IN THE COURT OF APPEALS OF THE STATE OF NEVADA

Appellate Court No. 83600-COA
District Court Case No. A-18-772761-C

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

v.

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

REPLY TO REAL PARTY IN INTEREST'S ANSWER TO PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

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I. RESPONSE TO ISSUES PRESENTED BY SEKERA

Real-Party-in-Interest Joyce Sekera's Answering Brief does not address the District Court's failure to consider the impact of prior rulings and Sekera's previous sharing of the subject incident reports in the September 7, 2021, order. The District Court found that certain personal information contained in the reports should be protected without acknowledging that Sekera already obtained the protected information and distributed it to other attorneys outside this litigation who have filed it with motions, making it part of the public record. The District Court's September 7, 2021, order fails to address this issue and compounds the problem by now ordering the disclosure of information it now deems private. Accordingly, the disputed order will effectively provide Sekera with complete unredacted copies of the subject reports and allow her to freely distribute them to other people in the community. Moreover, the District Court, in ordering the disclosure of personal information of Venetian guests, abused its discretion by summarily concluding that the information was relevant without providing any factual analysis or support for this conclusion.

In her Answer, Sekera argues that there was a continuous hazard on the Venetian's floors in an apparent attempt to invoke the "mode of operations doctrine" to circumvent the Nevada Supreme Court's holding in *Eldorado Club, Inc. v. Graff*, 78 Nev. 507, 377 P.2d 174 (1962). However, Sekera fails to advise

this Honorable Court that the District Court granted Venetian's motion for summary adjudication on the "mode of operation doctrine," finding that it is inapplicable in this lawsuit. Sekera's allegation is that she slipped on a transient condition - a wet spot on the floor. This allegation negates any argument regarding a "continuous" condition and the law of the case is that no such argument is available to Sekera in this lawsuit.

Finally, Venetian contends that the District Court abused its discretion by failing to properly consider the relevance and proportionality factors under NRCP 26(b)(1). For example, the District Court failed to give any consideration to the burden on the Venetian or its guests in having private information disclosed and indiscriminately circulated in the community. If the production called for in the challenged order is permitted, Venetian guests will be exposed to unwanted solicitations associated with public disclosure of their private information, including the potential use of this private information by unreputable actors, and loss of control over their personal private information.

II. RESPONSE TO SEKERA'S RELEVANT FACTS

The facts set forth in Sekera's Answering Brief are incomplete and rife with strategic omissions. One significant fact omitted from Sekera's Answer is that she presently has in her possession three years of redacted prior incident reports, which

Sekera has freely shared with counsel outside this litigation.[1] As a result of the prior writ proceedings and the District Court's September 7, 2021, order, information contained in those reports and openly shared with other counsel has now been found to involve a nontrivial privacy interest protected under NRCP 26(c).[2] The Court's September 7, 2021, order will now require the production of these same reports with the previously redacted information revealed. Were Venetian to produce this information as presently ordered, Sekera would have the equivalent of unredacted prior incident reports that she could continue to freely share with parties outside this litigation.[3]

Neither Sekera in her Answer, nor the District Court below, address how to resolve this issue created by Sekera. Sekera simply asserts a right to obtain and freely share the personal information of Venetian guests without explaining how this right outweighs the guests' right to personal privacy and the burden imposed on Venetian by virtue of its business relationship with these prior guests. Sekera's complete disregard for the privacy interest of these non-parties has created this circumstance[4] and no solution other than protecting the incident reports from production has been proposed. Sekera's failure to address this result is a tacit

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[1] *See id.* at 24, note 36; *see also*, Venetian Appendix 12, Tab 57 at VEN 2689-92.
[2] *See* Venetian Appendix, Vol. 16, Tab 95, *Order of Clarification from June 1, 2021, Hearing* (filed September 7, 2021), at VEN 3568-69.
[3] *See id.*, at VEN 3564-70.
[4] *See id.*, Vol. 15, Tab 90 at VEN 3299.

admission that an order allowing Sekera to obtain private personal information of Venetian guests and share it outside the litigation does not serve any good purpose.

Sekera also misrepresents the facts in this matter to raise a non-existent issue that was already summarily adjudicated by the District Court in Venetian's favor. She opens her brief with a misstatement of this Honorable Court's opinion in *Venetian Casino Resort, LLC v. Eighth Jud. Dist. Ct.*, 136 Nev., Adv. Op. 26, 467 P.3d 1, 3 (Ct. App. 2020) to support a disputed issue of fact: "Sekera slipped and fell on Venetian's marble floors **due to the presence of a foreign substance**."[5] This Honorable Court actually wrote: "Real party in interest, Joyce Sekera, **allegedly** slipped and fell on the Venetian Casino Resort's marble flooring...." *Id.* (Emphasis added.) This is an important distinction, as Venetian has always maintained that Sekera fell for reasons having nothing to do with the floor or a foreign substance.[6]

Sekera makes repeated references to the Venetian floor where she fell presenting a "continuing" hazard to Venetian guests.[7] As discussed further below, the District Court previously entered summary judgment in Venetian's favor on this issue as presented in Plaintiff's Complaint and First Amended Complaint

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[5] *See Sekera's Answer to Petition* at 2 (emphasis added).
[6] *See* Venetian Appendix, Vol 15, Tab 90 at VEN 3294:25-28 – VEN 3295:1-8; VEN 3296-98.
[7] *See, i.e., Sekera 's Answer to Petition* at 14-15.

based on the "Mode of Operations Liability Doctrine".[8] Moreover, Sekera's own expert conceded the Venetian floor does not present a continuing hazard as he testified that the floor is safe when dry.[9] Therefore, Sekera's attempt to resurrect the mode of operation doctrine of liability in her Answer to the Petition is inconsistent with the established law of the case and is inappropriate.

Venetian also disputes Sekera's assertion that it "does not challenge the district court's factual findings regarding the relevance or proportionality of the requested discovery"[10] In fact, Venetian submitted a competing proposed Order of Clarification on Production of Prior Incident Reports that was not adopted by the District Court.[11] In the petition for writ filed on October 11, 2021, Venetian argues that Sekera did not meet her burden of proof to establish the need for unredacted prior incident reports.[12] Indeed, the pending petition is based on the premise that Venetian challenges the District Court's findings of fact, conclusions of law, and order.[13]

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[8] *See* Venetian Appendix, Vol. 2, Tab 18 at VEN 449-52.
[9] *See* Venetian Appendix, Vol. 15, Tab 90 at VEN 3316:20-28, VEN 3464.
[10] *See Sekera 's Answer to Petition* at 15.
[11] *See* Venetian Appendix, Vol 16, Tab 94 at VEN 3548-57.
[12] *See Venetian's Petition for Writ of Mandamus* (filed October 11, 2021) at 21-24.
[13] *See id.* at 39-44.

III. LEGAL ARGUMENT

A. THE DISTRICT COURT ABUSED ITS DISCRETION BY FAILING TO PROTECT THE PERSONAL INFORMATION OF VENETIAN GUESTS BY CONCLUDING IT IS RELEVANT WITHOUT FACTUAL ANALYSIS OR SUPPORT.

The District Court below did not make specific findings of fact supporting its conclusion that Sekera's right to the personal information of Venetian guests involved in prior incidents outweighs their right to privacy and Venetian's desire to protect that information from free distribution to the public. The District Court simply found the information to be "relevant."[14] More specifically, the District Court determined as follows:

> *Venetian's incident reports, as well as the names and contact information of the slip and fall victims, are* ***relevant*** *to the claims and defenses in this case. First, the incident reports, and the information contained therein, are* ***relevant*** *to show* ***notice and foreseeability*** *of any unsafe or dangerous condition. Similarly, the incident reports are* ***relevant*** *to Plaintiff's claim for punitive damages. Next, the incident reports are* ***relevant*** *to Venetian's affirmative defense of comparative negligence. Finally, as to the redacted contact information for injured guests, that information is relevant as well, as those individuals are witnesses who have information regarding: (1) the facts and circumstances surrounding their slip and fall; and (2) the condition of Venetian's flooring at the time and location of their slip and fall.*[15]

The District Court did not present specific facts to support its relevancy conclusion regarding private information of Venetian guests involved in prior incidents. It simply concluded that Sekera is entitled to the information she

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[14] *See id.* at VEN 3564.

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

desires, which she may then use however she desires. The District Court is aware that its decision does not, and cannot, offer the kind of protection it deems appropriate under the circumstances, based on Sekera's sharing of information to persons outside the litigation. But the September 7, 2021, order, fails to address this issue.

While Venetian's original motion for protective order (filed on February 1, 2019) was pending, after Venetian provided redacted reports to Sekera counsel in good faith, Sekera began sharing the redacted prior incident reports to counsel in other litigation without advising Venetian or the court.[16] Sekera's counsel later advised the District Court as follows in the May 14, 2019, hearing related to Sekera's objection to the April 4, 2019, Discovery Commissioner's Report and Recommendation:

> *the Court should be aware that as members of the Nevada Justice Association, we all share information concerning our cases. We share briefing, we share experts, and we share discovery that, in fact, we collected in our case."*[17]

Such candor was not present when Sekera's counsel was before the Discovery Commissioner at the March 13, 2019, hearing, at which time he had already shared

[16] *See* Venetian Appendix, Vol. 1, Tab 9 at VEN 054-83, Tab 10 at VEN 084-85, Tab 11 at VEN 086-100.
[17] *See* Venetian Appendix, Vol. 1, Tab 15 at VEN 217:11-14.

the documents the Discovery Commissioner deemed protected under NRCP 26(c).[18]

Despite being fully advised that Sekera had shared protected information in violation of the April 4, 2019, Discovery Commissioner's Report and Recommendation, the District Court held that Sekera is entitled not only to obtain unredacted prior incident reports, but to share them.[19] The District Court's order of September 7, 2021, allows Sekera to continue the practice of distributing this information outside the litigation. The only modification by the District Court in the September 7, 2021, order is the allowance for limited redactions which do not include the contact information of Venetian guests. The order fails to recognize that Sekera already has in her possession and has widely distributed the information the District Court now deems protected and subject to redaction.

Aware of this issue, the District Court chose not to consider how to remedy the dilemma, as demonstrated in the following exchange from the June 1, 2021, hearing:

> *MR. ROYAL: Your Honor, I'm sorry. I just have a point of clarification.*
>
> *THE COURT: Go ahead.*
>
> *MR. ROYAL:* ***We have already provided prior incident reports to Plaintiff attached to their motion, and that information that you***

[18] *See* Venetian Appendix, Vol. 1, Tab 13 at VEN 186-200; *compare id.*, Tab 11 at VEN 084-85, Tab 12 at VEN 140-85.
[19] *See* Venetian Appendix, Vol. 2, Tab 15 at VEN 252-55.

have now ordered redacted is already out there, not only in this case, but other cases. How do we address that?

THE COURT: Well --

MR. ROYAL: Once we give them the names and stuff, anybody can match them up and figure it out. So may be made a public record.

THE COURT: ***I don't know how to address it*** *because although you have said, Mr. Royal, this is what they've done with it, again the argument from the very beginning was they are not trying to actually find fact witnesses for their own case, they are trying to get up business for themselves and the colleagues and the Plaintiffs bar to come sue us for other things.*

I don't know what happened or hasn't happened in that regard, I don't know how to do or undo anything*, just what I'm saying is, I've made the ruling I needed to make, I believe it's appropriate under the case law and the direction given from our Court of Appeals. I suppose we could do an oral motion on your part to deal with something previously gone out there, and they can't really claw it back, I don't believe at this point* ***because I don't know what they've done with it****, so in the end I guess we could argue to them or state this is an oral motion to have them claw back anything that was put out that contained protective information that has been determined by the Court today to have needed to be redacted, and the Venetian provide the redacted reports, and/or we can just seal up the redacted ones, so they can't do a comparison.*

You tell me. I think there's several different ways to slice a pie. ***I can't take another 20, 30 minutes to figure this out****, I have taken my entire morning calendar on one case....*[20]

Accordingly, the outstanding issue of reconciling what Sekera did by sharing information provided to her by Venetian in good faith remains unresolved. Sekera has never had to account for it. If Venetian complies with the present District

[20] *See* Venetian Appendix, Vol. 16, Tab 93 at VEN 3534-36 (emphasis added).

Court order, then Sekera and the beneficiaries of her information sharing will collectively have more than six-hundred pages of effectively unredacted prior incident reports containing information the District Court now deems protected under NRCP 26(c).

Venetian believes Sekera did not address this issue in her answer to the petition because she has no good response. She created the present circumstances by circulating documents that were the subject of a pending motion for protective order.[21] Per the District Court's September 7, 2021, order, Sekera may take two sets of redacted reports (one set with contact information redacted only and another set with protected health information redacted only), piece them together as unredacted reports, and then share them as she has previously done.

This Honorable Court previously instructed 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 the information among litigants will promote fairness and efficiency')."[22] The District Court did not perform that analysis or give it meaningful consideration.

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[21] *See id.*, Vol. 15, Tab 90 at VEN 3299.

[22] *Venetian Casino Resort, LLC v. Eighth Judicial Dist. Court*, 467 P.3d 1, 12, note 12.

How is contacting Venetian guests involved in other slip and fall incidents on Venetian property "relevant" to Venetian's affirmative defense of comparative fault? The only explanation Sekera has offered in her answer to the petition is as follows: "Sekera must investigate the facts surrounding the prior victims' falls, including the condition of the marble floors and the condition of the prior victims' shoes."[23] This is nonsensical. Further, the Court's finding of "relevance" to support Sekera's claim of "notice and foreseeability" is not supported by Nevada law under *Eldorado Club, Inc. v. Graff*, 78 Nev. 507, 377 P.2d 174 (1962).

Venetian contends that the redacted reports previously produced to Sekera provide her with the information she needs to address Venetian's affirmative defenses, "notice and foreseeability," and punitive damages without making personal contact with Venetian guests involved in prior incidents and/or circulating that information to attorneys unaffiliated with the present litigation.

B. SEKERA'S ARGUMENT OF CONTINUOUS HAZARD ON VENETIAN FLOORS AS AN EXCEPTION TO *ELDORADO CLUB, INC.* SHOULD BE DISREGARDED AS THE LAW OF THE CASE IS THAT THE *MODE OF OPERATIONS* THEORY OF LIABILITY DOES NOT APPLY.

Sekera used variations of the word "continuous" at least ten (10) times in her Answer, suggesting that she fell due to some kind of ongoing, permanent condition related to the Venetian floor in November, 2016.[24] Sekera herein presents an

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[23] *See Sekera 's Answer to Petition* at 18.
[24] *See id.*

argument from her First Amended Complaint claiming that Venetian "had actual and/or constructive notice of the condition which caused the fall," that "[p]ursuant to the **mode of operation doctrine**, Defendant was on **continuous notice** of the presence of liquid."[25] However, the District Court summarily dismissed Sekera's claim based upon the Mode of Operation Doctrine. Sekera's effort to now argue there was a "continuous" condition is misleading.[26]

In an order dated July 23, 2019, the District Court granted Venetian's motion for summary judgment on Sekera's use of the "mode of operations doctrine."[27] That is the law of the case. Indeed, the September 7, 2021, order makes no reference to a "continuous" hazard on Venetian property at the time of Plaintiff's fall on November 4, 2016.[28]

Sekera's strategy in using the word "continuous" here is an attempt to work around the Nevada Supreme Court's holding in *Eldorado Club, Inc. v. Graff*, 78 Nev. 507, 377 P.2d 174 (1962). In *Eldorado Club*, the trial court allowed the

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[25] *See* Venetian Appendix, Vol 1., Tab 6 at VEN 035:6-9 (emphasis added). *Compare id.*, Vol. 1, Tab 1 at VEN 002:26-28. *See also FGA, Inc. v. Giglio*, 128 Nev. 271, 277-28, 278 P.3d 490, 494 (2012) (citing *Sheehan v. Roche Bros. Supermarkets, Inc.*, 448 Mass. 780, 863 N.E.2d 1276, 1283 (Mass. 2007).

[26] *See Sekera's Answer to Petition* at 18.

[27] *See* Venetian Appendix, Vol. 2, Tab 18 at VEN 449-52. The District Court determined the following: "The mere fact that the Venetian property sells food and beverages to patrons who are then allowed to move about the premises is not enough to apply the mode of operation theory of liability under Nevada law." *Id.* at Ven 451:19-22.

[28] *See* Venetian Appendix, Vol. 16, Tab 93 at VEN 3558-70.

plaintiff – who slipped from a foreign substance on a ramp – to present witnesses involved in other prior incidents arising from slips and falls from foreign substances occurring on the same ramp. The evidence was allowed by the trial court to establish notice by the premises owner. The trial court noted: "the instrumentality causing the slip and fall was claimed to be, and in fact was, the lettuce leaf."[29] On review, the Nevada Supreme Court determined: "The admissibility of evidence of prior accidents in this kind of a case, to show notice or knowledge of the danger causing the accident, is generally confined to situations where there are conditions of permanency."[30] The higher court therefore held: "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."[31]

Throughout this lawsuit (including her answer to the petition), Sekera has asserted that her fall was due to the presence of a liquid on the floor.[32] Indeed, the evidence establishes that Sekera's prior use of the floor as an employee working on

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[29] *Eldorado Club, Inc.* 78 Nev at 511, 377 P.2d at 176.
[30] *Id.* (citation omitted).
[31] *Id.*
[32] *See Sekera's Answer to Petition* at 2; *see also* Venetian Appendix, Vol. 1, Tab 6 at VEN 035:4-9.

the Venetian premises for nearly a year negates any argument that a "continuous" hazard was present on November 4, 2016.[33]

Sekera, after working at the Venetian property for ten (10) months and walking on the subject floor thousands of times in the course of her employment, had no apparent issue navigating the floor until a foreign substance was allegedly present.[34] This is confirmed by the testimony of Sekera's own expert, Thomas Jennings, who testified in deposition as follows:

> *Q. ... If a jury were to determine that the area where the plaintiff slipped and fell was dry, your opinion . . . would be what?*
>
> *A. That the floor was slip resistant.*[35]

Thus, even Sekera's expert agreed that the Venetian floor where the subject incident occurred does not present a "continuous" hazard to pedestrians.

Sekera's argument that the alleged general facts and circumstances here (*i.e.*, a slip and fall on a foreign substance) are somehow different from those in *Eldorado Club, Inc.*, based on a "continuing" or permanent condition disregards the District Court's prior order granting summary judgment in favor of Venetian on Sekera's proposed use of the mode of operations liability doctrine. Sekera has never provided a cogent explanation as to why she needs Venetian guest

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[33] *See Venetian's Petition for Writ of Mandamus* (filed October 11, 2021) at 21-22.
[34] *See Venetian's Petition for Writ of Mandamus* (filed October 11, 2021) at 21-22.
[35] *See* Venetian Appendix, Vol. 15, Tab 90 at VEN 3316:20-28, VEN 3464.

information when she already has in her possession redacted copies of prior incident reports which identify the facts, location, and cause of those incidents.

In January 2019, the Discovery Commissioner recommended that Sekera review the prior incident reports provided to her by Venetian and identify any "substantially similar accidents that occurred in the same location as her fall...."[36] Then, she could make a specific request to obtain contact information of those guests. Sekera has never identified one prior incident as being so similar to her fall that she needs to contact that particular person. To the contrary, Sekera has taken a shotgun approach not only to obtain all this information, but to use and disseminate as she pleases. Sekera's argument that this is any more than a slip and fall from a temporary transient condition is without basis.

C. THE DISTRICT COURT ABUSED ITS DISCRETION IN ITS REVIEW OF THE PROPORTIONALITY FACTORS UNDER NRCP 26(b)(1).

In reviewing the NRCP 26(b)(1) proportionality factors in connection with the challenged order, the District Court abused its discretion by failing to properly assess the burden factor of disclosing private information.[37] The District Court considered broadly argued factors on "issues of notice, foreseeability, and whether

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[36] *See Venetian Casino Resort, LLC v. Eighth Judicial Dist. Court*, 467 P.3d 1, 3 (2020); *see also* Venetian Appendix, Vol. 1, Tab 14 at VEN 201-06, Venetian Appendix, Vol. 15, Tab 90, *Opposition to Plaintiff's Motion to Place on Calendar* at VEN 3299-30, VEN 3317 (Venetian requesting that the District Court adopt the April 4, 2019, Discovery Commissioner's Report and Recommendation).

[37] *See* Venetian Appendix, Vol. 16, Tab 93 at VEN 3564-66.

Plaintiff was comparatively negligent," which "weighs in favor" of disclosing the personal contact information of Venetian guests involved in prior incidents.[38] However, when it came to considering "the burden" on Venetian for disclosing the information to Sekera, the District Court considered only the physical task of Venetian "producing unredacted reports" without giving any consideration to the burden that disclosing private information would have on those guests, the Venetian, and its guest relations.

There is a recognized interest in protecting the disclosure of personal client information, as the unauthorized disclosure would likely damage the Venetian's guest relationships.[39] The actual burden on Venetian is not in the physical act of unredacting previously produced prior incident reports, it is dealing with the fallout associated with Sekera's unfettered use of the information for this litigation and consequences associated with Sekera circulating it among other members of the bar. This should have been part of the District Court's analysis of proportionality under *Venetian Casino Resort, LLC, supra,* 467 P.3d at 12, note 12.

The District Court determined that Venetian demonstrated "good cause" under NRCP 26(c) to protect certain information in the prior incident reports, after

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[38] *Id.* at VEN 3564-66.

[39] *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]").

applying the three-part test adopted in *Venetian Casino Resort, LLC, supra.*[40] The District Court concluded that the following information is worthy of protection: "(1) Social Security numbers; (2) dates of birth; (3) driver's license numbers; and (4) certain private health information, such as that provided to responding EMT's."[41] Thereafter the court found: "the remaining information contained in the incident reports, including names and contact information for the slip and fall victims, details regarding the facts and circumstances of the particular incidents, and **any self-reported injuries resulting from the incident** should be produced and disclosed **as <u>there is no expectation of privacy in this information and it was voluntarily disclosed by these individuals to a third party, the Venetian</u>**."[42]

Per the District Court's order cited above, neither Venetian nor its guests have an expectation of privacy when an incident on the premises occurs and is documented. The District Court did not provide legal support for this conclusion, but merely noted its application of the three-part test in *Venetian Casino Resort, LLC, supra.* Further, the September 7, 2021, order then recognizes that some of the information "voluntarily disclosed by these individuals to a third party, the Venetian" is, in fact, protected and was therefore provided <u>with</u> an expectation of

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[40] *See* Venetian Appendix, Vol. 16, Tab 93 at VEN 3567-68.
[41] *Id.*
[42] *Id.* at VEN 3569:3-9 (emphasis added).

privacy. The District Court failed to explain why the guests provided some information to responding Venetian EMTs with an expectation of privacy, and other information without an expectation of privacy.

Sekera cites to *Las Vegas Metro. Police Dept. v. Las Vegas Review-Journal,* 136 Nev., Adv. Op. 86, 478 P.3d 383, 386-387 (2020), for the proposition that "Nevada appellate courts review the scope of privacy interests de novo."[43] In *Las Vegas Metro. Police Dept.*, the Las Vegas Review-Journal successfully moved a district court to order disclosure of certain police officer personal information through the Nevada Public Records Act, concluding that the police officers lacked a nontrivial privacy interest. While the present controversy does not involve the Nevada Public Records Act, Venetian submits that these decisions by Nevada courts on the issue of privacy are persuasive authority directly applicable to the present circumstances.[44]

The Nevada Supreme Court reversed the district court's conclusion in *Las Vegas Metro. Police Dept.*, referring to its decision in *Clark County School District v. Las Vegas Review-Journal (CCSD)*, 134 Nev. 700, 707-08, 429 P.3d 313, 320 (2018) (citing *Cameranesi v. United States DOD,* 856 F.3d 626, 637 (9th Cir. 2017)), where it held "that when a government agency first shows that a

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[43] *See Sekera's Answer to Petition* at 27.

[44] *See, Venetian Casino Resort, LLC, supra*, at 467 P.3d at 12, note 12.

disclosure implicates a nontrivial privacy interest, the requester must then show that the information is likely to further a significant public interest."[45] The court noted that "**Nevada law has 'established protection of personal privacy interests' and 'protects personal privacy interests** from unrestrained disclosure under the NPRA."[46]

The court in *Las Vegas Metro. Police Dept.* held that "Courts should apply the test adopted in *CCSD* whenever the government asserts a nontrivial privacy interest."[47] Applying "the two-part burden shifting test" in *Cameranesi v. United States DOD*, 856 F.3d 626, 637 (9th Cir. 2017), the court noted that "the government must establish that disclosure would intrude on a personal privacy interest that is nontrivial or that rises above the *de minimis* level" after which "the requesting party [must] show that disclosure is likely to advance a significant public interest."[48] The court related that in *CCSD*, "**we noted that the district court failed to consider the privacy interests of 'teachers or witnesses who may face stigma or backlash for coming forward or being part of the investigation**."[49] The court stated that the *"CCSD* test is grounded in **Nevada's**

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[45] *Las Vegas Metro. Police Dept., supra,* 136 Nev., Adv. Op. 86, 478 P.3d 383, 386 (original emphasis).
[46] *Id.*, 478 P.3d at 387 (citing *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 266 P.3d 623 (2011)) (emphasis added).
[47] *Las Vegas Metro. Police Dept., supra,* 478 P.3d at 385.
[48] *Id.*, 478 P.3d at 387 (citing *CCSD, supra*, 134 Nev. at 707-08, 429 P.3d at 320).
[49] *Id.* (quoting *CCSD, supra,* 134 Nev. at 709, 429 P.3d at 321) (emphasis added).

'established protection of personal privacy interests,'" noting that "in *Cameranesi*, the court recognized that **personnel and medical files may be shielded from public disclosure to prevent an unwanted invasion of personal privacy.**"[50]

The court in *Las Vegas Metro. Police Dept.*, determined that Metro demonstrated a nontrivial privacy interest and related that "ample persuasive authority shows that **'[t]he avoidance of harassment is a cognizable privacy interest.**"[51] The case was remanded for the district court to determine whether the Review-Journal could meet its burden of demonstrating that production of the private information "is likely to advance a significant public interest."[52] In other words, the burden shifted to the requester once a nontrivial privacy interest was established.[53]

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[50] *Id.*, 478 P.3d at 387-88 (citing *Cameranesi, supra,* at 856 F.3d at 637 (applying 5 U.S.C. § 552(b)(6)) (emphasis added).

[51] *Id.*, 478 P.3d at 388 (citing *Cameranesi, supra,* 856 F.3d at 639 (citation omitted) (emphasis added). Note that the case was remanded for the district court to determine whether the Review-Journal could meet its burden of demonstrating that production of the private information "is likely to advance a significant public interest." *Id.,* 478 P.3d at 389.

[52] *Id.,* 478 P.3d at 389.

[53] *See Venetian Casino Resort, LLC, supra,* 467 P.3d 1, 12, note 12 (citing *Clark Cty. Office of the Coroner/Medical Examiner v. Las Vegas Review-Journal*, 458 P.3d 1048, 1051 (Nev. 2020), while noting: "The Nevada Supreme Court has recently stated that disclosing medical information implicates a nontrivial privacy interest in the context of public records requests").

Here, Venetian demonstrated that a nontrivial privacy interest exists in the prior incident reports and the District Court agreed.[54] At that point, the burden effectively shifted to Sekera to demonstrate that her need for the personal information of Venetian guests, together with her right to make contact and share that personal information outside the litigation, as she had previously done, outweighs the right to privacy and "[t]he avoidance of harassment."[55] All Sekera has done in that regard is to broadly assert that she needs to contact former Venetian guests to defend against Venetian's affirmative defense of comparative fault, to demonstrate "notice and foreseeability," and to pursue a claim for punitive damages.[56] Sekera has not presented specifics, but has relied on vague statements consistent with what she has presented in her Answer to the Petition.

Under *Venetian Casino Resort, LLC, supra,* the District Court was to (1) "determine if particularized harm would occur due to public disclosure of the information"; (2) "if … [a] particularized hardship would result, then … 'balance the public and private interests to decide … whether a protective order is necessary'"; and (3) "consider whether redacting portions of the discovery material will nevertheless allow disclosure."[57] Under item two (2) above, the District Court

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[54] *See* Venetian Appendix, Vol. 16, Tab 93 at VEN 3568-69.
[55] *Las Vegas Metro. Police Dept., supra,* 478 P.3d at 388 (citation omitted).
[56] *See id.* at VEN 3564.
[57] *Venetian Casino Resort, LLC, supra,* 467 P.3d at 10-11 (citations omitted).

was to follow the list of factors set forth in *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3rd. Cir. 1995):

> *(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 or safety****; (5) whether* ***the sharing of information among litigants will promote fairness and efficiency****; (6) whether a party benefitting from the order of confidentiality is a public entity or official; and (7) whether the case involves issues important to the public.*[58]

While the District Court references this three-part test in the September 7, 2021, order, the balancing of interests required by the test does not appear to have been given appropriate consideration by the District Court.

1. Disclosure of private Venetian guest information violates privacy interests

The District Court agrees that privacy interests worthy of protection are involved here. However, by ordering Venetian to provide private personal contact information of Venetian guests, the District Court has effectively ordered Venetian to provide three (3) years of unredacted reports to Sekera.[59] Sekera already possesses and has distributed copies of these reports with the private information unredacted. Requiring production of those same records with the contact

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[58] *Id.* at 10-11 (quoting *Glenmede Trust Co., supra,* 56 F.3d 476, 483) (emphasis added).

[59] This is because Sekera has had these documents in her possession since January 2019.

information unredacted will result in Sekera having complete unredacted copies of the guests' private contact and medical information – which she will still be allowed to share. Indeed, Sekera has once again attached all of these prior incident reports as part of her appendix in this matter – despite the fact that the September 7, 2021, order determined that they include unredacted private and protected information.[60] In so doing, Sekera has violated the September 7, 2021, order.[61]

2. The information is not being sought for a legitimate purpose

Sekera distributed prior incident information provided to her counsel by Venetian in good faith in redacted form while a motion for protective order was pending.[62] Sekera shared it with multiple law firms who then attached the documents to court pleadings in unrelated litigation while the original motion for protective order was pending.[63] There is no legitimate need for Sekera to make personal contact with Venetian guests having no knowledge of Sekera or her incident, and to share that information with persons outside the litigation.[64]

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[60] *See Sekera Appendix*, Vol. 14 at 2578-2797, Vol. 15 at 2798-3017, Vol. 16 at 3018-3237, and Vol. 17 at 3238-3277.

[61] *See* Appendix, Vol. 16, Tab 95 at VEN 3558-72; *compare* Appendix, Vol. 1, Tab 14 at VEN 201-06.

[62] *See* Venetian Appendix, Vol. 1, Tab 9 at VEN 054-83.

[63] *See* Venetian Appendix, Vol. 1, Tab 10 at 084-85, Tab 11 at VEN 0860139, Tab 13 at VEN 188-89.

[64] *See* Venetian Appendix, Vol. 1, Tab 15 at VEN 217:11-14. *See also,* Venetian Appendix, Vol. 2, Tab 16 at VEN 298 (the District Court previously determined that there is "no legal basis to preclude Plaintiff from sharing the unredacted incident reports with persons not involved in this litigation").

3. Disclosure of private personal contact information of Venetian guests adversely impacts Venetian's business relationship with its guests and will cause embarrassment for both the guests and Venetian

The District Court did not weigh the impact of disclosing private personal contact information of Venetian guests involved in prior incidents, noting only that "Venetian has already produced redacted reports, so the primary burden is producing unredacted reports consistent with the order" noting that the "burden is minimal."[65] The District Court ignored the burden on Venetian as it pertains to the business relationship it has with its guests involved in prior incidents being contacted and harassed by various law firms. Recall that the Nevada Supreme Court recognized in *Las Vegas Metro. Police Dept.* that "**[t]he avoidance of harassment is a cognizable privacy interest.**"[66] Venetian guests, without question, will be subjected to unwanted contact by not only Sekera's counsel, but representatives from other law firms with whom Sekera has shared the information. That places a significant burden on both Venetian, its guests, and its guest relations. Further, the District Court failed to address the added burden of Venetian now having to protect information that Sekera has already widely

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[65] *See* Venetian Appendix, Vol. 16, Tab 93 at VEN 3567.

[66] *Id.*, 478 P.3d at 388 (citing *Cameranesi, supra,* 856 F.3d at 639 (citation omitted) (emphasis added). Note that the case was remanded for the district court to determine whether the Review-Journal could meet its burden of demonstrating that production of the private information "is likely to advance a significant public interest." *Id.,* 478 P.3d at 389.

distributed. Respectfully, the District Court's failure to give this consideration was an abuse of discretion.

4. The private information sought by Sekera is not important to public health and safety

Sekera argues that the private personal information within Venetian guest incident reports is critical to her case; however, Sekera has information regarding each incident, including the date, time, area they occurred, facts and circumstances of each occurrence, and scene photographs. Sekera has more than enough information to make a "notice and foreseeability" argument. This discovery issue has nothing to do with the public health and safety.

It remains unclear how contacting Venetian guests will help Sekera respond to an affirmative defense of comparative fault. Venetian guests involved in prior incidents have no knowledge of Sekera's incident. They would not know that she walked the same flooring thousands of times in the course of her employment before her November 4, 2016 incident. They would not know anything about Sekera's footwear or her other work attire, how she was walking at the time of the incident, or whether she was carrying a beverage in her left hand at the time of her fall. Sekera has never provided specifics beyond her desire to engage in a massive fishing expedition – casting a wide net - at the expense of nonparty privacy rights.

5. The sharing of information among litigants will not promote fairness and efficiency

Sekera has not presented a coherent explanation as to why she needs to contact Venetian guests involved in unrelated prior incidents who know nothing about what happened to her on November 4, 2016. The District Court's September 7, 2021, order concludes that Venetian guests relinquished their expectations of privacy by "voluntarily" providing information to a responding/reporting Venetian EMT following an incident.[67] Yet, the District Court subsequently determined that there are some nontrivial privacy interests.[68]

Venetian has in good faith produced three years of prior incident reports with redactions of personal contact information and is prepared to produce two more years of prior incident reports once this issue is resolved. The District Court has concluded that there is a privacy interest. What the District Court failed to address is that Sekera presently has in her possession the very medical information the court acknowledged to be private, confidential, and protected, which can now be linked to all contact information provided. Compounding the issue is the fact that Sekera provided these documents to multiple attorneys who have published them in other litigation. If Venetian provides contact information, it will

[67] *See* Venetian Appendix, Vol. 16, Tab 93 at VEN 3569.
[68] *Id.* at VEN 3568-69.

effectively provide Sekera with unredacted reports, which she may still share freely with other members of the plaintiff's bar, as she has previously done.

Sekera's reliance on *Zuniga v. W. Apartments*, 2014 U.S. Dist. LEXIS 83135 (C.D. Cal. Mar. 25, 2014), is inapplicable here. In *Zuniga*, the court found a constitutionally based right to privacy that required the requesting party to demonstrate a need for private information of non-litigants that outweighed that privacy interest. Here, Sekera has not demonstrated such a need. Venetian does not object to Sekera's right to obtain redacted prior incident reports with NRCP 26(c) protection to build a case of "notice and foreseeability" or support other claims and defenses in this matter for use solely in the present litigation. However, Venetian objects to identifying those involved in prior incidents so Sekera and other members of the Nevada bar unaffiliated with this litigation may contact them. Sekera has never been required to demonstrate how her need to obtain, use and disseminate this private information outweighs the right to privacy of Venetian guests and Venetian's desire to protect its business relationship with these guests.

IV. CONCLUSION

The Discovery Commissioner had it right in the Discovery Commissioner's Report and Recommendation of April 4, 2019, observing that the information sought by Sekera "presents a privacy issue as it pertains to the identity of prior Venetian guests ...," that the personal information of Venetian guests is "to be

protected under an NRCP 26(c) order, **not to be shared with anyone who is not directly affiliated with the litigation** ..." and "that if Plaintiff identifies a specific prior incident report she feels is **sufficiently related to her fall, with substantially similar facts and circumstances, occurring in the same location,** that counsel will have an EDCR 2.34 conference to discuss the request and determine whether the identity of those involved in the **specific** prior incident should be provided before filing a motion."[69]

Venetian respectfully submits that the District Court abused its discretion in failing to recognize a privacy right regarding the personal contact information of Venetian guests involved in prior incidents, that the District Court erred in failing to recognize and address the fact that Sekera already has three (3) years of prior incident reports with information the District Court has now determined must be protected, which information Sekera has widely distributed among other members of the Nevada bar (who have published these reports in unrelated litigation on multiple occasions), and that the District Court abused its discretion in failing to adopt the recommendations presented in the Discovery Commissioner's Report

[69] *See* Venetian Appendix, Vol. 1, Tab 14 at VEN 203 (emphasis added).

and Recommendations of April 4, 2019, which appropriately addressed and balanced the privacy issues involved under NRCP 26(b)(1).

DATED this 6th day of January, 2022.

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CERTIFICATE OF COMPLIANCE
(NRAP Rules 21(e) & 32(a)(9))

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 Rules 21(d) & 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 **6,867 words** in compliance with NRAP 21(d) (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 if 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 10th day of January 2022.

NOTARY PUBLIC in and for said County and State

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

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the law firm of Royal & Miles LLP, attorneys for Petitioners, VENETIAN CASINO RESORT, LLC and LAS VEGAS SANDS, LLC, and that on the 6th day of January, 2022, I served true and correct copy of the foregoing REPLY TO REAL PARTY IN INTEREST'S ANSWER TO PETITION FOR WRIT OF MANDAMUS AND/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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