

**In the
Supreme Court of the State of Nevada**

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Elizabeth A. Brown
Clerk of Supreme Court

LAS VEGAS METROPOLITAN
POLICE DEPARTMENT,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT FOR THE STATE OF
NEVADA, IN AND FOR THE
COUNTY OF CLARK, AND THE
HONORABLE ADRIANA ESCOBAR,
DISTRICT JUDGE,

Respondents,

and

DUE DILIGENCE GROUP, LLC, a
limited liability company,

Real Party in Interest.

Case No.: 85129

Eighth Judicial District Court
Case No.: A-22-853953-W

**REAL PARTY IN INTEREST DUE DILIGENCE GROUP, LLC'S
OPPOSITION TO PETITIONER LVMPD'S EMERGENCY MOTION FOR
RELIEF TO STAY UNDER NRAP 27(e)**

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N.R.A.P. 26.1 DISCLOSURE

Pursuant to N.R.A.P. 26.1, the undersigned counsel of record certifies that there are no persons or entities as described in N.R.A.P. 26.1(a) that must be disclosed.

Dated this 9th day of August, 2022.

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Due Diligence Group, LLC (DDG), by and through its undersigned counsel, submits this opposition to Petitioner Las Vegas Metropolitan Police Department's Emergency Motion for Relief to Stay Under NRAP 27(e), filed August 5, 2022 ("Petitioner's Motion" or "Motion").

I. INTRODUCTION

Petitioner's opposition to Judge Escobar's recusal and accompanying Motion to Stay is the latest in a string of delay tactics Petitioner has used since February 2022 to avoid timely producing records to which DDG is entitled under Nevada's Public Records Act (NPRA). The Motion should be denied. First, it comes too late. Petitioner did not object when Judge Escobar advised the parties of her recusal at a hearing held almost a month ago. Petitioner did not even object in the three weeks that followed. Petitioner waited until this matter was *reassigned* to Judge Gall, and scheduled for a hearing on the merits. Only then did Petitioner first make its objection known, by filing this Writ of Prohibition and "emergency" Motion to Stay. Petitioner's inexplicable delay is reason alone to summarily deny the Motion. The Motion is also meritless on its face. Judge Escobar properly recused pursuant to Nevada Code of Judicial Conduct Rule 2.11, which does not require that a recusing judge give any explanation to the parties for recusal. Judge Escobar's explanation was a courtesy, and does not provide a basis for forcing a judge to hear a matter she have independently decided she cannot due to concerns about bias. Petitioner's

strained arguments to the contrary do not withstand scrutiny let alone warrant extraordinary and discretionary intervention. The Court should deny the Motion.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

DDG first submitted public records requests to Petitioner in December 2021 for emails exchanged between Sheriff Lombardo and his campaign consultants using his government-issued email address. Pet'r's Ex. 1, at 3. Petitioner advised DDG on January 28, 2022, that DDG could expect production in February. Pet'r's Ex. 1, at 4. On February 4, Petitioner refused to produce, claiming the emails were not public records. *Id.* After months of correspondence in which DDG explained its right to the requested emails and Petitioner continued to refuse to produce them, DDG filed this action in the district court on June 20, to compel Petitioner to comply with its duties under the NPRA and produce the records. *See* Pet'r's Ex. 1. That same day, DDG filed a motion requesting the court expedite the matter, which was granted over Petitioner's opposition. Pet'r's Ex. 2.

The matter was set for a motion hearing on July 14, but when the parties appeared, Judge Escobar stated that she was recusing due to her 30-year friendship with Governor Steve Sisolak. Not only have Governor Sisolak and Judge Escobar maintained a close relationship since serving together on the Taxicab Authority, Judge Escobar's husband currently serves on Governor Sisolak's subcabinet. Pet'r's Ex. 5. Judge Escobar reasoned that DDG's public records request relates to the

election in which Sheriff Lombardo is running against her longtime friend, and that, given their relationship, Nevada Code of Judicial Conduct Rule 2.11 requires recusal. *Id.* Petitioner did not object to Judge Escobar’s recusal at the hearing.

On July 27, the parties received notice that the underlying matter and all pending motions had been reassigned to Judge Gall and set for hearing on the merits on August 17. Pet’r’s Ex. 7. It was not until *a week and a half later*, that Petitioner filed its very belated Writ of Prohibition with this Court, and the accompanying Motion to Stay. Petitioner seeks “emergency” intervention to stay a recusal that it knew about—but did not object to—three weeks ago, and which has been fully effectuated by the transfer of the matter to Judge Gall, who has already scheduled a hearing on the merits.

III. ARGUMENT

Petitioner’s Motion should be denied. Petitioner failed to file its Motion at the earliest possible time as required by the appellate rules. Petitioner also fails to meet its burden in showing that a stay is required. Each of the relevant factors considered on a motion to stay favor denial. Because Petitioner cannot argue that it will be harmed if the merits of the case are heard by Judge Gall rather than Judge Escobar, denial will not seriously harm Petitioner, nor will it defeat the true object of Petitioner’s Writ. However, a stay would significantly harm DDG, who seeks disclosure of documents relevant to the upcoming November election. Finally,

Petitioner's Writ is unlikely to be successful as Judge Escobar's recusal is proper under Rule 2.11(A).

A. The Court should summarily deny the Motion due to Petitioner's delay in seeking "emergency" relief.

"If an emergency motion is not filed at the earliest possible time, the court may summarily deny the motion." NRAP 27(e)(1). Here, there can be no serious argument that Petitioner filed "at the earliest possible time." Instead, Petitioner inexcusably delayed filing for three weeks after learning of Judge Escobar's recusal. Oral orders that deal with "case management issues, scheduling, administrative matters or emergencies that do not allow a party to gain a procedural or tactical advantage are valid and enforceable." *Nalder v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 136 Nev. 200, 208, 462 P.3d 677, 685 (2020). Judge Escobar's recusal involved case management and administrative matters that do not "deal with the procedural posture or merits of the underlying controversy." *Id.* Despite learning of Judge Escobar's intent to recuse herself and her reasoning on July 14, Petitioner did not file its Motion—or voice any objection to recusal—until August 5.¹

¹ Petitioner's argument that it could not seek relief from the district court in the first instance is also untenable. First, Petitioner had approximately two weeks before this matter was transferred in which it could have sought relief while it was still pending before Judge Escobar. Petitioner attempts to avoid scrutiny of its inexplicable delay by arguing that it could not seek relief from Judge Gall, based on its own argument that Judge Gall should not make decisions on a case improperly before her. But not only is this a made up restriction, it ignores the weeks that came

The equitable doctrine of laches similarly weighs against granting the Motion. Laches applies if a party's delay in seeking relief disadvantages the other, causing a change of circumstances to make granting relief to the delaying party inequitable. *Bldg. & Const. Trades Council of N. Nevada v. State ex rel. Pub. Works Bd.*, 108 Nev. 605, 610–11, 836 P.2d 633, 636–37 (1992). In determining whether laches should be applied to preclude consideration of an extraordinary remedy courts consider “ (1) whether there was an inexcusable delay in seeking the petition, (2) whether an implied waiver arose from the petitioner's knowing acquiescence in existing conditions, and (3) whether there were circumstances causing prejudice to the respondent.” *Id.* Here, all three favor precluding consideration.

First, Petitioner offers no explanation for its delay in seeking emergency relief to stay Judge Escobar's recusal. As detailed *supra*, Petitioner delayed filing for three weeks. Second, an implied waiver arose from Petitioner's knowing acquiescence in existing conditions in the weeks following the July 14 motion hearing. *See id.* Lastly, Petitioner's inexcusable delay operates to DDG's substantial prejudice. DDG has been denied access to records to which it is entitled under the NPRA that are relevant to an upcoming election. DDG has a right to timely disclosure and expedited adjudication under the NPRA. NRS §§ 239.001, 239.010.

before reassignment, and assumes Petitioner will be successful in its challenge of Judge Escobar's recusal.

B. Petitioner’s Motion should be rejected on the merits.

It is Petitioner’s burden to show that a stay is necessary. Petitioner fails to meet this heavy burden. Issuance of a stay disrupts the “‘ordinary processes of administration and judicial review’ [which] best ensure ‘careful review and a meaningful decision.’” *Sierra Club v. Trump*, 929 F.3d 670, 688 (9th Cir. 2019) (citing *Nken v. Holder*, 556 U.S. 427, 129 S. Ct. 1749 (2009)). A stay applicant must make a “strong showing” that the circumstances of the case justify the Court’s exercise of discretion. *See id.* at 687-88. The Court’s consideration of a stay motion is guided by four factors articulated in NRAP 8(c):

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

NRAP 8(c); *Hansen v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000) (citing *Kress v. Corey*, 65 Nev. 1, 189 P.2d 352 (1948)). Each weigh strongly against issuance of a stay in this matter.

1. The object of Petitioner’s appeal will not be defeated absent a stay.

The object of Petitioner’s appeal is not that the merits of DDG’s petition be heard by Judge Escobar. Petitioner’s appeal pertains to whether Judge Escobar’s recusal was improper under Nevada Code of Judicial Conduct 2.11(A), Comment 1.

See Mot. at 7. In fact, Petitioner makes *no* argument that transfer of the case to another judge to adjudicate the merits will harm Petitioner's interests. Nor could it. Judge Escobar's recusal was based on a relationship that would reasonably bring her bias *against Petitioner* into question. The absurdity of Petitioner's position lays bare the motive behind its late-raised objection. Determining whether recusal was proper can be accomplished with or without a stay. It is of no consequence to the district court's consideration of the underlying matter or other motions pending before Judge Gall. Thus, this factor weighs against granting a stay.

2. Petitioner will not suffer irreparable or serious injury absent a stay.

Similarly, Petitioner cannot articulate any real harm it will suffer if its Motion is denied. Petitioner offers two supposed harms from denial: (1) it will be forced to use a preemptory challenge denied, and (2) Judge Gall may decide the merits of the underlying matter before this Court rules on Petitioner's writ petition. *See* Mot. at 7. Petitioner's failure to show harm to its interests that will result from Judge Gall rather than Judge Escobar ruling on the merits is fatal. This failure also shows Petitioner's threatened preemptory challenge is simply another strategy of delay.

3. DDG will suffer irreparable or serious injury if a stay is granted.

In contrast, DDG *will* suffer irreparable injury if a stay is granted. The NPRA mandates expedited adjudication of orders compelling disclosure "over other civil

matters to which priority is not given by other statutes.” NRS § 239.011(2). DDG’s right to an expedited hearing has already been hampered. If Petitioner’s Motion is granted, it will further delay consideration of the underlying matter causing DDG *actual* harm. The public has a right to know whether Sheriff Lombardo has upheld his duty to avoid conflicts of interest between public duties and his own private interests. Pet’r’s Ex. 4. Issuance of a stay would severely delay access to this important information, harming not only DDG’s interests but the public interest.

4. Petitioner is unlikely to prevail on the merits of its appeal.

Finally, and most importantly, Petitioner is unlikely to prevail on the merits of its appeal. Judge Escobar’s recusal was proper under Rule 2.11 of the Nevada Code of Judicial Conduct, which provides “A judge *shall* disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned.” Nev. Sup. Ct. R. CJC 2.11(A) (emphasis added). The comment to this rule explains that it applies “regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply.” Nev. Sup. Ct. R. CJC 2.11, Comment 1.

Here, Judge Escobar’s judgment that a 30-year friendship with an interested party’s political opponent might give rise to questions about her impartiality is entirely reasonable, and deference to her judgment is built into the governing rule.²

² Petitioner writes in its fact section that Judge Escobar “routinely” disqualifies herself in NPRA cases, Mot. at 4, but makes no argument and cites nothing to support that recusing from three NPRA cases in four years is inappropriate.

Rule 2.11 does not require Judge Escobar to state the extent of her bias, it leaves to her discretion the determination as to whether her impartiality might be reasonably questioned necessitating recusal and does not permit the parties to object to that decision. Nev. Sup. Ct. R. CJC 2.11(C) provides that for any *other* type of disqualification the parties can agree that the judge may continue to preside. But this waiver is not available in the case of bias or prejudice.

The case law Petitioner cites is inapposite. In all but one, recusal was not voluntary, it was requested by a party. *See City of Las Vegas Downtown Redevelopment Agency v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 116 Nev. 640, 642, 5 P.3d 1059, 1060 (2000) (respondent sought recusal after judge disclosed campaign contributions ranging from \$150 to \$2,000 from casinos affiliated with the project at issue); *In re Complaint of Jud. Misconduct*, 816 F.3d 1266, 1268 (9th Cir. 2016) (judge denied any potential bias stemming from being attending university and living next to its attorney); *United States v. Mosesian*, 972 F.2d 1346, 1992 WL 197408, at *5 (9th Cir. 1992) (unpublished) (judge refused to recuse when defendants alleged bias based on judge's friendships with former colleagues representing parties in separate but related cases). And in *Ham v. District Court*, 93 Nev. 409 (1977), though recusal was technically voluntary, it was requested in-chambers by a party alleging bias. *See* 93 Nev. 409, 413, 566 P.2d 420, 423 (1977). Regardless, *Ham* is clearly distinguishable on the facts. The judge, who had been

presiding over the case for three years, responded to allegations of bias by informing counsel that “he entertained no such bias or prejudice for or against either party, stating additionally that during the course of the proceedings, he had ruled in favor of and against both parties. Notwithstanding this, the Judge agreed to disqualify himself.” 93 Nev. at 411. In *Jeaness v. Second Judicial District Court*, this Court clarified that, “*Ham* is the narrow exception. In *Ham* it was ‘emphasize(d) that this case is decided on these facts alone,’” and it was only in a “narrow range of cases [that] extraordinary intervention by this court would be warranted.” 97 Nev. 218, 220, 626 P.2d 272, 274 (1981). Here, in contrast, Judge Escobar was the one to disclose her relationship with Sheriff Lombardo’s political opponent, and to conclude that it forms a reasonable basis to question her impartiality in a matter whose disposition may impact the election. This is more akin to *Humboldt County Public Defender v. Sixth Judicial District Court of State*, where the judge voluntarily recused due to his own admitted prejudice against an attorney and this Court affirmed his ability to do so. 126 Nev. 722, 2010 WL 3385773 (2010) (unpublished disposition). Petitioner is unlikely to prevail on the merits of its appeal.

IV. CONCLUSION

For all of the foregoing reasons, Petitioner’s Motion should be denied.

Dated this 9th day of August, 2022.

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By: /s/ Bradley Schrager, Esq.

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CERTIFICATE OF SERVICE

I certify that on August 9, 2022, I submitted the foregoing **REAL PARTY IN INTEREST DUE DILIGENCE GROUP, LLC'S OPPOSITION TO PETITIONER LVMPD'S EMERGENCY MOTION FOR RELIEF TO STAY UNDER NRAP 27(e)** for filing via the Court's eFlex electronic filing system.

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I further certify that I served a copy of this document by emailing a true and correct copy thereof, as follows:

The Honorable Maria Gall

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By: /s/Dannielle Fresquez

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