IN THE COURT OF APPEALS FOR THE STATE OF NEVADA

VENETIAN CASINO RESORT, LLC; LAS VEGAS SANDS, LLC, Appellants, v. EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA; THE HONORABLE KATHLEEN DELANEY, Respondents, JOYE SEKERA, Real Party in Interest	Court of Appeals Case No.: 79689-COA Electronically Filed Oct 08 2019 05:29 p.m. Elizabeth A. Brown Clerk of Supreme Court District Court Case No.: A788379

JOYCE SEKERA'S OPPOSITION TO APPELLANTS' EMERGENCY MOTION FOR STAY UNDER NRAP 27(e)

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Real Party in Interest, JOYCE SEKERA. ("Ms. Sekera"), by and through her attorneys, The Galliher Law Firm, hereby submits the following Opposition to Appellants' Emergency Motion Under NRAP 27(e). This Opposition is based upon and supported by the following memorandum of points and authorities, the pleadings and papers on file, the exhibits attached hereto, and any argument that the Court may allow at the time of hearing.

DATED this 8th of October, 2019

THE GALLIHER LAW FIRM

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MEMORANDUM AND POINTS OF AUTHORITIES

I. FACTUAL BACKGROUND

This is a case arises out of a slip and fall in the Venetian Casino at 12:30 p.m on November 4, 2016. (VEN005.) Ms. Sekera was walking past the Grand Lux Café Restrooms in the Venetian when she slipped and fell on water on the slick marble floor. (*Id.*) Appellants however, contend "Plaintiff's fall had nothing to do with a foreign substance being on the floor." (VEN061:27-28.) On the way down Ms. Sekera struck her skull and left elbow on the pillar and her left hip on the ground. Over the last three years Ms. Sekera treated for her injuries with low back injections, medial branch blocks and two rounds of radio frequency ablations. (APP122-24.) In June, Ms. Sekera's doctor recommended a fusion back surgery which Ms. Sekera will undergo in the near future. (APP125-26.)

During discovery Ms. Sekera's requested Appellants produce incident reports from the three years prior to the Ms. Sekera's fall to present. (VEN040.) In response, Appellants produced 64 redacted incident reports. (VEN056:2-057:2.) These reports redacted phonebook information (name, address and phone) plus dates of birth. (APP127-39.) The redacted incident reports contain spaces for social security numbers and drivers' licenses, however, Appellants did not redact this information because they do not collect it. (APP127-39.) Guests completing forms also did not fill in this information. (VEN007, APP127, APP128, APP136.)

Ms. Sekera asked Appellants to provide unredacted incident reports so she could identify witnesses to rebut the comparative negligence claim that Ms. Sekera should have seen liquid on the floor before she fell. (VEN057:3-14.) Appellants refused to produce the unredacted reports and filed for a protective order. (*Id.*)

The Discovery Commissioner recommended ("April 4, 2019 DCRR") granting the Motion for a Protective Order and ordering the unredacted incident reports be withheld. (VEN203.) Ms. Sekera objected to the April 4, 2019 DCRR because she needed the contact information for potential witnesses in her case and because Appellants' fear of collaborative discovery is not sufficient grounds for a protective order. (APP161:18-27.) The District Court overruled the April 4, 2019 DCRR because there was no legal basis for the protective order. (APP193.)

II. LEGAL ARGUMENT

A. Legal Standard for NRAP 8 Emergency Motion

A party may move for a stay of an order "pending appeal or resolution of a petition to the Supreme Court or Court of Appeals for an extraordinary writ [.]" NRAP 8(a)(1)(A). In deciding whether to issue a stay the Court must consider the following factors:

> (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). Appellants have the burden to show the factors in favor of a stay. *Aspen Fin. Servs. v. Dist. Ct.,* 128 Nev. 635, 642, 289 P.3d 201, 206 (2012).

In relation to discovery appeals, the Supreme Court held "Absent a clear abuse of discretion, we will not disturb a district court's decision regarding discovery." *In re Adoption of a Minor Child,* 118 Nev. 962, 968, 60 P.3d 485, 489 (2002) (*citing Diversified Capital v. City N. Las Vegas*, 95 Nev. 15, 23, 590 P.2d 146, 151 (1979)). Thus, to receive a stay, Appellants must show the District Court abused its discretion when it denied Appellants' Motion for a Protective Order.

B. Appellants Are Not Likely to Prevail on the Merits in the Writ

1. Appellants Fear of Collaborative Sharing of Information is Not Grounds for a Protective Order

Although not explicitly argued by Appellants, the language of the Writ makes clear the largest, if not sole motivation behind this protective order was to prevent the collaborative sharing of information. (*See* Writ at e, 1, 2, 3, 8, 9, 13, 14, 15, 17, 18, 22, 28 (complaining of collaborative discovery.)) Courts nationwide however uniformly agree that a concern of the risk of public disclosure or collaborative sharing of information does not constitute good cause for a protective order. *See, e.g. Olympic Refining Co. v. Carter*, 332 F.2d 260 (9th Cir. 1964); *see also De La Torre v. Swift Transp. Co.*, No. 2:13-CV-1786 GEB, 2014 WL

3695798, at *3 (E.D. Cal. July 21, 2014).[1] "The risk—or in this case, the certainty—that the party receiving the discovery will share it with others does not alone constitute good cause for a protective order." *Wauchop*, 138 F.R.D. at 546.

Rule 1 the Federal and Nevada Rules of Civil Procedure require they "be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." *See* FRCP 1; *see also* NRCP 1. Collaborative discovery fosters the goals of Rule 1 by eliminating the time and expense involved in re-discovery.[2] "It is particularly appropriate that this principle be applied in… cases in which individual plaintiffs must litigate against large, corporate defendants." *Baker*, 132 F.R.D. at 126 "Maintaining a suitably high cost of litigation for future adversaries is not a proper

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[1] *See also Wauchop v. Domino's Pizza,* 138 F.R.D. 539, 546 (N.D. Ind. 1991); *Ericson v. Ford Motor*, 107 F.R.D. 92, 94 (E.D. Ark. 1985); *Baker v. Liggett Group,* 132 F.R.D. 123, 125 (D.Mass 1990); *Garcia v. Peeples*, 734 S.W. 2d 343, 347-348 (Tex. 1987); *Earl v. Gulf & Western Mf.*, 366 N.W.2d 160, 165 (Wis. App. 1985); *Nestle Foods v. Aetna Casualty & Surety*, 129 F.R.D. 483, 484 (D. N.J. 1990); *Farnum v. G.D. Searle & Co.,* 339 N.W.2d 384, 390 (Iowa 1983); *Am. Tel. and Tel. Co. v. Grady*, 594 F.2d 594 (7th Cir. 1979); *Johnson Foils v. Huyck,* 61 F.R.D. 405 (N.D.N.Y.1973); *Williams v. Johnson and Johnson*, 50 F.R.D. 31 (S.D.N.Y. 1970); *Parsons v. Gen. Motors*, 85 F.R.D. 724, 726 (N.D. Ga. 1980); *Deford v. Schmid Prod. Co.*, 120 F.R.D. 648, 654 (D. Md. 1987);

[2] *Williams*, 50 F.R.D. at 32; *Wauchop*, 138 F.R.D. at 546; *Wilk v. Am. Med. Ass'n*, 635 F.2d 1295, 1299 (7th Cir.1980); *Grady*, 594 F.2d at 597; *Phillips Petroleum v. Pickens*, 105 F.R.D. 545, 551 (N.D.Tex.1985); *Carter-Wallace v. Hartz Mountain Indus.*, 92 F.R.D. 67, 70 (S.D.N.Y.1981); *Parsons*, 85 F.R.D. at 726; *Garcia*, 734 S.W.2d at 347; *Ward v. Ford Motor,* 93 F.R.D. 579, 580 (D.Colo.1982); *Baker*, 132 F.R.D. at 126; *Patterson v. Ford Motor,* 85 F.R.D. 152, 154 (W.D.Tex.1980).

purpose under Rules 1 or 26." *Wauchop*, 138 F.R.D. at 547; *see also Cipollone v. Liggett Grp., Inc.,* 113 F.R.D. 86, 87 (D.N.J. 1986).

A protective order in this case violates Rule 1 by increasing the time and expense of litigation by forcing plaintiffs to re-discover information. This is especially true here because Appellants are large corporations with teams of skilled lawyers who zealously argue on their behalf. Though there is nothing wrong with this, it increases the costs for individual plaintiffs to bring their claims.

More important than decreasing the costs of litigation "[s]hared discovery is an effective means to insure full and fair disclosure." *Garcia v. Peeples*, 734 S.W.2d 343, 347 (Tex. 1987). "Parties subject to a number of suits concerning the same subject matter are forced to be consistent in their responses by the knowledge that their opponents can compare those responses." *Garcia*, 734 S.W.2d at 347; *Buehler v. Whalen,* 70 Ill. 2d 51, 65, 374 N.E.2d 460, 466 (1977). The improper conduct the *Garcia* and *Buehler* courts guarded against is evident here: Appellants refused to fully disclose documents in four pending lawsuits and violated a court order in *Smith v. Venetian.* Appellants' failure to secure a protective order before disclosing incident reports is the only reason these four plaintiffs discovered Appellants violations. A protective order in this case could only serve the improper purpose of giving Appellants peace of mind future plaintiffs will not catch their discovery violations. This is not a legitimatize purpose for a protective order.

Because the District Court properly determined Appellants could not receive a protective order to prevent Ms. Sekera from sharing discovery, Appellants are unlikely to prevail on the merits on this argument and a stay is thus improper.

2. Appellants Apply the Incorrect Legal Standard for Review of a Motion for a Protective Order

Because Appellants filed this Writ on a motion for protective order, Appellants must show District Court abused its discretion when it determined Appellants did not show good cause for a protective order and therefore denied Appellants request for the same. *See* NRCP 26(c) ("for good cause shown" the Court may "make any order which justice requires to protect a party…"); *see also Beckman Indus., Inc., v. Int'l. Ins. Co.,* 966 F.2d 470, 476 (9th Cir. 1992) (to meet the burden of persuasion, "the party seeking the protective order must show good cause by demonstrating a particular need for the protection sought").

Section VII.A.1. of Appellants' Writ asks this Court to analyze the wrong legal standard, *to wit,* that the District Court abused its discretion because Ms. Sekera did not meet her burden of proof under NRCP 26(b)(1) to establish the need for the unredacted incident reports. (Wirt at 20.) Ms. Sekera's proof of discoverability of the incident reports under NRCP 26(b)(1) is not at issue in this Writ because it is not part of the burden of proof for a protective order. Because Appellants' Writ asks the Court to analyze the wrong standard in reviewing a

motion for a protective order, which the Appellate Court will not do, Appellants are unlikely to prevail on the merits on this argument and a stay is thus improper.

3. The Information in the Incident Reports Is Not Protectable

The incident reports produced by Appellants in this case contain information that is only slightly more revealing or invasive than information contained in a phonebook – phonebook information (name, address, phone) plus date of birth. Appellants agree they only redacted "names, addresses, phone numbers and dates of birth." (Writ at 12.) Although the CR-1 and Acknowledgement of First Aid Assistance forms leave space for social security and drivers' licenses' numbers, Appellants do not collect this information. It is clear Appellants also instruct their guests not to fill out the social security # line on the accident reports because the written responses place "N/A" or "------" on the social security # line.

This phonebook plus date of birth information contained in Appellants' incident reports is not protectable under NRCP 26(b). There is no Nevada case law which supports the contention that this information can be protected. (*See* Writ at 22-27.) Appellants also cannot establish a protectable interest over this information (names, addresses and phone numbers) because it is public and published in the phonebook. *See, e.g. Khalilpour v. CELLCO P'ship,* 2010 WL 1267749, at *2, 2010 U.S. Dist. LEXIS 43885, at *6–*7 (N.D.Cal.2010); *Busse v. Motorola, Inc.,* 351 Ill. App. 3d 67, 72, 813 N.E.2d 1013, 1018 (2004); *Keel v. Quality Med. Sys.,*

Inc., 515 So. 2d 337 (Fla. Dist. Ct. App. 1987); *Brignola v. Home Properties, L.P.*, No. CIV.A. 10-3884, 2013 WL 1795336, at *12 (E.D. Pa. Apr. 26, 2013).

The Writ cites a myriad of California cases, which at first glance appear to support Appellants' position. However, upon closer examination these cases are rogue or do not support Appellants' arguments. For example, the *Izzo* court did not grant a protective order on privacy interests as Appellants claim. *Izzo v. Wal-Mart Stores, Inc.*, No. 215CV01142JADNJK, 2016 WL 409694, at *4 (D. Nev. Feb. 2, 2016); *see also* Writ at 23-24. Rather, the *Izzo* court determined the defendant "provided a particularized showing of undue burden" i.e. "hundreds of hours of personnel time" and that plaintiff's request was "overbroad, unduly burdensome, and not relevant to the claims she asserts." *Id.*

Similarly, the unreported *Rowland v. Paris Las Vegas* case, that ordered a protective order on information phonebook information (name, address and phone number) appears to be a rogue decision resulting from the parties' embarrassing lack of briefing. *See* Joint Motion to Compel, *Rowland v. Paris Las Vegas*, No. 13CV2630-GPC DHB, 2015 WL 4742502 (S.D. Cal. Aug. 11, 2015) (APP368-73); *see also* Writ at 24-25. The parties in *Rowland* submitted a 5-page joint motion to compel on 23 discovery requests summarizing the requests and objections but failed to cite any legal authority, rules or statutes. (APP368-73.)

More importantly, the federal and state California cases which Appellants so eagerly urge the Court to follow support Ms. Sekera position because they hold a plaintiff's need to identify potential witnesses outweighs any privacy concerns a defendant may have about disclosing those witnesses' information. *See, e.g. Henderson v. JPMorgan Chase,* No. CV113428PSGPLAX, 2012 WL 12888829 (C.D. Cal. July 31, 2012); *Tierno v. Rite Aid,* 2008 WL 3287035 (N.D. Cal. July 31, 2008); *McArdle v. AT&T,* No. C 09-1117 CW (MEJ), 2010 WL 1532334 (N.D. Cal. Apr. 16, 2010); *Pioneer Elecs. (USA) v. Superior Court,* 40 Cal. 4th 360, 371, 150 P.3d 198, 205 (2007). The California Court of Appeals even held it was an abuse of discretion to require an opt-in notification system to secure the consent of identified potential witnesses before their contact information could be disclosed to the plaintiff. *Puerto v. Superior Court,* 158 Cal. App. 4th 1242, 1256, 70 Cal. Rptr. 3d 701, 712 (2008). Ms. Sekera sought the contact information of the parties in the incident reports because they are potential witnesses in her case to combat Appellants comparative fault defense. The California courts, which Appellants urge the Court to follow, support Ms. Sekera's position she is entitled to the contact information for these potential witnesses. Because Appellants have provided no case law that states they can withhold contact information for potential witnesses, they are unlikely to prevail on their Writ and a stay is thus improper.

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4. Appellants Have No Potential Liability under NRS 603A

Appellants' allege dissemination of their guests' private information is the equivalent to a data breach which will exposed to claims under NRS 603A. (Writ at 27.) Based upon the legislative history and the statute itself, there are three major reasons NRS 603A does not apply to the circumstances of this case.

First, NRS 603A was created to address large scale identity theft by criminals. (APP376.) Neither Ms. Sekera nor her counsel are identity thieves, and thus applying this statute under these circumstances would be contrary to the purposes of the statute's creation.

Second, providing unredacted incident reports is not within the meaning of "breach of the security of system data" defined by NRS 603A.020 as "unauthorized acquisition of computerized data that materially compromises the security, confidentiality or integrity of personal information maintained by the data collector." A Court order by definition authorizes conduct and has been understood to authorize conduct for nearly a century.[3] Thus, even if the information in the incident reports came within the reach of NRS 603A, disclosure of the incident reports in compliance with the Court's July 31, 2019 Order would be "authorized" acquisition. Because providing Ms. Sekera with the unredacted incident reports is

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[3] *See, e.g. In re Troyer's Estate,* 48 Nev. 72, 227 P. 1008, 1008 (1924) ("authorized by court order"); *Club Vista Fin. Servs. v. Dist. Ct.,* 128 Nev. 224, 228, 276 P.3d 246, 248 (2012) ("the district court's order authorizing…").

authorized conduct, it does not constitute a "breach of the security of system data" under NRS 603A.020 and therefore cannot subject Appellants to liability for a "breach of the security of system data."

Third, the incident reports do not contain "personal information" as defined by NRS 603A.040. NRS 603A.040(1) defines "personal information" as a first and last name in combination with a: (a) social security number, (b) driver's license number, (c) account, credit or debit card number with the pin or access code, (d) a health insurance or medical ID number, (e) a username with a passcode. NRS603A cannot apply to Appellants unless the incident reports contain one of these categories of information. Appellants' incident reports are devoid of any account numbers, credit/debit card numbers, medical ID numbers and usernames and passwords. Although the redacted incident reports leave spaces for social security and drivers' license numbers, Appellants apparently do not collect this information and thus never redacted these lines. Because Appellants do not collect the information necessary to come within the purview of NRS 603A, Appellants are unlikely to prevail on the merits on this argument and a stay is therefore improper.

5. Appellants' Privacy Policy Can't Subject Them to Liability

Finally, Appellants are unlike to succeed on the Writ because their Privacy Policy cannot subject them to liability. Appellants' drafted their Privacy Policy to absolve them of liability related to personal information: your "provision of

information to us is at your own risk." (VEN493.) As individuals provide their information at their "own risk" Appellants cannot be liable to them under this policy.

The Privacy Policy also lacks basic contract elements. *See May v. Anderson*, 119 P.3d 1254, 1257, 121 Nev. 668, 672 (2005). There was no offer or acceptance because this online only Privacy Policy was not offered to individuals before their information was collected. There was no meeting of the minds because the individuals did not know of the Privacy Policy when Appellants collected their information. Finally, the individuals did not provide return consideration for Appellants' promise to protect their information. *See Pink v. Busch*, 100 Nev. 684, 691 P.2d 456 (1984). This analysis is consistent with decisions nationwide holding these privacy policies unenforceable against the companies who issue them.[4]

Finally, the Privacy Policy states Appellants may use the information "to comply with applicable laws and regulations" and may share the information to third-parties when Appellants are "required to respond to legal requests." (VEN490-91.) The Privacy Policy permits Appellants to share the information collected to comply with laws and respond to legal requests. Ms. Sekera's request

[4] *See, e.g. In re Google Privacy Policy Litig.,* 58 F. Supp. 3d 968, 986 (N.D. Cal. 2014); *In re Pharmatrak Privacy Litig,* 329 F.3d 9, 19-20 (1st Cir. 2003); *In re Jetblue Airways Privacy Litig.,* 379 F. Supp. 2d 299 (E.D.N.Y. 2005); *Johnson v. Nat'l Beef Packing*, 220 Kan. 52, 551 P.2d 779 (1976); *In re Am. Airlines Privacy Litig.,* 370 F. Supp. 2d 552 (N.D. Tex. 2005); *In re Northwest Airlines Privacy Litig.*, No. Civ.04-126(PAM/JSM), 2004 WL 1278459 (D. Minn. June 6, 2004).

for production is a "legal request." Additionally, once the Court signed the Court's July 31, 2019 directing disclosure, Appellants' failure to comply constituted contempt. *See* NRS 22.010(3). Thus, providing the unredacted incident reports would be "complying with applicable laws." As Appellants Privacy Policy (1) absolves them of liability, (2) does not meet contract formation requirements, and (3) excludes privacy to comply with court orders Appellants' are unlikely to prevail on this argument and a stay is therefore improper.

C. The District Court Properly Denied Appellants' Motion for Reconsideration

Under established practice, a litigant may not re-argue matters considered in the court's initial opinion or raise new legal points for the first time on rehearing. *In Re Ross,* 99 Nev. 657,668 P.2d 1089, 1091 (1983). The failure to make arguments in the first instance constitutes waiver, *Chowdry v. NLVH, Inc.,* 111 Nev. 560, 893 P.2d 385 (1995).

Appellants Motion merely made arguments which Appellants could have presented in their original motion. All the cases cited by Appellants in support of their Motion predated their initial Motion for a Protective Order and these arguments were therefore waived. More significantly, Appellants previously argued many of the cases cited in their Motion for Reconsideration in their Motion for a Protective Order and Response to Ms. Sekera's Objection to the April 4, 2019 DCRR. Appellants also included a pre-dated Privacy Policy "last updated: May

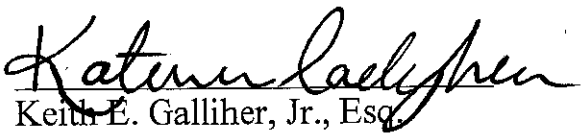
2018" a year before Appellants filed their Motion for a Protective Order. (VEN486.) Nevada law is clear: "points or contentions not raised, or passed over in silence on the original hearing, cannot be maintained or considered" on rehearing. *Chowdhry,* 111 Nev. at 562, 893 P.2d at 387. Appellants' choice to not include these arguments is not a valid reason for reconsideration. Appellants' are not likely to prevail on their argument the District Court's erred when it declined to consider their Motion for Reconsideration because the Motion impermissibly re-argued the same cases and points and raised new arguments which could have been raised in the initial motion, and as such a stay is improper.

III. CONCLUSION

Based on the foregoing, Ms. Sekera respectfully requests that the Court deny Appellants Motion for a Stay.

DATED this 8th day of October, 2019

THE GALLIHER LAW FIRM



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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of The Galliher Law Firm and that on the 8 day of October, 2019, pursuant to N.E.F.C.R. 8, I electronically filed and served a true and correct copy of the above and foregoing **JOYCE SEKERA'S OPPOSITION TO APPELLANTS' EMERGENCY MOTION FOR STAY UNDER NRAP 27(e)** as follows:

[X] by the Court's CM/ECF system which will send notification to the following; and

[ ] by US mail at Las Vegas, Nevada, postage prepaid thereon, addressed to the following:

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IN THE APPELLATE COURT OF THE STATE OF NEVADA

VENETIAN CASINO RESORT, LLC; LAS VEGAS SANDS, LLC, Appellants, v. EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA; THE HONORABLE KATHLEEN DELANEY, Respondents, JOYE SEKERA, Real Party in Interest	Court of Appeals Case No.: 79689-COA District Court Case No.: A788379

APPENDIX TO JOYCE SEKERA'S RESPONDING BRIEF

Volume 1 of 2

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JOYCE SEKERA, by and through her counsel of record, THE GALLIHER LAW FIRM, hereby submits her Appendix in compliance with Nevada Rule of Appellate Procedure 30.

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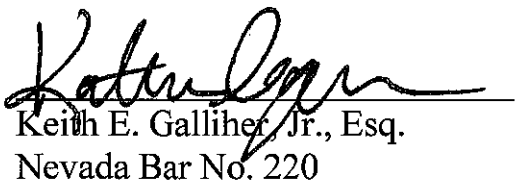
The Appendix shall be contained in 2 separate volumes in accordance with NRAP 30(c)(2) (2013, each volume containing no more than 250 pages.

DATED this 8th day of October, 2019

THE GALLIHER LAW FIRM



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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of THE GALLIHER LAW FIRM attorneys for Joyce Sekera, and that on the 8 day of October, 2019, I served true and correct copy of the foregoing **APPENDIX TO JOYCE SEKERA'S RESPONDING BRIEF**

Volume 1 of 2, by delivering the same via U.S. Mail addressed to the following:

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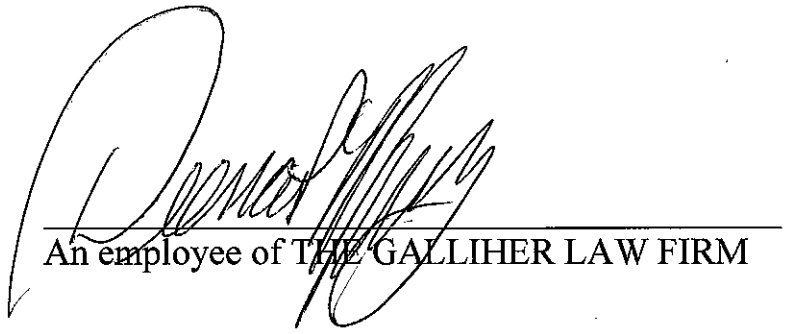

An employee of THE GALLIHER LAW FIRM

EXHIBIT 1

May 17, 2019

Mr. Michael A. Royal
Royal & Miles LLP
1522 W. Warm Springs Road
Henderson, NV 89014

Re: *Sekera v. VENETIAN CASINO RESORT*

Dear Mr. Royal:

1. At your request, I am writing this summary of my opinions in the above-referenced matter. My opinions are based on a reasonable degree of engineering and biomechanical certainty and founded on my professional education and on my academic and consulting experience in the fields of injury biomechanics, anatomy, and orthopaedics. I reserve the right to amend or supplement these opinions should additional information become available.

Qualifications

2. I am currently Emeritus Professor in the College of Health and Human Sciences at Oregon State University in Corvallis, Oregon. I am also President of Hayes+Associates, Inc., 2390 NW Kings Blvd., Corvallis, OR, 97330.

3. I graduated with a B.S. in Mechanical Engineering in 1964 and then an M.S. in Mechanical Engineering (Design) in 1966 from Stanford University. As an undergraduate and graduate student at Stanford University I took courses in engineering mechanics, dynamics and design and thus I am familiar with the fundamental engineering principles that are used in the reconstruction and simulation of falls and their associated injuries. I received a Ph.D. in Theoretical and Applied Mechanics (Biomedical Engineering) in 1970 from Northwestern University, where my course of study involved both medical and engineering courses, the latter again including advanced training in engineering dynamics and kinematics, and the former in anatomy, physiology and biomechanics. I then completed two post–doctoral fellowships, the first at the Laboratory for Experimental Surgery in Davos, Switzerland in 1970, and the second at the Department of Orthopaedics at the Karolinska Institute in Stockholm, Sweden in 1971.

4. From 1971 to 1976, I was Assistant Professor of Mechanical Engineering and Surgery (Orthopaedics) at Stanford University. From 1976 to 1979, I was Associate Professor of Orthopaedics and Bioengineering at the University of Pennsylvania. In 1979, I was named Director of the Orthopaedic Biomechanics Laboratory at Harvard's Beth Israel Hospital and Associate Professor of Orthopaedic Surgery at Harvard Medical School and at the Harvard–MIT Division of Health Sciences and Technology. I was named Full Professor in 1985 and then the first incumbent of the Maurice E. Mueller Professorship of Biomechanics at Harvard Medical School in 1988, a position I held until 1998, when I joined the faculty at Oregon State University. I served as Vice Provost for Research at Oregon State from May 1998 through June 2001, when I resigned that administrative position in order to focus more fully on Hayes+Associates, Inc.

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5. I have more than 50 years of teaching, research, and consulting experience in fields ranging across mechanical engineering, experimental mechanics, accident reconstruction, occupant dynamics, injury biomechanics, human functional anatomy, and clinical orthopaedics. I have taught undergraduate, graduate, and post-graduate students in both engineering and medical school settings. I have lectured on the subject of falls and injury biomechanics in a wide variety of post-graduate courses for engineers, medical students and residents, clinical orthopaedists, forensic scientists and accident reconstructionists. At Stanford, I taught courses in engineering mechanics, experimental mechanics and biomechanics, often using examples related to injury reconstruction and injury biomechanics. From 1985 to 1998 I was one of the three Course Directors of Human Functional Anatomy at Harvard Medical School. In this role, I was responsible for lectures, prosection demonstrations, and laboratory dissections, primarily related to the functional anatomy of the musculoskeletal system. I routinely made use of radiographs, MRI's, and CT's in the course of my teaching.

6. I have served as Principal or Co-Principal Investigator on over 60 research grants from federal, foundation or industrial sources, all of them involving the biomechanics of the musculoskeletal system. Most of these grants have directly involved injury biomechanics. I was funded continuously from 1990 - 2007 by the National Institutes of Health for a research program entitled Fall Biomechanics and Hip Fracture Risk. This research produced validated mathematical models for the dynamics of human falls and their associated injuries. Our research results have appeared in the peer-reviewed literature and are widely cited by scientists and experts in the field. I have authored or co-authored more than 200 peer-reviewed publications, over 60 chapters, and two books, one of which went through two editions. I was the founding editor of the Journal of Orthopaedic Research and served as its Co-Editor-in-Chief from 1983 to 1995. The Journal is now the preeminent research journal in orthopaedics.

7. Although I am not a licensed physician and do not treat patients, I have had considerable experience in clinical orthopaedics. As Vice Chairman for Research in the Department of Orthopaedic Surgery at Beth Israel Deaconess Medical Center, I attended x-ray rounds, often on a daily basis, offering advice to residents and house staff on the mechanisms and treatment of musculoskeletal injuries. I served as Acting Chairman of the Department from 1992-1993 while the Department searched for a new Chief. I routinely qualify in both state and federal court to testify, to a reasonable degree of engineering and biomechanical certainty, on injury biomechanics, routinely making use of and interpreting medical histories, radiographs and anatomy as the basis for my opinions.

8. A copy of my *curriculum vitae* is attached as Exhibit 1.

Case Materials

9. I reviewed the following materials in connection with my work in the case: Complaint (3/19/18); Venetian Reports: Venetian Security Report (11/4/16); Venetian Case MO Report (11/4/16); Venetian Person Profile Report (11/4/16); Venetian Security Narrative Report (11/4/16); and Venetian Accident Scene Check (11/4/16); Photographs: Scene Photos; and Security Scene Photos; Surveillance Video; Letter Regarding Wage Loss (Undated); Medical Records; Thomas A. Jennings, CXLT, Report (12/28/18) - Plaintiff Expert; Plaintiff's Opposition to Defendants' Motion for Protective Order (2/13/19), with Exhibits; Joyce P. Sekera, deposition (3/14/19); Additional Medical Records; First Amended Complaint (April 2019); Joseph Larson, deposition (10/11/18); and Radiology: Centennial Hills Hospital: 11/4/16, L-Spine Left Elbow. Desert Institute of Spine Care: 10/5/17, C-Spine, L-Spine. Desert Radiologists: 7/31/18, CT L-Spine, L-Spine, C-Spine, Scoliosis Study; 8/22/18, L-Spine; 3/18/15, Chest; 11/4/16, L-Spine, Left Elbow. Las Vegas Radiology: 11/14/16, C-Spine, T-Spine, Shoulder; 11/30/16,

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Hip/Pelvis, SI Joint. Steinberg Diagnostic: 12/16/16, MRI Brain; 12/21/16, MRI C-Spine, MRI L-Spine; 4/27/18, MRI Right Knee.

Medical Synopsis (DOI: 11/4/16)

10. 11/04/16, at 1257; Acknowledgement of First Aid Assistance & Advice to Seek Medical Care [1st Responder]; Venetian/Palazzo EMT: Subjective: Female fell backwards onto base of pillar. Negative loss of consciousness. Negative weak/dizzy. Left elbow positive tenderness. Lumbar spine guarded post [illegible]. Left axillary pain/soreness. Left flank/[illegible] back pain. Limited range of motion due to pain. Positive video [from The Venetian Surveillance]. Left foot slipped. [Bottom part of page is illegible]. 11/04/16, at 1533; Emergency Department Note; Rachel Taylor, APRN: History Source: Patient. Arrival Mode: Private vehicle. History of Present Illness: The patient presents following fall. The onset was just prior to arrival. The fall was described as slipped. Location: Left upper extremity. The character of symptoms is pain, swelling, and tingling. The patient's dominant hand is the right hand. A 60-year-old female status post fall at work. Patient was walking and slipped backwards. Patient did not hit her head. No loss of consciousness. Patient complains of left elbow pain and left lower back pain. Patient denies any dizziness or shortness of breath. Patient does complain of some paresthesias to her left hand. Patient able to ambulate without difficulty. Examination: Height: 5'6"; Weight: 189 pounds; BMI: 30.67 kg/m2. General: Alert, no acute distress. Musculoskeletal: Not normal range of motion, Proximal upper extremity: Left, elbow, tenderness. Impression: 1) Back strain; 2) Left elbow pain; and 3) Slip and fall. Condition: Improved. 11/04/16, at 1635; Radiology Report; Kaveh Kardooni, DO: Lumbar Spine. Comparison: None. Impression: Degenerative disc disease most conspicuously at L2/3 where there is endplate osteophyte formation and some endplate sclerosis. There is slight increased density at the disc space of uncertain etiology possibly related to some calcification. Further assessment with CT or MRI scan can be obtained as clinically warranted. 11/04/16, at 1635; Radiology Report; Rick Yeh, MD: Left Elbow. Findings: There are no soft tissue abnormalities. Impression: No evidence of acute fracture or dislocation.

11. 11/08/16; Progress Note; Jordan B. Webber, DC: Ms. Sekera had a slip and fall injury dated 11/4/16. She stated that she was at work inside the Venetian Hotel. She stated that she was walking on the marble floor when both of her feet slid out from under her and she fell to the ground, landing on her back and left elbow. She reported that her neck was thrust back when she fell. She stated that she cannot recall a loss of consciousness but recalls the first thing she can remember after her fall was people standing over her and feeling dazed. Ms. Sekera reported that she was evaluated by a paramedic at the scene of her fall and given a sling for her left shoulder. She reported making an incident report and was asked if she wanted an ambulance to take her to the hospital. She stated that she declined the ambulance and drove herself to Centennial Hills Hospital where she had x-rays, was given medication and a new shoulder sling. Ms. Sekera cannot recall having prior slip and fall injuries or motor vehicle accidents. The patient stated that she was pain free prior to the above-mentioned slip and fall. She reports that she has not returned to her work at this time due to her pain and she is unable to perform her job duties. Subjective: The patient rated the intensity of her pain/symptoms as an 8 on a scale of zero to 10, with zero being complete absence of symptoms and 10 being very severe or unbearable. She also reported memory problems and reported that she will go into a room and completely forget what she is doing there. The back of her head is sore and achy. Assessment: 1) Strain of muscle, fascia, and tendon at neck level; 2) Sprain of ligaments of thoracic spine; 3) Muscle spasms of back; 4) Sprain of ligaments of lumbar spine; 5) Strain of muscles, fascia, and tendon of lower back; 6)

Post-traumatic headache; 7) Concussion, with loss of consciousness of 30 minutes or less; 8) Post-concussional syndrome; 9) Sprain of sacroiliac joint; 10) Strain of muscle/tendon of the rotator cuff of left shoulder; and 11) Radiculopathy, lumbar region. Causation: Based on my 11/8/16, physical examination of Ms. Sekera, my discussion with the patient regarding how the accident happened, patient's medical history, and the mechanics of her body during the collision [sic], it is my opinion, to a reasonable degree of medical probability, the bodily injury sustained by the patient, as recorded in this report, was caused by the slip and fall dated 11/4/16.

12. 11/11/16; Progress Note; Jordan B. Webber, DC: Subjective: This patient presents with the following problems: 1) Headache, with associated blurred vision, memory problems, and balance problems. She stated she is having difficulty sleeping due to her pains; 2) Cervicalgia. The patient rated the intensity of her pain/symptoms as a 7/10, with associated numbness and tingling down both arms to her fingers; 3) Low back pain. The patient rated the intensity of her pain/symptoms as 8/10; 4) Pain in left shoulder. The patient rated the intensity of the pain as 8/10; 5) Pain in left elbow. The patient rated the intensity of the pain as 8/10; and 6) Pain in thoracic spine. The patient rated the intensity of the pain as 7/10. 11/14/16, at 1657; Radiology Report; James D. Balodimas, MD: Left Shoulder. Indication: Left shoulder pain. Conclusion: No evidence of acute skeletal pathology to the left shoulder. There are mild degenerative changes at the acromioclavicular articulation. 11/14/16, at 1663; Radiology Report; James D. Balodimas, MD: C-Spine, with flex extension. Comparison: None. Conclusion: No evidence of acute fracture. On the neutral, lateral projection, there is reversal of the normal lordotic curvature, could be due to spasm. 11/14/16, at 1706; Radiology Report; James D. Balodimas, MD: T-Spine. Findings: No measurable degree of scoliosis. No paraspinal soft tissue mass. Multilevel vertebral body endplate changes and osteophyte formation. Conclusion: No evidence of acute skeletal pathology to the thoracic spine.

13. 11/21/16, at 1015; Progress Note; Michelle Hyla, DO: Chief Complaint: Injuries from slip and fall. Initial Examination: 1) Headache; 2) Trouble sleeping; 3) Anxiety; 4) Cervical pain; 5) Thoracic pain; 6) Lumbar pain; 7) Abdominal pain; 8) Right shoulder pain; 9) Left shoulder pain; 10) Left shoulder joint pain; 11) Right upper arm pain; 12) Left upper arm pain; 13) Left elbow pain; 14) Left forearm pain; 15) Right hip pain; 16) Left hip pain; 17) Left hip joint pain; 18) Right thigh pain; 19) Left thigh pain; 20) Right knee pain; 21) Left knee pain; 22) Right knee joint pain; 23) Left knee joint pain; 24) Right lower leg pain; 25) Left lower leg pain; 26) Right calf pain; and 27) Left calf pain. Most Severe Area(s) of Pain: Lumbar pain, Cervical pain, and Left Shoulder pain. Accident Information: Contact: Both feet went out from under her, slipped on liquid. Landed on marble floor, on left elbow and back, does not know if she hit head. Concussion Symptoms: Present. Hit Head: Yes. Loss of Consciousness: Yes. Appearance: In obvious pain. Skin: Bruises, left elbow. Assessment: 1) Fall on same level from slipping, tripping, and stumbling without subsequent striking against object, initial encounter; 2) Sprain of ligaments of cervical spine; 3) Sprain of ligaments of thoracic spine; 4) Sprain of ligaments of lumbar spine; 5) Strain of muscle, fascia of tendon of lower back 6) Pain in right upper arm; 7) Pain in left upper arm; 8) Pain in left elbow; 9) Unspecified sprain on left elbow; 10) Pain in left forearm; 11) Pain in right hip; 12) Pain in left hip; 13) Pain in right thigh; 14) Pain in left thigh; 15) Pain in right knee; 16) Pain in left knee; 17) Pain in right lower leg; 18) Pain in left lower leg; 19) Post-traumatic headache; and 20) Attention and concentration deficit. Causation: It is my opinion that Joyce P. Sekera's symptoms for which she is being seen today are directly related to the accident described by the patient. 11/21/16; Progress Note; Jordan B. Webber, DC: She stated that her pain has been increased over the weekend and cannot recall doing anything to increase her pain. She reported that she remembered having an episode of low back pain approximately 5-8 years ago and went to the hospital and was subsequently released without further episode or treatment. 11/23/16; Progress Note; Jordan B. Webber, DC: Ms. Sekera stated that she feels that she is improving with treatment in my office. 11/30/16; Radiology Report; Elizabeth L. Huck, DO: Left Hip. Indication: Left hip pain. Findings (Bones): There is mild

osteophyte formation at each acetabulofemoral joint. There is a soft tissue calcification or prior avulsion fracture adjacent to the right acetabulum. Findings (Soft Tissues): No visible soft tissue swelling. Conclusion: Mild arthropathy of each hip. 11/30/16; Radiology Report; Elizabeth L. Huck, DO: SI Joints. Indications: Left sacroiliac joint pain. Findings (Bones): There is mild sclerosis at the sacroiliac joint. Findings (Soft Tissues): No visible soft tissue swelling. Conclusion: Mild arthropathy of each sacroiliac joint.

14. 12/16/16; Radiology Report; [Unknown Provider]: MRI Brain. Clinical History: Headaches, dizziness. Impression: Brain normal for age. 12/16/16; Radiology Report; [Unknown Provider]: Magnetic Resonance Angiogram Brain. Impression: No significant abnormality identified. 12/21/16; Radiology Report; Sara Kym, MD: MRI C-Spine, without contrast. Clinical History: Neck pain and bilateral arm numbness, pain, weakness. Impression: Mild multilevel degeneration. Mild neuroforaminal stenosis at C5/6. No spinal canal stenosis throughout. Mild dextrocurvature. Straightening of the cervical lordosis, which may be seen with muscle spasm. 12/21/16; Radiology Report; Saul Ruben, MD: MRI L-Spine, without contrast. Impression: Multilevel lumbar degenerative disc disease, with disc bulges extending from L1/2 through L5/S1. Annular fissuring at L4/5. No canal stenosis or neural foraminal narrowing at any level. There is note made of facet and ligamentous flavum hypertrophy at multiple levels.

15. 01/09/17; Pain Consultation; Katherine D. Travnicek, MD: 60-year-old female here today with complaints of neck, low back, and bilateral knee pain that started after a slip and fall backwards at work. She was walking and slipped on a liquid that was on the floor. She says she can't remember the whole event as she hit her head and was dazed. She denies history of prior injuries or chronic pain of these areas. Diagnoses: 1) Neck pain; 2) Mid cervical discopathy; 3) Cervical facet joint arthropathy/spondylosis; 4) Low back pain; 5) Lumbar discopathy; 6) Lumbosacral discopathy; 7) Lumbar facet joint arthropathy/spondylosis; 8) Lumbosacral facet joint arthropathy/spondylosis; 9) Muscle spasm; and 10) History of slip and fall. Discussion: Neck pain, I suspect facet and disc mediated pain. MRI report indicates disc protrusions at C5/6 and C6/7 levels and bilateral facet hypertrophy. Low back pain, I suspect facet and disc mediated pain. MRI lumbar spine report indicates an L4 annular fissure and bilateral facet hypertrophy at various levels. 02/07/17; Neurology Note; Russell J. Shah, MD: Present Complaint: She is noting problems with her memory and forgetfulness. She is noting the headaches and neck pain, as well as the low back pain are improved, and she is not improving in her memory. This is the biggest issue. The dizziness and nausea are significantly better now. Impression from 11/4/16, Trauma: 1) Post traumatic brain syndrome; 2) Cervical strain/headaches; 3) Migraines secondary insomnia due to #1 and 2; 4) Secondary insomnia due to # 1, 2 and 5; 5) Lumbar strain; and 6) Carpal tunnel syndrome. 10/05/17; Progress Note; Andrew M. Cash, MD: History of Present Illness: The patient was walking through The Venetian Hotel when she slipped on a liquid that was spilled on the floor. She reports that both legs flew up in front of her and she landed on her back. Immediately after the fall she felt pain in her left elbow, neck, and back. She complains of numbness, tingling, weakness, and pain in her upper and lower extremities. Assessment: Facet syndrome. Causation: In my opinion, the patient's symptoms which we are evaluating are directly related to the above-mentioned accident. This opinion is based on patient's history, physical exam, diagnostic studies, and medical records provided.

16. 02/07/19; History and Physical Report; William D. Smith, MD: This 61-year-old woman was a salesperson at a ticket booth. She slipped on a wet floor, striking her head and had loss of consciousness. The date of injury occurred in 2016. She was sent to my office for a surgical consultation. Comments: The CT scan is really quite interesting. It does show a rotatory subluxation at L5/S1 of approximately ten degrees. There are significant facet changes including what appears to be a poorly healed fracture on the superior articular facet. There is moderate foraminal stenosis at this level. She does also have bilateral signs of SI joint dysfunction.

Analysis

17. It is my understanding that on November 4, 2016, Ms. Sekera (Age: 60; Ht: 5'6"; Wt: 189 lbs.; BMI: 30.7) was working for Brand Vegas in the Venetian Casino in Las Vegas, NV. At about 12:30pm, she left her kiosk to use the restroom and get some lunch. She was carrying a coffee. As she walked toward the restroom, she alleges that *"her foot came into contact with a liquid substance on the floor causing her to slip and fall"* (Complaint, 3/19/18). As a result of the fall, Ms. Sekera is alleging injuries to her low back, SI joint, head and neck. On the other hand, defendants argue that the condition of the floor alleged by Ms. Sekera, if it existed at all, was open and obvious, that Ms. Sekera failed to mitigate damages, and that the injuries she alleged were from a pre-existing condition.

18. Given the facts of the case, the questions to be addressed to a reasonable degree of biomechanical and engineering certainty are: 1) Fall Reconstruction: Based on a scientifically reliable fall reconstruction, what were the biomechanics of Ms. Sekera's fall?; 2) Fall Initiation: Among the multiple factors known to influence the risk of falling, what factor or factors played a role in the initiation of Ms. Sekera's fall?; and 3) Injury Causation Biomechanics: Based on a formal and scientifically reliable injury causation analysis, did the fall that Ms. Sekera sustained on November 4, 2016, cause the acute injuries to the low back, SI joint, head and neck that she is alleging?

Methods

Fall Biomechanics

19. A fall can be described as including four, potentially overlapping phases: 1) Initiation; 2) Descent; 3) Impact; and 4) Post-impact, during which the faller comes to rest (28). Given our scientific understanding of the physics and biomechanics of falls, the position of rest and the injuries sustained can be viewed as signatures to the fall (41). A fall reconstruction can be used reliably to determine what initiated the fall and whether the fall caused the claimed injuries, as long as that reconstruction is grounded in the laws of physics and comports with the facts of the case. Given our scientific understanding of the physics and biomechanics of falls, the position of rest and the injuries sustained can be viewed as signatures to the fall(41). The first step in analyzing slip/fall incidents involves describing the sequence of events in terms of the four phases of a fall.

Fall Initiation

20. With respect to fall initiation, risk factors for falling are typically grouped into extrinsic and intrinsic factors. Extrinsic factors include the slip resistance of the walking surface, the presence of obstacles or trip hazards, inadequate lighting, choice of footwear (including, in particular, high heels or severely worn or damaged shoes). Intrinsic factors (i.e. inherent to the individual) include age, gait abnormalities, decreased proprioception, slowed reaction times, limb weakness, and impaired vision. Gait patterns (including changes in direction, turning or the use of avoidance maneuvers) and gait speed are also intrinsic risk factors that are critically associated with falls (31) as are the use of drugs and alcohol. Among intrinsic risk factors, the importance of perception and cognition of hazards as well as general attentiveness is known to be important in the prevention of fall incidents (5). In many instances, fallers report not having noticed a fall hazard prior to the incident because the fall hazard was obstructed from view or because the faller was distracted or simply not paying attention to a potential hazard that was clearly recognized by others. Given the range and variety of both extrinsic and intrinsic risk factors for falling, it is clearly a mistake to assume *a priori* that the sole, or even the dominant, risk factor for falling is the interface between the shoe and the walkway surface. In summary, the causes of pedestrian fall incidents are multi-factorial, reflecting that fall safety assessment is a highly complex subject, in which

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the likelihood of a slip and fall is a function of a variety of elements including the walking surface (types, materials and finishes), environmental conditions, and the characteristics of individual users (including choice of footwear and attentiveness).

21. Slips are due to loss of traction between footwear and a walking surface. One fundamental factor determining the slip potential of a given footwear/surface combination is the relationship between required friction and the friction available at the interface. Quoting Redfern et al. (2001): "*The force interactions between the shoe and floor are probably the most critical biomechanical parameters in slips and falls. If the shear [horizontal] forces generated during a particular step exceed the frictional capabilities of the shoe/floor interface, then a slip is inevitable*"(40). Four factors affect the traction between footwear and a walking surface: 1) The surface (e.g. concrete, grass, tile); 2) Contaminants on the walkway (i.e. liquid, dirt, sand); 3) Footwear (e.g. heels, flats, sneakers, flip-flops; and 4) Gait dynamics (e.g. how a person walks). The probability of a slip rises when either the friction available from the surface decreases or the required friction increases, due to either an increase in shear (horizontal) force or a decrease in normal (vertical) force. For example, when walking on level ground, as a person takes a step, the forward motion of the foot is stopped due to friction between the sole of the shoe and the ground. This friction is quantified by calculating the ratio of the force required to stop the forward motion of the foot/shoe and the vertical weight applied by the person's body weight. This force ratio, or "*Required Friction*", for level walking has been reported to be 0.23(11). "*Available Coefficient of Friction*" is the friction measured between the foot/shoe and the surface. When discussing available friction of a surface with respect to human gait, the proper terminology is "*Slip Resistance*". If the Required Friction during normal walking is greater than the available friction, or slip resistance, a slip is likely. Thus, if the slip resistance of a walkway is 0.30 and the known average required friction is 0.23, the foot is unlikely to slip. If the measured slip resistance is less than the Required Friction, a slip is more likely (but certainly not inevitable, depending on a variety of other factors briefly summarized above).

22. "Slip Resistance" is defined by the National Floor and Safety Institute (NFSI) as, "The property of a floor or walkway surface that acts in sufficient opposition to those forces and movements exerted by a pedestrian under all normal conditions of human ambulation."(1) Slip resistance is similar to "Friction", which is defined as, "Resistance to the relative motion of two solid objects in contact." The BOT-3000E has been widely used to characterize the frictional characteristics of walking surfaces because of its ease of use and reduction of operator manipulation of results. The BOT-3000E operates by dragging a test foot sensor along the floor under its own power at a constant speed to measure the dynamic coefficient of friction (DCOF).

23. On December 20, 2018, I inspected the floor where Ms. Sekera's fall occurred. Based on the surveillance video, three locations near the pillar where Ms. Sekera fell was selected for testing, in keeping with the ANSI A326 standard, using the BOT-3000. Dynamic coefficient of friction (DCOF) of a wet surface was measured using a rubber sensor, following the American National Standard Test Method for Measuring Dynamic Coefficient of Friction of Hard Surface Flooring Materials, ANSI A326.3 (4). The standard requires three test locations in four directions at each location, for a total of 12 repeated measurements (4). On December 21, 2018, I also inspected the shoes Ms. Sekera was wearing at the time of her fall.

24. The Introduction to the ANSI A326.3 Standard advises as to the limitations of the use of coefficient of friction measurements to predict the likelihood a person will or will not slip on a hard surface flooring material. The Introduction notes that the Standard is an evaluation of a hard surface flooring material "*under known conditions using a standardized sensor material prepared according to a specific protocol. As such, it can provide a useful comparison of surfaces, but does not predict the likelihood a person will or will not slip on a hard surface flooring material."* (4). In keeping with what we have noted above, A326.3 indicates that there are many factors that affect the possibility of a slip

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occurring on a surface including "*the material of the shoe sole and the degree of its wear; the presence and nature of surface contaminants; the speed and length of stride at the time of the slip; the physical and mental condition of the individual at the time of a slip; whether the floor is flat or inclined; how the hard surface flooring material is used and maintained; and the [coefficient of friction] COF of the material…"* . "*Because many variables affect the risk of a slip occurring, the COF shall not be the only factor determining the appropriateness of a hard surface flooring material for a particular application."* (4). Finally, the Standard further notes that, "*While specifying products with higher COF for use under contaminated conditions can be considered, higher COF can lead to maintenance/cleanliness issues and hard to remove contaminants and films, which can cause hazardous and unfavorable conditions. In addition to maintenance issues, a surface with a COF can create a difficult walking condition for that subset of the elderly and disabled who slide their feet on the floor. For them, smooth and dry flooring is needed…"*(4).

Injury Causation

25. To evaluate whether there is a scientifically reliable biomechanical mechanism for injury, we determined the loading state (mechanism and magnitude) on the low back from the fall using the fundamental laws of physics (16,27). To assess the likelihood of injury, we define a Factor of Risk (Φ) (28) as the ratio of the predicted load to the injury tolerance limit for each region. When this ratio exceeds 1.0, injury is more likely than not (i.e. 51% probable).

26. The facts of the case were compared to the scientific criteria necessary to establish injury causation in that there is: 1) A reliable biomechanical mechanism; 2) Objective evidence of injury; 3) Temporal consistency; and 4) No more likely explanations for the alleged injuries. An opinion as to whether an event causes one or more injuries is grounded first in what is meant by causation. To conclude that an injury was caused by an event, it is necessary to meet established criteria for both general and specific (individual) causation. General causation addresses whether there is a scientifically established cause-and-effect relationship between exposure and outcome (i.e. does a mechanism and tolerance limit for injury exist). Criteria for general causation have been established by Bradford-Hill(30) and others(10). These include an appropriate temporal sequence, i.e., that the health effect follows exposure, the specificity with which a risk factor is linked to a health outcome, the reversibility of the effect, the biological plausibility of the cause-effect relationships, the strength of the association between cause and effect, the consistency with which such cause-effect relationships are observed across multiple studies, and the slope of the dose-response gradient. The available literature (biomechanical and epidemiological) must be evaluated according to these criteria in order to establish an evidence-based conclusion of cause-and-effect between an alleged exposure (e.g. slip/fall incident) and an injury (e.g. lumbar disc herniation). Specific (individual) causation addresses whether a certain event produced the particular injury in question. Establishing general causation according to the above criteria is implicitly required in order to establish specific causation. However, to determine whether a specific event produced a certain injury in an individual there are also additional considerations. Approaches to specific causation have been developed by organizations such as the National Institute for Occupational Safety and Health (NIOSH), the American Medical Association (AMA), the National Academy of Sciences and others(15,23,29,32), for the evaluation of medical conditions, using the following steps. First, there must be objective evidence of acute injury. There must also be a consistent temporal relationship between the exposure and the injury or medical condition. The next step is to evaluate the specific circumstances of the event in question, with the focus on comparing the specific levels of exposure (as determined by a reconstruction based on engineering principles and the laws of physics) to those required to cause bodily damage. In other words, for a certain event, it must be determined whether the event produced sufficient loading to cause the injury (i.e. a scientifically reliable biomechanical mechanism). The final step is to consider modifying factors and alternative causes of the injury or condition(29).

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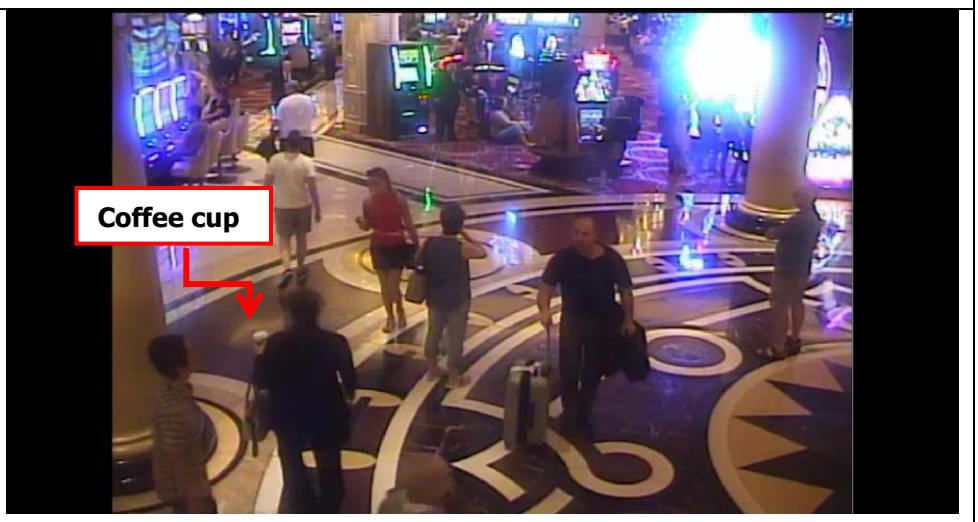
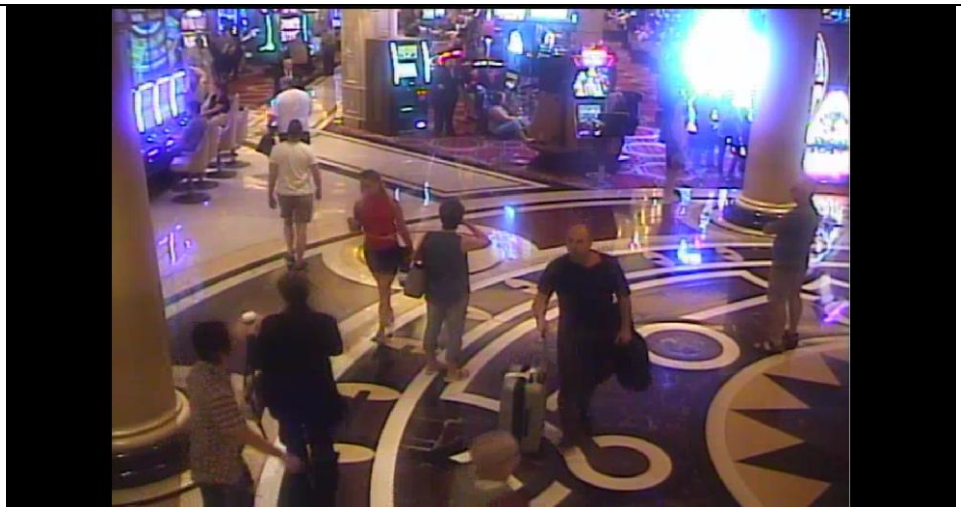
Results

Fall Reconstruction

27. With respect to the fall reconstruction, Ms. Sekera described her fall during her deposition. Her medical records also provide some descriptions about the phases of her fall. With respect to fall initiation, the Venetian/Palazzo EMT report indicates her *"left foot slipped"* (1st Responder, Venetian/Palazzo EMT, 11/4/16). A Progress Note from Jordan Webber, DC indicates *"she was walking on the marble floor when both of her feet slid out from under her"* (Progress Note, Jordan B. Webber, DC, 11/8/16). Ms. Sekera believes she slipped on liquid, testifying that *"I remember my pants being wet"* (Sekera deposition, 20:17). However, she never actually saw a foreign substance on the floor (Sekera deposition, 21:18). At the time of the fall, Ms. Sekera *"leave your kiosk, you take the elevator, you've got a cup of coffee, and you're planning to use the restroom and then you're going to lunch"* (Sekera deposition, 88:16). As she approached she did not notice anything unusual. She indicated *"my eyes were up here looking at the people trying not to hit somebody."* (Sekera deposition, 89:23). With respect to the descent phase, Ms. Sekera testified, *"the one thing I can remember, is my feet in front of me as I went down hard."* (Sekera deposition, 89:19). The EMT report indicates she *"fell backwards onto the base of the pillar"* (1st Responder, Venetian/Palazzo EMT, 11/4/16). Regarding the impact phase, Ms. Sekera testified, *"I just remember landing hard. Whether is was my back, my butt, I don't know. I just remember going backwards. I was dazed."* (Sekera deposition, 90:17). She did recall striking her left elbow *"hard on the marble"* (Sekera deposition, 91:4). She thought she also struck her left shoulder. She further testified *"I kind of just remember bouncing"* when asked if she remembered striking her left hip. (Sekera deposition, 91:21). Her medical record indicates, *"she fell to the ground, landing on her back and left elbow. She reported that her neck was thrust back when she fell"* (Progress Note, Jordan B. Webber, DC, 11/8/16). With respect to the post-impact phase, Ms. Sekera testified that she felt immediate pain in her left elbow, neck and head. Her whole left side. (Sekera deposition 92:16). After the fall, she recalled the EMT trying to help her and him *"walking me upstairs and fixing my arm so that I could drive to the hospital."* (Sekera deposition, 94:8). She asserted that the liquid on her pants was on the back left side, and also on the back of her shirt (Sekera deposition, 94:14).

28. The incident was recorded by a surveillance camera positioned in the Venetian Hotel and Casino. The surveillance camera images were captured at a rate of 30 frames per second. To conduct the analysis, the video was stepped through one frame at a time, both forward and backward, such that the relative motions of Ms. Sekera and other hotel patrons could be observed and characterized. Despite some limitations due to sampling rate and the number of individuals in the scene, the camera captured key moments and details from which to reconstruct Ms. Sekera's fall. Below are a series of stop-action frames from the surveillance video depicting Ms. Sekera's fall (Surveillus Networs Player (V5.8.1.0); video file: Cam 308 (1206-1236 hrs).evf):

A 12:36:49 Ms. Sekera has entered the frame. She is carrying her purse on her left arm and a coffee cup in her left hand. She is looking toward her right.	
B 12:36:50 Ms. Sekera's right foot is planted on the ground. She has begun turning her head toward the left.	
C 12:36:50 Ms. Sekera's left heel is just striking the ground. She is starting a turn toward her left around the pillar.	

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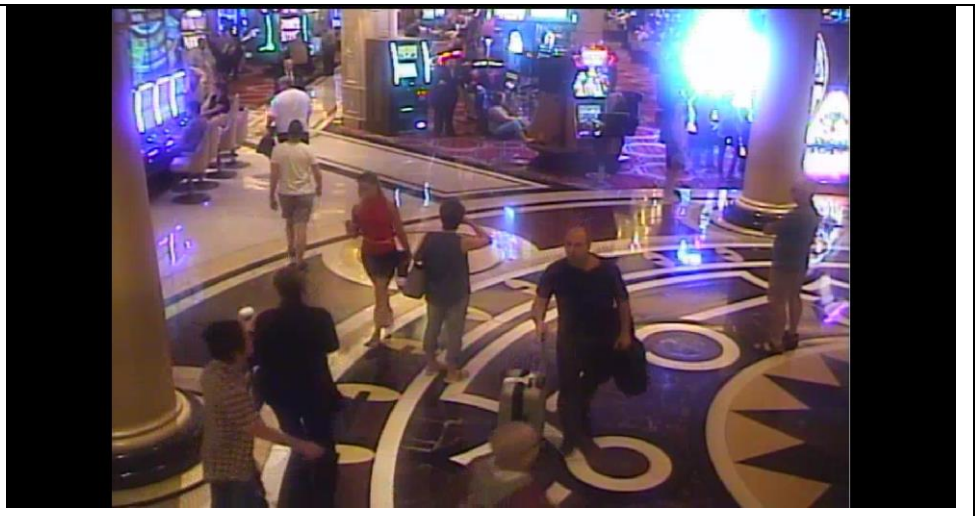
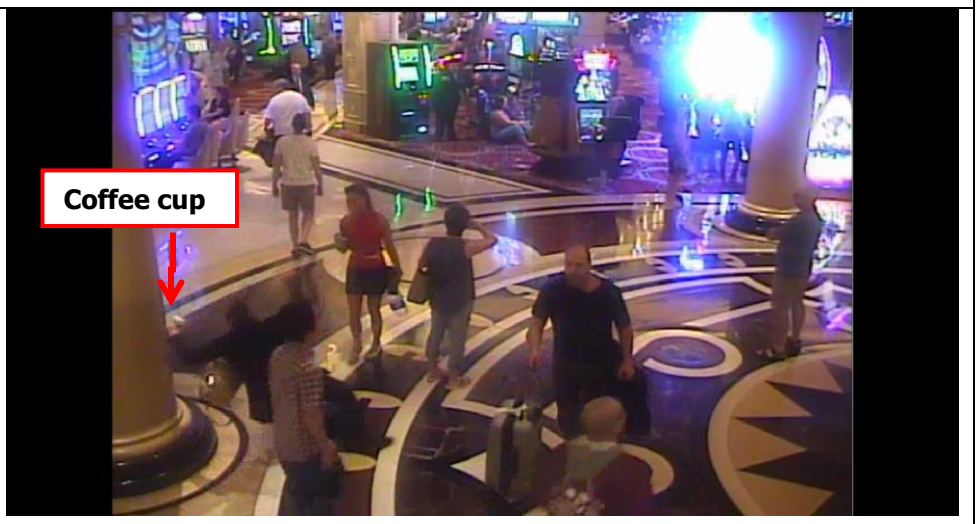
D 12:36:50 Ms. Sekera's left foot is moving toward the midline of her body. She is beginning to lean toward her left.	
E 12:36:50 Ms. Sekera's CG is outside her base of support and she is beginning to fall forward and toward her left as her legs move toward her right.	
F 12:36:50 Ms. Sekera continues to fall toward her left side.	

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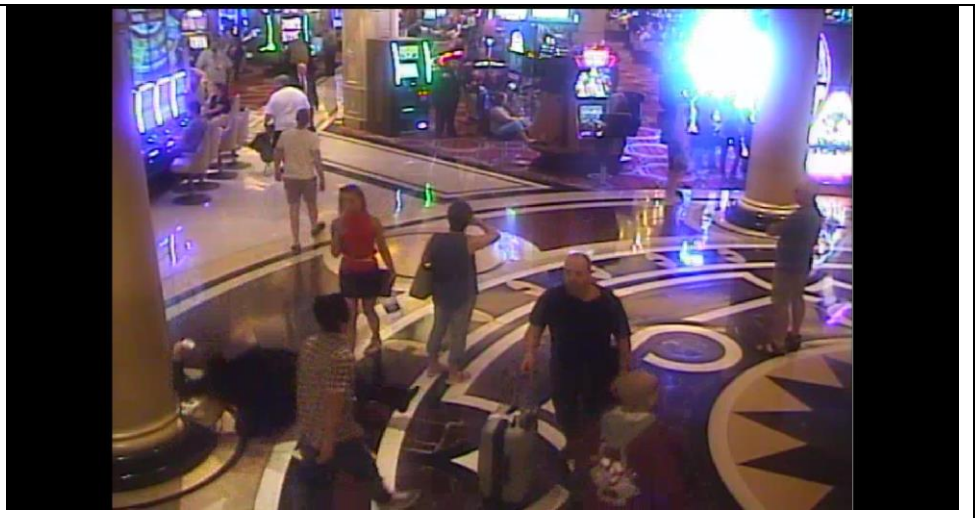
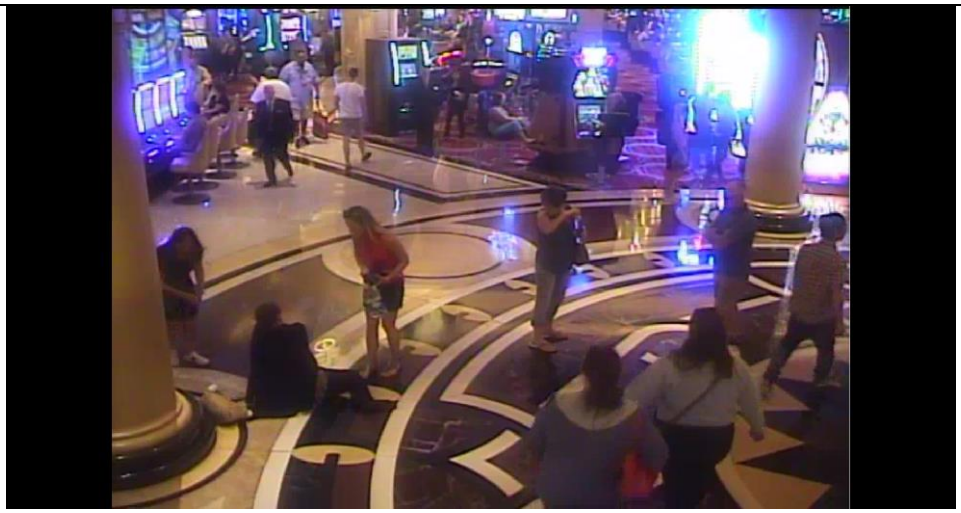
G 12:36:51 Ms. Sekera strikes her buttocks on the ground and her left elbow on the pillar	
H 12:36:51 Ms. Sekera rotates toward her back and her head comes in contact with the base of the pillar	
I 12:36:54 Ms. Sekera is beginning to sit up after the fall. Some nearby patrons are stopping to help her.	

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29. The surveillance video shows that Ms. Sekera is walking through the lobby at the same time as many other people. In particular, one person is seen walking through the almost exactly the same area only 6 seconds prior to Ms. Sekera's fall and did not slip or fall. As Ms. Sekera is walking, she is carrying her purse on her left arm near her elbow and is also carrying a coffee in her left hand (Frame A). As she is walking, she begins to turn toward her left around the pillar, and in the direction of the restroom. She testified, *"I walked out [of the elevator], focusing on the people because it's very crowded there a lot of times…My eyes were up here looking at the people trying not to hit somebody"* (Sekera deposition, 89:22). As she begins to turn her body, her left foot moves inward toward the midline of her body (Frame D). There is a woman wearing pink in the surveillance video who is walking almost directly at Ms. Sekera prior to her fall, looking at her phone. As she approached this area, Ms. Sekera did not notice anything unusual about the floor. Ms. Sekera testified, *"I don't remember exactly what was on the floor…I know it was liquid because my pants felt wet."* (Sekera deposition, 90:23). However, when asked if he observed a spill, Mr. Larson, the first responder, said he did not see any wet areas (Larson deposition, 48:25). Moreover, as described above, Ms. Sekera's coffee was in her left hand. To the extent that there was any liquid on the floor, it is also likely that the source of the liquid she noted as on her pants and the back of her shirt (Sekera deposition, 95:4) was due to the coffee cup she was carrying in her left hand and dropped after her fall had been initiated.

Fall Initiation

30. With respect to fall initiation, as described above, the surveillance video shows that as Ms. Sekera was walking through the lobby, she was making a turning maneuver around the pillar in the direction of the restroom. In addition, she was wearing very worn shoes that were well beyond their safe life (Fig. 3). The sole of the left shoe was worn more along the lateral compared to the medial edge of the heel (Fig. 4). Both left and right shoes were excessively worn on their lateral compared to medial heel edges, typically the consequence of valgus degenerative changes to the knees bilaterally. Such lower extremity degenerative changes are known, intrinsic (person-centered) risk factors for falling. During normal walking on level surfaces, the required friction is conventionally taken as about 0.23 (11).

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Figure 3: Photographs of Ms. Sekera's shoes, taken by Wilson C. "Toby" Hayes on December 21, 2018. (LEFT) The top of the shoes shows the left medial side near the arch is worn and bowed outward. At the heel, the insole is wrinkled and no longer lies flat in some areas. (RIGHT) The sole of the shoe is very worn, with little tread remaining. Parts of the sole are cracked or missing completely.

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Figure 4: Photographs of Ms. Sekera's shoes, taken by Wilson C. "Toby" Hayes on December 21, 2018. When the insoles are removed, the inner aspect of the sole is seen to be worn through on both shoes. The lateral aspect of both heels on her shoes were also extremely worn. The upper right image shows the left heel, while the lower right image shows the right heel.

31. As just noted, one of the important risk factors for falling relates to the shoes being worn, particularly if worn, ill-fitting or in some way defective. On Ms. Sekera's left shoe, the thickness of the medial edge of the sole was 0.85 inches, while the lateral edge of the sole was 0.35 inches (Fig. 4). Wearing highly worn shoes increases the energy cost and reduces lower leg stability during walking compared to shoes without wear (42). Fall risk has been shown to also increase for shoes with a smaller "critical tipping angle", such as high heel shoes (44). Moreover, soft soled shoes, such as those Ms. Sekera was wearing, require a larger coefficient of friction than hard soled shoes(46). In falls in older people, inadequate footwear was found to be a major contributing factor (34). Shoes with little to no tread, like the highly worn shoes Ms. Sekera was wearing, also result in reduced coefficients of friction compared to shoes with deeper tread (33). Gronqvist reported that "footwear must be discarded before the tread pattern is worn-out" (21). Thus, as a matter of general causation, Ms. Sekeras shoes were worn well beyond their safe life and, more likely than not, increased the risk of her falling. Moreover, and specific to Ms. Sekera's fall, the wedge-shaped heels of her excessively worn shoes resulted, as a matter of fundamental physics, in both an inwardly directed force with each step and a reduction in the opposing frictional force, due simply to the angle of the wedging. These effects were likely exacerbated by Ms.

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Sekera's slight turn to the left around the column. Taken together, and given the extreme wedging of her shoes, these reductions in frictional resistance were likely on the order of 50% or about the same as hypothetically adding liquid on a hard floor. Given the lack of credible evidence that there was a liquid on the floor at the time and location of Ms. Sekera's fall and, the inwardly directed translation of her left foot seen on the surveillance video (Frame D) indicates that Ms. Sekera's fall was initiated, not by a forward slip of the foot as would be typical of a slip initiated by a foreign substance on the floor, but instead by an inward translation of her left foot, caused by the extreme wear (to the point of wedging and loss of tread) of her shoes.

32. With respect to the role of slip resistance in the initiation of Ms. Sekera's fall, as noted above, the BOT-3000E (BOT) (Regan Scientific Instruments, Southlake, TX, USA) is supported by both national and international standards and widely-used worldwide. While the English XL Variable Incidence Tribometer (XL) (Excel Tribometers, LLC, Chesapeake, VA, USA) is no longer supported by such standards, it continues to be used in the United States. Moreover, the XL is often used as a basis for expert opinions in litigation on the causation of slips and falls. Until recently, given the differences in methodologies, there has not been a scientifically reliable way to compare the two techniques. Recently, Bevill and Baker (2017) used both tribometers (BOT and XL) to take slip resistance. Measurements with the XL were taken using a Neolite test foot with distilled water. Given that operator variability has been known to influence slip resistance measurements with the English XL, the XL instrument was equipped with an automated sequencer that reduced operator involvement. For conditions consistent with field use of the two tribometers (SBR foot with surfactant solution for the BOT-3000E and Neolite foot with distilled water for the English XL), there was a strong and highly significant linear correlation between the two methods:

$$BOT = 1.469 * XL - 0.014 \qquad \text{(Equation 1)}$$

These findings provide a framework to better understand the wet DCOF thresholds provided in ANSI/NFSI B101.3 and ANSI 326.3. While the BOT-3000E is the only commercially available tribometer that complies with the requirements of the ANSI Dynamic Coefficient of Friction (DCOF) standards, the results from these experiments provide a relationship by which "equivalent" threshold values can be calculated knowing results for either the BOT or the XL. Doing so results in equivalent XL slip index values of 0.30 and 0.21 corresponding to the "high" and "acceptable" threshold BOT values for DCOF from ANSI/NFSI B101.3 or ANSI 326.3.

33. While the above equivalent threshold values are considerably lower than the recommended threshold of 0.50, or the ADA recommended value of 0.60, insight into the converted "high" threshold for the XL (slip resistance = 0.30, corresponding to the BOT "high" threshold of 0.42) can be provided when this value is interpreted in the context of required COF and slip risk. For example, a number of force plate studies have shown mean values of required COF in the range of 0.2 to 0.3 for attentive subjects walking over level surfaces (7,11,13,25,39). Therefore, a slip index of 0.3 and above provides sufficient frictional force for most people during normal, attentive walking over level surfaces (11,39). Bevill and Baker further noted that, "*Additional insight into the slip risk associated with such a threshold value can be gleaned from the logistic regression model proposed by Burnfield and Powers, which supplied an equation to predict the probability of slipping as a function of the available COF (aCOF) of a flooring surface (as measured by an XL tribometer). Application of their logistic regression model … indicates that a surface with a slip index value of 0.30 would have an approximate probability of slipping of 8%.*" (6). Related to the slip resistance at the scene in the area where Ms. Sekera fell, the Dynamic Coefficient of Friction (DCOF) values measured with the BOT-3000 under wet conditions with 0.05% surfactant solution averaged 0.24 ± 0.07 over the twelve measurements.

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34. Opposing expert, Thomas A. Jennings, made measurements using an English XL tribometer of the marble floor at the Venetian under both wet and dry conditions. According to Mr. Jenning's testing, the average slip resistance of the floor near where Ms. Sekera fell under dry conditions was 0.70. Thus, according to his own results, the marble floor at the Venetian exceeded all recommended values (that he cites as "national standards") when dry. Under wet conditions, the slip resistance he measured was 0.33. As described above, a number of force plate studies have shown mean values of required COF in the range of 0.2 to 0.3 for attentive subjects walking over level surfaces (7,11,13,25,39). Therefore, a slip index of 0.3 and above, lower than that found during Mr. Jennings' study, provides sufficient frictional force for most people during normal, attentive walking over level surfaces (11,39). Based on Burnfield and Powers correlation, this is equivalent to a probability of slipping, when walking normally, straight ahead and presumably attentively with unworn shoes, of about 8% (12).

35. Mr. Jennings opined that *"the marble flooring in the are of plaintiff's slip and fall incident was [sic] tested well below the accepted national standard of 0.50 for a safe and slip resistant walking surface when contaminated with liquids."* (Thomas A. Jennings, CXLT, Report, 12/28/18) There are, of course, no "accepted national standards" or requirements for safe and slip resistant walking surfaces. Instead, there are several *recommendations* and suggestions for coefficients of friction specific to walkways and accessible routes: a) "Section 1910.22 General Requirements" of "OSHA 29 CFR Part 1910 Walking and Working Surfaces; Personal Protective Equipment (Fall Protection Systems)"(38) states, "*A reasonable measure of slip-resistance is static coefficient of friction (COF). A COF of 0.5… is recommended as a guide to achieve proper slip-resistance. A COF of 0.5 is not intended to be an absolute standard value.*"; b) ANSI A1264.2-2001(2), a "*Provision of Slip Resistance on Walking/Working Surfaces*" written and published by the American National Standards Institute (ANSI), suggests, "*…a slip resistance guideline of 0.5 for walking surfaces in the workplace under dry or wet conditions…"*; and c) Section A4.5.1 General of ADA Accessibility Guidelines (ADAAG)(3) states, "*A research project sponsored by the Architectural and Transportation Barriers Compliance Board (Access Board) conducted tests with persons with disabilities and concluded that a higher coefficient of friction was needed by such persons. A static coefficient of friction of 0.6 is recommended for accessible routes…*". One issue with these recommendations, however, is that the method for coefficient of friction in these recommendations is not specified.

36. With respect to what initiated Ms. Sekera's fall, and noting that: 1) Ms. Sekera was wearing highly worn shoes, which not only reduced the available friction at her heel, but also resulted in a lateral force that caused her foot to slip from her left to her right; 2) the lack of evidence from the surveillance video that Ms. Sekera's foot actually slipped forward (as would be typical of a liquid-related fall) and 3) there is no credible evidence that there was liquid on the floor at the time and location of Ms. Sekera's fall, I conclude, on a more likely than not basis, that her fall was initiated by the defective condition of her shoes and not by a liquid on the floor

Injury Causation

37. Ms. Sekera's fall at the Venetian Casino & Resort occurred on November 4, 2016. According to the complaint, she is asserting acute injuries to her low back and SI joint, head and neck. Notably, there is no objective evidence at any point in time of any acute injury at any of these sites. Rather, all are characterized as chronic degenerative conditions. In particular, on the date of the fall, November 4, 2016, Ms. Sekera was diagnosed as having degenerative disc disease, predominantly at L2/3 (Radiology Report, Kaveh Kardooni, DO, 11/4/16). On December 21, 2016, she was diagnosed as having multilevel degeneration and mild neuroforaminal stenosis at C5/6, and multilevel lumbar

degenerative disc disease with disc bulges extending from L 1/2 through L5/S1 (Radiology Report, Sara Kym, MD; Saul Ruben, MD, 12/21/16).

38. In rare instances, vertebral disc bulges and herniations can be caused when discs are subjected to a combination of compression and flexion sufficient to exceed the tolerances of the tissue. However, in the vast majority of cases, disc bulges and even frank herniations are the consequence of chronic, repetitive loading over time and the resultant accumulation of damage to the end plates and discs. Given her diagnosis as degenerative conditions of the spine, this is almost certainly the case with Ms. Sekera. However, to explore the Plaintiff's assertion that she sustained an acute injury related to this fall, the compressive loading in Ms. Sekera's lumbar spine from impact can be determined using the Impulse-Momentum principle ($F = mv/\Delta t$). The L5/S1 compressive impact force was approximately 279 lbs as a result of Ms. Sekera's fall onto her left hip and buttocks (Fig. 5). Compared to the compression tolerance of Ms. Sekera's lumbar spine based on her age and gender (750 ± 201 lbs (20)), the Factor of Risk for lumbar disc injury associated with her fall is 0.4. Thus, the forces associated with Ms. Sekera's fall at the Venetian Hotel and Casino on November 4, 2016 were only about 40% of the more likely than not level of force necessary to initiate disc damage and thus not sufficient to cause her alleged lumbar spine injuries. With respect to the lumbar facet joints, about 20% of the resultant compressive force on the lumbar functional spinal unit is transmitted through the facet joint (24). Therefore, Ms. Sekera's lumbar facet joint sustained approximately 60 lbs at the time of the fall.

39. A comparable approach can be used with the asserted injuries to the sacroiliac joint. The pelvis is composed of three bones (two paired ilia and the sacrum) and three joints (two SI joints and the pubic symphysis), and is stabilized by several ligaments and muscles. The wedge-shaped anatomy of the sacrum fits tightly into matching concavities in the two ilia. The function of the SI joints is to contribute to the transmission of forces from the spine to the lower extremities and vice versa, distributing the ground reaction forces that occur during walking and running(26). While SI joint dysfunction is possible from a hard fall onto the buttocks(43), previous researchers have shown the "downward shear strength" (35) of both SI joints is 1092 ± 185 lbs (22). However, exceeding the shear strength of the SI joint resulted in fractures in the sacrum close to the sacroiliac joint, first on one side then the other. There are no reports of acute sacral fracture in Ms. Sekera's medical or radiographic records and thus, SI joint acute injury can be ruled out in Ms. Sekera's case. Moreover, the direction of the shear forces across the sacroiliac joint are approximately the same as those in compression across the lumbar discs at the time of Ms. Sekera's fall. The shear force at the SI joint at the time of Ms. Sekera's fall was approximately 355 lbs. The Factor of Risk for SI joint injury is 0.65. The forces associated with Ms. Sekera's fall were not sufficient to cause her alleged sacroiliac joint injuries.

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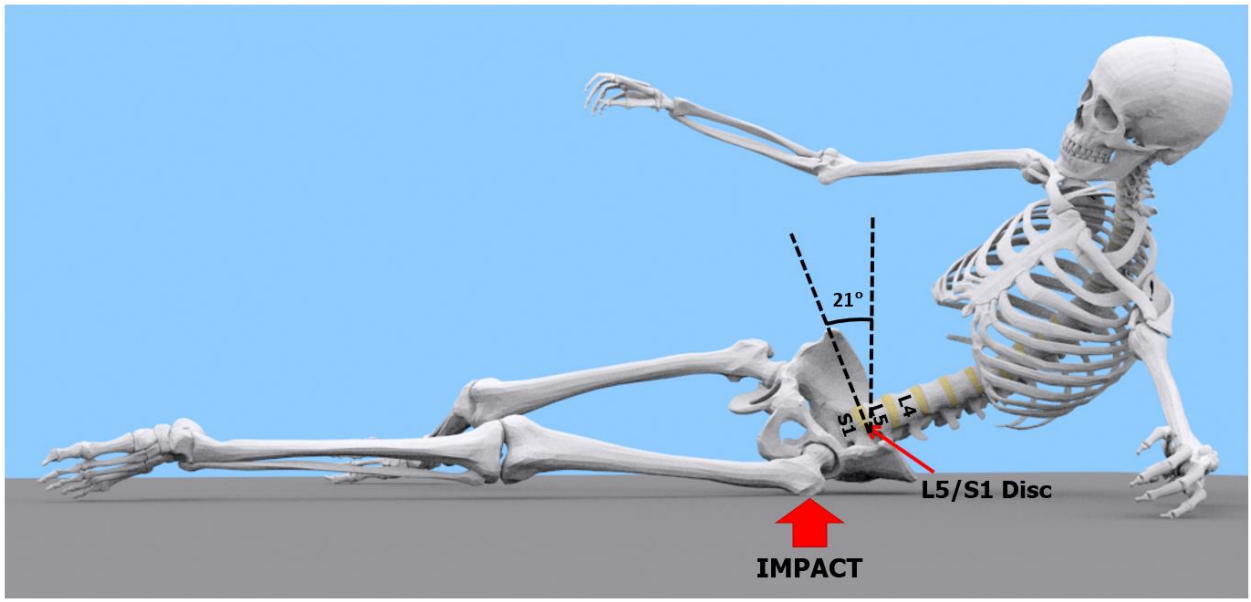

Figure 5: Illustration demonstrating the orientation of Ms. Sekera's body after she impacted the ground with her left hip. The diagram is illustrative and not meant to be exact. Moreover, it does not represent the nearly simultaneous impact of Ms. Sekera's left elbow on the pillar. Such an impact configuration would orient the AP (front-to-back) diameter of Ms. Sekera's L5/S1 disc approximately 21° from vertical.

40. With respect to her head and neck, after landing on her left hip, Ms. Sekera rotated rearward, and her head contacted the base of the pillar. The Head Injury Criterion (HIC) was developed and is mandated by the Federal Government(36), and takes both the magnitude and duration of head acceleration into account. MTBI thresholds have been determined to be between 85 and 233 g's, or a HIC score of 600 (19). Assuming Ms. Sekera rotated rearward after striking her hip on the ground, her head fell approximately 1 foot before contacting the pillar. The impact of Ms. Sekera's head on the pillar led to a peak head acceleration of about 73 g and a HIC score of 75, below injury thresholds for mild traumatic brain injury. Assuming Ms. Sekera struck the pillar with her the back of her head at an angle that was approximately 25 degrees from perpendicular to her neck, the neck compression force was approximately 103 lbs. Neck injury (e.g. disc hernation) tolerance limit for a 65 y/o female in compression is 380 lbs (37). The Factor of Risk for neck injury is 0.27. Therefore, the forces associated with Ms. Sekera's fall on November 4, 2016 were not sufficient to cause her alleged head and neck injuries.

41. The evidence in this case thus fails to meet the first criterion (a reliable biomechanical mechanism) necessary to establish injury causation. As described above, according to our biomechanical analysis, the subject fall incident did not generate forces sufficient to cause Ms. Sekera's alleged low back, SI joint, head or neck injuries. The second criterion (objective evidence of injury) is also not satisfied. There is no objective evidence of any acute injuries following the November 4, 2016, incident. On the date of the fall, radiographs of her lumbar spine indicated, *"Degenerative disc disease most conspicuously at L2/3 where there is endplate osteophyte formation and some endplate sclerosis. There is slight increased density at the disc space of uncertain etiology possibly related to some calcification."* (Radiology Report, Kaveh Kardooni, DO, 11/4/16). Radiographs of her left elbow indicated *"no soft tissue abnormalities"* (Radiology Report, Rick Yeh, MD, 11/4/16). On November 14, 2016, radiographs of her left shoulder indicated, *"No evidence of acute skeletal pathology to the left shoulder. There are mild*

degenerative changes at the acromioclavicular articulation." (Radiology Report, James Balodimas, MD, 11/14/16). Radiographs of her cervical spine were read as, *"No evidence of acute fracture. On the neutral, lateral projection, there is reversal of the normal lordotic curvature, could be due to spasm."* (Radiology Report, James Balodimas, MD, 11/14/16). Radiographs of her thoracic spine were read as, *"No evidence of acute skeletal pathology to the thoracic spine."* (Radiology Report, James Balodimas, MD, 11/14/16). On December 16, 2016, an MRI of her brain indicated no abnormalties. On December 21, 2016, an MRI of her cervical spine was read as *"Mild multilevel degeneration. Mild neuroforaminal stenosis at C5/6. No spinal canal stenosis throughout. Mild dextrocurvature. Straightening of the cervical lordosis, which may be seen with muscle spasm."* (Radiology Report, Sara Kym, MD, 12/21/16). On the same date, an MRI of her lumbar spine indicated, *"Multilevel lumbar degenerative disc disease, with disc bulges extending from L1/2 through L5/S1. Annular fissuring at L4/5. No canal stenosis or neural foraminal narrowing at any level. There is note made of facet and ligamentous flavum hypertrophy at multiple levels."* (Radiology Report, Saul Ruben, MD, 12/21/16). These radiographic reports indicate many instances of degenerative conditions, which take many months to years to develop, and thus pre-dated the fall in question. The presence of herniations or disc bulges on radiology is not an indication that they occurred acutely(17). Research has shown that for people over 40 years old, that are asymptomatic, 9% have abnormalities (e.g. disc herniation) present in their cervical spines(9). Similarly, for people between 60 and 80 years old, that are asymptomatic, 36% have at least one herniated lumbar disc (most often at L4/5 or L5/S1) and 79% have at least one bulging lumbar disc, without ever having low back pain, sciatica, or neurogenic claudication(8).

42. The evidence in this case also fails the third criterion (temporal consistency). The subject incident occurred on November 4, 2016. In February 2019, 39 months after the fall, Ms. Sekera went to a surgical consultation. At that time her physician reported, *"The CT scan is really quite interesting. It does show a rotatory subluxation at L5/S1 of approximately ten degrees. There are significant facet changes including what appears to be a poorly healed fracture on the superior articular facet. There is moderate foraminal stenosis at this level. She does also have bilateral signs of SI joint dysfunction."* (History and Physical Report, William Smith, MD, 2/7/19). This progress note was over three years after the fall and was the first mention of issues Ms. Sekera had with SI joint dysfunction or lumbar subluxation. With respect to the fourth criterion (alternative explanations), the forces experienced by Ms. Sekera's low back as a result of the incident were within the range of those generated during her everyday activities. It is well known that large spinal compressive forces are generated during everyday activities. Using a well validated three-dimensional model (The University of Michigan Three-Dimensional Static-Strength Prediction Program, V6.0.0, Ann Arbor, Michigan, 48109)(45) of lumbar spinal loading, spinal compression forces were estimated for Ms. Sekera during a simple forward bend to 45° and 90°. This posture, commonly experienced while engaging in many activities of daily living (e.g., lifting, tying shoes, picking up objects), generates low back loading of approximately 429 lbs and 509 lbs, respectively. Normal everyday walking generates lumbar compressive forces on the order of 2½ times body weight (14), or for Ms. Sekera, 473 lbs. With respect to the neck, hopping up and down generates, on average, 48 lbs of neck compression (47). "Plopping" down in a chair produces as much as 108 lbs of neck compression (18). Thus, the loads experienced by Ms. Sekera as a result of the fall at the Venetian were not only well below injury tolerance limits, but also well below the force levels generated during her normal everyday activities. When forces from an event that is alleged to have caused an injury are below or within the range of those experienced in everyday life, it is unlikely that injury can be caused by that event.

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Opinions

43. Based on my review of this case, and on my background, education and training in the fields of falls and injury biomechanics, anatomy, and orthopaedics, I conclude to a reasonable degree of engineering and biomechanical certainty, that: 1) Based on a scientifically reliable fall reconstruction, Ms. Sekera fell forward and toward her left during her fall. She first landed on her buttocks (absorbing energy) and then struck her left elbow on the pillar. She then rotated toward her back and the back of her head contacted the pillar; 2) Ms. Sekera's fall was initiated by factors related to her extensively worn and damaged shoes which not only reduced the available friction between shoe sole and floor, but also imposed a lateral force that caused her left foot to translate to her right. There is no scientifically reliable evidence that a liquid substance was on the floor where Ms. Sekera's fall initiated. Given the video surveillance evidence that Ms. Sekera's fall was initiated by a sideways translation and not a forward slip of her left foot (as would be expected with a liquid-related fall), a slip on wet flooring was not the proximate cause of her fall; and 3) Based on a formal and scientifically reliable injury causation analysis, the fall that Ms. Sekera sustained on November 4, 2016 was not the cause of the alleged acute injuries to her low back, SI joint, head or neck, nor would the fall have exacerbated any pre-existing conditions related to these regions.

44. Please note that I reserve the right to supplement this report should additional information become available to me. Thank you for the opportunity to review this case. Please let me know if I can provide any further information.

Respectfully Submitted,

Wilson C. "Toby" Hayes, Ph.D.
Hayes+Associates, Inc.

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EXHIBIT 2

DISTRICT COURT

CLARK COUNTY, NEVADA

JOYCE SEKERA, an Individual,

Plaintiff,

vs.

Case No. A-18-772761-C
Dept: 25

VENETIAN CASINO RESORT, LLC, d/b/a THE VENETIAN LAS VEGAS, a Nevada Limited Liability Company; LAS VEGAS SANDS, LLC d/b/a THE VENETIAN LAS VEGAS, a Nevada Limited Liability Company; YET UNKNOWN EMPLOYEE; DOES I through X, inclusive,

Defendants.
_____/

DEPOSITION OF GARY SHULMAN

Taken at the Galliher Law Firm
1850 East Sahara Avenue, Suite 107
Las Vegas, Nevada 89104

On Wednesday, April 17, 2019
At 3:15 p.m.

Reported By: PAULINE C. MAY
CCR 286, RPR

APPEARANCES:

For the Plaintiff: KEITH E. GALLIHER, JR., ESQ.
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Las Vegas, Nevada 89104
(702)735-0049

For the Defendants: MICHAEL A. ROYAL, ESQ.
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* * * * *

I N D E X

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GARY SHULMAN,
having been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION
BY MR. GALLIHER:
Q Would you state your name, please.
A Gary Shulman.
Q And your address.
A 10263 Jamapa Drive, Las Vegas, Nevada 89178.
Q Gary, have you ever had your deposition taken before?
A No.
Q You understand today that you are under oath?
A Yes.
Q And the oath you've taken carries with it the same solemnity as if you were testifying in court before a judge and a jury.
A Yes.
Q Do you understand that?
A Yes.
Q It also carries with it the penalties of perjury. Do you understand that?

A Yes.
Q A little general background first. How long have you lived in Las Vegas?
A Just about 13 years. In May, it will be 13 years.
Q Where did you come from?
A At the time I was living in California for 90 days. I was living in Marietta near Temecula where I worked for a casino called the Pechanga that was there. And before that, I was in a casino in Arizona, in Scottsdale, Arizona, for approximately three years.
Q And when you came to Las Vegas, was there a reason why you relocated to Las Vegas?
A Yeah. I wanted to be -- you know, my family, I have a brother and lot of cousins here. I also wasn't real happy in California, and I knew the Venetian at the time was considered a premier property to work in and so that's why I came here. But it was mostly to be with family.
Q When we talk about family, are you married?
A Yes.
Q What's your wife's name?
A Ellen.
Q Any children?
A She has a daughter; yes.

Q Now, when you relocated to Las Vegas to go to work at the Venetian, is that the reason you came to town, apart from family, to go to work at the Venetian?
A Yes.
Q And when you started at the Venetian, what was your position?
A Table games supervisor.
Q Tell me what a table games supervisor does.
A We basically circulate among certain sections and different sections of table game areas, being a host to the guests, and also trying to supervise the dealers, try and catch mistakes.
But basically, you know, some people play on credit, so I would process paperwork for someone who has a credit line and wants to take money out right at the table. And, like I said, be a host, you know, get the waitress if they need a cocktail, a cigarette girl, ashtrays. Just basically a host to the guests.
Q Now, did there come a time when you were employed at the Venetian that your job title changed in any way?
A No.
Q So would it be fair to state, then, for the entire 13 years you were employed at the Venetian, you

were a table games supervisor?
A That's correct. A little less than 13 years, but...
Q A little less than 13 years?
A Yes.
Q How far did you go in school?
A Excuse me?
Q How far did you go in school?
A I have a bachelor's degree from Colorado State University.
Q In what discipline?
A Business administration.
MR. GALLIHER: Off the record.
(Discussion off the record.)
BY MR. GALLIHER:
Q All right. I'm here today to talk to you about a fall which occurred at the Venetian Hotel and Casino on November 4, 2016. And before I get into the fall, you were subpoenaed to today's deposition; is that right?
A That's correct.
Q Now, in response to that subpoena, did you contact my office?
A Yes, I did.
Q And did you and I have a conversation about

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today's deposition?
A Yes, we did.
Q And did you come by the office and meet with me about today's deposition last week?
A Yes.
Q And did we discuss your version of what happened?
A Yes.
Q And did I also show you the video surveillance?
A Yes.
Q And I showed it to you two or three times; is that right?
A Yes.
Q All right, so I want to talk to you about that fall. And you've seen the video surveillance?
A Uh-huh.
Q Did you see yourself in the video surveillance?
A Yes.
Q Why don't you start with what you remember about the fall itself on that date.
A I remember getting relieved to take a 30-minute break. We get three 30-minute breaks every day, traditionally working two hours at a time.

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As I go on break, I heard a noise and I looked a little bit to my right and I noticed a lady down on the marble area near one of the columns very close to the Grand Lux, in between the Grand Lux Cafe and the restrooms.

I went over to assist her. I did notice that the floor was wet. It was some -- it was wet pretty much near where she fell. I also saw some -- a little bit of liquid at the base of the column that she was next to.

I went to get PAD, our public area department, to come and clean it up. I called for security, and basically waited for all the appropriate; people to get there and then I left.
Q When you say you approached the lady on the floor, did you have any conversations with her?
A I asked her if she was okay and she said that she hit her elbow, but other than that, she thinks she was okay.
Q Now, you mentioned that you saw liquid on the floor. Do you know what it was? Was it clear? Was it not clear?
A It was pretty much clear. Most of it was on like a black area of the marble. It was kind of hard to tell exactly. I mean, could be a number of things.

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Vodka, water, maybe even coffee. I didn't really look to see what it was. I was basically concerned for the guest.
Q And how much liquid, if you can quantify it, was on the floor when you approached?
A I would say equivalent to half a cup that you have in your hand right now.
Q So this cup is 16 ounces, so we would say roughly eight ounces of liquid?
A Yeah. It's hard for me to be exact with that.
Q Did you see any colored liquid or did it appear to be clear?
A It just appeared to be clear.
Q So if you were to give us your best estimate of what you thought you saw on that floor, would it be water or something else?
A It would be water or something else. I mean, there's -- yeah, there's different things that are clear. Someone could have a vodka on the rocks and spill a little when they walk by. I really didn't pay much concern, even up until now as to what it was.
Q But what you did know is that the floor was wet when you approached this lady?
A Yes. Yes.

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Q And it appeared that there was approximately eight ounces worth of liquid on that floor?
A I would say if you were -- I mean, I'm kind of guessing a little bit, but if you were to gather everything up, it might be eight ounces.
Q Can you give me an idea of the size of the spill itself?
A The size of the spill, I know on the black marble it was basically just like a small area like that. And then there was drops that kind of lead to the bottom of the column that she was next to.
Q And when you drew your little circle, if I was to give you a circumference, it looks to me like your circle is probably three to four inches in circumference; is that right?
A That's about right. Yeah, it wasn't real big.
Q And then, apparently, there were sprinkles or spots of water that led toward the column?
A Yes.
Q Now, how long were you at the scene of the fall?
A I would say at least 10 minutes.
Q So you spent approximately 10 minutes there. And as I understand your testimony, did you also

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notify security of the fall?
A I believe I called surveillance and they notified security. I may have called security. This is two and a half years ago. I think I notified my manager. Actually, her name was Chris Tonemah, and I think she called security.
Q But you said something about you notified the PAD people.
A Yes, I did. Actually went into the bathroom to get them. It was a lot quicker because there's always someone in there.
Q When you went into the bathroom, did you find any PAD people there?
A Yes.
Q Do you remember whether it was a male or female or both?
A It was just a male.
Q So you found a male there. Did you see a female PAD employee in that bathroom or anywhere nearby?
A Not that I recall.
Q Can you give me your best estimate of how long it took the PAD people to arrive at the scene?
A It was very quickly. After I went into the bathroom I pointed out to them, I said, you know,

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There's a lady down, you know, she slipped on something that was wet. If you could please clean that up and also clean up the base of the column where there's more drops, I don't want anybody else slipping.
Q Did you have that conversation with the male?
A Yes. It was an Hispanic male.
Q And to this date, do you know his name?
A No, I don't.
Q Now, how long after you had the conversation with this male did he arrive at the scene of the fall?
A Just a matter of seconds, really. I went into the bathroom and waved him out and pointed to the area, and then told him basically what needed to be done and went there.
Q And did he bring anything to clean up the spill?
A Yeah, yeah. He had a mop and a bucket and I think he put one of them yellow signs there. I can't remember, but could have been a yellow sign they put down that say "Wet Floor."
Q And did you observe him actually clean up the spill?
A Yeah, yeah.

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Q So I mean, as you testify here today, was there any doubt in your mind that there was water or a clear liquid on the floor as you approached the fall scene?
A No, there was no doubt in my mind. The floor was wet.
Q And do you know whether you saw any water or liquid on the clothing of the woman that fell?
A I don't recall any -- any part. I didn't really look for that, but, no, I didn't recall seeing anything wet on her.
Q Sounds like basically what you did is, you -- did you actually see the fall or did you approach her after the fall?
A I approached her after the fall.
Q And something drew your attention to the scene. Was it a noise?
A It was a noise; yeah.
Q And so you apparently zeroed in on the scene of the fall shortly after it happened?
A That's correct.
Q And then when you saw the lady down, you then approached her to make sure that she was okay?
A Yeah, and to advise her to stay down until we can get help to make sure she's okay.

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Q And is that what you did; you advised her to stay down?
A Yes.
Q Until help arrived?
A Yes.
Q So do you know how long after the fall the security officer arrived?
A It was a good -- at least 10 minutes, maybe 15.
Q And have you ever experienced or seen falls before at the Venetian?
A I can't say that I have, no.
Q So did that seem like an unusually long period of time in your view, or not?
A Usually they come much quicker than that; yeah.
Q So about 10, 15 minutes later the security officer arrived. Now, do you remember what color uniforms they wear?
A Some have a blue shirt with I think black pants, and then when you get to the next level, the supervisory level of security, usually a suit and tie just like I was.
Q And in the video, there's other people shown wearing suits and ties. Can you tell me who they work

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for?
A I know one worked for I believe the front desk.
Q And anyone else?
A I think there was one other person there. I can't remember where, what department that person worked in.
Q Now, you mentioned that you were employed at the Venetian for 13 years. And are you currently employed at the Venetian?
A No, I'm not.
Q And when did you leave the Venetian?
A I was terminated officially on January 23rd of 2019.
Q And what was the reason for your termination?
A They said I made a comment that made another team member feel threatened.
Q And did you make that comment?
A I made the comment, but not -- it was not a threat in any way.
Q Did you, as a result of being terminated at the Venetian, file for unemployment?
A Yes, I did.
Q And did you receive unemployment benefits?

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A I did.
Q Tell me how that happened.
A Well, when you first fill out online that you are terminated, there is a -- I guess a little bit of an investigation that the Department of Employment does. And they came to the conclusion that the comment I made was nothing more than an isolated comment that was taken out of context and did not constitute any misconduct in the workplace.
Q Did you have any problems, like warning notes and so forth, at the Venetian before this comment when you were terminated?
A I had a number of problems for about six months before this incident.
Q When did they start?
A They started around March of 2018.
Q And as you look back on those events, what is your feeling about the problems that surfaced at the Venetian regarding you?
A Well, I'm, you know, very disappointed and very upset at the Venetian. I received what I believe was some retaliation, intimidation, harassment. I received three written warnings in a two-week period for things that nobody ever got any discipline for, three writeups with potentially only one mistake on my

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part.
One of the warnings was because I didn't catch someone else's mistake. Another one was, I chose to sit down -- I was standing for an hour waiting in a closed pit with no chips on the table. We were filling up the tables with chips.
It's a well-known fact over there I have really bad arthritis in my hip, so I sat down. And they brought me in and gave me a written warning for that.
And all three of these written warnings they chose not to use any progressive discipline, just skip a couple of steps. And that was very upsetting to me because I've seen these things happen for 13 years with nothing more than a slap on the hand usually.
Q So did you have any -- was there any event which predated what you have described was harassment and so forth on the part of the Venetian?
A Well, there was a young lady, her name was Rhonda Salinas, and I received what I believe was harassment, belittling you in front of other people, making false allegations that -- that you did things that you never did.
And it got to the point where, about three days before I was suspended pending investigation, I

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went to human resources to file a complaint about her. And then a couple days later, I made this comment to a gentleman named Barry Goldberg, who at the time I felt was a friend of mine, from New Jersey and we were both Philadelphia fans, and we talked.
And, you know, I said -- I really didn't volunteer much information. I just said -- he said, "How are you?"
I said, "Oh, kind of stressful, you know. I don't like doing things like I did. I had to go complain about someone."
And he said, joking around, "I hope it wasn't me."
And I said, "No," I said, "but someone's in a world of shit."
And I didn't know at the time I was talking about me.
Q So you are talking about the event that predated your termination at the Venetian?
A Yeah.
Q Well, I'm going back to -- you talked about a pattern of harassment and intimidation on the part of the Venetian for roughly a six-month time frame before you were terminated.
A Uh-huh.

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Q Now, in your view, was there anything that you were involved in before that six-month time frame that you believe resulted in harassment and intimidation?

A Yeah. There's a supervisor -- or an area supervisor is the next level up. They got rid of the term pit manager, so now it's table game supervisor, area supervisor, and then you have like an assistant casino manager.

The casino manager, Mike Connery(phonetic), had brought us in maybe like eight months before all this happened with the lady. Wanted to tell us that we were going to be asked to watch more tables, we were going to be asked to help each other out more. If there's two people in one section, it's not that busy, you see another person in another section that's busier, then why don't you go over there and help.

So I found myself in a situation one day where I was in Pit 4 with about I believe seven tables to myself, which is quite a bit in that section. And dealers were making mistakes; customers were upset because I just couldn't service them, get them the waitress, take their players card so they could get rated and get their points for playing.

And I voiced my opinion on the way to break

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to another supervisor because I saw three other supervisors in a pit, Pit 9, which is our salon, with no players at all. And I made a comment to -- trying to think of his name. I'll come up with his name. I'll come up with it -- Ryan. Ryan Parker.

And I told him, "Really disappointed. You know, I got dealers making mistakes. I got customers complaining about service and there's three supervisors in this section doing nothing, and I thought we were supposed to help each other out."

And just, he kind of looked at me. He did say, "Well, if you do find yourself needing help, call us. We'll try and get some help." And then I went on my way.

Then the next day I went into Pit 4, getting the pit ready. We report at 11:45. One of the area managers, his name is Abraham Ly, spelled L-y, came over to me.

He said, "Between me and you, management is really pissed off about that comment you made. Mike Connery, the casino manager, takes that personally, that you're suggesting that he doesn't know how to staff the casino. And if I were you, I would be watching your back. Management is out to get you."

I said to him, "What do you mean they're out

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to get me?"

He said, "Well, let me put it this way. Every little thing you do is being watched, and they're just waiting for you to make a mistake to create a problem for you."

Q Well, now you've discussed this claim with me in my office. Have you ever discussed this claim with Mr. Royal? That's the gentleman next to you.

A Yeah.

No.

Q Okay. You've never discussed the claim with him at any time?

A No. The last -- I only met with Mike Royal, I believe it was on the 28th of November, 2018.

Q Well, so you did meet with Mr. Royal?

A I met with him, yeah, at the casino once.

Q At the casino?

A I thought you said did I meet with him after these things happened.

Q No. I want to know if you met with him in connection with the fall event which we're here about today.

A Yes. I'm sorry, I did.

Q And when was this?

A November 28, 2018, I believe.

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Q And where was this?

A This was in the back area of the salon in one of the private rooms. The rooms aren't numbered, it would probably be Number 1 of 2. I'm not sure, I don't work in that section.

Q Can you tell me about the meeting?

MR. ROYAL: Hold on a second. I'm going to -- you are getting into attorney-client information related to our discussion with an employee at the time, and I'm going to instruct him not to answer.

MR. GALLIHER: Well, he can instruct you, but you can answer if you want to whether he instructs you or not.

BY MR. GALLIHER:

Q Let me ask this question preliminarily. At the time you met with Mr. Royal in November 2018, had you hired him as your attorney?

A No.

Q Had you paid him a retainer or any money to represent you in connection with anything?

A No.

Q Have you asked him to represent you in connection with anything?

A No.

Q All right, so you met with him and you are

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claiming attorney-client privilege.
Are you -- you are no longer employed at the Venetian; is that right?
A That's correct.
Q All right. So subject to his objection, which is, of course, made part of the record, I'm going to again ask you the question of: Tell me about the meeting.
A Well, basically he asked me, you know, what I remember and what I don't remember.
I explained to him a lot of what I already said happened, that I went over, I was heading towards my break, I saw a lady that was down. I went over to her and asked if she was okay. I noticed the floor was wet.
At that time he said, "No, it wasn't wet. You didn't see anything wet. You are mistaken."
And I said, "Well, I'm pretty sure it was. I mean, that's why I called PAD to clean it up. In 13 years I've never called PAD to clean up a dry spot."
And he says, "But, no, no, there was nothing wet there."
And at that point, I kind of became concerned that I might get in trouble if I keep disagreeing with him. So I just said, "Okay, whatever

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you say," and that was it.
Q You talked about this pattern of harassment and threats and so forth on the part of the Venetian.
Did you have -- was there a pattern of threats and intimidation and so forth on the part of the Venetian before you had this meeting with Mr. Royal?
A No.
Q And how soon after you had this meeting with Mr. Royal did that start?
A I would say 30 to 60 days.
Q And did that continue up to the time that you were terminated?
A Yes.
Q Approximately how many times were you written up by the Venetian?
A In the entire 13 years or just like --
Q Let's start with the time that -- the time up to the time that you had a meeting with Mr. Royal in November of 2018.
A Before I met Mr. Royal?
Q Yes. In other words, at the time frame up to the time that you met with Mr. Royal, how many times were you written up by the Venetian?
A There was nothing for about three years and

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then there was a couple of minor things.
There was one incident approximately three years ago from this coming May where a dealer made a mistake sending the wrong amount of chips to a customer, and I didn't catch it and I got a written warning for that. That was the only thing that I really was aware of.
In the very beginning when I was there two or three years, I read my schedule wrong and didn't show up, which is -- casinos really frown on that. So I was given what they call a Career Decision Day where you write down what you did wrong, what you plan on doing to prevent it from happening again, and then you have to take a day off, which could be a paid day off if you have vacation time, or an unpaid day off.
Q So sounds at least like the written warnings were kind of few and far between during these initial years up to the time that you met with Mr. Royal.
A Oh, yeah.
Q Now, after you met with Mr. Royal, how many written warnings did you receive from the Venetian?
A I received three that I knew about. Then I found out there was a couple more put in my file without me knowing about it, but they weren't written warnings. One was called a note to file and another

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one was called a verbal coaching.
They said that they are allowed to do that without telling you. I'm not sure why, but I didn't know they were in there until we did this peer review to try to recover my job.
So but as far as written warnings, which are much more serious, there was three in a two-week period when I don't think I had three in the whole 13 years before that or 12 years before that.
Q And that was within the months after you met with Mr. Royal until the time you are terminated?
A That's correct.
Q You were terminated when?
A The official termination date is January 23rd.
Q Of 2019?
A Yes.
Q All right, so you've got a little less than a two-month time frame from the time you met with Mr. Royal in 2018 in November.
And during that two-month time frame, how many written warnings did you receive? You said three?
A Yes.
Q And then you also said two other entries

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were made in your job file -- I mean your employment file --
A Yes.
Q -- regarding a verbal coaching.
And what was the other one?
A One was a note to file. I gave a customer, a player at the table -- if you are not being a rated player meaning we don't have your name, we don't really give out thousand-dollar chips or higher.
And a mistake was made and the gentleman left with chips, but we got him very quickly back. And he was a rated player, so we found out who we was and we were able to account for those chips.
I was talked to about it. They said at this time we're not taking any disciplinary action, you know. They knew I had some problems at the time and my father with Alzheimer's in New Jersey and just a lot of stress from that. So that was basically it.
Q All right. So what I'm getting at is, during that roughly 60-day time frame between the time you met with Mr. Royal and the time you were terminated, would it be fair to state that you received more written warnings at the time you had during your 13 years at the Venetian?
A Absolutely.

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Q And as you look back on that situation, do you have an opinion regarding why that happened?
A Well, I believe that they were very upset about me using my privileges under the Family Medical Leave Act. I was getting lots of flareups with my neck and my hip and I had to --
I was definitely using it more than I'm accustomed to. Sometimes I wouldn't be able to come to work. Sometimes I would have to have procedures done where they burn away the nerves in my neck and put steroids into my hip.
Repeat the question.
Q Well, so what I'm trying to determine, your opinion why it is you started receiving all those writeups after you met with Mr. Royal.
So are you telling me it had to do with your health issues?
A Had to do with health issues; yes. I frequently, maybe once a week, once every two weeks would have to leave early or not come in at all. And I know that they were upset because it creates staffing problems when this happens.
Q Now, you apparently pursued unemployment. Did you receive it?
A Yes.

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Q Did you prevail at your initial hearing before the unemployment board? In other words, did you win?
A Yeah, we won. They didn't show up.
Q That apparently -- did that have to do with the initial hearing or the appeal?
A The initial hearing was just a finding from the Department of Employment that there was no misconduct.
Q And then did the Venetian appeal that?
A Then the Venetian appealed that.
Q And did you appear at the appeal hearing?
A Yes.
Q Did the Venetian appear?
A They did not appear; no.
Q So what was the result of that appeal hearing?
A That the appeal was dismissed.
Q And so you ended up receiving your unemployment despite the fact that the Venetian contested it?
A Yes.
Q Have you understood all my questions today?
A Yes.
Q Anything you want me to repeat or rephrase

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for you?
A No.
MR. GALLIHER: All right. Pass the witness.

EXAMINATION

BY MR. ROYAL:
Q Okay. When is the last time you looked at that video? Was it with Mr. Galliher?
A Yes, about a week ago.
Q Do you remember when I was -- I reached out to you to try and meet before the deposition?
A Yes, uh-huh.
Q Did you tell Mr. Galliher about that, about my effort to meet with you?
A I believe so; yeah.
Q And, first of all, why wouldn't you meet with me, but you would meet with Mr. Galliher?
A Well, I've experienced and also seen other things, just incredible, what I think are ethic violations and integrity.
And after what they did to me, I really didn't feel comfortable being affiliated in any way from anybody that had anything to do with Venetian.
Q Okay. Is there something in our communications and our interchange, since the time you

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first met me, that led you to believe that I was being somehow dishonest with you in any way?
A I don't know if I want to use the word "dishonest." You know, I -- I saw the floor was wet and you didn't seem happy about me saying that.
Q Okay. I'm having trouble recalling this entire exchange you are talking about.
A Okay.
Q So let me ask it this way. You asked me -- let me get back to that.
You asked if -- prior, if you would meet with me, whether or not you would be compensated. Do you remember that?
A Yes.
Q Do you remember my response to that?
A You said to contact Mr. Galliher.
Q I don't --
A You didn't?
Q No, I didn't.
A Or that you would check with the opposing counsel.
Q Okay. Well, let me -- did you get compensated by Mr. Galliher?
A I just have a check I saw to cash for $26.
Q What date did you meet with Mr. Galliher?

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A It was a week ago today, I believe.
Q In this office -- in his office?
A Yes.
Q And how long was the meeting?
A Approximately an hour.
Q And other than reviewing the video, did you review anything else?
A No.
Q Did you look at any photos of the scene; do you remember?
A I didn't look at them with Mr. Galliher. I had looked at them when you sent me e-mails with the photos included --
Q Okay.
A -- as attachments.
Q Did you provide Mr. Galliher with anything that I had written to you?
A No.
Q What else did you tell Mr. Galliher about our meetings, other than what you have already testified to today?
A Nothing.
Q Did Mr. Galliher indicate to you that Ms. Sekera, his client, was carrying some coffee in her hand at the time she fell?

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A I don't recall.
Q Okay. Do you remember that?
A That she had a cup of coffee?
Q Right.
A No, I don't.
Q Okay. So as you sit here today, you don't recall whether or not Ms. Sekera was carrying a beverage at the time she fell?
A No. I was not aware of anything, any beverage she was carrying at the time she fell.
Q Okay. But you did watch the video; correct?
A Uh-huh.
Q Yes?
A Yes.
Q And when you watched the video, did you watch her fall?
A Yeah.
Q Okay. I'm going to show you the video. I'm going to have you watch the video starting at 12:36:46. This is VEN019. I'm just going to have you watch this.
A Okay.
Q Do you recognize the area -- before I start it, do you recognize the area?
A Uh-huh.

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Q Yes?
A Yes.
Q And I'm going to point. Do you see yourself? I'm going to point up here to the top left. I believe that's you walking towards the area.
A Okay.
Q I'm going to start it now.
A Okay.
Q Here she comes. Okay, do you see that?
A Yes.
Q Now she's on the ground now, or the floor, at 12:36:54. I stopped it. Now I'm going to go back again and I'm going to stop it at 12:36:49.
A Okay.
Q Can you see whether or not she's got anything in her left hand?
A Yes, it does look like she has a cup of coffee.
Q Okay. I'm going to start it. She goes down; okay?
A Uh-huh.
Q What happens to the coffee? Do you see?
A Yep.
Q Okay. And someone responds there. There's a woman who responds, she picks up the cup. See that?

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A Uh-huh.
Q Yes?
A Right now; yes.
Q You just need to say yes or no. That's why I'm saying that.
A Okay.
Q At 12:36:57 you are approaching?
A Uh-huh.
Q Correct?
A Yes.
Q Okay. I'm going to stop right here at 12:37:01. Do you remember being in that particular position when you first arrived at the scene, talking to the -- the plaintiff is on the floor.
A Yes.
Q Do you remember there being a couple of women standing around?
A Yes.
Q And do you remember seeing this woman who would be to your right, she's got a cup in her hand?
A I don't remember her there. I mean, I was pretty much looking at the lady.
Q Okay. The lady on the ground?
A Yeah.
Q Okay. I'm going to start this again. And

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then there's this gentleman, a larger gentleman in a suit who comes and stands behind the woman. I stopped it at 12:37:05. You don't know who that is?
A Which one?
Q This gentleman in the dark suit.
A No, I don't know who that is.
Q Okay. So when you said -- okay. So at 12:37:12 on the video, you actually say something and then you leave.
Can you tell us what you did at that point?
A I basically -- I don't really recall the exact words, it's too long ago.
I said, "Okay. Everybody is here that you need to help you. I hope you feel better," and I left.
Q Okay. Just like that?
A I believe so; yeah.
Q Okay. Where was -- where was the liquid that you saw on the floor? Because at that point, the time I just stopped it, you were just standing barely in front of the woman on the ground -- on the floor.
Where was the spill?
A I saw the spill. It's kind of in between where the lady and this gentleman is.
Q Okay.

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MR. GALLIHER: When you say "this gentleman," talking about the large fellow in the foreground?
MR. ROYAL: This gentleman here?
THE WITNESS: Uh-huh.
MR. ROYAL: You need to say yes or no.
THE WITNESS: Yes.
BY MR. ROYAL:
Q Okay. Did you see anything in front of where she's -- the woman is on the floor when you approached?
A Yeah, I saw the floor was wet.
Q Okay. What part of the floor was wet? If I show you a photo -- let's say if I show you a photo -- here's one, VEN0140 -- do you recognize the area that's depicted?
A Yes.
Q Okay. And so if I show this particular photo, are you able to point to the area where there was water or something on the floor?
A Yeah. I saw it in this black area right here, and then there was a couple drops that were at the base of the column.
Q Okay. I'm going to ask you to mark what you just pointed to on VEN040. I want you to circle where

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you say there was something on the floor.
A Okay.
Q Okay. Can you make that darker, please?
A Do you want to make a circle?
Q No, I just want you to darken your circle.
A This spot?
Q Yes.
Now, is that the only area where you saw anything on the floor? Was there anywhere else?
A That's all I saw.
Q Okay. So, in other words, you didn't see anything, looking at the photo, to the right of that; is that correct?
A That's correct.
Q I'd like you to just initial down at the bottom left. Put your initials and today's date of 4/17.
A Okay.
MR. ROYAL: We'll mark that as "A."
MR. GALLIHER: Make it a joint exhibit.
MR. ROYAL: Okay, I'm fine with that. Mark it as "1."
(Plaintiff's Exhibit 1 marked for identification.)
/////

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BY MR. ROYAL:
Q All right. Let's look at this next photo, VEN041. Do you recognize what's depicted there?
A This looks like the same area.
Q Okay. Are you able to, using a pen, also mark this particular photo indicating where you saw something on the floor when you first arrived?
A It was somewhere in this black area.
Q Make a dark circle.
A And, again, with scattered drops and then a little bit of a collection at the base of the column.
Q Okay. So go ahead and sign that again. And while you are doing that, for the record, you've made a circle on both of those photos and you've had some dots which you indicate, I assume, to be sort of drops of something.
A Yeah, like a splash mark.
Q Let's just make that part of Exhibit 1. We'll just include it with Exhibit 1, all right?
MR. GALLIHER: Okay.
BY MR. ROYAL:
Q Okay. So as far as you can recall, after 12:37:14, which is depicted on this video, you never returned to the scene; is that correct?
A Correct.

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Q Okay. So you are done at that point?
A Yeah.
Q So you were there about -- what? -- ten seconds? Sound about right?
A Total time?
Q Yeah.
A No, more like closer to 10 minutes.
Q Okay. Well, see how --
A Or seven minutes. If it's 12:37 -- what time was that when I was walking away?
Q Well, you are walking away at 12:37:14. When you arrived, it's 12:36:55. She's just fallen and you are approaching. See that?
A Yes.
Q My question was, initially when you first approached I asked, first of all, about, let's -- what was your conversation with her?
A "Are you okay?"
Q Okay. What did she say?
A She said, "I hurt my elbow, but other than that I'm basically okay."
Q Okay. Did she say she struck her head?
A She didn't say anything about her head.
Q Did she tell you that her back hurt?
A No.

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Q Did she tell you that she was wet?
A No.
Q Did you point out to her or say anything to her about something that you saw on the floor?
A No.
Q I want you to watch -- we're going from 12:37:05 and I'm just going to let it run until you walk away. 12:37:13 you walk away.
Okay. So you would agree that's probably in the 10-, 15-second range?
A Yeah, but I think I come back.
Q Okay. That's my -- I'm asking you what you did at that point.
A I thought you're talking about the total time I was at the scene.
Q No, I'm just -- I'm sorry, I didn't mean to be confusing. So you left and what did you do at that point?
A I contacted my manager, Chris Tonemah.
Q And what did Chris Tonemah do?
A I believe she notified surveillance or security or both. I may have notified one or the other. I just don't recall.
Q Okay. I'm just going to fast-forward until you come back and I want you to just keep watching.

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Okay. So you arrived back at 12:37:48?
A Uh-huh.
Q See yourself there?
A Uh-huh.
Q Yes?
A Yes.
Q And you are bent over and you are speaking with the plaintiff, the woman on the floor; correct?
A Yes.
Q Okay. Anything else that you recall about her? Anything she told you at this time as you were talking to her?
A Nothing that I can recall.
Q Okay. Again, the only thing you recall her saying to you about what she injured was her left elbow?
A Yes. She didn't use the word "left," she just said "elbow."
Q Okay, it's still running. You are standing there, that other gentleman is standing behind her.
What are you waiting for at this point?
A I believe I'm waiting for an EMT.
Q And just for the record, it's 12:38:45. It zooms in and you are talking with the gentleman in the dark suit, a large gentleman. He's got his back to

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the camera. I believe his name is Louie Calleros.
Does that refresh your recollection at all?
A No.
Q Not somebody you worked with?
A No.
Q Okay, so I'm going to back up. Okay.
A Uh-huh.
Q Now, at 12:38:47 that's you talking to Mr. Louie Calleros, or at least who I represented to be Louie Calleros.
A Okay.
Q All right. That is you; correct?
A Yes.
Q Okay. I want you to watch. I'm going to start it now. 12:38:47, I want you to watch yourself. Where are you standing? Okay. All right.
Do you see what you just did? I stopped at 12:38:54. Did you see what you did?
A Yeah, I made some type of gesture.
Q Okay, let me go back again. I want you to watch where you go. Start at 12:38:48. I want you to watch your feet. Watch where you go.
Okay. Stop it again at 12:38:53.
Would you agree that you -- you walked through the area that you have marked where there

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was -- you said there was water on the floor?
A I don't -- half of that marble is cut out, so I can't -- I don't recall.
Q Okay. Now, you were pointing back in the area of the restrooms; correct?
A Yes.
Q And what are you pointing at; do you recall? I stopped it at 12:38:52. You were pointing back to the restroom. What are you pointing at?
A I believe I was waving over a PAD person. They wear black and white -- black and red, I'm sorry.
Q Did you see someone at that point?
A Yes.
Q Looks like you are -- again, you are having a conversation with who I'll represent is Louie as you are pointing; right?
That's what it looks like?
A Okay.
Q Does it?
A I don't recall conversing with him, but I could have.
Q Okay. Now, at 12:38:58, you leave the scene and we just see Mr. Louie Calleros. And I'll represent that it looks like you walked towards the area of the restroom.

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A Okay.
Q Would you agree with that?
A Yeah.
Q Now, you were on a restroom break; correct?
A I don't remember if it was my normal break or a restroom break. I'm starting to think that it was a restroom break because our breaks are typically on quarter after or quarter of the hour.
And you are saying I approached at 12:37 so I was probably taking my own restroom break, which we're allowed to do if we need a break.
Q And when you left the scene -- I stopped it at 12:39:06 and you are gone. And, in fact, we see a woman now who has appeared on the scene in the top right.
Would that be your supervisor?
A Yes.
Q What was her name?
A Chris Tonemah.
Q Okay. So at this particular time you've gone to the restroom. Did you use the restroom at that time; do you recall?
A I don't recall.
Q I'm going to allow this to run until you come back. I've stopped it here at 12:39:21 and I'm

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just going to let it run a little bit. You return to the restroom area.
Do you remember having a conversation with the PAD people or someone else?
A I -- I remember instructing a PAD person to come over.
Q Okay. Now, at 12:39:35, you are bent over talking with the woman on the floor. Do you remember that?
A Yes.
Q I'm sorry. Do you see that?
A Yes.
Q Okay. Now, at 12:39:43, another gentleman arrives from the left, also in a suit.
Do you know who that is?
A I don't know who it was. I believe I was told it was a front desk person, a team member.
Q Okay, now I'm going to stop right here. There's a -- at 12:39:56, there is a gentleman from PAD who starts mopping. Okay.
Do you see that?
A Yes.
Q At 12:39:58, I want you to see -- look at where he is standing. Do you see where he's standing?
A Yeah.

Q Okay.
A Yes.
Q Is that in the area where you recall seeing water that you have marked on Exhibit 1 today?
A Yes.
Q Okay. And that's where he is standing, that's the only area where you saw something on the floor other than the dots --
A Right.
Q -- from there leading to the column?
A Correct.
Q Okay. Okay. So while this is going on, it looks like there's -- at 12:40:03, we saw three PAD people in there.
Do you remember any conversations that you heard among the PAD personnel?
A No.
Q Do you remember any conversations that you had with security personnel who later came to the scene?
A No. I don't remember what was said, if I had a conversation with them.
Q Did you ever have any conversation with anyone to determine how this substance got onto the floor and how long it had been there?

A No.
Q In the course of your job as a table games supervisor, did you have any kind of supervisory responsibility for people working in the Public Area Department?
A Could you repeat that?
Q Yeah. Did you ever have any supervisory responsibility for people who worked in the PAD department?
A No.
Q And as I understand it, this is the first time that you responded to an incident like this; is that correct?
A No. Well, as far as a lady falling, yes, we had numerous -- I would say almost once a day we have spills where we need to call PAD.
Q Okay. Okay. These are --
A "We" meaning me and other supervisors who oversee it, especially when there's glass broken.
Q Sure. And this would be spills in the gaming table area?
A Yeah. Traditionally right outside the area where the people are sitting, or usually it's in the marble walkways that they recently -- well, not recently, but a few years ago they put in.

That's where people seem to either slip or drop things all the time.
Q Okay. Have you testified about everything you can recall regarding your conversations with the woman who was on the floor?
A Yes.
Q Okay. One moment here. Okay. Let me go back about the timing, then. I want to make sure I understand your testimony today as it relates to why you were -- why you were terminated from the Venetian. Because I feel -- I get a sense from your testimony that you feel that I'm somehow connected to this.
Am I reading that wrong? Do you feel like I'm somehow connected to your having been terminated from the property?
A I don't know at this time.
Q Well, what does -- what do you feel like my meeting with you had to do with anything associated with your employment?
A I don't really know how to answer that. It was just a lot of -- a lot of things that went against me in the form of discipline, after I met you, that were just kind of unique to what they usually discipline people for.
Q Okay. So I want to make sure, because

Counsel went through this with you and he established that I met with you and then within two months you were terminated.
A No.
Q I mean he said I met with you in November of 2018.
A Right.
Q And you were terminated in January of 2019?
A Right.
Q So within two months of my meeting with you, everything went south and you don't know what to think of that; right?
A No, I really don't.
Q Okay. And you are sure about the timing?
A I mean as far as what I think about it, it seems -- it leaves me feeling suspicious.
Q Okay.
A Okay -- that there is some ulterior motive to terminate me.
Q Okay. And again, ulterior motives, you think it has something to do with what you told me in a meeting about what you saw when you arrived at the scene?
A It could be.
Q Okay. I've never said anything like that to

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you; right?
A Say that again.
Q I have never said anything to you that would give you the impression that your job could be in jeopardy?
A No.
Q Would it surprise you to learn that you actually met with me in June of 2018?
A I may have had the date wrong.
Q Well, you would have had it a lot wrong.
A Yeah.
Q That's a lot earlier than November 2018; isn't it?
A Yeah, it's true. Yeah, it would be.
Q If you met with me in June 2018 and all this stuff started within six months or so -- I don't know -- 60 days is what I understood from your earlier testimony.
A Uh-huh.
Q Does that at all influence your thinking about this connection you think might occur between your meeting with me and ultimately being terminated?
A I don't know.
Q Well, did things start going south in July of 2018?

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A They started going south in May.
Q Okay. Before you met with me --
A Uh-huh.
Q -- right?
A Yes.
Q Okay. So what was started going south in May of 2018?
A Well, that's when I received the three written warnings in a two-week period.
Q I see, okay. So because -- with the timing that you testified about on direct, I was confused because I thought you said you got these three warnings between November of 2018 and January when you were let go in January of 2019.
Did I understand that incorrectly?
A Say that again.
Q Okay. I understood that your testimony on direct with Mr. Galliher was that you met with me and then, within a very short period of time after that, you got these three written warnings and then a couple other things were put in your file and then you were terminated.
A That sounds about right.
Q That's what you testified to?
A Yes.

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Q You just now testified that everything started to go south in May of 2018 before you even knew who I was.
A Uh-huh.
Q Correct?
A Yes.
Q So if I met with you in June of 2018, you would have already received three warnings by that time --
A That's correct.
Q -- in 2018?
A Yeah.
Q Okay. And so I'm just -- I'm trying to figure out this connection that you have made that I somehow played a role in getting warnings -- you getting warnings prior to you ever knowing who I was or ever meeting with me.
A Well, we're still investigating as to the real reason I was terminated.
I am convinced that the reason they gave me has nothing to do with me being terminated. Whether it pertained to me not supporting the Venetian with the slip-and-fall or whether it was their anger at me using my FMLA privileges, we're still investigating that.

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Q You say "we're investigating," who is investigating?
A Me and other attorneys.
Q Okay. What attorneys?
A Christian Gabroy. I haven't hired anyone yet.
Q Tell me then, what have you had attorneys do for you?
A He represented me at the unemployment hearing.
Q I see. And so is he going to -- did you talk -- strike that.
Is he representing you now on some other --
A No.
Q -- thing?
A No.
Q You already got your unemployment; right?
A I'm presently receiving unemployment.
Q Okay. Right. So you are receiving unemployment, but you still feel like that the Venetian did something improper, you are investigating. I assume you are considering filing a lawsuit against Venetian.
A Absolutely.
Q Okay. And that's something that is still in

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the works because you are investigating; correct?
A Yes.
Q Okay. At the time you met with me in June of 2018, you weren't considering suing the Venetian; right?
A No.
Q That didn't happen until when? When did you first think: I've got to consider suing the Venetian?
When did that first come to your mind?
A It first came to my mind when I was suspended pending investigation. It was Tuesday before Thanksgiving, which I think was November 20th, and also a couple days before that when they brought me in and I had recently -- I basically gave them six months of many, many different incidents of harassment. And they chose to ignore that and just talk about this innocent comment I made.
Q Did you ever -- did I ever get linked into this harassment thing?
A Not that I'm aware of.
Q Okay. In other words, up until today I've never heard anything about this. So this is -- as I gather it, you've made some connection prior to the deposition today that I might have something to do with you having been fired or terminated; is that

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correct?
A That's correct.
Q And that's why you wouldn't meet with me; correct?
A Well, I just felt uncomfortable meeting with anyone at Venetian at that point.
Q Okay. Because you thought maybe I had something -- I might have -- I don't know.
A I just knew the reason I got terminated was not the ones that they are listing on their paperwork. And so I didn't -- I don't have -- I don't trust anyone associated with the Venetian.
Q Okay. All right. So it's your testimony today that when you and I met in June of 2018, that you told me, "I saw water on the floor as I approached her," and I said something to the effect of, No, you didn't, wink, wink.
Correct?
A Correct.
Q So you got the impression from our meeting that I was intimidating you?
A Yeah, that you didn't want me to be truthful.
Q Okay. I was -- so your opinion at that time is I was trying to get you to lie under oath?

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A Yes.
Q Okay. What's your e-mail address?
A Vegasgary1@gmail.com.
Q Did you ever get an e-mail from me?
A Uh-huh.
Q Yes?
A Yes.
Q Did you feel that I harassed or intimidated you by e-mail?
A I really can't answer that. I don't think so.
Q I'm going to show you a document that I'm going to mark as Exhibit A.
(Defendants' Exhibit A marked for identification.)
BY MR. ROYAL:
Q Please look at that. Have you seen this before?
A Yes.
Q Okay. That's your e-mail address; correct?
A Yes.
Q Do you see the date? What's it dated?
A June 29th.
Q 2018?
A 2018, the day after we met.

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Q Right. And do you recall receiving this from me?
A Yes.
Q Okay. I would like to -- and when you reviewed this, by the way, and received this, did you see something in here that you felt was incorrect?
A I'm going to have to read it again.
Q Okay. That's fine, go ahead.
A The only thing that is incorrect is in the last part on the first page. I didn't get to the second page yet.
It says, "I went into the restroom area to advise PAD personnel to have them come to clean as a precaution."
I told them I noticed it was wet. I didn't say anything "as a precaution."
Q Okay, and -- and that's fine. Go to the next page. Let me know when you are done reading the next page.
A Again in the second paragraph, very similar to the first one, or the last paragraph on the first page, it says I didn't see anything on the floor, but I did.
Q Okay.
A I don't remember really saying anything

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about "something other than a dry marble floor may have caused her to fall." I don't recall that.
Q Okay. So is it your testimony today that what's depicted here does not reflect what you told me during our meeting of June 28, 2018?
Is that your testimony?
A Yes.
Q And so you read this when you received it; right?
A Yes.
Q And you can see, like for example on page 2 of Exhibit A, Number 6, in parentheses, I wrote, "Note, this is something I inferred, but which I need confirmation." That relates to plaintiff did not state to you that she slipped on any substance.
Do you see that?
A Yes.
Q Okay. That indicates to you that I wanted to follow up with you on that particular point; doesn't it?
A Yes.
Q Okay. Because I needed confirmation from you?
A Uh-huh.
Q Now, you received this and you read it and

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you and I had subsequent communications; correct?
A Yes.
Q And --
A -- by e-mail only I believe.
Q Well, we also spoke on the phone. Do you recall?
A I don't recall. We could have.
Q Okay. And so if something in here that I wrote is incorrect, you would have corrected me; right?
Actually, if I said there was nothing with -- my understanding was you said there was nothing on the floor. That would have raised some red flags and you would have said, No, no, that's not what I said. I'm sure there must be some communication from you to me related to that -- right? -- correcting it?
A I don't know.
Q But you would expect that. Because you are testifying today that what is here on Exhibit A representing that you had told me that you didn't see anything on the floor, that that's completely false.
So I assume that you would have written me and corrected me, especially when I asked you for confirmation.

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A Well, I told you at the time that the floor was wet and so I know it wasn't.
So I said I called -- I got the PAD over to clean it up because I thought it was wet. I saw it was wet and you just kept refuting me, basically, "No, you are mistaken. It wasn't wet."
Q Up until today during this deposition, after having met with Mr. Galliher on this matter and having gone out and retained or conferred with attorneys about suing the Venetian, have you ever communicated to me that you -- after receiving this e-mail that we marked as Exhibit A, have you ever communicated that the information I put in there was incorrect?
A No.
Q Okay. So today's the first day that you have decided to tell me that what I put in the e-mail of June 28 -- 29th, 2018, here has something that is incorrect?
A I didn't decide to tell you. I was forced to tell you. This is a deposition and I'm under oath.
Q Okay. All right, so you didn't correct me previously. Even though you had months to do it and we had other communications, you never corrected me and told me that, what I understood from our initial meeting, is that you saw nothing on the floor, until

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today; correct?
A I told you that day there was something on the floor, and I'm telling you today there was something on the floor that was wet.
Q Okay. But in between when we were having discussions and I sent you something in writing saying, This is what I understand, you never corrected me and said, No, that's not true?
A That's true; I never corrected you.
Q Right, okay.
You did read it before today. You did understand that that was my understanding, but you never responded and corrected me until today at your deposition after you met with Mr. Galliher; correct?
A That's correct.
Q Okay, see if there's anything else here.
Do you remember Ms. Sekera apologizing for falling?
A No.
Q Of course, you don't remember anything about the coffee she was carrying; right?
A No.
Q You think today's the first time that you noticed, in looking at that surveillance, that she was carrying coffee? Is today the first time you noticed?

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A Yeah, that's the first time I noticed.
Q So when you're talking about stuff on the floor, you never made any kind -- you didn't give any consideration as to whether or not it's something that could have come from her coffee cup; right?
A Yeah, I didn't relate anything to that because I didn't see her fall.
Q Okay.
A But by the time I got there, I believe the cup was on the floor or was in the other lady's hand. I probably just assumed at the time that that was the other lady's cup.
No, I -- I didn't see the incident. I just saw her down on the ground.
Q Okay. You never made a connection between Ms. Sekera holding a coffee cup in her left hand at the time she fell and you seeing something on the floor, like some foreign substance?
A No. I don't know anything about the cup of coffee. I didn't even know she had one in her hand because I got there after it left her hand.
Q When you spoke with her, did she say anything to you about what she thought caused her to fall?
A She didn't say anything about what caused

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her to fall.
Q And she never said anything to you about her clothing being wet?
A No.
Q And the only thing that you saw on the floor of a foreign substance was in the area you've indicated on Exhibit 1 on those two photographs; correct?
A Correct.
Q You don't know how long this -- or strike that.
What you saw on the floor, you don't know what it was; correct?
A Correct.
Q You don't know how it got there; correct?
A Correct.
Q You don't know how long it was there?
A Correct.
Q You are not aware of any kind of patrolling that was being done by the PAD personnel in that area prior to your arrival; is that correct?
A Correct.
Q We just had a PAD employee, Maria Cruz, testify just before you today that, just within a couple of minutes prior to this fall, she had walked

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through the area and didn't see anything on the floor where you said you saw something on the floor.
Would that surprise you?
A I don't know if it would surprise me. They walk by a lot of areas and miss them, so, no, that doesn't surprise me.
Q Okay. So you would think that if that -- you described it like eight ounces. Maybe it looked like someone had spilled something on the floor.
A Uh-huh.
Q Right?
A Yeah.
Q So eight ounces of water. Is that right; eight ounces? So once you spill that, it would splash pretty good; right? Even more than just three or four inches?
A Could have. Could have been more. I don't really know. Once it's on the floor, I don't really know how to measure it.
Q Right. So you drew this little circle which I think you said it was three or four inches in diameter.
A Yes.
Q And some drops leading to the column.
A Yes.

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Q You would have expected that, had that been there for four or five minutes, somebody would have -- before the woman got there, somebody would have stepped in that -- I mean slipped or something; right?
MR. GALLIHER: Objection, calls for speculation.
You may answer.
THE WITNESS: What?
MR. GALLIHER: I said, "Objection, calls for speculation." But you may answer it if you can.
THE WITNESS: Repeat that question again.
BY MR. ROYAL:
Q If that water was there or that substance as you drew it on Exhibit 1 -- if that was there for, let's say hypothetically, three or four minutes before this occurred, you would have expected somebody to step in it at some point?
MR. GALLIHER: Same objection.
You may answer.
THE WITNESS: Yeah. I don't know if I would expect someone to fall or not.
BY MR. ROYAL:
Q Or slip.
A Yeah, or slip. I can't really speculate on that.

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Q You've never seen anyone slip before when they stepped on some foreign substance on the marble?
A At the Venetian? No.
Q Okay. So this is the first time?
A Most of the time when there's a spill, we get chairs out there right away and make like a little circle around it so people don't walk in it.
Q So this kind of event is pretty rare?
A Yes.
Q In fact, it's the only event that you can recall ever being personally aware of?
A Of a slip-and-fall.
Q Yes.
MR. ROYAL: Okay. Thank you.
THE WITNESS: You're welcome.

FURTHER EXAMINATION
BY MR. GALLIHER:
Q Just a couple questions if I may. I'd like to refer you to page 2 again of the e-mail that Mike sent you, and the second paragraph and I'm going to read what he said. He said, "Based on our discussion, I understand you can affirmatively state the following."
Then let's go to Number 5. It says, "You

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advised PAD personnel in the restrooms of the incident, not because you saw anything on the floor, but because you assumed something other than a dry marble floor may have caused her to fall."
Is that accurate?
A Not really. I never mentioned the word "precaution" or -- yeah.
No, I don't know. I told him it was wet and needs to be cleaned up. That's all I told him.
Q All right, so that's not what I'm reading.
A That's correct, that's a little different.
Q All right, so let's go to Number 7. Number 7 says, "You did not see any substance on the floor other than possibly some drops of liquid in front of where Plaintiff was positioned on the floor, that likely came from her coffee cup on the way down."
Again, is that an accurate statement? Something that you said?
A No, that's not accurate because the liquid I saw was in a -- like behind her. And the spill from the coffee, if that was her coffee, was in front of her.
Q You just saw the video surveillance again -- correct -- and you saw the fall?
A Yeah, on the video.

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Q And would it be fair to state what you see in that fall, you see the plaintiff's feet go out from under her when she's holding the coffee cup in her left hand?
A Yes.
Q And she then falls. And do you notice whether or not the top comes off the coffee cup?
A In the video?
Q Yes.
A I didn't look for that; no.
Q All right. Now, again you testified in response to Mike's questions that the slip-and-fall that you saw this day, that you observed this day, was a rare event; is that right?
A Yes.
Q And --
A That doesn't mean it doesn't happen. It's just that, you know, people don't slip -- I work in a carpeted area and I don't remember seeing any slip-and-fall.
Q All right. So what you are talking about, when you talk about "rare event," you don't see slip-and-falls occurring on the carpeted area?
A Correct.
Q And so if, for example, the Venetian's

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entire casino floor were carpeted, would you agree with me you probably would see less slip-and-falls?
A Oh, definitely.
MR. ROYAL: Objection, form; calls for speculation.
BY MR. GALLIHER:
Q All right. So your answer is?
A Yes.
Q All right. So and do you know if anybody, to your knowledge, has ever complained to anyone at the Venetian about the fact that they persist in having marble floors as opposed to carpet?
A We've had people complain when -- not just slips, but when someone actually dropped a glass or bottle and it shatters and goes all over the place. And, yeah, I've had people say, you know, "Why do you have these marble floors? Everything's going to break and really shatter on these things."
And, well, it makes a more convenient to go back and forth from one property to the other when you're hauling luggage and so forth. I think that's why they put it in.
Q And also for an aesthetic effect?
MR. ROYAL: Objection.
/////

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BY MR. GALLIHER:
Q These are actually very attractive floors -- are they not -- the marble floors?
A Yes.
MR. GALLIHER: That's all I have.
Make it quick, I got an hour to get to dinner.
MR. ROYAL: Okay.
We can continue this.
MR. GALLIHER: What more could you ask?
MR. ROYAL: In fact, you know what? I want to -- I'm going to reserve my right to. What more I want to ask?
MR. GALLIHER: Well, I don't think there's a right necessarily.
MR. ROYAL: That's fine. You said you had to be somewhere.
MR. GALLIHER: I do, I do. I have to be somewhere in an hour, but I don't necessarily want to continue on.
MR. ROYAL: I can continue on as long as I want.
MR. GALLIHER: That's fine. Then, have at it.
MR. ROYAL: Okay. If you are going to put

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limitations on me, then --
MR. GALLIHER: No, not at all, but you just had an hour of questions. I want to know how much more you have to ask him that you haven't asked him already.
MR. ROYAL: Okay. Can I?
MR. GALLIHER: Yeah, please.

FURTHER EXAMINATION

BY MR. ROYAL:
Q Just so I'm clear, Counsel asked you, from Exhibit A, went over these items "6" and "7."
MR. GALLIHER: "5" and "7."
MR. ROYAL: Oh, I'm sorry. Okay. Was it "5" and "7"?
MR. GALLIHER: Yes.
BY MR. ROYAL:
Q He went over numbers "5" and "7" on page 2 of Exhibit A, which you claim today is completely untrue.
MR. GALLIHER: Objection.
MR. ROYAL: Correct?
MR. GALLIHER: Objection, misstates testimony.
You may answer.

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BY MR. ROYAL:
Q Well, how much of it is true? How much of Number 5 is true?
A Hardly any of it. Only at the beginning where it says, I advised PAD personnel in the restrooms of the incident.
Q Okay. And again, for clarity sake, you never responded to me, ever, correcting that particular fact until today at your deposition after you met with Mr. Galliher; correct?
A Right. And it's possible I never even read this whole thing if it's a three-page e-mail.
Q Well, but if I have something in writing from you indicating you did, you would -- I assume that might refresh your recollection?
A Something in writing that I --
Q Yeah. You responded to me, we communicated about the e-mail. You responded to this; correct?
A I don't recall.
Q In fact, you asked me if you could have a copy of the video so you could show it to your wife.
A That, I remember.
Q Okay. And you did that by e-mail; correct?
A Yes.
Q Okay. And your testimony today is you

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didn't see anything on the floor in front of the woman. Nothing, no liquid or anything on the floor?
A No.
Q Okay. Is that correct?
A Correct.
Q Okay. All right, thank you.
A You are welcome.

FURTHER EXAMINATION

BY MR. GALLIHER:
Q Gary, you met with me last week and we discussed this deposition in this case; is that right?
A Yes.
Q At any time during the meeting, did I advise you to do anything other than tell the truth at today's deposition?
A No.
MR. GALLIHER: Thank you.
MR. ROYAL: Thank you.
MR. GALLIHER: All right. We're done. Thank you, Gary.
THE COURT REPORTER: Mr. Royal, did you want a copy of both of these depositions?
MR. ROYAL: Yes, please.
(The deposition concluded at 4:37 p.m.)

REPORTER'S DECLARATION

STATE OF NEVADA)
)
COUNTY OF CLARK)

I, Pauline C. May, CCR No. 286, declare as follows:

That I reported the taking of the deposition of the witness, GARY SHULMAN, commencing on Wednesday, April 17, 2019 at the hour of 3:15 p.m.

That prior to being examined, the witness was by me duly sworn to testify to the truth, the whole truth, and nothing but the truth.

That I thereafter transcribed said shorthand notes into typewriting and that the typewritten transcript of said deposition is a complete, true and accurate transcription of said shorthand notes taken down at said time, and that a request has not been made to review the transcript.

I further declare that I am not a relative or employee of counsel of any party involved in said action, nor a relative or employee of the parties involved in said action, nor a person financially interested in the action.

Dated at Las Vegas, Nevada this _____ day of _____, 2019.

_____

Pauline C. May, CCR 286, RPR

D

E

EXHIBIT 3

OPPM
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DISTRICT COURT

CLARK COUNTY, NEVADA

JOYCE SEKERA, an Individual; Plaintiff, v. VENETIAN CASINO RESORT, LLC, d/b/a THE VENETIAN LAS VEGAS, a Nevada Limited Liability Company; LAS VEGAS SANDS, LLC d/b/a THE VENETIAN LAS VEGAS, a Nevada Limited Liability Company; YET UNKNOWN EMPLOYEE; DOES I through X, inclusive, Defendants.	CASE NO.: A-18-772761-C DEPT. NO.: XXV

OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND THE COMPLAINT

COMES NOW, Defendants, VENETIAN CASINO RESORT, LLC, and LAS VEGAS SANDS, LLC (collectively referenced herein as *Venetian*), by and through their counsel, ROYAL & MIILES LLP, and hereby file this OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND THE COMPLAINT.

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This Opposition is based on the pleadings and papers on file, the memorandum of points and authorities contained herein, the affidavit of counsel, the attached exhibits and any argument permitted by this Court at the time set for hearing.

DATED this 2 day of May, 2019.

ROYAL & MILES LLP

By _____

Michael A. Royal, Esq.
Nevada Bar No. 4370
1522 W. Warm Springs Rd.
Henderson, NV 89014
Attorney for Defendants
VENETIAN CASINO RESORT, LLC and
LAS VEGAS SANDS, LLC

DECLARATION OF MICHAEL A. ROYAL, ESQ.

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

MICHAEL A. ROYAL, ESQ., being first duly sworn, under oath deposes and states:

1. I am an attorney duly licensed to practice law in the State of Nevada and I am counsel for Venetian Casino Resort, LLC, and Las Vegas Sands, LLC, in connection with the above-captioned matter. I have personal knowledge of the following facts and if called upon could competently testify to such facts.

2. This action arises out of an alleged incident involving a floor located within a common area of the Venetian casino on November 4, 2016, when Plaintiff slipped and fell on a dry marble floor.

3. The incident report does not provide evidence that there was anything on the floor causing Plaintiff to fall other than the following: *"She [Plaintiff] stated she was walking through the area when she slipped in what she believed was water on the floor."* (*See* Exhibit A, *Venetian Security Narrative Report* (IR 1611V-0680), November 4, 2016, VEN 008-09.)

4. Plaintiff admits that she never saw any foreign substance on the floor at any time on the date of the subject incident. (*See* Exhibit B, *Transcript of Joyce Sekera Deposition* at 19, ln 23-25; 20, ln 1-25; 21, ln 1-21.)

5. The area where Plaintiff slipped as depicted on the surveillance footage is identified at **12:36:50**. (*See* Exhibit C, *Surveillance Footage*, VEN 019; *see also* Exhibit D, marked Venetian security scene photo (VEN 043), for demonstrative purposes.)

6. Surveillance footage of the subject incident (attached hereto as Exhibit C), reveals the following:

a. **12:06:49**. Coverage begins with no spill in the subject area

b. **12:14:25**. An African-American female Venetian Public Area Department (*PAD*) employee (wearing a black uniform with red collar, red on the shoulders, and gold name tag on the front upper left lapel area) walks through area with a garbage bin. By this point, nearly 100 people have walked through the subject area since the footage began at 12:06:49, without the slightest indication of a foreign substance on the floor.

c. **12:18:50**. A female employee holding a white rag walks right through the subject area without incident. By this point, approximately 150 people have walked through the area since the footage began, without any evidence of a spill or spill related incident.

d. **12:20:25**. A female Venetian PAD employee (dressed in black/red uniform described in Paragraph 6.b above) with sweeper walks about 20 feet from the area towards bathrooms located just out of view to the left. By this point, approximately 180 people have walked through the area since the footage began, without the slightest hint of a spill or spill related incident.

e. **12.25.09**. An African-American male Venetian PAD employee (dressed in black/red uniform described in Paragraph 6.b above) holding a broom/dust pan walks about 10 feet from the area towards bathrooms located just out of view to the left. By this point, approximately 250

people have walked through the area since the footage began, without any evidence of a spill or spill related incident.

f. **12:26:42**. A male Venetian security employee (officer) wearing a blue uniform walks past the subject area (from right to left in the footage). By this point, approximately 270 people have walked through the area since the footage began, without the slightest evidence of a spill or spill related incident.

g. **12:33:38**. An African-American female wearing a blue apron believed to be a Venetian tenant employee stops in the slip area to speak with a male briefly, both who whom are depicted standing directly in the subject area where Plaintiff claims there was a foreign substance. Here, once again, there is no evidence of a spill or spill related incident.

h. **12:33:53**. Venetian PAD employee **Maria Cruz** (wearing the uniform described in Paragraph 6.b above) walks through the subject slip area with a dust pan and broom. Ms. Cruz identified herself from this footage during her April 17, 2019 deposition and testified that this depicts her patrolling the area, walking right through the alleged spill area without identifying anything on the floor. By this time, less than three minutes before the subject incident occurred, there had been approximately 330 people walk through the subject area, without the slightest hint of a spill or spill related incident.

I. **12:33:58**. A woman walks right through the subject slip area within five (5) seconds of Ms. Cruz, without the slightest hint of a spill or spill related incident.

j. **12:34:01**. Two female Venetian PAD employees (dressed as described in Paragraph 6.b above) are seen walking about twenty-five (25) from the subject area as a male looking at his cell phone walks through the subject area, without the slightest hint of a spill or spill related incident.

k. **12:34:20**. A group of eight (8) people walk through the subject area without incident. By this time, there remains no evidence of a spill or spill related incident in the preceding nearly twenty-eight (28) minutes, while Venetian has continued to patrol this high traffic area.

l. **12:35:47**. A woman walks directly over the slip area, followed by four (4) other people, with no evidence of a spill or spill related incident.

m. **12:36:07**. A minor boy and two adults walk right through the slip and alleged spill area, without the slightest hint of a foreign substance on the floor. They are followed by a woman walking in the same direction, then by a male and female walking through the same area in the opposite direction, also without any hint of a spill or spill related incident.

n. **12:36:36**. The slip area depicted is completely dry. To this point, there has been no evidence of a spill or spill related incident since 12:06:49, as Venetian employees have continued to patrol the area.

o. **12:36:50**. Plaintiff slips and falls while carrying a beverage with a lid in her left hand. By the time this incident occurs, approximately 390 people walked through the subject area without the slightest hint of a spill or spill related incident since 12:06:49.

p. **12:37:00**. Venetian Table Games Supervisor, Gary Shulman (bald male in dark suit, white shirt and tie) arrives at the scene with coworker Venetian Front Desk Clerk, Louie Calleros (large Hispanic male with dark hair and mustache wearing dark suit, white shirt and tie). Mr. Schulman speaks with Plaintiff as she is seated on the floor, as one woman holds Plaintiff's beverage, while Mr. Calleros then stands behind the area where Plaintiff fell and uses his phone.

q. **12:38:46**. The camera zooms into the subject area as Mr. Shulman walks directly through the Plaintiff's slip area while speaking with Mr. Calleros. Mr. Shulman is then seen departing the area without any evidence of any liquid substance being in the area where he had been

standing between Mr. Calleros and Plaintiff or evidence of a foreign substance being tracked across the floor from the bottom of his shoes.

r. **12:39:45**. Three Venetian PAD employees (all wearing uniforms as described in Paragraph 6.b above) respond to the scene: Maria Cruz (who arrives holding a broom/dustpan in her left hand, green rag in her left hand, and wearing glasses), David Martinez (who arrives with a mop and bucket) and Milan Graovac (depicted arriving without any cleaning tools, standing next to the column in front of Plaintiff, top left area of footage).

s. **12:39:55**. Venetian PAD employee Martinez arrives at the slip area with a mop and bucket, stepping directly into the slip area with his right foot, and begins mopping an area two to three feet away, towards the column, while continuing to stand in the slip area. Mr. Martinez does not actually drag the mop across the slip area where he originally stood until **12:41:12**.

7. Venetian PAD employee Maria Cruz testified on April 17, 2019 that she did not see any evidence of a foreign substance on the floor in the subject area before when she walked through at **12:33:53** or upon her return at **12:39:45**, prior to Mr. Martinez standing in the slip area and running his mop through a different area. There is no dispute that Ms. Cruz walked through the subject area as part of her assigned duties to patrol to identify potential hazards within three (3) minutes of the subject incident.

8. Venetian PAD employee Milan Graovac testified on April 22, 2019 that he did not see anything on the floor around where Plaintiff is depicted at **12:39:33 - 12:40:03**.

9. Venetian Front Desk Clerk Louie Calleros testified on April 22, 2019 that he did not identify a foreign substance on the floor from the time of his arrival at **12:37:00** until leaving the subject area at approximately **12:44:50**.

10. Gary Shulman testified on April 17, 2019 that he saw water on the floor as depicted in Exhibit B herein; however, Mr. Shulman (a former Venetian employee who testified that he has

retained legal counsel to represent him in a potential lawsuit against Venetian for wrongful termination) is then depicted at **12:38:50** of the footage (attached as Exhibit C) standing in the very area he claims to have been covered in water while speaking with coworker Louis Calleros. (*See* Paragraph 6.q herein above.) Mr. Shulman also testified that in his fourteen (14) years as a Venetian Table Games Supervisor working exclusively in the casino level area, this was the one and only time he had ever witnessed someone slip and fall on Venetian premises. It was also discovered during Mr. Shulman's deposition of April 22, 2019 that he had met privately with Plaintiff's counsel, Keith Galliher, Esq., and, over my objection, revealed discussions he purportedly had with me in my capacity as Venetian legal counsel about his recollection of events which interview occurred in the course of Mr. Shulman's employment, which discussion was deemed protected as attorney/client privilege. (*See* Exhibit E, *Correspondence from Michael Royal, Esq., to Keith Galliher, Esq.*, dated April 19, 2019. *See also* Exhibit F, *Correspondence from Keith Galliher, Esq., to Michael Royal, Esq.*, dated April 22, 2019.)

11. I have since received records related to Mr. Shulman's employment pertaining to his job performance, discipline history and termination (which occurred on January 23, 2019 following an in person meeting with his superiors), and confirmed that there is no reference to Mr. Shulman's alleged grievances related to his involvement as a witness in this matter.

12. Other than Mr. Shulman's tainted testimony, which is clearly contrary to the objective evidence reviewed herein above, Plaintiff has no objective evidence that a foreign substance existed on the floor causing her to fall. She has therefore resorted to a position of an adverse inference based on the fact that Venetian PAD personnel arrived at the scene post incident with cleaning tools, such as a mop and rag, arguing that no such action would have been taking without the existence of a foreign substance on the floor prior to Plaintiff's fall (ignoring the fact that Plaintiff fell with a beverage in her left hand).

13. On or about August 16, 2018, Plaintiff served Plaintiff's Request for Production of Documents and Materials to Defendant in which Plaintiff requested reports related to slip and falls occurring within three (3) years preceding the subject incident to the present.

14. Defendants objected to providing information related to any incident reports following the subject incident of November 4, 2016, and produced a total of sixty-four (64) prior incident reports from November 4, 2013 to November 4, 2016.[1]

15. I had discussions with Mr. Galliher regarding Defendants' desire to keep such information protected pursuant to NRCP 26(c), which was memorialized in correspondence dated December 17, 2018.

16. Mr. Galliher refused to execute a stipulation to provide NRCP 26(c) protection of information requested, which included the names, addresses, phone numbers, dates of birth, Social Security information, and HIPAA protected information related to alleged injuries and first responder care provided to involved guests of the Defendants.

17. Despite Mr. Galliher's refusal to stipulate to an NRCP 26(c) order, I sent him a total of sixty-four (64) incident reports from November 4, 2013 through November 4, 2016 in redacted form to protect the identity of involved persons, which Defendants not only deemed irrelevant (*see* footnote 1), but that Defendants insist they have an obligation to protect.

18. I filed a Motion for Protective Order with the Discovery Commissioner on February 1, 2019.

19. A hearing on the Motion for Protective Order was held on March 13, 2019, in which Defendants' motion was granted.

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[1]Even though Defendants maintain Plaintiff slipped on a dry marble floor, as related in the paragraphs above, they nevertheless produced prior incidents occurring from guests slipping on a foreign substance on the Venetian casino level common areas for the three preceding years.

20. Approximately one week prior to the March 13, 2019 hearing, I discovered that Mr. Galliher had provided copies of all incident reports to counsel outside this litigation, including but not limited to Peter Goldstein, Esq., who is representing the plaintiff in the matter of *Carol Smith v. Venetian*, case no. A-17-753362-C. Mr. Goldstein filed documents with the court in **his** matter on March 12, 2019, one day prior to the court's hearing of the Motion for Protective Order, and attached a copy of all sixty-four (64) prior incidents. This was clearly done with Mr. Galliher's knowledge and blessing, who was very much aware of Venetian's desire to keep those documents protected pursuant to NRCP 26(c).[2]

21. Mr. Galliher did not move to stay the April 2, 2019 DCRR granting Defendants Motion for Protective Order, and made no effort to comply by taking any remedial action for his premeditated actions which appear to have been designed to circumvent any potential adverse ruling by the Court.

22. Plaintiff testified in deposition on March 14, 2019 that she worked for Brand Vegas, LLC, selling show tickets for Strip properties, including Venetian, stationed at a kiosk located in the Grand Canal Shops, which required her daily and continued use of Venetian property and facilities, from December 2015 to November 2016. Plaintiff testified that she worked approximately 50-70 hours a week, with no vacations, during which time she made many hundreds of walks through the incident area without incident. (*See* Exhibit B at 19-21, 75-79, 109.) Plaintiff further testified that she never saw a foreign substance on the floor of Defendants' property while working thousands of hours,

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[2]Defendants refer the court to their Response to Plaintiff's Objection to Discovery Commissioner's Report and Recommendations Dated April 2, 2019, Countermotion to strike Facts and Arguments Not Briefed Before the Discovery Commissioner, Countermotion for Order Directing Plaintiff to Comply With Protective Order by Retrieving All Information Distributed to Persons Outside the Litigation, and Countermotion for Appropriate Sanctions Under NRCP 37(b)(2), filed April 23, 2019, which incorporated herein. **Exhibit 7 of Plaintiff's motion is a copy of the motion filed by Mr. Goldstein on February 13, 2019 in the *Smith* litigation based on reports Mr. Galliher provided to him. Defendants filed a Motion for Protective Order related to the prior incident reports on February 1, 2019. Mr. Galliher, thus knew full well that the matter of disclosure and distribution of this information was in controversy, and did nothing to prevent Mr. Goldstein from filing them in the *Smith* matter before the protection motion could be heard.**

constantly walking Venetian floors, that she had never seen a slip and fall and denied that she had ever even heard of someone slipping and falling on Venetian property while logging thousands of hours of time representing Venetian interests in the course and scope of her employment. (*See id.*)

23. At the March 13, 2019 hearing before the Discovery Commissioner, Mr. Galliher alleged that Venetian failed to produce four (4) prior incident reports he obtained from Mr. Goldstein in the *Smith* litigation (*supra*). That was the first time Mr. Galliher had raised the issue of a purported discrepancy with records he compared with Mr. Goldstein in the *Smith* litigation.[3] At the Discovery Commissioner's direction, I investigated the alleged discrepancy following the March 13, 2019 hearing and send correspondence to Mr. Galliher addressing his alleged concerns. (*See* Exhibit G, *Correspondence from Michael Royal, Esq., to Keith Galliher, Esq.,* dated March 25, 2019.)

24. Joseph Larson, former Venetian Security Officer who responded to the subject incident, testified that he did not observe any wet areas at the scene. (*See* Exhibit H, *Transcript of Joseph Larson Deposition* (taken 10.11.18) at 48, ln 24-25; 51, ln 1-18.) Mr. Larson also confirmed that Plaintiff did not provide any description of what she believed to have caused her fall. (*Id.* at 54, ln 11-25; 55, ln 1-4.) Mr. Joseph further testified that the only evidence he obtained from his response to the scene of a possible foreign substance was Plaintiff's stated belief that there was water on the floor. (*See id.* at 69, ln 17-25; 70, ln 1-4.) Mr. Larson also denied that Plaintiff ever related to him that her pants were wet as a result of her fall (contrary to Plaintiff's testimony in this matter). (*See id.* at 71, ln 14-20; 82, ln 10-25; 83, ln 1.) Mr. Larson testified that as part of his reporting, he contacted surveillance control regarding coverage of the incident and was advised that there was no evidence of a substance on the floor. (*See id.* at 48, ln 3-18.) In short, Mr. Larson found no evidence of water on the floor from his investigation beyond Plaintiff's stated belief.

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[3]Mr. Galliher raised the issue before the Discovery Commissioner during the hearing without complying with EDCR 2.34, and without briefing the matter, leaving the undersigned with little opportunity to provide a substantive response.

25. Mr. Larson also estimated in deposition that of the prior slip and falls to which he responded in his nine (9) years as a Venetian security EMT, he could only think of perhaps *"a handful of those"* which falls he said were *"usually related to footwear or somebody not being cautious about where they are stepping."* (*See id.* at 81, ln 19-25; 82, ln 1-9.) Mr. Larson that he took pictures of Plaintiff's shoes to demonstrate their worn nature. (*See id.* at 70, ln 22-25; 71, ln 1-7; *see also* Exhibit I, *Photos of Plaintiff's Shoes* (VEN 037-038).)

26. Of the sixty-four (64) prior incident reports provided to Plaintiff in this matter by Venetian, none involve a guest slipping on a dry floor, such as the case here.

27. In addition to the sixty-four (64) prior incident reports provided to Plaintiff, she now claims on pages 4-5 of the pending Motion for Leave to Amend the Complaint, that Venetian did not provide reports of certain prior incidents which went into litigation. As for each, I offer the following by way of response:

a. ***Ceja v. Venetian Casino Resort, LLC*** (A-16-737866). I represented Venetian in this action. It was a slip and fall occurring in the Grand Canal Shops, which is not property owned by Defendants. It, therefore, has no relevance to this matter.

b. ***Lim v. Venetian Casino Resort, LLC*** (A-15-728316). I am advised that there is no corresponding security report related to this matter, that Venetian was unaware of the claim until the Complaint was filed, and that Venetian was unable to ever confirm the incident location and facts surrounding the occurrence. Defendants cannot state even today when, where and how this alleged incident occurred.

c. ***Nguyen v. Venetian Casino Resort, LLC*** (A-17-749115-C). This incident occurred at the upper mall level valet area and involved a guest who fainted after presenting a ticket to valet. There was no evidence of a slip of any kind causing the fall. This incident is clearly not remotely similar to the subject incident location or description.

d. ***Rucker v. Venetian Casino Resort, LLC*** (A-15-729566-C). This incident involves a slip and fall on liquid in the main Venetian hotel lobby area. This incident should have been included by Venetian in its response to the request for prior incident reports. Failure to include it was inadvertent. I did not represent Venetian in this matter and was unaware of it. Defendants will supplement NRCP 34 responses to provide this incident report.

e. ***Rowan v. Venetian Casino Resort, LLC*** (A-17-751293-C). This incident occurred in the breezeway area of the Venetian after unknown guests jumped into a water fountain then out, spilling large amounts of water onto the floor, leading to guest incident within the following two minutes. This incident should have been included by Venetian in its response to the request for prior incident reports. Failure to include it was inadvertent. I did not represent Venetian in this matter and was unaware of it. Defendants will supplement NRCP 34 responses to provide this incident report.

28. Venetian has not withheld any of the above matters in some kind of calculated manner to prevent her from being able to establish up to sixty-six (66) prior incident reports.

29. I further declare that the exhibits identified herein below are true and correct copies of documents produced in or otherwise related to this matter.

EXHIBIT	TITLE
A	Venetian Security Narrative Report (IR 1611V-0680) (10.04.16) (VEN 008-09)
B	Transcript of Joyce Sekera Deposition (03.14.19) pp. 19-21, 75-79, 109
C	Surveillance Footage of Subject Incident (VEN 019)
D	Marked Venetian security scene photo (VEN 043) for demonstrative purposes
E	Correspondence from Michael Royal to Keith Galliher, Esq., dated 04.19.19
F	Correspondence from Keith Galliher, Esq., to Michael Royal, Esq., dated 04.23.19
G	Correspondence from Michael Royal, Esq., to Keith Galliher, Esq., dated 03.25.19
H	Transcript of Joseph Larson Deposition (10.11.18), pp. 48-55, 69-83

EXHIBIT	TITLE
I	Photos of Plaintiff's Shoes (VEN 037-038)

Executed on 2 day of May, 2019.

MICHAEL A. ROYAL, ESQ.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF RELEVANT FACTS

This litigation arises from a November 4, 2016 incident occurring when Plaintiff fell in a lobby area of the Venetian while taking a break from her work station where she was employed as a salesperson for Brand Vegas, LLC, working pursuant to an agreement between Venetian and her employer to sell tickets to Venetian events. At around 12:36 pm, as Plaintiff was en route to the women's bathroom located on the Venetian casino level near the Grand Lux Café, while carrying a covered beverage in her left hand, Plaintiff stepped with her left foot, then slipped and fell to the floor. (*See* Exhibit C at 12:36:50.) Plaintiff testified that she had walked that same path hundreds of previous times without ever seeing evidence of any foreign substance on the floor. (*See* Exhibit B at 19-21, 75-79, 109.)

The cause of Plaintiff's fall is in dispute, as Venetian denies that there was any foreign substance on the floor at the time the incident occurred. This is very clear from surveillance footage of the incident and related testimony by responders. (*See id.*; *see also Declaration of Michael A. Royal, Esq.* paragraphs 2-12.) Regardless, Venetian produced sixty-four (64) prior incident reports from November 4, 2013 through November 4, 2016 related to incidents occurring in the common area of the Venetian casino level area where the subject incident occurred.

II.

NATURE OF RESPONSE

Plaintiff's motion has no basis in fact or law. It is supported by an unfounded premise, based on the nonsensical mathematical extrapolations of Plaintiff and her counsel, conjuring up out of thin air the representation that Mr. Larson testified that there have been *"466-700 falls in the last five years."* (*See Motion for Leave* at 2, ln 21-22.) The other faulty premise of Plaintiff's present motion is that the subject floor was wet. It was not. **Plaintiff admits that the subject floor is safe when dry.**[4] Plaintiff produced an expert report based on multiple assumptions of fact - the primary one being that the subject floor was wet. Now, based on these presumptions and fabricated stats, Plaintiff moves this Honorable Court to grant leave to add a claim of punitive damages.

Plaintiff's motion should be seen for what it is - a maneuver to try her case before the court without having to present actual evidence. It is an absurd *smoke and mirrors* tactic aimed at diverting the Court from surveying actual facts supported by evidence, and present a mythical sinister plot by Defendants to injure and maim guest.

This is a negligence case. It was plead as a negligence case. Plaintiff now asserts that because she has invented a new mythical number of seventy-three (73) prior incidents (*see Motion to Amend*, Exhibit 1 at 4, ln 2) over a three year period (as opposed to sixty-four (64) previously produced), she now has a basis to assert a claim for punitive damages under NRS 42.005. Out of the many millions of people coming upon Venetian's premises annually (including Plaintiff's personal use of the same flooring area hundreds of time prior to the incident), because floors are not maintained as Plaintiff's expert recommends, Plaintiff is satisfied that she has presented facts sufficient for a punitive damages claim.

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[4]Plaintiff's expert report indicates the floor dry tested at .70.

This is a discovery motion cloaked as a motion for leave to amend. Plaintiff does not want to return to the Discovery Commissioner to present her alleged discovery abuse issues. Why? Because Plaintiff has entirely dishonored, disobeyed and disregarded the Discovery Commissioner's ruling on March 13, 2019, memorialized in the April 2, 2019 DCRR, which ruled that all prior incident reports are to be protected pursuant to NRCP 26(c). Plaintiff and her counsel ignored the ruling, shared all of the protected information with counsel in other matters litigated against Venetian (*see* note 2), and is now using the District Court to bypass the alleged discovery abuses and have it grant leave to amend the Complaint.

Plaintiff's motion should be denied. She has not met her burden of establishing a reasonable basis for bringing a punitive damages claim. A review of the surveillance footage attached hereto as Exhibit C (and reviewed in Paragraph 6 of the Declaration herein above) not only conclusively demonstrates there was no foreign substance on the floor causing Plaintiff to fall, but that Defendants had multiple employees patrolling the area - even within three (3) minutes of the subject fall. How on earth does that constitute *"conscious disregard"*? Moreover, Plaintiff's entire motion is tainted with the blatant violation of a present court ruling that all prior incident reports produced in this matter are protected pursuant to NRCP 26(c). For that reason alone, the Court should deny this motion and require Plaintiff to file his discovery grievance with the Discovery Commissioner, where he can explain on the record why he felt that abiding by her March 13, 2019 ruling was not required. Plaintiff's entire case is founded upon a house of cards - which is why she must focus on prior incidents. Therefore, by using inflammatory, invented facts and statistics, creating some new strict liability standard of care, Plaintiff hopes to convince the Court to act in a way contrary to the actual evidence. This present motion is just more of the same hyperbole and gross overstatement of unsupported facts by Plaintiff.

III.

LEGAL ANALYSIS

Rule 15(a), Nevada Rules of Civil Procedure, provides that leave to amend a complaint should *"be freely given when justice so requires."* Leave to amend, however, *"should not be granted if the proposed amendment would be futile."* (Halcrow, Inc. v. Eighth Judicial Dist. Court, 129 Nev. 394, 398, 302 P.3d 1148, 1152 (2013).) A district court exercising its discretion denying a motion for leave to amend is reviewed by higher courts in the state under an *abuse of discretion* standard. (*See* Holcomb Condo. Homeowners' Ass'n v. Stewart Venture, LLC, 129 Nev. 181, 191, 300 P.3d 124, 130-31 (2013).)

Defendants respectfully submit that Plaintiff's motion should be denied, as she has not even plead facts, much less established any, which would even begin to approach a claim for punitive damages in this simple negligence case.

The instant motion is entirely lacking in any reasonable evidentiary basis. Plaintiff has taken the testimony of one former employee security officer and extrapolated it into numbers of ridiculous proportion to prejudice the Court and get its attention from the actual facts of the incident. The actual verified facts from this litigation (as set forth above) are as follows:

1. Plaintiff was extremely familiar with the Venetian property as a pseudo employee, working on the premises daily, with thousands of hours logged less than a year before the incident, Plaintiff having walked the subject area hundreds of times prior to the subject incident without ever witnessing a slip and fall, seeing a foreign substance on the floor, or even hearing about any such incidents. (*See* Exhibit B at 19-21, 75-79, 109.) (Plaintiff's own testimony should defeat the instant motion. She has first hand knowledge that the numbers offered here by her counsel are beyond bogus.)

2. Plaintiff never identified a foreign substance on the floor where the incident occurred. (See *id.*) The only evidence of a foreign substance related to responding security by Plaintiff was her

stated belief that she slipped on water. (Plaintiff did not report to anyone that any part of her clothing was wet due to the fall, as she later claimed in sworn testimony.)

3. Video surveillance of the area within thirty (30) minutes of the incident not only reveals hundreds of people walking through the subject area without the slightest issue, it further reveals that Defendants had multiple PAD employees walking through the area without identifying any substance on the floor. (This includes Maria Cruz, who walked through the area with a broom/dustpan within three minutes of the fall.) (*See* Exhibit C.)

4. While Plaintiff will argue that the presence of a mop and bucket brought to the scene post incident is somehow *per se* evidence of a preexisting spill, it does not.

Even if Plaintiff could somehow prove that a foreign substance caused her fall, what evidence has she presented that Defendants were not taking reasonable efforts to maintain the floor? All she has offered this Honorable Court are some fabricated numbers surrounding prior incidents (an issue she needs to bring before the Discovery Commissioner), and an expert report which confirms that the subject flooring is safe in the kind of dry condition depicted in the surveillance footage. If the floor is as inherently dangerous as Plaintiff claims, Defendants would have expected to see at least one other person from the video surveillance having difficulty walking through the area. There is no such evidence. (Also, one would think that Plaintiff, in her thousands of hours working to sell tickets to Venetian events while working on and around its property, would have had some personal experience consistent with the picture she is painting for the Court in the pending motion. To the contrary, her own testimony is contrary to the position (based on pure speculation) she now presents.)

Plaintiff's motion should be denied because she has not presented evidence supporting a claim for punitive damages, and to allow her to so amend would be futile. Plaintiff is merely attempting to try her case now, before the Court, by manufacturing circumstances which did not - and do not - exist.

A. **Plaintiff Has Not Pled Facts Supporting Punitive Damages**

The Court's authority to preclude a party from adding redundant, frivolous and/or unwarranted portions of a pleading is well established and has been recognized since the beginning of Nevada history. (*See*, Sankey v. Noyes, 1 Nev. 68, 70 (1865).) When considering a motion to amend such as this one, the court, *"[t]he issue is not whether a plaintiff will ultimately prevail, but whether he claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test."* (Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).) Leave to amend should not be granted if *"it is clear that the complaint could not be saved by an amendment."* (Livid Holdings Ltd. v. Salomon Smith Barney, Inc., 416 F.3d 940,946 (9th Cir. 2005).)

Here, Plaintiff's proposed new cause of action for punitive and exemplary damages against the Defendants should be not be granted, as Plaintiff's negligence allegations are insufficient to support a prayer for punitive or exemplary damages against Defendants. On its face, Plaintiff's Complaint alleges only Negligence against Defendants. Even Plaintiff's proposed amended Complaint does not allege a proper legal basis for punitive damages. As is further explained below, Plaintiff cannot pray for an award of punitive damages on claims arising out of negligence, mere recklessness or even gross negligence.

B. **As a Matter of Law, Plaintiff Cannot Plead a Prayer for Punitive Damages on a Negligence Claim**

The Nevada Supreme Court has stated that a Plaintiff is not entitled to punitive damages as a matter of right. (*See* Dillard Department Stores v. Beckwith, 115 Nev. 372, 980 P.2d 882 (1999).) Rather, the Plaintiff must offer **substantial evidence** of malice or oppression, express or implied, to support a claim for punitive damages. (Countrywide Home Loans, Inc. v. Thitchner, 192 P.3d 243 (2008).) Significantly, punitive damages are not awarded to compensate the plaintiff for harm incurred, but to punish the defendant for conduct not meeting the standard. (*See* Act Truck and

Equipment Rentals, Inc., v. Kahn, 103 Nev. 503, 506, 746 P.2d 132, 134 (1987) (*citing* New Hampshire Ins. Co. v. Gruhn, 99 Nev. 771, 67 P.2d 941 (1983)).)

Chapter 42.005(1), Nevada Revised Statutes, requires a plaintiff to prove by **clear and convincing evidence** that a defendant has been guilty of oppression, fraud, or malice in order to obtain an award of punitive damages. Pursuant to NRS 42.001(3), malice, express or implied, is defined as *"conduct which is **intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others**."* (Emphasis added.) With respect to oppression, NRS 42.001(4) defines it as *"**despicable conduct** that subjects a person to **cruel and unjust hardship and conscious disregard** of the rights of the person."* (Emphasis added.) Both definitions use ***conscious disregard*** as a common mental element. NRS 42.001(1) defines ***conscious disregard*** as *"the knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences."* Because the statute's language plainly states that a **defendant is required to have acted with a culpable state of mind**, the Court in Countrywide Home Loans, Inc., *supra.* determined that NRS 42.001 requires that the defendant's conduct, at a minimum, must exceed mere recklessness or gross negligence. (*See* Countrywide Home Loans, Inc., 124 Nev. at 743, 192 P.3d at 255.)

Defendants are not aware of a single case in which the Nevada Supreme Court has affirmed an award of punitive damages in a simple or even gross negligence case. In applying NRS 42.001, the Nevada Supreme Court has held that a Plaintiff cannot recover punitive damages even when a defendant has acted with unconscionable irresponsibility. (*See* Maduike v. Agency Rent-a-Car, 114 Nev. 1, 953 P.2d 24 (1998).) In Maduike, despite the fact that the defendants were aware of a potentially dangerous condition in their rental car and refused to repair or replace the vehicle, the Nevada Supreme Court upheld the trial Court's dismissal of the punitive damages claim. The Supreme Court determined that even unconscionable irresponsibility will not support an award of punitive

damages. As the Nevada Supreme Court explained with respect to *conscious disregard* of the rights of others, the Defendant must act *"with a culpable state of mind"* and his conduct ***"must exceed mere recklessness or gross negligence."*** (Countrywide Home Loans, Inc., 192 P.3d at 255, emphasis added.)

In the present matter, Plaintiff alleges only negligence against Defendants. Her claim that Defendants have had between sixty-four (64) and seventy-three (73) incidents - none of which are related to the present set of facts - cannot transform a simple negligence case to one for punitive damages.[5] If that were the case, then every negligence case would include a prayer for punitive damages. A plain reading of Plaintiff's Complaint makes clear that there are no allegations that Defendants' alleged conduct was intentional or malicious.

Plaintiffs allegations, even in the most favorable light, rise to only simple negligence as to Defendants. Plaintiff's grossly misleading extrapolation from Mr. Larson's testimony (which truly forms the primary basis for the present motion) is insufficient to support a claim for punitive damages. At best, Plaintiff can show from Mr. Larson's testimony that a full-time EMT with Defendants' security department responded to less than one call per month related to some kind of slip and fall on Venetian property. (This is put into better context when considering that millions of people who walk through Venetian property each month.) Further, Plaintiff's expert admits the subject flooring is safe when dry. The objective evidence, frankly, demonstrates that the floor was dry. Even if, for the sake of argument (not remotely conceded by Defendants), there was something wet on the floor, Defendants had employees sweeping through the area, patrolling and monitoring. Such conduct is the very antithesis of *conscious disregard.* In fact, it arguably does not even reach to the level of simple negligence. And where do Plaintiff's shoes play into the analysis? What about her gait, what she was

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[5]Plaintiff's number of *at least* seventy-three (73) prior incident reports is another fabrication. Defendants produced sixty-four (64), and has identified two (2) more per the Declaration herein above, which will be produced by supplement in redacted form.

carrying, why no one else demonstrated any trouble traversing across the subject area of the floor? Her expert apparently will not say.

Plaintiff is actually moving for this Honorable Court to adopt a strict liability standard in Nevada in every case where floors wet test below .50 coefficient of friction (*COF*). Plaintiff provides no supporting evidence for this proposition. What industry standard is there which provides that a business owner with a walking surface testing below 0.50 when wet is strictly liable and subject to punitive damages? There is none. Assuming Plaintiff's allegations are true for the purpose of this Motion (without conceding anything), the allegations do not rise to the level of oppression, malice or despicable conduct necessary for an award of punitive damages against Defendants. Plaintiff's Complaint does not plead (and cannot plead) the requisite state of mind or intentional conduct that supports a prayer for punitive damages. Consequently, Plaintiff's proposed *tacked on* vague allegation and prayer for punitive or exemplary damages contained in the last paragraph of the Complaint under Negligence should be denied as a matter of law.

C. **Plaintiff Has Not Properly Plead a Prayer for Punitive Damages Against Defendants as Legal Entities**

To allege punitive damages against a corporate Defendant, a Plaintiff must plead specific conduct on the part of the manager, directors, or officers of the corporation. There are no such allegations here.

NRS 42.007 governs claims for punitive or exemplary damages against an employer for the wrongful acts of its employees. The statute also specifically addresses claims for punitive or exemplary damages against an employer that is a corporation. NRS 42.007 provides, in pertinent part:

> *Except as otherwise provided in subsection 2, in an action for the breach of an obligation in which exemplary or punitive damages are sought pursuant to subsection 1 of NRS 42.005 from an employer for the wrong act of his employee, the employer is not liable for the exemplary or punitive damages unless:*

(a) The employer had advance knowledge that the employee was unfit for the purposes of the employment and employed him with a conscious disregard for the rights or safety of others;

(b) The employer expressly authorized or ratified the wrongful act of the employee for which the damages are awarded; or

(c) The employer is personally guilty of oppression, fraud or malice, express or implied. If the employer is a corporation, the employer is not liable for exemplary or punitive damages unless the elements of paragraph (a), (b) or (c) are met by an officer, director or managing agent of the corporation who was expressly authorized to direct or ratify the employee's conduct on behalf of the corporation.

NRS 42.007 (emphasis added).

In Countrywide, *supra*, the Nevada Supreme Court determined that the director or managing agent of a corporation must act with conscious disregard for punitive damages to be appropriate. (*See* Countrywide Home Loans, Inc., 192 P.3d at 254-55, emphasis added.) The Court in Countrywide further stated that the defendant must possess a culpable state of mind, *to wit:* at a minimum, it must exceed mere recklessness or gross negligence. (*See id.*)

In the case at hand, Plaintiff did not plead any facts alleging that Defendants' officers, directors, or managing agents acted with the intent to harm Plaintiff. Plaintiff's Complaint does not identify any particular officer, director or managing agent, and does not allege that Defendants' officers, directors, or managing agents acted with culpability beyond mere negligence. On the face of the Complaint, as well as the proposed Amended Complaint, Plaintiff fails to properly plead punitive damages against Defendants, and, therefore, Defendants respectfully request that Plaintiff's motion for leave to add a claim for punitive damages be denied.

IV.

CONCLUSION

Plaintiff has not demonstrated that she should be granted leave to amend the Complaint under NRCP 15(a). Plaintiff cannot recover punitive or exemplary damages arising from a simple negligence claim. Further, under NRS 42.005, Plaintiff cannot recover punitive or exemplary damages from a

corporate entity, such as Defendants, absent factual allegations of malice, fraud or oppression by a corporate officer, director or managing agent. None were alleged here and, as a result, the Court should deny Plaintiff's motion for leave to amend the Complaint against Defendants, with prejudice. Moreover, Plaintiff's wild fabricated assertions based on extremely poor math skills, her outright refusal to obey Court orders (as discussed above),[6] and Plaintiff's transparent attempt to circumvent the Discovery Commissioner by bringing a motion addressing Plaintiff's assertions related to the production of prior incident reports to her should not be even slightly rewarded.

DATED this 2 day of May, 2019.

ROYAL & MILES LLP

By _____
Michael A. Royal, Esq.
Nevada Bar No. 4370
1522 W. Warm Springs Rd.
Henderson, NV 89014
Attorney for Defendants
VENETIAN CASINO RESORT, LLC and
LAS VEGAS SANDS, LLC

[6] *See* note 2.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2 day of May, 2019, and pursuant to NRCP 5(b), I caused a true and correct copy of the foregoing **OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND THE COMPLAINT** to be served as follows:

✓ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

(with exhibits)
____ to be served via facsimile; and/or

✓ pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail; and/or

____ to be hand delivered;

to the attorneys and/or parties listed below at the address and/or facsimile number indicated below:

Keith E. Galliher, Jr., Esq.
THE GALLIHER LAW FIRM
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Ashley Schmitt
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EXHIBIT 4

OPPS
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DISTRICT COURT

CLARK COUNTY, NEVADA

JOYCE SEKERA, an Individual; Plaintiff, v. VENETIAN CASINO RESORT, LLC, d/b/a THE VENETIAN LAS VEGAS, a Nevada Limited Liability Company; LAS VEGAS SANDS, LLC d/b/a THE VENETIAN LAS VEGAS, a Nevada Limited Liability Company; YET UNKNOWN EMPLOYEE; DOES I through X, inclusive, Defendants.	CASE NO.: A-18-772761-C DEPT. NO.: XXV ***Before the Discovery Commissioner*** Hearing Date: August 2, 2019 Hearing Time: 9:00 am

OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL TESTIMONY AND DOCUMENTS AND COUNTERMOTION FOR PROTECTIVE ORDER AS TO PLAINTIFF'S REQUEST FOR PRODUCTION OF INCIDENT REPORTS FROM JANUARY 1, 2000 TO PRESENT, COUNTERMOTION TO COMPEL INFORMATION AND DOCUMENTS OF PRIOR INCIDENT REPORTS PROVIDED TO PLAINTIFF EXPERT THOMAS JENNINGS AND IDENTIFIED IN HIS MAY 30, 2019 REBUTTAL REPORT AND FOR LEAVE TO RETAKE THE JENNINGS DEPOSITION TO ADDRESS THE 196 PRIOR CLAIMS REFERENCED IN HIS REPORT

COMES NOW, Defendants, VENETIAN CASINO RESORT, LLC, and LAS VEGAS SANDS, LLC (collectively referenced herein as *Venetian*), by and through their counsel, ROYAL & MILES LLP, and hereby file this OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL TESTIMONY AND DOCUMENTS AND COUNTERMOTION FOR PROTECTIVE ORDER AS TO PLAINTIFF'S REQUEST FOR PRODUCTION OF INCIDENT REPORTS FROM JANUARY 1, 2000 TO PRESENT, COUNTERMOTION TO COMPEL INFORMATION AND DOCUMENTS OF PRIOR INCIDENT REPORTS PROVIDED TO PLAINTIFF EXPERT THOMAS JENNINGS AND IDENTIFIED IN HIS MAY 30, 2019 REBUTTAL REPORT AND FOR LEAVE TO RETAKE THE JENNINGS DEPOSITION TO ADDRESS THE 196 PRIOR CLAIMS REFERENCED IN HIS REPORT.

This Opposition and Countermotion is based on the pleadings and papers on file, the memorandum of points and authorities contained herein, the affidavit of counsel, the attached exhibits and any argument permitted by this Court at the time set for hearing.

DATED this 17 day of July, 2019.

ROYAL & MILES LLP

By _____

Michael A. Royal, Esq. (SBN: 4370)
Gregory A. Miles, Esq. (SBN: 4336)
1522 W. Warm Springs Rd.
Henderson, NV 89014
Attorney for Defendants
VENETIAN CASINO RESORT, LLC and
LAS VEGAS SANDS, LLC

DECLARATION OF MICHAEL A. ROYAL, ESQ.

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

MICHAEL A. ROYAL, ESQ., being first duly sworn, under oath deposes and states:

1. I am an attorney duly licensed to practice law in the State of Nevada and I am counsel for Defendants Venetian in connection with the above-captioned matter. I have personal knowledge of the following facts and if called upon could competently testify to such facts.

2. This action arises out of an alleged incident involving a floor located within a common area of the Venetian casino on November 4, 2016, when Plaintiff slipped and fell on a dry marble floor.

3. Plaintiff worked as a kiosk employee for Brand Vegas which required her to come upon the Venetian property daily to park and then walk to her work station in the Grand Canal Shops. Plaintiff has presented testimony in this matter that she worked thousands of hours in and around the Venetian property from December 28, 2015 to November 4, 2016, and walked the subject area hundreds of times without ever seeing a spill on the floor, without ever having come upon a scene where someone had fallen, or even heard of such an event occurring prior to the subject incident. (*See* Exhibit A, *Transcript of Joyce Sekera Deposition* (taken March 14, 2019) at 86, ln 13-25; 87, ln 1-5; 88, ln 7-14.)

4. The incident report does not provide evidence that there was anything on the floor causing Plaintiff to fall other than the following: *"She [Plaintiff] stated she was walking through the area when she slipped in what she believed was water on the floor."* (*See* Exhibit B, *Venetian Security Narrative Report* (IR 1611V-0680), November 4, 2016, VEN 008-09.)

5. Plaintiff admits that she never saw any foreign substance on the floor at any time on the date of the subject incident. (*See* Exhibit B, *Transcript of Joyce Sekera Deposition* at 19, ln 23-25; 20, ln 1-25; 21, ln 1-21.)

6. The area where Plaintiff slipped as depicted on the surveillance footage is identified at **12:36:50**. (*See* Exhibit C, *Surveillance Footage*, VEN 019; *see also* Exhibit D, marked Venetian security scene photo (VEN 043), for demonstrative purposes.)

6. Surveillance footage of the subject incident (attached hereto as Exhibit C), reveals that there was absolutely nothing on the floor in the thirty (30) minutes preceding the subject incident, as more than 400 people walk through the area from 12:06:49 to the incident of 12:36:50. The video depicts multiple Venetian personnel patrolling the subject area, including former employee porter Maria Cruz, who is seen walking over the subject area at 12:33:53, less than three (3) minutes prior to Plaintiff's fall.

7. Multiple persons responding to the scene after Plaintiff's fall, including Ms. Cruz, testified that they did not observe any liquid substance on the floor where Plaintiff slipped. (*See* Exhibit E, *Transcript of Maria Cruz Deposition* (taken 04.17.19) at 33, ln 8-17; 34, ln 20-22; 39, ln 21-25; 40, ln 1-9; 41, ln 11-17; 42, ln 10-25. *See also* Exhibit F, *Transcript of Milan Graovac Deposition* (taken 04.22.19) at 15-17, 23-25; 31, ln 14-22; Exhibit G, *Transcript of Louie Calleros Deposition* (taken 04.22.19) at 14-15; 18-19, 22, ln 16-20; 24, ln 16-25; 25, ln 1-11; 27, ln 1-19; 29, ln 21-25; 30, ln 1; Exhibit H, *Transcript of Sang Han Deposition* (taken 05.06.19) at 15, ln 6-14; 16, ln 11-25; 17, ln 1-7; 18, ln 25; 19, ln 1-18; 23, ln 6-25; 24, ln 1-2; 25, ln 18-21; Exhibit I, *Transcript of Christopher Johnson Deposition* (taken 05.06.19) at 17, ln 6-10; 18, ln 9-23.)

8. A careful review of the post scene surveillance footage further demonstrates the absence of any liquid substance on the floor. (*See* Exhibit C.)

9. In his deposition of July 2, 2019, Plaintiff's expert Thomas Jennings testified that after having been retained by Plaintiff in October 2018 and been provided a copy of the security report, scene photos, and surveillance footage, he was unable to objectively identify any evidence of a foreign

substance on the floor beyond the fact that Plaintiff fell and told security she believed she slipped in water.

10. On January 4, 2019, Defendants provided Supplemental Responses to Plaintiff's Requests for Production of Documents and Materials to Defendant related to Plaintiff's request for prior incident reports from November 4, 2013 to present. (*See* Exhibit J, Response No. 7.) Defendants objected to the vast overreaching scope of Plaintiff's request, which was not limited to any factually similar event in or around the same area prior and subsequently to the subject incident, and was therefore not reasonably calculated to lead to the discovery of admissible evidence. (*See id.*) Nevertheless, Defendants provided Plaintiff with sixty-four (64) prior incident reports in redacted form.

11. Defendants filed a motion for protective order related to the prior incident reports on February 1, 2019 related to the sixty-four (64) redacted prior incident reports. The Discovery Commissioner agreed that the prior incident reports were to remain in redacted form and that they were not to be shared by Plaintiff. However, while the motion was pending, Plaintiff shared them all with attorneys representing clients in other presently pending cases against Defendants. In fact, the day preceding the March 13, 2019 hearing before the Discovery Commissioner, all sixty-four (64) redacted prior incident reports were filed by Peter Goldstein, Esq., plaintiff's counsel in another case to support a motion against Venetian in the matter of *Carol Smith v. Venetian Casino Resort, LLC*, case no. A-17-753362-C. Plaintiff's counsel did not advise Defendants or the Discovery Commissioner of the disclosure and public filing of the very same documents the Court then determined to be afforded production under NRCP 26(c).

12. At the March 13, 2019 hearing, Mr. Galliher advised the Discovery Commissioner that when comparing Venetian's prior incident reports with those received by Peter Goldstein, Esq., in the *Smith* matter, there were only four (4) additional reports he felt should have been part of the sixty-four

(64) prior incident reports disclosed by Defendants in this matter. (*See* Exhibit K, *Transcript of Hearing Before Discovery Commissioner*, dated 03.13.19, at 7, ln 13-21.)

13. On March 25, 2019, I sent correspondence to Mr. Galliher responsive to his representation at the March 13, 2019 hearing related to the alleged four (4) undisclosed prior incident reports. (*See* Exhibit L.)

14. Plaintiff's objection to the DCRR regarding the redacted prior incident reports was heard on May 14, 2019, in which the District Judge reversed the DCRR and ordered production of unredacted reports by Defendants. However, the parties submitted competing proposed orders to the Court and, at present, no order has been filed. Defendants reserve their right to bring this matter again before the District Court as provided for under local rules.

15. During a May 28, 2019 hearing regarding Plaintiff's motion for leave to amend the Complaint to add a claim for punitive damages, Plaintiff's counsel represented to the Court that he had evidence that expert David Elliott, PE, had provided deposition testimony about ten (10) years ago in the matter of *Farina v. Desert Palace, Inc.*, case no. A542232, in which he made recommendations to Venetian about its flooring which were ignored. More specifically, Plaintiff's counsel asserted the following:

> *And that is the Venetian in the mid-2000s -- 2005, 2006, 2007 -- hired David Elliot . . .* ***to evaluate their floors at the Venetian and make recommendations concerning how they can make the floors safer.*** *The* ***one thing we've determined so far, Mr. Elliot told him that under no circumstances is marble an acceptable surface for a floor*** *such as a hotel/casino like the Venetian.* ***He made recommendations concerning how they could go from marble to tile and increase the co-efficient of friction*** *-- slip resistance -- to the .5 industry standard from where it is now.*

(See Exhibit M, *Reporter's Transcript* of the May 28, 2019 hearing, at 14, ln 10-23, emphasis added.)

16. During that May 28, 2019 hearing, Mr. Galliher represented to the Court that the David Elliott deposition testimony from 2009 presented: *"**a smoking gun big time.**"* (See *id.* at 17, ln 2-3, emphasis added.)

17. Based on these new allegation represented by Plaintiff at the May 28, 2019 hearing, the Court noted: *"I think at the end of the day, **with what's been alleged**, it would do a disservice to this case if I didn't allow there to be some exploration to see if there's evidence that could support the damages claim."* (See *id.* at 24, 22-25, emphasis added.)

18. A transcript of the David Elliott deposition was obtained subsequent to the May 28, 2019 hearing. (Exhibit N, *Transcript of David Elliott (taken February 13, 2009),* in Farina v. Desert Palace, Inc., case no. A542232, attached hereto.)

19. Mr. Elliott presented the following testimony in his February 13, 2009 deposition related to the Venetian:

> *Q. Essentially if you don't have carpet down, it's slippery when it's wet, right?*
> *A. No, sir. There's other tile that you can use that is very aesthetically pleasing that will meet that standard.*
> *Q. Give me some examples, if you don't mind.*
> *A. **You can go into the Venetian. I do a lot of work for the Venetian and consulting and litigation, and their tile is slip resistant when wet, and it looks good**.*
> *Q. But it's not marble flooring?*
> *A. No, it's not marble flooring.*
> *Q. Is it tile?*
> *A. **It's a ceramic tile**.*

(See id. at 34, ln 12-25, emphasis added.)

20. The February 13, 2009 deposition testimony of David Elliott is not the ***"smoking gun big time"*** Plaintiff's counsel made it out to be before the Court in the May 28, 2019 hearing. To the contrary, the above-cited deposition testimony of Mr. Elliott confirms that he found the Venetian flooring to be slip resistant and safe, even exemplary.

21. Defendants filed a motion for reconsideration related to the Court's granting Plaintiff's motion for leave to add a claim of punitive damages on July 3, 2019, with a hearing set for July 16, 2019.

22. On June 25, 2019, Mr. Galliher and I had a brief meet and confer outside the courtroom of Department 25 following a hearing related to this matter. During that conference, Mr. Galliher inquired about production of the unredacted reports related to those previously produced. I advised that I was waiting for the Court to sign and file one of the competing proposed orders submitted. Mr. Galliher advised that he would be filing a motion to compel. He further asserted entitlement to subsequent incident reports. However, Mr. Galliher did not make reference to a reported batch of other incidents occurring at the Venetian between November 4, 2013 and November 4, 2016. Our EDCR 2.34 conference was limited to the production of unredacted versions of previously produced incident reports and post incident reports.

23. Subsequent to the above discussion, I received correspondence from Mr. Galliher dated in which he quite vaguely produced a table of information purportedly relating to prior incidents. (*See* Exhibit O, *Correspondence from Keith Galliher, Esq., to Michael Royal, Esq.*, dated 06.25.19.) Mr. Galliher did not produce any documents supporting the information presented in the chart produced in his June 25, 2019 correspondence, nor did he discuss the issue with me pursuant to EDCR 2.34. The number of events set forth in the table within counsel's June 25, 2019 letter is similar to the number previously identified and produced in this matter, it did not occur to me that the table of incidents was different from those previously disclosed, as I noticed some events which appeared familiar.[1]

24. Defendant previously provided a Rule 34 request of Plaintiff to produce the entire file of all experts she identified in this matter. (*See* Exhibit P, *Plaintiff, Joyce Sekera's, Responses to Defendant Venetian Casino Resort, LLC's First Set of Request for Production of Documents* (served 08.27.18), No. 18.)

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[1]As discussed further herein below, after investing hours to review Plaintiff's accusations, I managed to identify only five (5) events not previously produced by Defendants, only two (2) of which occurred within the Venetian casino level area of the property.

25. As earlier noted, the deposition of Plaintiff expert, Thomas Jennings, was taken on July 2, 2019. Prior to the deposition, Mr. Jennings was served with a subpoena duces tecum, which required him to bring the following documents: *"Your entire file pertaining to Joyce Sekera vs. Venetian Casino Resort, LLC.* (*See* Exhibit Q, *Second Subpoena Duces Tecum for Tom Jennings*, served 06.10.19.)

26. Mr. Jennings had produced a written report dated May 30, 2019, in which he made the following proclamation:

> *It should also be noted that the Venetian Hotel-Casino* ***has experienced 196 slip and fall events between January 1, 2012 to August 5, 2016 with the majority of those events occurring on the marble flooring within the same approximate area*** *as plaintiff's slip and fall.*

(*See* Exhibit R, *Rebuttal Report by Thomas Jennings*, dated May 30, 2019) at 3.)

27. At the July 2, 2019 deposition, Mr. Jennings appeared with reportedly his entire file in response to the subpoena; however, he did not produce any documents related to the information related to the 196 slip and fall events referenced in his May 30, 2019 report. When asked about this information, Mr. Jennings responded that it was sent to him via email from Mr. Galliher in May, 2019, prior to drafting his rebuttal report. When asked to produce a copy of the same pursuant to the subpoena duces tecum, Mr. Jennings responded that he was no longer in possession of the information, confirming it was not preserved. I asked Mr. Jennings to describe the information provided to him by Mr. Galliher. He was vague and could not recall details, other than he concluded that the 196 prior incidents occurred not just somewhere on Venetian property, but within the Grand Lux rotunda area where the Plaintiff fell in this matter. Plaintiff's counsel present for the deposition did not commit to producing the missing documents.

28. I sent correspondence to Mr. Galliher on July 2, 2019 following the Jennings deposition demanding production of the prior incident information he produced to Mr. Jennings in or about May

2019. (*See* Exhibit S, *Correspondence from Michael Royal, Esq., to Keith Galliher, Esq.*, dated 07.02.19.) To date, there has been no response.

29. In this matter, Defendants have produced a total of sixty-six (66) identified prior incident reports related to stip and falls in the Venetian casino level area. Defendants did not limit production to just the Grand Lux area where the subject incident occurred. Plaintiff claimed to have identified another sixty-five (65) in the June 25, 2019 correspondence. However, in the pending motion, Plaintiff now only identifies forty-six (46) other incidents, apparently paring the number down by nineteen (19) without any explanation.

30. In reviewing the forty-six (46) prior incidents identified by Plaintiff in the pending motion, I have determined that all are among the sixty-six (66) previously produced by Defendants but for only five (5). Thus, the number Plaintiff claims withheld by Defendants is not 196, sixty-five (65) or forty-six (46), but appears to be, at best, five (5).

31. In Plaintiff's motion, she has presented a table of alleged *46 Undisclosed Incident Reports* in a deceptive manner. For example, item no. 6 on page 5 of the motion was previously produced to Plaintiff. Therefore, Plaintiff has the omitted information for time and the report no. Yet, Plaintiff has presented the motion as though she has only partial information from some source other than Defendants. That is misleading. Plaintiff provided the Court with further omissions on page 6 of the pending motion (nos. 10, 13, 14, 17 and 17), page 7 (nos 26, 27, 28, 30, 33, and 34, and page 8 (nos 39, 41, and 45).

32. I have identified the five (5) reports found in the duplicate prior incidents documented by Plaintiff in the table found within the pending motion, and offer the following by way of response:

a. **11/7/13 (Grand Lux Café; Marble slip and fall)** (no event no. provided by Plaintiff);

This event involves a patron who claims to have slipped and rolled his ankle two days earlier (November 5, 2013) while walking just outside the Grand Lux Café, without claiming the involvement

of a liquid substance. No evidence of a foreign substance was ever identified. This incident is arguably not responsive to Plaintiff's request, as it is not factually similar; however, in the spirit of cooperation, Defendants will produce a redacted version of this report pursuant to NRCP 16.1 and NRCP 34.

b. **12/27/13 (WOW Fountain Feature)** (no event number provided by Plaintiff);

The WOW Fountain Feature is not located within or anywhere near the Venetian casino area, but is on the Palazzo side of the property. Defendants would not have produced this report from its initial search for like falls occurring on marble flooring within the Venetian casino level of the property and maintain that it is not relevant today.

c. **04/20/15 (Lobby 1 Trip/Fall)** (no event number provided by Plaintiff);

Information provided in Plaintiff's summary in the Opposition on page 6, ln 13-15, describes this as a trip and fall on a metal strip. Since the alleged incident does not involve a foreign substance on the floor, nor does it involve a slip, Defendants would not have produced it since it is not at all factually similar.

e. **03/18/16 (5th floor of garage elevator lobby)** 1603V-3584

This report was not produced to Plaintiff by Defendants in this action; however, it is already in Plaintiff's possession by way of Peter Goldstein, Esq., in the *Smith vs. Venetian* litigation. It was one of the four reports Mr. Galliher claimed were not provided by Venetian when the parties were before the Discovery Commissioner on March 13, 2019. I addressed this in my March 25, 2019 letter to Mr. Galliher following the March 13, 2019 hearing, advising that it is an event located on an exterior area of the property on a different floor (parking garage), that is not deemed relevant to the subject area of the Grand Lux rotunda. Plaintiff did not object to this explanation, but merely added this event again in the instant motion without advising the Court that it was previously addressed by Defendants.

f. **06/11/16 (Venetian front office, puddle of water)** 1606V-2353

This incident involves a reported slip/fall on water in the front desk area of the Venetian property, which is nowhere near the Grand Lux rotunda area where the subject incident occurred nor does it involve a factually similar circumstance. This is also a case presently litigated against Venetian, identified by Plaintiff in Exhibit 16 of Plaintiff's Motion to Compel Testimony and Documents, where Plaintiff clearly is already in possession of this information. Regardless, in the spirit of cooperation, Defendants will produce a redacted version of this report pursuant to NRCP 16.1 and NRCP 34.

33. Thus, after wading through the sixty-five (65) reports allegedly *undisclosed* by Defendants in this matter, per the June 25, 2019 correspondence, which was refined to forty-six (46) in ths subject motion (without explanation by Plaintiff's counsel), there are actually only five (5) which were not part of the sixty (66) prior incident reports previously produced to Plaintiff by Defendants in this matter. Of those five (5) reports, only two (2) would be potentially factually similar and located within the Venetian casino level area. These two (2) additional reports have now been provided to Plaintiff.

34. Mr. Galliher has not explained how he obtained information related to the alleged 196 prior incident reports of events occurring in the Venetian Grand Lux rotunda area referenced by Mr. Jennings in his May 30, 2019 rebuttal report. Mr. Galliher has not revealed what he produced to Mr. Jennings to support his gold factual assertion, whether information included duplicates of previously identified and produced events, such as what Plaintiff has done on pages 5-8 of the pending motion, how he compiled the information June 25, 2019 and the motion of July 1, 2019, or whether he is presently in possession of all of these incident reports.

35. If Plaintiff is in possession of 196 prior incident reports she produced to her expert, Mr. Jennings, it is Defendants' contention that they must be provided immediately.

36. Although I was present with Plaintiff's counsel for the Tom Jennings deposition on July 2, 2019, there was no discussion about the production of *previously undisclosed* prior incident reports beyond that described above. In other words, Plaintiff's counsel did not advise that he was in possession of information that there were any *previously undisclosed* prior incident reports as set forth in the June 25, 2019 correspondence. Plaintiff filed the pending motion to compel in the hours following the Jennings deposition.

37. Mr. Jennings testified in his July 2, 2019 deposition that he is also a disclosed expert in the *Smith v. Venetian* litigation, where he tested the marble flooring at a site approximately 100 feet away from the subject incident and came up with vastly different numbers for his coefficient of friction testing. (Mr. Jennings tested the subject fall area dry at .70 COF vs. .90 COF in *Smith*, and Mr. Jennings tested the subject fall area wet at .33 COF vs. .40 COF in *Smith*.) Mr. Jennings acknowledged that different areas of the property can test for coefficient of friction differently based on a number of factors, including cleaning methods to foot traffic, among others.

38. On May 31, 2019, Plaintiff served Rule 34 requests which include the production of incident reports from January 1, 2000 to the present. (*See* Exhibit T, *Plaintiff's Sixth Request for Production of Documents and Materials to Defendants*, served 05.31.19, Nos. 23-26, 29.)

39. Exhibit 15 to Plaintiff's motion, identified as *Plaintiff's Notice of Motion and Motion for Terminating Sanctions, et al* filed by Peter Goldstein, Esq., on February 13, 2019 in the *Smith* matter, was denied by the District Court in a hearing held on May 7, 2019. Therefore, the relevance of that motion referenced on page 17 of the motion to compel is unclear.

40. On July 9, 2019, I attempted to have an EDCR 2.34 conference with Plaintiff's counsel about the issues addressed herein above, and was advised that any such conferences must be held only with Mr. Galliher, who has not responded to my request for the documents he provided to Tom Jennings to support an expert opinion but has not produced to me.

41. On July 11, 2019, I spoke with Mr. Galliher regarding the 196 prior incident reports provided to Mr. Jennings and the request for production of prior incident reports back to January 1, 2000. Mr. Galliher advised that he would be producing the information he provided to Tom Jennings; however, I have not yet received them as of the date of this filing. Mr. Galliher and I also discussed his intent to insist that Venetian produce records related to prior incidents for the preceding twenty (20) years. We disagree that Venetian is obligated to produce records in the broad scope of the production request.

42. I have met the requirements of EDCR 2.34 to confer with Plaintiff's counsel about issues surrounding the Tom Jennings deposition and failure to produce copies of the 196 prior incident reports as related in his report of May 30, 2019 and the.

43. This opposition and countermotion is not brought in bad faith, or for any improper purpose.

44. I declare that true and correct copies of the following exhibits are attached hereto in support of this Opposition.

EXHIBIT	TITLE
A	Transcript of Joyce Sekera Deposition (03.14.19) pp. 19-21, 75-79, 109
B	Venetian Security Narrative Report (IR 1611V-0680) (10.04.16) (VEN 008-09)
C	Surveillance Footage of Subject Incident (VEN 019)
D	Marked Venetian security scene photo (VEN 043) for demonstrative purposes
E	Transcript of Maria Cruz Deposition (04.17.19)
F	Transcript of Milan Graovac Deposition (taken 04.22.19)
G	Transcript of Louie Calleros Deposition (taken 04.22.19)
H	Transcript of Sang Han Deposition (taken 05.07.19)
I	Transcript of Christopher Johnson deposition (taken 05.07.19)
J	Supplemental Responses to Plaintiff's Requests for Production of Documents and Materials to Defendant, served 01.04.19
K	Transcript of Hearing Before Discovery Commissioner, dated 03.13.19, select pp

L	Correspondence from Michael Royal, Esq., to Keith Galliher, Esq., dated 03.25.19
M	Reporter's Transcript of May 28, 2019 hearing
N	Transcript of David Elliott (taken February 13, 2009), in *Farina v. Desert Palace, Inc.*, case no. A542232, selected pages
O	Correspondence from Keith Galliher, Esq., to Michael Royal, Esq., dated 06.25.19
P	Plaintiff, Joyce Sekera's, Responses to Defendant Venetian Casino Resort, LLC's First Set of Request for Production of Documents, served 08.27.18
Q	Second Subpoena Duces Tecum for Tom Jennings, served 06.10.19
R	Expert Rebuttal Report, Thomas Jennings (dated 05.30.19)
S	Correspondence from Michael Royal, Esq., to Keith Galliher, Esq., dated 07.02.19
T	Plaintiff's Sixth Request for Production of Documents and Materials to Defendants, served 05.31.19
U	Complaint, filed 04.12.18
V	First Amended Complaint, filed 06.28.19
W	Discovery Commissioner's Report and Recommendation (filed 07.09.19), *Boucher v. Venetian Casino Resort, LLC*, Case No. A-18-773651-C

Executed on 17 day of July, 2019.

MICHAEL A. ROYAL, ESQ.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF RELEVANT FACTS

This litigation arises from a November 4, 2016 incident occurring when Plaintiff fell in a lobby area of the Venetian while taking a break from her work station where she was employed as a salesperson for Brand Vegas, LLC, working pursuant to an agreement between Venetian and her employer to sell tickets to Venetian events. At around 12:37 pm, as Plaintiff was en route to the women's bathroom located on the Venetian casino level near the Grand Lux Café, while carrying a covered beverage in her left hand, Plaintiff stepped with her left foot, then slipped and fell to the floor.

(*See* Exhibit C at 12:36:50.) Plaintiff testified that she had walked that same path hundreds of previous times without ever seeing evidence of any foreign substance on the floor. (*See* Exhibit B at 19-21, 75-79, 109.)

The cause of Plaintiff's fall is in dispute, as Venetian denies that there was any foreign substance on the floor at the time the incident occurred. This is very clear from surveillance footage of the incident and related testimony by responders. (*See id.*; *see also Declaration of Michael A. Royal, Esq.* paragraphs 4-9.) Regardless, Venetian produced sixty-six (66) prior incident reports from November 4, 2013 through November 4, 2016 related to incidents occurring in the common area of the Venetian casino level area where the subject incident occurred.

II.

NATURE OF OPPOSITION

Defendants contend that the issue surrounding the production of unredacted reports to those produced responsive to Plaintiff's Production Request No. 7 remains an open issue, as there is no order and Defendants are awaiting filing of the order, where competing orders were presented to the District Judge. As for the alleged other four (4), forty-seven (47), sixty-five (65) or 197 prior incident reports allegedly not produced (depending on which numbers Plaintiff chooses to assert on any given day), Defendants only very recently became aware of this alleged issue and there was no meet and confer with Plaintiff pursuant to EDCR 2.34 prior to filing of the instant motion. If Plaintiff already has the information, then it is unclear what Plaintiff expects Defendants to do. Regarding Plaintiff's demand for subsequent incident reports, this is a simple negligence case arising from an alleged temporary transitory condition on the Venetian floor. Plaintiff argues in the motion to compel that this litigation is akin to a products defect claim. It is not. That is simply not the case. In fact, Plaintiff has pled and continues to plead this as a simple negligence case. (*See* Exhibits T and U.) There is no reasonable basis to allow Plaintiff to obtain other incident reports subsequent to her fall.

III.

LEGAL ANALYSIS

A. Plaintiff Failed to Comply With EDCR 2.34 Regarding Alleged Undisclosed Reports

Prior to filing this Motion, Plaintiff failed to comply with her meet-and-confer obligation pursuant to EDCR 2.34, which is sets forth in pertinent part as follows:

> *Discovery motions may not be filed unless an **affidavit** of moving counsel is attached thereto setting forth that after a discovery dispute conference or a good faith effort to confer, counsel have been unable to resolve the matter satisfactorily. A conference requires either a personal or telephone conference between or among counsel. Moving counsel must set forth in the affidavit what attempts to resolve the discovery dispute were made, what was resolved and what was not resolved, and the reasons therefor. If a personal or telephone conference was not possible, the affidavit shall set forth the reasons.*[2]

Similarly, Rule 37 of the Nevada Rules of Civil Procedure mandates as follows:

> *On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.*[3]

Plaintiff's motion lacks any declaration or affidavit whatsoever in compliance with the above-stated rules. Therefore, the motion should not be considered. Plaintiff's counsel did not attempt a *meaningful, good-faith* discussion regarding the alleged undisclosed prior incident reports, and she has not attached an affidavit of any kind to the pending motion. It is therefore defective and the motion should be denied in its entirety. However, if the Court is inclined to consider Plaintiff's motion to compel.

B. Unredacted Reports

The Discovery Commissioner previously ruled in Defendants' favor on this issue and it was thereafter presented to the District Court on May 14, 2019. Counsel prepared competing orders for the

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[2]EDCR 2.25(a).

[3]NRCP 37(a)(1).

judge's signature. To date, there has been no order signed. Defendants have rights that do not accrue until after an order is signed and filed by the Court and notice of entry provided. That has not yet occurred.

At the time of the May 14, 2019 hearing, Defendants were unaware that the Discovery Commissioner's Report and Recommendation related to redaction of information on prior incident reports was affirmed by Judge Jones in the *Smith* matter on May 7, 2019, based on a ruling by the preceding Discovery Commissioner. Judge Delaney appeared to be of the understanding that the April 2, 2019 DCRR related to the protection of prior incident reports in this matter was a novel, isolated, outlier decision; therefore, she granted the objection and ordered that unredacted reports be produced. The rules allow Defendants to bring this new information before the judge. Since this issue remains open, and Defendants have not exhausted their rights, where production of unredacted reports will result in irreparable harm to Defendants as Plaintiff shares the private information of Venetian guests freely with the world (thus far without any specific limitation), Defendants have not yet produced unredacted reports.[4]

C. **Other Allegedly "Undisclosed" Prior Incident Reports**

1. **Plaintiff's Claim of Four (4) *Missing* Reports at the March 13, 2019 Hearing is Not Properly Before the Court; However, it Was Long Ago Resolved**

The Discovery Commissioner will recall that during the March 13, 2019 hearing, Plaintiff's counsel complained that although Defendants provided sixty-four (64) prior incident reports, he compared production provided by Venetian in the *Smith* litigation and identified a total of four (4) prior incident reports Mr. Galliher claimed were not produced by Defendants in this matter. (*See* Exhibit K at 7, ln 13-21.) That issue was raised by Plaintiff for the first time during the March 13, 2019 hearing. There was no EDCR 2.34 Conference and the matter was not briefed. Nevertheless, the

[4]It is noteworthy that Plaintiff did not serve the First Amended Complaint until after the order granting her leave to do so was executed and filed with the District Court.

Discovery Commissioner responded that parties were to address it and then bring it before her later after an EDCR 2.34 conference if it remained unresolved. (*See id.* at 14-15.) Defendants reviewed the issue of the four (4) alleged missing reports and addressed it in correspondence of March 25, 2019. (*See* Exhibit L.) There has been no further discussion regarding those four (4) reports pursuant to EDCR 2.34 as directed by the Discovery Commissioner. Therefore, this issue is not properly before the Court. If the Court chooses to address it, Defendants explained that three (3) of the four (4) prior incident reports were outside the three (3) years requested by Plaintiff and that one (1) of the reports within the three year time period was an exterior lobby in the parking garage area of the property, not remotely close to the subject Grand Lux rotunda area.

2. **The Issue of Sixty-Five (65) Allegedly *Undisclosed* Reports (June 25, 2019 Letter) is Not Properly Before the Court**

On June 25, 2019, following a brief EDCR 2.34 Conference held earlier on the same date to address the issue of when unredacted reports would be produced, Plaintiff's counsel sent correspondence addressing the status of unredacted reports. (*See* Exhibit O.) In the same corresponded, Plaintiff presented a table of sixty-five (65) incident reports, which Defendants initially presumed related to the previously produced unredacted reports. Since Plaintiff had never previously advised that she was in possession of an additional sixty-five (65) prior incident reports, Defendants did not readily identify this as a new issue. To date, Plaintiff has not addressed this with Defendants pursuant to EDCR 2.34. Had that occurred, Plaintiff's counsel may have realized that his list of sixty-five (65) prior incident reports was by and large a restatement of information already in Plaintiff's possession. The pending motion does not contain an affidavit affirming any attempt to comply with meet and confer requirements as per local rules and as otherwise required by EDCR 2.34, NRCP 37, or otherwise.

As noted above, Defendants have reviewed the list of sixty-five (65) reports and identified only two (2) of which relate to incidents occurring within the Venetian casino area level of the property (and

that neither are, frankly, factually similar). Thus, Plaintiff's claim that Defendants did not produce sixty-five (65) prior incident reports in the June 25, 2019 was blatantly false.

3. **The Issue of Forty-Six (46) Allegedly *Undisclosed* Reports (July 2, 2019 Motion) is Not Properly Before the Court**

Since Plaintiff did not comply with EDCR 2.34 requirements prior to filing the instant motion, Defendants have no idea why she pared down the sixty-five (65) allegedly undisclosed prior incident reports to forty-six (46). However, Defendants believe that Plaintiff's counsel reviewed the list of sixty-five (65) and found nineteen (19) duplicates, which were eliminated prior to filing this motion. Had Plaintiff taken a little more time, she would have discovered that of the forty-six (46) alleged undisclosed reports, there were really only five (5) - and of those five (5), only two (2) of which relate to a slip and fall on a foreign substance within the Venetian casino level area of the property.

Plaintiff acknowledges that she has been exchanging information with counsel in other ongoing cases against Venetian. This is particularly why an EDCR 2.34 conference would have been helpful here, since counsel for the parties could have discussed this alleged new information and potentially resolved the issues. For example, if Plaintiff's counsel had taken time to actually review the evidence before filing this motion, he would likely have discovered that Defendants have already produced forty-one (41) of the forty-six (46) prior incident reports very carefully set forth and numbered in the pending motion. The parties may have discovered that there were actually only five (5) other events not previously disclosed, then could have had a discussion to review them as set forth in Paragraph thirty-two (32) of the above Declaration. Since Plaintiff was in possession of most of the security reports identified on pages 5-8 of the pending motion, it is unclear why she withheld information in the table thereby presenting the illusion of missing information due to non-production. It is rather rich that Plaintiff has accused Defendants of intentionally withholding information from her in their discovery responses while at the same time Plaintiff is withholding information from the Court.

The subject incident occurred in the Grand Lux rotunda of the Venetian, which itself is subject to a lot of pedestrian traffic as it is located at the base on the escalators to and from the parking garage and third floor valet, and is also a main artery between the front desk and the guest tower elevator lobby. In his deposition of July 2, 2019, Plaintiff's expert Tom Jennings acknowledged that issues surrounding coefficient of friction can vary depending on factors which include the amount of foot traffic.[5]

Recall that Mr. Jennings testified on July 2, 2019 that Plaintiff is in possession of **196 prior incident reports** related to incidents occurring **solely** in the Grand Lux rotunda area where the subject incident occurred. Those reports were produced to Mr. Jennings by Plaintiff but never to Defendants.

During the March 13, 2019 hearing, the Discovery Commissioner noted the following after ruling that the reports produced to Plaintiff could remain in redacted form:

> *With that said, **if the Plaintiff goes through the reports and identifies incidents that occurred in substantially the same location as this incident occurred or have substantially similar facts as to the incident at issue** -- because The Venetian is a huge place, and so it needs to be sufficiently identified to be in the same location or under similar facts -- then I'd ask that the two of you have a 2.34 conference about disclosing the contact information for those particular incidents because I'm sure that's a much more narrow scope than all of them. And if you cannot agree following that 2.34 conference, then bring it back to the Commissioner's attention and we will have a hearing regarding the disclosure of the contact and privacy information with regard to those individuals.*

(*See* Exhibit K at 12, ln 12-23, emphasis added.) Plaintiff has made no effort to comply with this instruction. She has not limited her request for prior incident reports to the Grand Lux rotunda or to substantially similar facts. She has just unleashed a shotgun blast of prior incidents, relying on sheer numbers (most of them wholly contrived) to bolster her notice argument - which is especially important to her here, since she actually fell on a dry marble floor.

---

[5]This was Mr. Jennings' explanation of why his coefficient of friction measurements were so different in the *Smith v. Venetian* litigation in an area less than 100 feet away.

At this point, Defendants need some guidance from the Discovery Commissioner as to what exactly Plaintiff is entitled to. Defendants have produced sixty-six (66) redacted prior incident reports related to falls occurring at the Venetian casino level area from November 4, 2013 - November 4, 2016 and has agreed to provide two (2) additional reports as noted above. Plaintiff is now apparently expanding it to the entire property, including different floors, different towers, and obviously different circumstances, when her own expert, Mr. Jennings, testified that Venetian flooring in different areas can test differently based on a variety of circumstances.

Plaintiff's request for prior incident reports should be limited to the area of the subject incident. If there are, in fact, 196 prior incident reports related to the area of Plaintiff's fall for the four-and-a-half preceding years, as Mr. Jennings has both reported and testified, then Plaintiff has sufficient information upon which to make a notice argument - even to support punitive damages. However, obtaining reports from different areas throughout the property, different floors, different circumstances, etc., is a mere fishing expedition.

4. **Plaintiff's Motion Oddly Fails to Address the 196 Prior Incident Reports Provided to Plaintiff Expert Tom Jennings**

In addition to Plaintiff withholding information in readily in her possession to create a false impression the Court, as set forth above, there is another glaring omission in the pending motion; *to wit:* Plaintiff claims to already have **196 prior incident reports (from January 1, 2012 to August 5, 2016) which relate solely to the area of the Grand Lux rotunda**. (*See* Exhibit R at 3.) Mr. Jennings testified in deposition on July 2, 2019 that he received these reports from Plaintiff's counsel in May 2019. However, Mr. Jennings could not produce any information related to these alleged 196 prior incident reports at the deposition in response to a subpoena duces tecum.

D. **Plaintiff is Not Entitled to Subsequent Incident Reports in a Simple Negligence Case Arising From an Alleged Temporary Transitory Condition on an Interior Floor**

Plaintiff is moving to compel Defendants to produce incident reports from January 1, 2000 to the present. (*See* Exhibit T, Nos. 23-26, 29.) Plaintiff's counsel has made it clear that every document obtained via discovery (or otherwise) in this litigation goes into a repository and is shared with multiple attorneys/firms presently litigating cases against Venetian. Plaintiff now seeks to attain post incident claim information which is clearly not relevant to show notice and would not be admissible at trial.

In *Schlatter v. Eighth Judicial Dist. Court*, 93 Nev. 189, 561 P.2d 1342 (1977), the trial court issued a pretrial discovery order permitting blanket discovery of the petitioner's medical records and income tax returns where the plaintiff had brought an action for personal injuries. The Nevada Supreme Court limited the discovery to only those matters addressing issues raised in the complaint, stating that the trial court abused its discretion by allowing *carte blanche* discovery of all information contained in those materials without regard to relevancy. That is exactly what Plaintiff is doing here against Defendants.

This is a simple negligence action, arising from an alleged slip and fall from a temporary transitory condition. (*See* Exhibit U, *Complaint* (filed 04.12.18); Exhibit V, *First Amended Complaint* (filed 06.28.19).) Plaintiff has not set forth a claim for product defect, for example; yet, that is the kind of discovery course Plaintiff is following here. As noted above, Defendants dispute the existence of a foreign substance on the floor as the cause of Plaintiff's fall on November 4, 2016.

Plaintiff's demand for subsequent incident reports is based on a claim for punitive damages which the Court allowed Plaintiff to file in an Amended Complaint during a hearing on May 28, 2019, where Plaintiff's counsel made representations related to the 2009 testimony of David Elliott which were later discovered to be unfounded. A motion for reconsideration has been filed and is set to be heard on July 16, 2019. Even if the punitive damages claim remains, it does not entitle Plaintiff to obtain the kind of discovery she is demanding here to address not only an alleged temporary transitory condition, but one where the clear evidence suggests there was no such condition at all. There is

simply no basis for punitive damages in a simple negligence case arising from a temporary transitory condition.

Subsequent incidents have no value or relevance to establish notice. They will do nothing to establish whether there was a foreign substance on the floor causing Plaintiff's fall and, if so, how/when the substance was introduced to the floor, how long it was there, and the procedures followed by Venetian staff to patrol the subject area.

Plaintiff has cited cases from multiple other jurisdictions to support her motion to compel subsequent incident reports; however, she has quite notably failed to present any cases from Nevada. Also, none of the cases cited by Plaintiff stand for the proposition that the production of subsequent incident reports is required in a simple negligence action arising from an alleged transitory condition.

The leading case cited by Plaintiff, *Hilliard v. A. H Robins Co.*, 148 Cal. App. 3d 374,196 Cal. Rptr. 117 (Ct. App. 1983), is a product defect case. None of the string of cases cited by Plaintiff thereafter support her assertion that she is entitled to subsequent incident reports in a simple negligence case such as this. (*See* Plaintiff's Motion to Compel at 15-16 (*Schaffer v. Edward D. Jones & Co.*, 1996 SD 94, 552 N.W.2d 801 (1996) (securities fraud); *Roth v. Farner-Bocken Co.*, 667 N.W.2d 651 (S.D. 2003) (wrongful termination, discrimination); *Boshears* v. *Saint Gobain Calmar, Inc.*, 272 S.W.3d 215, 226 (Mo. Ct. App. 2008) (negligence action arising from explosion with discovery allowed to address subsequent remedial measures); *Bergeson v. Dilworth*, 959 F.2d 245 (10th Cir. 1992) (relates to the admission of post incident letters written by others related to the subject incident relevant to the subject event); *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1249 (10th Cir. 2000) (product defect case); *GM Corp. v. Mosely*, 213 Ga. App. 875 (Ga. Ct. App. 1994) (product defect case); *Wolfe v. McNeil-PPC Inc.*, 773 F. Supp.2d 561 (E.D. Pa. 2011) (product defect case); *Coale v. Dow Chem. Co.*, 701 P.2d 885 (Colo.App. 1985) (product defect case); *Palmer v. A.H Robins Co.*, 684 P.2d 187 (Colo.

1984) (product defect case); *Hoppe v. G.D. Searle & Co.*, 779 F.Supp. 1413 (S.D.N.Y. 1991) (product defect case).)

Defendants cannot find one Nevada case supporting Plaintiff's motion to compel them to produce subsequent incident reports in a simple negligence action such as this one. The expert disclosure deadline has passed and Plaintiff has not identified an expert who will present testimony that the flooring at Venetian is defective - nor has Plaintiff even made that allegation. (*See* Exhibits U and V.) The Discovery Commissioner recently provided the following in a Discovery Commissioner's Report and Recommendation (filed 07.09.19), in the case of *Boucher v. Venetian Casino Resort, LLC*, Case No. A-18-773651-C: ***Subsequent incident reports do not need to be provided, because liquid on a walkway is a transient condition.*** (*See* Exhibit W.)

There is no basis to support Plaintiff's motion to compel the production of subsequent incident reports in a slip and fall case from a temporary transitory condition based on negligence.

COUNTERMOTION TO COMPEL INFORMATION AND DOCUMENTS OF PRIOR INCIDENT REPORTS PROVIDED TO PLAINTIFF EXPERT THOMAS JENNINGS AND IDENTIFIED IN HIS MAY 30, 2019 REBUTTAL REPORT AND FOR LEAVE TO RETAKE THE JENNINGS DEPOSITION TO ADDRESS THE 196 PRIOR CLAIMS REFERENCED IN HIS REPORT

Defendants hereby file this countermotion for NRCP 26(c) protective order as to Plaintiff's demand for incident reports from January 1, 2000 to present as set forth in Plaintiff's Sixth Request for Production of Documents and Materials to Defendants served on May 31, 2019. (*See* Exhibit T, Nos. 23-26, 29.) Defendants further file this countermotion to compel Plaintiff to produce a copy of all incident reports provided to expert Tom Jennings used to support his factual assertion that there have been 196 prior incidents occurring in the Grand Lux rotunda area of the Venetian property from January 1, 2015 to August 5, 2015. Defendants further move the Court to compel Plaintiff to produce all prior incident reports related to the sixty-five (65) matters identified in her correspondence of June

25, 2019, or which are otherwise in Plaintiff's possession beyond those produced by Defendants pursuant to NRCP 16.1 or otherwise in response to an NRCP 34 request.

A. **Defendants Move for Protection Under NRCP 26(c) From Plaintiff's Expansive Discovery of Incident Reports from January 1, 2000 to Present**

Rule 26, Nevada Rules of Civil Procedure, governs the scope of discovery, and provides for protection of both parties and other persons, against annoyance, embarrassment, oppression, or undue burden or expense. More specifically, NRCP 26(b)(1) provides as follows:

> *Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.*

Rule 26(c), Nevada Rules of Civil Procedure, reads as follows in pertinent part:

> ***Protective Orders***. *Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with the other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embaTassment, oppression, or undue burden or expense, including one or more of the following:*
>
> *(1) that the discovery not be had;*
> *(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;*
> *(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;*
> *(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;*
> *(5) that discovery be conducted with no one present except persons designated by the court;*
> *(6) that a deposition after being sealed be opened only by order of the court;*
> *(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way;*
> *(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.*

The objective of discovery rules is to limit discovery to relevant matters, and to prevent *"fishing expeditions"* by restricting litigants to discovery that only implicates matters raised by them in the pleadings. (See FED. R. CIV. P. 26(b), Advisory Committee Note, Amendments to Federal Rules of Civil Procedure, at 388-90). Pursuant to the Nevada Rules of Civil Procedure, the court in which the action is pending may make any order/recommendation which justice requires to protect a party so that certain discovery abuses do not occur. (*See* NRCP 26). The compulsion of production of irrelevant information is an inherently undue burden. (*See Jimenez v. City of Chicago*, 733 F. Supp. 2d 1268, 1273 (W.D. Wash. 2010) (*citing, Compaq Computer Corp. v. Packard Bell Elecs.*, 163 F.R.D. 329, 335-336 (N.D. Cal. 1995)).

In Plaintiff's Request No. 29, she seeks the following information: *Any and all complaints submitted by guests or other individuals regarding the safety of marble floors.* (*See* Exhibit T, No. 29.) This request is preceded by numerous requests for information dating back to January 1, 2000. (*See id.*, Nos. 23-26.) In other words, Plaintiff is seeking anything and everything related to Venetian flooring dating back twenty (20) years. As such, Plaintiff is seeking a massively expanded amount of information beyond her initial request for prior incident reports from November 4, 2013 ***to the present***, which Defendants have produced in redacted form up to and including November 4, 2016. (*See* Exhibit J at 4-5, Request No. 7.) Defendants have always objected to Plaintiff's demand for subsequent incident reports. (*See id.*) Plaintiff's latest request is overly broad in that it is not sufficiently limited in time, limited to the subject fall area, limited to factually similar facts, etc. Plaintiff simply demands anything and everything.

Defendants therefore move this Honorable Court for an order protecting it from Plaintiff's ongoing demands for past and present incident reports. Defendants move for the Court to provide the parties with a scope limited to three (3) years preceding the subject incident to the date of the subject incident, occurring in the Grand Lux rotunda. As noted, Plaintiff's expert claims he has seen 196 such

reports from January 1, 2012 to August 5, 2016. Plaintiff therefore presumably has all the information regarding prior incident she needs to establish notice.

B. **Defendants Move to Compel Production of All Prior Incident Reports Produced by Plaintiff to Expert Tom Jennings**

Defendants have properly requested that Plaintiff produce a copy of the entire file for any experts retained in this matter. (*See* Exhibit P at 6, no. 18.) Defendants further requested that Mr. Jennings produce a copy of his entire file at the July 2, 2019 deposition. (*See* Exhibit Q.) Mr. Jennings confirmed in deposition that he received a copy of information from Plaintiff's counsel identifying the 196 prior incident reports set forth in his May 30, 2019 rebuttal. Mr. Jennings further stated that he is no longer in possession of this information. Defendants have demanded that this be provided by Plaintiff. It remains a contested issue. Therefore, Defendants hereby move this Honorable Court for an order compelling Plaintiff to produce all information provided to Mr. Jennings to support his conclusion that there were 196 prior incidents occurring in the Grand Lux rotunda area from January 1, 2012 to August, 5 2016.[6]

Defendants further move for an order to compelling Plaintiff to provide all information supporting her claim that there were sixty-five (65) prior incident reports not previously disclosed by Defendants as set forth in her correspondence of June 25, 2019, which would obviously be in addition to the 196 prior incident reports occurring on ly in the Grand Lux area she provided exclusively to Mr. Jennings as related in his May 30, 2019 report and July 2, 2019 deposition. If Plaintiff is indeed already in possession of 260 other prior incident reports (a combined total of the 196 prior incident reports and those identified in Plaintiff's June 25, 2019 correspondence), then Defendants should not have to go through the expense and effort to produce them a second time.

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[6]Mr. Jennings could not confirm whether the prior incident reports were in redacted form, whether names of those involved were included, how he knew they were all within the Grand Lux rotunda area, etc. This is a very critical fact and inexcusable omission by Mr. Jennings and Plaintiff.

If the 196 prior incident reports relied upon by Mr. Jennings and his May 30, 2019 rebuttal report are ultimately produced by Plaintiff, Defendants move for leave under NRCP 30(a)(2)(A)(ii) to retake Mr. Jennings' deposition for the purpose of reviewing this information, which should have been available to Defendants at the July 2, 2019 deposition of Mr. Jennings, and that Plaintiff be responsible for all costs associated with that deposition, to be limited in time to one (1) hour.

IV.

CONCLUSION

Based on the foregoing, Defendants hereby respectfully submit that Plaintiff's Motion to Compel Production of Testimony and Documents must be denied. Defendants further hereby move by way of countermotion for a protective order pursuant to NRCP 26(c) related to Plaintiff's request for documents related to incident reports from opening of the Venetian to date.

Defendants further move by countermotion for an order directing Plaintiff to produce the 196 prior incident reports provided to Tom Jennings, as related in his May 30, 2019 report, and for Plaintiff to provide copies of all prior incident reports in her possession not produced by Defendants.

DATED this 12 day of July, 2019.

ROYAL & MILES LLP

By _____

Michael A. Royal, Esq. (SBN: 4370)
Gregory A. Miles, Esq. (SBN 4336)
1522 W. Warm Springs Rd.
Henderson, NV 89014
Attorney for Defendants
LAS VEGAS SANDS, LLC, and
VENETIAN CASINO RESORT, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12 day of July, 2019, and pursuant to NRCP 5(b), I caused a true and correct copy of the foregoing **OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL TESTIMONY AND DOCUMENTS AND COUNTERMOTION FOR PROTECTIVE ORDER AS TO PLAINTIFF'S REQUEST FOR PRODUCTION OF INCIDENT REPORTS FROM JANUARY 1, 2000 TO PRESENT, COUNTERMOTION TO COMPEL INFORMATION AND DOCUMENTS OF PRIOR INCIDENT REPORTS PROVIDED TO PLAINTIFF EXPERT THOMAS JENNINGS AND IDENTIFIED IN HIS MAY 30, 2019 REBUTTAL REPORT AND FOR LEAVE TO RETAKE THE JENNINGS DEPOSITION TO ADDRESS THE 196 PRIOR CLAIMS REFERENCED IN HIS REPORT** to be served as follows:

_____ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

_____ to be served via facsimile; and/or

✓ pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail; and/or

_____ to be hand delivered;

to the attorneys and/or parties listed below at the address and/or facsimile number indicated below:

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EXHIBIT 5

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DISTRICT COURT

CLARK COUNTY, NEVADA

JOYCE SEKERA, an Individual,

Plaintiff,

v.

VENETIAN CASINO RESORT, LLC, d/b/a THE VENETIAN LAS VEGAS, a Nevada Limited Liability Company; LAS VEGAS SANDS, LLC d/b/a THE VENETIAN LAS VEGAS, a Nevada Limited Liability Company; YET UNKNOWN EMPLOYEE; DOES I through X, inclusive,

Defendants.

CASE NO.: A-18-772761-C
DEPT. NO.: 25

PLAINTIFF'S MOTION FOR LEAVE TO AMEND THE COMPLAINT

HEARING REQUESTED

Plaintiff, Joyce Sekera, submits her Motion for Leave to Amend Her Complaint (the "Motion") to add a claim for punitive damages. Punitive damages are warranted in this case because

Venetian consciously disregarded their customers' safety by refusing to fix the known hazard which caused Plaintiff's fall.[1]

This Motion is based upon the records and pleadings on file herein, the points and authorities attached hereto, and any oral arguments that may be allowed at the hearing of this Motion.

DATED this 22nd day of April, 2019

THE GALLIHER LAW FIRM

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a personal injury case arising out of a slip and fall on the shiny marble floors in the Venetian Casino Resort. On November 4, 2016 Plaintiff sustained serious injuries after she slipped and fell on water on the marble floors of Venetian near the Grand Lux Cafe. During discovery Plaintiff's expert tested the marble floors and determined they were significantly below industry slip resistant standards when wet. Based on the deposition of Venetian's responding EMT/security officer this dangerous condition resulted in 466-700 injury falls in the last five years. Incident reports were taken in all of these cases, however, because Venetian determined the discovery rules and court orders do not apply to them, they only disclosed 64 of these reports. Nonetheless, Plaintiff identified another 4 incident reports disclosed to another slip and fall case, and another 5 incidents from downloading court documents. As discussed below, the Court should grant Plaintiff's Motion

[1] A copy of the proposed Amended Complaint is attached hereto as Exhibit "1."

because Venetian consciously disregarded the safety of its customers when it failed to increase the slip resistance of their floors after receiving notice of the hazard from hundreds of customers.

II. FACTUAL BACKGROUND

On November 4, 2016 around 12:30 p.m. Plaintiff Joyce Sekera was walking through Venetian. (*See* Incident Report, attached as Exhibit "3" at 4.) As she passed the Grand Lux Café Restrooms Plaintiff slipped and fell on water on the marble floors. (*Id.*) On the way down Plaintiff struck her left elbow which caused immediate pain and limited her range of motion. (*Id.*) Venetian's EMT/security officer Joseph Larson ("Mr. Larson") responded to the fall. (*Id.*) Plaintiff was initially very embarrassed by the fall and did not want to be transported to the hospital. (*Id.*) Mr. Larson put Plaintiff's left arm in a splint and assisted her to a more private area. (*Id.*) After some discussion Mr. Larson convinced Plaintiff to seek medical attention at Centennial Hills Hospital. (*Id.* at 5.)

During discovery Plaintiff requested Venetian produce:

> True and correct copies of any and all claim forms, legal actions, civil complaints, statements, security reports, computer generated lists, investigative documents or other memoranda which have, as its subject matter, slip and fall causes occurring on marble floors within the subject VENETIAN CASINO RESORT within three years prior to the incident described in Plaintiff's Complaint [November 4, 2013], to the present [August 15, 2018].

(Plaintiff's Requests for Production, attached as Exhibit "4.")

On October 11, 2018, before receiving Venetian's answers, Plaintiff took the deposition of Mr. Larson. (Deposition of Joseph Larson, attached as Exhibit "5.") Mr. Larson testified he had worked at Venetian as an EMT/security officer for nine years. (*Id.* at 20:23-24:1.) Mr. Larson worked eight-hour shifts, five days a week. (*Id.* at 28:12-15.) Mr. Larson testified two or three EMT/security officers work per shift per side (Venetian and Palazzo). (*Id.* at 28:23-35.) During the nine years he worked at Venetian Mr. Larson testified he investigated 100 injury falls on marble floors. (*Id.* at 24:3-27:14.)

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Based upon these numbers, Plaintiff estimated she would receive somewhere around 466-700[2] slip and fall incident reports in response to her request for production. Thus, three months later when Venetian disclosed a mere 64 redacted incident reports, Plaintiff instantly suspected the vast majority were missing. (*See* e.g. Declaration of Defense Counsel Michael Royal, Esq. in Support of Venetian's Motion for Protective Order, attached as Exhibit "6" at ¶ 17.) To verify Venetian's compliance with the discovery request, the undersigned contacted Mr. Peter Goldstein, Esq., ("Mr. Goldstein") Plaintiff's counsel in another pending premise liability action against Venetian. (*See Carol Smith v. Venetian Casino Resort, LLC*, Case No. A-17-753362-C.) From their discussion, the undersigned and Mr. Goldstein realized Venetian provided them each with reports Venetian did not give the other. (*See* Plaintiff's Motion for Terminating Sanctions in *Smith v. Venetian,* attached as Exhibit "7.") To determine which reports Venetian failed to provide each Plaintiff, the parties put together a table of all the incident reports disclosed in the two cases. (*See* Summary of Falls in *Sekera v. Venetian* and *Smith v. Venetian,* attached as Exhibit "8.")[3] After comparing the discovery provided, the undersigned and Mr. Goldstein determined Venetian willfully left out four reports in response to Plaintiff's Requests for Production which were disclosed in *Smith v. Venetian*, and willfully left out 35 reports in response to plaintiff's requests for production in *Smith v. Venetian.* (*Id.*) Additionally, Plaintiff pulled pleadings from five of the 50 or so cases filed against Venetian in the Eighth Judicial District Court in the last five years and discovered none of the incident reports from these slip and falls were disclosed either. (*See* Complaint and incident report from A-16-

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[2] 100 x 2 x 4.2 x 5/9 = **466**;
100 x 3 x 4.2 x 5/9 = **700**
Where 100 represents the injury falls Mr. Larson attended to in his 9 years; 2 and 3 represents the number of EMT/security officers on the clock per shift, and 4.2 represents the number of shifts per week (168 hrs per week / 40hr shift), and 5/9 represents 5 of 9 years Mr. Larson worked. (Exhibit "4" at 24:3-27:14 (100 falls); 20:23-24:1 (9 years); 28:23-35 (2-3 EMT/security officers per shift); 28:12-15 (8 hr shifts)).

[3] The PDF files of incident reports provided by Venetian in these two pages collectively contain over 1000 pages. Thus, this summary is attached for the Court's convenience. Upon the Court's request Plaintiff can produce the original PDF files.

737866-C; Commissioner's Decision on Request for Exemption from A-15-728316-C; Commissioner's Decision on Request for Exemption from A-15-729566-C; Complaint from A-17-749115-C; and Complaint from A-17-751293-C, attached collectively as Exhibit "9.")

On December 4, 2018 Plaintiff's human factors and safety engineering expert, Thomas Jennings, conducted a formal site inspection and performed a slip resistance test at Venetian where Plaintiff fell. (*See* Report of Thomas Jennings, attached as Exhibit "10" at 5.) Mr. Jennings' test revealed the marble floors at Venetian where Plaintiff fell had a wet slip resistance of 0.33. (*Id.* at 5.) The industry standard for wet coefficient of friction is 0.50. (*Id.* at 2.)

III. LEGAL ARGUMENT

A. Standard for a Motion for Leave to Amend

NRCP 15(a) requires leave to amend "be freely given when justice so requires." NRCP 15(a); *see also Kantor v. Kantor,* 116 Nev. 886, 891, P.3d 825, 828 (2000) ("After a responsive pleading is filed, a party may amend his or her pleading only by leave of court or by written consent of the adverse party, and leave shall be freely given when justice so requires"); *Adamson v. Bowker,* 85 Nev. 115, 121, 450 P.2d 796, 800 (1969) ("Rule 15(a) declares that leave to amend shall be freely given when justice so requires; this mandate is to be heeded"). It is reversible error to deny a motion for leave without a reasonable justification. *Id.* at 120, 450 P.2d at 800.

A party generally must seek leave to amend before the deadline in the scheduling order, unless the movant shows good cause for the untimely filing. *See Nutton v. Sunset Station, Inc.* 131 Nev. Adv. Rep. 34 (Nev. Ct. App. June 11, 2015). Finally, a court should only deny a Motion for Leave to Amend if the opposing party can prove "undue delay, bad faith or dilatory motive on the part of the movant." *Stephens v. S. Nev. Music Co.,* 89 Nev. 104, 105–06, 507 P.2d 138, 139 (1973); *see also Nutton v. Sunset Station, Inc.,* 131 Nev. Adv. Op. 34, 357 P.3d 966, 970 (Nev. App. 2015); *Foman v. Davis,* 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962) ("If the underlying

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facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.' ").

Here, the deadline to amend pleadings is not until May 17, 2019. (*See* Stipulation and Order to Extend Discovery, attached as Exhibit "3" at 2:3-4.) As the deadline to amend pleadings has not passed, the Court must grant Plaintiff's Motion to amend her Complaint to add punitive damages unless Venetian can prove "undue delay, bad faith or dilatory motive."

B. Punitive Damages Are Appropriate Because Venetian Consciously Disregarded the Known Hazard Which Caused Plaintiff's Fall

"Punitive damages are designed to punish and deter a defendant's culpable conduct and act as a means for the community to express outrage and distaste for such conduct." C*ountrywide Home Loans. Inc. v. Thitchener,* 124 Nev. 725, 739, 192 P.3d 243 252 (2008); *see also Republic Ins. v. Hires,* 107 Nev. 317, 320, 810 P.2d 790, 792 (1991) ("Punitive damages provide a benefit to society by punishing undesirable conduct not punishable by the criminal law"). Punitive damages are a "means of punishing the tortfeasor and deterring the tortfeasor and others from engaging in similar conduct." *Siggelkow v. Phoenix Ins. Co.,* 109 Nev. 42, 44-45, 846 P.2d 303, 304-05 (1993). "The allowance of punitive damages also provides a benefit to society by punishing undesirable conduct that is not punishable by the criminal law." *Id.* at 45, 846 P.2d at 305.

A plaintiff may recover punitive damages when evidence demonstrates the defendant acted with "malice, express or implied." *Wyeth v. Rowatt,* 126 Nev. Adv. Rep. 44, 244 P.3d 765, 783 (2010) *quoting* NRS 42.005(1). " 'Malice, express or implied,' means conduct which is intended to

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injure a person **or** despicable conduct which is engaged in with a conscious disregard of the rights or safety of others." *Id. quoting* NRS 42.001(3) (emphasis added). "A defendant has a 'conscious disregard' of a person's rights and safety when he or she knows of 'the probable harmful consequence of a wrongful act and a willful and deliberate failure to act to avoid those consequences.' " *Id. quoting* NRS 42.001(1). "In other words, under NRS 42.001(1), to justify punitive damages, the defendant's conduct must have exceeded 'mere recklessness or gross negligence." *Id. quoting Countrywide Home Loans. Inc. v. Thitchener*, 124 Nev. 725, 742-43, 192 P.3d 243, 254-55 (2008).

In *Maduike v. Agency Rent-A-Car,* the Nevada Supreme Court held the refusal to repair a known dangerous condition, without more, does not support punitive damages. *Maduike*, 114 Nev. 1, 953, P.2d 24, 26-27 (1998). However; the Court retreated from this approach in *Thitchener* and ruled that the disjunctive "implied malice" prong of the punitive damages statute permits such damages for the conscious disregard of unsafe conditions. *See Thitchener,* 124 Nev. at 739-40 & n.51, 192 P.3d at 253-55 & n.51. The Court defined conscious disregard as the "knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences." NRS 42.001(1). In *Thitchener,* the Court allowed punitive damages in a wrongful eviction case, under the implied malice theory, where plaintiffs "presented evidence of multiple ignored warning signs suggesting that Countrywide knew of a potential mix-up, as well as evidence indicating Countrywide continued to proceed with the foreclosure despite knowing of the probable harmful consequences of doing so." *Thitchener*, 124 Nev. at 744, 192 P.3d at 255.

Other states similarly hold punitive damages are available in cases where the facts show Defendant acted with conscious disregard for the safety of others. For example, in *Nolin v. National Convenience Stores* the California Appellate Court upheld a punitive damages award arising out of a a slip and fall incident at a self-serve gas station. *Nolin v. Nat'l Convenience Stores, Inc.,* 95 Cal.

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App. 3d 279, 157 Cal. Rptr. 32 (Ct. App. 1979), In *Nolin*, the gas nozzle, when used, consistently overflowed and spilled gasoline onto the pump and ground. *Id.* at 283, 157 Cal. Rptr. at 34. The manager of a gas station expressed concern about the hazardous condition to the district representative and informed him spilled gasoline caused two customers slip and fall. *Id.* Additional testimony indicated several of the defendant's employees also slipped and fell on spilled gasoline from the same nozzle. *Id.* at 284, 157 Cal. Rptr. at 34. The district representative brushed off manager's concern and failed to remedy the problem. *Id.* Plaintiff then slipped and fell on gasoline spilled from the overflowing nozzle. *Id.* at 282, 157 Cal. Rptr. at 33. At trial the jury awarded plaintiff $68,101 in compensatory damages and $50,000 in punitive damages. *Nolin,* 95 Cal. App. 3d at 281, 157 Cal. Rptr. at 33. The court upheld the punitive damages because the defendant "showed a complete lack of concern regarding the harmful potential the probability and likelihood of injury." *Id.* at 288, 157 Cal. Rptr. at 37. *See also Workman v. UA Theatre Circuit, Inc.*, 84 F. Supp. 2d 790, 793-94 (S.D. W.Va. 2000)(movie theatre's failure to correct a known hazardous condition – water on floor from leaking roof – where large numbers of the public are business invitees is evidence sufficient to go to trial on punitive damages for defendant's reckless conduct where plaintiff slipped and fell on the water); *Poulter v. Cottrell, Inc.,* 50 F.Supp.3d 953, (N.D. Ill. 2014) (plaintiff who slipped and fell on defendant's equipment could proceed to trial on punitive damages where defendant's actions showed reckless indifference for the safety of others by its inaction in the face of a known danger that was remediable and/or by its cavalier willingness to expose the public to an unreasonable risk of physical injury).

Similar to the defendant in *Nolin,* Venetian's conscious disregard of a known hazard also warrants punitive damages. Venetian was aware their marble floors created an unreasonable danger when wet but did nothing to remedy it; the marble floors have a wet slip resistance of 0.33, nearly a third below the industry standard of 0.50. In other words, Venetian's marble floors, when wet are

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nearly 50% more slippery than industry standards. This dangerous condition was not hidden in a corner or difficult to spot; rather, this marble floor is part of a major walkway in the casino directly in front of the restrooms. Venetian could have easily remedied this unsafe condition by applying a slip resistant treatment to their marble floors at a cost of ¢21 to ¢35 per square foot, but they choose not to. (Exhibit "10" at 2.)

Moreover, Plaintiff's fall was not the first time a patron notified Venetian's management of the unsafe marble floors. Venetian was notified of the problem over and over and over again; their EMT/security officers made a *minimum* 73 incident reports of injury slip and falls on the marble floors in the three years prior to Plaintiff's fall. The Court should note **73 represents a fraction of the times customers notified Venetian of the issue.** The EMT/security officer, Mr. Larson testified he investigated 100 injury falls on marble floors in Venetian during the 9 years he worked there. If we do the math and assume Mr. Larson was an average EMT/security officer, there should be somewhere around 840-1260[4] injury falls on marble floors at Venetian in the last 9 years. Narrowing that down to the scope of Plaintiff's Request for Production (5 years), there should be 466-700[5] slip and fall incident reports. **In other words, one injury fall occurs on Venetian's marble floors every 2.6 – 3.9 days.** However, Because Venetian decided they are the only litigant in the State of Nevada which the discovery rules and court orders do not apply to, Plaintiff could not determine the exact amount of injury falls. Based on Venetian's refusal to disclose all of the incident reports, Plaintiff believes the number of injuries falls on marble floors is closer to 700. In any event, this number is infinitely larger than the two prior slip and falls sufficient to uphold the punitive damages award in *Nolin.*

[4] *See supra,* FN 2.
[5] *See supra,* FN 2.

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What happened to Plaintiff is not the result of ordinary negligence, but the result of Venetian's conscious disregard for the safety of Plaintiff and other customers. Customers repeatedly placed Venetian on repeated notice their floors were unreasonably slippery when wet, but Venetian did nothing to correct it. Because Venetian failed to remedy this hazardous condition, Plaintiff fell and sustained serious injuries. Moreover, Venetian's subsequent actions evidence its guilty state of mind. Venetian provided a mere fraction, 15-20%, of the incident reports requested by Plaintiff. It did the same thing in *Smith v. Venetian* and at in doing so violated numerous court orders. After Venetian was caught playing hide-the-ball in both cases, it moved for a protective order on the previously disclosed incident reports. (Defendant's Addendum to Reply To Plaintiff's Opposition to Defendant's Motion for Protective Order, attached as Exhibit "11" at 4:19-23.) There is only one motivation for such deplorable conduct: Venetian intentionally refused to fix a problem that caused numerous injuries and does not want to be held accountable via punitive damages.

Instead coating the marble floors with slip resistant product at a cost of ¢21 to ¢35 per square foot Venetian allowed its guests to get injured year after year. (Exhibit "10" at 2.) Plaintiff's injuries would not have occurred but for Venetian's willful failure to act. 466-700 individuals slipped and fell on the marble floors at Venetian in the last five years, and rather than address this issue, Venetian acts as if nothing is wrong. Apparently, Venetian does not believe a cost of ¢21 to ¢35 per square foot outweighs the benefit of preventing one injury slip and fall every 2.6 – 3.9 days. As such, Venetian's conscious disregard of the inherent danger of their marble floors justifies a claim for punitive damages.

//

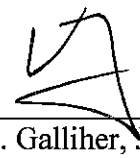
//

IV. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests this Court grant her Motion to Amend her Complaint to add punitive damages.

DATED this 22nd day of April, 2019

THE GALLIHER LAW FIRM



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of THE GALLIHER LAW FIRM and that service of a true and correct copy of the above and foregoing **PLAINTIFF'S MOTION FOR LEAVE TO AMEND THE COMPLAINT** was served on the 22 day of April, 2019, to the following addressed parties by:

_____ First Class Mail, postage prepaid from Las Vegas, Nevada pursuant to N.R.C.P 5(b)

_____ Facsimile, pursuant to EDCR 7.26 (as amended)

X Electronic Mail/Electronic Transmission

_____ Hand Delivered to the addressee(s) indicated

_____ Receipt of Copy on this _____ day of April 2019,

acknowledged by, _____

Michael A. Royal, Esq.
Gregory A. Miles, Esq.
ROYAL & MILES LLP
1522 W. Warm Springs Road
Henderson, Nevada 89014
Attorneys for Defendants

An Employee of THE GALLIHER LAW FIRM

EXHIBIT 6

PAIN INSTITUTE OF NEVADA
7435 W. Azure Drive, Ste 190
Las Vegas, NV 89130
Tel 702-878-8252
Fax 702-878-9096

OFFICE VISIT

Date of Service: July 10, 2019

Patient Name: **Joyce P Sekera**
Patient DOB: 3/22/1956

PAIN COMPLAINTS
Neck
Low back

Mrs Sekera returns for follow up. She saw Dr. Smith yesterday and his notes say she got no relief from the RFA. She tells me this must be an error as she feels about 70% relief in her low back pain. Her memory isn't too good she tells me so can't remember exactly what he told her but that she would need surgery at some point. She has mild pain now, improved range of motion, has less AM pain, and walks longer / farther now.
Activities that aggravate the pain: Sitting and walking for prolonged periods
Activities that relieve the pain: Stretch and exercise
Description of the pain: Ache
Least pain throughout day (0-10): 3/10
Most pain throughout day (0-10): 3/10

Neck stiffness comes/goes and isn't too bothersome. She denies arm symptoms.
Activities that aggravate the pain: Turning to the left
Activities that relieve the pain: Heat
Description of the pain: Dull
Least pain throughout day (0-10): 0/10, no pain.
Most pain throughout day (0-10): 3/10

INTERIM HISTORY
Hospitalizations or ER visits: None
Changes in health: None
Problems with medications: None
Obtaining pain meds from other physicians: Patient denies.
New injuries or MVA's: No
Work Status: Unemployed
Therapy: Pt is not currently receiving physical or chiropractic therapy.

IMAGING/TESTING
MRI brain without contrast: Report dated 12/16/2016
Brain normal for age.

MRI cervical spine without contrast: Report dated 12/21/2016
Mild dextrocurvature with straightening of cervical lordosis.
C3-4: Mild bilateral facet hypertrophy.
C4-5: Mild bilateral facet hypertrophy. Mild left uncovertebral arthropathy.
C5-6: Mild disc protrusion with mild bilateral facet hypertrophy. Bilateral uncovertebral arthropathy with mild left greater than right neural foraminal stenosis.
C6-7: Mild broad disc protrusion AP diameter spinal canal 10 mm.

MRI lumbar spine without contrast: Report dated 12/21/2016
L1-2: Mild disc bulge.
L2-3: Minimal spondylosis and disc bulge.
L3-4: Mild disc bulge with mild facet and ligamentum flavum hypertrophy bilaterally. AP dimension of the spinal canal 11 mm.
L4-5: Left paracentral disc bulge with annular fissuring. Assessment and ligamentum flavum hypertrophy bilaterally. AP dimension spinal canal 11 mm.
L5-S1: Central disc bulge with facet hypertrophy bilaterally. AP dimension spinal canal 10 mm.

XRAYS cervical spine with Flex/Ext : Report dated 7/31/2018
Cervical spine straightening with mild degenerative disc disease at C5, there is 6 to a lesser degree. C4-C5. Multilevel mild spondylosis. Flexion and extension views demonstrate no ligamentous laxity or instability.

AP and lateral thoracic and lumbar spine with right and left lateral bending: Report dated 7/31/2018
Mild endplate osteophytosis of the mid thoracic and lumbar spine. Equal excursion of right and left lateral bending. No significant scoliosis measured on chronic exam.

X-ray lumbar spine with flexion and extension: Report dated 7/31/2018
Mild degenerative disc disease at L1-L2 mL, 2–3 with multilevel mild spondylosis, most evident at L4-S1. Vascular calcifications noted with slight levoconvex curvature. No evidence of subluxation with flexion extension views.

CT lumbar spine: Without contrast: Report dated 7/31/2018
Mild levoscoliosis of the lumbar spine with anterior osteophyte formation at L1-L3 Moderate facet hypertrophy is seen at right L4-S1 levels and mild facet hypertrophy seen within the remainder of the lumbar spine.
Disc bulges causing mild spinal canal narrowing at L2-L3, L3-L4, and L4-L5 with bilateral lateral recess narrowing at L4-L5.

X-rays lumbar spine: Report dated 8/22/2018
Spurring seen mildly throughout lumbar spine, or focal involving L2-L3. Mild sclerosing of left SI joint.

PROCEDURES
03/09/2017
FJI B L5S1
Post injection: Complete resolution of usual pain
Sustained: No relief of usual pain.

05/08/2017
MBB B L5S1
Post Injection: Complete Resolution of usual pain.
Sustained: 2 days at 100% relief and pain eventually returned

11/30/2017
RFA B L5S1
Sustained: ROM has improve significantly, 80% resolution of usual pain. Tender ache with right side more than left.

06/20/2019
RFA B L5S1
Sustained: 70% reduction of usual pain with improved ROM again

MEDICAL HISTORY
Diabetes type 2, HbA1C 6.5
Memory impairment from mild TBI
Low back pain

ALLERGIES
No known drug allergies

MEDICATIONS
Metformin 500mg qd

NV & CA PMP REVIEWED 6/5/17-6/5/19 NO MEDS FOUND

SURGICAL HISTORY
No prior surgeries reported.

FAMILY HISTORY
Lung Cancer

SOCIAL HISTORY
Family Status: Single / not married , has children , lives with family
Occupation: Customer service / Unemployed
Habits: The patient smokes rarely. The patient does not drink. The patient denies recreational drug use.

SYSTEMS REVIEW
Constitutional Symptoms: Negative
Visual: Negative
ENT: Negative
Cardiovascular: Negative
Respiratory: Negative
Gastrointestinal: Negative
Genitourinary: Negative
Endocrine: Negative
Musculoskeletal: See HPI
Neurological: Negative
Hematologic: Negative
Integumentary: Negative
Psychological: Negative

VITAL SIGNS
Height: 66.00 Inches
Weight: 205.00 Pounds
Blood Press: 134/78 mmHg
Pulse: 82 BPM
BMI: 33.1
Pain: 03

PHYSICAL EXAMINATION
GENERAL APPEARANCE
Appearance: Mild discomfort
Transition: Slight limited
Ambulation: Patient can ambulate without assistance.
Gait: Gait is normal

LUMBAR SPINE
Appearance: Grossly normal. No scars, redness, lesions, swelling or deformities.
Tenderness: Mild tenderness noted bilateral lower lumbar spine
Trigger Points: None noted.
Spasm: Mild spasm is noted in the paravertebral musculature.

Facet Tenderness: Facet joint tenderness is noted.
Spinous Tenderness: Spinous processes are non-tender.
ROM: Full ROM with mild pain on extension only
Straight Leg Raising: Negative at 90 deg bilaterally. Does not produce radicular pain.

PSYCHOLOGICAL EXAMINATION
Orientation: The patient is alert and oriented x3. No sign of impairment.
Mood / Affect: Mood is normal. Full affect.
Thought Process: Intact.
Memory: Intact.
Concentration: Intact.
Suicidal Ideation: None.

DIAGNOSIS
M47.817 LUMBOSACRAL FACET JOINT ARTHROPATHY / SPONDYLOSIS
M51.27 LUMBOSACRAL DISCOPATHY
M62.838 MUSCLE SPASM

PRESCRIPTIONS
None

PLAN
** RETURN: As needed when her pain returns

Katherine D Travnicek MD

Copy to: William Smith MD

Electronically signed by KATHERINE TRAVNICEK Date: 7/10/2019 Time: 11:20:13

EXHIBIT 7

William D. Smith, MD

Western Regional Center for Brain & Spine Surgery
Comprehensive Neurosurgical Care

Street: 3061 S. Maryland Parkway, Suite 200
City/State/Zip: Las Vegas, NV 89109
Phone: (702) 737-1948
Fax: (702) 737-7195

Patient: Joyce P. Sekera **Patient #:** 379090 **DOB:** 03/22/1956 (63 years)

Date of Encounter: 07/08/2019

History of Present Illness

The patient is a 63 year old female who presents for a follow-up visit. Note for "Follow-up visit": This woman continues to complain of back pain. She had a rhizotomy done I believe a week or two ago. It gave her some temporary improvement, but the pain returned.

Additional reasons for visit:

Transition into care is described as the following:
The patient is transitioning into care and a summary of care was reviewed.

Allergies

No Known Allergies 02/26/2018
No Known Drug Allergies 02/26/2018

Past Medical History

Cervical spondylosis with myelopathy
Other secondary scoliosis, lumbosacral region
Back pain, sacroiliac
Lumbar spondylosis with myelopathy

Family History

Mother: In good health
Father: Deceased
Brother 1: In good health
Sister 1: In good health

Social History

Occupation/Work Status: Retirement (Health Related)
Marital Status: Single
Children: 1.
Living situation: Lives with his mother.
Tobacco use: Current some day smoker: Smokes 1-2 cigarettes a week.
Alcohol Use: No alcohol use
Illicit drug use: Never
HIV risk factors: None
Highest recreation level prior to spine condition: No Response.

Other Problems

Unspecified Diagnosis

Past Surgical

None (02/26/2018)

Diagnostic Studies

Chiropractor
Exercise Therapy
MRI Brain, Brain Stem
MRI, Cervical Spine
MRI, Lumbar Spine
Lumbar Spine X-ray

Vitals

07/08/2019 06:27 AM
Weight: 200 lb **Height:** 66 in
Body Surface Area: 2 m² **Body Mass Index:** 32.28 kg/m²

Assessment & Plan

Back pain, sacroiliac 724.6 | M53.3

- Patient Education: Smoking: Ways to Quit: smoking cessation
- **Review of Diagnostic Test**
  Comments: Once again, I have reviewed her CT scan. The CT scan not only showed the rotatory scoliosis, but the left L5-S1 facet appears to have a fracture. This certainly is consistent with a work injury.

- How to access health information online
- Instructed / counseled on smoking cessation including modes of cessation. Readiness to quit and motivation assessed.

Lumbar spondylosis with myelopathy 721.42 | M47.16

- Patient Education: Low Back Pain: low back

With this in mind, once again, I do not see how this woman will be able to avoid surgical treatment for this. Rhizotomies in my opinion will give her some temporary relief, but certainly not long-term. Please do not hesitate to call me with questions. I will continue to see this woman as required.

Cc: Farmers W/C (702) 436-1189 (faxed)
Walter M. Kidwell, MD (702) 878-9096
Jeffrey Webb, Dc (702) 457-7083
Katherine Travnicek, MD (702) 878-9096
Edson Erkvwater, MD (702) 259-5554
Galliher Law (702) 735-0204

William D. Smith, MD

EXHIBIT 8

THE VENETIAN THE PALAZZO

Incident Report Number: 13/10-5588

Accident Report – Security

Please type or print clearly.

Name: [redacted] Age/DOB: [redacted]

Home Address: [redacted] Social Security #:

City: [redacted] State: [redacted] Zip Code: [redacted]

Home Telephone: [redacted] Your Occupation: Teacher

By Whom Employed: Alta Loma School District

Are You a Guest of The Venetian or The Palazzo?: yes Suite #: 11-315

Local Address or Hotel if not a Venetian or Palazzo Guest: Ø

Please state, in your own words, what you were doing and what happened to cause your accident.

While walking in sneakers my right heel slid on some spilled cider in main hallway by a post causing my right leg to slide out from under me - my left knee bent & hit marble floor. The left knee historically is bone on bone & had a shot Obtaining Video 11/19/13

Date of Accident: 11/24/13 Time of Accident: 1:45pm

Location of Accident (Please be specific): Hallway - main 3/4 of the way up

Whom do you consider to blame?: Hotel - Apple cider which spilled on the floor

If you consider The Venetian or The Palazzo responsible, please state why: yes impossible to see because of the shiny floor until the liquid was encountered.

What, if any, injuries did you sustain?: (L) knee - more swollen

What, if any, property damage did you suffer?: N/A

Number of Guests In Your Party at Time of Accident: 1

Dated this 24th Day of November 20 13

Signature of Guest: [redacted]

Security Officer: [redacted] TM #: 3417

Guest Checkout Date:

FORM NO. GR-HTL-0071A-05-07

THE VENETIAN THE PALAZZO

13IW-5588

Acknowledgement of First Aid Assistance & Advice to Seek Medical Care

☑ I (or my guardian) have been informed that only an initial Emergency First Aid treatment and evaluation has been rendered to me by a Venetian or Palazzo Emergency Medical Technician (EMT) who is not a medical doctor and that I (or my guardian) have been advised that I should seek the advice of a physician as soon as possible.

☐ I (or my guardian) refuse treatment by a Venetian or Palazzo Emergency Medical Technician (EMT) and have been advised that I should seek the advice of a physician as soon as possible.

Name (Print): [redacted]

Signature: [redacted]

Address: [redacted] Social Security #: [redacted]

Date of Birth: [redacted]

Phone: [redacted]

Witness: [redacted] Niney daughter

Witness: [redacted] lab lead & other people stopped no names

Date: 11/24/13 Time: 1:45 pm

Refused to Sign:

Venetian/Palazzo EMT: [redacted] ID#: 34137

AGE: 58 Male / Female C/C: hurt Lft. knee.

		Pain -
Pulse -	Hx -	O -
Resp -		P -
BP -	Allergies -	Q -
Eyes -		R -
Lungs -	Meds -	S -
LOC -		T -
Skins -	Last oral Intake -	CCFD -
		MedicWest -
BGL -	Hydration -	Transport -

FORM NO GR-HTL-0070A-05-07

Arrest ☐
Crime ☐
Non-Criminal ☒

Venetian Security

3355 LAS VEGAS BLVD., S. LAS VEGAS, NV 89109

CR-1

CASE# 1401V-5339

PAGE 1

OFFENSE(S): PHI - T/M Protected Health Information

OFFENSE(S) cont'd.:

DATE, TIME AND DAY OF OCCURENCE: 01/26/14 00:28 Sunday TO 01/26/14 01:35 Sunday

DATE AND TIME REPORTED: 01/26/14 00:28

MORE CHARGES: YES ☐ NO ☒

ESTIMATED LOSS VALUE: $ 0.00

LOCATION OF OCCURENCE: 1 Lobby 1

LOCATION NAME:

TYPE OF LOCATION:

BEAT:

SECTOR:

PERSONS

Codes: V = Victim W = Witness C = Complainant P = Parent G = Guardian R = Party O = Other

MORE NAMES: YES ☐ NO ☒

CODE	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1
MN 1 OF 1	Klaver, Connie		

OCCUPATION	RACE	SEX	AGE	DOB	ADDRESS 2	PHONE 2

DL	STATE	SS#	INJURIES	ADDRESS 3	PHONE 3

CODE	NAME - LAST, FIRST, MIDDLE, SUFFIX	HOME	CELLULAR
GU 1 OF 1	[redacted]	[redacted]	[redacted]

OCCUPATION	RACE	SEX	AGE	DOB	ADDRESS 2	PHONE 2
	W	F	32	[redacted]		

DL	STATE	SS#	INJURIES	ADDRESS 3	PHONE 3

CODE	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1
TM 1 OF 1	Barrett, Joe		

OCCUPATION	RACE	SEX	AGE	DOB	ADDRESS 2	PHONE 2
Facilities Senior Watch						

DL	STATE	SS#	INJURIES	ADDRESS 3	PHONE 3

CASE SUMMARY / VEHICLE INFORMATION

SUMMARY:

Protected Health Information- [redacted] of suite 11-115

VEHICLE USED IN CRIME	OF	LICENSE (NO. AND STATE)	YEAR	MAKE	MODEL	BODY TYPE	COLOR	VIN	MORE VEHICLES
YES ☐ NO ☐ UNK ☐									YES ☐ NO ☒

TOW REPORT	GARAGE NAME AND PHONE	REGISTERED OWNER	R/O ADDRESS
YES ☒ NO ☐			

SUSPECT(S)/ ARRESTEE(S)

Codes: S = Suspect A = Arrestee D = Detainee SV - Suspect/Victim AV - Arrestee/Victim DV - Detainee/Victim

MORE NAMES: YES ☐ NO ☒

CODE	OF	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1

RACE	SEX	HT	WT	HAIR	EYE	AGE	DOB	ADDRESS 2	PHONE 2

OCCUPATION	INJURIES	ADDRESS 3	PHONE 3

SCARS / MARKS / TATTOOS	AKA's		ARRESTEE DISPOSITION	RELEASE LOCATION	ARREST DATE / TIME
YES ☐ NO ☐					/

DL	STATE	ARRESTED	BOOKING #	WARRANT	CITATION #	SS#	CII#
		YES ☐ NO ☐		YES ☐ NO ☐			

CHARGES:

CODE	OF	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1

RACE	SEX	HT	WT	HAIR	EYE	AGE	DOB	ADDRESS 2	PHONE 2

OCCUPATION	INJURIES	ADDRESS 3	PHONE 3

SCARS / MARKS / TATTOOS	AKA's		ARRESTEE DISPOSITION	RELEASE LOCATION	ARREST DATE / TIME
YES ☐ NO ☐					/

DL	STATE	ARRESTED	BOOKING #	WARRANT	CITATION #	SS#	CII#
		YES ☐ NO ☐		YES ☐ NO ☐			

CHARGES:

ADMINISTRATION

VICTIM DESIRES PROSECUTION: YES ☐ NO ☒

FOLLOW-UP: YES ☐ NO ☒

COPIES TO: ☐ PAT. ☐ DET. ☐ DA ☐ COURT ☐ PROBATION ☐ VWAP ☐ OTHER:

BY OFFICER	DATE/TIME	APPROVED BY	DATE APPROVED
L. Sivrais 000038582	01/26/14 23:57	Jacob Johnson 000025575	01/27/14

OFFICER	UNIT/SHIFT	ASSIGNED TO	CASE STATUS
			Closed

Arrest ☐
Crime ☐
Non-Criminal ☒

Venetian Security

3355 LAS VEGAS BLVD., S. LAS VEGAS, NV 89109

CR-1

CASE# 1405V-0423

PAGE 1

OFFENSE(S)	OFFENSE(S) cont'd.
PHI - T/M Protected Health Information	

DATE, TIME AND DAY OF OCCURENCE		DATE AND TIME REPORTED	MORE CHARGES	ESTIMATED LOSS VALUE
05/02/14 16:42 Friday	TO 05/02/14 17:07 Friday	05/02/14 16:42	YES ☐ NO ☒	$ 0.00

LOCATION OF OCCURENCE	LOCATION NAME	TYPE OF LOCATION	BEAT	SECTOR
1 Grand Hall, Las Vegas			1	

PERSONS

Codes: V = Victim W = Witness C = Complainant P = Parent G = Guardian R = Party O = Other

MORE NAMES YES ☐ NO ☒

CODE	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1
MN 1 OF 1	Arguello, Manny		

OCCUPATION	RACE	SEX	AGE	DOB	ADDRESS 2	PHONE 2

DL	STATE	SS#	INJURIES	ADDRESS 3	PHONE 3

CODE	NAME - LAST, FIRST, MIDDLE, SUFFIX	HOME	HOME
GU 1 OF 2	[redacted]	[redacted]	[redacted]

OCCUPATION	RACE	SEX	AGE	DOB	ADDRESS 2	PHONE 2
	H	F	62	[redacted]		

DL	STATE	SS#	INJURIES	ADDRESS 3	PHONE 3
E05447230	CA				

CODE	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1
GU 2 OF 2	[redacted]		

OCCUPATION	RACE	SEX	AGE	DOB	ADDRESS 2	PHONE 2
	H	M	30-35			

DL	STATE	SS#	INJURIES	ADDRESS 3	PHONE 3

CASE SUMMARY / VEHICLE INFORMATION

SUMMARY

Protected Health Information Registered Guest [redacted] Suite #30-125

VEHICLE USED IN CRIME	OF	LICENSE (NO. AND STATE)	YEAR	MAKE	MODEL	BODY TYPE	COLOR	VIN	MORE VEHICLES
YES ☐ NO ☐ UNK ☐									YES ☐ NO ☒

TOW REPORT	GARAGE NAME AND PHONE	REGISTERED OWNER	R/O ADDRESS
YES ☒ NO ☐			

SUSPECT(S)/ ARRESTEE(S)

Codes: S = Suspect A = Arrestee D = Detainee SV - Suspect/Victim AV - Arrestee/Victim DV - Detainee/Victim

MORE NAMES YES ☐ NO ☒

CODE	OF	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1

RACE	SEX	HT	WT	HAIR	EYE	AGE	DOB	ADDRESS 2	PHONE 2

OCCUPATION	INJURIES	ADDRESS 3	PHONE 3

SCARS / MARKS / TATTOOS	AKA's	ARRESTEE DISPOSITION	RELEASE LOCATION	ARREST DATE / TIME
YES ☐ NO ☐				/

DL	STATE	ARRESTED	BOOKING #	WARRANT	CITATION #	SS#	CII#
		YES ☐ NO ☐		YES ☐ NO ☐			

CHARGES

CODE	OF	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1

RACE	SEX	HT	WT	HAIR	EYE	AGE	DOB	ADDRESS 2	PHONE 2

OCCUPATION	INJURIES	ADDRESS 3	PHONE 3

SCARS / MARKS / TATTOOS	AKA's	ARRESTEE DISPOSITION	RELEASE LOCATION	ARREST DATE / TIME
YES ☐ NO ☐				/

DL	STATE	ARRESTED	BOOKING #	WARRANT	CITATION #	SS#	CII#
		YES ☐ NO ☐		YES ☐ NO ☐			

CHARGES

ADMINISTRATION

VICTIM DESIRES PROSECUTION	FOLLOW-UP	COPIES TO:
YES ☐ NO ☒	YE ☐ NO ☒	PAT. ☐ DET. ☐ DA ☐ COURT ☐ PROBATION ☐ VWAP ☐ OTHER:

BY OFFICER	DATE/TIME	APPROVED BY	DATE APPROVED
R. Marquez 000016346	05/02/14 17:29		05/02/14
OFFICER	UNIT/SHIFT	ASSIGNED TO	CASE STATUS
			Closed

Arrest ☐
Crime ☐
Non-Criminal ☒

Venetian Security

3355 LAS VEGAS BLVD., S. LAS VEGAS, NV 89109

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CASE# **1405V-0687**

PAGE **1**

OFFENSE(S)	OFFENSE(S) cont'd.
PHI - T/M Protected Health Information	

DATE, TIME AND DAY OF OCCURENCE		DATE AND TIME REPORTED	MORE CHARGES	ESTIMATED LOSS VALUE
05/03/14 15:36 Saturday	TO **05/03/14 15:57 Saturday**	**05/03/14 15:36**	YES ☐ NO ☒	**$ 0.00**

LOCATION OF OCCURENCE	LOCATION NAME	TYPE OF LOCATION	BEAT	SECTOR
1 Grand Hall			**1**	

PERSONS

Codes: V = Victim W = Witness C = Complainant P = Parent G = Guardian R = Party O = Other

MORE NAMES YES ☐ NO ☒

CODE	NAME - LAST, FIRST, MIDDLE, SUFFIX	HOME	PHONE 1
R 1 OF 1	[redacted]	[redacted]	

OCCUPATION	RACE	SEX	AGE	DOB	HOTEL ROOM	PHONE 2
	W	**F**	**49**	[redacted]	**Luxor , ,**	

DL	STATE	SS#	INJURIES	ADDRESS 3	PHONE 3

CODE	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1
SO 1 OF 2	**Harris, Thomas**		

OCCUPATION	RACE	SEX	AGE	DOB	ADDRESS 2	PHONE 2
Security Officer						

DL	STATE	SS#	INJURIES	ADDRESS 3	PHONE 3

CODE	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1
SO 2 OF 2	**Rescigno, Gary**		

OCCUPATION	RACE	SEX	AGE	DOB	ADDRESS 2	PHONE 2
Security/EMT						

DL	STATE	SS#	INJURIES	ADDRESS 3	PHONE 3

CASE SUMMARY / VEHICLE INFORMATION

SUMMARY

Protected health information. Non-guest [redacted]

VEHICLE USED IN CRIME	OF	LICENSE (NO. AND STATE)	YEAR	MAKE	MODEL	BODY TYPE	COLOR	VIN	MORE VEHICLES
YES ☐ NO ☐ UNK ☐									YES ☐ NO ☒

TOW REPORT	GARAGE NAME AND PHONE	REGISTERED OWNER	R/O ADDRESS
YES ☒ NO ☐			

SUSPECT(S) / ARRESTEE(S)

Codes: S = Suspect A = Arrestee D = Detainee SV - Suspect/Victim AV - Arrestee/Victim DV - Detainee/Victim

MORE NAMES YES ☐ NO ☒

CODE	OF	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1

RACE	SEX	HT	WT	HAIR	EYE	AGE	DOB	ADDRESS 2	PHONE 2

OCCUPATION	INJURIES	ADDRESS 3	PHONE 3

SCARS / MARKS / TATTOOS	AKA's		ARRESTEE DISPOSITION	RELEASE LOCATION	ARREST DATE / TIME
YES ☐ NO ☐					/

DL	STATE	ARRESTED	BOOKING #	WARRANT	CITATION #	SS#	CII#
		YES ☐ NO ☐		YES ☐ NO ☐			

CHARGES

CODE	OF	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1

RACE	SEX	HT	WT	HAIR	EYE	AGE	DOB	ADDRESS 2	PHONE 2

OCCUPATION	INJURIES	ADDRESS 3	PHONE 3

SCARS / MARKS / TATTOOS	AKA's		ARRESTEE DISPOSITION	RELEASE LOCATION	ARREST DATE / TIME
YES ☐ NO ☐					/

DL	STATE	ARRESTED	BOOKING #	WARRANT	CITATION #	SS#	CII#
		YES ☐ NO ☐		YES ☐ NO ☐			

CHARGES

ADMINISTRATION

VICTIM DESIRES PROSECUTION	FOLLOW-UP	COPIES TO:
YES ☐ NO ☒	YE ☐ NO ☒	☐ PAT. ☐ DET. ☐ DA ☐ COURT ☐ PROBATION ☐ VWAP ☐ OTHER:

BY OFFICER	DATE/TIME	APPROVED BY	DATE APPROVED
T. McFate 000033912	**05/04/14 13:35**	**George Valley 000013454**	**05/04/14**
OFFICER	UNIT/SHIFT	ASSIGNED TO	CASE STATUS
			Closed

Arrest ☐
Crime ☐
Non-Criminal ☒

Venetian Security

3355 LAS VEGAS BLVD., S. LAS VEGAS, NV 89109

CR-1

CASE# 1405V-5900

PAGE 1

OFFENSE(S)	OFFENSE(S) cont'd.
PHI - T/M Protected Health Information	

DATE, TIME AND DAY OF OCCURENCE	DATE AND TIME REPORTED	MORE CHARGES	ESTIMATED LOSS VALUE
05/24/14 21:49 Saturday	05/24/14 21:49	YES ☐ NO ☒	$ 0.00

LOCATION OF OCCURENCE	LOCATION NAME	TYPE OF LOCATION	BEAT	SECTOR
1 Lobby 1				

PERSONS

Codes: V = Victim W = Witness C = Complainant P = Parent G = Guardian R = Party O = Other

MORE NAMES YES ☐ NO ☒

CODE	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1
C 1 OF 1	[redacted]		

OCCUPATION	RACE	SEX	AGE	DOB	ADDRESS 2	PHONE 2
	H	F	31	[redacted]		

DL	STATE	SS#	INJURIES	ADDRESS 3	PHONE 3

CODE	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1
MN 1 OF 2	Sidhoo, Karan 22352		

OCCUPATION	RACE	SEX	AGE	DOB	ADDRESS 2	PHONE 2
Front Desk Manager						

DL	STATE	SS#	INJURIES	ADDRESS 3	PHONE 3

CODE	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1
MN 2 OF 2	Alvonellos, Tim		

OCCUPATION	RACE	SEX	AGE	DOB	ADDRESS 2	PHONE 2
Security Shift Manager						

DL	STATE	SS#	INJURIES	ADDRESS 3	PHONE 3

CASE SUMMARY / VEHICLE INFORMATION

SUMMARY

Protected Health Information. Registered Guest suite 27-124 [redacted]

VEHICLE USED IN CRIME	OF	LICENSE (NO. AND STATE)	YEAR	MAKE	MODEL	BODY TYPE	COLOR	VIN	MORE VEHICLES
YES ☐ NO ☐ UNK ☐									YES ☐ NO ☒

TOW REPORT	GARAGE NAME AND PHONE	REGISTERED OWNER	R/O ADDRESS
YES ☒ NO ☐			

SUSPECT(S)/ ARRESTEE(S)

Codes: S = Suspect A = Arrestee D = Detainee SV - Suspect/Victim AV - Arrestee/Victim DV - Detainee/Victim

MORE NAMES YES ☐ NO ☒

CODE	OF	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1

RACE	SEX	HT	WT	HAIR	EYE	AGE	DOB	ADDRESS 2	PHONE 2

OCCUPATION	INJURIES	ADDRESS 3	PHONE 3

SCARS / MARKS / TATTOOS	AKA's	ARRESTEE DISPOSITION	RELEASE LOCATION	ARREST DATE / TIME
YES ☐ NO ☐				/

DL	STATE	ARRESTED	BOOKING #	WARRANT	CITATION #	SS#	CII#
		YES ☐ NO ☐		YES ☐ NO ☐			

CHARGES

CODE	OF	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1

RACE	SEX	HT	WT	HAIR	EYE	AGE	DOB	ADDRESS 2	PHONE 2

OCCUPATION	INJURIES	ADDRESS 3	PHONE 3

SCARS / MARKS / TATTOOS	AKA's	ARRESTEE DISPOSITION	RELEASE LOCATION	ARREST DATE / TIME
YES ☐ NO ☐				/

DL	STATE	ARRESTED	BOOKING #	WARRANT	CITATION #	SS#	CII#
		YES ☐ NO ☐		YES ☐ NO ☐			

CHARGES

ADMINISTRATION

VICTIM DESIRES PROSECUTION	FOLLOW-UP	COPIES TO:
YES ☐ NO ☒	YE ☐ NO ☒	☐ PAT. ☐ DET. ☐ DA ☐ COURT ☐ PROBATION ☐ VWAP ☐ OTHER:

BY OFFICER	DATE/TIME	APPROVED BY	DATE APPROVED
T. Morgan 000038731	05/25/14 16:26	Tim Alvonellos 000003460	05/25/14
OFFICER	UNIT/SHIFT	ASSIGNED TO	CASE STATUS
			Closed

Arrest ☐
Crime ☐
Non-Criminal ☒

Venetian Security

3355 LAS VEGAS BLVD., S. LAS VEGAS, NV 89109

CR-1

CASE# 1406V-6937

PAGE 1

OFFENSE(S)	OFFENSE(S) cont'd
PHI - T/M Protected Health Information	

DATE, TIME AND DAY OF OCCURENCE		DATE AND TIME REPORTED	MORE CHARGES	ESTIMATED LOSS VALUE
06/28/14 02:10 Saturday	TO 06/28/14 03:20 Saturday	06/28/14 02:10	YES ☐ NO ☒	$ 0.00

LOCATION OF OCCURENCE	LOCATION NAME	TYPE OF LOCATION	BEAT	SECTOR
1 Grand Lux Cafe				

PERSONS

Codes: V = Victim W = Witness C = Complainant P = Parent G = Guardian R = Party O = Other

MORE NAMES YES ☐ NO ☒

CODE	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1
MN 1 OF 2	Kluver, Connie		
OCCUPATION / RACE / SEX / AGE / DOB		ADDRESS 2	PHONE 2
DL / STATE / SS# / INJURIES		ADDRESS 3	PHONE 3
CODE	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1
MN 2 OF 2	Coronado, Nicholas		
OCCUPATION / RACE / SEX / AGE / DOB		ADDRESS 2	PHONE 2
DL / STATE / SS# / INJURIES		ADDRESS 3	PHONE 3
CODE	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1
R 1 OF 1	Florentino, Andres		
OCCUPATION / RACE / SEX / AGE / DOB		ADDRESS 2	PHONE 2
DL / STATE / SS# / INJURIES		ADDRESS 3	PHONE 3

CASE SUMMARY / VEHICLE INFORMATION

SUMMARY

Protected Health Information-registered Guest of Suite 8-109 slip and fall on a wet floor.

VEHICLE USED IN CRIME	LICENSE (NO. AND STATE)	YEAR	MAKE	MODEL	BODY TYPE	COLOR	VIN	MORE VEHICLES
YES ☐ NO ☐ UNK ☐ OF								YES ☐ NO ☒

TOW REPORT	GARAGE NAME AND PHONE	REGISTERED OWNER	R/O ADDRESS
YES ☒ NO ☐			

SUSPECT(S)/ ARRESTEE(S)

Codes: S = Suspect A = Arrestee D = Detainee SV - Suspect/Victim AV - Arrestee/Victim DV - Detainee/Victim

MORE NAMES YES ☐ NO ☒

CODE / OF	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1
RACE / SEX / HT / WT / HAIR / EYE / AGE / DOB		ADDRESS 2	PHONE 2
OCCUPATION / INJURIES		ADDRESS 3	PHONE 3
SCARS / MARKS / TATTOOS YES ☐ NO ☐	AKA's	ARRESTEE DISPOSITION	RELEASE LOCATION / ARREST DATE / TIME
DL / STATE / ARRESTED YES ☐ NO ☐ / BOOKING # / WARRANT YES ☐ NO ☐ / CITATION # / SS# / CII#			
CHARGES			
CODE / OF	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1
RACE / SEX / HT / WT / HAIR / EYE / AGE / DOB		ADDRESS 2	PHONE 2
OCCUPATION / INJURIES		ADDRESS 3	PHONE 3
SCARS / MARKS / TATTOOS YES ☐ NO ☐	AKA's	ARRESTEE DISPOSITION	RELEASE LOCATION / ARREST DATE / TIME
DL / STATE / ARRESTED YES ☐ NO ☐ / BOOKING # / WARRANT YES ☐ NO ☐ / CITATION # / SS# / CII#			
CHARGES			

ADMINISTRATION

VICTIM DESIRES PROSECUTION	FOLLOW-UP	COPIES TO:
YES ☐ NO ☒	YE ☐ NO ☒	PAT. ☐ DET. ☐ DA ☐ COURT ☐ PROBATION ☐ VWAP ☐ OTHER:

BY OFFICER	DATE/TIME	APPROVED BY	DATE APPROVED
J. Lopez 000031497	06/30/14 05:16	Nicholas Coronado 000032415	07/01/14
OFFICER	UNIT/SHIFT	ASSIGNED TO	CASE STATUS
			Closed

Arrest ☐ Crime ☐ Non-Criminal ☒

Venetian Security

3355 LAS VEGAS BLVD., S. LAS VEGAS, NV 89109

CR-1

CASE# 1407V-1121

PAGE 1

OFFENSE(S): PHI - T/M Protected Health Information

OFFENSE(S) cont'd.:

DATE, TIME AND DAY OF OCCURENCE	DATE AND TIME REPORTED	MORE CHARGES	ESTIMATED LOSS VALUE
07/05/14 18:05 Saturday	07/05/14 18:05	YES ☐ NO ☒	$ 0.00

LOCATION OF OCCURENCE	LOCATION NAME	TYPE OF LOCATION	BEAT	SECTOR
1 Lobby 1				

PERSONS

Codes: V = Victim W = Witness C = Complainant P = Parent G = Guardian R = Party O = Other

MORE NAMES: YES ☐ NO ☒

CODE C 1 OF 1 — NAME - LAST, FIRST, MIDDLE, SUFFIX: [redacted]

OCCUPATION	RACE	SEX	AGE	DOB	HOME	HOME
	F	[redacted]	[redacted]	[redacted]	ADDRESS 2	PHONE 2

DL	STATE	SS#	INJURIES	ADDRESS 3	PHONE 3
[redacted]					

CODE MN 1 OF 1 — NAME - LAST, FIRST, MIDDLE, SUFFIX: Peck, Brittany

OCCUPATION	RACE	SEX	AGE	DOB	ADDRESS 1	PHONE 1
Front Desk Mgr					ADDRESS 2	PHONE 2

DL	STATE	SS#	INJURIES	ADDRESS 3	PHONE 3

CODE TM 1 OF 1 — NAME - LAST, FIRST, MIDDLE, SUFFIX: Pemberton, Sean

OCCUPATION	RACE	SEX	AGE	DOB	ADDRESS 1	PHONE 1
Engineer					ADDRESS 2	PHONE 2

DL	STATE	SS#	INJURIES	ADDRESS 3	PHONE 3

CASE SUMMARY / VEHICLE INFORMATION

SUMMARY: Protected Health Information-Pham-Tung

VEHICLE USED IN CRIME	LICENSE (NO. AND STATE)	YEAR	MAKE	MODEL	BODY TYPE	COLOR	VIN	MORE VEHICLES
YES ☐ NO ☐ UNK ☐ OF								YES ☐ NO ☒

TOW REPORT	GARAGE NAME AND PHONE	REGISTERED OWNER	R/O ADDRESS
YES ☒ NO ☐			

SUSPECT(S)/ ARRESTEE(S)

Codes: S = Suspect A = Arrestee D = Detainee SV - Suspect/Victim AV - Arrestee/Victim DV - Detainee/Victim

MORE NAMES: YES ☐ NO ☒

CODE OF — NAME - LAST, FIRST, MIDDLE, SUFFIX

RACE	SEX	HT	WT	HAIR	EYE	AGE	DOB	ADDRESS 1	PHONE 1
								ADDRESS 2	PHONE 2

OCCUPATION	INJURIES	ADDRESS 3	PHONE 3

SCARS / MARKS / TATTOOS	AKA's	ARRESTEE DISPOSITION	RELEASE LOCATION	ARREST DATE / TIME
YES ☐ NO ☐				/

DL	STATE	ARRESTED	BOOKING #	WARRANT	CITATION #	SS#	CII#
		YES ☐ NO ☐		YES ☐ NO ☐			

CHARGES:

CODE OF — NAME - LAST, FIRST, MIDDLE, SUFFIX

RACE	SEX	HT	WT	HAIR	EYE	AGE	DOB	ADDRESS 1	PHONE 1
								ADDRESS 2	PHONE 2

OCCUPATION	INJURIES	ADDRESS 3	PHONE 3

SCARS / MARKS / TATTOOS	AKA's	ARRESTEE DISPOSITION	RELEASE LOCATION	ARREST DATE / TIME
YES ☐ NO ☐				/

DL	STATE	ARRESTED	BOOKING #	WARRANT	CITATION #	SS#	CII#
		YES ☐ NO ☐		YES ☐ NO ☐			

CHARGES:

ADMINISTRATION

VICTIM DESIRES PROSECUTION	FOLLOW-UP	COPIES TO:
YES ☐ NO ☒	YE ☐ NO ☒	PAT. ☐ DET. ☐ DA ☐ COURT ☐ PROBATION ☐ VWAP ☐ OTHER:

BY OFFICER	DATE/TIME	APPROVED BY	DATE APPROVED
L. Sivrais 000038582	07/05/14 22:52	Tim Alvonellos 000003460	07/05/14

OFFICER	UNIT/SHIFT	ASSIGNED TO	CASE STATUS
			Closed

Arrest ☐ Crime ☐ Non-Criminal ☒

Venetian Security

3355 LAS VEGAS BLVD., S. LAS VEGAS, NV 89109

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CASE# 1407V-2272

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OFFENSE(S)	OFFENSE(S) cont'd.
PHI - T/M Protected Health Information	

DATE, TIME AND DAY OF OCCURENCE		DATE AND TIME REPORTED	MORE CHARGES	ESTIMATED LOSS VALUE
07/10/14 13:09 Thursday	TO 07/10/14 13:41 Thursday	07/10/14 13:09	YES ☐ NO ☒	$0.00

LOCATION OF OCCURENCE	LOCATION NAME	TYPE OF LOCATION	BEAT	SECTOR
1 Grand Lux Cafe				

PERSONS

Codes: V = Victim W = Witness C = Complainant P = Parent G = Guardian R = Party O = Other

MORE NAMES YES ☐ NO ☒

CODE	NAME - LAST, FIRST, MIDDLE, SUFFIX	HOME	PHONE 1
C 1 OF 1	[redacted]	[redacted]	
OCCUPATION / RACE / SEX / AGE / DOB	[redacted]	HOTEL ROOM , MGM Grand,	PHONE 2
DL / STATE / SS# / INJURIES		ADDRESS 3	PHONE 3
CODE	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1
SO 1 OF 2	[redacted]		
OCCUPATION: Security Officer / EMT / RACE / SEX / AGE / DOB		ADDRESS 2	PHONE 2
DL / STATE / SS# / INJURIES		ADDRESS 3	PHONE 3
CODE	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1
SO 2 OF 2	[redacted]		
OCCUPATION: Security Officer / RACE / SEX / AGE / DOB		ADDRESS 2	PHONE 2
DL / STATE / SS# / INJURIES		ADDRESS 3	PHONE 3

CASE SUMMARY / VEHICLE INFORMATION

SUMMARY

Protected Health Information - Non Guest - [redacted]

VEHICLE USED IN CRIME	OF	LICENSE (NO. AND STATE)	YEAR	MAKE	MODEL	BODY TYPE	COLOR	VIN	MORE VEHICLES
YES ☐ NO ☐ UNK ☐									YES ☐ NO ☒

TOW REPORT	GARAGE NAME AND PHONE	REGISTERED OWNER	R/O ADDRESS
YES ☒ NO ☐			

SUSPECT(S) / ARRESTEE(S)

Codes: S = Suspect A = Arrestee D = Detainee SV - Suspect/Victim AV - Arrestee/Victim DV - Detainee/Victim

MORE NAMES YES ☐ NO ☒

CODE	OF	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1
RACE / SEX / HT / WT / HAIR / EYE / AGE / DOB			ADDRESS 2	PHONE 2
OCCUPATION / INJURIES			ADDRESS 3	PHONE 3
SCARS / MARKS / TATTOOS YES ☐ NO ☐	AKA's	ARRESTEE DISPOSITION	RELEASE LOCATION	ARREST DATE / TIME /
DL / STATE / ARRESTED YES ☐ NO ☐ / BOOKING # / WARRANT YES ☐ NO ☐ / CITATION # / SS# / CII#				
CHARGES				
CODE	OF	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1
RACE / SEX / HT / WT / HAIR / EYE / AGE / DOB			ADDRESS 2	PHONE 2
OCCUPATION / INJURIES			ADDRESS 3	PHONE 3
SCARS / MARKS / TATTOOS YES ☐ NO ☐	AKA's	ARRESTEE DISPOSITION	RELEASE LOCATION	ARREST DATE / TIME /
DL / STATE / ARRESTED YES ☐ NO ☐ / BOOKING # / WARRANT YES ☐ NO ☐ / CITATION # / SS# / CII#				
CHARGES				

ADMINISTRATION

VICTIM DESIRES PROSECUTION	FOLLOW-UP	COPIES TO:
YES ☐ NO ☒	YE ☐ NO ☒	PAT ☐ DET. ☐ DA ☐ COURT ☐ PROBATION ☐ VWAP ☐ OTHER ☐

BY OFFICER	DATE/TIME	APPROVED BY	DATE APPROVED
J. Larson 000025821	07/10/14 14:55	Christopher Mosier 000026118	07/11/14
OFFICER	UNIT/SHIFT	ASSIGNED TO	CASE STATUS
			Closed

THE VENETIAN THE PALAZZO

14077-2272

Acknowledgement of First Aid Assistance & Advice to Seek Medical Care

☒ I (or my guardian) have been informed that only an initial Emergency First Aid treatment and evaluation has been rendered to me by a Venetian or Palazzo Emergency Medical Technician (EMT) who is not a medical doctor and that I (or my guardian) have been advised that I should seek the advice of a physician as soon as possible.

☐ I (or my guardian) refuse treatment by a Venetian or Palazzo Emergency Medical Technician (EMT) and have been advised that I should seek the advice of a physician as soon as possible. _____

Name (Print): [redacted]

Signature: X [redacted]

Address: [redacted]

Date of Birth: [redacted] Social Security #: N/A

Phone: _____

Witness: _____

Witness: _____

Date: 7.10.2014 Time: 1322

Refused to Sign: _____

Venetian/Palazzo EMT: T. MCFATE ID#: 33412

Age: [redacted] **Gender:** M / F

c/o: LT KNEE PAIN

( ) CP ( ) SOB ( ) Abd Pain ( ) Nausea
( ) Vomiting ( ) Diarrhea ( ) Weakness
( ) Dizziness ( ) Headache ( ) Blurred vision
Pain Scale 10 out of 10 A / O x 4
Trauma DUE TO PAIN SHARP ISSUES MEDIAL MENISCUS

Medical Hx:
1. [redacted]
2.
3.
4.
5.
6.
7.

Notes:
S+F BACKWARDS TO BUTTOCKS
NEG H/N/S PAIN, OLOC
FOOTWEAR - SANDALS

Treatment:
( ) Advice only
( ) Vital signs taken
( ) Oxygen: ____ LPM via ____
(X) Other:

Medications: **Dose:**
1. _____ ____ mg
2. _____ ____ mg
3. _____ ____ mg
4. _____ ____ mg
5. _____ ____ mg
6. _____ ____ mg
7. _____ ____
8. _____ ____

Medication(s) taken today: Y / N

Vital Signs: Temp: ____ F

	1	2	3
B/P:	/	/	/
Pulse:			
Resp:			

Pupils: (X) PERRL ( ) Unequal ( )
R6 ar
(X)
( ) ( )

Dispatched: 1317 hours

CCFD: Res/Eng 218 Arrival 1326 1320

MedicWest / AMR: 729 Arrival 1330

Allergies: (X) NKDA
1. _____
2. _____
3. _____
4. _____

( ) _____ Cab # _____

Arrest ☐
Crime ☐
Non-Criminal ☒

Venetian Security

3355 LAS VEGAS BLVD., S. LAS VEGAS, NV 89109

CR-1

CASE# 1407V-2142

PAGE 1

OFFENSE(S)	OFFENSE(S) cont'd.
PHI - T/M Protected Health Information	

DATE, TIME AND DAY OF OCCURENCE		DATE AND TIME REPORTED	MORE CHARGES	ESTIMATED LOSS VALUE
07/10/14 00:30 Thursday	TO 07/10/14 01:00 Thursday	07/10/14 00:30	YES ☐ NO ☒	$ 0.00

LOCATION OF OCCURENCE	LOCATION NAME	TYPE OF LOCATION	BEAT	SECTOR
1 Grand Hall			1	

PERSONS

Codes: V = Victim W = Witness C = Complainant P = Parent G = Guardian R = Party O = Other

MORE NAMES YES ☐ NO ☒

CODE	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1
MN 1 OF 1	Han, Sang Jeen		

OCCUPATION	RACE	SEX	AGE	DOB	ADDRESS 2	PHONE 2
Front desk manager						

DL	STATE	SS#	INJURIES	ADDRESS 3	PHONE 3

CODE	NAME - LAST, FIRST, MIDDLE, SUFFIX	HOME	PHONE 1
GU 1 OF 1	[redacted]	[redacted]	

OCCUPATION	RACE	SEX	AGE	DOB	ADDRESS 2	PHONE 2
	[redacted]					

DL	STATE	SS#	INJURIES	ADDRESS 3	PHONE 3

CODE	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1
MW 1 OF 1	Medic West, 706		

OCCUPATION	RACE	SEX	AGE	DOB	ADDRESS 2	PHONE 2

DL	STATE	SS#	INJURIES	ADDRESS 3	PHONE 3

CASE SUMMARY / VEHICLE INFORMATION

SUMMARY

Protected Health Information - Reg Guest 6-102 [redacted]

VEHICLE USED IN CRIME	OF	LICENSE (NO. AND STATE)	YEAR	MAKE	MODEL	BODY TYPE	COLOR	VIN	MORE VEHICLES
YES ☐ NO ☐ UNK ☐									YES ☐ NO ☒

TOW REPORT	GARAGE NAME AND PHONE	REGISTERED OWNER	R/O ADDRESS
YES ☒ NO ☐			

SUSPECT(S)/ ARRESTEE(S)

Codes: S = Suspect A = Arrestee D = Detainee SV - Suspect/Victim AV - Arrestee/Victim DV - Detainee/Victim

MORE NAMES YES ☐ NO ☒

CODE	OF	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1

RACE	SEX	HT	WT	HAIR	EYE	AGE	DOB	ADDRESS 2	PHONE 2

OCCUPATION	INJURIES	ADDRESS 3	PHONE 3

SCARS / MARKS / TATTOOS	AKA's		ARRESTEE DISPOSITION	RELEASE LOCATION	ARREST DATE / TIME
YES ☐ NO ☐					/

DL	STATE	ARRESTED	BOOKING #	WARRANT	CITATION #	SS#	CII#
		YES ☐ NO ☐		YES ☐ NO ☐			

CHARGES

CODE	OF	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1

RACE	SEX	HT	WT	HAIR	EYE	AGE	DOB	ADDRESS 2	PHONE 2

OCCUPATION	INJURIES	ADDRESS 3	PHONE 3

SCARS / MARKS / TATTOOS	AKA's		ARRESTEE DISPOSITION	RELEASE LOCATION	ARREST DATE / TIME
YES ☐ NO ☐					/

DL	STATE	ARRESTED	BOOKING #	WARRANT	CITATION #	SS#	CII#
		YES ☐ NO ☐		YES ☐ NO ☐			

CHARGES

ADMINISTRATION

VICTIM DESIRES PROSECUTION	FOLLOW-UP	COPIES TO:
YES ☐ NO ☒	YE ☐ NO ☒	PAT. ☐ DET. ☐ DA ☐ COURT ☐ PROBATION ☐ VWAP ☐ OTHER:

BY OFFICER	DATE/TIME	APPROVED BY	DATE APPROVED
E. Gizelbach 000031617	07/10/14 03:26	Richard Davies 000028074	07/10/14
OFFICER	UNIT/SHIFT	ASSIGNED TO	CASE STATUS
			Closed

Arrest ☐ Crime ☐ Non-Criminal ☒

Venetian Security

3355 LAS VEGAS BLVD., S. LAS VEGAS, NV 89109

CR-1

CASE# 1407V-3057

PAGE 1

OFFENSE(S): PHI - T/M Protected Health Information

OFFENSE(S) cont'd.

DATE, TIME AND DAY OF OCCURENCE: 07/13/14 08:02 Sunday TO 07/13/14 09:01 Sunday

DATE AND TIME REPORTED: 07/13/14 08:02

MORE CHARGES: YES ☐ NO ☒

ESTIMATED LOSS VALUE: $0.00

LOCATION OF OCCURENCE: 1 Lobby 1

LOCATION NAME: Lobby 1

TYPE OF LOCATION

BEAT

SECTOR

PERSONS

Codes: V = Victim W = Witness C = Complainant P = Parent G = Guardian R = Party O = Other

MORE NAMES: YES ☐ NO ☒

CODE	NAME - LAST, FIRST, MIDDLE, SUFFIX	RACE	SEX	AGE	DOB	ADDRESS 1	PHONE 1
MN 1 OF 2	Johnson 25575, Jacob			[redacted]		ADDRESS 2	PHONE 2
OCCUPATION: Asst Sec Manager						ADDRESS 3	PHONE 3
DL / STATE		SS#		INJURIES			
MN 2 OF 2	Peck, Brittany					ADDRESS 1	PHONE 1
OCCUPATION: Front Desk Mgr		RACE	SEX	AGE	DOB	ADDRESS 2	PHONE 2
DL / STATE		SS#		INJURIES		ADDRESS 3	PHONE 3
SO 1 OF 1	McFate, Tyler					ADDRESS 1	PHONE 1
OCCUPATION: EMT Security Officer		RACE	SEX	AGE	DOB	ADDRESS 2	PHONE 2
DL / STATE		SS#		INJURIES		ADDRESS 3	PHONE 3

CASE SUMMARY / VEHICLE INFORMATION

SUMMARY: Protetcted Health Information. Guest of suite [redacted]

VEHICLE USED IN CRIME	OF	LICENSE (NO. AND STATE)	YEAR	MAKE	MODEL	BODY TYPE	COLOR	VIN	MORE VEHICLES
YES ☐ NO ☐ LINK ☐									YES ☐ NO ☒

TOW REPORT	GARAGE NAME AND PHONE	REGISTERED OWNER	R/O ADDRESS
YES ☒ NO ☐			

SUSPECT(S) / ARRESTEE(S)

Codes: S = Suspect A = Arrestee D = Detainee SV - Suspect/Victim AV - Arrestee/Victim DV - Detainee/Victim

MORE NAMES: YES ☐ NO ☒

CODE	OF	NAME - LAST, FIRST, MIDDLE, SUFFIX						ADDRESS 1	PHONE 1
RACE	SEX	HT	WT	HAIR	EYE	AGE	DOB	ADDRESS 2	PHONE 2
OCCUPATION				INJURIES				ADDRESS 3	PHONE 3
SCARS / MARKS / TATTOOS YES ☐ NO ☐		AKA's				ARRESTEE DISPOSITION		RELEASE LOCATION	ARREST DATE / TIME /
DL / STATE		ARRESTED YES ☐ NO ☐		BOOKING #		WARRANT YES ☐ NO ☐	CITATION #	SS#	CII#
CHARGES									

CODE	OF	NAME - LAST, FIRST, MIDDLE, SUFFIX						ADDRESS 1	PHONE 1
RACE	SEX	HT	WT	HAIR	EYE	AGE	DOB	ADDRESS 2	PHONE 2
OCCUPATION				INJURIES				ADDRESS 3	PHONE 3
SCARS / MARKS / TATTOOS YES ☐ NO ☐		AKA's				ARRESTEE DISPOSITION		RELEASE LOCATION	ARREST DATE / TIME /
DL / STATE		ARRESTED YES ☐ NO ☐		BOOKING #		WARRANT YES ☐ NO ☐	CITATION #	SS#	CII#
CHARGES									

ADMINISTRATION

VICTIM DESIRES PROSECUTION	FOLLOW-UP	COPIES TO							
YES ☐ NO ☒	YE ☐ NO ☒	PAT. ☐	DET ☐	DA ☐	COURT ☐	PROBATION ☐	VWAP ☐	OTHER:	

BY OFFICER	DATE/TIME	APPROVED BY	DATE APPROVED
G. Rescigno 000034137	07/13/14 14:59	Jacob Johnson 000025575	07/14/14
OFFICER	UNIT/SHIFT	ASSIGNED TO	CASE STATUS
			Closed

EXHIBIT 9

Arrest ☐
Crime ☐
Non-Criminal ☒

Venetian Security

3355 LAS VEGAS BLVD., S. LAS VEGAS, NV 89109

CR-1 RC 00008621

CASE# 1611V-0680

PAGE 1

OFFENSE(S): **Protected Health Information**

OFFENSE(S) cont'd:

DATE, TIME AND DAY OF OCCURENCE: **11/04/16 12:39 Friday** TO **11/04/16 13:31 Friday**

DATE AND TIME REPORTED: **11/04/16 12:39**

MORE CHARGES: YES ☐ NO ☒

ESTIMATED LOSS VALUE: **$ 0.00**

LOCATION OF OCCURENCE:

LOCATION NAME: **Outside Grand Lux Cafe Restrooms**

TYPE OF LOCATION:

BEAT:

SECTOR:

PERSONS

Codes: V = Victim W = Witness C = Complainant P = Parent G = Guardian R = Party O = Other

MORE NAMES: YES ☐ NO ☒

CODE	NAME - LAST, FIRST, MIDDLE, SUFFIX	HOME	CELLULAR
C 1 OF 1	Sekera, Joyce	7840 Nesting Pine Place , Las Vegas, NV 89143	(702) 467-5457

OCCUPATION	RACE	SEX	AGE	DOB	ADDRESS 2	PHONE 2
Las Vegas Tours Employee	W	F	60	03/22/1956		

DL	STATE	SS#	INJURIES	ADDRESS 3	PHONE 3

CODE	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1
TM 1 OF 1	Chavez, Rafael		

OCCUPATION	RACE	SEX	AGE	DOB	ADDRESS 2	PHONE 2
Facilities		M				

DL	STATE	SS#	INJURIES	ADDRESS 3	PHONE 3

CODE	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1
OF			

OCCUPATION	RACE	SEX	AGE	DOB	ADDRESS 2	PHONE 2

DL	STATE	SS#	INJURIES	ADDRESS 3	PHONE 3

CASE SUMMARY / VEHICLE INFORMATION

SUMMARY:

Protected Health Information - Grand Canal Shoppes Employee - Sekera, Joyce

VEHICLE USED IN CRIME	LICENSE (NO AND STATE)	YEAR	MAKE	MODEL	BODY TYPE	COLOR	VIN	MORE VEHICLES
YES ☐ NO ☐ UNK ☐ OF								YES ☐ NO ☒

TOW REPORT	GARAGE NAME AND PHONE	REGISTERED OWNER	R/O ADDRESS
YES ☒ NO ☐			

SUSPECT(S)/ ARRESTEE(S)

Codes: S = Suspect A = Arrestee D = Detainee SV - Suspect/Victim AV - Arrestee/Victim DV - Detainee/Victim

MORE NAMES: YES ☐ NO ☒

CODE	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1
OF			

RACE	SEX	HT	WT	HAIR	EYE	AGE	DOB	ADDRESS 2	PHONE 2

OCCUPATION	INJURIES	ADDRESS 3	PHONE 3

SCARS / MARKS / TATTOOS	AKA's	ARRESTEE DISPOSITION	RELEASE LOCATION	ARREST DATE / TIME
YES ☐ NO ☐				/

DL	STATE	ARRESTED	BOOKING #	WARRANT	CITATION #	SS#	CI#
		YES ☐ NO ☐		YES ☐ NO ☐			

CHARGES:

CODE	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1
OF			

RACE	SEX	HT	WT	HAIR	EYE	AGE	DOB	ADDRESS 2	PHONE 2

OCCUPATION	INJURIES	ADDRESS 3	PHONE 3

SCARS / MARKS / TATTOOS	AKA's	ARRESTEE DISPOSITION	RELEASE LOCATION	ARREST DATE / TIME
YES ☐ NO ☐				/

DL	STATE	ARRESTED	BOOKING #	WARRANT	CITATION #	SS#	CI#
		YES ☐ NO ☐		YES ☐ NO ☐			

CHARGES:

ADMINISTRATION

VICTIM DESIRES PROSECUTION	FOLLOW-UP	COPIES TO:
YES ☐ NO ☒	YE ☐ NO ☒	☐ PAT. ☐ DET ☐ DA ☐ COURT ☐ PROBATION ☐ VWAP ☐ OTHER:

BY OFFICER	DATE/TIME	APPROVED BY	DATE APPROVED
J. Larson 000025821	11/04/16 15:30	Michael Dean 000041303	11/05/16

OFFICER	UNIT/SHIFT	ASSIGNED TO	CASE STATUS
			Closed

255-1133

CR-1 Larso/025821 Entered by: Joseph Larson

APDC (Rev. 12/13/13) Print Date: 11/18/2016

EXHIBIT 10

OPP

THE GALLIHER LAW FIRM
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Jeffrey L. Galliher, Esq.
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Attorneys for Plaintiff

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Las Vegas, Nevada 89104
702-735-0049 Fax: 702-735-0204

DISTRICT COURT

CLARK COUNTY, NEVADA

JOYCE SEKERA, an Individual,

Plaintiff,

v.

VENETIAN CASINO RESORT, LLC, d/b/a THE VENETIAN LAS VEGAS, a Nevada Limited Liability Company; LAS VEGAS SANDS, LLC d/b/a THE VENETIAN LAS VEGAS, a Nevada Limited Liability Company; YET UNKNOWN EMPLOYEE; DOES I through X, inclusive,

Defendants.

CASE NO.: A-18-772761-C
DEPT. NO.: 25

Before the Discovery Commissioner

PLAINTIFF'S OPPOSITION TO DEFENDANTS'MOTION FOR PROTECTIVE ORDER

In it's Motion for Protective Order, The Venetian represents that 660 pages of redacted

documents produced in response to Plaintiff's Request For Production Of Documents No. 7 references 64 incident reports showing slip and falls occurring on the marble flooring within The Venetian Hotel and Casino presumably during the 3 years prior to the November 4, 2016 slip and fall up to the present date. The Venetian then argues that this production is sufficient and that Plaintiff is not entitled to discover their names, addresses, and contact information of those individuals who suffered slip and falls events at the Venetian on marble floors.

In connection with its Motion, The Venetians cites authority which is not relevant to the present dispute. Reference to case authority involving social security numbers has nothing to do with the issue presented to the Discovery Commissioner as The Venetian incident reports do not contain this information. **Exhibit 1**. Further, Plaintiff has no interest in receiving this information.

On the contrary, Plaintiff has requested complete, unredacted incident reports which contain contact information for those individuals injured in slip and falls at The Venetian during the relevant time frames. This would include full name, address, telephone number, and names of witnesses who witnessed the slip and fall, if any. The reports should also describe whether or not the individual was injured and, if so, the nature of the injury suffered.[1]

The Venetians cites alleged "privacy concerns" in support of its attempt to keep this information from Plaintiff. It has no standing to even raise this argument. On the contrary, the individuals who previously experienced slip and falls at the Venetian are witnesses to the conditions of the marble floor at The Venetian and the fact that this flooring is very unsafe when topped with water or some other liquid substance.

To be clear, a slip and fall at The Venetian is not an isolated event. Rather, there is a systematic series of slip and falls created by an unsafe slippery marble floor which become very

[1] The Commissioner has heard and decided this issue before, *Cohen v. Venetian*, Case No.: A-17-761036-C. **Exhibit 4**.

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dangerous when covered with any type of liquid substance, including water.

In support of the Plaintiff's allegations that this is a continuing and well known hazard with respect to The Venetian, Plaintiff deposed Joseph Larson, a present Venetian employee who describes himself as a EMT/Security Officer. During his deposition, Mr. Larson testified to facts which make The Venetian's production of only 64 incident reports extremely suspect. Attached hereto are the relevant portions of the transcript of Mr. Larson's deposition for the Commissioner's review and information. **Exhibit 2**. The Commissioner's attention is directed to page 24-25 line 8 and page 27 line 10-12, where Mr. Larson estimates that he investigated approximately 100 injury falls as an EMT/Security Officer with respect to the marble flooring outside the 7000 suites at The Venetian Hotel and Casino during the 9 years he has been employed there.

At page 28 of his deposition, Mr. Larson testifies that there are two or three EMT/Security Officers per shift per side (Venetian and Palazzo). If we do the math, and assume Mr. Larson was an average EMT/Security Officer, there would be somewhere in the neighborhood of 600-1000 injury falls occurring at the marble floors at the Venetian in a period of 9 years. If we narrow that 9 year time frame to the scope of the Plaintiff's Request for Production, (5 years) there should be approximately 300-500 incident reports documenting injury slip and falls at The Venetian on it's marble flooring outside of its 7000 suites during the relevant time frames requested by the Plaintiff. Using these numbers, The Venetian has produced approximately 15-20% of the incident reports requested by the Plaintiff.

To reiterate, the Plaintiff has no interest in social security numbers. However, information enabling Plaintiff's counsel to contact fall victims as witnesses in this case inclusive of full name, address, telephone number, and identification of witnesses to theses injury falls is clearly designed to lead to discoverable evidence in this case.

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Prior and subsequent falls on the marble floors at The Venetian are relevant in this case to show notice on its part that its marble floors, when wet, are dangerous slip hazardous.[2] This is particularly true when The Venetian locates a number of business which sell liquids and food for takeout adjacent to these marble floors.[3]

The Plaintiff retained Tom Jennings, a court-qualified expert to test the marble flooring at The Venetian to determine whether or not this flooring is dangerous when wet. Attached is a copy of Mr. Jennings' preliminary report which it documents his visit, his measurements, and the reasons why The Venetian marble flooring is a continuous and well known slip hazard to The Venetian management. **Exhibit 3**. In this report, Mr. Jennings references the presence of businesses located adjacent to this marble flooring and further points out that the mode of operation selected by The Venetian has resulted in the likelihood of many slip and fall injury events. This information is corroborated by the testimony of Mr. Larson and the common sense mathematics addressed in this Opposition.

Lastly, The Venetian has cited no relevant case authority which should require the signing of any type of confidentiality agreement restricting the use of the requested information in this case, only. This request is nothing more than an attempt by The Venetian to suppress this potentially explosive information and shield it from other attorneys who represent similar victims in similar circumstances.

///

[2] In *Galloway v. McDonalds Restaurant of Nevada, Inc.*, 102 Nev. 534,728 P.2d 826 (1986), the Court stated evidence of prior incidents is admissible to show the Defendant was on notice of dangerous conditions and likewise, the lack of prior incidents can be argued by the Defendant that the condition was safe, or Defendant had no knowledge of it.

[3] Plaintiff intends to request a "mode of operation" jury instruction at trial. The Venetian has no less than 9 separate business locations in close proximity to it's marble floors which sell food and drink, including water for take out by customers. *Sprague v. Lucky Stores Inc.*, 849 P.2d 320, 109 Nev. 247 (1993). See *FGA, Inc. v. Giglio*, 278 P.3d 480 (Nev. 2012).

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To its credit, The Venetian has not made any argument that the information sought is not reasonably calculated to lead to discoverable evidence. While The Venetian may seek to limit and/or exclude this evidence at trial, that is a decision for the trial court. Since the prior and subsequent falls show actual and/or constructive notice on the part of The Venetian, it seems fairly obvious to the Plaintiff that the attempts by The Venetian to suppress this information and exclude it from evidence at trial will not be successful. These slip and falls are all substantially similar.[4]

In any event, the showing made by The Venetian with respect to its Motion for Protective Order is insufficient to justify a report and recommendation that excludes relevant contact information with respect to victims of slip and fall at The Venetian, and imposes a confidentiality agreement as a condition of disclosing information which should have been disclosed upfront in response to Plaintiff's Request for Production No. 7.

For these reasons, The Venetian's Motion must be denied. The Venetian should be ordered to promptly supply the requested unredacted reports to the Plaintiff. Moreover, the Plaintiff should not be required to sign any type of confidentiality agreement as a condition of receipt of what she has requested from The Venetian in this case. If there are any documents produced by The Venetian which contain social security numbers, Plaintiff has no problem with their deletion from the production.

Lastly, the disclosure of 64 prior incident reports appears to be a relatively small fraction of the incident report actually generated in slip and fall cases at the Venetian as requested by the Plaintiff per Mr. Larson's sworn testimony. Accordingly, Plaintiff also request that the Discovery Commissioner specifically order The Venetian to produce all the requested incident reports rather

///

[4] *Jaquillard v. Home Depot USA, Inc.*, 2012 U.S. Dist. Lexis 19898, 2012 WL527421 (D.GA. 2012).

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than a relatively small percentage of them within the next 30 days.

DATED this 13th day of February, 2019.

THE GALLIHER LAW FIRM

Keith E. Galliher, Jr., Esq.
Nevada Bar No. 220
1850 E. Sahara Avenue, Suite 107
Las Vegas, Nevada 89104
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of THE GALLIHER LAW FIRM amd that service of a true and correct copy of the above and foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER** was serve on the 13th day of February, 2019, to the following addressed parties by:

_____ First Class Mail, postage prepaid from Las Vegas, Nevada pursuant to N.R.C.P 5(b)

_____ Facsimile, pursuant to EDCR 7.26 (as amended)

✓ Electronic Mail/Electronic Transmission

_____ Hand Delivered to the addressee(s) indicated

_____ Receipt of Copy on this _____ day of February, 2019,

acknowledged by, _____

Michael A. Royal, Esq.
Gregory A. Miles, Esq.
ROYAL & MILES LLP
1522 W. Warm Springs Road
Henderson, Nevada 89014
Attorneys for Defendants

An Employee of THE GALLIHER LAW FIRM

THE GALLIHER LAW FIRM
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EXHIBIT 11

ROPP
Michael A. Royal, Esq.
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Gregory A. Miles, Esq.
Nevada Bar No. 4336
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Attorneys for Defendants
VENETIAN CASINO RESORT, LLC and
LAS VEGAS SANDS, LLC

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1522 W Warm Springs Road
Henderson NV 89014
Tel: (702) 471-6777 ◆ Fax: (702) 531-6777

DISTRICT COURT

CLARK COUNTY, NEVADA

JOYCE SEKERA, an Individual; Plaintiff, v. VENETIAN CASINO RESORT, LLC, d/b/a THE VENETIAN LAS VEGAS, a Nevada Limited Liability Company; LAS VEGAS SANDS, LLC d/b/a THE VENETIAN LAS VEGAS, a Nevada Limited Liability Company; YET UNKNOWN EMPLOYEE; DOES I through X, inclusive, Defendants.	CASE NO.: A-18-772761-C DEPT. NO.: XXV ***Before the Discovery Commissioner*** Hearing Date: 03/13/19 Hearing Time: 9:00 am

ADDENDUM TO REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER

COMES NOW, Defendants, VENETIAN CASINO RESORT, LLC, and LAS VEGAS SANDS, LLC (collectively referenced herein as *Venetian*), by and through their counsel, ROYAL & MIILES LLP, and hereby files this ADDENDUM TO REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER.

This Reply is based on the pleadings and papers on file, the memorandum of points and authorities contained herein, the affidavit of counsel, the attached exhibits and any argument permitted by this Court at the time set for hearing.

DATED this 6 day of March, 2019.

ROYAL & MILES LLP

By _____

MICHAEL A. ROYAL, ESQ.
Nevada Bar No. 4370
1522 W. Warm Springs Rd.
Henderson, NV 89014
Attorney for Defendants
VENETIAN CASINO RESORT, LLC and
LAS VEGAS SANDS, LLC

DECLARATION OF MICHAEL A. ROYAL, ESQ.

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

MICHAEL A. ROYAL, ESQ., being first duly sworn, under oath deposes and states:

1. I am an attorney duly licensed to practice law in the State of Nevada and I am counsel for Venetian in connection with the above-captioned matter. I have personal knowledge of the following facts and if called upon could competently testify to such facts.

2. That today I became aware of a motion pending in the mater of *Carol Smith v. Venetian Casino Resort, LLC,* Case No. A-17-753362-C, entitled *Plaintiff's Notice of Motion and Motion for Terminating Sanctions, Monetary Sanctions for Wilful Suppression of Evidence Pursuant to NRCP Rule 37*, filed by Peter Goldstein, Esq. (exhibits omitted), attached hereto as Reply Exhibit B.

3. On pages 4-5 of the aforementioned motion filed by Mr. Goldstein, he writes the following:

Keith Gallagher, Esq. represents the Plaintiff in the pending case Joyce Sekera v. Venetian Casino Resort, case no. A-18-772761-C, another slip and fall case against the same Defendant (filed subsequent to Smith v Venetian). ***Mr. Gallagher and Mr. Goldstein discussed their respective cases and what the Venetian produced*** *with regard to prior slip and fall incident reports on February 7, 2019. Mr. Goldstein learned that Venetian produced twice as many prior incident reports to Mr. Gallagher in Sekera than what was produced in Smith.* ***Mr. Gallagher produced those prior reports to Mr. Goldstein's office on February 7, 2019.*** *They contain 660 pages of PDF documents of prior slip and falls on wet marble floors. Moreover, Mr. Gallagher took the deposition of a former EMT/security officer whose testimony suggested that there may have been as many as 300 to 400 falls on marble floors at the Venetian within the last eight years. Goldstein Decl. at 5, 6, 7, 8.*

After comparing and compiling the prior incident reports from both cases it was clear that Venetian produced 35 additional incident reports to Keith Gallaher in Joyce Sekera v. Venetian of slip and falls on marble floors *in both Lobby 1 and other lobbies with marble flooring on the property from 2013-2016 that were produced by the Venetian yet were not produced in this case. See EXHIBIT 4 (list of incident reports produced in Sekera case containing 61 prior reports in a spreadsheet with a column indicating which incidents were not produced in Smith). More than half of the Sekera reports were intentionally omitted and not produced in the Smith case.*

(*See* Exhibit B at 4, ln 22-28; 5, ln 1-10, emphasis added.)

4. In the *Declaration of Peter Goldstein*, dated February 13, 2019, attached as Reply Exhibit B, Mr. Goldstein writes the following in pertinent part:

Mr. Keith Gallagher provided additional incident reports of slip and falls on marble floors on property, produced by the Venetian in the case Sekera v. Venetian and that he *"can provide PDF copies of all incident reports disclosed in . . . Sekera v. Venetian.*

(*See id.* at 10, ln 21-25, emphasis added.)

5. In the *Smith* case referenced in Paragraph 2, the Discovery Commissioner issued a Report and Recommendation regarding the production of prior incident reports on July 2, 2018 which provides the following in pertinent part:

COMMISSIONER RECOMMENDED, Defendant Venetian Casino Resort LLC's Motion for Protective Order is GRANTED; re: transitory condition of the floor; counsel can have the number of falls in the lobbies . . . ***but REDACT the names; after reviewing information, if there is a specific fall event that happened in the general area of Plaintiff's fall, have a 2.34 conference with Defense counsel and bring back to Commissioner's attention.***

(*See* Reply Exhibit C, *Smith, supra,* Case No. A-17-753362-C, *Discovery Commissioner's Report and Recommendations* (dated July 2, 2018), emphasis added.) Therefore, the Discovery Commissioner has previously not only held in a similar Venetian litigated matter that information from prior incident reports qualifies for protection under NRCP 26(c), but also that contact information of prior guests is likewise to be protected, to be withheld from Plaintiff absent a showing of relevance and need based on similarities of circumstances on a case by case basis. (*See id.*)

6. It is apparent that, despite the presence of a protective order in the *Carol Smith v. Venetian* litigation, that Plaintiff's counsel, Peter Goldstein, Esq., nevertheless shared information with Mr. Gallagher, Plaintiff's counsel in the instant matter. It is also apparent that Mr. Gallagher not only shared testimony of former Venetian EMT, Joseph Larson, to Plaintiff's counsel in the matter of *Cohen v. Venetian Casino Resort, LLC*, Case No. A-17-761036-C, but that he did the same in the *Smith* matter according to the motion filed by Mr. Goldstein. (*See* Reply Exhibit B at 5, ln 1-3.)

7. The above latest information further underscores Defendants' concern that Plaintiff has every intention of obtaining the private information of prior Venetian guests and distributing throughout the legal community, thereby subjecting prior guests to untold contact from any number of other unknown persons.

8. While Venetian initially agreed with Plaintiff's counsel to submit unredacted information pursuant to a Protective Order, it now withdraws that offer and moves the Court to order an NRCP 26(c) Protective Order related to the approximate 650 pages of redacted materials previously produced to Plaintiff in this matter.

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9. I further declare that the exhibits identified in the Addendum to Reply to Plaintiff's Opposition to Defendants' Motion For Protective Order, as outlined below, are true and correct copies of documents produced in or otherwise related to this matter.

Executed on 6 day of March, 2019.

MICHAEL A. ROYAL, ESQ.

MEMORANDUM OF POINTS AND AUTHORITIES

Based on the latest information obtained by Defendants regarding the relationship between Mr. Gallagher and Mr. Goldstein, in addition to that previously disclosed between Mr. Galligher and George Bochanis, Esq., in the *Cohen* matter, as referenced in Defendants' Reply filed on March 5, 2019, Defendants not only move for a protective order under NRCP 26(c), but further move for an order by the Discovery Commissioner consistent with its ruling of July 2, 2018, allowing for the production of redacted contact information for guests involved in prior incidents, with personal contact information to be provided on a case by case basis upon a showing of relevance by Plaintiff's counsel.

It appears quite clear that Mr. Gallagher intends to share any and all information obtained in this matter related to prior guests of Venetian with all the world, without the slightest limitation, and that is simply untenable. Defendants cannot subject prior guests to such apparent invasions to their privacy, where HIPPA protected information is often found.

DATED this 6 day of March, 2019.

ROYAL & MILES LLP

By_____

MICHAEL A. ROYAL, ESQ.
Nevada Bar No. 4370
1522 W. Warm Springs Rd.
Henderson, NV 89014
Attorney for Defendants
VENETIAN CASINO RESORT, LLC and
LAS VEGAS SANDS, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6 day of March, 2019, and pursuant to NRCP 5(b), I caused a true and correct copy of the foregoing **ADDENDUM TO REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER** to be served as follows:

____ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

____ to be served via facsimile; and/or

✓ pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail; and/or

____ to be hand delivered;

to the attorneys and/or parties listed below at the address and/or facsimile number indicated below:

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Ashley Schmitt
An employee of ROYAL & MILES LLP

EXHIBIT 12

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DISTRICT COURT

CLARK COUNTY, NEVADA

JOYCE SEKERA, an Individual,

Plaintiff,

v.

VENETIAN CASINO RESORT, LLC, d/b/a THE VENETIAN LAS VEGAS, a Nevada Limited Liability Company; LAS VEGAS SANDS, LLC d/b/a THE VENETIAN LAS VEGAS, a Nevada Limited Liability Company; YET UNKNOWN EMPLOYEE; DOES I through X, inclusive,

Defendants.

CASE NO.: A-18-772761-C
DEPT. NO.: 25

PLAINTIFF'S OBJECTION TO DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS DATED APRIL 2, 2019

Plaintiff hereby submits her Objection to the Discovery Commissioner's Report and Recommendations dated April 2, 2019.

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I. INTRODUCTION

On November 4, 2016 Plaintiff slipped and fell in the lobby of the Venetian on water on the marble floor. During discovery Plaintiff requested Venetian provide similar incident reports from November 4, 2013 to present, a total of five years of reports. In response to this request, Venetian produced 64 redacted incident reports. Plaintiff requested Venetian provide the unredacted reports so Plaintiff could identify witnesses to counter Venetian's comparative negligence claim that Plaintiff should have seen liquid on the floor before she fell. Venetian refused to produce the unredacted reports and filed a Motion for Protective Order. After subsequent briefing the Discovery Commissioner issued a Report and Recommendation. As discussed below, the Court should not adopt the recommendations because they are inconsistent with the Nevada Rules of Civil Procedure, applicable law, and the distinct majority opinion in courts across the country.

II. FACTUAL BACKGROUND

On August 15, 2018 Plaintiff requested Venetian produce:

> True and correct copies of any and all claim forms, legal actions, civil complaints, statements, security reports, computer generated lists, investigative documents or other memoranda which have, as its subject matter, slip and fall causes occurring on marble floors within the subject VENETIAN CASINO RESORT within three years prior to the incident described in Plaintiff's Complaint [November 4, 2016], to the present.
>
> (Defendant's Mot., Exhibit "A.")

On October 11, 2018 Plaintiff took the deposition of Joseph Larsen, a security officer/ENT at the Venetian. During his deposition Mr. Larsen indicated approximately 300-500 injury slip and fall injuries occurred on the marble floors at Venetian in the last five (5) years.[1] (Plaintiff's Opp. at 3:8-

[1] Mr. Laron estimated he investigated 100 injury falls on marble floors during the 9 years he has been employed at Venetian. (Plaintiff's Opp., Exhibit "2" at 24:3-27:14.) Mr. Larson testified there were two or three other EMT/Security Officers per shift per side (Venetian and Palazzo). (*Id.* at Exhibit "2" 28:23-35.) If Mr. Larson is an average EMT/Security Office, 600-1000 injury falls occurred on marble floors in Venetian in the last 9 years. (*Id.* at 3:14-16.) Narrowing that down to the scope of Plaintiff's Request for Production (5 years), there should be 300-500 slip and fall incident reports. (*Id.* at 3:16-20.)

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20.) Thus, when Venetian disclosed a mere 64 redacted incident reports Plaintiff instantly suspected the vast majority were missing. To verify Venetians compliance with the discovery request, Plaintiff's Counsel contacted Mr. Peter Goldstein, Esq., ("Mr. Goldstein") Plaintiff's counsel in another pending premise liability action against the Venetian. (*See Carol Smith v. Venetian Casino Resort, LLC*, Case No. A-17-753362-C.) From their discussion, Mr. Galliher determined Venetian willfully left out four reports in response to Plaintiff's Requests for Production which were disclosed in *Smith v. Venetian*. (Defendant's Addendum to Rplt., Exhibit "B.") Likewise, Mr. Goldstein determined Venetian willfully left out 35 reports in its response to plaintiff's requests for production in *Smith v. Venetian*. (*Id.*)

Around the same time, Plaintiff requested Venetian provide the unredacted reports. Venetian refused and sought a protective order. (Defendant's Mot.) Initially, Venetian only wanted to prevent disclosure of the individuals' contact information in the 64 reports. (*Id.* at 11:17-19.) However, once Venetian realized Mr. Galliher shared the redacted reports with Mr. Goldstein, leading to a Motion for Terminating Sanctions and Monetary Sanctions for Willful Suppression of Evidence in *Smith v. Venetian*, Venetian changed its position and requested a protective order on the previously disclosed redacted materials. (Defendant's Addendum to Rply. At 4:19-23.)

After briefing the Discovery Commissioner made the following Recommendations:

1. "that all information within the redacted prior incident reports produced by Venetian are to be protected under an NRCP 26(c) order, not to be shared with anyone who is not directly affiliated with the litigation (i.e. counsel, counsel's staff, experts, etc.), and when attached as exhibits to any filings with the Court are to be provided under seal."; and
2. "that the prior incident reports produced by Venetian are to remain in redacted form as originally provided in response to an NRCP 34 request, the Court agreeing that this

presents a privacy issue as it pertains to the identity of prior Venetian guests and includes protected HIPPA related information."

(Report and Recommendation at 3:5-14.)

III. LEGAL ARGUMENT

A. Plaintiff Cannot Be Prohibited from Sharing the Redacted Incident Reports

First, Plaintiff disagrees with the recommendation that the redacted incident reports be subject to a protective order and not be shared with anyone who is not directly affiliated with the instant litigation. (Report and Recommendation at 3:10-14.) There is no justification for this recommendation: it directly contradicts the vast majority of cases across the country, it encourages Venetian's scheme of hiding evidence and disobeying court orders and it negatively impacts the civil justice system, Nevadans and visitors to our state.

1. Courts Uniformly Agree the Risk of Collaborative Sharing of Information Is Not Grounds for a Protective Order

Courts uniformly agree that a risk of public disclosure or collaborative sharing of information does not constitute good cause for a protective order under Rule 26(c). *See, e.g. Olympic Refining Co. v. Carter*, 332 F.2d 260 (9th Cir. 1964); *see also De La Torre v. Swift Transp. Co.*, No. 2:13-CV-1786 GEB, 2014 WL 3695798, at *3 (E.D. Cal. July 21, 2014).[2] "**The risk—or in this case, the certainty—that the party receiving the discovery will share it with others does not alone constitute good cause for a protective order.**" *Wauchop,* 138 F.R.D. at 546. Rule 1 of both the Federal Rules and the Nevada Rules of Civil Procedure require they "be construed, administered,

[2] *See also Wauchop v. Domino's Pizza, Inc.*, 138 F.R.D. 539, 546 (N.D. Ind. 1991); *Ericson v. Ford Motor Co.*, 107 F.R.D. 92, 94 (E.D. Ark. 1985); *Baker v. Liggett Group, Inc.*, 132 F.R.D. 123, 125 (D.Mass 1990); *Garcia v. Peeples*, 734 S.W. 2d 343, 347-348 (Tex. 1987); *Earl v. Gulf & Western Mf. Co.*, 366 N.W.2d 160, 165 (Wis. App. 1985); *Nestle Foods Corporation v. Aetna Casualty & Surety*, 129 F.R.D. 483, 484 (D. N.J. 1990); *Farnum v. G.D. Searle & Co.*, 339 N.W.2d 384, 390 (Iowa 1983); *American Telephone and Telegraph Co. v. Grady*, 594 F.2d 594 (7th Cir. 1979); *Johnson Foils, Inc. v. Huyck Corp.*, 61 F.R.D. 405 (N.D.N.Y.1973); *Williams v. Johnson and Johnson*, 50 F.R.D. 31 (S.D.N.Y. 1970); *Parsons v. Gen. Motors Corp.*, 85 F.R.D. 724, 726 (N.D. Ga. 1980); *Deford v. Schmid Prod. Co., a Div. of Schmid Labs.*, 120 F.R.D. 648, 654 (D. Md. 1987);

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and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." *See* Fed. R. Civ. Pro. 1; *see also* Nev. R. Civ. Pro 1. Collaborative use of discovery material fosters the goals of Rule 1 by eliminating the time and expense involved in "re-discovery." *Williams*, 50 F.R.D. at 32; *Wauchop,* 138 F.R.D. at 546; *Wilk v. American Medical Ass'n*, 635 F.2d 1295, 1299 (7th Cir.1980); *Grady*, 594 F.2d at 597; *Phillips Petroleum Co. v. Pickens*, 105 F.R.D. 545, 551 (N.D.Tex.1985); *Carter-Wallace v. Hartz Mountain Industries*, 92 F.R.D. 67, 70 (S.D.N.Y.1981); *Parsons*, 85 F.R.D. at 726; *Garcia*, 734 S.W.2d at 347; *Ward v. Ford Motor Co.,* 93 F.R.D. 579, 580 (D.Colo.1982) ("Each plaintiff should not have to undertake to discovery [sic] anew the basic evidence that other plaintiffs have uncovered. To so require would be tantamount to holding that each litigant who wishes to ride a taxi to court must undertake the expense of inventing the wheel."); *Baker,* 132 F.R.D. at 126 ("[T]o routinely require every plaintiff ... to go through a comparable, prolonged and expensive discovery process would be inappropriate."); *Patterson v. Ford Motor Co.,* 85 F.R.D. 152, 154 (W.D.Tex.1980) ("The availability of the discovery information may reduce time and money which must be expended in similar proceedings, and may allow for effective, speedy, and efficient representation."). "It is particularly appropriate that this principle be applied in... cases in which individual plaintiffs must litigate against large, corporate defendants." *Baker,* 132 F.R.D. at 126 "Maintaining a suitably high cost of litigation for future adversaries is not a proper purpose under Rules 1 or 26." *Wauchop,* 138 F.R.D. at 547; *see also Cipollone v. Liggett Grp., Inc.,* 113 F.R.D. 86, 87 (D.N.J. 1986).

Thus, the recommendation that the redacted incident reports be subject to a protective order and not be shared with anyone who is not directly affiliated with the instant litigation violates Rule 1 by increasing the time and expense of litigation by forcing parties to re-discovery information in each case. This is especially applicable here because Venetian is a large corporation with a team of skilled lawyers who zealously argue on their behalf. Though there is nothing wrong with this, it

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increases the cost of individual plaintiffs bringing claims. Nonetheless, Venetian attempts to limit the collaborative sharing of information by regularly seeking protective orders[3] so they can safely violate discovery rules, ignore court orders and selectively disclose information.

Moreover, "[s]hared discovery is an effective means to insure full and fair disclosure." *Garcia v. Peeples*, 734 S.W.2d 343, 347 (Tex. 1987). "Parties subject to a number of suits concerning the same subject matter are forced to be consistent in their responses by the knowledge that their opponents can compare those responses." *Garcia*, 734 S.W.2d at 347; *Buehler v. Whalen*, 70 Ill. 2d 51, 65, 374 N.E.2d 460, 466 (1977). The improper conduct the *Garcia* and *Buehler* courts guarded against is evident here: Venetian refused to fully disclose documents, knowingly violated court orders and ignored discovery rules in not one, but two pending lawsuits. Venetian's failure to secure a protective order before it disclosed the redacted reports is the only reason Mr. Galliher and Mr. Smith discovered Venetian's selectively disclosed incident reports and violated discovery rules and court orders. Thus, the recommendation the Court prohibit Plaintiff from sharing the redacted reports serves only one purpose: to give Venetian peace of mind future plaintiffs won't catch its violations. This is not a legitimatize purpose for a protective order and the Court should therefore decline to follow the recommendation.

2. Venetian's Protective Order Violates Public Policy, Undermines the Civil Justice System, and Hurts Nevadans and Other Visitors to Our State.

Venetian's request is concerning for many reasons beyond the obvious discussed above. Adopting Venetian's request to prohibit Plaintiff from sharing the redacted reports undermines the purpose of the civil justice system: deterrence of unsafe practices through imposition of financial

[3] *See* Maria Potts vs Venetian Casino Resort LLC (08A568029); Andrew Gold vs. Las Vegas Sands LLC (A-09-604694-C); Judy Sorci vs. Venetian Casino Resort LLC (A-10-612854-C); Freida Robinson vs. Venetian Casino Resort, LLC (A-11-638095-C); Soloman Cogan vs. Venetian Casino Resort LLC (A-12-663219-C); Grace Aye vs. Las Vegas Sands Corp (A-15-716380-C); Mui Lim, Plaintiff vs. Venetian Casino Resort LLC (A-15-728316-C); Eric Cohen vs. Venetian Casino Resort, LLC (A-17-761036-C); John Kierce vs. Las Vegas Sands Corp (A-17-757314-C); Carol Smith vs. Venetian Casino Resort LLC, (A-17-753362-C).

liability.[4] The tort system's economic function is deterrence of non-cost justified accidents through creation of economic incentives for "allocation of resources to safety."[5] The possibility of tort liability deters culpable wrongdoers from repeating their negligence or misconduct and gives them the proper economic incentives to become more safe and responsible. In cases where criminal laws are violated but are not properly enforced, the potential for civil damages can become a more effective deterrent than criminal sanctions. However, when wrongdoers are not forced to bear the full cost of the damages they cause, they do not take sufficient precaution to prevent future harm.[6] In other words, "[t]he tort system seems to be the most significant mechanism to keep risk aversion in the market."[7]

The civil justice system deters not only by imposing financial liability but also by forcing disclosure of important internal information about unsafe premises, products, drugs, toxics and other practices and processes, and by allowing dissemination of this information to millions of people through the mass media.[8] When disputes are resolved without trial and without a public record, wrongdoers can often suppress the information.

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[4] *See, e.g.,* W. Page Keeton et al., *Prosser & Keeton on the Law of Torts*, p. 25 (5th ed. 1984).

[5] *See* William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law*, 28 (1987) ("[M]uch of tort law can be explained on the simple hypothesis that it is indeed a system for bringing about an efficient allocation of resources to safety."). Richard Posner is a former 7th Circuit Court of Appeals judge.

[6] It has long been recognized that there is a "moral hazard" associated with insurance which is characterized by the fact that the party causing the damage does not bear the full costs of his actions, and, therefore, may take insufficient precautions to prevent future harm. *See, e.g.* Jeffrey Stempel, et. al., Principals of Insurance Law, § 1.05 Fortuity, Adverse Selection, and Moral Hazard (4th ed. 2012.)

[7] MASSACHUSETTS INSTITUTE OF TECHNOLOGY, *The Role of Changes in Statutory/Tort Law and Liability Insurance in Preventing and Compensating Damages from Future Releases of Hazardous Waste* (Oct. 1987). (finding of a study of hazardous waste litigation by a Massachusetts Institute of Technology research team led by Dr. Nicholas Ashford created for the Special Legislative Commission on Liability for Releases of Oil and Hazardous Materials); *See also* William B. Schwartz, M.D. & Neil K. Komesar, J.D., Doctors, *Damages and Deterrence - An Economica View of Medical Malpractice*, 298 NEW ENG. J. MED. 1282 (1978). (finding "replacing the present tort system with a no-fault insurance scheme ... might well abolish the deterrent signal or distort clinical decision making.." because the fault system, which assesses damages against negligent doctors, sends "signals" to other doctors that discourage future carelessness and reduce future damages.

[8] Asbestos is an example. Asbestosis, or asbestos disease, was reported for the first time in Britain in 1900, and for 40 years, the U.S. asbestos industry suppressed data about asbestos hazards. The first jury to hear an asbestosis lawsuit,

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By hiding 80-85% of the incident reports of slip and falls on its marble floors, Venetian ensures the public will never determine the magnitude of the problem, will never have the opportunity to deter Venetian from wrongdoing, and will never be able to encourage Venetian to make their premises safer. By granting the protective order, the Court ensures litigants will not be able to gather enough evidence to demonstrate Venetian knew its floors were unreasonably hazardous and failed to act. Without this evidence plaintiffs will struggle to seek the punitive damages necessary to incentivize Venetian to become safer and more responsible. The recommendation that Plaintiff be prohibited from sharing these reports with other plaintiffs in Nevada impedes the civil justice system and hurts all individuals who visit Venetian including Nevada's citizens, individuals from out of state and visitors from other countries.

Moreover, the recommendation that the Court prohibit Plaintiff from sharing the redacted reports interferes with the rights of current and past plaintiffs. Plaintiffs in current cases have a right to these reports to determine if they are entitled to sanctions against Venetian for hiding evidence. Likewise, plaintiffs in previously resolved cases have a right to these reports to determine if they are entitled to re-open their judgments for fraud and misconduct. *See* NRCP 60(b)(3) ("the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party…")

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brought in 1971 by a worker with asbestosis, awarded only $68,000 in actual damages. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973). Punitive damages were not requested. *Id.* It took several years of similar civil jury trials before victims' attorneys finally obtained enough documents to demonstrate that many asbestos manufacturers had known about asbestos hazards and had covered up the information. As this evidence became available, judges allowed juries to consider and award punitive damages against asbestos manufacturers. For example, in the 1986 case *Fisher v. Johns--Manville*, a jury awarded compensatory damages of $86,000 to James Fischer and $5,000 to Geneva Fischer and punitive damages totaling $300,000. *Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 512 A.2d 466 (1986). Because of information released in connection with asbestos cases, millions have learned of the dangers of asbestos and have taken their own precautions, while public officials have enacted stronger health and safety standards. The Ford Pinto case is another example. *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (Ct. App. 1981).

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As such, the Court should not follow the Recommendation that Plaintiff be prohibited from sharing these reports with other Plaintiff's attorneys in Nevada as it goes against the strong trend of case law, violates public policy, undermines our court system, harms Nevadans, harms our state's visitors and encourages Venetian to continue its elaborate scheme of ignoring court orders and selectively disclosing evidence.

B. Venetian Must Produce the Unredacted Incident Reports

Second, Plaintiff takes issue with Venetian's production of **redacted** reports. Neither Venetian nor the Discovery Commissioner cite authority to support the recommendation that "the prior incident reports produce by Venetian are to remain in redacted form… [as] this presents a privacy issue as it pertains to the identity of prior Venetian guests and includes protected HIPAA information." (Report and Recommendation at 3:5-9.)

The HIPAA Rules (42 USC § 1320d et seq) do not apply to Venetian, rather they only apply to "covered entities" and "business associates." U.S. Department of Health and Human Services, *Covered Entities and Business Associates* HHS.GOV (2017), https://www.hhs.gov/hipaa/for-professionals/covered-entities/index.html (last visited Apr 12, 2019). "Covered entities" include healthcare providers, health plans, and health care clearinghouses. *Id.*; *see also* 45 CFR § 160.103. Individuals, organizations, and agencies that meet the definition of a "covered entity" under HIPAA must comply with the Rules' requirements to protect the privacy and security of health information and must provide individuals with certain rights with respect to their health information. U.S. Department of Health and Human Services, *Covered Entities and Business Associates* HHS.GOV (2017), https://www.hhs.gov/hipaa/for-professionals/covered-entities/index.html (last visited Apr 12, 2019); *see also* 42 USC § 1320d et seq. If a covered entity engages a "business associate" to help it carry out its health care activities and functions, the covered entity must have a written business associate contract or other arrangement with the business associate that establishes specifically what

the business associate has been engaged to do and requires the business associate to comply with the Rules' requirements to protect the privacy and security of protected health information. U.S. Department of Health and Human Services, *Covered Entities and Business Associates* HHS.GOV (2017), https://www.hhs.gov/hipaa/for-professionals /covered-entities/index.html (last visited Apr 12, 2019); *see also* 45 CFR § 160.103. If an entity does not meet the definition of a covered entity or business associate, it does not have to comply with the HIPAA Rules. U.S. Department of Health and Human Services, *Covered Entities and Business Associates* HHS.GOV (2017), https://www.hhs.gov/hipaa/for-professionals/covered-entities/index.html (last visited Apr 12, 2019); *see also* 42 USC § 1320d-1.

Venetian is not a covered entity as defined in 42 USC § 1320d and 45 CFR § 160.103. Venetian is not a healthcare provider, not a health plan, and not a health care clearinghouse. Venetian is also not a business associate of one these entities. Rather, Venetian is a hotel casino, and as such, the HIPAA laws do not apply. Because the HIPAA laws do not apply to Venetian, the Court should decline to following the recommendation that HIPAA laws provide a legal basis for the requested protective order.

Moreover, Plaintiff needs the names and contact information on the incident reports because they are potential witnesses. The identity of the individuals who fell at Venetian and were injured on its marble floors as a result of impacting liquid are important because they will enable Plaintiff's Counsel to locate these witnesses and present them to counter Venetian's expected claims that Plaintiff was comparatively negligent because she did not see the liquid substance on the floor before she fell. The identity of other slip and falls victims at Venetian are clearly discoverable as the information obtained from them regarding the visibility of liquid substances on the marble floor at Venetian is reasonably calculated to lead to discoverable evidence in this case.

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Las Vegas, Nevada 89104
702-735-0049 Fax: 702-735-0204

IV. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests this court decline to adopt the Recommendations from the Discovery Commissioner and instead hold:

1. Prior injury incident reports should be disclosed in unredacted form.

2. A protective order should not be issued to prevent Plaintiff's counsel from exchanging and comparing similar information obtained by other plaintiffs in lawsuits against the Venetian resulting from the unsafe condition of its marble floors.

DATED this 15th day of April, 2019

THE GALLIHER LAW FIRM

Keith E. Galliher, Jr., Esq.
Nevada Bar Number 220
1850 E. Sahara Avenue, Ste. 107
Las Vegas, Nevada 89104
Attorney for Plaintiff

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of THE GALLIHER LAW FIRM and that service of a true and correct copy of the above and foregoing **PLAINTIFF'S OBJECTION TO DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS DATED APRIL 2, 2019** was served on the 16th day of April, 2019, to the following addressed parties by:

_____ First Class Mail, postage prepaid from Las Vegas, Nevada pursuant to N.R.C.P 5(b)

_____ Facsimile, pursuant to EDCR 7.26 (as amended)

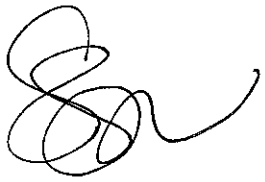
__✓__ Electronic Mail/Electronic Transmission

_____ Hand Delivered to the addressee(s) indicated

_____ Receipt of Copy on this _____ day of April 2019,

acknowledged by, _____

Michael A. Royal, Esq.
Gregory A. Miles, Esq.
ROYAL & MILES LLP
1522 W. Warm Springs Road
Henderson, Nevada 89014
Attorneys for Defendants



An Employee of THE GALLIHER LAW FIRM

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EXHIBIT 13

ROPP
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DISTRICT COURT

CLARK COUNTY, NEVADA

JOYCE SEKERA, an Individual; Plaintiff, v. VENETIAN CASINO RESORT, LLC, d/b/a THE VENETIAN LAS VEGAS, a Nevada Limited Liability Company; LAS VEGAS SANDS, LLC d/b/a THE VENETIAN LAS VEGAS, a Nevada Limited Liability Company; YET UNKNOWN EMPLOYEE; DOES I through X, inclusive, Defendants.	CASE NO.: A-18-772761-C DEPT. NO.: XXV

RESPONSE TO PLAINTIFF'S OBJECTION TO DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS DATED APRIL 2, 2019, COUNTERMOTION TO STRIKE FACTS AND ARGUMENTS NOT BRIEFED BEFORE THE DISCOVERY COMMISSIONER, , COUNTERMOTION FOR ORDER DIRECTING PLAINTIFF TO COMPLY WITH PROTECTIVE ORDER BY RETRIEVING ALL INFORMATION DISTRIBUTED TO PERSONS OUTSIDE THE LITIGATION, AND COUNTERMOTION FOR APPROPRIATE SANCTIONS UNDER NRCP 37(b)(2)

COMES NOW, Defendants, VENETIAN CASINO RESORT, LLC, and LAS VEGAS SANDS, LLC (collectively referenced herein as *Venetian*), by and through their counsel, ROYAL & MIILES LLP, and hereby files this RESPONSE TO PLAINTIFF'S OBJECTION TO DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS DATED APRIL 2, 2019, COUNTERMOTION TO STRIKE FACTS AND ARGUMENTS NOT BRIEFED BEFORE THE DISCOVERY COMMISSIONER, COUNTERMOTION FOR ORDER DIRECTING PLAINTIFF TO COMPLY WITH PROTECTIVE ORDER BY RETRIEVING ALL INFORMATION DISTRIBUTED TO PERSONS OUTSIDE THE LITIGATION, AND COUNTERMOTION FOR APPROPRIATE SANCTIONS UNDER NRCP 37(b)(2). This Response is based on the pleadings and papers on file, the memorandum of points and authorities contained herein, the affidavit of counsel, the attached exhibits and any argument permitted by this Court at the time set for hearing.

DATED this 22 day of April, 2019.

ROYAL & MILES LLP

By_____

Michael A. Royal, Esq.
Nevada Bar No. 4370
1522 W. Warm Springs Rd.
Henderson, NV 89014
Attorney for Defendants
VENETIAN CASINO RESORT, LLC and
LAS VEGAS SANDS, LLC

DECLARATION OF MICHAEL A. ROYAL, ESQ.

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

MICHAEL A. ROYAL, ESQ., being first duly sworn, under oath deposes and states:

1. I am an attorney duly licensed to practice law in the State of Nevada and I am counsel for Venetian Casino Resort, LLC, and Las Vegas Sands, LLC, in connection with the above-captioned matter. I have personal knowledge of the following facts and if called upon could competently testify to such facts.

2. This action arises out of an alleged incident involving a floor located within a common area of the Venetian casino on November 4, 2016, when Plaintiff slipped and fell on a dry marble floor.

3. On or about August 16, 2018, Plaintiff served Plaintiff's Request for Production of Documents and Materials to Defendant in which Plaintiff requested reports related to slip and falls occurring within three years preceding the subject incident to the present.

4. Defendants objected to providing information related to any incident reports following the subject incident of November 4, 2016, and produced a total of sixty-four (64) prior incident reports from November 4, 2013 to November 4, 2016.[1]

5. I had discussions with Mr. Galliher regarding Defendants' desire to keep such information protected pursuant to NRCP 26(c), which was memorialized in correspondence dated December 17, 2018.

6. Mr. Galliher refused to execute a stipulation to provide NRCP 26(c) protection of information requested, which included the names, addresses, phone numbers, dates of birth, Social

[1]Even though Defendants maintain Plaintiff slipped on a dry marble floor, they nevertheless produced prior incidents occurring from guests slipping on a foreign substance on the Venetian casino level common areas for the three preceding years.

Security information, and HIPAA protected information related to alleged injuries and first responder care provided to involved guests of the Defendants.

7. Despite Mr. Galliher's refusal to stipulate to an NRCP 26(c) order, I sent him a total of sixty-four (64) incident reports from November 4, 2013 through November 4, 2016 in redacted form to protect the identity of involved persons, which Defendants not only deemed irrelevant (*see* footnote 1), but that Defendants insist they have an obligation to protect.

8. Mr. Galliher thereafter contacted me to discuss his objection to Venetian having provided redacted reports, and stated his desire to name sixty-four (64) additional witnesses to testify about their particular incidents and experiences on Defendants' property. During that conversation, Mr. Galliher did not relay his theory that this evidence is relevant to address Defendants' anticipated arguments of comparative fault, as indicated in Plaintiff's Objection, filed with the court. (*See Plaintiff's Objection* at 2, ln 6-8.) Further, Mr. Galliher did not then advise that he had been meeting privily with other attorneys handling presently litigated matters against Venetian and producing information to them which he knew Venetian desired to be protected under NRCP 26(c). Mr. Galliher likewise did not advise that he had been receiving information from the same attorneys in other litigated matters which were under NRCP 26(c) protective orders.

9. Mr. Galliher first set forth his rationale for client's need for unfettered access all persons identified in the prior incident reports during argument at the March 13, 2019 hearing, which is presented as follows in pertinent part:

> *MR. GALLIHER: . . . the comparative negligence issue is a big one because invariably juries will come back and apportion the negligence in the case. It's a little –*
>
> *DISCOVERY COMMISSIONER: But the comparative negligence of another party versus your own party wouldn't be relevant to this action.*
>
> *MR. GALLIHER: Well, I disagree, and I'll tell you why. If you've got a situation like this where people are slipping on the same floor* ***on liquid*** *-- and all the floors' identical, it's not like it's different -- and these people don't see the liquid before they fall, which is why they fall, why would that not be relevant to the question of*

comparative negligence? Because if five people didn't see it, or ten people didn't see it, why should my client have seen it? Very relevant. I mean, remember, we're not talking just about admissibility, because that's the call that's going to be made by Judge Delaney. We're talking about discoverability, that's all.

(*See* Exhibit A, *Transcript of Hearing Before the Discovery Commissioner* (March 13, 2019) at 9, ln 4-21, emphasis added)

10. In response to Mr. Galliher's never previously articulated commentary regarding use of witnesses involved in unrelated incidents occurring on Defendants' property with entirely dissimilar fact patterns in order to contest comparative fault arguments, I advised the Discovery Commissioner that the facts of this case are unique from each of the sixty-four (64) redacted reports of prior incident provided to Plaintiff, as this incident does not involve a foreign substance on the floor. (*See id.* at 4, ln 12-23; 10, ln 14-20.) Yet, in good faith, Defendants nevertheless produced the redacted reports. As a compromise, I offered to provide Mr. Galliher with unredacted information for specific prior incidents where he can show substantially similar facts, which the Discovery Commissioner agreed to be fair.

11. Mr. Galliher advised the Court during the March 13, 2019 hearing that he has been sharing information obtained in this case with attorneys presently representing parties in unrelated litigation against Venetian - despite the fact that he knew from the beginning of Venetian's desire to have it protected. One such attorney is Peter Goldstein, Esq., who I understand to be operating under an NRCP 26(c) Protective Order in the matter of *Carol Smith v. Venetian*, case no. A-17-753362-C. Mr. Galliher acknowledged that he obtained protected information from Mr. Goldstein regarding prior incidents obtained from Venetian in the *Smith* matter and compared it with requested NRCP 26(c) protected information he obtained from Venetian in this matter.[2] (*See id.* at 7, ln 13-25; 8, ln 1-8.)

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[2]It is my understanding that Mr. Goldstein was operating under an NRCP 26(c) Protective Order, in the *Smith* litigation, which he clearly did not honor by sharing prior incident information with Mr. Galliher, who then used that information to raise issues which were not addressed in the motion for protective order or in Plaintiff's opposition thereto.

12. During the March 13, 2019 hearing, Mr. Galliher attempted to portray Defendants in an unfair light, raising issues not briefed before the Court or raised in the Opposition regarding his sharing of protected information regarding prior incident reports with Mr. Goldstein in *quid pro quo* fashion. In addition, Mr. Galliher has also been distributing other information obtained in this case (which he knew Venetian had requested to be protected) with George Bochanis, Esq., in the matter of *Cohen v. Venetian Casino Resort, LLC*, case no. A-17-761036-C.[3]

13. When I discovered that Mr. Galliher not only wanted unredacted information for the sixty-four (64) prior incident reports identified and produced by Defendants, but that he also intended to both contact them and share their personal information with anyone, any way, and anywhere for whatever purpose he fancied (as he had already accomplished with Attorneys Goldstein and Bochanis), I argued at the March 13, 2019 that any such reports produced must remain in redacted form and likewise be protected pursuant to NRCP 26(c).[4]

14. The Discovery Commissioner ordered as follows: *"the reports that are to be produced, they are to be redacted for the names and the contact information for all witnesses and individuals who reported incidents."* (*See id.* at 12, ln 9-11.) She added: *"there are privacy and HIPAA issues that are to be considered, and so my inclination is not to disclose the names and contact information for all people on all reports."* (*Id.* at 12, ln 24-25; 13, ln 1.)

15. Mr. Galliher did not reveal that he was freely sharing and comparing prior incident reports with Mr. Goldstein, Mr. Bochanis or any other attorney unrelated to this litigation prior to the hearing of March 13, 2019, despite the fact that he was aware of the issue and Defendants' desire for

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[3]Mr. Galliher attached a DCRR from the *Cohen* matter as Exhibit 4 to his Opposition to the Motion for Protective Order, and made reference to *"three different defense firms representing The Venetian in these three different cases; they're all different."* (*See* Exhibit A at 7, ln 17-21.)

[4]It seems apparent that this private guest information shared by Mr. Galliher with Mr. Goldstein and Mr. Bochanis (perhaps among others), would be used in some kind of depository for access by others for the purpose not only of identifying prior incidents, but also of making unwanted repeated contact with these persons. (*See* Exhibit A at 11, ln 10-25.)

NRCP 26(c) protection as of mid-December 2018, and despite the fact that a motion for protection was pending before the Court.[5] This appears to have been very much by design, so Mr. Galliher could share all information he knew Venetian deemed worthy of protection before the matter could be ruled upon by the Discovery Commissioner.

16. The Discovery Commissioner's Report and Recommendation was filed April 2, 2019. (*See* Exhibit B.)

17. Following the March 13, 2019 hearing, I sent correspondence to Mr. Galliher advising that I had reconciled an alleged discrepancy in production of prior incident reports, an issue raised for the first time by Mr. Galliher during the March 13, 2019 hearing, which was not an issue before the court, where Mr. Galliher claimed to have compared documents he obtained from Mr. Goldstein in the *Smith* litigation. (*See* Exhibit C, *Correspondence from Michael Royal, Esq., to Keith Galliher, Esq.*, dated March 25, 2019.)

18. It is Defendants' position that production of certain information provided in prior incident reports is an invasion of privacy, that said information is not necessary for Mr. Galliher to present evidence and make arguments related to notice, comparative fault, etc., and his stated desire to contact any and all such prior patrons personally is the very kind of fishing expedition contemplated by *Schlatter v. Eighth Jud. Dist Court*, 561 P.2d 1342 (Nev. 1977).

19. **There is no stay in place as to the Discovery Commissioner's Report and Recommendation of April 2, 2019**, and to my knowledge Mr. Galliher has not made any effort to comply with the NRCP 26(c) order by retrieving the protected information he has already shared with Mr. Goldstein and Mr. Bochanis regarding the sixty-four (64) prior incidents produced in this matter, which are protected pursuant to NRCP 26(c). To the contrary, Mr. Goldstein and Mr. Bochanis are

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[5]Mr. Galliher did not comply with EDCR 2.34 by discussing this issue with me prior to presenting it before the Discovery Commissioner at the March 13, 2019 hearing.

in fact presently using the NRCP 26(c) protected information provided to them by Mr. Galliher in their respective litigated matters against Venetian without any regard for the Discovery Commissioner's ruling that the protective order is presently in place. (*See* NRCP 37(b)(2); *Bahena v. Goodyear Tire & Rubber Co.,* 235 P.3d 592, 597 (2010).) (*See* Exhibit D, *Smith v. Venetian Casino Resort, LLC,* Plaintiff's Reply to Defendant Venetian Casino Resort, LLC's Opposition to Plaintiff's Motion for Terminating Sanctions, Monetary Sanctions for Willful Suppression of Evidence Pursuant to NRCP Rule 37 (March 12, 2019), with exhibits.)

20. I attended the deposition of former Venetian employee, Gary Shulman, at the office of Plaintiff's counsel on April 17, 2019. While this deposition occurred well after the April 2, 2019 DCRR at issue here, events unfolding at the deposition are germane to pending issues before the Court. I first met Mr. Shulman on June 28, 2018, when he was employed as a Table Games Supervisor for Venetian Casino Resort, LLC. On that date, Mr. Shulman and I discussed his recollection of events while he was on a shift break at my client's property. Mr. Shulman's employment was terminated on or about January 23, 2019. I was unaware of Mr. Schulman's termination until a few weeks prior to his deposition. Mr. Shulman refused to meet with me before his April 17, 2019 deposition. At the outset of the deposition, I learned that Mr. Shulman had, in fact, met with Mr. Galliher a few days earlier and related to Mr. Galliher certain facts and communications Mr. Shulman had with me during his employment in my capacity as legal counsel for Venetian in this matter. Over my objection, Mr. Shulman testified about conversations he had with me where the witness made false claims against me, personally, which put me in a very difficult and troubling position. Mr. Galliher was well aware of the ambush he had set for me at the deposition and contended that I had no right to prevent this former employee of revealing what I considered to be privileged communications to Mr. Galliher on the record. I was unprepared to adequately cross Mr. Shulman on issues raised, as Mr. Galliher did not provide any prior warning that a former employee witness would be making salacious allegations

against me personally, based on private communications he had with Mr. Galliher. Without question, Mr. Galliher knew what was coming. Mr. Galliher also knew that there was no effective way for me to cross-examine Mr. Shulman without getting into our privileged communications.

21. **I fully expect that Mr. Galliher intends to provide a copy of Mr. Shulman's deposition transcript with Mr. Goldstein and Mr. Bochanis, among many others, as part of his ongoing practice** (as he has already done with the deposition transcript of **Joseph Larson, EMT**, which has been identified under NRCP 16.1 by both Mr. Goldstein in the *Smith* litigation and also by Mr. Bochanis in the *Cohen* litigation). In the case of Mr. Shulman's deposition, Mr. Galliher elicited information he knew was deemed protected by attorney/client privilege from the witness, over objection, knowing that it would essentially turn me into a witness. I will be moving to strike all testimony elicited from Mr. Shulman in this matter based on Mr. Galliher's conduct, and **most certainly contend that the NRCP 26(c) order presently in place should preclude Mr. Galliher from sharing deposition transcripts, such as that of Mr. Shulman where confidential communications with legal counsel have been elicited and shared.**

22. Mr. Shulman also testified in his approximate 14 years working on the casino floor of Defendants' property, the subject incident of November 4, 2016 was the only occasion where he was aware of a guest falling on the marble floor.

23. I discovered on April 22, 2019 that on April 19, 2019, Mr. Goldstein filed *Plaintiff's Supplemental Opposition to Defendant's Reply to Plaintiff's Opposition to Defendant's Motion to Strike* in the matter of *Smith* matter. (*See* Exhibit I.) In that document filed with the court, Mr. Goldstein actually attached a copy of the pending *Plaintiff's Objection to Discovery Commissioner's Report and Recommendations Dated April 2, 2019*, along with an affidavit related to the production of all prior incident reports from the instant matter of *Sekera*, which was attached to the March 12, 2019 Reply filed by Mr. Goldstein. (*See id. Compare* Exhibit D.)

24. The timing of the Goldstein disclosure in the matter of *Smith* is critical. Mr. Goldstein received documents which were the subject of a motion for protective order while the issue was pending before the court, and actually filed them to support a motion one day before the Discovery Commissioner granted the Defendants' motion for protective order. The April 19, 2019 filing by Mr. Goldstein demonstrates that both he and Mr. Galliher are working in concert to defy a Court Order in order to promote their respective causes. The fact that Mr. Goldstein has attached the pending Objection filed by Mr. Galliher as an exhibit to the April 19, 2019 filing by the court in *Smith* is further evidence of that.

25. Plaintiff testified in deposition on March 14, 2019 that she worked from December 2015 to November 2016 for as much as 50-70 hours a week, with no vacations, during which time she made many hundreds of walks through the incident area without incident. (*See* Exhibit J, *Transcript of Joyce Sekera Deposition* (taken March 14, 2019) at 75-79.) Plaintiff further testified that she never saw a foreign substance on the floor of Defendants' property. (*See id.*)

26. I further declare that the exhibits identified in this response and countermotion, as outlined below, are true and correct copies of documents produced in or otherwise related to this matter.

EXHIBIT	TITLE
A	Recorder's Transcript of Hearing [On] Defendant's Motion for Protective Order (March 13, 2019)
B	Discovery Commissioner's Report and Recommendation (April 2, 2019)
C	Correspondence from Michael Royal, Esq., to Keith Galliher, Esq., dated March 25, 2019
D	*Smith v. Venetian Casino Resort, LLC*, Plaintiff's Reply to Defendant Venetian Casino Resort, LLC's Opposition to Plaintiff's Motion for Terminating Sanctions, Monetary Sanctions for Willful Suppression of Evidence Pursuant to NRCP Rule 37 (March 12, 2019), with exhibits
E	Surveillance Footage of Subject Incident (VEN 019)
F	Narrative Report (VEN 008-09)

EXHIBIT	TITLE
G	Acknowledgment of First Aid Assistance & Advice to Seek Medical Care (VEN 017)
H	Correspondence from Michael Royal to Keith Galliher, Esq., dated April 19, 2019
I	*Smith v. Venetian Casino Resort, LLC*, Plaintiff's Supplemental Opposition to Defendant's Reply to Plaintiff's Opposition to Defendant's Motion to Strike (April 19, 2019)
J	Transcript of Joyce Sekera Deposition (March 14, 2019), pp 75-79

Executed on 22 day of April, 2019.

MICHAEL A. ROYAL, ESQ.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF RELEVANT FACTS

This litigation arises from a November 4, 2016 incident occurring when Plaintiff fell in a lobby area of the Venetian while taking a break from her work station where she was employed as a salesperson for Brand Vegas, LLC, working pursuant to an agreement between Venetian and her employer, Brand Vegas, LLC, to sell tickets to Venetian events. At around 12:36 pm, as Plaintiff was en route to the women's bathroom located on the Venetian casino level near the Grand Lux Café, while carrying a covered beverage in her left hand, Plaintiff stepped with her left foot, then slipped and fell to the floor.

The cause of Plaintiff's fall is in dispute, as Venetian denies that there was any foreign substance on the floor at the time the incident occurred. This is very clear from surveillance footage of the incident. (*See* Exhibit E.)[6] Regardless, Venetian produced sixty-four (64) prior incident reports

[6]Mr. Galliher misrepresented what is depicted on the surveillance footage to the Discovery Commissioner in the March 13, 2019 hearing. (*See* Exhibit A at 5, ln 17-23.) Surveillance footage was offered by Defendants to the Discovery Commissioner at the March 13, 2019 hearing in the event

from November 4, 2013 through November 4, 2016, in redacted form, to protect the privacy of its patrons, with the understanding that Plaintiff desired the prior incident reports to argue notice and related theories of liability. Plaintiff refused to protect the privacy of information related to the prior incident reports, and demanded that they be produced in unredacted form so that she can not only use them in the present litigation to contact those involved in prior incidents, but also that she may share their personal information with others outside the litigation in uncontrolled and unfettered fashion, including but not limited to Mr. Goldstein and Mr. Bochanis (which Plaintiff's counsel has already accomplished, despite Defendants' request for a protective order, its motion for a protective order, and a present DCRR providing for an NRCP 26(c) protective order).

Following a hearing on March 13, 2019, the Discovery Commissioner ruled that the sixty-four (64) prior incident reports produced by Venetian in this matter must remain in redacted form and that they are protected pursuant to NRCP 26(c). (*See* Exhibit B.) To Venetian's knowledge, **Plaintiff has taken no action to honor the Discovery Commissioner's determination by requesting return of information her counsel produced to counsel representing parties against Venetian in other matters. To the contrary, that protected information is being used by counsel for plaintiffs in other ongoing Venetian litigation with impunity and complete disregard for the ruling presently in place.**[7] Since Plaintiff has not moved to stay the Discovery Commissioner's Report and

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she wanted to review it to gain perspective regarding the alleged condition of the floor in light of Defendants' very liberal NRCP 34 production to Plaintiffs. (*See id.* at 10, ln 14-20.) The subject incident occurs at 12:36:50 of the video. (*See* Exhibit E.) At 12:33 53, just under three minutes earlier, Venetian PAD employee Maria Cruz walks through the subject area with a broom and dust pan, and testified in deposition on April 17, 2019 that she did not see anything on the floor at that time. (*See id.*) Numerous people walk through the area over the following three minutes with absolutely no indication of any foreign substance on the floor. At 12::39:37, the camera zooms in close to the slip area and there is nothing identified from the video on the floor. Maria Cruz testified in deposition on April 17, 2019 that she did not see anything on the floor when she returned to the area with other PAD personnel at 12:39:54. Plaintiff denies she ever saw anything on the floor before or after the incident, but related that the left side of her pants were wet. (*See* Exhibits F and G.)

[7]As noted in the above Declaration, Paragraphs 20-21, Mr. Galliher has been sharing deposition transcripts with counsel in other cases, despite the fact that a Rule 26(c) protective order is in place.

Recommendation, **Plaintiff is presently in blatant violation of the Rule 26(c) protective order.** (*See* NRCP 37(b)(2); *Bahena v. Goodyear Tire & Rubber Co.*, 235 P.3d 592, 597 (2010).) Plaintiff rang a bell she knew could not be unrung here by both eliciting and sharing protected information. Even as late as April 19, 2019, the documents which are the subject of the Objection to the DCRR now before the Court have been filed with the court hearing the *Smith* matter. (*See* Exhibits D and I.) There is no stay in place, the documents at issue are under a protection order, and they are now being shared and used by counsel outside this litigation with virtual impunity.[8]

II.

NATURE OF RESPONSE

Defendants have provided Plaintiff with sixty-four (64) prior incident reports over a period of three (3) years. **The number of prior incident reports produced by Defendants' to Plaintiff in this matter is not at issue**. The only matter brought before the Discovery Commissioner was Defendants' Motion for Protective Order. Defendants moved to have information related to the sixty-four (64) prior incidents protected pursuant to NRCP 26(c), and to keep the information in redacted form. Plaintiff did not raise the issue of what she now refers to as *"Venetian's scheme of hiding evidence and disobeying court orders"* (*see Objection* at 4, ln 11-2) until the March 13, 2019 hearing. Now, in the Objection, Plaintiff has added facts and arguments that were neither briefed nor presented to the Discovery Commissioner in oral argument at the March 13, 2019 hearing.

Despite having very unclean hands, Plaintiff now comes before This Honorable Court and portrays herself as a victim in need of relief. Accordingly, Defendants not only respectfully submit that the Discovery Commissioner's Report and Recommendation be adopted by the District Court, but

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See also Exhibit H, *Correspondence from Michael Royal, Esq., to Keith Galliher, Esq.*, dated April 19, 2019.

[8]Plaintiff has actually allowed documents protected by the pending DCRR to become part of the public record, and does so without the slightest concern.

move to strike Plaintiff's arguments related to actions she has taken *"To verify Venetian's compliance with the discovery request"* **which included improperly obtaining information from Mr. Goldstein**, who was under an NRCP 26(c) protective order in the *Smith* litigation, which issue was not briefed before the Discovery Commissioner below but was merely thrown out by Mr. Galliher during the March 13, 2019 hearing in sandbag fashion, and further moves the Court to issue sanctions against Plaintiff for her continued refusal to comply with the Rule 26(c) order presently in place.

III.

ARGUMENT

A. Defendants Appropriately Sought and Obtained an NRCP 26(c) Protective Order

Rule 26 (b)(1), Nevada Rules of Civil Procedure, governs the scope of discovery, and provides for protection of both parties and other persons, against annoyance, embarrassment, oppression, or undue burden or expense. Rule 26(c), Nevada Rules of Civil Procedure, reads as follows in pertinent part:

> ***Protective Orders***. *Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with the other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:*
>
> *(1) that the discovery not be had;*
> *(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;*
> *(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;*
> *(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;*
> *(5) that discovery be conducted with no one present except persons designated by the court;*
> *(6) that a deposition after being sealed be opened only by order of the court;*
> *(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way;*
> *(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.*

The objective of discovery rules is to limit discovery to relevant matters, and to prevent *"fishing expeditions"* by restricting litigants to discovery that only implicates matters raised by them in the pleadings. (See FED. R. CIV. P. 26(b), Advisory Committee Note, Amendments to Federal Rules of Civil Procedure, at 388-90). Pursuant to the Nevada Rules of Civil Procedure, the court in which the action is pending may make any order/recommendation which justice requires to protect a party so that certain discovery abuses do not occur. (*See* NRCP 26). The compulsion of a party to produce irrelevant information is an inherently undue burden. (*See Jimenez v. City of Chicago*, 733 F. Supp. 2d 1268, 1273 (W.D. Wash. 2010) (*citing, Compaq Computer Corp. v. Packard Bell Elecs.*, 163 F.R.D. 329, 335-336 (N.D. Cal.1995)). Here, the private information Plaintiff desires has no good, relevant purpose other than to harass, vex and annoy Defendants and their guests by not only making direct contact themselves, but sharing the personal information of all such guests with the world. Plaintiff's actions are, in a word, unbelievable. The fact that Plaintiff has obtained NRCP 26(c) protected information from counsel in other ongoing litigated matters and refuses to abide by the pending NRCP 26(c) ruling by the Court is likewise very troubling.

B. **This is the kind of circumstance NRCP 26(c) is designed to address**

Plaintiff claims entitlement to all unredacted information related to the sixty-four (64) prior incident reports, and to do whatever she pleases with personal information provided on unredacted reports of prior incidents, including freely sharing them with anyone in any forum, in any manner whenever and however she chooses. Plaintiff cares nothing for the rights of those persons identified in the prior incident reports. Here, Plaintiff is seeking the very kind of *carte blanche* information (*fishing expedition*) the Nevada Supreme Court has so objected to in its holding of *Schlatter v. Eighth Judicial Dist. Court*, 93 Nev. 189, 192 (1977). Contrary to what she would have this Court believe, Plaintiff is not a victim.

1. **Guest Privacy Rights**

The Discovery Commissioner agreed that the people identified in the prior incident reports have certain rights to privacy, that there is **protected HIPAA information** in the prior incident reports, and that producing these reports in redacted form to protect the privacy of these individuals is appropriate. (*See* Exhibit B.) The Health Insurance Portability and Accountability Act of 1996 (*HIPAA*) prohibits unauthorized disclosure of certain protected health information. (*See* 42 USCS. § 1320d *et seq.*; 45 C.F.R. §§160-164.)

Providing Plaintiff with *carte blanche* personal information of all Venetian guests previously involved in incidents sets up Defendants for a cause of action for invasion of privacy by these persons. (*See e.g. Iorio v. Check City P'ship, LLC*, No. 64180, 2015 Nev. Unpub. LEXIS 658, 2015 WL 3489309, at *3 (Nev. May 29, 2015); *People for Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 111 Nev. 615, 895 P.2d 1269, 1279 (Nev. 1995) holding modified by *City of Las Vegas Downtown Redevelopment Agency v. Hecht*, 113 Nev. 632, 940 P.2d 127 (Nev. 1997), holding modified by *City of Las Vegas Downtown Redevelopment Agency v. Hecht*, 113 Nev. 644, 940 P.2d 134 (Nev. 1997).)

2. **Guest Personal Information**

Defendants employ emergency medical technicians who respond to injury related matters on Venetian property. Those EMTs routinely perform triage like exams and render first aid care, which includes not only collecting information about present condition of a guest, but also information related to past medical history, medications, etc. They also frequently provide information relayed by responding paramedics, which information is intended to be relayed to hospital personnel. Statements to responding EMTs and outside EMS personnel are often recorded in incident reports. By collecting and reporting this information, Venetian contends that it is a provider within the umbrella of HIPAA and, as such, cannot release information related to complaints of injury. Take Plaintiff's own incident, for example. Plaintiff was examined by Joe Larson, EMT, who provided intricate details of his

exchange with Plaintiff, from her initial complaints to his physical examination. (*See* Exhibit F, *Narrative Report*, VEN 008-09; Exhibit G, *Acknowledgment of First Aid Assistance & Advice to Seek Medical Care*, VEN 017.) Defendants have Plaintiff's personal information for use in this litigation; however, it does not assert *carte blanche* right to freely disseminate Plaintiff's information wherever and however it pleases.

Plaintiff cannot reasonably articulate how the identity of individuals involved in prior incidents on Venetian's premises, with no relation to Plaintiffs case, without any similar facts or circumstances, could be remotely relevant to any of Plaintiff's claims here. Her personal injury litigation arises from the allegation that Plaintiff slipped and fell on a marble floor. Individuals involved in prior slip-and-fall incidents would be unable to provide any information regarding the alleged hazard which Plaintiff contends caused her fall. Reports of prior slip and fall incidents, which occurred on different circumstances, and on different dates, in different areas of the property have no relevancy to the issue of whether Venetian had notice of any condition contributing to Plaintiff's fall on November 4, 2016. (*See Eldorado Club, Inc. v. Graff*, 78 Nev. 507 (1962); *Southern Pac. Co. v. Harris*, 80 Nev. 426, 431 (1964).)

Venetian has very good reason to request protection for its prior guests - as Plaintiff holds their privacy rights in complete disregard - much like her ongoing disregard for the present NRCP 26(c) order in place. Venetian's concern is that such information can be disseminated to the public in a multitude of ways, and passed onto other persons having nothing to do with this litigation, thereby subjecting the persons identified herein to multiple contacts by persons, who have access to their personal information, including events, injuries, care provided, etc. (Plaintiff has already demonstrated how this process works.) Plaintiff's desire to obtain this information and share it with the world serves absolutely no good purpose and is very bad public policy.

C. **The policy interests of protecting the confidential personal information outweigh the alleged need for discovery in this case**

Even where inquiries could reasonably lead to the discovery of admissible evidence, courts must still balance the proponent's interest in discovery of the information against any legitimate interest of the other party. *"[T]he initiation of a lawsuit, does not, by itself, grant plaintiffs the right to rummage unnecessarily and unchecked through the private affairs of anyone they choose. A balance must be struck."* (*Ragge v. MCA/Universal Studios*, 165 F.R.D. 601, 605 (C.D. Cal. 1995) *(quoting Cook v. Yellow Freight Sys., Inc.*, 132 F.R.D. 548,551 (E.D. Cal. 1990)). Discovery based on mere suspicion or speculation is nothing more than the proverbial *"fishing expedition."* (*See, Mackelprang v. Fid. Nat'l Title Agency of Nev.*, 2007 U.S. Dist. LEXIS 2379, *7 (D. Nev. Jan. 9, 2007); *see also, Costella v. Clark*, 2009 U.S. Dist. LEXIS 120566, *5 (N.D. Cal. Dec. 7, 2009).)

Where privacy concerns are implicated by discovery requests, the party requesting such information ***"must show that the value of the information sought would outweigh the privacy interests of the affected individuals."*** (*Case v. Platte County*, No. 8:03CV160, 2004 WL 1944777, at *2 (D. Neb. June 11, 2004) (emphasis added); *see also, Walters v. Breaux*, 200 F.R.D. 271, 274 (W.D. La. 2001), acknowledging legitimate privacy concerns with respect to social security numbers).)

Public policy concerns surrounding the protection of personal medical information are far reaching. Generally, public policy concerns favor the protection of individual health information. Similar privacy concerns surround the protection of other confidential information of non-parties, including individuals' Social Security numbers, unlisted telephone numbers and addresses, and dates of birth. A protective order is warranted where the requested discovery *"contains highly personal information.."* (*Knoll v. AT&T, et al.*, 176 F.3d 359 (6th Cir. 1999) (recognizing the need for protection of information from non-parties including an individual's unlisted address and telephone number, marital status, and medical background). In addition, many courts have found that social

security numbers are confidential and not reasonably calculated to lead to the discovery of admissible evidence. (*See, e.g., Mike v. Dymon*, No. 95-2405-EEO, 1996 WL 674007, at *7 (D. Kan. Nov. 14, 1996) (*"The court does not find that requests for social security numbers and dates of birth of all individuals who provided information to answer the interrogatories are reasonably calculated to lead to the discovery of admissible evidence."*); *Beasley v. First Amer. Real Estate Info. Serv., Inc.*, No. 3-04-CV-1059-B, 2005 WL 1017818, at *2 (N.D. Tex. April 27, 2005) (*"[T]he social security numbers of employees are confidential and not reasonably calculated to lead to the discovery of admissible evidence."*).

1. **Plaintiff plans to distribute all information freely as she has previously done**

The approximate 650 pages of incident reports include home addresses, dates of birth, driver's license numbers, and Social Security Numbers, in addition to the private health related information. Venetian has produced these prior reports with all personal identification information redacted, in order to preserve the privacy of the guests. All other information contained in the prior incident reports, which include the date, time, place and circumstances related thereto have been produced. Plaintiff's counsel and those within his circle clearly do not honor protective orders. Therefore, anything produced in unredacted form will be circulated whether a protective order is in place or not. That is quite evident here.

Should unredacted reports be produced without a protective order, the personal identification information, the medical information contained in the reports, including brief medical histories of the guests, as well as other private information, including dates and durations of the guests' stay with the hotel, injuries sustained during the prior incidents, and the perception of consumption of alcohol of the guests at the time of the incidents, could be used for any number of reasons by untold others wholly unrelated to this lawsuit. If this information were so disclosed, without court ordered protection, it would likely lead to the annoyance and aggravation of the individuals involved in prior incidents on

Venetian's property; individuals who are not believed to have any personal knowledge or information regarding any of the facts surrounding Plaintiff's alleged incident.

2. **Plaintiff is using information produce for improper purposes and cannot articulate a reasonable need for guest contact information**

Disclosure of the guest information as it pertains to this litigation alone creates an issue for Venetian, as it is potentially detrimental to its business interests to protect the confidential information of its guests. Were Venetian to disclose this information without court ordered protection, subjecting its customers to unrelenting contact by persons uninvolved with the litigation, it would likely diminish the customer/client relationships which Venetian has extended extraordinary effort and resources establishing. There is a recognized interest in protecting the disclosure of personal client information, as unauthorized disclosure would likely be perceived negatively by customers and potential customers. (*See e.g., 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]"*).)

Guests who stay at Venetian do so with an expectation that their personal information (especially when it involves health issues) will not be disclosed or disseminated freely without their consent. Accordingly, Venetian respectfully requests that the private identification information of its guests involved in prior incidents be protected from disclosure by anyone not involved in this litigation as legal counsel, an expert witness, or otherwise.

What has Plaintiff done do demonstrate her need for this information is so great that it outweighs the privacy rights of Defendants' guests? She provides the following:

> . . . Plaintiff needs the names and contact information on the incident reports because they are potential witnesses. The identity of the individuals who fell at Venetian and were injured on its marble floors as a result of impacting liquid are important because they will enable Plaintiff's Counsel to locate these witnesses and present them to **counter Venetian's expected claims that Plaintiff was comparatively negligent because she did not see the liquid substance on the floor** before she fell.

(*See Objection* at 10, ln 18-24. Emphasis added.)

Plaintiff's explanation of why she *needs* unredacted information to potentially contact hundreds of persons and share their personal information with the world makes absolutely no sense. Further, there is not now, nor has there ever been, an argument by Defendants that Plaintiff ***did not see the liquid substance on the floor before she fell*** in this matter, because Defendants' position has always been that **here was no foreign substance on the floor**. (*See* Exhibit E.)

Certainly, if Plaintiff can find a factually similar circumstance among the sixty-four (64) prior redacted incident reports previously provided that truly identify someone with something potentially relevant to provide in that regard, the Defendants will provide it to Plaintiff for the limited purpose of this litigation. If Plaintiff's rationale above is the best she can do to articulate a reason to get the *carte blanch* personal information for guests of Defendants to make contact with these people and other persons with them, and to then freely share it with the world, then her objection should fail on its face.

This is a slip and fall incident. Plaintiff has all the information she needs to argue notice. Plaintiff has an expert witness who has prepared a report and is identified to testify at trial. How can the testimony of someone who had an incident on a different day and time, at a different location within the property, under entirely different circumstances, be used to rebut an argument for comparative fault made by Defendants? We do not know, and Plaintiff apparently cannot explain it. She just *needs* it all.

Plaintiff's assertion that Venetian is acting to *"safely violate discovery rules, ignore court orders and selectively disclose information"* is classic projecting. (*See Objection* at 6, ln 1-3.) If Defendants were guilty of such conduct, certainly there would be some mention of it in the March 13, 2019 hearing transcript or within the Discovery Commissioner's Report and Recommendation. Plaintiff's allegation that Defendants have been *"hiding 80-85% of the incident reports of slip and falls on its marble floors"* is just more unsubstantiated rubbish tossed out by Plaintiff in the Objection that

should be stricken and ignored by the Court. (*See Objection* at 8, ln 1.)[9] Moreover, the issue of how many incident reports were produced by Defendants in response to Plaintiff's discovery request was not at issue before the Discovery Commissioner. Plaintiff did not file a motion or countermotion, nor did she hold a conference as required by EDCR 2.34.

Here is what Plaintiff has demonstrated in the Objection:

1. She received sixty-four (64) prior incident reports (consisting of about 650 pages) from Defendants, with contact information of all non-employees involved redacted;

2. She obtained the deposition testimony of former security officer/EMT Joseph Larson who opined that he may have responded to 100 or so slip/fall incidents over a nine year period - or about eleven (11) per year; and

3. Plaintiff has a retained expert, Thomas Jennings, prepared to testify that the subject fall area is slippery when wet, among other things.

Still, however, Plaintiff claims she cannot quite make her case unless she can identify all those involved in prior incidents, name them as witnesses, contact them, prepare to bring them to trial to testify about their unrelated experiences, and then share them freely with others wholly unaffiliated with the present litigation. That is disingenuous, at best. Plaintiff is playing a game designed to distract the finder of fact from the real issue here; *to wit:* Plaintiff fell on November 4, 2016 while walking on a dry marble floor. All the smoke and mirrors she can muster will not change that fact. Certainly, subjecting hundreds of Venetian guests who may have knowledge of unrelated prior incidents to being harassed by Plaintiff and other legal offices unaffiliated with this matter will not get us any closer to the truth. Such an effort would serve no good purpose other than to harass Defendants and their guests.

---

[9]Plaintiff's counsel is free to use his creative math skills to invent numbers of prior incidents occurring on Defendants' property.

COUNTERMOTION TO STRIKE FACTS, EVIDENCE AND ARGUMENTS NOT BRIEFED BELOW

Defendants hereby move this Honorable Court to strike and disregard the following factual assertions and arguments not presented to the Discovery Commissioner in Defendants' Motion for Protective Order.

1. *During his deposition Mr. Larson indicated approximately 300-500 injury slip and fall injuries (sic) occurred on the marble floors at Venetian in the last five (5) years.* (*See id.* at 2, ln 21-23.) That is a complete misrepresentation of Mr. Larson's sworn testimony. First Mr. Larson has not been employed with Venetian for more than two (2) years; therefore, Plaintiff's representation is false on its face. Second, this fabrication had nothing to do with any issue before the Discovery Commissioner.

2. *Thus, when Venetian disclosed a mere 64 redacted incident reports Plaintiff instantly suspected the vast majority were missing.* (*See id.* at 3, ln 1-2.) This is simply Plaintiff's post motion justification for colluding with Mr. Goldstein so that Plaintiff's counsel could improperly obtain information protected pursuant to NRCP 26(c) in the *Smith* litigation.

3. Nothing related to Mr. Galliher's collusion with Mr. Goldstein was briefed before the Discovery Commissioner. It should not be considered here other than to demonstrate Plaintiff's unclean hands and complete disregard for Court determinations, by refusing to comply with the NRCP 26(c) protective order presently in place both in this matter and in the *Smith* matter involving Mr. Goldstein.

4. *"By hiding 80-85% of the incident reports of slip and falls on its marble floors, Venetian ensures the public will never determine the magnitude of the problem, will never have the opportunity to deter Venetian from wrongdoing, and will never be able to encourage Venetian to make their premises safer."* (*See id.* at 8, ln 1-5.) No evidence has **ever** been produced by Plaintiff to substantiate her claim that Venetian is hiding anything. Again, this issue was not brief before

the Discovery Commissioner, there was no EDCR 2.34 conference held by Plaintiff's counsel, and it is unrelated to the DCRR. Therefore, this commentary and any argument related thereto should not be allowed or given consideration here.

To the extent such argument is so considered, the Court should be aware that Plaintiff herself testified that while spending approximately 3,000 hours on Defendants property between December 2015 and November 2016, making multiple walks through Venetian property a day, she never saw a foreign substance on the floor, never saw a person fall, and never even heard of such an occurrence. (*See* Declaration of Michael A. Royal, Esq., paragraph 25; Exhibit J.) Also, former employee Gary Shulman testified that in his fourteen (14) years working on the Venetian casino floor as a Table Games Supervisor, the subject incident was the only occasion in which he can recall having any personal knowledge of a guest slip and fall. (*See* Declaration of Michael A. Royal, paragraph 22.) That kind of testimony does not agree with the creative accounting promoted by Plaintiff in her presented analysis above. It is just more fabrication by Plaintiff present a false narrative and justify her refusal to comply with the present protective order.

COUNTERMOTION FOR ORDER DIRECTING RETURN OF ALL NRCP 26(c) PROTECTED INFORMATION AND COUNTERMOTION FOR SANCTIONS

1. An NRCP 26(c) Protective Order is in place, there is no stay, and Plaintiff is in blatant violation

Rule 2.34(e), Eighth Judicial District Court Rules, provides the following: "***The commissioner may stay any disputed discovery proceeding pending resolution by the judge.***" (Emphasis added.) Plaintiff did not move for a stay of the Court's ruling on Defendants' motion for an NRCP 26(c) protective order. Accordingly, the NRCP 26(c) protective order is the law of the case. Despite that, Plaintiff has done nothing to comply with it. To the contrary, as Plaintiff has demonstrated here, she strategically conspired with counsel in the *Smith* matter to take all protected prior incident reports at issue before the Discovery Commissioner and have them filed

with the court, becoming public record, on March 12, 2019 - one day before the March 13, 2019 hearing before the Discovery Commissioner. (*See* Exhibits D and I.) Plaintiff should have protected the documents prior to the March 13, 2019 hearing. Most certainly, Plaintiff should have taken action following the March 13, 2019 hearing to comply with the DCRR. To the contrary, Plaintiff has ignored it entirely. She and counsel in the *Smith* and *Cohen* matters have collectively shown complete disregard for the rule of law. Defendants therefore respectfully submit that Plaintiff is now subject to sanctions under NRCP 37(b)(2) for her blatant violation of the DCRR.

2. **Plaintiff should be ordered to take every possible step to retrieve information protected per the Discovery Commissioner's April 2, 2019 DCRR and ensure it is not improperly used by anyone outside this litigation**

There is a protective order in place. Plaintiff disregarded it, distributed the information, obtained information from other attorneys in unrelated ongoing litigation, and seeks to benefit from her refusal to comply. That alone should be sufficient to affirm the DCRR. However, Plaintiff quickly distributed information she knew was deemed protected by Defendants before the Court could hear this matter, then did nothing as counsel in other cases swiftly identified it in their respective NRCP 16.1 disclosures. Therefore, Defendants respectively move this Honorable Court to order that Plaintiff retrieve all information distributed in this matter to anyone outside this litigation, with an order directing that such information cannot be used in any other matter, as though there had been no inappropriate distribution by Plaintiff at all.

3. **Defendants move for appropriate sanctions**

The Nevada Supreme Court has held that *"a district court has the discretion to sanction a party for its failure to comply with a discovery order. . . ."* (*Bahena v. Goodyear Tire & Rubber Co.*, 235 P.3d 592, 596 (2010).) Therefore, this Honorable Court has discretion to impose appropriate sanctions based on Plaintiff's complete failure to protect information she has shared with persons outside the litigation. (Indeed, Plaintiff's sharing of information she knew Venetian

desired to be kept confidential prior to the issue being heard before the Discovery Commissioner was a very calculated, premeditated end around to head off any potential adverse ruling by the Court.)

The options available to the Court are set forth in NRCP 37(b)(2), which include establishing certain disputed facts as true, striking certain claims or defenses, striking pleadings in whole or in part, staying proceedings until the order is obeyed, or dismissal.

Plaintiff is under a legal obligation to comply with the Discovery Commissioner's Report and Recommendation at issue. She has taken no steps to remedy the matter by retrieving documents exchanged with other counsel in ongoing unrelated litigation against Defendants, despite the Court order. In the meantime, Mr. Goldstein has used the prior incident reports (with Plaintiff's knowledge and blessing) to support a motion for sanctions against Defendants which hearing is set to be heard this week. Obviously, Plaintiff did not comply with the present Court order because it would have impeded Mr. Goldstein's failed efforts against Venetian in the *Smith* litigation. Yet, Plaintiff has the audacity to assert that Venetian is the one abusing discovery and violating Court orders.

a. **Dismissal**

Based on Plaintiff's bad actions, Defendants hereby move for dismissal of the Complaint. Plaintiff clearly fears she cannot win on the merits and has therefore elected to utilize unscrupulous methods of discovery.[10]

b. **Establish a Disputed Fact**

Should the Court seek a lesser alternative, Defendants move for a finding that there was no foreign substance on the floor, consistent with the evidence, and that Plaintiff pay Defendants' fees

[10]*See i.e.* Declaration of Michael A. Royal, Paragraphs 20-21. *See also* Exhibit H.

and costs associated with having to both bring the Motion for Protective Order, and to respond to the Objection to the Discovery Commissioner's Report and Recommendation.

c. ***Bass-Davis* Like Instruction**

Alternatively, the Court could fashion an instruction or finding under *Bass-Davis v. Davis*, 122 Nev. 442, 134 P.3d 103 (2006), providing Defendants with a rebuttable presumption instruction that Defendants had no constructive notice of any foreign substance on the floor prior to Plaintiff's fall, and preclude Plaintiff from using evidence obtained from any other pending litigation involving the Venetian property. Defendants would further move for an award of its fees and costs associated with the Motion for Protective Order, and to respond to the present Objection.

d. **Affirm and Order Document/Information Retrieval, with Fees/Costs**

At a minimum, Defendants move for a finding that the DCRR be affirmed, that all information provided to Plaintiff by Defendants in this matter be protected under NRCP 26(c), that Plaintiff be ordered to pay Defendants' fees and costs associated with having to bring the motion for protective order and respond to this Objection, along with any additional monetary sanctions the Court deems appropriate to prevent Plaintiff from so blatantly disregarding a Court order in the future, and that Plaintiff be ordered undertake to reacquire all documents previous distributed to counsel in other litigated matters, with an order stating that these documents were inappropriately shared by Plaintiff. Finally, the order should relate to all discovery exchanged and deposition transcripts. As noted in Paragraphs 20-21 of the Declaration of Michael A. Royal, Plaintiff in this case purposely elicited testimony protected by attorney/client privilege from a witness and will no doubt distribute it wildly to the world when the transcript is received.

Defendants also move for leave under NRCP 30(a)(2)(A) to retake the deposition of Gary Shulman, if deemed necessary.[11]

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[11] *See id.*

IV.

CONCLUSION

Based on the foregoing, Defendants respectfully submit that the Discovery Commissioner's Report and Recommendation of April 2, 2019 should be affirmed, and that Defendants' countermotion for sanctions under NRCP 37(b)(2) should be granted based on Plaintiff's refusal to obtain a stay from the DCRR and comply with the protective order now in place, as set forth above.

DATED this 22 day of April, 2019.

ROYAL & MILES LLP

By _____

Michael A. Royal, Esq.
Nevada Bar No. 4370
1522 W. Warm Springs Rd.
Henderson, NV 89014
Attorney for Defendants
VENETIAN CASINO RESORT, LLC and
LAS VEGAS SANDS, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23 day of April, 2019, and pursuant to NRCP 5(b), I caused a true and correct copy of the foregoing **RESPONSE TO PLAINTIFF'S OBJECTION TO DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS DATED APRIL 2, 2019, COUNTERMOTION TO STRIKE FACTS AND ARGUMENTS NOT BRIEFED BEFORE THE DISCOVERY COMMISSIONER, COUNTERMOTION FOR ORDER DIRECTING PLAINTIFF TO COMPLY WITH PROTECTIVE ORDER BY RETRIEVING ALL INFORMATION DISTRIBUTED TO PERSONS OUTSIDE THE LITIGATION, AND COUNTERMOTION FOR APPROPRIATE SANCTIONS UNDER NRCP 37(b)(2)** to be served as follows:

✓ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

____ to be served via facsimile; and/or (with exhibits)

✓ pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail; and/or

____ to be hand delivered;

to the attorneys and/or parties listed below at the address and/or facsimile number indicated below:

Keith E. Galliher, Jr., Esq.
THE GALLIHER LAW FIRM
1850 E. Sahara Avenue, Suite 107
Las Vegas, NV 89014
Attorneys for Plaintiff
Facsimile: 702-735-0204
E-Service: kgalliher@galliherlawfirm.com
dmooney@galliherlawfirm.com
gramos@galliherlawfirm.com
sray@galliherlawfirm.com

Ashley Schmitt
An employee of ROYAL & MILES LLP

EXHIBIT 14

Register of Actions

Case No. A-18-772761-C

Joyce Sekera, Plaintiff(s) vs. Venetian Casino Resort LLC, Defendant(s) §
§
§
§
§
§

Case Type:	**Negligence - Premises Liability**
Date Filed:	**04/12/2018**
Location:	**Department 25**
Cross-Reference Case Number:	**A772761**

Party Information

		Lead Attorneys
Defendant	**Las Vegas Sands LLC *Doing Business As* Venetian Las Vegas**	**Michael A Royal** *Retained* 7024716777(W)
Defendant	**Venetian Casino Resort LLC *Doing Business As* Venetian Las Vegas**	**Michael A Royal** *Retained* 7024716777(W)
Plaintiff	**Sekera, Joyce**	**Keith E. Galliher, Jr.** *Retained* 7027350049(W)

Events & Orders of the Court

05/28/2019 **All Pending Motions** (9:00 AM) (Judicial Officer Delaney, Kathleen E.)

Minutes

05/28/2019 9:00 AM

- Kathleen Galligher, Esq. present on behalf of Pltf. PLTF'S. MOTION FOR LEAVE TO AMEND THE COMPLIANT...DEFT'S. MOTION TO STRIKE ADDED EVIDENCE AND INFORMATION BY PLTF. IN REPLY TO DEFT'S. OPPOSITION TO PLFT'S. MOTION FOR LEAVE TO AMEND THE COMPLIANT AND TO STRIKE ALL UNAUTHENTICATED EVIDENCE, OR, ALTERNATIVELY, TO ALLOW DEFT'S. AN OPPORTUNITY TO RESPOND, ON ORDER SHORTENING TIME Extensive arguments regarding Ptlf's. ability to add punitive damages, Deft's. concerns regarding representations made by Mr. Gary Shulman and if there was misrepresentation, if information in Pltf's. reply is accurate, if any information should be stricken, and prior recommendations made regarding Deft's. marble floors and discovery regarding the history of falls on the floors. COURT STATED FINDINGS, and ORDERED, Pltf's. Motion for Leave to Amend the Compliant GRANTED;it would be a disservice to the case to not allow discovery that could support punitive damages. Deft's. Motion DENIED. Mr. Galliher to prepare the Order, provide a copy to opposing counsel for review as to form and content, and return it back to the Court within 10 days. Upon Mr. Royal's inquiry, COURT ADVISED, It's prior Order regarding the Protective Order still STANDS.

Parties Present
Return to Register of Actions

EXHIBIT 15

RFP
Michael A. Royal, Esq.
Nevada Bar No. 4370
Gregory A. Miles, Esq.
Nevada Bar No. 4336
ROYAL & MILES LLP
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Attorneys for Defendants
VENETIAN CASINO RESORT, LLC and
LAS VEGAS SANDS, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

JOYCE SEKERA, an Individual; Plaintiff, v. VENETIAN CASINO RESORT, LLC, d/b/a THE VENETIAN LAS VEGAS, a Nevada Limited Liability Company; LAS VEGAS SANDS, LLC d/b/a THE VENETIAN LAS VEGAS, a Nevada Limited Liability Company; YET UNKNOWN EMPLOYEE; DOES I through X, inclusive, Defendants.	CASE NO.: A-18-772761-C DEPT. NO.: XXV

RESPONSES TO PLAINTIFF'S THIRD REQUEST FOR PRODUCTION OF DOCUMENTS AND MATERIALS TO DEFENDANT

TO: Plaintiff JOYCE SEKERA; and

TO: Keith E. Galliher, Jr., Esq.; her attorney:

Pursuant to Rules 26 and 34 of the Nevada Rules of Civil Procedure, Defendant VENETIAN CASINO RESORT, LLC, and LAS VEGAS SANDS, LLC, by and through their counsel, ROYAL & MILES LLP, responds to Plaintiff's first requests for production of documents and materials as follows:

ROYAL & MILES LLP
1522 W Warm Springs Road
Henderson NV 89014
Tel: (702) 471-6777 ◆ Fax: (702) 531-6777

REQUEST NO. 12:

Any and all documents, reports, emails, correspondence, test results, including expert reports generated by Plaintiffs and/or The Venetian Casino Resort, LLC, d/b/a The Venetian Las Vegas with respect to the coefficient of friction, wet and dry, of the marble floors located on the ground floor and Bouchon restaurant floor of The Venetian Casino Resort, LLC, d/b/a The Venetian Las Vegas from three years before the fall, November 4, 2013, to the present.

RESPONSE NO. 12:

Defendants object to the extent this request lacks foundation and assumes facts not in evidence, is overly broad, vague and ambiguous (*i.e. "ground floor"* would refer to the basement which has a different floor surface, and *"Bouchon restaurant floor"* as Defendants did not own, manage, maintain or control the premises of the Bouchon restaurant nor is there any evidence that Plaintiff ever in the Bouchon restaurant at any time), is unduly burdensome and presupposes Defendants are in possession of all information requested, further to the extent that it seeks information protected by attorney/client privilege and/or attorney work product privilege, further to the extent it seeks information surrounding expert consultants or seeks information related to the disclosure of experts prior to the time set forth in the Joint Case Conference Report, and also to the extent it seeks information not reasonably calculated to lead to the discovery of admissible evidence. Without waiving and subject to said objection, Defendants respond as follows: As to any such reports obtained from November 3, 2013 to November 4, 2016 on the main casino floor level where the subject incident occurred, Defendant has no documents responsive to this request beyond those which it has disclosed pursuant to NRCP 16.1 and all supplements thereto. Discovery is continuing.

REQUEST NO. 13:

Any and all documents invoices, work orders or communications with respect to the purchase and/or application of any coating placed on the marble floors located on the ground floor and Bouchon

restaurant floor of the Venetian Casino Resort, LLC, d/b/a The Venetian Las Vegas from three years before the fall, November 4, 2013, to the present.

RESPONSE NO. 13:

Defendants object to this request as vague, ambiguous and overly broad as to *"any coating placed on the marble floor"* (*i.e.* this conceivably would include water used to clean), *"ground floor"* (as this refers to the basement area, which has an entirely different floor surface), and *"Bouchon restaurant floor"* (Defendants did not own, manage, maintain or control the premises of the Bouchon restaurant nor is there any evidence that Plaintiff ever in the Bouchon restaurant at any time), lacks foundation and assumes facts not in evidence (*i.e.* that Plaintiff was ever in and around the Bouchon restaurant at any time prior to the subject incident or that there was a foreign substance on the floor at the time of Plaintiff's fall, which Defendants deny), to the extent it seeks information not reasonably calculated to lead to the discovery of admissible evidence. Without waiving and subject to said objection, Defendants respond as follows: As to the area where Plaintiff fell, from the time period of November 4, 2013 to November 4, 2016 on the main casino floor level where the subject incident occurred, please see Defendants' disclosures pursuant to NRCP 16.1, including but not limited to VEN 1078-VEN 1097. Discovery is continuing.

REQUEST NO. 14:

Any and all incident/security reports regarding injury falls on the marble floors located at the Venetian Casino Resort, LLC, d/b/a The Venetian Las Vegas, from three years before the fall November 4, 2013, to the present.

RESPONSE NO. 14:

Defendants object to the extent this request lacks foundation and assumes facts not in evidence (*i.e.* that there was a foreign substance on the floor at the time of Plaintiff's fall, which Defendants deny), is overly broad, vague and ambiguous, unduly burdensome and presupposes Defendants are in

possession of all information requested, to the extent that it seeks information protected by attorney/client privilege and/or attorney work product privilege, to the extent it seeks information surrounding expert consultants or seeks information related to the disclosure of experts prior to the time set forth in the Joint Case Conference Report, and to the extent it seeks information not reasonably calculated to lead to the discovery of admissible evidence. Without waiving and subject to said objection, Defendants respond as follows: *See* documents previously identified by Defendants as VEN 269 - 928, and all supplements thereto, which relate to the common areas of flooring on the casino floor area where the subject incident occurred. Discovery is continuing.

DATED this 15 day of April, 2019.

ROYAL & MILES LLP

By: _____

Michael A. Royal, Esq.
Nevada Bar No. 4370
Gregory A. Miles, Esq.
Nevada Bar No. 4336
1522 W. Warm Springs Road
Henderson, NV 89014
Attorneys for Defendants
VENETIAN CASINO RESORT, LLC and
LAS VEGAS SANDS, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15 day of April, 2019, and pursuant to NRCP 5(b), I caused a true and correct copy of the foregoing **RESPONSES TO PLAINTIFF'S THIRD REQUEST FOR PRODUCTION OF DOCUMENTS AND MATERIALS TO DEFENDANT** to be served as follows:

_____ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

_____ to be served via facsimile; and/or

✓ pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail; and/or

_____ to be hand delivered;

to the attorneys and/or parties listed below at the address and/or facsimile number indicated below:

Keith E. Galliher, Jr., Esq.
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An employee of ROYAL & MILES LLP

EXHIBIT 16

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DISTRICT COURT

CLARK COUNTY, NEVADA

JOYCE SEKERA, an Individual,

Plaintiff,

v.

VENETIAN CASINO RESORT, LLC, d/b/a THE VENETIAN LAS VEGAS, a Nevada Limited Liability Company; LAS VEGAS SANDS, LLC d/b/a THE VENETIAN LAS VEGAS, a Nevada Limited Liability Company; YET UNKNOWN EMPLOYEE; DOES I through X, inclusive,

Defendants.

CASE NO.: A-18-772761-C
DEPT. NO.: 25

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION OF ORDER REVERSING THE APRIL 4, 2019 DCRR ON UNREDACTED INCIDENT REPORTS

Plaintiff hereby submits her Opposition to Defendants' Motion for Leave to File Motion for Reconsideration of Order Reversing the April 4, 2019 DCRR on Unredacted Incident Reports.

This Oposition is based upon and supported by the following memorandum of points and authorities, the pleadings and papers on file, the exhibits attached hereto, and any argument that the Court may allow at the time of hearing.

DATED this 5th day of September, 2019

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Kathleen H. Gallagher, Esq.
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MEMORANDUM AND POINTS OF AUTHORITIES

I. INTRODUCTION

This is a personal injury case arising out of a slip and fall in the Venetian Casino Resort. On November 4, 2016 around 12:30 p.m. Plaintiff Joyce Sekera was walking through Venetian. As Joyce passed the Grand Lux Café Restrooms, she slipped and fell on water on the black marble floors. On the way down Plaintiff struck her skull on the pillar and her left elbow on the ground. The first Venetian employee to come to Joyce's aid, Gary Shulman, confirmed there was water on the floor. (*See* Deposition of Gary Shulman, attached as Exhibit "1" at 8:6-10; 8:23-9:11; 10:8-17.)

Over the last two years Plaintiff underwent low back injections, medial branch blocks and two rounds of radio frequency ablations. (July 10, 2019 Pain Institute of Nevada Record, attached as Exhibit "2" at 2.) In June, after Plaintiff's most recent set of radio frequency ablations failed, Dr. Smith opined "I do not see how this woman will be able to avoid surgical treatment" "Rhizotomies in my opinion will give her some temporary relief, but certainty not long-term." (July 8, 2019 Western Regional record, attached as Exhibit "3.") Plaintiff will thus be undergoing L5-S1 surgery in the near future.

Over a year ago Plaintiff sent Defendants a request for production for prior and subsequent incident reports. Defendants provided the redacted reports and moved for a protective order on the unredacted reports. The Discovery Commissioner granted the protective order however the Court overruled the Report and Recommendation stating: "Commissioner Truman made an error here, it is relevant discovery. Court does not see any legal basis upon which this should have been precluded." (Defendants' Mot. at Exhibit "C.") Defendants now move the Court to reconsider its order overruling the Discovery Commissioner's report and recommendation on the unredacted incident reports. As discussed in detail below, the Court should deny Defendants' Motion for Reconsideration ("Defendants' Motion") because it improperly re-argues previous arguments, improperly re-argues the same cases and improperly makes new meritless arguments which could have been presented in Defendants' original motion and opposition to Plaintiff's objection.

II. FACTUAL BACKGROUND

A. Plaintiff's Request for Production and Defendants' Motion for A Protective Order

On August 16, 2018 Plaintiff sent Defendants her first set of requests for production. Plaintiff's 7th request asked Defendants provide:

> True and correct copies of any and all claim forms, legal actions, civil complaints, statements, security reports, computer generated lists, investigative documents or other memoranda which have, as its subject matter, slip and fall cases occurring on marble floors within the subject VENETIAN CASINO RESORT within three years prior to the incident described in Plaintiff's Complaint [November 4, 2013], to the present.

(Plaintiff's First Set of Requests for Production, attached as Exhibit "4" at 3:3-9.)

In response to this request, Defendants produced 64 redacted incident reports between November 4, 2013 and November 4, 2016. (Defendants' Motion for a Protective Order, attached as Exhibit "5" at 3:25-4:2.) Defendants produced these reports before moving for a protective order. (*Id.* at 3:25-26.) Defendants ignored the portion of Plaintiff's request which asked for subsequent incident reports and subsequently misrepresented to the Court that Plaintiff had only requested reports "occurring within three years preceding the subject incident." (*Id.* at 3:14-16.)

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Plaintiff requested Defendants provide the unredacted reports so she could identify witnesses to counter Defendants' comparative negligence claim that Plaintiff should have seen liquid on the floor before she fell. (*Id.* at 4:3-14.) Defendants refused to produce the unredacted reports and filed a motion for a protective order on the unredacted reports only. (*Id.*) Defendants' Motion for a Protective Order argued, per *Eldorado Club,* the unredacted incident reports requested "have no relevancy to the issue of whether Venetian had notice of any condition contributing to Plaintiffs fall on November 4, 2016." (*Id.* at 7:27-8:2.) Defendants' further argued the privacy interests of the affected individuals, including not having their names, address, dates of birth, medical information, ect. disclosed, do not outweigh the need for discovery. (Exhibit "5" at 8:13-11:14.)

Plaintiff's Opposition argued she needed the unredacted reports to identify "witnesses to the conditions of the marble floor at The Venetian and the fact that this flooring is very unsafe when topped with water or some other liquid substance", that no privacy concerns were involved because there are no social security numbers in the incident reports, and that even if there were privacy concerns Venetian did not have standing to raise them. (Plaintiff's Opp. to Defendants' Mot. for a Protective Ordr., attached as Exhibit "6" at 2:8-23.)

Defendants Reply in Support of their Motion argued "It is clear that Plaintiff does not care about issues related to the protect (sic) of privacy rights" and reiterated their position that that privacy concerns warrant a protective order. (Defendants' Rply. in Support of Their Mot. for a Protective Ordr., attached as Exhibit "7" at 10:3-11:4.) Defendants also filed an Addendum to ask the Discovery Commissioner for new relief: a protective order on the previously produced redacted incident reports. (Defendants' Addendum to Their Rply. in Support of Mot. for a Protective Order, attached as Exhibit "8" at 4:20-23.)

Based upon the briefing and oral argument, the Discovery Commissioner issued a Report and Recommendation recommending "the prior incident reports produced by Venetian... remain in redacted form as originally provided" and that the prior redacted reports "present[] a privacy issue as it pertains to the identity of prior Venetian guests and includes protected HIPPA related information" and should therefore be subjected to a protective order. (Defendants' Mot. at Exhibit "D" at 3:5-9.)

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B. Objection to the April 4, 2019 DCRR

Plaintiff objected to the Report and Recommendation and argued courts uniformly agree a risk of public disclosure or collaborative sharing of information is not good cause for a protective order, and that sharing discovery amongst lawyers saves costs, expedites litigation and is an effective means of insuring full and fair disclosure from opposing parties. (Plaintiff's Obj. to April 4, 2019 DCRR, attached as Exhibit "9" at 4:13-5:18.) Plaintiff further argued that issuing a protective order in this case undermines the civil justice system because it ensures the public will never know the magnitude of the problem of Venetian's floors and will therefore never be able to encourage Venetian to make their premises safer in the future by holding them accountable. (*Id.* at 6:19-9:6.) Finally, Plaintiff argued the HIPAA rules do not apply to hotel-casinos. (*Id.* at 9:8-10:26.)

Defendants' opposed Plaintiff's Objection and argued the incident reports should remain in redacted form with a protective order preventing them from being shared to "protect the privacy of its [Venetian's] partrons" and to protect Defendants' guests for Plaintiff who wishes "to harass, vex, and annoy Defendants and their guests by not only making direct contact themselves, but sharing the personal information of all such guests with the world." (Defendants' Opp. to Plaintiff's Obj. to April 4, 2019 DCRR, attached as Exhibit "10" at 12:1-2, 15:11:13.) Defendants' further argued HIPAA protects the information sought. (*Id.* at 16:1-16.) Finally, Defendants reiterated their argument that under *Eldorado* the prior incident reports were irrelevant to the issue of notice, and that the policy interests of protecting the private information outweighed Plaintiff's need for discovery. (*Id.* at 16:12-17, 18:1-22:25.)

Plaintiff submitted a Reply in Support of her Objection which reiterated her arguments that courts uniformly agree the risk of collaborative sharing of information is not grounds for a protective order and that the HIPAA laws and supporting cases do not include hotel-casinos. (Plaintiff's Rply. in Support of Her Obj., attached as Exhibit "11" at 8:17-11:5.)

The Court heard Plaintiff's Objection on May 14, 2019. (Defendants' Mot. at Exhibit "C.") The Court determined "Commissioner Truman made an error here, it is relevant discovery. Court

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does not see any legal basis upon which this should have been precluded." (*Id.*) Thus, the Court overruled the April 4, 2019 DCRR in its entirety. (*Id.*)

C. Defendants' History of Playing Hide the Ball in Discovery

Also relevant background information is Defendants' history of playing hide the ball in discovery. On April 15, 2019 Defendants served their responses to Plaintiff's third set of requests for production which stated "As to any such [incidents] reports obtained from November 3, 2013 to November 4, 2016 on the main casino floor level where the subject incident occurred, Defendants have no documents responsive to this request beyond those which it has disclosed pursuant to NRCP 16.1 and all supplements thereto." (Defendants' Rspn. to Plt.'s Third RFPs, attached as Exhibit "12" at 2:21-24.) Shortly after receiving this response Plaintiff's counsel dug through a few prior cases to identify unproduced responsive incident reports. Plaintiff's counsel quickly found 2 prior responsive incident reports that resulted in litigation (case nos. A-15-729566-C and A-17-751293-C) which Defendants "missed" when compiling their responses. Defendants later admitted these reports "should have been included by Venetian in its response to the request for prior incident reports" and that "Defendants will supplement NRCP 34 responses to provide" these reports. (Excerpts of Michael Royal's Declaration in Support of Opposition to Motion to Amend, attached as Exhibit "13" at 12:1-15.)

In July 2019 Plaintiff filed her first motion to compel in which listed additional responsive reports Defendants again conveniently missed. (Defendants' Opp. to Plt.'s Mot. to Compel filed July 12, 2019, attached as Exhibit "14.") Defendants' Opposition admitted they did not provide an "11/7/13 (Grand Lux Cafe; Marble slip and fall)" and a 06/11/16 "Venetian front office" slip and fall on "a puddle of water." (*Id.* at 10:25-11:4, 12:1-12:8.) Defendants then provided both of these reports.

Defendants also did not fully and fairly disclose incident reports in three other cases: *Smith v. Venetian, Cohen v. Venetian* and *Boucher v. Venetian.* In *Smith v. Venetian,* Defendants left out 35 incident reports responsive to Smith's request for production. (Motion for Case Ending Sanctions in *Smith v. Venetian* attached as Exhibit "15" at 4:7-10, 5:5.) In *Boucher v. Venetian,* Defendants left

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out 32 incident reports responsive to Boucher's request for production. (Excerpts of Motion to Amend in *Boucher v. Venetian* attached as Exhibit "16" at 7:19-11:19.)

III. LEGAL ARGUMENT

A. Standard of Review for A Motion for Reconsideration

A rehearing of a matter may only occur when a movant obtains leave of the court. EDCR. 2.24(a). *Murphy v. Murphy*, 183 P.2d 632 ,635 (Nev. 1947). Under established practice, a litigant may not raise new legal points for the first time on rehearing. *In Re Ross,* 99 Nev. 657,668 P.2d 1089, 1091 (1983). Further, a motion for rehearing may not be utilized as a vehicle to reargue matters considered and decided in the court's initial opinion. *Id.* Rather, a motion for rehearing should direct attention to some controlling matter which the court has overlooked or misapprehended. *Id.* Rehearings are not granted as a matter of right and are not allowed for the purpose to reargue, unless there is a reasonable probability the Court may have arrived at an erroneous conclusion. *Geller v. McCown,* 64 Nev. 102, 178 P.2d 380 (1947).

It is well-settled that rehearings are appropriate only where "substantially different evidence is subsequently introduced or the decision is clearly erroneous." *Masonry & Tile Contractors v. Jolley, Urga & Wirth*, 113 Nev. 737, 941 P.2d 486 (1997). In order to gain a "second bite at the apple" the defendant may not raise points or contentions not raised in its initial motion and oppositions. *Edward J. Achrem, Chartered v. Expressway Plaza, Ltd.*, 112 Nev. 373, 917 P.2d 447 (1996). The failure to make the arguments in the first instance constitutes a waiver. *Chowdry v. NLVH, Inc.,* 111 Nev. 560,893 P.2d 385 (1995). Venetian's Motion should be denied because the new evidence raised is not substantially different and because it impermissibly reargues points and contentions not raised in the initial opposition in an attempt to gain a second bite at the apple.

Despite the fact that Defendants are well aware of these cases, the Motion conveniently leaves out all established precedent related to re-arguing points and raising new legal points for the first time on rehearing.[1]

---

[1] Plaintiff cited these same cases in her opposition to Defendants' Motion for Reconsideration on the order granting Plaintiff's motion to amend her complaint to add a claim for punitive damages.

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B. Defendants' Attempt to Sway the Court's Opinion by Misrepresenting the Facts of the Case

1. Plaintiff's Counsel Never Stated He is "Mining" Information for Other Lawyers and Is Not Using Discovery to Aid His Violation of NRPC 7.3(a)

Defendants repeatedly allege Plaintiff's counsel stated he is "min[ing]" information to share with multiple other attorneys within the local plaintiff's bar" "Keep in mind that Plaintiff is, in her counsel's own words, "*mining*" information. (Defendants' Mot. at 18:2-4, 5:7-8, 7:1-2, 14:3, 18:21-24.) Defendants are literally making up quotes from Plaintiff's counsel. The undersigned **NEVER** made such statements or otherwise implied, eluded to or suggested he was engaging in such conduct. This allegation is untrue, unsupported and was designed specifically and intentionally by Defendants to get the Court to rule in their favor.

The phrase – "mining information" – came from Defendants, who pulled one over on this Honorable Court by sneaking it into an order they submitted in May. Defendants strategically placed this phrase in the Order reversing the Discovery Commissioner's April 4, 2019 DCRR: Defendants argued "Plaintiff is using the discovery process to mine information." (Defendants' Mot. at Exhibit "A" at 3:1-3.) This was the first time the phrase "mining information" was used in this case. Coincidentally after Defendants filed this Order they suddenly began quoting these words as Plaintiff's counsel's.

Defendants then discuss the fact that these incident reports involved persons and "incidents within the two year statute of limitations." (Defendants' Mot. at 22:27-28; *see also* Defendants' Mot. for a Protective Ordr. at 23:27-24:2 "this [Plaintiff's discovery] is a thinly veiled attempt by Plaintiff's counsel to "*mine information*" that will potentially allow him to identify potential clients involved in incidents within the preceding two years.") This second statement strongly implies Plaintiff's counsel is sending discovery requests to aid in his violation of NRPC 7.3(a) ("a lawyer

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(Excerpts of Plaintiff's Opp. to Def.'s Mot. for Reconsideration, attached as Exhibit "17" at 6:19-7:18, 9:15-22, 10:15-25.) Despite the fact that Defendants were well aware they could not bring up new points which could have been raised in the initial briefing, Defendants insist on wasting the Court's and Plaintiff's time by filing a motion for reconsideration solely based on information available to Defendants at the time of the initial briefing.

shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.") Defendants offer no evidence to back up this insinuation. The undersigned has been nothing less than an outstanding member of the bar for the last 45 years. The fact that Defendants, without a scintilla of evidence, would imply otherwise is gravely concerning.

2. Plaintiff Never Shared "Unredacted" Information and Never Shared Information with the Lawyers In *Boucher v. Venetian*

The Motion also alleges "Mr. Galliher is known to have already shared unredacted information in his possession with attorneys representing plaintiff... *Boucher v. Venetian* (A-18-773651-C). As noted, Mr. Galliher has acknowledged that he is presently in the process of "*mining*" information from Venetian." This statement is absurd and a clear Rule 11 violation: it is impossible for Plaintiff to have shared "unredacted information" because Defendants never provided the unredacted information. Moreover, Plaintiff never provided the redacted incident reports to the lawyer – Sarah Banda, Esq. ("Ms. Banda") – in *Boucher v. Venetian.* The first time Plaintiff's counsel heard from Ms. Banda was on August 18, 2019 – 6 days after Defendants filed this Motion. Ms. Banda reached out to the undersigned because she downloaded Defendants' Motion for Reconsideration and saw this blatant misrepresentation. Ms. Banda wished to make sure the undersigned knew she was not falsely representing to her opposing counsel (Messner Reeves) that the undersigned provided her with copies of unredacted incident reports.

3. Plaintiff Did Not Share Documents Which Were the Subject of a Pending Protective Order

The Motion states Defendants' initially produced the redacted incident reports "with the understanding that Defendants would seek protection under NRCP 26(c) regarding the reports" and that a "Motion for Protective Order was filed on February 1, 2019." (Defendants' Mot. at 10:20-23.) Defendants then allege Plaintiff's counsel nonetheless "on or about February 7, 2019... shared all of the sixty-four (64) prior incident reports at issue" after the Motion for a Protective Order was filed. (*Id.* at 10:26-28.) This rendition of the facts is inaccurate. Defendants' filed their Motion for a

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Protective Order on February 1, 2019 **only on the UNREDACTED incident reports.**[2] Defendants did not move for a protective order until they filed their Addendum to their Reply in Support of Their Motion for a Protective Order on March 6, 2019: Venetian now "moves the Court to order an NRCP 26(c) Protective Order related to the approximate 650 pages of redacted materials previously produced to Plaintiff in this matter." (Exhibit "8" at 4:20-23.) Thus, on February 7, 2019 when Plaintiff supposedly shared the redacted incident reports there was **no motion for a protective order pending on the same.**

C. The Court Should Deny Defendants' Motion Because It Improperly Reargues Cases, Improperly Presents New Cases and Improperly Presents New Arguments Which Could Have Been Made in the Original Motion

As Defendants are well aware long-established precedent states a litigant may not raise new legal points for the first time on rehearing. *In Re Ross,* 99 Nev. 657,668 P.2d 1089, 1091 (1983). A motion for rehearing may not be utilized as a vehicle to reargue matters considered and decided in the court's initial opinion. *Id.* Rather, a motion for rehearing should direct attention to some controlling matter which the court has overlooked or misapprehended. *Id.*

In order to gain a "second bite at the apple" the defendant may not raise points or contentions not raised in its initial motion and oppositions. *Edward J. Achrem, Chartered v. Expressway Plaza, Ltd.*, 112 Nev. 373, 917 P.2d 447 (1996). Information not presented - but which could have been presented - in the original opposition cannot be considered in a motion for reconsideration. *Chowdry v. NLVH, Inc.,* 111 Nev. 560,893 P.2d 385 (1995); *see also United States v. Wong*, 470 F.2d 129, 132 (9th Cir. 1972). **An argument not previously raised is therefore waived.** *Id.*; *see also Lippi v. City Bank*, 955 F.2d 599 (9th Cir.1992); *National Steel Corp. v. Golden Eagle Ins. Co.*, 121 F.3d 496 (9th Cir. 1997).

Defendants' Motion merely makes arguments which Defendants' could have presented in their original motion. All the cases cited by Defendants in support of their Motion predate their

[2] "Venetian moves this Honorable Court for a protective order, that the unredacted information sought by Plaintiff not be disclosed for any purpose not directly related to this litigation." (Exhibit "5" at 11:23-12:2.)

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initial Motion for a Protective Order and these arguments were therefore waived. More significantly, many of the cases Defendants cite were previously argued in their initial Motion for a Protective Order (Exhibit "5") and Response to Plaintiff's Objection to the Discovery Commissioners' report and recommendation. (Exhibit "10.")

CASE	YEARS DECIDED BEFORE DEFENDANTS' BRIEFING	PAGE:LINE IN MOTION FOR RECONSIDERATION	LOCATION IN INITIAL MOTION AND RESPONSE TO OBJECTION
Eldorado Club, Inc. v. Graff, 78 Nev. 507, 377 P.2d 174 (1962)	**57 years**	9:6-7, 11:18, 11:23, 13:11, 13:17, 13:19, 14:24, 15:8, 16:11, 16:28, 17:17, 17:28, 18:15, 22:11	Exhibit "5" at 8:1; Exhibit "10" at 17:16
Southern Pac. Co. v. Harris, 80 Nev. 426, 431 (1964)	**55 years**	13:11	Exhibit "5" at 8:2; Exhibit "10" at 17:16
Schlatter v. Eighth Judicial Dist. Court, 93 Nev. 189, 192 (1977)	**42 years**	13:24	Exhibit "5" at 8:20-22; Exhibit "10" at 7:19, 15:24-25
Ragge v. MCA/Universal Studios, 165 F.R.D. 601, 605 (C.D. Cal. 1995)	**24 years**	13:25	Exhibit "5" at 8:22-9:1; Exhibit "10" at 18:5-7
Cook v. Yellow Freight Sys., Inc., 132 F.R.D. 548, 551 (E.D. Cal. 1990)	**29 years**	13:25-26	Exhibit "5" at 9:1; Exhibit "10" at 18:8
Mackelprang v. Fid. Nat'l Title Agency of Nev. Inc., 2007 U.S. Dist. LEXIS 2379, *7 (D. Nev. Jan. 9, 2007)	**12 years**	13:27-28	Exhibit "5" at 9:2-4; Exhibit "10" at 18:9-10
Izzo v. Wal-Mart Stores, Inc., 2016 U.S. Dist. LEXIS 12210; 2016 WL409694,	**13 years**	15:3	
Rowland v. Paris Las Vegas, 2015 U.S. Dist. LEXIS 105513; 2015 WL 4742502,	**3 years**	15:19, 16:17-18	
Bible v. Rio Props., Inc., 246 F.R.D. 614, 2007	**12 years**	16:14, 16:17-18	

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U.S. Dist. LEXIS 80017			
Lologo v. Wal-Mart Stores, Inc., 2016 U.S. Dist. LEXIS 100559; 2016 WL4084035	**3 years**	16:27	
Caballero v. Bodega Latina Corp., 2017 U.S. Dist. LEXIS 116869, 2017 WL 3174931	**2 years**	16:28-17:28	
Dowell v. Griffin, 275 F.R.D. 613, 620 (S.D. Cal. 2011)	**8 years**	17:1-2	
Shaw v. Experian Info. Sols., Inc., 306 F.R.D. 293, 299 (S.D. Cal. 2015)	**4 years**	17:10-11	
Gonzales v. Google, Inc., 234 FRD 674, 684 (N.D.CA 2006)	**13 years**	18:8-9	Exhibit "5" at 11:6-9; Exhibit "10" at 20:13-16
Beazer Homes, Nev., Inc. v. Dist. Ct., 120 Nev. 575, 97 P.3d 1132 (2004)	**15 years**	23:3	

As set forth in the table, Defendants' Motion merely re-argues the same cases and presents "new" old cases to make arguments which could have been presented in the original motion. Nevada law is clear: "points or contentions not raised, or passed over in silence on the original hearing, cannot be maintained or considered on petition for rehearing." *Chowdhry,* 111 Nev. at 562, 893 P.2d at 387. As all of these cases pre-date Defendants' initial Motion for a Protective Order they could have been raised in that motion but were not. All of these cases are thus improperly included in Defendants' Motion. Defendants also included a pre-dated "privacy policy" which was "last updated: May 2018" a year before Defendants filed their initial Motion for a Protective Order on the underacted incident reports. (Defendants' Mot. at Exhibit "N.") As such, the privacy policy is also improperly included because it existed at the time of Defendants' initial Motion for a Protective Order and therefore could have been raised in it. Finally, Defendants included expired insurance contracts to argue they don't currently have coverage for data breaches and could therefore be subject to uninsured claims. (*Id.* at Exhibit "P" at VEN 1443, VEN 1447, VEN 1450.) These insurance contracts – which expired in 2016 and 2017 – similarly pre-date Defendants' initial Motion for a Protective Order and thus could also have been included in it. Defendants' choice to

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and later regret of not including these cases, the privacy policy and their insurance contract is not a valid reason for reconsideration. Under Nevada law these arguments are an improper attempt a to gain "second bite at the apple" and the Court should therefore deny their Motion. *Edward J. Achrem, Chartered,* 112 Nev. 373, 917 P.2d 447.

D. The Court Should Deny Defendants' Motion for Because There is No "New" Law to Apply

The Motion argues reconsideration should be granted because the court must order a protective order "under the **new** NRCP 26(b)(1)." (Defendants' Mot. at 11:24.) (emphasis added). The Motion cites to these rules as the "new version of NRCP 26(b)(1)." (*Id.* at 11:24, 14:4, 14:7.) Although Plaintiff's counsel agrees these rules are relatively new, they are not "new" enough to qualify for reconsideration. The amendments to NRCP 26(b)(1) became effective on March 1, 2019. (Order Amending NRCP, attached as Exhibit "18" at 3.) Although Defendants filed their initial Motion for a Protective Order before the effective date – on February 1, 2019 – Defendants' initial Motion for a Protective Order argued the new version of NRCP 26(b)(1). (Exhibit "5" at 6:5-10.) More importantly, the hearing in front of the Discovery Commissioner, the Objection, and the hearing on the Objection were all after the new rules went into effect. (Defendants' Mot. at 3:20, 4:3-11.) Thus, the Discovery Commissioner and this Honorable Court applied the new rules, not the old ones. As such, the "new version" of NRCP 26(b)(1) is irrelevant, and not a proper basis for reconsideration.

E. The Court Should Deny Defendants' Motion Because the *Eldorado* Decision is Irrelevant to The Case at Hand and Has Already Been Argued by Defendants

Aside from the fact Defendants cannot re-argue *Eldorado*, Defendants' Motion repeatedly misleads to Court to believe *Eldorado* applies to this case when this Court and other courts have indicated it does not. In *Eldorado* the plaintiff sued the defendant for negligence for leaving a lettuce leaf on a ramp. *Eldorado Club v. Graff,* 78 Nev. 507, 510 377 P.2d 174, 176 (1962). The *Eldorado* Court, in holding prior falls were inadmissible emphasized that "no contention is made that the ramp was dangerous per se; that there was a structural, permanent or continuing defect." *Id.* at 510, 377 P.2d 176. The *Eldorado* Court continued: "the admissibility of evidence of prior accidents **in this**

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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." *Id.* at 511, 377 P.2d 176. (emphasis added) "Evidence of the type here in question is **usually excluded** where it relates to a **temporary condition** which might or might not exist from one day to the other **unless, of course,** there is proper showing that the conditions surrounding the prior occurrences have continued and persisted." *Id.* (emphasis added). Thus, the *Eldorado* case only deals with transitory conditions.

To support the *Eldorado* argument the Motion grossly misstates Plaintiff's position: "it is Plaintiff's claim that she fell due to a wet, temporary transient condition." (Defendants' Mot. at 13:3-4.) Defendants know full well this is untrue; Plaintiff argued this numerous times to the Court, who agreed with Plaintiff[3] that punitive damages were appropriate because Venetian knew its **marble floors were unreasonably slippery** and posed a high risk to guests. If the marble floors themselves are the issue, then this case is not about a "temporary transient condition." The whole basis for Plaintiff's punitive damages claim is the non-transitory condition of the marble floors. If Defendants somehow forgot this after all the briefing on the Motion to Amend, all the briefing on their Motion for Reconsideration, all the briefing on their Motion to Dismiss and all the briefing on their Motion for Summary Judgment, Plaintiff reminded Defendants **in writing** at least another 6 times.[4] Plaintiff's theory of liability – backed by the Court's stamp of approval on Plaintiff's claim for punitive damages – is that this case is about a non-transitory condition. Because this case involves

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[3] The Court agreed with Plaintiff by granting her Motion to Amend on May 28, 2019 to allow her to add a claim for punitive damages. The Court also agreed with Plaintiff by denying Defendants' Motion to Dismiss or Alternatively for Summary Judgment on Plaintiff's punitive damages claim on August 27, 2019.

[4] *See, e.g.*
1. 6/12/2019 Opp. to Defendants' Mot. to Quash at 2:17-21;
2. 7/19/2019 Mot. to Extend Discovery and Trial at 4:25-5:3;
3. 7/24/2019 Mot. for Jury Trial 2:22-25;
4. 7/25/2019 RIS Mot. to Compel at 4:25-27;
5. 8/2/2019 Opp. to MTD or Alternatively MSJ at 13:1, 14:1-2;
6. 8/13/2019 RIS Mot. for Jury Trial and Opp. to Mot. for Sanctions at 4:8-11.

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the non-transitory condition of Defendants' marble floors *Eldorado* does not apply and therefore cannot be the basis for granting reconsideration on the order reversing the April 4, 2019 DCRR.[5]

Defendants however, are well aware *Eldorado* is a meritless argument in this case as this is not the first time their *Eldorado* argument has been shot down. This is not even the first time Defendants have made this argument **with the same facts.** In December 2018 Defendants made this same *Eldorado* transitory condition argument to Discovery Commissioner Bulla who ruled Defendants' floors were not a "transitory condition":

> DISCOVERY COMMISSIONER: But I think what you are not understanding is that this case is not as simple as it looks at first glance. There is a difference between a permanent condition and a transitory condition.
> ...
> Here's the small, little, tiny problem that the Venetian has -- you have a floor that, in and of itself, isn't apparently a problem, but every time water goes on that floor, which is foreseeable -- the people will bring in water bottles, or the drinks will be shared on the casino floor and end up on the tile -- then your floor turns into something different. It turns into a fall hazard. And if you didn't have that big, thick notebook sitting in front of you to show all the slip and falls you've had on this flooring, we might be able to argue something differently.

(October 31, 2018 Discovery Hearing Transcript from *Smith v. Venetian* at 4:17-5:11, attached as Exhibit "19.") Defendants (also Venetian) in the *Smith* case objected to this report and recommendation **with the same argument Defendants (Venetian) make here.** Compare the argument in *Smith* (under *Eldorado* "prior slip and falls...are not relevant to the slip and fall here nor admissible to show liability or notice") with Defendants' Motion in this case ("the Eldorado Club, Inc. court expressly held that it is reversible error to receive *"notice evidence"* of prior similar incidents involving transient conditions to prove constructive notice."). (Venetian's Objection to the DCRR in *Smith v. Venetian* at 16:19-17:20, attached as Exhibit "20"; Defendants Mot. at 21:16-19.) **The *Smith* District Court found this argument meritless, overruled Defendants' objection and**

[5] As such, the decisions Defendants cite that reply on *Eldorado – Izzo v. Wal-Mart Stores*, Inc., No. 215CV01142JADNJK, 2016 WL 409694 (D. Nev. Feb. 2, 2016), *Lologo v. Wal–Mart Stores, Inc.*, No. 2:13-CV-1493-GMN-PAL, 2016 WL 4084035 (D. Nev. July 29, 2016) and *Caballero v. Bodega Latina Corp.*, No. 217CV00236JADVCF, 2017 WL 3174931 (D. Nev. July 25, 2017) – are also irrelevant. (Defendants' Mot. at 15:3-18, 16:26-28, 17:27-28.)

affirmed the report and recommendation. (Order on Objection to DCRR in *Smith v. Venetian*, attached as Exhibit "21.")

Defendants' also **already argued *Eldorado* in twice in this case** in their initial Motion for a Protective Order and in their Response to Plaintiff's Objection to the DCRR Dated April 4, 2019: "Reports of prior slip and fall incidents, which occurred on different circumstances, and on different dates, in different areas of the property have no relevancy to the issue of whether Venetian had notice of any condition contributing to Plaintiffs fall on November 4, 2016. (*See Eldorado Club, Inc. v. Graff*, 78 Nev. 507 (1962)." (Exhibit "5" at 8:1; Exhibit "10" at 17:16.) In other words, Defendants previously argued, and are now again arguing, the incident reports should be protected based upon the *Eldorado* case. This behavior is tantamount to relitigating issues which Defendants know full well[6] they are not allowed to do, especially in a motion for reconsideration. *See Mosley v. Figliuzzi*, 113 Nev. 51, 58, 930 P.2d 1110, 1114 (1997), *overruled on other grounds by Castle v. Simmons*, 120 Nev. 98, 86 P.3d 1042 (2004) (Parties cannot "file immediate, repetitive, serial motions until the right circumstances or the right judge allows them to achieve a different result, based on essentially the same facts."); *see also Nance v. Ferraro*, 418 P.3d 679, 684 (Nev. App. 2018) ("Parties may not file repetitive, serial motions seeking to relitigate the same issues based on the same underlying facts."); *Edward J. Achrem, Chartered v. Expressway Plaza, Ltd.*, 112 Nev. 373, 917 P.2d 447 (1996) (holding parties may not raise points or contentions not raised in its initial motion and oppositions on reconsideration). Defendants previously brought this *Eldorado* argument in the *Smith* case, lost it, objected to the loss, lost again, brought the same argument in this case, lost it and then decided it was necessary to argue the same meritless argument for the **FOURTH TIME on reconsideration.** At this point Defendants are just wasting the Court's time, unnecessarily delaying the litigation and increasing Plaintiff's costs in violation of Rule 11. *See* NRCP 11(b)(1).

[6] In their opposition to Plaintiff's initial Motion for a Protective Order, Defendants attempted to relitigate the issue of whether incident reports outside the Grand Lux Café area were discoverable. Plaintiff's reply in support, cited the same case law and informed Defendants they could not relitigate issues. (Excerpts of Plt's RIS of Her Mot. to Compel, attached as Exhibit "23" at 12:6-12.)

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F. The Court Should Deny Defendants' Motion Because Defendants Have No Potential Liability Based on Their Privacy Policy

The Motion argues, based upon Defendants' Privacy policy "could subject Defendants to liability for privacy violations" because "Defendants do not have the guests'/visitors' authority to disseminate their personal, private information to any other party" and that Defendants "must seek and obtain a waiver" with respect to this information. (Defendants' Mot. at 18:16, 19:10-11, 19:15.) Defendants' then attempt to improperly shift the burden to Plaintiff to prove that there is a "substantial need" for the information. (Defendants' Mot. at 19:12.) It is not Plaintiff's burden to prove "substantial need"; rather, it is Defendants' burden to demonstrate good cause for the information to be protected. *See NRCP 26(c); see also Okada v. Eighth Jud. Dist. Ct., 131 Nev. Adv. Op. 83, 359 P.3d 1106, 1111 (2015); Beckman Indus., Inc., v. Int'l. Ins. Co.,* 966 F.2d 470, 476 (9th Cir. 1992) (to meet the burden of persuasion, "the party seeking the protective order must show good cause by demonstrating a particular need for the protection sought.")

Aside from the fact Defendants mislead the Court regarding the burden of proof, and the fact that they cannot raise this argument because it could have been raised in their initial opposition,[7] Defendants' Motion misleads the Court to believe their privacy policy could subject Defendants to liability. There are three major problems with this argument.

First and most significantly, Defendants' privacy policy states "your use of our products and services and provision of information to us **is at your own risk.**" (Defendants' Mot. at Exhibit "N" at 8.) Defendants drafted this policy to absolve themselves of all liability related to personal information. Anyone who provides personal information to them does so at their "own risk." Defendants thus cannot be liable guests/visitors under this policy.

Second, even if the privacy policy did not absolve Defendants of all liability, the privacy policy is unenforceable because it lacks offer and acceptance, meeting of the minds and consideration. *See May v. Anderson*, 119 P.3d 1254, 1257, 121 Nev. 668, 672 (2005) (a valid and

[7] Defendants attach a pre-dated "privacy policy"[7] which was "last updated: May 2018" a year before Defendants filed their initial Motion for a Protective Order on the underacted incident reports. (Defendants' Mot. at Exhibit "N.")

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enforceable contract requires "an offer and acceptance, meeting of the minds, and consideration.") Defendants' privacy policy is online only. Defendants' did not offer this policy to guests/visitors before collecting their information to compete an incident report. Under these circumstances there is no offer from Defendants and no acceptance from the individuals. Furthermore, because the individuals listed in the incident reports have no knowledge of Defendants' online privacy policy there can be no "meeting of the minds." Finally, although Defendants may claim they are passing consideration to the individuals (in the form of a promise to keep their information private) there is no return consideration from the individuals to Defendants. *See Pink v. Busch*, 100 Nev. 684, 691 P.2d 456 (1984) (to constitute consideration, a performance or return promise must be bargained for, and a performance or return promise is bargained for if it is sought by the promissor in exchange for his promise and is given by the promisee in exchange for that promise.) This analysis of Defendants' privacy policy is consistent with decisions from across the nation holding these privacy policies unenforceable against the companies that issue them. *See, e.g. In re Google, Inc. Privacy Policy Litig.,* 58 F. Supp. 3d 968, 986 (N.D. Cal. 2014) (holding that the plaintiff class adequately stated a claim for breach of contract when Google disclosed user data to third parties in violation of the company's privacy policy); *Trikas v. Universal Card Servs. Corp.*, 351 F. Supp. 2d 37,46 (E.D.N.Y. 2005) (stating that the court "need not address whether the Privacy Promise constitutes a contract, but broad statements of company policy do not generally give rise to contract claims") (internal citations and quotations omitted); *Dunn v. First Nat. Bank of Olathe,* 111 P.3d 1076 (Kan. Ct. App. 2005) (rejecting claim for breach of contract based on bank's privacy policy); *In re Jetblue Airways Corp. Privacy Litigation,* 379 F. Supp. 2d 299 (E.D.N.Y. 2005) (denying breach of contract claims under the privacy policy where plaintiffs were unable to prove damages); *In re Yahoo! Inc. Customer Data Sec. Breach Litig.,* No. 16-MD-02752-LHK, 2017 WL 3727318, at *46 (N.D. Cal. Aug. 30, 2017); *Johnson v. Nat'l Beef Packing Co.*, 220 Kan. 52, 551 P.2d 779 (1976); *In re American Airlines, Inc., Privacy Litigation,* 370 F. Supp. 2d 552 (N.D. Tex. 2005); *In re Northwest Airlines Privacy Litigation*, No. Civ.04-126(PAM/JSM), 2004 WL 1278459, at *6 (D. Minn. June 6, 2004); *Kuhn v. Capital One Fin. Corp.,* No. CA015177, 2004 WL 3090707, at *3 (Mass. Super.

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Nov. 30, 2004); Crowley v. Cybersource Corp., 166 F. Supp. 2d 1263 (N.D. Cal. 2001); *In re Pharmatrak, Inc. Privacy Litigation,* 329 F.3d 9, 19-20 (1st Cir. 2003); *Dyer v. Northwest Airlines Corp.,* 334 F. Supp. 2d 1196 (D.N.D. 2004).

Third, Defendants are not required to "obtain a waiver" or get "authority to disseminate... personal private information to any other party" because Defendants' privacy policy informs readers "we may also use your information in other ways... including but not limited to the following purposes... **to comply with applicable laws and regulations**." (*Id.* at Exhibit "N" at 5-6.) The privacy policy further states "We may share information about you to the third parties as indicated below" when "required to respond to legal requests for your information" and "to comply with laws that apply to us or other legal obligations." (*Id.* at Exhibit "N" at 6.) Defendants' privacy policy clearly tells readers Defendants may share information collected to comply with the laws and to respond to other legal requests. Plaintiff's request for production alone is a "legal request" within the meaning of this privacy policy. As such, Defendants' do not need permission to disclose this information. Moreover, once the Court signed the order directing Defendants to turn over the information, their failure to comply with that order constituted contempt in violation of NRS 22.010(3). *See* NRS 22.010(3) ("The following acts or omissions shall be deemed contempts:... 3. Disobedience or resistance to any lawful writ, order, rule or process issued by the court or judge at chambers.") Providing the unredacted incident reports would thus be "complying with applicable laws." Finally, the privacy policy states users' requests regarding privacy will be "accomodat[ed] where your requests meet legal and regulatory requirements." (*Id.* at Exhibit "N" at 7.) Thus, even if the individuals requested Defendants withhold their information from Plaintiff, Defendants own policy states they will ignore these wishes because they would force Defendants to violate NRS 22.010(3).

G. The Court Should Deny Defendants' Motion Because Defendants' Choice to Not Purchase Insurance Is Irrelevant to Discoverability

As a peripheral matter, the Court should note that Defendants just disclosed their insurance policy, and only did so because they believed it helped their argument. (Defendants 20th Supplement

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to Their 16.1 Disclosures, attached as Exhibit "22.") NRCP 16.1(a)(1)(A)(v) required Defendants disclose this insurance agreement in their initial disclosures on July 6, 2018. **Defendants have thus been in violation of the discovery rules for the last 13 months. In other words, Defendants continue to show they believe they are the only litigant in the state of Nevada to whom the discovery rules do not apply.**

Discovery rule violations aside, Defendants lack of "casualty insurance" on data breach argument is improper because it could have been raised in Defendants' initial opposition. (Defendants' Mot. at 21:24-22:15.) Moreover, this argument it completely illogical. Defendants' essentially argue "we didn't insure against it, therefore it's not discoverable." NRCP 26 does not state a lack of insurance effects discoverability. Moreover, Defendants did not even produce their current policy which would be the one covering a "data breach" occurring today. (Defendants' Mot. at Exhibit "P.")

H. The Court Should Deny Defendants' Motion Because Defendants Have No Potential Liability Based on NRS 603A

Defendants' allege "mass dissemination of Venetian's guests' private information is the equivalent to a data breach, thereby exposing Venetian to additional third-party claims." (Defendants' Mot. at 19:2-4.) Based upon the fact that the Defendants' argument mirrors an Venetian's opposition in another case, Plaintiff believes Defendants are alluding to NRS 603A. (*See* Excerpts of Defendants' Opp. Mot. to Compel in *Cohen v. Venetian,* attached as Exhibit "23" at 11:7-14:21.) NRS 603A was designed "to protect personal information held by certain businesses to address identity theft and to ensure security breaches of business databases containing personal information will be disclosed to the persons affected by the breach." (Excerpts of NV S. Comm. Min 4/5/2005, attached as Exhibit "24" at 16.) The bill, which later became NRS 603A, was prompted by an incident involving ChoicePoint, Incorporated, a consumer data services company. *Id.* Criminals posed as legitimate businesses to obtain personal information from ChoicePoint. *Id.* The data of 145,000 individuals, including their names, addresses, social security numbers and credit reports, were accessed by criminals who then set up fraudulent accounts. *Id.* When this happened, California

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was the only state which required companies to notify individuals when their personal data was compromised. *Id.* ChoicePoint thus did not notify the Nevadans affected until the State put substantial pressure on them to do so. *Id.* Thus SB 435 (aka NRS 603A) – requiring businesses to notify consumers of security breaches of personal data – was born. *Id.* Based upon the legislative history and the act itself, there are three major reasons NRS 603A does not apply to the circumstances of this case.

Frist, NRS 603A was clearly designed to address identity theft by criminals. Neither Plaintiff's counsel nor Plaintiff are identity thieves, and thus applying this statute under these circumstances would be contrary to the purposes of its creation.

Second, providing unredacted incident reports is not within the meaning of "breach of the security of system data." NRS 603A specifically deals with "breach of the security of the system data" which is defined as "**unauthorized acquisition** of computerized data that materially compromises the security, confidentiality or integrity of personal information maintained by the data collector." NRS 603A.020. (emphasis added). A Court order by definition authorizes conduct and has been understood to authorize conduct for nearly a century.[8]/[9] As such, even if the information in

[8] *See, e.g. Matter of Connell,* 422 P.3d 713 (Nev. 2018) ("the district court order appointing the trustee authorizes the trustee to..."); *Hernandez v. State*, 399 P.3d 333 (Nev. 2017) ("the requesting officer could apply for a court order to authorize the blood draw"); *Clark Cty. v. Smith*, 96 Nev. 854, 855, 619 P.2d 1217, 1218 (1980) ("Clark County and its Comptroller appeal the district court's order authorizing payment"); *In re Troyer's Estate,* 48 Nev. 72, 227 P. 1008, 1008 (1924) ("the administrator was authorized by court order to compromise, settle, release, and discharge a claim"); *A 1983 Volkswagen, Id. No. IVWC0179V63656, License No. 2AAB574(CA) v. Washoe Cty., Washoe Cty. Sheriff's Dep't Consol. Narcotics Unit,* 101 Nev. 222, 223–24, 699 P.2d 108, 109 (1985) ("This is an appeal from the district court's order authorizing forfeiture of a vehicle used in violation of the Uniform Controlled Substances Act."); *Club Vista Fin. Servs. v. Dist. Ct.,* 128 Nev. 224, 228, 276 P.3d 246, 248 (2012) ("the district court's order authorizing the deposition of Morrill"); *Jones v. Free,* 83 Nev. 31, 36, 422 P.2d 551, 553 (1967) ("the trial court's order authorizing the receiver to enter a compromise agreement"); *Bean v. State*, 81 Nev. 25, 25, 398 P.2d 251, 253 (1965) ("defense counsel sought a court order authorizing him to employ, at public expense, two psychiatrists"); *Tower Homes v. Heaton,* 132 Nev. 628, 631, 377 P.3d 118, 120 (2016) ("the bankruptcy court's order authorizing the same resulted in an impermissible assignment"); *Odin v. State,* No. 66806, 2015 WL 4715074, at *1 (Nev. App. Aug. 5, 2015) ("the deputy would then seek a court order authorizing the test"); *City of N. Las Vegas v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark,* No. 66204, 2014 WL 3891680, at *1 (Nev. Aug. 7, 2014) ("challenges a district court order denying a motion for a protective order and authorizing a judgment debtor examination.")

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the incident reports places them within the preview of this statute, Defendants disclosure of the incident reports in compliance with the Court's July 31, 2019 Order would constitute "authorized" acquisition. Because providing Plaintiff with the unredacted incident reports is authorized conduct, it does not constitute a "breach of the security of system data" under NRS 603A.020 and therefore cannot subject Defendants to liability for a "breach of the security of system data" under NRS 603A.215(3).

Third, the incident reports do not contain "personal information" as defined by NRS 603A.040. NRS 603A.040 defines "personal information" as:

> 1. "Personal information" means a natural person's first name or first initial and last name **in combination with any one or more of the** following data elements, when the name and data elements are not encrypted:
>
> (a) Social security number.
>
> (b) Driver's license number, driver authorization card number or identification card number.
>
> (c) Account number, credit card number or debit card number, in combination with any required security code, access code or password that would permit access to the person's financial account.
>
> (d) A medical identification number or a health insurance identification number.
>
> (e) A user name, unique identifier or electronic mail address in combination with a password, access code or security question and answer that would permit access to an online account.

These incident reports are completely devoid of any fields to fill in account numbers, credit/debit card numbers, medical ID numbers and usernames and passwords. Although the redacted incident reports produced by Venetian leave spaces for social security numbers and drivers' licenses', Defendants apparently do not collect this information. (*See* Excerpts of Redacted Incident Reports, attached as Exhibit "25.") Defendants also apparently instruct guests not to fill out the social security # line on the accident reports. (*See, e.g. Id.* at VEN287, VEN288, VEN359.)

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[9] *See In re Troyer's Estate* decided in 1924: "the administrator was **authorized by court order** to compromise, settle, release, and discharge a claim." 48 Nev. at 72, 227 P. at 1008 (emphasis added).

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I. The Court Should Deny Defendants' Motion Because There Are No Nevada Privacy Rights Concerned and The California Courts Defendants Cite Support Plaintiff's Position that the Contact Information Must Be Disclosed

If the Court were to ignore the fact that the Motion improperly relitigates the issue of privacy rights in relation to the incident reports and improperly re-argues the exact same cases, the Motion still fails to cite any Nevada decision which supports their position that disclosing names, address and phone numbers creates "privacy concerns." (*See generally,* Defendants' Mot.) The Motion cites a myriad of California federal case law, which at first glance support their position. However, upon closer examination these cases are clearly irrelevant. For example, the Motion cites *Bible v. Rio Properties, Inc.*, 246 F.R.D. 614, 620 (C.D. Cal. 2007). The *Bible* Court based its privacy determination at least partially on the California Constitution: the "responsive documents invade third parties' privacy rights. In California, the right to privacy is set forth in Article I, Section I of the California Constitution, as defendant cites..." *Id.* Similarly, unsupportive of Defendants' argument is *Shaw v. Experian Info. Sols., Inc.*, 306 F.R.D. 293, 301 (S.D. Cal. 2015). (Defendants' Mot. at 18:20-21.) The *Shaw* Court actually required the defendants disclose the "names, addresses, and telephone number" of third-parties without a protective order on the same. *Id*

More important than the fact these cases do not support Defendants' position, California federal district courts and California state courts consistently hold a Plaintiff's need to identify potential witnesses outweighs any privacy concerns a defendant may have about disclosing those witnesses' contact information. *See, e.g. Henderson v. JPMorgan Chase Bank,* No. CV113428PSGPLAX, 2012 WL 12888829, at *4 (C.D. Cal. July 31, 2012) ("The Court finds that plaintiffs' interest in identifying potential... witnesses here outweighs defendant's concern regarding its employees' privacy interests in their names and personal contact information."); *Tierno v. Rite Aid Corp.*, 2008 WL 3287035, at *3 (N.D. Cal. July 31, 2008) (plaintiffs' significant interest in identifying potential witnesses outweighed those individuals' privacy interests in their identities and contact information); *McArdle v. AT & T Mobility LLC,* No. C 09-1117 CW (MEJ), 2010 WL 1532334, at *4 (N.D. Cal. Apr. 16, 2010) ("Defendants' complaining customers may be considered percipient witnesses to the relevant" issues and therefore are considered to be "persons having

discoverable knowledge and proper subjects of discovery."); *Pioneer Elecs. (USA), Inc. v. Superior Court,* 40 Cal. 4th 360, 371, 150 P.3d 198, 205 (2007) (plaintiff sought the "names, addresses and contact information" of persons who submitted complaints because they were percipient witnesses, the court ordered this information disclosed because it "would not be particularly sensitive or intrusive") The California appellate even held **it was an abuse of discretion for the trial court to rule that an opt-in notification system was required to secure the consent of identified potential witnesses before disclosing their contact information to plaintiffs.** *Puerto v. Superior Court,* 158 Cal. App. 4th 1242, 1256, 70 Cal. Rptr. 3d 701, 712 (2008). As previously discussed in Plaintiff's Opposition to Defendants' Motion for a Protective Order and her Objection, she seeks the contact information for these individuals because they are potential witnesses in her case. The California courts, which Defendants so eagerly urge the Court to follow, support Plaintiff's position that she is entitled to the name and contact information for these potential witnesses. As such, granting Defendants' motion for reconsideration and issuing a protective order on the names and contact information of these potential witnesses would be improper.

IV. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests this Court deny Defendants' Motion for Reconsideration on the April 4, 2019 DCRR on the unredacted incident reports. Additionally, because all of Defendants' arguments are meritless Plaintiff respectfully requests this Court deny Defendants' motion for a stay.

DATED this 5th day of September, 2019

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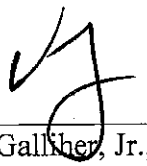

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of THE GALLIHER LAW FIRM and that service of a true and correct copy of the above and foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION OF ORDER REVERSING THE APRIL 4, 2019 DCRR ON UNREDACTED INCIDENT REPORTS** was served on the 5th day of September, 2019, to the following addressed parties by:

_____ First Class Mail, postage prepaid from Las Vegas, Nevada pursuant to N.R.C.P 5(b)

_____ Facsimile, pursuant to EDCR 7.26 (as amended)

__✓__ Electronic Mail/Electronic Transmission

_____ Hand Delivered to the addressee(s) indicated

_____ Receipt of Copy on this _____ day of September 2019,

acknowledged by, _____

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EXHIBIT 17

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CAROL SMITH

DISTRICT COURT

CLARK COUNTY, NEVADA

CAROL SMITH, an individual, Plaintiff, vs. VENETIAN CASINO RESORT, LLC; and DOES 1 through 50, inclusive, Defendants.	Case No.: A-17-753362-C Dept. No.: X Discovery Commissioner Date of Hearing: Time of Hearing:

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR TERMINATING SANCTIONS, MONETARY SANCTIONS FOR WILLFUL SUPRESSION OF EVIDENCE PURSUANT TO NRCP RULE 37

NOTICE OF MOTION

TO: ALL PARTIES and their ATTORNEYS:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that Plaintiff, CAROL SMITH, will bring the foregoing MOTION FOR TERMINATING SANCTIONS FOR WILLFUL SUPRESSION OF EVIDENCE, TO STRIKE DEFENDANT'S ANSWER AND FOR MONETARY SANCTIONS FOR EXPERT FEES AND ATTORNEY FEES PURSUANT TO NRCP 37 on for decision on the 20 day of March, 2019, at 9:00 o'clock a.m. or soon thereafter, in _____ of the above-entitled Court, as counsel may be heard.

DATED:_____ LAW OFFICES OF PETER GOLDSTEIN

BY:_____
PETER GOLDSTEIN, ESQ.
ATTORNEY FOR PLAINTIFF

MEMORANDUM OF POINTS AND AUTHORITIES

I. Background – Statement of Facts

This is a personal injury case arising from an incident at the Venetian Hotel Resort Casino in Las Vegas on July 7, 2016. There was a large spill of water on the marble floor in Lobby 1 that Defendant failed to timely discover and clean up, causing Plaintiff to slip and fall. Plaintiff suffered injuries requiring four knee surgeries and diminution to her quality of life, including the inability to return to her job as an instructional assistant for Irvine Unified School District, necessitating an early retirement. Plaintiff alleges that the marble flooring is inherently unreasonable and dangerous because it is extremely slippery when wet. Defendant's own expert testing of the flooring wet found a mean average of 0.15 as the friction coefficient. Plaintiff's expert testing of the floor found it was significantly below the 0.5 standard for safe walking surfaces. Although Defendants attempt to couch this case as one of notice and focused on the 6 minute gap between the spill and the fall, Plaintiff's theory of liability encompasses not only the fact that the floor is unsafe because when it mixes with water it becomes extremely slippery, but also proffers the mode of operation theory of liability, essentially alleging that it is foreseeable that the marble floor will become wet that water is extremely difficult to decipher and that Defendants have chosen not to use any treatment to increase the friction coefficient of the marble floor. In an effort to prove Plaintiff's case Plaintiff requested prior incident reports which Defendant has not produced resulting in extreme prejudice to Plaintiff, and Plaintiff recently discovered Defendant committed fraud on Plaintiff and this court.

II. Discovery Commissioner's Orders

This case concerns a marble floor that when wet, causes serious injuries to customers and patrons due to frequent slip and fall events. Plaintiff alleges, among other things, that the marble floor itself,

when wet, constitutes an unreasonably dangerous condition. That the Venetian knows this and is negligent in maintaining the floor (as products are available to make the floor more slip resistant when wet) and is negligent in the training of Casino employees to mitigate the substantial risk that exists to patrons when liquid is spilled on the marble flooring. The videos and the prior incidents go to notice and Defendants have refused to stipulate to the admission of the prior incident reports, or even to discuss the subject of admissibility nor has it produced the videos pertaining to the prior incidents. Plaintiff filed two previous motions to compel prior incident reports and the videos that pertain to those reports. In the Discovery Commissioner Report and Recommendation filed 12/27/2018, (see Exhibit 2) the Discovery Commissioner made the following findings:

"there is a difference between a permanent condition and a transitory condition. If it is transitory, the issue is whether or not the employees had reasonable notice of water on the floor to clean it up, so other slip and falls are not relevant to the notice in that case. Here, Plaintiff is making the argument that the Venetian's marble floor, in and of itself is not a problem, but turns into a fall hazard every time water goes on the flooring, and that it is foreseeable people will bring in water bottles or drinks on the casino floor which will end up on the tile, so the Discovery Commissioner finds the video is discoverable, with certain protections."

On July 2, 2018, the Discovery Commissioner ordered Defendant to produce:

(i) Incident reports from five years prior to the incident (2011 – 2016) of slip and falls on the marble floors located in Lobby 1, and

(ii) Incident reports from three years prior to the incident (2013 – 2016) of slip and falls on marble floors anywhere on the property.

See EXHIBIT 1 (July Discovery Commissioner's Order)

On November 29, 2018, the Discovery Commission ordered Defendant to produce video footage. *See* EXHIBIT 2 (November Discovery Commissioner's R&R).

Defendant has repeatedly acted in bad faith and engaged in misleading and fraudulent discovery tactics. Plaintiff has had to file two separate motions to compel, on March 28, 2018, and September 27, 2018, respectively. *See* Docket.

III. Willful Failure to Produce Evidence and Cooperate

Defendant has failed to comply with any of the above orders. Defendant produced prior reports of slip and falls on the marble floor in lobby one from 2014 to 2016, and zero reports from 2011 to 2014.

Defendant produced 25 incident reports to Plaintiff, ranging from 7/10/2014 – 5/25/2016, of slip and falls on marble floors in both the lobby and other lobbies with marble floors. *See* EXHIBIT 3 (excel spreadsheet of incident reports produced in Smith Case). Plaintiff recently became aware that **The incident reports produced are incomplete and deficient and Defendant failed to produce 35 reports from the same time period that they did produce in a different case, all those reports also deal with slip and falls on wet marble floors.** It is shocking that Defendants violated court orders and selectively produced what they deemed to be discoverable to the Plaintiff. Moreover Defendant has failed to produce any video footage that comply with the Discovery Commissioner's report and recommendation, even though the District Court affirmed that recommendation on January 22, 2019. *Goldstein Decl* at 3, 4. Furthermore, Defendant has failed to supplement its disclosures and produce additional reports knowing full well that the production to the Plaintiff in this case was grossly deficient. One can only discern that Defendant intended to mislead Plaintiff and the Court by producing less than half of the slip and fall incidents relevant to the discovery requests. Plaintiff requests that Defendants be punished for this egregious conduct as enumerated below.

IV. Discovery of Additional Incident Reports, Intentionally Omitted and Willfully Suppressed by Defendant

Keith Galliher, Esq. represents the Plaintiff In the pending case *Joyce Sekera v. Venetian Casino Resort*, case no. A-18-772761-C, another slip and fall case against the same Defendant(filed subsequent to *Smith v Venetian)*. Mr. Galliher and Mr. Goldstein discussed their respective cases and what the Venetian produced with regard to prior slip and fall incident reports on February 7, 2019. Mr. Goldstein learned that Venetian produced twice as many prior incident reports to Mr. Galliher in *Sekera* than what was produced in *Smith*. Mr. Galliher produced those prior reports to Mr. Goldstein's office on February 7, 2019. They contain 660 pages of PDF documents of prior slip and falls on wet marble floors.

Moreover, Mr. Gallagher took the deposition of a former EMT/security officer whose testimony suggested that there may have been as many as 300 to 400 falls on marble floors at the Venetian within the last eight years. *Goldstein Decl.* at 5, 6, 7, 8.

After comparing and compiling the prior incident reports from both cases it was clear that Venetian produced **35 additional** incident reports to Keith Gallaher in *Joyce Sekera v. Venetian* of slip and falls on marble floors in both Lobby 1 and other lobbies with marble flooring on the property from 2013-2016 that were produced by the Venetian yet were **not produced** in this case. *See* EXHIBIT 4 (list of incident reports produced in *Sekera* case containing 61 prior reports in a spreadsheet with a column indicating which incidents were not produced in Smith). More than half of the Sekera reports were intentionally omitted and not produced in the Smith case.

V. Plaintiff Has Been Harmed and Prejudiced by Defendant's Deceit

This case has been ongoing since March 2017 and discovery has been conducted with incomplete and misleading information. **Discovery closes** on February 14, 2019. Depositions of expert witnesses have been conducted based upon false and incomplete information. All previous discovery has been severely tainted and compromised as result of Defendants deceitful discovery tactics.

Plaintiff has relied on the incomplete and misleading reports produced by Defendant, and has been severely prejudiced due to Defendant's willful and intentional suppression of evidence. If Defendant's Answer is not striken as a sanction for abusive litigation tactics, Plaintiff must re-conduct its expert witness depositions and further discovery must be performed in light of this new information. This is an extreme burden to Plaintiff in both time and expense, resulting in severe prejudice. Should this motion be granted Plaintiff will submit a memorandum of fees and costs for the experts' retention fees, expert depositions and attorney's fees incurred by conducting discovery based on misleading and incomplete prior reports. Strikingly, during the depositions of Plaintiff's experts, one of defense counsel's main lines of examination consisted of asking whether falls once or twice per month, rather than nine or more per month constitute a danger knowing that his questions were based on false and fraudulent discovery.

VI. Plaintiff Requests Terminating Sanctions

Defendant had these additional incident reports in its possession yet failed to produce them in Discovery. Defendant has also completely failed to make any attempts to provide the ordered video footage, to review and approve the proposed order after it objected to the discovery Commissioner's report and recommendation or to engage in a good faith discussion of how to admit the prior falls into evidence since the names of the victims of the prior falls were redacted. We can infer the bad intent in this case. Defendant clearly found that it was better to be deceitful and attempt to hide evidence that would harm their case than comply with discovery orders or to produce required documents in discovery. It is impossible to know whether or not the *Sekera* case contains all the prior reports. At this point, nothing the Defendant produced in this case can be relied upon as true and correct. Defendant's deceit should not go unpunished. Even Defendants rationale and argument for redacting the names of the victims of the prior falls is specious. Plaintiff believes that Defendant never obtained or attempted to obtain medical records pursuant to the HIPAA requests that it had prior fall victims of the dangerous slippery floor sign in order to shield providing the names of the victims in discovery. This is another example of the subterfuge that Defendant has engaged in to hide its clear liability and justify the following findings against Defendant:

(i) a willful suppression of evidence occurred; and
(ii) strike Defendant's Answer and affirmative defenses on liability and allow the case to proceed to trial on damages only;
(iii) In absence of striking Defendant's Answer, allow for the additional incident reports produced in the *Sekera* case to be admitted into evidence in this case and require Defendant to produce videos associated with those omitted incident reports.
(iv) award costs for expert witness fees, both past and prospective;
(v) issue monetary sanctions for attorney fees against Defendant for its willful violation of multiple Discovery Orders and violations of relevant discovery rules.

VII. Willful Violation of Discovery Order

NRCP 37 provides for discovery sanctions for a party's willful violation of a discovery order and it is within the district court's "inherent equitable powers" to dismiss a defense for abusive litigation practices. *Young v. Johnny Ribeiro Bldg, Inc.*, 109 Nev. 88, 92, 787 P.2d 777, 779 (1990)

(quotation omitted).

It is undisputed that Defendant has willfully violated multiple discovery orders. Defendant failed to produce video footage and has attempted to mislead this Court in its selective production of incident reports and failed in its duty to supplement its disclosures in discovery.

A. **Legal Standard.**

NRCP 37(c)(1) sets forth the appropriate sanctions for parties who fail to disclose and/or to supplement disclosures of information required by NCRP 16.1 and 26(e)(1) ad (2). NRCP 37(c)(1) provides in pertinent part:

> **(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.**
> (1) A party without substantial justification fails to disclose information required by Rule 16.1, 16.2, or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion or after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C) and may include information the jury of the failure to make the disclose.

In addition to informing the jury of the failure to make a disclosure, pursuant to NRCP 37(c)(1), the following sanctions are authorized under NRCP 37(b)(2):

> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim or the party obtaining the order;
>
> (B) ***An order refusing to allow the disobedient party to support or oppose designated claims or defenses***, or prohibiting that party from introducing designated matters in evidence;
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgement by default against the disobedient party;

NRCP 37(b)(2)(A), (B), and (C) (emphasis added).

Discovery sanctions are within the power of the district court, and the Supreme Court will not reverse particular sanctions imposed absent a showing of abuse of discretion. *GNLV Corp v. Service*

Control Corp., 111 Nev. 866, 869, 900 P.2d 323, 325 (1995). While Nevada case law specific to NRCP 37(c)(1) is limited, the Nevada Supreme Court has a long-standing history relying on case law interpreting its Federal counterpart, when interpreting the Nevada Rules of Civil Procedure. *See e.g. Dougan v. Gustaveson*, 108 Nev. 517, 835 P.2d 795 (1992); *Bowyer v. Taack*, 107 Nev. 625, 817 P.2d 1176 (1991). Federal courts have consistently held that Rule 37(c)(1) gave "teeth" to the disclosure requirements mandated by the Rules of Civil Procedure. *Yeti by Molly Ltd. V. Deckers Outdoors Corp.*, 259 F.3d 1101, 1106 (9th Cir.2011). The rule was "explicitly designed to punish negligent or elusive behavior during discovery and to prevent any party from gaining an advantage as a result of discovery antics." *Sanchez v. Stryker Corp.*, 2012 WL 1570569, at *2 (C.D. Cal. May 2, 2012) quoting (*Yeti by Molly Ltd. V. Deckers Outdoor Corp.*, 259 F.3d at 1106).

Further, the Ninth Circuit has held that the burden is on the party who failed to comply with its discovery obligations to demonstrate that it meets on of the two exceptions to sanctions. *Id.* At 1107 ("Implicit in Rule 37(c)(1) is that the burden is on the party facing sanctions to prove harmlessness."). Indeed, the burden is on the proponent of the evidence to demonstrate that the failure to disclose was either substantially justified or harmless. *Id.* Moreover, according to the Ninth Circuit, a district court need not find willfulness or bad faith to impose sanctions pursuant to Rule 37(c)(1). *Hoffman v. Contr. Protective Servs.*, Inc., 541 F.3d 1175, 1179 (9th Cir. 2008).

B. Willful Suppression of Evidence

Alternatively, Plaintiff is requesting that a rebuttable presumption be granted against Defendant for willfully and intentionally omitting the additional incident reports as well as the surveillance video. Pursuant to NRS 47.250, it shall be a disputable presumption that "evidence willfully suppressed would be adverse if produced and a recommendation that all the prior incident reports be admitted into evidence.

In *Bass-Davis v Davis, 134 P.3d 103*, the court clarified the distinction that must be drawn between awarding a party a "rebuttable presumption" versus an "adverse inference." The court noted

that NRS 47.250(3) creates a rebuttable presumption when evidence is willfully suppressed or destroyed with an intent to harm. See *Bass-Davis*, 134 P.3 at 107.

In this case, the evidence indicates that Defendant willfully omitted the inclusion of additional incident reports that it actually had in its possession. This is worse than destroying evidence through the general course of business. Defendant had the information and failed to produce it.

VIII. Conclusion

In summary, Defendant had these additional incident reports in its possession yet failed to produce them in Discovery. Defendant has also completely failed to make any attempts to provide the ordered video footage. We can infer the bad intent in this case. Defendant clearly found that it was better to be deceitful and attempt to hide evidence that would harm their case than comply with discovery orders or to produce required documents in discovery. It is difficult to know whether or not the *Sekera* case contains all the prior reports. At this point, nothing the Defendant produced can be relied on, accordingly Plaintiff respectfully requests that this court grant her Motion and find:

(i) a willful suppression of evidence occurred; and
(ii) recommend the District Court strike Defendant's Answer and affirmative defenses on liability and allow the case to proceed to trial on damages only;
(iii) recommend allowing for the additional incident reports produced in the *Sekera* case to be admitted into evidence in this case and require Defendant to produce videos associated with those omitted incident reports.
(iv) award costs for expert witness fees, both past and prospective;
(v) issue monetary sanctions for attorney fees against Defendant for its willful violation of multiple Discovery Orders and violations of relevant discovery rules.

Dated: February 13, 2019

PETER GOLDSTEIN LAW CORPORATION

Signed: _____

PETER GOLDSTEIN, SBN 6992

Attorney for Plaintiff

DECLARATION OF PETER GOLDSTEIN

I, Peter Goldstein, declare as follows:

1. I am an attorney duly licensed to practice law in Nevada and am counsel of record for Plaintiff. I have personal knowledge of all matters stated herein that I know to be true.

2. The exhibits attached hereto are true and correct copies of the originals of those documents that I have kept in my office file for this matter in the ordinary course of business.

Exhibit 1 is the Discovery Commissioner's Report and Recommendations from May 2, 2018.

Exhibit 2 is the Discovery Commissioner's Report and Recommendations from October 31, 2018.

Exhibit 3 is a spreadsheet documenting the incident reports disclosed to Plaintiff in the Smith v. Venetian case.

Exhibit 4 is a spreadsheet documenting incident reports from Sekera v. Venetian and a column of what was not disclosed in Smith v. Venetian.

Exhibit 5 is Plaintiff's proposed Order regarding the Defendant's Objection to the Discovery Commissioner's Report and Recommendation, as well as correspondence with my office and the Defense, which has gone unanswered.

3. Defendant has failed to produce any video footage.

4. Defendant has failed to produce any incident reports from 2011 – 2013.

5. Mr. Keith Gallagher provided additional incident reports of slip and falls on marble floors on property, produced by the Venetian in the case Sekera v. Venetian, Case No. A-18-772761-C, on February 7, 2019.

6. I can provide PDF copies of all incident reports disclosed in the Smith v. Venetian and Sekera v. Venetian cases, if required by the Court.

7. Defendant has refused to discuss the admissibility of prior reports.

8. Defendant has refused to respond to the proposed order, submitted to them on February 4, 2019.

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

Dated February 13, 2019 at Las Vegas, Nevada.

Signed: _____

Peter Goldstein, Declarant

CERTIFICATE OF SERVICE

Pursuant to Rule 5(b) of the Nevada Rules of Civil Procedure and [N.E.F.R. 9(b) I certify that I am an employee of Peter Goldstein Law Corporation and that on February 13, 2019, I served a true and correct copy of the foregoing document entitled **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR TERMINATING SANCTIONS, MONETARY SANCTIONS FOR WILLFUL SUPPRESSION OF EVIDENCE PURSUANT TO NRCP RULE 37** upon all parties listed below, via the following means:

_____ Via U.S. Mail by placing said document in a sealed envelope, with postage prepaid [N.R.C.P. 5(B)]

__X___ Via Electronic Filing [N.E.F.R. 9(b)]

_ X__ Via Electronic Service [N.E.F.R. 9]

_____ Via Facsimile [E.D.C.R. 7.26(a)]

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2/13/19
Date

Jocelynn Jordan
An employee of the Law Office of Peter Goldstein

EXHIBIT 18

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DISTRICT COURT

CLARK COUNTY, NEVADA

ANGELICA BOUCHER, individually, Plaintiff, vs. VENETIAN CASINO RESORT, LLC d/b/a VENETIAN RESORT HOTEL CASINO d/b/a THE VENETIAN d/b/a THE VENETIAN/THE PALAZZO; LAS VEGAS SANDS, LLC d/b/a VENETIAN RESORT HOTEL CASINO / PALAZZO RESORT HOTEL CASINO d/b/a THE VENETIAN CASINO d/b/a VENETIAN CASINO RESORT; LAS VEGAS SANDS CORP.; DOES 1 through 100 and ROE CORPORATIONS 1 through 100, inclusive, Defendants.	Case No.: A-18-773651-C Dept. No.: X **PLAINTIFF'S MOTION TO AMEND COMPLAINT TO INCLUDE PUNITIVE DAMAGES** **HEARING REQUESTED**

Plaintiff ANGELICA BOUCHER, by and through her attorneys of record, FARHAN R. NAQVI and SARAH M. BANDA of NAQVI INJURY LAW, hereby moves this Court pursuant to Nevada Rule of Civil Procedure 15 to amend the Complaint to include punitive damages

> Responding Defendant reserves the right to supplement this response pursuant to the Nevada Rules of Civil Procedure.
>
> **RESPONSE TO REQUEST NO. 10:**
> Defendant objects to this request as overbroad, irrelevant, and to the extent it is not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections, please *see* Defendant's First Supplemental Early Case Conference List of Witnesses and Production of Documents at Bates Nos. VEN1423-VENI1782. Discovery is continuing and ongoing. Responding Defendant reserves the right to supplement this response pursuant to the Nevada Rules of Civil Procedure.[19]

The Defendant disclosed thirty-one (31) slip and fall incidents on the marble flooring in the Venetian, twenty-eight (28) of which occurred within two years of the incident at issue.[20] In the five (5) months preceding the subject incident, the Venetian responded to **at least** eight (8) known incidents involving patrons slipping on a liquid substance and falling to the ground.[21]

After taking the highly evasive depositions of two current Venetian Employees who responded to the incident (i.e. Emily Whiddon and Patrick Overfield), Plaintiff suspected that the Defendant had not produced all prior incidents involving slip and falls on the marble tile in the Venetian. After further researching the issue, the results are alarming and concerning, as outlined below.

Undisclosed Prior Incidents

A large concern in this case is the Defendant's failure to produce relevant prior incidents, which appears to be the Defendant's modus operandi. For example, a very recent review of the court filings revealed numerous incidents that were not disclosed, a few of which are outlined below:

---

[19] *See* Defendant Venetian Casino Resort, LLC's Responses to Plaintiff's First Request for Production, attached hereto as *Exhibit 8*.

[20] *See* Venetian Security reports (7/22/11 – 5/25/16), collectively attached hereto as *Exhibit 9*.

[21] *See* Venetian Security reports (2/20/16 – 5/25/16), collectively attached hereto as *Exhibit 9*.

- Joan Gartner v. Venetian, A-13-689661-C, which alleges a slip and fall on clear liquid in the Grand Lobby on September 18, 2012. Venetian was also represented by Messner Reeves LLP in this case.[22]
- Bertha Matz v. Sands d/b/a Venetian, A-15-719757, which alleges a slip and fall on liquid in the lobby on June 23, 2013. Venetian was also represented by Messner Reeves LLP in this case.[23]
- Nancy Rucker v. Venetian, A-15-729566-C, which alleges a slip and fall on clear liquid in the lobby on August 23, 2014. Venetian was also represented by Messner Reeves LLP in this case.[24]

Additionally, the recent review of public records demonstrates that Defendant's modus operandi of hiding relevant prior incident reports has been raised in another matter, Sekera v. Venetian, A-18-772761-C.[25] In Sekera, Plaintiff's counsel spoke with counsel in another Venetian matter (the Smith case) and realized that Venetian was not producing all incident reports in all cases. For example, upon information and belief, Venetian produced 4 incident reports in the Smith case that were not produced in the Sekera case and, even more alarmingly, ***Venetian produced 36 incident reports in Sekera that were not produced in Smith***. The Plaintiff in Sekera created and filed the following table with its Motion for Leave to Amend Complaint:[26]

---

[22] *See* Defendant Venetian Casino Resort, LLC's Motion in Limine to Preclude Any Arguments Regarding Alleged Spoliation of Evidence, Case No. A-13-689661-C, attached hereto as *Exhibit 10.*

[23] *See* JCCR, Case No. A-15-719757-C, attached hereto as *Exhibit 11.*

[24] *See* Complaint, Case No. A-15-729566-C, attached hereto as *Exhibit 12.*

[25] *See* Plaintiff's Motion for Leave to Amend Complaint, Case No. A-18-772761-C, pertinent parts attached hereto as *Exhibit 13.*

[26] *See* Plaintiff's Motion for Leave to Amend Complaint, Case No. A-18-772761-C, pertinent parts attached hereto as *Exhibit 13 (Exhibit 7, sub-exhibit 4 to said Motion).*

Incident Reports From Joyce Sekera v. Venetian Compared With Carol Smith v. Venetian

	Date of Incident	Incident Report ID	Location at Venetian	Disclosed in SMITH case?
1	11/24/2013	1311V-5502	Grand Lux Café	No
2	11/24/2013	1311V-5588	Grand Hall	No
3	1/26/2014	1401V-5539	Lobby 1	No
4	5/2/2014	1405V-0423	Grand Hall	No
5	5/3/2014	1405V-0687	Grand Hall	No
6	5/3/2014	1405V-0704	Lobby 1	No
7	5/24/2014	1405V-5900	Lobby 1	No
8	6/28/2014	1406V-6937	Grand Lux Café	No
9	7/5/2014	1407V-1121	Lobby 1	No
10	7/10/2014	1407V-2272	Grand Lux Café	Yes
11	7/10/2014	1407V-2142	Grand Hall	No
12	7/13/2014	1407V-3057	Lobby 1	Yes
13	7/18/2014	1407V-4386	Lobby 1	No
14	7/25/2014	1407V-6125	Lobby 1	No
15	7/25/2014	1407V-6151	Grand Hall	No
16	7/29/2014	1407V-7161	Lobby 1	Yes
17	7/30/2014	1407V-7375	Lobby 1	No
18	8/4/2014	1408V-0843	Lobby 1	No
19	8/5/2014	1408V-1088	Lobby 1	No
20	8/28/2014	1408V-7104	Venetian Tower	Yes
21	8/31/2014	1408V-7791	Lobby 1	Yes
22	9/13/2014	1409V-2807	Lobby 1	No
23	9/15/2014	1409V-3261	Lobby 1	No
24	9/30/2014	1409V-6750	Grand Hall	No
25	10/11/2014	1410V-2293	Lobby 1	No
26	12/23/2014	1412V-4685	Lobby 1	No
27	1/17/2015	1501V-3857	Lobby 1	Yes
28	1/31/2015	1501V-6887	Lobby 1	No
29	2/9/2015	1502V-1803	Lobby 1	Yes
30	2/20/2015	1502V-4322	Lobby 1	Yes
31	3/8/2015	1503V-1561	Grand Hall	No
32	3/23/2015	1503V-5040	Lobby 1	No
33	4/24/2015	1504V-5396	Grand Hall	Yes
34	5/3/2015	1505V-0844	Grand Hall	No
35	5/22/2015	1505V-5319	Lobby 1	Yes
36	5/29/2015	1505V-7253	Lobby 1	No
37	5/30/2015	1505V-7506	Lobby 1	Yes
38	6/12/2015	1506V-2824	Lobby 1	No
39	6/30/2015	1506V-7480	Lobby 1	Yes
40	7/5/2015	1507V-1236	Venezia Tower	Yes
41	7/19/2015	1507V-5024	Grand Hall	No
42	7/19/2015	1507V-5121	Venetian Tower	Yes
43	7/20/2015	1507V-5392	Entrance/Lobby	No
44	8/2/2015	1508V-0357	Lobby 1	No
45	8/8/2015	1508V-1866	Grand Hall	No
46	8/8/2015	1508V-1869	Lobby 1	Yes
47	8/29/2015	1508V-7246	Lobby 1	Yes
48	9/6/2015	1509V-1497	Lobby 1	Yes
49	9/13/2015	1509V-3312	Grand Hall	No
50	12/27/2015	1512V-5875	Lobby 1	No
51	2/20/2016	1602V-4290	Lobby 1	Yes
52	3/6/2016	1603V-1233	Lobby 1	Yes
53	3/25/2016	1603V-5018	Lobby 1	Yes
54	4/9/2016	1604V-1850	Grand Hall	No
55	4/9/2016	1604V-1926	Lobby 1	Yes
56	4/10/2016	1604V-2136	Grand Hall	No
57	4/12/2016	1604V-2459	Lobby 1	Yes
58	5/5/2016	1605V-0952	Lobby 1	Yes
59	5/25/2016	1605V-5069	Lobby 1	Yes
60	7/7/2016	1607V-1506	Lobby 1	SMITH

36 Total Not Disclosed in Smith

From this table, the Defendant has not produced the following **32 incident reports** in the instant case: 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 13, 14, 15, 17, 18, 19, 22, 23, 24, 25, 26, 28, 31, 32, 34, 36, 41, 43, 45, 49, 54, and 56. Also, of note, is that the Defendant did not disclose the instant case in Sekera even though the instant case occurred merely a month before said incident.

Plaintiff's counsel sent an email to defense counsel on June 12, 2019 at 4:43 p.m. which stated as follows: "In the meantime, I wanted to request that you also check with your client and confirm that there are not any additional incident reports related to slip and falls on the marble that have not been disclosed. I believe you produced 31 prior incidents in your First Supplement."[27] Rather than confirming that all incident reports have been produced, Defendant makes veiled allegations of impropriety against Plaintiff's counsel through the following email,[28]

I am writing to follow up with you regarding an additional issue you raised during our telephone conference yesterday. As we discussed Defendant's responses to Plaintiff's Requests for Production of Documents in the *Boucher v. Venetian* case, you stated that you have Venetian incident reports or documents produced by Venetian in several different, active lawsuits currently pending against Venetian. Specifically, you claimed that by comparing Venetian's production of these incident reports among the various cases, you identified inconsistencies among Venetian's disclosures – the context of your statement seemed to imply some degree of impropriety by Venetian that could be at issue in this case.

Considering the substance of your statements during our June 11, 2019 telephone conference, it appears that you – or your law firm – have obtained Venetian's private/protected documents and information from unrelated, third-party sources, which is quite concerning to say the least.

In light of your claim that you contrasted Venetian's production of private/protected documents in extraneous, unrelated cases, further claiming that you identified inconsistencies among Venetian's documents produced among the various cases, **we request that you immediately contact our office in writing, and provide the following information with respect to Venetian Casino Resort** (Including Palazzo, Las Vegas Sands Corp., and any related company)

(1) Specifically identify each and every document produced by Venetian, Palazzo, or any subsidiary of Las Vegas Sands Corp. in any other civil action, that was obtained by you (or your law firm obtained, received or reviewed that was provided by any source other than the Venetian or its representative(s), or that was obtained by you or your law firm from any source other than the Venetian outside of a civil action in which your firm actively appeared;

(2) Specifically identify all attorneys, law firms, or third-parties from whom you received such documents or protected information; and

(3) Identify the date each document was received and the format it which it was received (paper, mail, email, electronically, etc.).

Please let me know if you have any questions.

Truly,

David Pritchett

[27] *See* Email from Sarah M. Banda, Esq. (6/12/19), attached as *Exhibit 14.*
[28] *See* Email from David P. Pritchett, Esq. (6/12/19), attached as *Exhibit 15.*

The email, in addition to misquoting Plaintiff's counsel as Plaintiff's counsel merely said that she believes there are other incidents that have not been disclosed, indirectly acknowledges that the Defendant has other incident reports and/or prior incident information that it has intentionally withheld. However, instead of disclosing the same, Defendant makes allegations that Plaintiff somehow obtained Venetian's private/protected documents. This too is untrue, as all the information attached to this Motion and all information Plaintiff is aware of was obtained through a recent search of public records and cases on the Court website.

To date, Defendant Venetian has engaged in a deliberate pattern of evasive discovery abuse. For example, on June 14, 2019, the Discovery Commission heard the Plaintiff's Motion to Compel Production of Documents, which was largely granted, and requested that the Court compel items, such as the insurance policies, which the Defendant has yet to produce even though this case has been pending for over a year.[29] The gamesmanship that has ensued thus far in the discovery process leads the Plaintiff to believe that the failure to produce prior incident reports is deliberate and further evidence of Defendant's belief that the rules do not apply to the Venetian. Therefore, Plaintiff has reason to believe Defendant Venetian is withholding additional highly relevant documents regarding prior similar incidents.

The Incident at Issue

This matter arises from an incident that occurred on June 11, 2016 at approximately 2:36 p.m. on the premises of the Venetian Resort Hotel Casino located at 3355 S. Las Vegas Boulevard, Las Vegas, Nevada 89109.[30] On said date, Plaintiff was visiting the subject location when she slipped and fell on a wet and slippery walking surface in the lobby area. The Venetian

[29] *See* Plaintiff's Motion to Compel Production of Documents, pleading only, attached hereto as *Exhibit 16.*
[30] *See* Venetian Incident Report related to the instant case, attached hereto as *Exhibit 17.*

EXHIBIT 19

TRAN
CASE NO. A-18-772761-C
DEPT. NO. 25

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

JOYCE SEKERA, Plaintiff, vs. VENETIAN CASINO RESORT, Defendant.	REPORTER'S TRANSCRIPT OF PLTF'S MOTION TO AMEND DEFT'S MOTION TO STRIKE

BEFORE THE HONORABLE KATHLEEN DELANEY
DISTRICT COURT JUDGE

DATED: TUESDAY, MAY 28, 2019

REPORTED BY: SHARON HOWARD, C.C.R. NO. 745

APPEARANCES:

For the Plaintiff: KEITH GALLIHER, ESQ.
KATHLEEN GALLIHER, ESQ.

For the Defendant: MICHAEL ROYAL, ESQ.

* * * * *

LAS VEGAS, NEVADA; TUESDAY, MAY 28, 2019

P R O C E E D I N G S

* * * * *

THE COURT: Page 8, Joyce Sekera vs. Venetian Casino Resort.

MR. GALLIHER: Good morning, your Honor. Keith Galliher and Kathleen Galliher on behalf of Joyce Sekera.

THE COURT: Good to see you back. Now, you're all seasoned. You don't get any special --

MR. GALLIHER: Very experienced now.

MR. ROYAL: Mike Royal for Defendants, your Honor.

THE COURT: Good morning.

So this is Plaintiff's motion for leave to amend the complaint, and the Defendant's motion to strike related to information that was included in the reply to the Defendant's opposition. And the strike was geared toward what has been styled as unauthenticated evidence or alternatively to allow defense the opportunity to respond on order shortening time.

The way this all boils down, I really think we can address it here today. They want to add punitive damages. The argument is this is essentially a negligence claim and

punitive damages aren't warranted. There has been a lot of discussion about -- in the pleadings about information that's being pointed to, extrapolated from, otherwise not really quantitative or admissible evidence, as I think it's been argued by Mr. Royal, to show how many times there might have been notice or actual slip and fall circumstances.

I really want to just address this, do we get punitives in or not. Is there any reason why we can't do that. I'm not saying we can't talk about and look at evidence and arguments or things that were pointed to in the reply that shouldn't be there, but, you know, the court can self-police -- the court can police and use self-restraint to look at a bunch of things that really don't have support and otherwise, I think, make the call in terms of whether or not this really is to me an operation of law as to whether what we have here is sufficient to allow this standard to be met under Rule 15 or not.

Let me give Mr. Royal an opportunity, since he did make the argument in his motion to strike, that there's quite a bit of information here we should not be considering.

MR. ROYAL: Thank you, your Honor.

What I'm most concerned about are

representations there was -- I noted about 11 representations that were made by counsel in the reply that could have been made in the moving papers. But what I'm most concerned about are representations to the court such -- for example -- that relate to Mr. Shulman. Counsel has repeatedly, before this court now and also in front of the discovery commissioner, made false representations specifically about Mr. Shulman's testimony. It's all designed, your Honor, in order to inflame the court against Defendants to make it appear that Defendants are every bit this corporate criminal that Plaintiff's counsel is alleging them to be.

Here, for example, Mr. Shulman was represented to have testified that he met with me as relates to this particular case. That he never had any prior disciplinary warnings or anything on his record for the previous 13 years. They also represented that in the following 60 days he received a bunch of -- at least 3 warnings and then he was fired all because, Mr. Shulman believed, that he met with me. And he wouldn't lie.

Now, your Honor, that is untrue. It's unfounded. And it's clear from the testimony of Mr. Shulman on cross that it's untrue.

So what concerns me is that's one of many misrepresentations that were made to the court in the

reply -- not in the moving papers -- that relate to -- that they're using to support their motion that they be granted leave in order to add a claim of punitive damages.

They are suggesting, for example, that what Venetian does on a routine basis is meet with employees getting ready to testify and tell them to lie. They're using -- they're making statements that are absolutely false.

THE COURT: It seemed to me though in the reply, yes, okay, they talked about Mr. Shulman and some of these communications and things, but they really, kind of, where the court focused, right or wrong, because I recalled Mr. Shulman's testimony was a point of contention before. But they talk about, look, just look at our numbers. Mr. Loron -- if I'm pronouncing that correctly -- his testimony and simple calculation is more reliable. They give this number, this average among how many things per day or average days between. It seems to be that at the end of the day what they're really just saying is, you know, go with our numbers. Not necessarily that Mr. Shulman is, you know, really --

I will say something to you that I just said to a recent trial that I had. I really believe this to be true. You don't win a case because you make the other side look like a bad guy. Everybody wants to try the case

that way. Everybody thinks that's how it's going to work. You are going to win or lose this case, and you're going to win or lose this motion on the law and what is here and what is appropriate facts to consider and how to apply the law to those facts. Like, I'm not inflamed by the arguments about what Mr. Shulman did or didn't do and the conversations you may or may not have had. It's really not the point.

The point for me is, you know, is there sufficient basis here to believe that punitive damages is a viable claim. It's not a high standard to meet to amend, as you pointed out.

There's some argument it should just be automatically gotten unless there's prejudice or some other thing. The reality to me is I don't allow an amendment to a claim if there's not a viable basis for the claim. That's all I'm looking at.

MR. ROYAL: I understand, your Honor. I'm not trying to make counsel look bad. What I see is in the reply counsel has made misrepresentations.

THE COURT: You're not trying to make counsel look bad.

MR. ROYAL: They're trying to make me look bad.

They say Mr. Royal told a witness to lie. That's not trying to make me look bad. What am I supposed

to do with that. And they're using that to say, and, by the way, it's a pattern of bad conduct by Venetian and therefore you should grant our motion for leave to amend.

If the court is not inclined to consider those things, such as representations about Venetian purposely omitting reports, in violation of discovery commissions report and recommendation. Venetian violating court orders in Smith vs. Venetian, which there's no evidence of that. I don't know why that belongs in the reply in support of this motion. They said, Venetian did not review the discrepancy and provide, quote, all reports deemed responsive to Plaintiff's request for prior incident reports. There's no evidence of that, your Honor. To the contrary. To the contrary we did respond as the discovery commissioner asked us to. Sent a letter to Mr. Galliher in that regard.

They've made other statements regarding counsel. Counsel lied to the court. Venetian frivolously filed motions for sanctions. Venetian unjustly accused undersigned and Mr. Goldstein of criminal conspiracy and implied professional responsibility violations. Harassed and eventually fired Mr. Shulman, an employee, who had never received written warnings in his 13 years of work for Venetian. Venetian is an awful corporate citizen.

Venetian admitted it inadvertently missed 4 reports provided in Smith vs. Venetian.

First of all, it's not true.

Secondly, they are the ones, Plaintiff is the one trying to make me personally look bad in order to get this motion -- the court to move in its favor of this motion.

Lastly, your Honor, my comment about Mr. -- about the -- some case that I'm not familiar with and something that Mr. David Elliot may or may not have said, put in the reply. All of this information, all these things were known to Mr. Galliher prior to filing his motion.

Certainly he knew about testimony from Joe Larsen. That was provided in October 2018. The numbers he's relying on, that you made reference to earlier --

THE COURT: Was it Larsen.

MR. ROYAL: Yes, Larsen.

Then there's -- he's made reference to Tom Jennings in his report. It was done in December of 2018. Those are -- that's the primary basis he's using, saying we have some kind of strict liability standard, I guess, that we have to meet. Otherwise, they're entitled to punitive damages.

They've known all of this. They knew it well before they filed this motion. I'll address that in more detail, your Honor, after Mr. Galliher has his say on the

motion.

THE COURT: Do you want to speak to the -- Mr. Galliher -- before we speak to the motion for leave to amend, do you want to speak all to the -- obviously, it's caused -- I'll use a mild word -- some chagrin for the fact these things were put into the reply. And he's obviously taking issue with the fact he finds them to be not well-founded accusations, or frankly, false accusations, he said. At the end of the day, again, I didn't focus on that as being the overarching concern I had about whether or not to grant your motion.

Did you just want to speak to what you put in the reply and why you think it was appropriate to put it there. I'm not terribly inclined to grant the motion to strike and muddy the water. I really don't know what that looks like to make you refile something and take it out. The reality is I'm not considering it in terms of anything terribly meaningful toward this decision making, but at the end of the day, it's there, and he has the concern.

MR. GALLIHER: I have to say, Judge, I've been practicing law for 45 years and I have to say this is probably the first case and only case I remember being called so many names.

But the thing that's of interest to me is that -- we pointed this out in the paperwork we filed in

response to the motion to strike. We pointed out there was no law cited in the motion to strike. When we searched the law we found out that the legal basis for the motion didn't exist. We've seen that throughout this case. I'm not sure how to address it.

THE COURT: There's always a legal basis for a motion to strike in the sense that we have a rule that basically indicates anything impertinent, scandalous -- I forget the other two adjectives -- but anything that comes before the court that fall into those categories we can strike.

What he's basically saying is this is not accurate information. It shouldn't be in the reply. It either bears no barring on punitive damages amendment request, or it's just false and inflammatory. And I think that's the basis. It's a 12(f) basis, regardless. Now, it is a pleading. No. But I think 12(f), has been used for purposes to strike for briefings too.

MR. GALLIHER: I understand that.

Normally the way this is done is we file a motion to amend. The defense files an opposition. We file a reply and that's the end of it. But what has happened in this case consistently is we file a reply and that's not the end of it. Then we have a motion to strike, just like we did on the last hearing. And this

motion to strike is based on the fact the evidence was supposedly not authenticated, which, of course, is not a requirement. And that we raised new matters in the reply. Which pursuant to Nevada law we're entitled to do. So we didn't violate anything by the reply that we filed.

Now, I think the problem -- a lot of this is, to me, is irrelevant to what we're doing. The allegations back and forth. No. He said this. No. He didn't say that. No. To me it's a very simple motion. And it was from the get go.

THE COURT: Let's segue over to the motion. You made a motion for leave to amend the complaint to add punitive damages. The central argument is this is a negligence claim. Where do you get punitives at. And how do you have a legal basis to do that.

MR. GALLIHER: Very simple.

This is what we intend to prove at trial. The Venetian has been open for 20 years. They have marble floors in their casino area and walkway area on the ground floor. They've had marble floors since they opened.

We have testimony from Joseph Larsen, the security guard and EMT, employed by Venetian -- still employed by Venetian -- who says during the 9 years I've worked as an EMT/security officer I have personally investigated over 100 injury falls at the Venetian.

Also, by the way, there are two security guards/EMTs per shift at the Venetian, sometimes 3. So if we take 2 or 3 times 3 shifts, let's do the math.

Now, it goes from -- I'm assuming he's an average security officer and EMT. We go from 100 to 900 injury falls over a 9 year time frame. You add that into the 20 years Venetian has been open with the same floors, now we're at 1,500 injury falls at the Venetian.

THE COURT: So we've gone from the number of reports and the concern that some of the reports were left out -- which number is significantly less then the number you're quoting now -- to some extrapolation of testimony of, well, I think it's probably about this many I've done. If there's this many of me, then it's this many things.

MR. GALLIHER: That's not what he said. He was very definite. I went over and over it with him in his deposition. There was no, maybe, there's a hundred. A hundred was minimum. So in his deposition testimony he's not indefinite. He is very, very sure of what he's testified to.

Let's take a look at that information first. Okay. Then we've got the 73 injury fall reports, which is what we discovered. Then we've got the porter's testimony.

Now, these again are Venetian employees who testified that their supervisor informed them that the marble floors

at the Venetian are very dangerous, very dangerous. And if there is a spot of water, a slight amount of water on the floor a customer can slip and fall. This is coming from management. So it's not like they don't know that their floors are very, very dangerous to their customers. So that's coming again from their own employees' testimony.

Then we've got the David Elliot situation. This is something which is recent which we have yet to discover, but we intend to. And that is the Venetian in the mid-2000s -- 2005, 2006, 2007 -- hired David Elliot -- who the court is probably familiar with. He's a court qualified bio-mechanical engineer, PE. They hired him to evaluate their floors at the Venetian and make recommendations concerning how they can make the floors safer.

The one thing we've determined so far, Mr. Elliot told him that under no circumstances is marble an acceptable surface for a floor such as a hotel/casino like the Venetian. He made recommendations concerning how they could go from marble to tile and increase the co-efficient of friction -- slip resistance -- to the .5 industry standard from where it is now.

As we know from Dr. Jennings report the slip testing. When wet the slip resistance was .33. It's far below the

industry average. Now we've got the Venetian hiring somebody, who's an expert, to come in and advise concerning the floors and how to make them safer. Nothing has changed. The floors are still marble. They're still not slip resistant. We've got that information as well.

Also we've got the fact that there are now coatings available for these types of marble floors. And if you use a coating on the marble floors you can make them more slip resident. And the Venetian has elected -- what we know so far -- remember, we're talking about an amendment, so we need an opportunity to discover information. But what we know is that the Venetian has not utilized all of the substances available to it to coat the marble floors and, perhaps, make them more slip resistant.

THE COURT: Let me turn your argument back to you, Mr. Galliher, that you made to Mr. Royal on his motion, which was like where is the law to support this.

You know that if we're going to have punitives that ultimately -- and it's a viable claim in a case, then it's ultimately going to have to be proven by clear and convincing evidence that there was oppression, fraud, malice. That type of things. What you're arguing is just sheer quantity of accident and that that converts what occurred here into oppression, fraud, or malice. Where is the case law that would support, in a negligence action,

sheer quantity of accident.

MR. GALLIHER: We cited case law in 1 case, 2 events were enough for an amendment to include a claim of punitive damages.

THE COURT: If I recall those cases correctly, there was evidence there that we may not, yet, have here. I'm not seeing the smoking gun, so to speak, you know. Well, I'm not going to try to say what I think is evidence I should be seeing. I'm just saying I'm not sure I see the tie in between the evidence I know to be in this case so far and what was in those cases.

MR. GALLIHER: We only have to show that it's arguable. We don't have to prove our case.

The court has the ultimate authority here. If we have our complaint amended and we attempt to discover a punitive damage claim, and we do not discover information sufficient to support the claim, well, then the court can move on a motion for summary judgment in this case brought by the defense on the grounds there's no clear and convincing evidence to show punitive damages. Or at trial, once the testimony is presented the court at that point in time can say, you know what, I don't think there's clear and convincing evidence to show a punitive damage claim in this case and the court can decline to give the instruction.

So we're talking now about a motion to amended to give us the opportunity. We have, what I believe, is a smoking gun big time. Remember something. This is a hotel/casino built 20 years ago for the purpose of attracting customers through the hotel/casino. For the purpose of attracting customers, who then use the marble floors at the Venetian.

The fact that we've had so many falls documented indicates to me that there have been a history of these falls from the get go. The floors at the Venetian, when they first erected the hotel, are still marble, and they haven't changed the same marble. I don't think we have to be rocket scientists to figure out there must be a significant history of injury falls at this hotel/casino on these floors.

So now the question is, what did the Venetian know and when did they know it. Well, that's all part of discovery that we have to do in order to substantiate our claim for punitive damages. That's where the court comes in. Because if, in fact, we can't prove the claim, it will be a subject of a summary judgment motion, which the court can rule on.

I'm talking strictly about whether it's an arguable claim. Whether or not we get to amend the complaint. Whether leave is freely given to, in this case, the

Plaintiff, to amend their complaint to include a claim for punitive damages. If the evidence doesn't support the claim, I'm going to be the first guy to say, well, we'll dismiss it.

On the other hand, from what I can see here so far, I think the evidence is going to show a 20-year history of conscious disregard for the safety of the Venetian's customers by hotel management, who were aware of the dangerous floor that they installed when they built the casino, who have been aware of the dangerous state of this flooring from then to the present.

THE COURT: As counsel pointed out in the case law, reckless disregard, this type of thing, doesn't necessarily get you there to punitives. Your argument is that somehow this evidence is going to show something more then that.

MR. GALLIHER: We believe that's the case. Of course, as the case law pointed out, that's one of the reasons our motion to amend is granted. It gives us the opportunity to explore the issue, discover the information and it either supports our position or it doesn't.

THE COURT: I'm not, not mindful of the fact that if I were to allow this that does change the scope of discovery. The potential of this claim coming in against a large casino/hotel enterprise could be, you know,

something that the jurors could take and run with, whether or not the evidence is there or not. The court would have to ultimately be the gatekeeper to determine whether or not it survives summary judgment.

Why does it not meet the much lower standard at this point of there's some evidence that could indicate the type of decision making that is culpable -- if you want to call it that -- at this point -- at least as alleged -- and that ultimately discovery will pan that out.

MR. ROYAL: Your Honor, as you know from prior hearings, there is a dispute as to whether or not there was any foreign substance on the floor in this case.

THE COURT: Whether it was wet or not is the distinction you use.

MR. ROYAL: That's an important distinction because their own expert says the floor is safe when it's dry.

Our position is there was nothing wrong with the floor. We have a lot of witnesses that will support that. We provided the court with lots of surveillance evidence. Their expert is not going to be able to testify there was anything on the floor. At least from what he sees on the video.

Let me make a couple of corrections what counsel

said. He said Mr. Larsen is still employed by Venetian. That's not true. He hasn't been employed with Venetian for quite some time. He's been using extrapolating numbers from Mr. Larsen's testimony, again, since he got it back in October of 2018. He's arguing about things that he's known since that time, maybe even before that time. He's been collaborating with Mr. Goldstein we know in the Smith case. So he's waited -- I mean, we filed a joint case conference report late July of 2018. He waited until this late date making it appear as though he's just coming up with this information now. I mean, he has a burden to meet as it relates to undue delay, bad faith, dilatory conduct and so forth. I don't believe he's met that as relates to this particular motion.

Another thing, your Honor, that I just want to point out. When Mr. Galliher is extrapolating all these numbers about how dangerous this floors is, his client worked in the Venetian on the property for a year. Spent many thousands of hours, hundreds and thousands of time walking across this very same marble floor, never even heard about somebody slipping and falling. Much less experiencing it, seeing it, or anything like that. So to the extent that the court is at all influenced by the numbers he's throwing out here, it's simply not supported by his client's own testimony.

THE COURT: It's not the numbers. It's the question of whether the current or former employees have testimony that this is a known hazardous condition that could have been ameliorated. It hasn't been. There's been decision making. The evidence will bear out there's that, as alleged -- and again, standard to amend is very low.

I hear you, obviously. There's got to be some discussion about whether or not there's any kind of prejudice or undue delay, this type of thing. At this point in litigation, I'm not sure we have that concern.

He's indicated in his argument that you should be proving that up against them to prevent the amendment. But at the end of the day, I'm not sure I see that as much as I see is there any potential liability for this claim. If there is, and the standard is low, they should be able to explore it. If the evidence doesn't pan out, Mr. Galliher is right, it will be kicked out on summary judgment.

It's very hard to make a decision at this stage of the case not to allow some exploration of this in light of, at least, not just the numbers but in light of what has been asserted to be the testimony of some of these witnesses.

MR. ROYAL: One of the things he represented to

the court about what the PAD people said is also incorrect. They didn't say they had been told by supervisors it's slippery when wet. They're testifying about their own experience.

Your Honor, I guess I'm concerned that every single -- this is as simple a negligence case as you have. He wants to try every case but the actual one that we have. So what this is going to turn into is a huge discovery deal where Mr. Galliher is going to now he's seeking subsequent incidents and he's going to be making demands to prove up his punitive damage claim, financials and all kinds of stuff that he otherwise wouldn't be entitled to in a simple negligence case.

If he had brought a claim for punitive damages in his original complaint, we'd be filing a motion for summary judgment today. He does not have and has not presented evidence that would remotely support a punitive damages claim.

I want to point out to the court there's no evidence of conscious disregard. There's no evidence of even something beyond gross negligence in this case. It's a simple slip and fall that an expert will testify to that if dry -- and we believe there's sufficient evidence that it was -- that it's absolutely safe.

Also I'll just point out to the court there is no

national standard of .50 coefficient of friction. It's not something Mr. Jennings is going to be able to support.

MR. GALLIHER: You don't need to hear further from me.

THE COURT: So this is a very difficult call to make in all candor because I know and I respect the consequences of allowing this amendment. I will also be candid that coming in here today my inclination was against it because I think we start from the premise this is a negligence claim. It is an uphill battle to be able to get a punitive damages allegation in a negligence claim. And there has to be far, far more evidence to support a punitive damages claim then could ever be there to support or would ever be there to support a negligence claim.

So, you know, there's a lot of talking about numbers. There's no doubt in my mind the vast majority of that, if not all of that, is purely speculative and extrapolations from some personal experiences but not necessarily numbers that we rely on to consider granting the motion to amend.

I think what ultimately just tipped the scale over to the side of it is appropriate to allow the amendment -- again, I do this with trepidation, because I will tell you

though I will be a very strong watch dog about this ever getting before a finder of fact if there is not evidence to support a punitive damages claim. And it's not the same standard. It's not going to be the same standard as this motion to amend. And there had better be substantial evidence that will allow for that to get to the trier of fact.

Should you be able to explore it, I think the Tichner (ph) case and the cases cited do show that it is possible to have a punitive damages claim in a case such as this. And to the extent that there is some evidence indicated now that there could be implied malice, that there could otherwise be knowledge of possible harmful consequences and a willful and deliberate failure to act, which is the language that we see in cases where punitive damages were found in negligence cases and/or statutory requirement for punitive damages, I think it would be abuse of my discretion not to grant the amendment.

The standard met to allow for amendment is here. That there isn't evidence of undue delay or prejudice. And while it's not going to be, perhaps, pretty, this discovery, I think at the end of the day, with what's been alleged, it would do a disservice to this case if I didn't allow there to be some exploration to see if there's evidence that could support the damages claim.

So in that regard I think the proper call to make is to allow the amendment to include punitive damages. Allow it to be filed as requested and see where discovery goes.

If the evidence is not there, if we are talking about multiple accidents but nothing more then that, it's very hard for this court to see how punitive damages will ever get to the fact finder. That's where I think the potential harm to a large operation lies. The discovery and the fact there may have been decisions made and some sort of willful, deliberate failure to act to avoid harmful circumstances, whether or not that's there or not, we'll find out. I think it is appropriate to allow exploration at this stage.

MR. GALLIHER: Thank you.

THE COURT: I'll grant the motion. Mr. Galliher, you'll prepare the order.

MR. ROYAL: Your Honor, my only concern relates to the prior motion that we had, prior decision that relates to protective order we were seeking. Counsel is going to be seeking subsequent incident reports, I'm sure, as a result of this ruling.

THE COURT: That prior order still stands. I made it clear to Mr. Galliher what he can use in support and what he cannot.

MR. GALLIHER: That's a discovery commissioner issue. We're going to be filing a motion to compel and some other matters in this case as well, but that's not before the court.

THE COURT: We do have the order the court issued before that tells you what your disclosure scope is and is not. And the fact that what you'd engaged in before is not something the court is expecting you to be engage in going forward. I expect that to be honored.

The prior order still stands. I appreciate that clarification.

MR. GALLIHER: Thank you, your Honor.

THE COURT: Thank you, Counsel.

* * * * *

CERTIFICATE

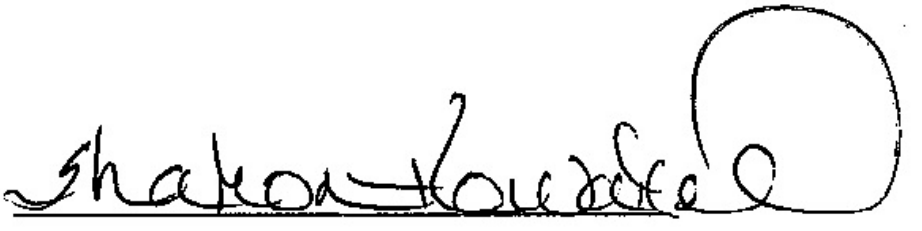
OF

CERTIFIED COURT REPORTER

* * * * *

I, the undersigned certified court reporter in and for the State of Nevada, do hereby certify:

That the foregoing proceedings were taken before me at the time and place therein set forth; that the testimony and all objections made at the time of the proceedings were recorded stenographically by me and were thereafter transcribed under my direction; that the foregoing is a true record of the testimony and of all objections made at the time of the proceedings.



Sharon Howard
C.C.R. #745