

1 **MDSM**
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11 Attorneys for the Respondent

12 **EIGHTH JUDICIAL DISTRICT COURT**

13 **CLARK COUNTY, NEVADA**

14 MICHAEL SHACKLEFORD, as an
15 Individual,

16 Petitioner,

17 vs.

18 NEVADA GAMING COMMISSION, a
19 Nevada Government Entity,

20 Respondent.

21 Case No.: A-12-671998-W

22 Dept No.: XIII

23 **MOTION TO DISMISS**

24 **PETITION FOR WRIT OF MANDAMUS**

25 COMES NOW, Respondent, STATE OF NEVADA, *ex rel* its NEVADA GAMING
26 COMMISSION ("COMMISSION"), by and through its attorneys CATHERINE CORTEZ
27 MASTO, Attorney General, and MICHAEL P. SOMPS, Senior Deputy Attorney General, and
28 hereby moves to dismiss the Petition for Writ of Mandamus submitted by Petitioner,
MICHAEL SHACKLEFORD, and requests that the Petition for Writ of Mandamus be denied.

This Motion to Dismiss is made pursuant to NRS 34.150 *et. seq.*, and NEV. R. OF CIV.
P. 12(b), and is based upon the attached Points and Authorities and all other papers and
pleadings on file.

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1 POINTS AND AUTHORITIES

2 I.

3 BACKGROUND

4 On December 21, 2012, Petitioner filed a Petition for Writ of Mandamus (Petition) with
5 the Eighth Judicial District Court seeking the issuance of a writ of mandamus requiring the
6 COMMISSION to release "slot win percentages for Clark County casinos with \$1,000,000 in
7 revenue, by both denomination and casino for the last available twelve (12) month period."

8 On January 8, 2013, Petitioner served the Petition on the COMMISSION. No other
9 parties have been served with the Petition.

10 II.

11 STANDARD FOR WRIT RELIEF

12 "The petitioner has the burden to establish that writ relief is appropriate." *Halverson v.*
13 *Secretary of State*, 124 Nev. 484, 487, 186 P.3d 893, 896 (2008). "A writ of mandamus will
14 issue when the respondent has a clear, present legal duty to act." *Round Hill General Imp.*
15 *Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981) (citing NRS 34.160 and *Gill v.*
16 *St. ex rel. Booher*, 75 Nev. 448, 345 P.2d 421 (1959)). A writ of mandamus is available to
17 compel the performance of an act which the law requires as a duty resulting from an office,
18 trust or station or to compel the performance of an act which the law especially enjoins as a
19 duty resulting from an office, trust or station. See NRS 34.160 and *Cote H. v. Eighth Judicial*
20 *Dist. Court ex rel. County of Clark*, 124 Nev. 36, 39, 175 P.3d 906, 907 – 908 (2008). See
21 also *State v. Second Judicial Dist. Court ex rel. County of Washoe*, 118 Nev. 609, 55 P.3d
22 420 (2002) ("The writ is generally issued to compel the performance of an act that the law
23 requires as a duty resulting from an office, trust or station, or to control an arbitrary or
24 capricious exercise of discretion.")

25 "Mandamus, moreover, is an extraordinary remedy, and the decision to entertain such
26 a petition is addressed solely to [the court's] discretion. *State ex rel. Masto v. Second*
27 *Judicial Dist. Court ex rel. County of Washoe*, 125 Nev. 37, 43-44, 199 P.3d 828, 832 (2009)
28 (citing *Poulos v. District Court*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982)).

1 actions are the basis for the suit. An action against the State of
2 Nevada must be filed in the county where the cause or some part
3 thereof arose or in Carson City. In an action against the State of
4 Nevada, the summons and a copy of the complaint must be served
5 upon:

(a) The Attorney General, or a person designated by the
Attorney General, at the Office of the Attorney General in Carson
City; and

(b) The person serving in the office of administrative head of
the named agency.

6
7 The COMMISSION does not dispute that NRS 41.031(2)(b) has been complied with.
8 However, the requirement in NRS 41.031(2)(a) to serve the Nevada Attorney General has
9 not been met, which is a jurisdictional prerequisite.

10 NEV. R. OF CIV. P. 12(b)(4) allows for a motion to challenge sufficiency of service of
11 process. Petitioner's service of his Petition is insufficient as he has not served the Nevada
12 Attorney General. Therefore, the COMMISSION requests that the Petition be dismissed.

13 II. THE PETITION FOR WRIT OF MANDAMUS IS DEFECTIVE

14 Petitioner's Petition for Writ of Mandamus is itself defective. NRS 34.170 provides
15 that the writ "shall be issued upon affidavit, on the application of the party beneficially
16 interested." See also *State v. Wright*, 10 Nev. 167 (1875) ("The truth of the facts set forth in
17 the petition should be shown by the *oath* of the petitioner, or the *affidavits* of others.").

18 Petitioner neither verified his Petition nor included an affidavit. Therefore, Petitioner
19 failed to comply with NRS 34.170 and his Petition for Writ of Mandamus should be dismissed
20 pursuant to NEV. R. CIV. P. 12(b)(5).

21 III. PETITIONER DOES NOT HAVE A CLEAR RIGHT TO THE RELIEF REQUESTED

22 Regardless of the above-argued defective aspects of the Petition, Petitioner is not
23 entitled to the issuance of a writ of mandate against the COMMISSION based on a
24 substantive analysis. Although Petitioner relies on NRS chapter 239, it does not provide
25 authority establishing a clear right to the relief requested, which is a prerequisite to the court
26 granting his Petition. Therefore, Petitioner has failed to state a claim upon which relief can
27 be granted and his Petition should be dismissed pursuant to NEV. R. OF CIV. P. 12(b)(5).
28

1 a. Petitioner is Seeking Information that is Confidential Pursuant to NRS 463.120

2 Petitioner seeks "win percentages or payback percentages of slot machines for Clark
3 County casinos with \$1,000,000 in revenue, by both denomination and casino." However,
4 there is no COMMISSION document that identifies the slot win percentage for each casino.
5 See Exhibit A, Affidavit of Frank Streshley. The COMMISSION simply does not maintain this
6 information in the requested format. Rather, any win percentage by denomination and by
7 casino would have to be calculated using revenue information submitted by gaming
8 licensees in tax related filings. See Exhibit A, Affidavit of Frank Streshley.

9 First, there is no duty on the part of the COMMISSION to provide records it does not
10 maintain or engage staff in the work of calculating and then documenting slot win
11 percentages for casinos in Clark County at the behest of and for the personal benefit of
12 Petitioner. If Petitioner wants the slot win percentage for particular casinos, he should go to
13 the source for that information. He should request that information from the casinos as that
14 information belongs to them. There is no basis to compel the COMMISSION to use State
15 resources to compile information for Petitioner's personal research projects.

16 Second, a writ of mandamus is available to compel the performance of an act which
17 the law requires. However, there is no legal duty on the part of the COMMISSION to
18 disclose to Petitioner those financial and tax related filings submitted by gaming licensees
19 that could be used to calculate slot win percentages. Those documents are not public
20 records required to be provided to the public upon request pursuant to the provisions of NRS
21 chapter 239. Instead, those documents are unquestionably deemed confidential pursuant to
22 NRS 463.120.

23 NRS 463.120(4) (a) provides in relevant part that:

24 Except as otherwise provided in this section, all information
25 and data:

26 (a) Required by the Board or Commission to be furnished to
27 it under chapters 462 to 466, inclusive, of NRS or any regulations
28 adopted pursuant thereto or which may be otherwise obtained
relative to the finances, earnings or revenue of any applicant or
licensee;

1 are confidential and may be revealed in whole or in part only in the
2 course of the necessary administration of this chapter or upon the
3 lawful order of a court of competent jurisdiction. The Board and
4 Commission may reveal such information and data to an authorized
5 agent of any agency of the United States Government, any state or
6 any political subdivision of a state or the government of any foreign
7 country. Notwithstanding any other provision of state law, such
8 information may not be otherwise revealed without specific
9 authorization by the Board or Commission.

10 NRS 463.120(4) (a) (emphasis added).

11 Because the COMMISSION has no duty to provide confidential information to the
12 public upon request, there is no basis for the issuance of a writ of mandamus.

13 While Petitioner argues in his Petition that he is not seeking confidential revenue
14 information, the reality is that his request is substantively related to revenue. Even the
15 Petition categorizes the information sought as "Gaming Revenue Information." See Petition,
16 p. 2, ll. 23 -24 and p. 4, ll. 15 – 16. For Petitioner to argue that he does not seek revenue
17 related information from the COMMISSION is disingenuous.

18 Petitioner also argues that the COMMISSION could redact the identity of the casino
19 associated with confidential information. However, the revenue figures Petitioner seeks are
20 in and of themselves confidential regardless of whether a casino name is removed. There is
21 nothing that could be redacted that would result in the revenue information losing its
22 confidential nature. NRS 463.120 makes all information and data relative to finances,
23 earnings, and revenue confidential.

24 Petitioner does not have a clear right to the relief he seeks as the information that is
25 the subject of his Petition is confidential. Therefore, the COMMISSION requests that the
26 Petition be dismissed pursuant to NEV. R. OF CIV. P. 12(b)(5).

27 b. Petitioner is Seeking Information that may be Privileged Pursuant to NRS
28 463.3407

 Those documents in the custody of the COMMISSION that would enable Petitioner to
calculate "win percentages" for slot machines at the large Clark County casinos may, in
addition to being confidential, be privileged pursuant to NRS 463.3407. NRS 463.3407
provides:

1
2 1. Any communication or document of an applicant or
3 licensee, or an affiliate of either, which is made or transmitted to the
4 Board or Commission or any of their agents or employees to:

5 (a) Comply with any law or the regulations of the Board or
6 Commission;

7 (b) Comply with a subpoena issued by the Board or
8 Commission; or

9 (c) Assist the Board or Commission in the performance of
10 their respective duties,

11 is absolutely privileged and does not impose liability for defamation
12 or constitute a ground for recovery in any civil action.

13 2. If such a document or communication contains any
14 information which is privileged pursuant to chapter 49 of NRS, that
15 privilege is not waived or lost because the document or
16 communication is disclosed to the Board or Commission or any of
17 its agents or employees.

18 3. Notwithstanding the provisions of subsection 4 of NRS
19 463.120:

20 (a) The Board, Commission and their agents and
21 employees shall not release or disclose any information,
22 documents or communications provided by an applicant or
23 licensee, or an affiliate of either, which are privileged pursuant to
24 chapter 49 of NRS, without the prior written consent of the
25 applicant, licensee or affiliate, or pursuant to a lawful court order
26 after timely notice of the proceedings has been given to the
27 applicant, licensee or affiliate.

28 (b) The Board and Commission shall maintain all privileged
information, documents and communications in a secure place
accessible only to members of the Board and Commission and their
authorized agents and employees.

(c) The Board and Commission shall adopt procedures and
regulations to protect the privileged nature of information,
documents and communications provided by an applicant or
licensee, or an affiliate of either.

NRS 463.3407 (emphasis added).

Pursuant to the provisions of NRS 463.3407, the COMMISSION is barred from
disclosing any information provided by a licensee which is privileged pursuant to NRS
chapter 49 without the licensee's consent. NRS chapter 49 includes an "accountant and
client" privilege pursuant to NRS 49.125 – 49.205, and that privilege, if it exists between any
of the gaming licensees and their accountants, would remain intact despite submitting the

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1 privileged information to the COMMISSION. See NRS 463.3407(3)(a). Thus, the
2 information sought by Petitioner conceivably encompasses privileged communications.

3 Accordingly, Petitioner does not have a clear right to the relief he seeks as the
4 information that is the subject of his Petition is potentially privileged. Therefore, the
5 COMMISSION requests that the Petition be dismissed pursuant to NEV. R. OF CIV. P.
6 12(b)(5).

7 IV. PETITIONER HAS NOT COMPLIED WITH NRS 463.341 OR NRS 463.3407(3)(a).

8 Given that Petitioner is seeking an order from this Court requiring the COMMISSION
9 to release information that is confidential pursuant to NRS 463.120(4) and potentially
10 privileged pursuant to NRS 463.3407, Petitioner must comply with the notice requirements
11 contained in NRS 463.341 and NRS 463.3407(3)(a). NRS 463.341 provides:

12 An application to a court for an order requiring the Board or
13 the Commission to release any information declared by law to be
14 confidential shall be made only upon motion in writing on 10 days'
15 written notice to the Board or Commission, the Attorney General
16 and all persons who may be affected by the entry of such order.
17 Copies of the motion and all papers filed in support of it shall be
18 served with the notice by delivering a copy in person or by certified
19 mail to the last known address of the person to be served.

20 NRS 463.341.

21 A prerequisite to a court order requiring the COMMISSION to release any confidential
22 information is "notice to all persons who may be affected by the entry of such order."

23 Again, Petitioner seeks the release of "slot win percentages for Clark County casinos
24 with \$1,000,000 in revenue, by both denomination and casino for the last available twelve
25 (12) month period." Given that every Clark County casino with \$1,000,000 or more in
26 revenue may be affected by releasing confidential information that is also proprietary to them,
27 Petitioner is required to notify those casinos that he is seeking a court order mandating that
28 the COMMISSION release the information. There is nothing in the Petition to suggest that
such notice has been provided.

1 Similarly, NRS 463.3407(3)(a) requires timely notice to a licensee of any proceedings
2 that may result in the release of their privileged information. Again, all of those Clark County
3 casinos that may be impacted by a court order requiring the COMMISSION to release
4 information that may be privileged must be given notice of this matter.

5 Petitioner's evident failure to comply with NRS 463.341 and 463.3407(3)(a) forms yet
6 another basis for denial of his Petition. With the failure to comply with NRS 463.341 and
7 463.3407(3)(a), Petitioner is unable to establish that he has a clear right to the relief he
8 seeks and it is appropriate to dismiss the Petition.

9 IV.

10 CONCLUSION

11 Petitioner's Petition for Writ of Mandate is defective in a number of ways. There are
12 various technical, yet decisive, failures associated with the Petition in that it has not been
13 properly served and does not include the required affidavit. However, even beyond these
14 failures, Petitioner still does not have a clear right to the relief he seeks. It is worth keeping
15 in mind that Petitioner is seeking an extraordinary remedy to obtain access to extraordinarily
16 sensitive proprietary information that ultimately belongs to Nevada gaming licensees. It is his
17 burden to support his request. Significantly, there is no duty on the part of the
18 COMMISSION to disclose confidential and potentially privileged information to Petitioner
19 necessitating this Court issue a writ of mandamus. Ultimately, Petitioner cannot meet his
20 burden given that he is not entitled to access confidential and potentially privileged
21 information. Therefore, the COMMISSION requests that the Petition be dismissed for failure
22 to state a claim upon which relief can be granted pursuant to NEV. R. OF CIV. P. 12(b).

23 Dated this 23rd day of January, 2013.

24 Submitted by:
25 CATHERINE CORTEZ MASTO
26 Attorney General

27 By: /s/ Michael P. Somps
28 MICHAEL P. SOMPS
Senior Deputy Attorney General

Office of the Attorney General
Gaming Division
5420 Kietzke Lane, Suite 202
Reno, Nevada 89511

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 23rd day of January 2013, I served a copy of the foregoing MOTION TO DISMISS PETITION FOR WRIT OF MANDAMUS by United State Mail, first-class, postage prepaid, addressed to the following:

Brandon L. Phillips, Esq.
Brandon L. Phillips, Attorney at Law, PLLC
3960 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169

/s/ Melissa Mendoza
An Employee of the State of Nevada

Office of the Attorney General
Gaming Division
5420 Kietzke Lane, Suite 202
Reno, Nevada 89511

1 **AFFT**
2 CATHERINE CORTEZ MASTO
3 Attorney General
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5 Senior Deputy Attorney General
6 Nevada State Bar No. 6507
7 Office of the Attorney General
8 5420 Kietzke Lane, Suite 202
9 Reno, Nevada 89511
10 (775) 850-4152

11 *Attorneys for the Respondent*

12 **EIGHTH JUDICIAL DISTRICT COURT**
13 **CLARK COUNTY, NEVADA**

14 MICHAEL SHACKLEFORD, as an
15 Individual,

16 Petitioner,

17 vs.

18 NEVADA GAMING COMMISSION, a
19 Nevada Government Entity,

20 Respondent.

Case No.: A12-671998-W

Dept. No.: XIII

21 **AFFIDAVIT OF FRANK STRESHLEY**

22 STATE OF NEVADA)

23 CARSON CITY)

ss:

24 I, FRANK STRESHLEY, do hereby swear under oath that the assertions of this Affidavit
25 are true and correct to the best of my knowledge and belief.

26 1. I am currently employed by the State Gaming Control Board (Board) as Chief of the
27 Tax and License Division, and as such, my duties include the supervision and administration
28 of the Board's and Nevada Gaming Commission's (Commission) collection of all gaming taxes
and fees, including all reporting related to such collections.

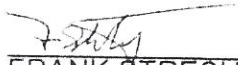
2. That I make this Affidavit for use in the Petition for Writ of Mandamus (Petition) filed
in the above-captioned matter, and know the matters set forth herein on personal knowledge
and am competent to testify thereto if called upon to do so.

1 3. That I am aware that the Petition seeks a court order requiring the Commission to
2 disclose "Gaming Revenue Information, specifically win percentages or payback percentages
3 of slot machines for Clark County casinos with \$1,000,000 in revenue, by both denomination
4 and casino for the last available twelve (12) month period."

5 4. That the Commission does not maintain a record of the information sought by the
6 Petition in the requested format. Rather, any win percentage by denomination and by casino
7 would have to be calculated using revenue information submitted by gaming licensees in tax
8 related filings, which is confidential pursuant to NRS 463.120.

9 Further affiant sayeth not.

10 DATED this 23rd day of January, 2013.

11
12 
13 FRANK STRESHLEY, Chief
14 State Gaming Control Board
15 Tax and License Division

14 SUBSCRIBED AND SWORN to before me

15 this 23rd day of January, 2013.

16 
17 NOTARY PUBLIC

