**IN THE SUPREME COURT OF THE**

**STATE OF NEVADA**



E&T VENTURES, LLC,

Petitioner,

vs

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, THE HONORABLE JOANNA KISHNER,

Respondent,

EUPHORIA WELLNESS, LLC a Nevada limited liability company,

Real Party in Interest.

Supreme Court Case No. 84336

District Court Case: A-19-796919-B

# REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF MANDAMUS

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## I. Introduction.

Petitioner, E&T Ventures, LLC ("Petitioner"), filed its petition on March 7, 2022. See Dkt. No. 22-07119 ("Petition"). The Petition is supported by Volume I and Volume II of Petitioner's Appendix. See Dkt. Nos. 22-07120 and 22-07121.[1] Real Party-in-Interest, Euphoria Wellness, LLC ("Euphoria"), filed its response to the Petition on June 10, 2022, as ordered by the Nevada Supreme Court on April 29, 2022. See Dkt. 22-18592 ("Euphoria's Response"). Euphoria's Response was supported by Volume I and Volume II of its Appendix. See Dkts. 22-18595 and 22-18597.

Euphoria's Reply inappropriately assigns motivations for the Petition, which do not exist, and briefs the discovery dispute in the district court, which is not before the Nevada Supreme Court. Like in the district court, Euphoria wants to influence the Nevada Supreme Court inappropriately with the objective of receiving a favorable result. Facts and law should be the guide. For the record, Petitioner disputes that its discovery responses were "wholly insufficient and patently false."

[1] The Table of Contents included as part of Volume II of Petitioner's Appendix (Dkt. No. 07121) contains errant references to "ppe i," which appeared after the Appendix was filed. The Table of Contents included as part of Volume I of Petitioner's Appendix (Dkt. No. 22-07120) can be used for both Volumes I and II of Petitioner's Appendix.

Petitioner appeared before the district court to address Euphoria's discovery issues. In fact, the district court held an evidentiary hearing on Euphoria's request for sanctions on February 11, 2022, after the Nevada Supreme Court denied the petition filed in Case No. 84133. See Exhibit 1 to Petitioner's Motion to Stay, Dkt. No. 22-15505. Euphoria's claim that Petitioner's filings constituted an "elaborate scheme" to "avoid sanctions rulings" is unprofessional, unethical and inconsistent with the record before the district court and the Nevada Supreme Court. To remind the Nevada Supreme Court, ***the district court continued to hear and decide matters until the Nevada Supreme Court granted a stay at the request of the Petitioner on June 9, 2022***. See Dkt. No. 22-18429.

## II. Standard of Review is De Novo—not Abuse of Discretion.

Euphoria incorrectly contends that the standard of review applicable to the Petition is abuse of discretion by Chief Judge Linda Bell. See Euphoria's Response, page 11 (Article VI, Section A). Where a party contends in a petition for a writ that the district court has exceeded or is about to exceed its jurisdiction, the Nevada Supreme Court reviews that issue ***de novo***. See Fulbright & Jaworski LLP v. Eighth Judicial Dist. Court, 131 Nev. 30, 35, 342 P.3d 997, 1001 (2015). The Petition alleges Chief Judge Bell's power and authority (jurisdiction) to decide the matter of

disqualification ***was conditional*** by the plain and unambiguous language of the statute. See NRS 1.235(6) ("***if*** they are unable to agree"). Euphoria's Response suggests that the parties actually disagree on the interpretation of the statute. In such case, the Nevada Supreme Court also reviews questions of statutory interpretation de novo. In re Estate of Black,132 Nev. 73, 75, 367 P.3d 416, 417 (2016).

## III. Chief Judge Linda Bell's Decision was Premature.

Euphoria contends that Chief Judge Bell had the power and authority to decide Petitioner's initial disqualification request because "the parties had never agreed upon a judge to hear the motion to disqualify." See Euphoria's Response, page 11 (Article VI, Section 1). NRS 1.235(6) plainly and unambiguously provides that disqualification "must ***thereupon*** be heard and determined by another judge agreed upon by the parties ***or, if they are unable to agree***, by a judge appointed [as set forth in NRS 1.235(6)(a)."] (emphasis added). NRS 1.235(6) admittedly fails to provide any deadline by which the parties must agree (or fail to agree) before the Chief Judge has jurisdiction to decide the matter. ***Here, Euphoria imposed a deadline of 9:00 a.m. on February 10, 2022,*** to reach an agreement. See **Exhibit 4**, Vol. II, Petitioner's Appendix 264-286 (Exhibit 1 to Motion to Withdraw/Reconsider Decision, App 276-279). Euphoria's Response also confirms the same. See

Euphoria's Response, page 5-6 (Euphoria admits that it provided Petitioner until 9:00 a.m. on February 10, 2022 to reach an agreement, and if no response was received by that time (9:00 a.m.), ***Euphoria would file*** a notice that there was no agreement by the parties). Chief Judge Bell issued her decision on February 10, 2022 at 7:52 a.m. before Euphoria's deadline. See **Exhibit 3**, Vol. II, Petitioner's Appendix 256-263. Petitioner filed its application on February 2, 2022 at 6:56 p.m. See **Exhibit 1**, Vol. I, Petitioner's Appendix 256-263. Judge Kishner filed her response on February 7, 2022 at 1:19 p.m. See **Exhibit 2**, Vol. II, Petitioner's Appendix 241-255. ***Less than three (3) judicial days elapsed between Judge Kishner's response and Chief Judge Bell's decision.***

Chief Judge Bell stated in her decision denying Petitioner's motion to withdraw her initial ruling as premature the following: "Because disqualification is considered a question requiring prompt resolution, pursuant to NRS 1.235(6) once a judge has responded to a disqualification request, the matter is considered procedurally ready for decision." See **Exhibit 9**, Vol. II, Petitioner's Appendix 332-337 (APP 333, lines 21-23). However, Chief Judge Bell did not cite to any authority in support of her conclusion, and Petitioner has not located any case, other statute or rule in support. If true, Chief Judge Bell then fails to explain why she waited until

March 3, 2022 to consider the new request for relief (including a new affidavit/declaration/certification pursuant to NRS 1.235(1)) when Petitioner filed its motion on February 10, 2022—almost a month earlier. It would seem that Chief Judge Bell's rationale is not supported by the existence of this substantial delay.

NRS 1.235(6) provides as follows:

6. A judge may challenge an affidavit alleging bias or prejudice by filing a written answer with the clerk of the court within 5 judicial days after the affidavit is filed, admitting or denying any or all of the allegations contained in the affidavit and setting forth any additional facts which bear on the question of the judge's disqualification. ***The question of the judge's disqualification must thereupon be heard and determined by another judge agreed upon by the parties or, if they are unable to agree, by a judge appointed***:

(a) If the judge is a district judge, by the presiding judge of the judicial district in judicial districts having more than one judge, or if the presiding judge of the judicial district is sought to be disqualified, by the judge having the greatest number of years of service[.]

(emphasis added).

As stated above (Article II), the Chief Judge's application of NRS 1.235(6) presents an issue of statutory interpretation that the Nevada Supreme Court reviews de novo. State v. Lucero, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011); see also Bailey v. State, 120 Nev. 406, 407, 91 P.3d 596, 597 (2004). The Nevada Supreme Court's primary goal in construing a statute is to give effect to the Nevada Legislature's intent in enacting it. Hobbs v. State, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011). Thus, the Nevada Supreme Court first looks to the statute's plain language to determine its meaning, and it will enforce it as written if the language is clear and unambiguous. Id. The Nevada Supreme Court will look beyond the statute's language ***only if*** that language is ambiguous or its plain meaning was clearly not intended or would lead to an absurd or unreasonable result. Newell v. State, 131 Nev. 974, 977, 364 P.3d 602, 603-04 (2015); Sheriff, Clark Cty. v. Burcham, 124 Nev. 1247, 1253, 198 P.3d 326, 329 (2008). In interpreting an ambiguous statute, "we look to the legislative history and construe the statute in a manner that is consistent with reason and public policy." Lucero, 127 Nev. at 95, 249 P.3d at 1228.

Here, like Chief Judge Bell, Euphoria contends that the Chief Judge has jurisdiction to decide the matter of disqualification as soon as the judge subject to disqualification provides his/her response. See Euphoria's Response, pages 13-14.

According to Euphoria, this view is consistent with the meaning of "thereupon" used in the statue (which is defined as "immediately; without delay; promptly" and is the exact argument made by Chief Judge Bell. Id. However, Chief Judge Bell (like Euphoria in Euphoria's Response) ignores the fact that the statute's use of "thereupon" applies to the timing of the determination of disqualification ***generally***—either by the judge agreed upon by the parties ***or*** the Chief Judge. Under the Chief Judge's rationale (which Euphoria supports), the Chief Judge has jurisdiction to decide the matter without giving any opportunity to the parties to agree on the judge to make the decision. This interpretation simply renders the right of the parties to agree on the judge as provided by the Nevada legislature meaningless (which is unreasonable and absurd). ***Petitioner points out that the parties do not need to agree on a judge if the judge subject to disqualification elects not to respond***. See NRS 1.235(5)(a)-(c). Chief Judge Bell acknowledges that she was unaware at the time of her decision that the parties were working on an agreement to select a judge to decide the matter. See **Exhibit 9**, Vol. II, Petitioner's Appendix 332-337 (APP 333, lines 25-28). Given such acknowledgement, Chief Judge Bell should have withdrawn her decision as premature.

Jurisdictional rules go to the very power of judges to act. Narcho v. State, 459 P.3d 884 (Nev. App. 2020) ("In Nevada, courts do not have unlimited power to do whatever they want. "); see also Ex Parte Wonacott, 27 Nev. 102, 106 (Nev. 1903) (("It has frequently been held that courts have no power to act away from the place fixed for their terms, and that even consent cannot confer jurisdiction in such cases.") (citations omitted)). While Euphoria is correct that the statute does not require the parties to file a notice of agreement or disagreement (or otherwise inform the Chief Judge of their negotiations via telephone, email, or other form of communication), the Chief Judge's decision to act regardless is clear error. Why? Every judge (including the Chief Judge and Judge Kishner) is required to know the boundaries of his/her power and authority. Phillips v. Welch, 11 Nev. 187, 188 (1876) ("Every court is bound to know the limits of its own jurisdiction, and to keep within them."). As it should be clear to the Nevada Supreme Court, both Chief Judge Bell and Euphoria disregard the word "if" and focus incorrectly on the word "thereupon" in NRS 1.235(6) in support of their position. The word "if" unequivocally makes Chief Judge Bell's jurisdiction conditional. No one disputes that the Chief Judge can act immediately ***upon receipt*** of the power and authority (jurisdiction) to do so. Accordingly, the burden was on Chief Judge Bell to determine whether she had jurisdiction before acting. Phillips v. Welch, 11 Nev. 187, 188 (1876).

## IV. Judge Kishner failed to Respond to Petitioner's Motion Challenging Chief Judge Bell's Decision.

Euphoria falsely claims Petitioner's motion challenging Chief Judge Bell's decision did not include a new affidavit pursuant to NRS 1.235(1). Petitioner included a new affidavit/declaration/certification pursuant to NRS 1.235 as part of its motion, which was signed by Petitioner's counsel who also prepared, signed and filed the motion (and the original affidavit). See **Exhibit 4**, Vol. II, Petitioner's Appendix 264-286 (App 275). Paragraph 4 of the affidavit/declaration/certification pursuant to NRS 1.235 expressly provides as follows:

> 4. The facts set forth in the above motion are true and accurate. Such facts support withdrawal/reconsideration of the decision by Chief Judge Bell, an evidentiary hearing concerning the disqualification of Judge Kishner, and/or a stay of the case pending resolution of the issue of disqualification. I have personal knowledge of the facts contained in this filing unless otherwise qualified by information and belief or such knowledge is based on the record in this case, and I am competent to testify thereto, and such facts are true and accurate to the best of my knowledge and belief.

The motion clearly includes ***new bases*** for disqualification based on Judge Kishner's response to the original affidavit. See id. (Paragraphs 4-6 of motion, Appendix 270-272) (misrepresentation of the record to justify her abuse of judicial power and to

avoid disqualification). The motion was filed ***on the same date*** as Chief Judge Bell's original decision (so there was no delay or timing issue). Euphoria conveniently ignores the relief requested by the motion—reconsideration based in part on Judge's Kishner's response to the original affidavit under NRS 1.235—and the timing of Petitioner's motion. It is unclear why Chief Judge Bell failed to address the new bases for disqualification or the fact that Judge Kishner did not respond.

Judge Kishner had the right to respond to the motion as supported by the new affidavit/declaration/certification pursuant to NRS 1.235 in accordance with NRS 1.235(6). She failed to do so. This is not disputed (even though Euphoria claims the affidavit was not adequate). While Petitioner disagrees with Euphoria's position (for the reasons set forth above), Judge Kishner was the party responsible for making that argument. Therefore, NRS 1.235(5) ***required*** Judge Kishner to "immediately transfer the case to another department of the court[.]". Even before the Nevada Supreme Court intervened and issued a stay, Judge Kishner failed to transfer the case and refused to provide any basis for her failure.

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## V. Judge Kishner had Notice of the Motion Challenging Chief Judge Bell's decision but proceeded with an evidentiary hearing regardless.

Judge Kishner received actual notice of the motion challenging Chief Judge Bell's decision because it was filed in the district court case. However, on February 11, 2022, during an evidentiary hearing she scheduled after the petition was denied in Nevada Supreme Court Case No. 84133, Judge Kishner inexplicably refused even to acknowledge it. See Transcript, pages 11-24 attached as Exhibit 1 to Petitioner's Motion to Stay, Dkt. 22-15505. As set forth in the transcript (Exhibit 1), Judge Kishner acted as if it did not exist (despite being on the docket), took a survey of court personnel during the hearing about whether they received it, and proceeded over the objection of Petitioner with the evidentiary hearing. Id. Despite claiming not to be bound by NRS 1.1235 (because personal service was not complete at the time of the evidentiary hearing), Judge Kishner and her staff subsequently refused to accept personal service and directed Petitioner's process server to deliver it to the chambers' "in-box" at the Regional Justice Center. See Certificate of Service, (Volume II of Petitioner's Appendix, Exhibit 6 (Appendix 289-325)). The Nevada Supreme Court should note that Petitioner expressly informed Judge Kishner that the motion challenging Chief Judge Bell's decision included a new affidavit

pursuant NRS 1.1235(1)). See Transcript, page 5 (lines 9-11) attached as Exhibit 1 to Petitioner's Motion to Stay, Dkt. 22-15505 ("In that motion there is a new affidavit concerning disqualification and a request to disqualify the Court as briefed in that motion."). Petitioner has no explanation for Judge Kishner's actions, yet Euphoria attempts to explain them on the basis of a lack of personal service. Euphoria's position on service is dead wrong.

NRS 1.235(5) provides that "the judge against whom an affidavit alleging bias or prejudice ***is filed*** shall proceed no further with the matter[.]" (emphasis added). Clearly (because it was filed), Judge Kishner had notice of the motion before the evidentiary hearing on February 11, 2022 (even though personal service was not complete as required by NRS 1.235(4)). NRS 1.235(5) does not provide "the judge against whom an affidavit alleging bias or prejudice is filed ***and served*** shall proceed no further with the matter." Service in accordance with NRS 1.235(4) simply triggers the timeframe during which Judge Kishner had the opportunity to respond in accordance with NRS 1.235(6). Gamesmanship over service was not expected by Petitioner from a member of the judiciary.

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## VI. Conclusion.

For the reasons set forth in the Petition and this Reply in support, the Petitioner seeks the following relief:

A. An order disqualifying Judge Joanna Kishner of Department 31 in the Eighth Judicial District Court, State of Nevada, from presiding over the district court case below.

B. An order instructing the Clerk of the Eighth Judicial District Court to re-assign the case to another Business Court Judge.

C. An order vacating any orders entered by Judge Kishner after the initial application/affidavit in support of disqualification was filed by Petitioner.

DATED this 8th day of July, 2022

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/s/ Mitchell Stipp

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## CERTIFICATE OF COMPLIANCE

1. The reply has been prepared in a proportionally spaced typeface using Microsoft Word, Version 16.11.1, in 14 point, Times New Roman.
2. The reply does not exceed 15 pages.

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## VERIFICATION

I hereby certify that I have read the 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 reply complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 21. I understand that I may be subject to sanctions in the event that the reply is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of July 2022, I filed the foregoing **REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF MANDAMUS,** using the court's electronic filing system. Notice of the filing of the REPLY was made upon acceptance by the Nevada Supreme Court using the District Court's electronic filing system to the following e-service participants in District Court Case and by mail to the addresses as indicated:

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