. Const. art. 6, § 19(1)(c); SCR 10. Subsequently, that order was withdrawn.

personal information of injured parties from the reports, including names, addresses, phone numbers, medical information, and any social security numbers collected. Sekera insisted on receiving the unredacted reports in order to gather information to prove that it was foreseeable that future patrons could slip and fall on the marble flooring and that the Venetian was on notice of a dangerous condition.[2] Further, Sekera wanted to contact potential witnesses to gather information to show that she was not comparatively negligent, as the Venetian asserted. Sekera's counsel disseminated all 64 redacted reports to other plaintiffs' counsel in different cases, who also were engaged in litigation against the Venetian for slip and fall injuries.

Unable to resolve their differences regarding redaction, the Venetian moved for a protective order, which Sekera opposed. The discovery commissioner found that there was a legitimate privacy issue and recommended that the court grant the protective order, such that the reports remain redacted, and prevented Sekera from sharing the reports outside of the current litigation. The commissioner further recommended, however, that after Sekera reviewed the 64 redacted reports and identified substantially similar accidents that occurred in the same location as her fall, the parties could have a dispute resolution conference pursuant to EDCR 2.34. At that conference, the parties would have the opportunity to reach an agreement to allow disclosure of the persons involved in the previous similar accidents. If the parties failed to reach an agreement, Sekera could file an appropriate motion.

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[2]Sekera agreed that any social security numbers should remain redacted.

Sekera objected to the discovery commissioner's recommendation. The district court agreed with the objection and rejected the discovery commissioner's recommendation in its entirety, thereby denying the motion for a protective order. The district court concluded (1) there was no legal basis to preclude Sekera from knowing the identity of the persons involved in the prior incidents, as this information was relevant discovery material, and (2) there was no legal basis to prevent the disclosure of the unredacted reports to third parties not involved in the Sekera litigation. Nevertheless, the court strongly cautioned Sekera to be careful with how she shared and used the information.

The Venetian filed the instant petition for writ relief, which was transferred to this court pursuant to NRAP 17. We subsequently granted a stay of the district court's order pending resolution of this petition.

DISCUSSION

Writ consideration is appropriate

This court has original jurisdiction to issue writs of mandamus. Nev. Const. art. 6, § 4(1). But "[t]he decision to entertain a writ petition lies solely within the discretion of" the appellate courts. *Quinn v. Eighth Judicial Dist. Court*, 134 Nev. 25, 28, 410 P.3d 984, 987 (2018). "A writ of mandamus is available to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion." *Humphries v. Eighth Judicial Dist. Court*, 129 Nev. 788, 791, 312 P.3d 484, 486 (2013). Writ relief is not appropriate where a "plain, speedy, and adequate remedy" at law exists. *Id.* "A writ of mandamus may be issued to compel the district court to vacate or modify a discovery order."[3] *Valley*

[3]We recognize that writs of prohibition are typically more appropriate for the prevention of improper discovery. *See, e.g., Club Vista Fin. Servs. v.*

Health Sys., LLC v. Eighth Judicial Dist. Court, 127 Nev. 167, 171, 252 P.3d 676, 678 (2011).

Here, if the discovery order by the district court remained in effect, a later appeal would not effectively remedy any improper disclosure of the Venetian's guests' private information. Because we conclude that the Venetian has no plain, speedy, and adequate remedy at law, we exercise our discretion to entertain the merits of this petition. NRS 34.170.

The district court should have considered proportionality under NRCP 26(b)(1)

The Venetian argues that the district court abused its discretion when it did not consider and apply proportionality under NRCP 26(b)(1) prior to allowing the discovery.[4] Sekera argues that other courts

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Eighth Judicial Dist. Court, 128 Nev. 224, 228 n.6, 276 P.3d 246, 249 n.6 (2012). A writ of prohibition is the "proper remedy to restrain a district judge from exercising a judicial function without or in excess of its jurisdiction." *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991); *see also* NRS 34.320. Here, we are not concluding that the district court's discovery order was outside its jurisdiction. Instead, we are (1) compelling the district court to perform the analysis that the law requires and (2) controlling an arbitrary exercise of discretion. Thus, mandamus relief is more appropriate, and we deny the Venetian's alternative request for a writ of prohibition.

[4]The Nevada Rules of Civil Procedure were amended effective March 1, 2019. *See In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, December 31, 2018) ("[T]his amendment to the [NRCP] shall be effective prospectively on March 1, 2019, as to all pending cases and cases initiated after that date."). Thus, we cite and apply the current version of Rule 26 because the motions and hearings before the district court judge, and the resulting orders at issue in this writ petition, all occurred after March 1, 2019.

have found the information at stake here to be discoverable under rules similar to NRCP 26(b)(1).[5] We agree with the Venetian.

Generally, "[d]iscovery matters are within the district court's sound discretion, and we will not disturb a district court's ruling regarding discovery unless the court has clearly abused its discretion." *Club Vista*, 128 Nev. at 228, 276 P.3d at 249. NRCP 26(b)(1) defines and places limitations on the scope of discovery:

> 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.

NRCP 26(b)(1). Further, "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable." *Id.*

Here, the district court identified only relevance at the hearing and in its order as the legal basis to deny the protective order. Specifically, the court stated at the hearing that the information was relevant to show

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[5]The authority cited by Sekera is unpersuasive, as the cases do not consider proportionality as required by the newly adopted amendments to NRCP 26(b)(1). However, we emphasize that our opinion does not stand for the proposition that the information at stake here is not proportional to the needs of the case and thus not discoverable. Rather, we hold that the district court must conduct the proper analysis under the current version of NRCP 26(b)(1) and consider both relevance *and* proportionality together as the plain language of the rule requires.

notice and foreseeability.[6] Problematically, the district court did not undertake any analysis of proportionality as required by the new rule. The rule amendments added a consideration of proportionality to

> redefine[ ] the scope of allowable discovery consistent with the proportionate discovery provision in FRCP 26(b). As amended, [NRCP] 26(b)(1) requires that discovery seek information "relevant to any party's claims or defenses and proportional needs of the case," departing from the past scope of "relevant to the subject matter involved in the pending action." This change allows the district court to eliminate redundant or disproportionate discovery and reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry.

NRCP 26 advisory committee's note to 2019 amendment; *see also* FRCP 26 advisory committee's note to 2015 amendment ("The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry."). When FRCP 26(b)(1) was amended, federal district courts noted that relevance was no longer enough for allowing discovery. *In re Bard IVC Filters Prod. Liab. Litig.*, 317 F.R.D. 562, 564 (D. Ariz. 2016) ("Relevancy alone is no longer sufficient—discovery must also be proportional to the needs of the case."); *Samsung Elecs. Am.,*

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[6]The Venetian cites *Eldorado Club, Inc. v. Graff*, 78 Nev. 507, 511, 377 P.2d 174, 176 (1962), to demonstrate prior incidents are not relevant to establish notice when it relates to a temporary condition "unless . . . the conditions surrounding the prior occurrences have continued and persisted." Sekera appears to have abandoned the notice and foreseeability arguments proffered in the district court and now only argues in her answering brief that the unredacted reports are relevant to show a lack of comparative negligence.

Inc. v. Yang Kun Chung, 321 F.R.D. 250, 279 (N.D. Tex. 2017) ("[D]iscoverable matter must be both relevant and proportional to the needs of the case—which are related but distinct requirements.").[7]

As noted above, NRCP 26(b)(1) outlines several factors for district courts to consider regarding proportionality:

> [(1)] the importance of the issues at stake in the action; [(2)] the amount in controversy; [(3)] the parties' relative access to relevant information; [(4)] the parties' resources; [(5)] the importance of the discovery in resolving the issues; and [(6)] whether the burden or expense of the proposed discovery outweighs its likely benefit.[8]

See also In re Bard, 317 F.R.D. at 563. Upon consideration of these factors, "a court can—and must—limit proposed discovery that it determines is not proportional to the needs of the case . . . ." *Vallejo v. Amgen, Inc.*, 903 F.3d 733, 742 (8th Cir. 2018) (quoting *Carr v. State Farm Mut. Auto. Ins., Co.*, 312 F.R.D. 459, 468 (N.D. Tex. 2015)).

The district court abused its discretion when it failed to analyze proportionality in light of the revisions to NRCP 26(b)(1) and make findings related to proportionality. Because discovery decisions are "highly fact-

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[7]"[F]ederal decisions involving the Federal Rules of Civil Procedure provide persuasive authority" for Nevada appellate courts considering the Nevada Rules of Civil Procedure. *Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005). Furthermore, the current version of the NRCP is modeled after the federal rules. NRCP Preface, advisory committee's notes to 2019 amendment.

[8]Per the amendments to the Federal Rules of Civil Procedure, these factors specifically apply to proportionality. *See* FRCP 26 advisory committee's note to 2015 amendment ("The present amendment restores the *proportionality factors* to their original place in defining the scope of discovery." (emphasis added)).

intensive," *In re Anonymous Online Speakers*, 661 F.3d 1168, 1176 (9th Cir. 2011), and this court is not positioned to make factual determinations in the first instance, we decline to do so; instead, we direct the district court to engage in this analysis.[9] *See Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines*, 128 Nev. 289, 299, 279 P.3d 166, 172-73 (2012).

The district court should have determined whether the Venetian demonstrated good cause for a protective order under NRCP 26(c)(1)

The Venetian sought a protective order under NRCP 26(c)(1), arguing that it had good cause to obtain one. The district court determined that there was no legal basis for a protective order. We disagree and conclude the district court abused its discretion when it determined that it had no legal basis to protect the Venetian's guests' information without first considering whether the Venetian demonstrated good cause for a protective order based on the individual circumstances before it. As stated above, discovery matters are generally reviewed for an abuse of discretion. *Club Vista*, 128 Nev. at 228, 276 P.3d at 249. A district court abuses its discretion when it "ma[kes] neither factual findings nor legal arguments" to support its decision regarding a protective order. *In re Nat'l Prescription Opiate Litig.*, 927 F.3d 919, 929 (6th Cir. 2019) (quoting *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 (1981)).

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[9]While the district court abused its discretion by not considering proportionality whatsoever in its order or at the hearing, the parties are also responsible for determining if their discovery requests are proportional. "[T]he proportionality calculation to [FRCP] 26(b)(1)" is the responsibility of the court and the parties, and "does not place on the party seeking discovery the burden of addressing all proportionality considerations." FRCP 26, advisory committee's notes to 2015 amendment.

NRCP 26(c)(1) articulates the standard for protective orders, stating that "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ."[10] The United States Supreme Court has interpreted the similar language of FRCP 26(c) as conferring "broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984). The Court continued by noting that the "trial court is in the best position to weigh fairly the competing needs and interests of the parties affected by discovery." *Id.* "The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders." *Id.*

The United States Court of Appeals for the Ninth Circuit has articulated a three-part test for conducting a good-cause analysis under FRCP 26(c). *In re Roman Catholic Archbishop of Portland in Or.*, 661 F.3d 417, 424 (9th Cir. 2011). First, the district court must determine if particularized harm would occur due to public disclosure of the information. *Id.* at 424. ("As we have explained, '[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not

[10]Although NRCP 26(c), like its federal counterpart, applies to all forms of discovery (including written discovery), the Nevada Supreme Court has defined what constitutes good cause under the rule only in the context of depositions. *See Okada v. Eighth Judicial Dist. Court*, 131 Nev. 834, 842-43, 359 P.3d 1106, 1112 (2015) (articulating factors for courts to consider when determining good cause for a protective order designating the time and place of a deposition). Therefore, Nevada courts do not have firm guidelines to assist their determination of good cause when it comes to written discovery.

satisfy the Rule 26(c) test.'" (quoting *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992))).

Second, if the district court concludes that particularized harm would result, then it must "balance the public and private interests to decide whether . . . a protective order is necessary." *Id.* (internal quotation marks and citation omitted). The Ninth Circuit has directed federal district courts to utilize the factors set forth in a Third Circuit Court of Appeals case, *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995), to help them balance the private and public interests. *Roman Catholic*, 661 F.3d at 424; *see also Phillips v. Gen. Motors*, 307 F.3d 1206, 1212 (9th Cir. 2002). *Glenmede* sets forth the following nonmandatory and nonexhaustive list of factors for courts to consider when determining if good cause exists:

> (1) whether disclosure will violate any privacy interests; (2) whether the information is being sought for a legitimate purpose or for an improper purpose; (3) whether disclosure of the information will cause a party embarrassment; (4) whether confidentiality is being sought over information important to public health and safety; (5) whether the sharing of information among litigants will promote fairness and efficiency; (6) whether a party benefiting from the order of confidentiality is a public entity or official; and (7) whether the case involves issues important to the public.

56 F.3d at 483. The *Glenmede* court further recognized that the district court is in the best position to determine what factors are relevant to balancing the private and public interests in a given dispute. *Id.*

Third, even if the factors balance in favor of protecting the discovery material, "a court must still consider whether redacting portions of the discovery material will nevertheless allow disclosure." *Roman Catholic*, 661 F.3d at 425.

The Venetian sought a protective order pursuant to NRCP 26(c)(1), but the district court summarily concluded that there was no legal basis for issuing the protective order. It did so without analyzing whether the Venetian had shown good cause pursuant to NRCP 26(c)(1).[11] The district court's outright conclusion that there was no legal basis for a protective order and failure to conduct a good-cause analysis resulted in an arbitrary exercise of discretion. NRCP 26(c)(1) grants the district court authority to craft a protective order that meets the factual demands of each case if a litigant demonstrates good cause. Thus, since the court did have the legal authority to enter a protective order if the Venetian had shown good cause under NRCP 26(c)(1), it should have determined whether good cause existed based on the facts before it.

To determine good cause, we now approve of the framework established by the Ninth Circuit in *Roman Catholic* and the factors listed by the Third Circuit in *Glenmede*. District courts should use that framework and applicable factors, and any other relevant factors, to consider whether parties have shown good cause under NRCP 26(c)(1).[12] If

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[11]Sekera argues that the district court did not abuse its discretion by determining the Venetian did not show good cause. We are not convinced. The fact that the district court failed to mention good cause, either in its order or at the hearing, undermines Sekera's argument.

[12]Writ relief is discretionary, and in light of our disposition, we decline to address the other issues argued by the parties in this original proceeding. However, we note that *Glenmede* factors one, three, and five authorize the district court to consider the ramifications of information being disseminated to third parties (i.e., "whether disclosure will violate any privacy interests," "whether disclosure of the information will cause a party embarrassment," and "whether the sharing of information among litigants will promote fairness and efficiency"). 56 F.3d at 483. Importantly, the Nevada Supreme Court has recently stated that disclosing medical

the party seeking the protective order has shown good cause, a district court may issue a remedial protective order as circumstances require. *See* NRCP 26(c)(1). However, we do not determine whether the Venetian has established good cause for a protective order; instead, we conclude that is a matter for the district court to decide in the first instance. *See Ryan's Express*, 128 Nev. at 299, 279 P.3d at 172.

CONCLUSION

In denying the Venetian's motion for a protective order, the district court abused its discretion in two ways. First, it focused solely on relevancy and did not consider proportionality as required under the amendments to NRCP 26(b)(1). Second, it did not conduct a good-cause analysis as required by NRCP 26(c)(1). Because the district court failed to conduct a full analysis, its decision was arbitrarily rendered.

Thus, we grant the Venetian's petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order denying the Venetian's motion for a protective order. The district court shall conduct further proceedings consistent with this opinion to determine whether disclosure of the unredacted reports is relevant and proportional under NRCP 26(b)(1). If disclosure is proper, the district court must conduct a good-cause analysis under NRCP 26(c)(1), applying the framework provided herein to determine whether the Venetian has shown good cause for a protective order. If the Venetian demonstrates good cause,

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information implicates a nontrivial privacy interest in the context of public records requests. *Cf. Clark Cty. Coroner v. Las Vegas Review-Journal*, 136 Nev., Adv. Op. 5, 458 P.3d 1048, 1058-59 (2020) (explaining that juvenile autopsy reports implicate "nontrivial privacy interest[s]" due to the social and medical information they reveal, which may require redaction before their release).

the district court may issue a protective order as dictated by the circumstances of this case.

_____, C.J.
Gibbons

I concur:

_____, J.
Tao