

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

SPECIAL ADMINISTRATOR  
SHALONDA MOLLETTE, AN  
INDIVIDUAL, IN PLACE AND STEAD  
OF JOE N. BROWN,

Appellant,

vs.

GNL, CORP., A NEVADA  
CORPORATION, AND  
THYSSENKRUPP ELEVATOR  
CORP.,  
A FOREIGN CORPORATION,

Respondents.

SPECIAL ADMINISTRATOR  
SHALONDA MOLLETTE, AN  
INDIVIDUAL, IN PLACE AND STEAD  
OF JOE N. BROWN,

Appellant,

vs.

GNL, CORP., A NEVADA  
CORPORATION, AND  
THYSSENKRUPP ELEVATOR  
CORP.,  
A FOREIGN CORPORATION,

Respondents.

No. 80581

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**APPENDIX TO APPELLANT'S OPENING BRIEF**

**VOLUME 13**

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Dated June 10, 2022.

Respectfully submitted,

IQBAL LAW PLLC

By: /s/ Mohamed A. Iqbal, Jr.

MOHAMED A. IQBAL, JR.

Nevada Bar No. 10623

9130 W. Post Road, Suite 200

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*Attorneys for Appellant*

### **CERTIFICATE OF SERVICE**

I certify that I am an employee of IQBAL LAW PLLC and that on June 10, 2022, I caused a true and correct copy of the **APPENDIX TO APPELLANT’S OPENING BRIEF VOLUME 13** to be served as follows:

\_\_\_ By placing the 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

\_\_\_ Pursuant to NEFCR 9, to be sent via facsimile; and/or

\_X\_ Pursuant to NEFCR 9, by transmitting via the Court’s electronic filing services by the document(s) listed above to the Counsel set forth on the service list.

/s/ Marie-Claire Alsanjakli  
An Employee of **IQBAL LAW PLLC**

## EXHIBIT I

JNB02259



1 ECC  
REBECCA L. MASTRANGELO, ESQ.  
2 Nevada Bar No. 5417  
ROGERS, MASTRANGELO, CARVALHO & MITCHELL  
3 700 S. Third Street  
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4 Phone (702) 383-3400  
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5 rmastrangelo@rmcmlaw.com  
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6 THYSSENKRUPP ELEVATOR CORPORATION

7  
DISTRICT COURT  
8  
CLARK COUNTY, NEVADA  
9

10 JOE N. BROWN, an individual, and his wife, )  
11 NETTIE J. BROWN, an individual, )  
12 Plaintiffs, )

CASE NO. A-16-739887-C  
DEPT. NO. XXXI

13 vs. )  
14 LANDRY'S INC., a foreign corporation; )  
15 GOLDEN NUGGET, INC., a Nevada )  
16 corporation d/b/a GOLDEN NUGGET )  
LAUGHLIN; GNL, CORP., a Nevada )  
17 corporation; DOE INDIVIDUALS 1-100, )  
ROE BUSINESS ENTITIES 1-100, )  
18 Defendants. )

19 GNL, CORP., a Nevada corporation; )  
20 Third-Party Plaintiff, )

21 vs. )  
22 THYSSENKRUPP ELEVATOR CORPORATION )  
a foreign corporation; DOES 1-75; ROE )  
23 CORPORATIONS 1-75 and ROE )  
CORPORATIONS 1-25, )

24 Third-Party Defendants. )

25  
26 **DEFENDANT/THIRD PARTY DEFENDANT THYSSENKRUPP ELEVATOR**  
**CORPORATION'S SEVENTH SUPPLEMENT TO EARLY CASE CONFERENCE LIST**  
27 **OF WITNESSES AND PRODUCTION OF DOCUMENTS**

28 Defendant, THYSSENKRUPP ELEVATOR CORPORATION, by and through its

1 attorneys, REBECCA L. MASTRANGELO, ESQ. and the law firm of ROGERS,  
2 MASTRANGELO, CARVALHO & MITCHELL, hereby supplements its Early Case Conference  
3 List of Witnesses and Production of Documents as follows: **(Supplements in bold)**

4 I.

5 WITNESSES

- 6 1. Joe N. Brown  
7 c/o Mohamed A. Iqbal, Jr., Esq.  
8 Christopher Mathews, Esq.  
9 101 Convention Center Drive, Suite 1175  
10 Las Vegas, Nevada 89109

11 Plaintiff is expected to testify as to the facts and circumstances surrounding the subject  
12 incident.

- 13 2. Nettie J. Brown  
14 Mohamed A. Iqbal, Jr., Esq.  
15 Christopher Mathews, Esq.  
16 101 Convention Center Drive, Suite 1175  
17 Las Vegas, Nevada 89109

18 Plaintiff is expected to testify as to the facts and circumstances surrounding the subject  
19 incident.

- 20 3. Chris Dutcher and/or  
21 Persons Most Knowledgeable  
22 THYSSENKRUPP ELEVATOR CORPORATION  
23 c/o Rebecca L. Mastrangelo, Esq.  
24 700 S. Third Street  
25 Las Vegas, Nevada 89101

26 These witnesses may be called to testify as to the condition, function, and maintenance of  
27 the subject escalator at all relevant times as well as the inspection of the escalator following the  
28 subject incident.

4. Persons Most Knowledgeable  
Golden Nugget Laughlin  
c/o Annalisa N. Grant, Esq.  
GRANT & ASSOCIATES  
7455 Arroyo Crossing Parkway, Suite 300  
Las Vegas, Nevada 89113

These witnesses are expected to testify as to the facts and circumstances surrounding the

1 subject incident and the investigation of same.

2       5.     Steve Robertson or Person Most Knowledgeable  
3             State of Nevada  
4             Department of Business and Industry  
5             Division of Industrial Relations  
6             Mechanical Compliance Section  
7             1301 N. Green Valley Parkway, Suite 160  
8             Henderson, Nevada 89074

9       This witness is expected to testify as to his inspection of the subject escalator on May 13,  
10 2015, and his opinion on the cause of the accident.

11       6.     William Schaefer  
12             State of Nevada  
13             Department of Business and Industry  
14             Division of Industrial Relations  
15             Mechanical Compliance Section  
16             1301 N. Green Valley Parkway, Suite 160  
17             Henderson, Nevada 89074

18       This witness is expected to testify as to the inspections and permitting of the subject  
19 escalator at all times relevant herein as well as the content of the State of Nevada file pertaining  
20 to the subject escalator.

21       7.     Larry Panaro  
22             current address unknown

23       This witness may be called to testify as to the proposals made to Golden Nugget  
24 pertaining to the subject escalator and communications between the parties relative to same.

25       8.     Person Most Knowledgeable  
26             THYSSENKRUPP ELEVATOR CORPORATION  
27             c/o Rebecca L. Mastrangelo, Esq.  
28             700 S. Third Street  
29             Las Vegas, Nevada 89101

30       This witness may be called to testify as to the proposals made to Golden Nugget  
31 pertaining to the subject escalator and communications between the parties relative to same.

32       9.     William Schaefer and/or Person Most Knowledgeable  
33             High Sierra Elevator Inspections, Inc.  
34             4894 Sparks Blvd.  
35             Sparks, NV 89436

36       This witness may be called to testify as to the inspections and permitting of the subject

1 escalator at all times relevant herein as well as the content of the High Sierra Elevator Inspections  
2 file pertaining to the subject escalator.

3 Defendant also names as witnesses all of Plaintiffs' health care providers after the  
4 subject accident, and, as relevant, prior to same.

5 Defendant reserves the right to add to its list of witnesses as discovery proceeds and as  
6 the testimony at trial may make necessary.

7 **DOCUMENTS**

- 8 1. Defendant thyssenkrupp Elevator Corporation's Answer to Third Party  
9 Complaint;
- 10 2. Agreement for Dover Master Maintenance Service (with pricing redacted as  
11 irrelevant to the subject matter of the pending action and not reasonably calculated  
12 to lead to the discovery of admissible evidence);
- 13 3. Thyssenkrupp Elevator First Report of Alleged Incident;
- 14 4. State of Nevada Elevator Accident Report;
- 15 5. Thyssenkrupp Account History Report dating from May 13, 2014 though May 12,  
16 2015;
- 17 6. Video of subject incident (in the possession of GNL, Corp.);
- 18 7. Commercial Lines Policy for Thyssenkrupp North America, Inc. (with premiums,  
19 deductibles and retentions redacted as irrelevant to the subject matter of the  
20 pending action and not reasonably calculated to lead to the discovery of  
21 admissible evidence);
- 22 8. State of Nevada escalator inspection and permitting documents (previously  
23 produced by GNL, Corp.);
- 24 9. Account History for Subject Escalator dating from November 2012 through  
25 December 2015;
- 26 10. Dover proposal dated June 23, 1998 and related correspondence;
- 27 11. ThyssenKrupp Elevator Repair Order (proposal) dated September 12, 2012;
- 28 12. ThyssenKrupp Elevator Repair order (proposal) dated October 2, 2012;
13. ThyssenKrupp Elevator Work Order (proposal) dated June 16, 2015;
14. ThyssenKrupp Elevator Work Order (proposal) dated June 16, 2015;

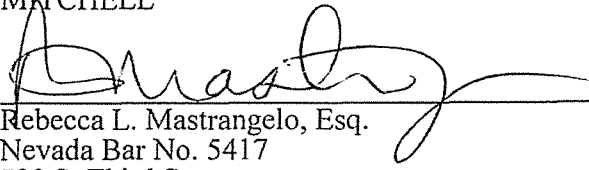
- 1 15. ThyssenKrupp Elevator Repair Order (proposal) dated November 1, 2015;  
2 16. Various emails between Larry Panaro and employees of Golden Nugget pertaining  
3 to escalator steps and proposals (2012 and 2015);  
4 17. State of Nevada records for escalator bearing State Number NV1993;  
5 18. High Sierra Elevator Inspections, Inc. file subpoenaed for the subject elevator for  
6 the period of time from 2012 to 2016;  
7 19. Safety for Older Adults publication from Elevator Escalator Safety Foundation &  
8 EESF Canada;  
9 20. A Safe Ride for Senior Citizens (An Elevator, Escalator and Moving Walk Safety  
10 Guide for Your Family, Your Friends and You);  
11 21. **iPhone/email communications from Chris Dutcher;**  
12 22. **Davis Turner file materials (on disc).**

13 Defendant also identifies and incorporates the documents produced by all other parties  
14 herein.

15 Defendant reserves the right to add to its list of document as discovery proceeds.

16 DATED this 16<sup>th</sup> day of November, 2018.

17 ROGERS, MASTRANGELO, CARVALHO &  
18 MITCHELL

19   
20 Rebecca L. Mastrangelo, Esq.  
21 Nevada Bar No. 5417  
22 700 S. Third Street  
23 Las Vegas, Nevada 89101  
24 Attorney for Defendant  
25 THYSENKRUPP ELEVATOR CORPORATION  
26  
27  
28

1 **CERTIFICATE OF SERVICE**

2 Pursuant to N.R.C.P. 5(a), E.D.C.R. 7.26(a), and Rule 9 of the N.E.F.C.R. I hereby certify  
3 that I am an employee of Rogers, Mastrangelo, Carvalho & Mitchell, and on the 16<sup>th</sup> day of  
4 November, 2018, a true and correct copy of the foregoing **DEFENDANT/THIRD PARTY**  
5 **DEFENDANT THYSSENKRUPP ELEVATOR CORPORATION'S SEVENTH**  
6 **SUPPLEMENT TO EARLY CASE CONFERENCE LIST OF WITNESSES AND**  
7 **PRODUCTION OF DOCUMENTS** was served via electronic means with the Eighth Judicial  
8 District Court, addressed as follows, upon the following counsel of record:

9  
10 Mohamed A. Iqbal, Jr., Esq.  
11 Christopher Mathews, Esq.  
12 101 Convention Center Drive, Suite 1175  
13 Las Vegas, Nevada 89109  
14 Attorneys for Plaintiffs

15 Annalisa N. Grant, Esq.  
16 Alexandra McLeod, Esq.  
17 GRANT & ASSOCIATES  
18 7455 Arroyo Crossing Parkway, Suite 300  
19 Las Vegas, Nevada 89113  
20 Attorneys for Defendant/Third-Party Plaintiff

21  
22  
23  
24  
25  
26  
27  
28  
  
An employee of ROGERS, MASTRANGELO,  
CARVALHO & MITCHELL



Molasky Corporate Center  
100 City Parkway Ste. 150  
Las Vegas, NV. 89106

**Brown v. Thyssenkrupp  
Elevator**

**JNB02266**

**Rebecca Mastrangelo**

---

**From:** Chris Dutcher <nvdutch@yahoo.com>  
**Sent:** Wednesday, May 27, 2015 3:42 PM  
**To:** Olsen, Scott  
**Subject:** Golden nugget step cracks

Hello sir,

Today I inspected the golden nugget down escalator steps as per Kone's bulletins.

I found 20 steps to be the new thru-axle type.

I found 35 old style welded fabricated cracked steps in total with type A cracks in them.

5 steps had no cracks visually

Of the 35 steps that are cracked 15 of the steps need to be replaced with the new style thru axle step asap.

I recommend at a minimum the 40 old style fabricated steps should be replaced with the new style steps if not all of the steps.

sincerely,  
Chris Dutcher

Sent from my iPhone



## Rebecca Mastrangelo

---

**From:** Olsen, Scott  
**Sent:** Thursday, May 28, 2015 6:52 AM  
**To:** Chris Dutcher; Panaro, Larry  
**Subject:** RE: Golden nugget step cracks

Thanks, Chris I'll pass this on to Larry and we will discuss this with Don next week.

Scott Olsen  
Service Operation Superintendent

ThyssenKrupp Elevator Americas  
4145 W. Ali Baba Ste. A  
Las Vegas, NV 89118

Phone: (702) 262-6775  
Direct: (702) 789-4636  
Cell: (702) 429-9927  
Fax: (866) 248-5612  
scott.olsen@thyssenkrupp.com

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-----  
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-----Original Message-----

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**Sent:** Wednesday, May 27, 2015 3:42 PM  
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sincerely,  
Chris Dutcher

Sent from my iPhone

## Rebecca Mastrangelo

---

**From:** Chris Dutcher <nvdutch@yahoo.com>  
**Sent:** Thursday, May 28, 2015 7:01 AM  
**To:** Olsen, Scott  
**Subject:** Re: Golden nugget step cracks

Hello sir,

Would you like me to speak with Don about the cracked steps and give him the KONE cracked step bulletin or should I leave all the information for you and Larry to discuss with him ?

Please let me know

thank you,  
Chris Dutcher

Sent from my iPhone

> On May 28, 2015, at 6:52 AM, Olsen, Scott <Scott.Olsen@thyssenkrupp.com> wrote:  
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> Thanks, Chris I'll pass this on to Larry and we will discuss this with Don next week.  
>  
>  
>  
> Scott Olsen  
> Service Operation Superintendent  
>  
>  
> ThyssenKrupp Elevator Americas  
> 4145 W. Ali Baba Ste. A  
> Las Vegas, NV 89118  
>  
> Phone: (702) 262-6775  
> Direct: (702) 789-4636  
> Cell: (702) 429-9927  
> Fax: (866) 248-5612  
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> Facebook · Blog · Twitter · LinkedIn · Google+ · YouTube Subscribe to  
> our e-newsletter www.urban-hub.com  
>  
>  
>

> -----Original Message-----

> From: Chris Dutcher [mailto:nvdutch@yahoo.com]

> Sent: Wednesday, May 27, 2015 3:42 PM

> To: Olsen, Scott

> Subject: Golden nugget step cracks

>

> Hello sir,

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> sincerely,

> Chris Dutcher

>

> Sent from my iPhone

## Rebecca Mastrangelo

---

**From:** Olsen, Scott  
**Sent:** Thursday, May 28, 2015 7:10 AM  
**To:** Chris Dutcher  
**Subject:** RE: Golden nugget step cracks

Sure, go ahead and plant the seed!

Scott Olsen  
Service Operation Superintendent

ThyssenKrupp Elevator Americas  
4145 W. Ali Baba Ste. A  
Las Vegas, NV 89118

Phone: (702) 262-6775  
Direct: (702) 789-4636  
Cell: (702) 429-9927  
Fax: (866) 248-5612  
scott.olsen@thyssenkrupp.com

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-----  
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-----Original Message-----

**From:** Chris Dutcher [mailto:nvdutch@yahoo.com]  
**Sent:** Thursday, May 28, 2015 7:01 AM  
**To:** Olsen, Scott  
**Subject:** Re: Golden nugget step cracks

Hello sir,

Would you like me to speak with Don about the cracked steps and give him the KONE cracked step bulletin or should I leave all the information for you and Larry to discuss with him ?

Please let me know

thank you,  
Chris Dutcher

Sent from my iPhone

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>  
>  
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> Scott Olsen  
> Service Operation Superintendent  
>  
>  
> ThyssenKrupp Elevator Americas  
> 4145 W. Ali Baba Ste. A  
> Las Vegas, NV 89118  
>  
> Phone: (702) 262-6775  
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> Fax: (866) 248-5612  
> scott.olsen@thyssenkrupp.com  
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> Monthly Safety Message ----- Safety Is Not By Chance, But By Choice . . . Make the Correct Choice!  
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> \_\_\_\_\_  
> -----  
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> our e-newsletter www.urban-hub.com  
>  
>  
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> -----Original Message-----  
> From: Chris Dutcher [mailto:nvdutch@yahoo.com]  
> Sent: Wednesday, May 27, 2015 3:42 PM  
> To: Olsen, Scott  
> Subject: Golden nugget step cracks  
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> Of the 35 steps that are cracked 15 of the steps need to be replaced with the new style thru axle step asap.  
>

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>

> sincerely,

> Chris Dutcher

>

> Sent from my iPhone

## Rebecca Mastrangelo

---

**From:** Rebecca Mastrangelo  
**Sent:** Wednesday, November 14, 2018 3:59 PM  
**To:** Rebecca Mastrangelo  
**Subject:** FW: golden nugget  
**Attachments:** FullSizeRender.jpg; ATT600010.txt; FullSizeRender.jpg; ATT600013.txt;  
FullSizeRender.jpg; ATT600015.txt; FullSizeRender.jpg; ATT600017.txt;  
FullSizeRender.jpg; ATT600019.txt

-----Original Message-----

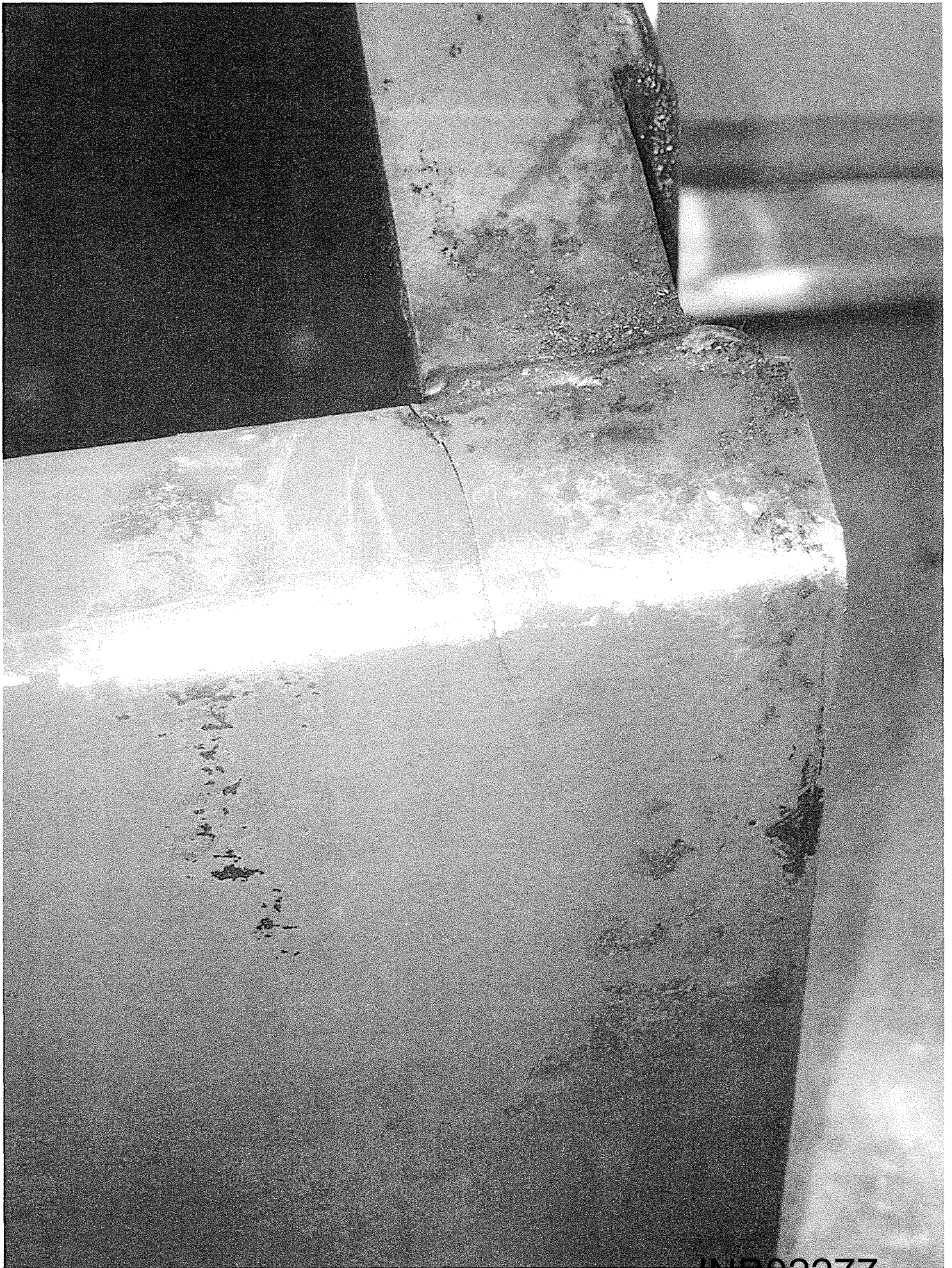
**From:** Chris Dutcher [mailto:nvdutch@yahoo.com]  
**Sent:** Wednesday, June 03, 2015 1:01 PM  
**To:** Olsen, Scott <Scott.Olsen@thyssenkrupp.com>; Panaro, Larry <larry.panaro@thyssenkrupp.com>  
**Subject:** golden nugget





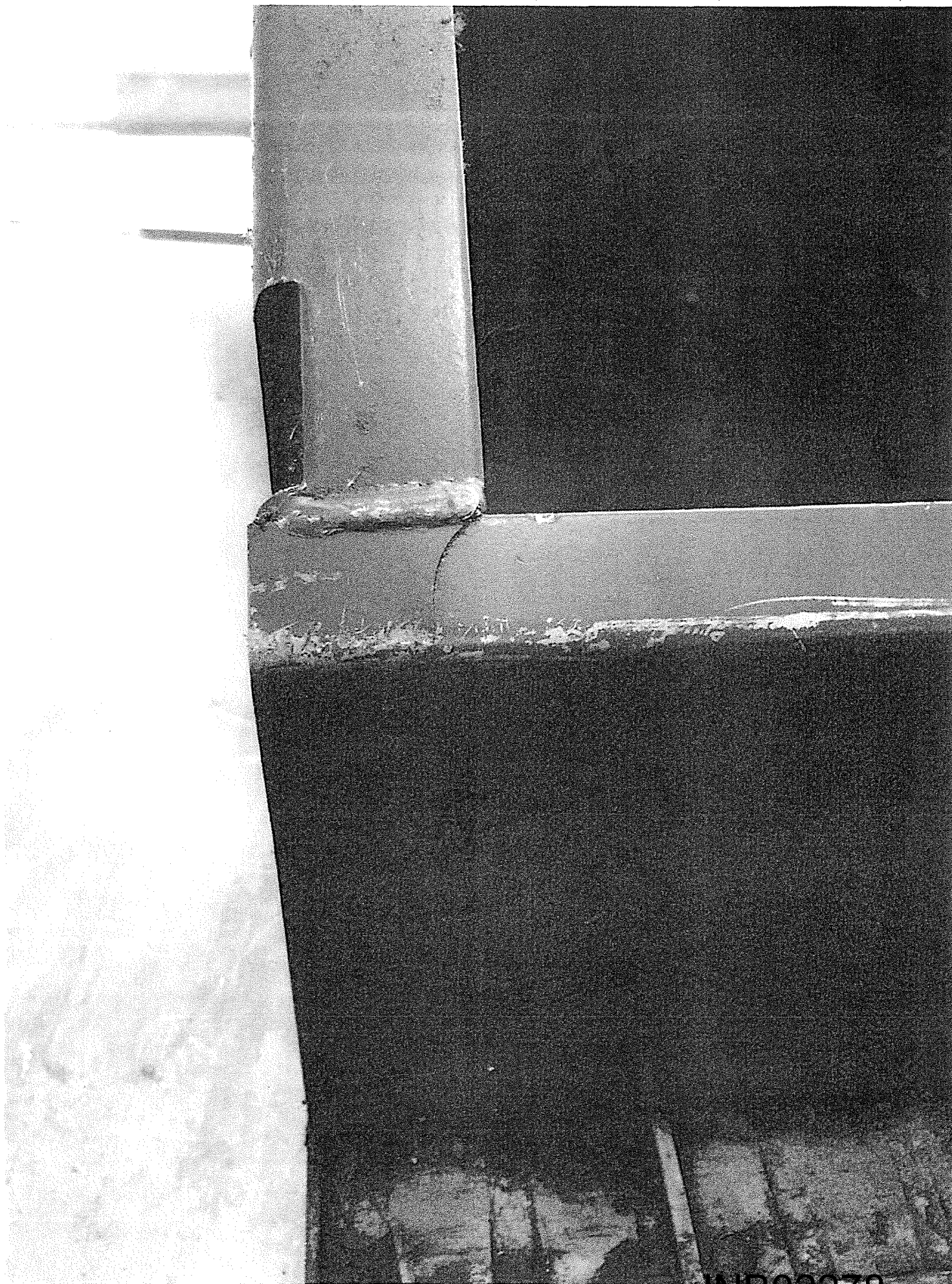
JNB02276





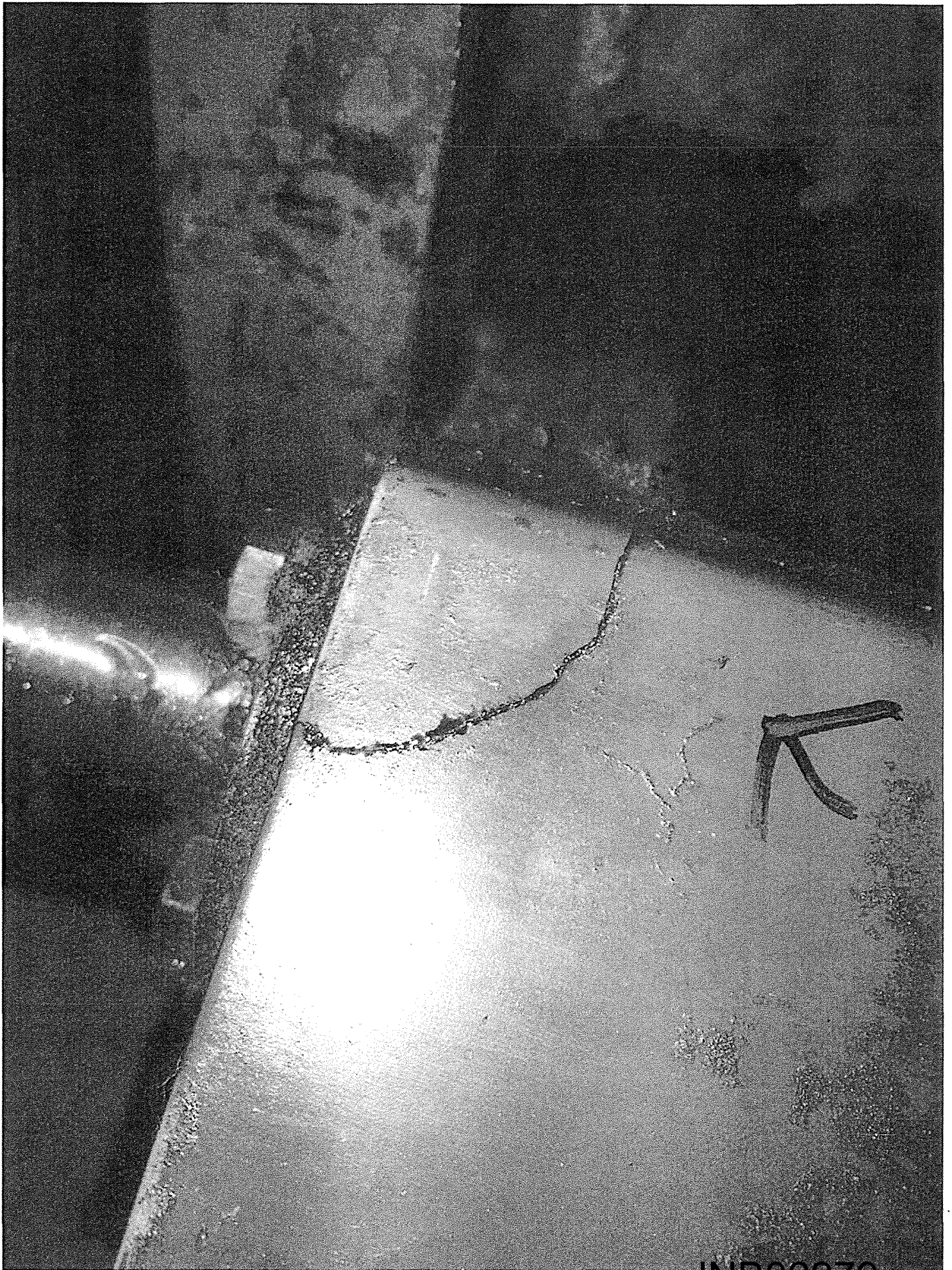
JNB02277





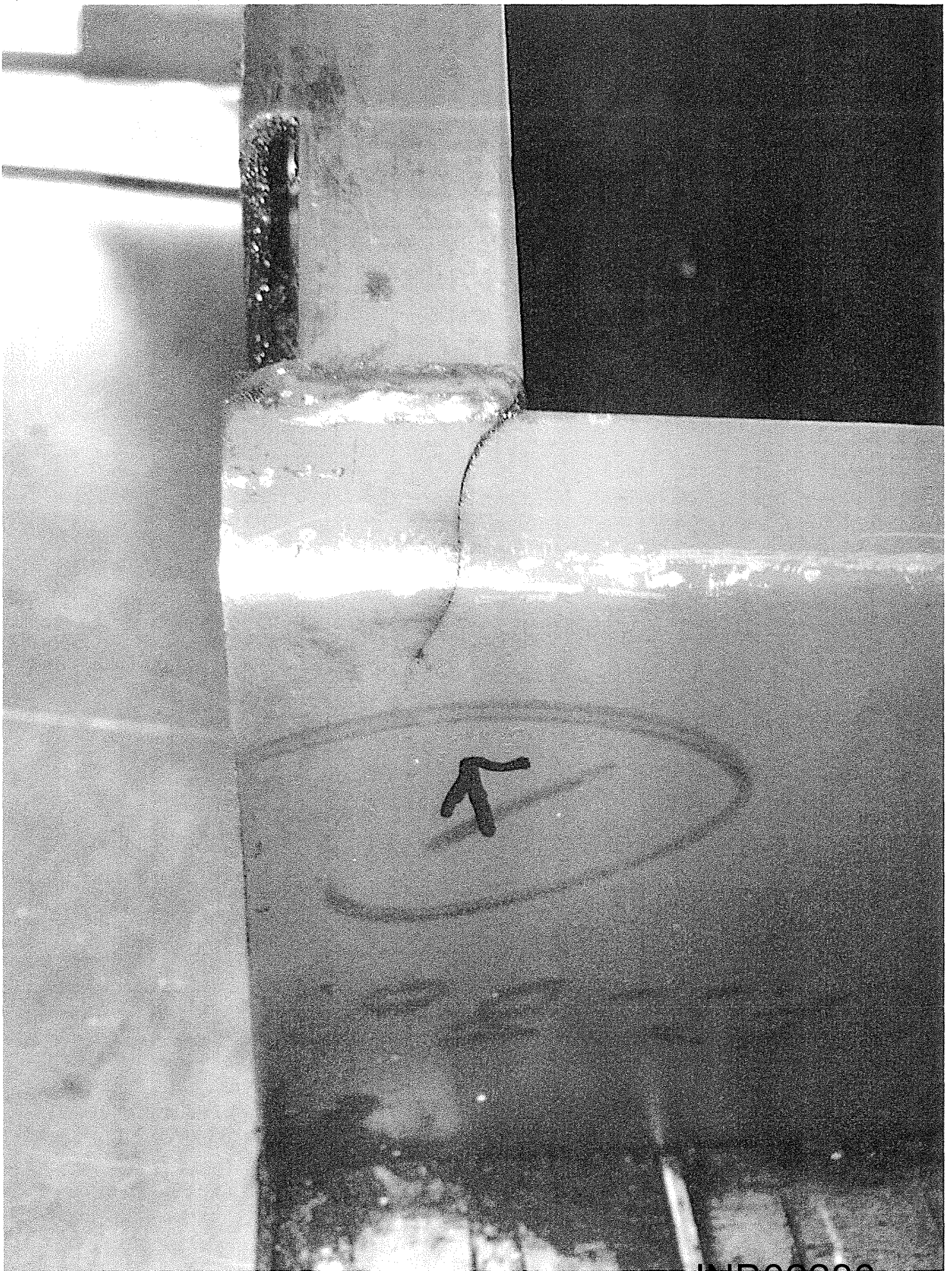
JNB02278





JNB02279





JNB02280

## Rebecca Mastrangelo

---

**From:** Panaro, Larry  
**Sent:** Friday, June 05, 2015 9:21 AM  
**To:** nvdutch@yahoo.com  
**Subject:** FW: Quotes and Tech Bulletin  
**Attachments:** 2281\_001.pdf; ATT6459538.htm; SEB-03-004-2007.pdf; ATT6459539.htm  
  
**Importance:** High

Is this the quote for GN Laughlin?

Larry Panaro  
Account Manager  
Service, Repair and Modernization Sales

**ThyssenKrupp Elevator Americas**  
4145 W. Ali Baba, Suite A  
Las Vegas, NV 89118

Phone: (702) 262-6775

Cell: (702) 591-9422

Fax: (866) 248-5612

<mailto:larry.panaro@thyssenkrupp.com>

Monthly Safety Message - Remember: Report all accidents in a timely manner!

---

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---

**From:** Chris Dutcher [<mailto:nvdutch@yahoo.com>]

**Sent:** Wednesday, May 27, 2015 7:39 AM

**To:** Olsen, Scott; Panaro, Larry

**Subject:** Fwd: Quotes and Tech Bulletin

Hello gentleman,

Below are the quotes that I have acquired from Kone spares.

One quote is for just the step chain entirely.

The second quote is for step chain, steps, roller kits.

Also included is the bulletin for cracked steps as we have found cracked steps in this unit beforehand.

thank you, Chris dutcher

Sent from my iPhone

Begin forwarded message:





## Quotation Confirmation

<b>KONE Spares</b> One KONE Court Moline, IL 61265-1380				Phone: 800-343-3344 Fax: 309-743-5355 Home Page Internet: <a href="http://www.konespares.us">www.konespares.us</a> E-Mail Internet: <a href="mailto:ksparts@kone.com">ksparts@kone.com</a>		
<b>Quotation Number:</b> 330335166 <b>Customer Number:</b> N170735				ATTN: FAX: 866-768-8655 PHONE: 770-799-0425 FROM: THYSSENKRUPP ELEVATOR COMPANY 114 TOWN PARK DRIVE SUITE 300 KENNESAW GA 30144 USA		
Sales Order Date: 05/27/2015 FOB: Origin Terms: Net 30 Purchase Order Number: PENDING Purchase Order Date: 05/27/2015 Salesperson: Miss Sarah Studnicka Valid To Date: 06/27/2015				Lead Time:		
Bill To: THYSSENKRUPP ELEVATOR COMPANY 114 TOWN PARK DRIVE SUITE 300 KENNESAW GA 30144				Ship To: THYSSENKRUPP ELEVATOR 4145 WEST ALI BABA SUITE A LAS VEGAS NV 89118 USA		
QUANTITY			ITEM NO.	DESCRIPTION	UNIT PRICE	AMOUNT
Req	Co	D.Date				
10	10	05/28/2015	10	US67884 CHAIN,STEP,ROLL,24P,41000#	436.00	4,360.00
Total before Tax						4,360.00
Sales Tax						353.16
TOTAL PRICE						4,713.16

JNB02283





## Quotation Confirmation

<b>KONE Spares</b> One KONE Court Moline, IL 61265-1380				Phone: 800-343-3344 Fax: 309-743-5355 Home Page Internet: <a href="http://www.konespares.us">www.konespares.us</a> E-Mail Internet: <a href="mailto:ksparts@kone.com">ksparts@kone.com</a>			
<b>Quotation Number: 330335169</b> <b>Customer Number: N170735</b>				ATTN: FAX: 866-768-8655 PHONE: 770-799-0425 FROM: THYSSENKRUPP ELEVATOR COMPANY 114 TOWN PARK DRIVE SUITE 300 KENNESAW GA 30144 USA			
Sales Order Date: 05/27/2015 FOB: Origin Terms: Net 30 Purchase Order Number: PENDING Purchase Order Date: 05/27/2015 Salesperson: Miss Sarah Studnicka Valid To Date: 06/27/2015				Lead Time:			
Bill To: THYSSENKRUPP ELEVATOR COMPANY 114 TOWN PARK DRIVE SUITE 300 KENNESAW GA 30144				Ship To: THYSSENKRUPP ELEVATOR 4145 WEST ALI BABA SUITE A LAS VEGAS NV 89118 USA			
QUANTITY			ITEM NO.	DESCRIPTION	UNIT PRICE	AMOUNT	
Req	Co	D.Date					
10	10	05/28/2015	10	US67884 CHAIN,STEP,ROLL,24P,41000#	436.00	4,360.00	
60	60	05/28/2015	20	USP34244001 STEP, 3E THRU-AXLE SERVICE	420.00	25,200.00	
60	60	05/28/2015	30	USP29864 ROLLER,4"DIA 7/8"WIDE	58.00	3,480.00	
Total before Tax						33,040.00	
Sales Tax						2,676.24	
TOTAL PRICE						35,716.24	

JNB02284

# Product Bulletin

## SEB PCM and Product Reliability



Attn: All Escalator Service Personnel

File: SEB-03-004-2007

Date: 2008-1-28 (Rev 1)  
(Rev 0 published 2007-01-12)

Subject: Obsolescence and Replacement  
Policy Statement – Fabricated  
Escalator Steps with Step Body Cracks

## Obsolescence and Replacement Policy Statement – Fabricated Escalator Steps with Step Body Cracks

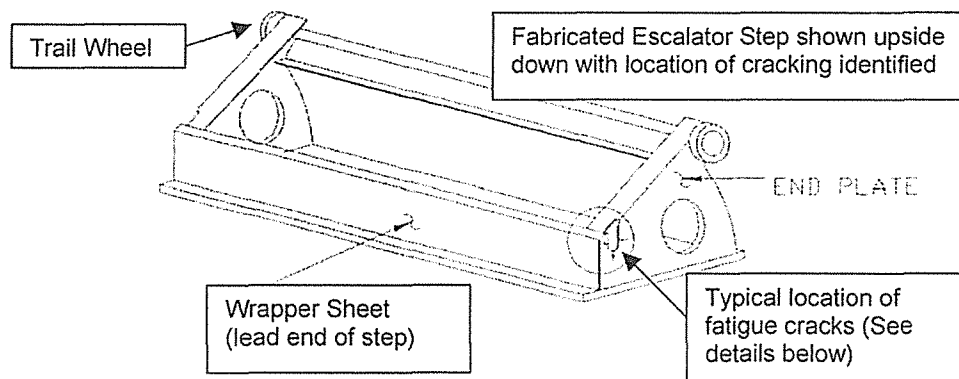
### Product Affected

This bulletin defines type A and type B step cracks that may occur in fabricated steps used on HR type escalators, where the chain rollers are individually flange mounted to the step body end plate. This type of step was manufactured prior to 1993, and all related components are now classed as obsolete.

### Issue

This bulletin is to be used in making a proper determination of when step replacement is necessary. The replacement policy given is based on the continuing policy KONE Spares has followed since we conducted an independent study through the University of Illinois Engineering Dept. in 1981. Additionally, the many years of accumulated field experience with KONE HR escalators, using fabricated steps, has now provided full life cycle knowledge of this component.

During the lifetime of escalator step band components it has been found that on fabricated steps used on HR type escalators, where the chain rollers are individually flange mounted to the step body end plate, cracking can occur in the sheet metal body, due to long term cyclic loading fatigue. The length of time required to develop these cracks is dependent on the equipment operating hours, unit operating speed, loading on the equipment, environmental and building conditions, and service care provided. Therefore, regular maintenance inspections are necessary to determine if cracks have developed, and to determine if steps should be replaced.



# Product Bulletin

## SEB PCM and Product Reliability

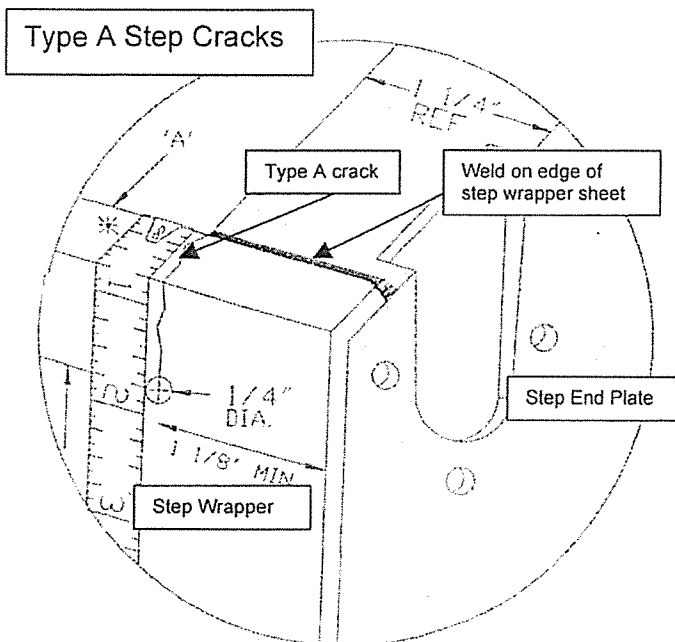


### Cause & Effect

#### Crack type definitions:

**Type A** – Cracks are located at the lead end of the step (where the chain rollers attach), beginning at the end of the 1" weld on the edge of the step wrapper sheet where it attaches to the end plate. The crack proceeds toward the tread surface at approximately 90 degrees to the weld. (See the diagram below)

**Type B** – Cracks radiate from the bolt pattern on the end plate where the chain wheel roller flange attaches to the step. (See diagram of Type B cracks for location identification).



Type A cracks are a result of weld stress imparted to the step body during manufacturing. On older style steps, where the step wrapper is welded to the step end plate as shown in the diagram, the step body is quite rigid, and the weld places the wrapper in stress at the end of the weld. In use, the slight twisting that a step is subject to during its travel through the step band path will allow that stress to relieve itself in the form of a crack. The crack is not a result of static loading. Even if a unit is maintained properly, 'A' cracks may develop, and proceed to the point of relief, normally the bend in the wrapper sheet of the step body. However, the crack may progress over the bend in the wrapper sheet, as shown in the diagram, before stopping.

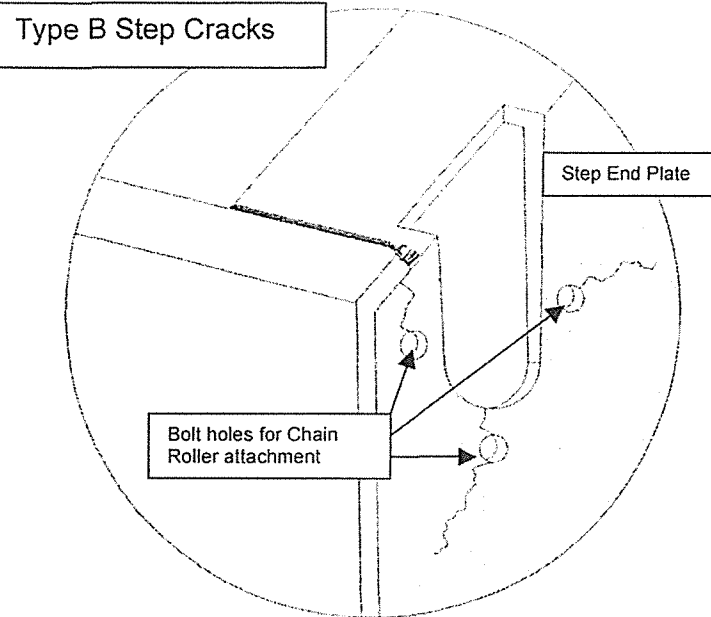
*Type A cracks do not necessarily require replacement.* If the crack has not grown beyond 1-3/4" long, as shown in the diagram, measured from point 'A' on the wrapper edge, a relief hole may be drilled at the end of the crack to terminate the cracking.

### Replacement Policy for steps with Type A cracks

Steps with Type A cracks do not necessarily require replacement. A 1/4" diameter hole may be drilled at the end of the crack to provide a smooth relief surface at the end of the crack. (See diagram above) This relief hole will terminate further progression of the crack. NOTE: If the crack has progressed over the bend in the step body wrapper sheet and has turned toward the side of the step, it should be replaced. The diagram above shows the maximum allowable crack progression for Type A cracks.

## Product Bulletin

### SEB PCM and Product Reliability



Type B cracks are a direct result of fatigue due to cyclic loading over time imposed on the end plate by the chain roller mounting flange attachment. As the steps move over the upper 30 degree transition, the combined weight of any loading on the step wheel is transferred through the chain wheel flange attachment to the side of the step resulting in continued flexing of the step body as it moves around the step band. Novatex board adjustment plays a role in determining the length of time that steps may operate before cracking occurs. Novatex boards must be adjusted properly to support the weight of the chain, steps and live load, and improperly maintained novatex boards can cause higher cyclic loading to occur on the step body, with resultant life reduction. The continued cycling of steps moving around the step band, combined with step end plate loading results in fatigue crack formation at the chain wheel flange attachment point. Type B cracks radiate outward from the mounting holes, as shown. (See Life Cycle section of this bulletin)

**Replacement Policy for steps with Type B cracks**  
**ANY STEPS WITH TYPE "B" CRACKS REQUIRE REPLACEMENT**

### ***Factors affecting step lifetime in service***

In service, steps may develop cracks defined by KONE Spares as Type A or Type B. Type A cracks are a result of weld stress relief in a particular manufacturing design that used a weld on the edge of the step wrapper sheet. This weld was eliminated in later models of the step and replaced by a rivet. Type B cracks form in the end plate and are a result of long term fatigue in the step end plate due to the cyclic loading described above in this discussion.

Tests conducted by KONE, through the University of Illinois in the early nineteen eighties showed that Type A cracks are unrelated to static loading, and if they occur, this will be after 400,000 to 500,000 stepband cycles. Type A cracks do not cause degeneration of structural integrity, and the cracks may be terminated by drilling a small hole at the end of the crack.

Type B cracks however, are degenerate, and occur due to step end plate fatigue. On escalators where the novatex board adjustments are properly maintained, the life of steps has been found to be in excess of 15 years, and is dependent upon loading, hours of service, step-band speed, environmental conditions, and maintenance care. The step design affected by this cyclic loading is now an OBSOLETE component. KONE Spares recommends that this type of step be upgraded to a through axle type of step, or cast aluminum step, which exhibits much better life and is not affected by end plate flexing in the same way.

# **Product Bulletin**

## *SEB PCM and Product Reliability*



### **Corrective Action**

Step cracks do not appear overnight. Normal maintenance procedures and examinations consistent with KONE approved service guidelines for HR Escalators will give warning of potential problems and prevent them from becoming critical. Steps may not be repaired by welding, and any type of repair other than drilling for type A cracks is not an approved repair. Any field documents or letters which may show repairs by welding should be discarded.

### **Contact Person**

For more information, contact the PCM and Product Reliability engineering group at KONE Service Business Center in Moline IL.

### **Approvals & Version History**

Checked by: E.G.S. Date: 2008-1-15

Approved by: J.M.B. Date: 2008-1-16

Issue	Date	Description of Change	Ref. CR	Approved by
R0	2008-01-12	First release		John Bril
R1	2008-01-28	Shorter version of policy statement released in Jan 2007		John Bril

## Rebecca Mastrangelo

---

**From:** Chris Dutcher <nvdutch@yahoo.com>  
**Sent:** Tuesday, June 09, 2015 9:46 AM  
**To:** Panaro, Larry  
**Cc:** Olsen, Scott  
**Subject:** Golden nugget laughlin

Larry,

I am writing to you in regards as to the golden nugget laughlin.

Don Hartman at the golden nugget came to look at our current progress this morning and in doing so he was wanted to know if you had sent him the quote for the steps as he had not currently received it.

We indeed will need the 5 steps and roller package to complete the step chain replacement and have the unit back in service by Friday.

Would you please send him the quote for the 5 steps and 5 rollers and also would you send him the quote for replacing the 40 steps and 40 roller package as well.

Please cc me as well so I can hand deliver the quote if necessary.

Thank you,  
Chris Dutcher @ Thyssenkrupp Las Vegas

Sent from my iPhone

## Rebecca Mastrangelo

---

**From:** Dutcher, Christopher M. - Field Technician  
**Sent:** Tuesday, October 06, 2015 1:49 PM  
**To:** Panaro, Larry  
**Cc:** Olsen, Scott  
**Subject:** Laughlin Proposals needed asap

Hello sir,

Yesterday I spoke with Don Hartman in regards to his escalator steps needing replaced as soon as possible.

He made know to me that he has not received a proposal as of yet for step replacement.

Would you please send or resend the proposal to him and to myself in case I need to hand deliver said proposal.

Today I spoke with Richard Ruff in regards to the glass replacement that needs to be done.

He made known to me that he has not received a proposal as of yet for glass replacement.

Would you please send or resend the proposal to him and to myself in case I need to hand deliver said proposal.

Thank you sir

Sincerely,  
Chris Dutcher

Sent from my iPhone

## Rebecca Mastrangelo

---

**From:** Dutcher, Christopher M. - Field Technician  
**Sent:** Wednesday, October 07, 2015 8:31 AM  
**To:** Panaro, Larry  
**Cc:** Olsen, Scott  
**Subject:** Laughlin Proposals needed asap

Hello sir,

Yesterday I spoke with Don Hartman in regards to his escalator steps needing replaced as soon as possible.

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Would you please send or resend the proposal to him and to myself in case I need to hand deliver said proposal.

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Thank you sir

Sincerely,  
Chris Dutcher

Sent from my iPhone



## Rebecca Mastrangelo

---

**From:** Olsen, Scott  
**Sent:** Wednesday, October 07, 2015 9:24 AM  
**To:** Panaro, Larry  
**Cc:** Dutcher, Christopher M. - Field Technician  
**Subject:** FW: Laughlin Proposals needed asap

Larry, see Chris Dutcher's email below. can you please get proposals sent over to Don and Richard ASAP, if you have already please disregard.

Thanks

Scott Olsen  
Service Operation Superintendent

**ThyssenKrupp Elevator Americas**  
5440 S. Procyon St. Ste. B  
Las Vegas, NV 89118

Phone: (702) 262-6775  
Direct: (702) 789-4636  
Cell: (702) 429-9927  
Fax: (866) 248-5612  
[scott.olsen@thyssenkrupp.com](mailto:scott.olsen@thyssenkrupp.com)

Monthly Safety Message ----- Use the Right Tool and Choose it Correctly

---

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[Subscribe to our e-newsletter](#)  
[www.urban-hub.com](http://www.urban-hub.com)

---

**From:** Dutcher, Christopher M. - Field Technician  
**Sent:** Wednesday, October 07, 2015 8:31 AM  
**To:** Olsen, Scott  
**Subject:** Fwd: Laughlin Proposals needed asap

Sent from my iPhone

Begin forwarded message:

**From:** Christopher Dutcher <[christopher.dutcher@tkelevator.net](mailto:christopher.dutcher@tkelevator.net)>  
**Date:** October 6, 2015 at 1:49:14 PM MST  
**To:** [larry.panaro@thyssenkrupp.com](mailto:larry.panaro@thyssenkrupp.com)

**Cc:** Scott Olsen <[scott.olsen@thyssenkrupp.com](mailto:scott.olsen@thyssenkrupp.com)>

**Subject:** Laughlin Proposals needed asap

Hello sir,

Yesterday I spoke with Don Hartman in regards to his escalator steps needing replaced as soon as possible.

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Thank you sir

Sincerely,  
Chris Dutcher

Sent from my iPhone

## Rebecca Mastrangelo

---

**From:** Panaro, Larry  
**Sent:** Wednesday, October 07, 2015 10:04 AM  
**To:** Olsen, Scott  
**Cc:** Dutcher, Christopher M. - Field Technician  
**Subject:** RE: Laughlin Proposals needed asap

Guys,

I will follow up on these today.

Thanks,

**Larry Panaro**  
Sales Manager - Las Vegas  
West Region

**ThyssenKrupp Elevator Americas**  
5440 S. Procyon St., Ste. B  
Las Vegas, NV 89118

Phone: (702) 262-6775

Cell: (702) 591-9422

Fax: (866) 248-5612

<mailto:larry.panaro@thyssenkrupp.com>

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---

**From:** Olsen, Scott  
**Sent:** Wednesday, October 07, 2015 9:24 AM  
**To:** Panaro, Larry  
**Cc:** Dutcher, Christopher M. - Field Technician  
**Subject:** FW: Laughlin Proposals needed asap

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Service Operation Superintendent

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**From:** Dutcher, Christopher M. - Field Technician  
**Sent:** Wednesday, October 07, 2015 8:31 AM  
**To:** Olsen, Scott  
**Subject:** Fwd: Laughlin Proposals needed asap

Sent from my iPhone

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**From:** Dutcher, Christopher M. - Field Technician  
**Sent:** Wednesday, October 07, 2015 10:16 AM  
**To:** Panaro, Larry  
**Subject:** Re: Laughlin Proposals needed asap

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Thank you sir.  
Your help and time are very much appreciated.

Sent from my iPhone

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**From:** Olsen, Scott  
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**Cc:** Dutcher, Christopher M. - Field Technician  
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## Rebecca Mastrangelo

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**From:** Olsen, Scott  
**Sent:** Wednesday, October 07, 2015 11:21 AM  
**To:** Panaro, Larry  
**Cc:** Dutcher, Christopher M. - Field Technician  
**Subject:** RE: Laughlin Proposals needed asap

Thanks, Larry

Scott Olsen  
Service Operation Superintendent

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**Cc:** Dutcher, Christopher M. - Field Technician  
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**From:** Dutcher, Christopher M. - Field Technician

**Sent:** Wednesday, October 07, 2015 8:31 AM

**To:** Olsen, Scott

**Subject:** Fwd: Laughlin Proposals needed asap

Sent from my iPhone

Begin forwarded message:

**From:** Christopher Dutcher <[christopher.dutcher@tkelevator.net](mailto:christopher.dutcher@tkelevator.net)>  
**Date:** October 6, 2015 at 1:49:14 PM MST  
**To:** [larry.panaro@thyssenkrupp.com](mailto:larry.panaro@thyssenkrupp.com)  
**Cc:** Scott Olsen <[scott.olsen@thyssenkrupp.com](mailto:scott.olsen@thyssenkrupp.com)>  
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Thank you sir

Sincerely,  
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Sent from my iPhone

## Rebecca Mastrangelo

---

**From:** Dutcher, Christopher M. - Field Technician  
**Sent:** Thursday, October 08, 2015 3:23 PM  
**To:** Panaro, Larry  
**Subject:** Re: Laughlin Proposals needed asap

Hello Larry,

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**From:** Olsen, Scott  
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**To:** Panaro, Larry  
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**Cc:** Scott Olsen <[scott.olsen@thyssenkrupp.com](mailto:scott.olsen@thyssenkrupp.com)>  
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## Rebecca Mastrangelo

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**From:** Panaro, Larry  
**Sent:** Thursday, October 08, 2015 3:54 PM  
**To:** Dutcher, Christopher M. - Field Technician  
**Subject:** RE: Laughlin Proposals needed asap

Chris,

Proposal has been sent to Richard. You can follow up with him.

Proposal has been prepared for Don at Golden Nugget, but I have not sent it yet because I would like to speak with him first. I will let you know when he gets it.

Thanks,

**Larry Panaro**  
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West Region

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**To:** Panaro, Larry  
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**From:** Olsen, Scott

**Sent:** Wednesday, October 07, 2015 9:24 AM

**To:** Panaro, Larry

**Cc:** Dutcher, Christopher M. - Field Technician

**Subject:** FW: Laughlin Proposals needed asap

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**From:** Dutcher, Christopher M. - Field Technician  
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## Rebecca Mastrangelo

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**From:** Dutcher, Christopher M. - Field Technician  
**Sent:** Thursday, October 08, 2015 4:39 PM  
**To:** Panaro, Larry  
**Subject:** Re: Laughlin Proposals needed asap

Larry,

Thank you sir for the update.  
I will talk to Richard in the morning.

Talk to you soon  
Chris Dutcher

Sent from my iPhone

On Oct 8, 2015, at 3:53 PM, Panaro, Larry <[Larry.Panaro@thyssenkrupp.com](mailto:Larry.Panaro@thyssenkrupp.com)> wrote:

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Begin forwarded message:

**From:** Christopher Dutcher <[christopher.dutcher@tkelevator.net](mailto:christopher.dutcher@tkelevator.net)>  
**Date:** October 6, 2015 at 1:49:14 PM MST  
**To:** [larry.panaro@thyssenkrupp.com](mailto:larry.panaro@thyssenkrupp.com)  
**Cc:** Scott Olsen <[scott.olsen@thyssenkrupp.com](mailto:scott.olsen@thyssenkrupp.com)>  
**Subject:** Laughlin Proposals needed asap

Hello sir,

Yesterday I spoke with Don Hartman in regards to his escalator steps needing replaced as soon as possible.

He made know to me that he has not received a proposal as of yet for step replacement.

Would you please send or resend the proposal to him and to myself in case I need to hand deliver said proposal.

Today I spoke with Richard Ruff in regards to the glass

replacement that needs to be done.

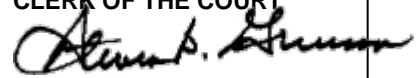
He made known to me that he has not received a proposal as of yet for glass replacement.

Would you please send or resend the proposal to him and to myself in case I need to hand deliver said proposal.

Thank you sir

Sincerely,  
Chris Dutcher

Sent from my iPhone



**JOIN**

LEE J. GRANT II, ESQ.  
Nevada Bar No. 11808  
ALEXANDRA B. M<sup>c</sup>LEOD, ESQ.  
Nevada Bar No. 8185  
GRANT & ASSOCIATES  
7455 Arroyo Crossing Parkway, Suite 300  
Las Vegas, Nevada 89113  
Tel.: (702) 940-3529  
Fax: (855) 429-3413  
Alexandra.M<sup>c</sup>Leod@aig.com

Attorney for Defendants/Third-Party Plaintiffs,  
GNL, CORP., LANDRY'S, INC. & GOLDEN NUGGET, INC.

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

JOE N. BROWN, an individual, and his Wife,  
NETTIE J. BROWN, an individual,  
Plaintiffs,

**Case No.: A-16-739887-C**  
**Dept. No.: XXXI**

vs.

**JOINDER TO THYSSENKRUPP'S  
OPPOSITION TO PLAINTIFFS'  
MOTION TO RE-OPEN DISCOVERY  
AND FOR SANCTIONS**

LANDRY'S, INC., a foreign corporation;  
GOLDEN NUGGET, INC. a Nevada  
corporation, d/b/a GOLDEN NUGGET  
LAUGHLIN; GNL, CORP., a Nevada  
corporation; THYSSENKRUPP ELEVATOR  
CORP., a foreign corporation; DOE  
INDIVIDUALS 1-100,  
ROE BUSINESS ENTITIES 1-100,

Defendants.

GNL, CORP., a Nevada corporation;

Third-Party Plaintiff,

vs.

THYSSENKRUPP ELEVATOR  
CORPORATION a foreign corporation; DOES  
1-75; ROE CORPORATION 1-75 and ROE  
CORPORATION 1-25,

Third-Party Defendants

**Date of hearing: Jan 8, 2019**

**Time of hearing: 9:00 a.m.**

COME NOW Defendants, GNL, CORP., LANDRY'S, INC. & GOLDEN NUGGET,  
INC. (collectively "Defendants" and/or "GNL"), by and through their counsel of record,  
ALEXANDRA B. M<sup>c</sup>LEOD, ESQ., of the law firm of GRANT & ASSOCIATES, and hereby

GRANT & ASSOCIATES  
7455 Arroyo Crossing Parkway, Suite 300  
Las Vegas, Nevada 89113  
Telephone No. (702) 940-3529  
Facsimile No. (855) 429-3413

1 submit the instant **JOINDER TO THYSSENKRUPP'S OPPOSITION TO PLAINTIFFS'**  
2 **MOTION TO RE-OPEN DISCOVERY AND FOR SANCTIONS** in the above-entitled  
3 action, pursuant to NRCP 26 and 37. Said Joinder hereby adopts and incorporates by reference  
4 the Points and Authorities contained in the subject Opposition. Furthermore, these joining  
5 parties point out to this Honorable Court the additional Points & Authorities herein to follow.

6 This Joinder is made and based upon all of the papers and pleadings on file herein, the  
7 subject Opposition, as well as the Points and Authorities contained therein, and such oral  
8 argument and testimony as this Honorable Court may entertain at the hearing of the Motion.

9 RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of December, 2018.

10 GRANT & ASSOCIATES

11 

12 ALEXANDRA B. MCLEOD, ESQ.

13 Nevada Bar No. 8185

14 7455 Arroyo Crossing Parkway, Suite 300

15 Las Vegas, Nevada 89113

16 *Attorney for Defendants GNL, LANDRY'S, & GNI*



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ADDITIONAL POINTS & AUTHORITIES

I. **JOINDER & STATEMENT OF RELEVANT FACTS**

Elderly Plaintiff, Joe Brown, fell after stepping onto a down escalator on May 12, 2015 at the Golden Nugget Laughlin (GNL), while intoxicated and using a cane. His wife, Nettie, claims loss of consortium. Plaintiff's Second Amended Complaint alleges the escalator was too loose, unstable, narrow, and shaky (at ¶¶13-14). To the contrary, State Inspector Steve Robertson determined that the incident occurred when Plaintiff stepped in between steps and lost his balance when the steps began to descend. ThyssenKrupp Elevator (TKE) was the servicing company contracted to maintain and repair the down escalator at the Golden Nugget Laughlin prior to and at the time of Plaintiff's fall.

Plaintiff's Motion focuses on TKE's "incomplete and untimely disclosure of damaging emails" after the running of the discovery deadline. (*See* Motion at 3:11-12 and throughout) However, it is clear that TKE is not attempting to "hide" evidence or it would not have supplemented its production when additional responsive documents were found. Furthermore, the information revealed in this supplement had previously been discovered through other documents and testimony. As for the other inflammatory statements included in Plaintiffs' Motion, Defendants challenge same for the reasons set forth below.

II. **DEFENDANTS IN THE CASE AT BAR HAVE SHOWN DILIGENCE IN SUPPLEMENTING THEIR DISCLOSURES AND DISCOVERY RESPONSES AS REQUIRED**

The Rules of Civil Procedure make a party's duty to produce and, importantly here, to supplement its evidence in discovery clear. Both NRCP 16.1 and 26 require a party to supplement their disclosures as they obtain additional information and in a reasonable time:

(e) **Supplementation of Disclosures and Responses.** A party who has made a disclosure under Rule 16.1 or 16.2 or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired, if ordered by the court or in the following circumstances:

(1) A party is under a *duty to supplement at appropriate intervals* its disclosures under Rule 16.1(a) or 16.2(a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties

1 during the discovery process or in writing. With respect to testimony of an expert  
2 from whom a report is required under Rule 16.1(a)(2)(B) the duty extends both to  
3 information contained in the report and to information provided through a  
deposition of the expert, and any additions or other changes to this information  
shall be disclosed by the time the party's disclosures under Rule 16.1(a)(3) are  
due.

4 (2) A party is under a *duty seasonably to amend* a prior response to an  
5 interrogatory, request for production or request for admission, if the party learns  
6 that the response is in some material respect incomplete or incorrect and if the  
additional or corrective information has not otherwise been made known to the  
other parties during the discovery process or in writing. (emphases added)

7 Pursuant to NRCP 16.1(a)(3), "Unless otherwise directed by the court, these disclosures  
8 must be made *at least 30 days before trial.*" (emphasis added) TKE's most recent supplement  
9 was made on November 16, 2018, which, although beyond the discovery cut-off date, was 52  
10 days before the then-scheduled trial date. All the Defendants in this case, as defendants in likely  
11 every case, have disclosed discoverable information and perpetually supplemented witnesses  
12 and documents as more was learned and revealed throughout discovery. The GNL Defendants  
13 have made 21 supplements in addition to their initial NRCP 16.1 disclosures, and TKE has  
14 made seven. The very name of this investigatory stage of litigation, "discovery," demonstrates  
15 the reasonableness of the expectation that information will be supplemented as it is revealed.

16 **III. BECAUSE THERE HAS BEEN NO COLLUSION OR OBSTRUCTION IN THE**  
17 **CASE AT BAR, THERE ARE NO GROUNDS ON WHICH TO RE-OPEN**  
18 **DISCOVERY**

19 Although Plaintiffs' most recent motion focuses mostly on TKE and whether its Seventh  
20 Supplement to NRCP 16.1 disclosures, served November 16, 2018, was proper, Plaintiffs also  
21 accuse the GNL Defendants of making false statements and obstructionist discovery tactics  
(Motion at 11:20 *et seq.*). As best can be discerned, Plaintiffs seek discovery sanctions and  
22 funding for a special master from both TKE as well as GNL equally. Accordingly, GNL is  
23 compelled to respond and set the record straight with regard to the declarations from opposing  
24 counsel and inaccurate interpretations of the evidence revealed in discovery.

25 ***A. Alleged False Statements***

26 Plaintiffs have perpetually mischaracterized a statement made in by GNL in discovery.  
27 The subject request, objection, and response follow below:

28 . . .

**REQUEST NO. 2:**

All DOCUMENTS CONCERNING ANY reported malfunction by, AND ANY mechanical/operational problem issue CONCERNING, the ESCALATOR.

**RESPONSE TO REQUEST NO. 2:**

**OBJECTION:** This Request is vague, overly broad as it is not limited to temporal scope or alleged incident, unduly burdensome and assumes facts not in evidence.

Subject to and without waiving the foregoing objections, this answering Defendant responds as follows: Defendant was unaware of any mechanical/operational issues with the Subject Escalator *at the time the alleged incident occurred*, and therefore, has no documents responsive to this request. Discovery is ongoing.

(Defendant GNL, Corp.'s Responses to Plaintiff's First Set of Request for Production of Documents, served 2-2-17, and attached as Plaintiffs' **EXHIBIT 1-J**; emphasis added)

Plaintiffs request was overbroad in scope and time considering that the Subject Escalator has been in operation for decades and therefore Defendant's objection should be well taken. However, despite the vague and objectionable question, GNL responded with information regarding mechanical issues on the date of the Subject Incident. Plaintiffs misinterpret that limited and narrow response as an overall denial that there were ever any problems with or maintenance performed on the Subject Escalator. Such a reading of GNL's response is not only inaccurate, but nonsensical.

***B. Alleged Collision in Expert Discovery***

This has been addressed in Defendants' Opposition to Plaintiffs' Motion *in Limine* to Exclude Expert Witness, David L. Turner. The November 16, 2017 inspection of GNL's escalator by GNL's shared expert did not violate any discovery rules, and Plaintiffs' were notified of the identity and opinions of the defense experts in accordance with the applicable Scheduling Order.

***C. Testimony of Select Witnesses***

Plaintiffs make broad conjectures about the extent of searches for email and other electronically stored information (ESI) based on what a few individual witnesses, selected for deposition by Plaintiffs' counsel, did or did not do. In fact, they try to make an issue out of the fact that Clint Belka, Vice President of Facilities/Engineering for GNLV ( a sister company who is not a party to this action), performed no email searches which neither he nor his employer were under any obligation to do. Plaintiffs know nothing about what other searches were done

1 by GNL overall through other employees or its legal department, only to what a few individuals  
2 testified. Again, information was produced and later supplemented as discovery continued as is  
3 both contemplated and expected under the NRCP. Plaintiffs' finger pointing falls far short of  
4 proving concealment of evidence or false discovery responses.

5 ***D. Alleged False Verification***

6 Plaintiffs characterize the GNL verification to discovery responses as "false," because it  
7 was executed by someone who, although authorized to verify the responses, did not have  
8 *personal* knowledge of the content of those responses. Mr. Smith's verification clearly states  
9 that the "responses were formed based on the knowledge of the company, its employees/agents,  
10 and available documents known at the time of the responses" not on his personal knowledge. In  
11 fact, that is the correct standard for responses from a corporate entity. Again, Plaintiffs  
12 rabbleroising amounts to nothing more than a red herring.

13 **IV. CONCLUSION**

14 WHEREFORE, for the above reasons, reopening discovery is not warrant or necessary  
15 and Plaintiffs' vexatious motion should be denied.

16 RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of December, 2018.

17 GRANT & ASSOCIATES

18 

19 ALEXANDRA B. MCLEOD, ESQ.

20 Nevada Bar No. 8185

21 7455 Arroyo Crossing Parkway, Suite 300  
22 Las Vegas, Nevada 89113

23 *Attorney for Defendants/Third-Party Plaintiffs,*  
24 *GNL, CORP., LANDRY'S, INC. & GOLDEN*  
25 *NUGGET, INC.*  
26  
27  
28

**CERTIFICATE OF SERVICE**

I certify that I am an employee of GRANT & ASSOCIATES and that on this 20<sup>th</sup> day of December, 2018 I caused a true and correct copy of the foregoing **JOINDER TO THYSSENKRUPP'S OPPOSITION TO PLAINTIFFS' MOTION TO RE-OPEN DISCOVERY AND FOR SANCTIONS** to be served as follows:

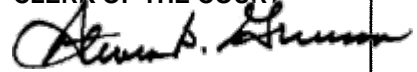
— By placing the same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

— Pursuant to EDCR 7.26, to be sent via facsimile; and/or

X Pursuant to EDCR 7.26, by transmitting via the Court's electronic filing services by the document(s) listed above to the Counsel set forth on the service list.

*/s/ Alexandra B. McLeod, Esq.*

\_\_\_\_\_  
An Employee of GRANT & ASSOCIATES



REBECCA L. MASTRANGELO, ESQ.  
Nevada Bar No. 5417  
ROGERS, MASTRANGELO, CARVALHO & MITCHELL  
700 South Third Street  
Las Vegas, Nevada 89101  
Phone (702) 383-3400  
Fax (702) 384-1460  
rmastrangelo@rmcmlaw.com  
Attorneys for Defendant/Third-Party Defendant  
THYSSENKRUPP ELEVATOR CORPORATION

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

JOE N. BROWN, an individual, and his wife,  
NETTIE J. BROWN, an individual,  
Plaintiffs,

vs.

LANDRY'S INC., a foreign corporation;  
GOLDEN NUGGET, INC., a Nevada  
corporation d/b/a GOLDEN NUGGET  
LAUGHLIN; GNL, CORP., a Nevada  
corporation; DOE INDIVIDUALS 1-100,  
ROE BUSINESS ENTITIES 1-100,

Defendants.

GNL, CORP., a Nevada corporation;

Third-Party Plaintiff,

vs.

THYSSENKRUPP ELEVATOR CORPORATION  
a foreign corporation; DOES 1-75; ROE  
CORPORATIONS 1-75 and ROE  
CORPORATIONS 1-25,

Third-Party Defendants.

CASE NO.: A-16-739887-C

DEPT. NO.: XXXI

Date of Hearing: 02/12/19

Time of Hearing: 10:00 a.m.

**DEFENDANT/THIRD PARTY DEFENDANT THYSSENKRUPP ELEVATOR  
CORPORATION'S REPLY IN SUPPORT OF JOINDER IN, AND ADDITIONAL  
POINTS AND AUTHORITIES IN SUPPORT OF, DEFENDANT GNL, CORP.'S  
MOTION FOR SUMMARY JUDGMENT ON PUNITIVE DAMAGES**

JNB02321

1 Defendant/Third-Party Defendant, thyssenkrupp Elevator Corporation, by and through its  
2 attorney of record, REBECCA L. MASTRANGELO, ESQ., of the law firm of ROGERS,  
3 MASTRANGELO, CARVALHO & MITCHELL, hereby submits its Reply in Support of its Joinder  
4 in, and Additional Points and Authorities in support of, Defendant GNL, Corp.'s Motion for  
5 Summary Judgment on Punitive Damages.

6 This Reply is based upon the pleadings and papers on file herein, the accompanying  
7 Memorandum of Points and Authorities and oral argument, if any, at the time of the hearing on this  
8 matter.

9 **POINTS AND AUTHORITIES**

10 **I.**

11 **FORWARD**

12 Plaintiffs' Opposition to the subject motion and thyssenkrupp's joinder thereto is misplaced  
13 and erroneous. Plaintiffs suggest that the Defendants are asking this Court to reconsider its prior  
14 decision to allow Plaintiffs to amend their complaint to, inter alia, assert a claim for punitive  
15 damages. This is clearly not the case. This Court has already permitted Plaintiffs to amend their  
16 complaint under NRCP 15, which requires that leave to amend be freely given. Simply because  
17 Plaintiffs were permitted to *allege* punitive damages in no way means they have the evidence to  
18 *prove* malice, fraud or oppression such that punitive damages may be awarded. It is one thing to  
19 make a claim or allegation; it is quite another to prove the claim, particularly under the higher  
20 standard of clear and convincing evidence, which is required to allow a claim for punitive damages  
21 to go to the jury.

22 As Plaintiffs have failed to produce evidence showing the requisite malice, fraud or  
23 oppression, the claim for punitive damages must be dismissed.

24 **II.**

25 **STATEMENT OF UNDISPUTED FACTS**

26 It is undisputed that the down escalator at the Golden Nugget was the subject of a Kone  
27

1 bulletin advising that the steps were prone to cracking and should be replaced if a certain type of  
2 cracking occurred. (Plaintiffs' opposition at page 2, line 11, states that TKE was the manufacturer  
3 of the escalator. This is false and is believed to be an oversight on the part of Plaintiffs' counsel as  
4 there is no dispute that the escalator at issue was designed and manufactured by Montgomery, which  
5 was then purchased by Kone. Neither Montgomery nor Kone are parties to the instant action.) It is  
6 further undisputed in this case that TKE recommended to the Golden Nugget, in 2012, that all of the  
7 escalator steps be replaced. As Golden Nugget was the owner of escalator, the decision as to  
8 whether or not to replace the steps was entirely in Golden Nugget's purview. TKE can only  
9 recommend; it cannot force.

### 10 III.

#### 11 LEGAL ARGUMENT

12 It is undisputed that Nevada law requires Plaintiffs to show, by clear and convincing  
13 evidence, not just that Defendants were negligent or reckless or irresponsible, but that they engaged  
14 in despicable conduct they knew would likely cause injury. Plaintiffs contend that although TKE  
15 recommended replacement of the escalator steps in 2012, not all of the steps were replaced at that  
16 time. Plaintiffs contend that this constitutes "despicable conduct," yet fail to articulate how TKE  
17 is responsible for Golden Nugget's failure to replace all of the steps (an area of dispute by Golden  
18 Nugget). The only evidence produced against TKE by Plaintiffs is that their escalator expert, Sheila  
19 Swett, found the escalator steps in 2018 to be dirty. She has admitted that such dirty condition, even  
20 if it was present in 2015 (which she does not know), would not have caused the escalator steps to  
21 be shaky:

22 Q. If there was a buildup of dust and dirt and so forth underneath this escalator and in  
23 the areas that you observed it in 2018, if that same or similar condition was present  
in 2015, could that have caused the escalator steps to be shaky?

24 A No.

25 See Exhibit "A," deposition of Sheila Swett at page 104, lines 14-19. Thus, even if the steps were  
26 dirty and even if this could be attributable to TKE's failure to clean them, the dirt did not cause the



1 fall, and the failure of cleaning certainly cannot be characterized as “despicable conduct.”

2 Although Plaintiffs take issue with TKE’s historical analysis of Nevada law on punitive  
3 damages by saying that the prior version of the punitive damages statute required a “willful wrong,”  
4 they fail to analyze the present state of the law which *absolutely* still requires a conscious intent to  
5 cause harm. In fact, every subsection of NRS 42.001 describes willful wrong. "'Oppression' means  
6 despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of  
7 the rights of the person." NRS 42.001(4) (emphasis added). "Conscious disregard," in turn, is  
8 defined as [1] "the knowledge of the probable harmful consequences of a wrongful act and [2] a  
9 willful and deliberate failure to act to avoid those consequences." NRS 42.001(1). "'Malice, express  
10 or implied' means conduct which is intended to injure a person or despicable conduct which is  
11 engaged in with a conscious disregard of the rights or safety of others." NRS 42.001(3) (emphasis  
12 added). Likewise, *Maduiké v. Agency Rent-A-Car*, cited in the moving brief, remains good law.

13 The final argument made by Plaintiffs, that the question of punitive damages is one for  
14 the jury, is also misleading, if not erroneous, as prior to allowing the question of punitive  
15 damages to go to the jury, this Court must make a determination as to whether or not enough  
16 evidence exists to justify an award of punitive damages. *Smith’s Food & Drug Centers, Inc. v.*  
17 *Bellegarde*, 114 NEV. 602, 606, 958 P.2d 1208 (1998), overruled on other grounds. Whether or  
18 not such evidence exists is a question of law for the trial court. *Id.*

#### 19 IV.

#### 20 CONCLUSION

21 Negligence, such as the failure to properly clean escalator steps, is not enough to justify  
22 sending punitive damages to the jury. Plaintiffs have not shown, and cannot show, that TKE  
23 engaged in conduct that was intended to injure them, or that TKE knowingly, willfully, and  
24 deliberately ignored the probable consequences to Plaintiffs’ rights and safety. As Plaintiffs have

25 ///

1 failed to present any evidence of the despicable conduct necessary to request punitive damages  
2 from a jury, partial summary judgment should be granted at this time.

3 DATED this 20<sup>th</sup> day of December, 2018.

4 ROGERS, MASTRANGELO, CARVALHO  
5 & MITCHELL

6 

7 REBECCA L. MASTRANGELO, ESQ.

8 Nevada Bar No. 5417

9 700 S. Third Street

10 Las Vegas, Nevada 89101

11 Attorney for Defendant/Third-Party Defendant

12 THYSSENKRUPP ELEVATOR CORPORATION

1 **CERTIFICATE OF SERVICE**

2 Pursuant to N.R.C.P. 5(a), E.D.C.R. 7.26(a), and Rule 9 of the N.E.F.C.R. I hereby certify  
3 that I am an employee of Rogers, Mastrangelo, Carvalho & Mitchell, and on the 21 day of  
4 December, 2018, a true and correct copy of the foregoing **DEFENDANT/THIRD PARTY**  
5 **DEFENDANT THYSSENKRUPP ELEVATOR CORPORATION'S REPLY IN SUPPORT**  
6 **OF JOINDER IN, AND ADDITIONAL POINTS AND AUTHORITIES IN SUPPORT OF,**  
7 **DEFENDANT GNL, CORP.'S MOTION FOR SUMMARY JUDGMENT ON PUNITIVE**  
8 **DAMAGES** was served via electronic means with the Eighth Judicial District Court, addressed as  
9 follows, upon the following counsel of record:

10 Mohamed A. Iqbal, Jr., Esq.  
11 Christopher Mathews, Esq.  
12 101 Convention Center Drive, Suite 1175  
13 Las Vegas, Nevada 89109  
Attorneys for Plaintiffs

14 Annalisa N. Grant, Esq.  
15 Alexandra B. McLeod, Esq.  
16 GRANT & ASSOCIATES  
7455 Arroyo Crossing Parkway, Suite 300  
Las Vegas, Nevada 89113  
Attorneys for Defendant/Third-Party Plaintiff

17 

18  
19 An employee of ROGERS, MASTRANGELO, CARVALHO  
20 & MITCHELL

## EXHIBIT A

JNB02327

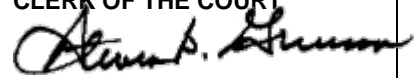
1	DISTRICT COURT	
2	CLARK COUNTY, NEVADA	
3		
4	JOE N. BROWN, an	:
	individual, and his wife,	:
5	NETTIE J. BROWN, an	:
	individual,	:
6		:
	Plaintiffs,	: CASE NO. A-16-739887-C
7		: DEPT. NO XXXI
	vs.	:
8		:
	LANDRY'S INC., a foreign	:
9	corporation; GOLDEN	:
	NUGGET, INC., a Nevada	:
10	corporation d/b/a GOLDEN	:
	NUGGET LAUGHLIN; GNL,	:
11	CORP., a Nevada	:
	corporation; DOE	:
12	INDIVIDUALS 1-100, ROE	:
	BUSINESS ENTITIES 1-100,	:
13		:
	Defendants.	:
14		:
	GNL, CORP., a Nevada	:
15	corporation;	:
		:
16	Third-Party Plaintiffs,	:
		:
17	vs.	:
		:
18	THYSSENKRUPP ELEVATOR	:
	CORPORATION a foreign	:
19	corporation; DOES 1-75;	:
	ROE CORPORATIONS 1-75 and	:
20	ROE CORPORATIONS 1-25,	:
		:
21	Third-Party Defendants.	:
		:
22		
23		
24		
25		

JNB02328

SHEILA NABORS SWETT - 10/01/2018

<p style="text-align: right;">Page 2</p> <p>1</p> <p>2 ORAL DEPOSITION</p> <p>3 SHEILA NABORS SWETT</p> <p>4 OCTOBER 1ST, 2018</p> <p>5 ORAL DEPOSITION of SHEILA NABORS SWETT, taken on</p> <p>6 the 1st day of October, 2018, beginning at 10:28 a.m.,</p> <p>7 at the offices of Regus, 1200 Smith Street, Houston,</p> <p>8 Texas, pursuant to Notice and to Rule 30(b) (2) of the</p> <p>9 Nevada Rules of Civil Procedure.</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 4</p> <p>1 A P P E A R A N C E S</p> <p>2 FOR THE PLAINTIFFS:</p> <p>3 Mr. Mohamed A. Iqbal, Jr.</p> <p>4 IQBAL LAW PLLC</p> <p>5 101 Convention Center Drive, Suite 1175</p> <p>6 Las Vegas, Nevada 89109</p> <p>7 Telephone: (484) 680-6981</p> <p>8 E-mail: mai@ilawlv.com</p> <p>9</p> <p>10 FOR THE THIRD-PARTY DEFENDANT THYSSENKRUPP ELEVATOR</p> <p>11 CORPORATION:</p> <p>12</p> <p>13 Ms. Rebecca L. Mastrangelo</p> <p>14 ROGERS, MASTRANGELO, CARVALHO &amp; MITCHELL</p> <p>15 700 South Third Street</p> <p>16 Las Vegas, Nevada 89101</p> <p>17 Telephone: (702) 383-3400 - Fax: (702) 384-1460</p> <p>18 E-mail: rmastrangelo@rmcmllaw.com</p> <p>19</p> <p>20 FOR THE DEFENDANTS, LANDRY'S INC., A FOREIGN</p> <p>21 CORPORATION; GOLDEN NUGGET, INC., NEVADA CORPORATION</p> <p>22 D/B/A GOLDEN NUGGET LAUGHLIN AND GNL, CORP., A NEVADA</p> <p>23 CORPORATION:</p> <p>24 Ms. Alexandra McLeod (Via Videoconference)</p> <p>25 GRANT &amp; ASSOCIATES</p> <p>7455 Arroyo Crossing Parkway, Suite 300</p> <p>Las Vegas Nevada 89113</p> <p>Telephone: (702) 940-3529</p> <p>E-mail: alexandra.mcleod@aig.com</p>
<p style="text-align: right;">Page 3</p> <p>1 INDEX</p> <p>2 PAGE</p> <p>3 Appearances .....4</p> <p>4 SHEILA NABORS SWETT</p> <p>5 Examination by Ms. Mastrangelo .....5</p> <p>6 Examination by Ms. McLeod .....145</p> <p>7 Examination by Mr. Iqbal .....155</p> <p>8 Further Examination by Ms. McLeod .....179</p> <p>9 Further Examination by Mr. Iqbal .....186</p> <p>10 Reporter's Certification .....189</p> <p>11</p> <p>12 EXHIBITS</p> <p>13 EXHIBIT DESCRIPTION PAGE</p> <p>14 Exhibit A Escalator Maintenance Tasks and 99</p> <p>15 Records (GNL002095-098)</p> <p>16</p> <p>17 Exhibit B Escalator Maintenance Tasks and 99</p> <p>18 Records (GNL002099-102)</p> <p>19</p> <p>20 Exhibit C Elevator and Escalator Result 100</p> <p>21 of Inspection (NO BATES NUMBER)</p> <p>22</p> <p>23 Exhibit D Elevator and Escalator Result 101</p> <p>24 of Inspection (NO BATES NUMBER)</p> <p>25</p>	<p style="text-align: right;">Page 5</p> <p>1 SHEILA NABORS SWETT,</p> <p>2 having been first duly sworn, testified as follows:</p> <p>3 EXAMINATION</p> <p>4 BY MS. MASTRANGELO:</p> <p>5 Q. Would you state your full name for the</p> <p>6 record, please?</p> <p>7 A. Sheila Nabors Swett, S-w-e-t-t.</p> <p>8 Q. Okay. Ms. Swett, we met previously at the</p> <p>9 escalator inspection. My name is Rebecca Mastrangelo.</p> <p>10 I represent ThyssenKrupp Elevator. Ms. McLeod is on</p> <p>11 the videoconference. She represents Golden Nugget.</p> <p>12 How many depositions have you given</p> <p>13 previously?</p> <p>14 A. Twenty-ish.</p> <p>15 Q. When was the last time, approximately?</p> <p>16 A. In the last six months, I've given one, yeah.</p> <p>17 Q. Okay. Have you had any other cases in the</p> <p>18 state of Nevada?</p> <p>19 A. No.</p> <p>20 Q. Have you testified in trial as an expert at</p> <p>21 all?</p> <p>22 A. None of my cases have made it to trial.</p> <p>23 Q. Okay. As far as you know, has your testimony</p> <p>24 or your qualifications as an expert been offered to go</p> <p>25 to trial and it's been excluded or disallowed for any</p>

<p style="text-align: right;">Page 102</p> <p>1 Exhibit D, which is dated 7/14/14, which is the same 2 form, but it was filled out the year later. 3 MR. IQBAL: Also, there's no Bates 4 numbers on here. But I agree with Rebecca. The dates 5 are handwritten 7/14/14 and then there's a stamped date 6 of 7/16/14. 7 Q. (BY MS. MASTRANGELO) So, this report also 8 says, "No discrepancies found during inspection. Okay 9 to issue operating permits. This notice acts as permit 10 until received. Maintenance program on site and up to 11 date. Location, clean and neat." 12 Did I read that correctly? 13 A. Yes. 14 Q. Okay. Do you have any reason to believe any 15 of those notations by the third-party inspector were 16 not accurate or false? 17 A. I have no reason to believe. 18 Q. And in those sections in 2013 and 2014 of the 19 what's now part of the state file which indicates that 20 the location was neat and clean would indicate to me 21 that there wasn't that dirty and lint condition that 22 you observed present in 2013 and 2014. Is that how you 23 would interpret that? 24 MR. IQBAL: Objection; form, vague. 25 Counsel is testifying.</p>	<p style="text-align: right;">Page 104</p> <p>1 were. 2 Q. Okay. Do you believe -- do you know this 3 guy, Bill Schaefer, at all? 4 A. I do not. 5 Q. Do you believe that some third-party 6 inspectors, like, falsify records and say that there 7 were no violations or that it was clean and neat when 8 they didn't even do a good inspection? 9 A. Yes. New York just kicked a whole bunch of 10 them out. 11 Q. Do you know anything about Mr. Schaefer's 12 qualifications or how long he's been employed? 13 A. I do not. 14 Q. If there was a buildup of dust and dirt and 15 so forth underneath this escalator and in the areas 16 that you observed it in 2018, if that same or similar 17 condition was present in 2015, could that have caused 18 the escalator steps to be shaky? 19 A. No. 20 Q. If the dirty, dusty condition that you saw in 21 2018 existed in May of 2015, did that have any bearing 22 on Mr. Brown's fall? 23 A. The steps that we saw were dirty enough that 24 they could -- you could not see the cracks. 25 Q. No, but I'm just talking about him getting on</p>
<p style="text-align: right;">Page 103</p> <p>1 A. Honestly, I couldn't -- there -- there is so 2 many records of third-party inspections that aren't 3 actually done. Is there a signature of the mechanic 4 that was there on that inspection? 5 Q. (BY MS. MASTRANGELO) Well, that wasn't what I 6 was asking you. I'm asking you not for other cases 7 that you've seen in Texas or anywhere else, but in this 8 particular case, by your review of that record, would 9 that indicate to you that there was a filthy, dirty 10 buildup of dust and lint in the pit and the steps? 11 MR. IQBAL: Objection; vague as to time 12 period. Same prior objections. 13 A. It would indicate that that inspector wrote 14 that down. And it was his -- what he felt like he was 15 seeing. 16 Q. (BY MS. MASTRANGELO) Okay. And this in 17 July of 2014 was an internal inspection, meaning the 18 steps would have been pulled and he would have looked 19 under there? 20 A. Correct. 21 Q. Okay. 22 A. And at that point, I would have looked to see 23 how long the elevator mechanic was there during that 24 time period. So, I would then correlate that with the 25 time the mechanic -- according to his -- the documents</p>	<p style="text-align: right;">Page 105</p> <p>1 the escalator and falling, did that -- was that caused 2 in any way by the dirt? 3 A. It was caused by the cracks of the steps. 4 Q. Okay. I've got to have a yes or no unless 5 there's some other answer to it. If the dirty, dusty 6 condition that you observed in 2018, if that same 7 condition or similar condition was present in May of 8 2015 on this escalator, did that in any way cause 9 Mr. Brown to fall on that date? 10 A. Okay. The dirt, had it occurred on that day 11 or previous to that date, would have impeded their 12 ability to see cracks. So, the dirt itself would not 13 have caused it. The inability to properly visually 14 inspect the step caused... 15 Q. Okay. And do you know why -- other than 16 that, why it's not a good idea to have your escalator 17 dirty? 18 A. That is, for the most part, the reason is all 19 mechanical pieces of equipment of any kind, it is -- 20 the No. 1 thing is keep them clean, for a multitude of 21 reasons, one of which is you cannot tell if there is 22 issues occurring if you cannot see those issues. 23 Q. Isn't the main reason that that is in the 24 code because it could be a fire hazard? 25 A. Well, it can be a fire hazard. But for</p>



**RPLY**

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**DISTRICT COURT  
CLARK COUNTY, NEVADA**

JOE N. BROWN, an individual, and his Wife,  
NETTIE J. BROWN, an individual

Plaintiffs,

vs.

LANDRY'S, INC., a foreign corporation;  
GOLDEN NUGGET, INC. a Nevada  
corporation, d/b/a GOLDEN NUGGET  
LAUGHLIN; GNL, CORP., a Nevada  
corporation; THYSSENKRUPP ELEVATOR  
CORP., a foreign corporation; DOE  
INDIVIDUALS 1-100,  
ROE BUSINESS ENTITIES 1-100,

Defendants.

AND ALL RELATED CASES

Case No.: A-16-739887-C  
Dept. No.: XXXI

**PLAINTIFFS' REPLY IN SUPPORT OF  
EMERGENCY MOTION FOR  
REOPENING DISCOVERY, COURT  
INTERVENTION, AND SANCTIONS ON  
ORDER SHORTENING TIME**

**DATE: January 8, 2018  
TIME: 9:00 a.m.**

**I. Defendant Thyssenkrupp Elevator Corporation ("TKE")'s Opposition Fails Substantively, as detailed in Section II, But A More Fundamental Problem Revealed Itself Shortly After the December 4, 2018 Calendar Call and Plaintiffs' Submission of the Emergency Motion: TKE's ex parte Communication of False Statements to the Nevada Supreme Court, regarding the Very Same "Disclosure of Emails" Issue**

A. A PASSING COMMENT AT THE DECEMBER 4, 2018 CALENDAR CALL SPARKED AN INVESTIGATION AND DISCOVERY OF *EX PARTE* COMMUNICATIONS

Plaintiffs' Emergency Motion is based on TKE's incomplete and untimely disclosure of damaging emails on November 16, 2018, well beyond the close of discovery, which revealed Defendants' denials during discovery to be false. Motion at 3:11-18. Plaintiffs submitted the Emergency Motion very late in the afternoon on December 3, 2018; it was not 'checked in' until

PLAINTIFFS' REPLY IN SUPPORT OF EMERGENCY MOTION

1 of 9

**JNB02331**



the morning; and it was addressed (only for the purposes of potential scheduling) by the Court and the parties at calendar call that morning, December 4, 2018.

At the calendar call, at approximately 11:20 am, her Honor asks if the parties wanted to stay in the January 2019 stack and TKE's counsel mentioned a writ in passing and expert availability as reasons for vacating the trial date and moving to another stack.<sup>1</sup> This was the *first* time Plaintiffs had heard about a writ.

The next day, on December 5, 2018, Plaintiffs accessed the Nevada Appellate Court Docket Sheet, which shows Annalisa Grant and Alexandra McLeod (attorneys for the Nugget Defendants) as counsel for "Real Party in Interest" – Plaintiffs Joe and Nettie Brown.<sup>2</sup> Plaintiffs' counsel is not listed on the docket and was not included in the Notice of Transfer. As such, TKE's October 19, 2018 Petition for Writ of Mandamus ("Petition") was an *ex parte* communication to the Nevada Supreme Court.<sup>3</sup> TKE has been on notice of this issue since at least November 2, 2018, when TKE received the Notice of Transfer from the Nevada Supreme Court to the Nevada Court of Appeals.

B. NOT ONLY WAS TKE'S PETITION AN *EX PARTE* COMMUNICATION—IT CONTAINED **NUMEROUS FACTUAL CONTENTIONS WHICH WERE FALSE**—AND TKE **KNEW OF THEIR FALSITY AND HAS NOT CORRECTED THEM**, DESPITE THE FACT THAT THEY PUBLICLY AND UNTRUTHFULLY ACCUSE UNDERSIGNED COUNSEL OF HAVING MADE FALSE REPRESENTATIONS TO THE TRIAL COURT (AND THE HONORABLE JUDGE KISHNER)

TKE's Petition contains many, many false statements regarding the withheld emails at issue in the Motion, and regarding Plaintiffs' (undersigned counsel's) lack of candor. Below is just the Top 10 List of TKE's false statements, with the core contention being that emails

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<sup>1</sup> Undersigned counsel began investigating this immediately, and on December 5, 2018 the Supreme Court website and (available documents) was accessed. On December 11, 2018, undersigned counsel obtained the tape from the Calendar Call to confirm the course of events.

<sup>2</sup> See attached hereto as **Exhibit 1-A** a December 5, 2018 print-out of the Nevada Appellate Court Docket Sheet, and a separate November 2, 2018 Notice of Transfer to Court of Appeals.

<sup>3</sup> See attached hereto as **Exhibit 1-B** the October 19, 2018 Petition for Writ of Mandamus; to be sure, TKE's Certificate of Service on page 36 of the Petition asserts that Plaintiffs were served through undersigned counsel's receipt of Supreme Court Electronic Service, but that did not occur, and Plaintiffs did not become see the actual Petition until December 5.

regarding the subject escalator's cracked steps were produced in November of 2016 *[by Golden Nugget]* and Plaintiffs' counsel was wrong and/or dishonest to assert that said emails were produced only in November of 2017, a year later:

#	TKE's Factual Assertion to the Nevada Supreme Court	Petition Citation
1	"GNL produced an email from TKE which addressed [cracks in the escalator steps]. This production was provided to Plaintiff <i>[sic]</i> on <b>November 9, 2016.</b> "	Pet. at vii:5-10 (citations omitted; emphasis in original).
2	"The order also alleges ... that TKE withheld evidence concerning its culpability, which was a "basis" for permitting the amendment. This assertion is untrue, as Plaintiffs' received <i>[sic]</i> the so-called "hidden" documents in the very first ECC production by GNL on November 9, 2016."	Pet. at 5:13-22 (citations omitted).
3	"In the present case, there are no factual disputes concerning the ... ECC documents ... establishing notice prior to the running of the statute of limitations."	Pet. at 6:25-7:2.
4	"Plaintiffs should not have been allowed to amend their complaint to name [TKE] as a Defendant, as Plaintiffs had sufficient knowledge of [TKE]'s role in the maintenance of the subject escalator well prior to the running of the statute ..."	Pet. at 8:21-24.
5	"Plaintiffs chose not to sue [TKE] before the statute ran. This was a deliberate choice ..."	Pet. at 21:8-9.
6	"Defendant TKE never concealed its identity or otherwise obstructed Plaintiffs' investigation of this incident."	Pet. at 22:1-2.
7	" <b><u>TKE never improperly withheld any safety information.</u></b> "	Pet. at 22:19 (emphasis in original).
8	"This argument [that TKE failed to produce emails showing that they were aware of the cracks] is absolutely untrue. Plaintiffs were aware that TKE was concerned about cracks in the escalator stairs because <u>GNL produced the email from TKE discussing the issue on November 9, 2016.</u> "	Pet. at 23:8-11 (emphasis in original).
9	"TKE asserted at the hearing that Plaintiffs were aware of these emails far earlier than November 2017. In fact, it was <b>November of 2016</b> when Plaintiff <i>[sic]</i> first received these emails."	Pet. at 23:12-15.
10	"These documents were never "hidden" as Plaintiffs argued, and as the order improperly reflects. Plaintiffs' decision not to sue TKE was simply based on	Pet. at 23:20-23.

1           their own choice (or lack of diligence), and not on any withholding of  
2           evidence.”

3           Plaintiffs’ Emergency Motion and TKE’s late and partial disclosure of relevant emails renders  
4           several of the above statements false. More critically, TKE’s own filings in this Court, via an  
5           affidavit of TKE’s counsel dated November 19, 2018, show TKE’s above statements to be false.

6           C. DESPITE TKE’S EAGERNESS BEFORE THE NEVADA SUPREME COURT TO ACCUSE  
7           PLAINTIFFS’ COUNSEL OF MAKING “ABSOLUTELY UNTRUE” STATEMENTS TO THE TRIAL  
8           COURT (THIS COURT, AND HER HONOR), IT WAS TKE’S ***OWN ASSERTIONS*** REGARDING  
9           THE EMAILS’ DATE OF PRODUCTION THAT WERE FALSE – ***AS ADMITTED BY TKE IN A***  
10          ***SWORN AFFIDAVIT***

11          On November 19, 2018, TKE filed a curious document: an affidavit of Charles A.  
12          Michalek, Esq., counsel for TKE, associated with an Errata to Motion in Limine #7 re: Claim  
13          that Thyssenkrupp “Hid” or Failed to Produce Evidence. In the affidavit, TKE retracts  
14          statements in the motion and admits that Plaintiffs did not receive the emails until November of  
15          2017:

16                 5. Plaintiff’s [sic] counsel Mohhamed [sic] Iqbal, Esq. was apparently not  
17                 provided with a copy of the emails referenced in Motion in Limine #7 until TKE  
18                 produced them on November 6, 2017. Undersigned counsel regrets the error and  
19                 accepts responsibility for it.

20                 6. Counsel withdraws that portion of the motion which argues that the  
21                 emails were produced earlier than November 6, 2017.<sup>4</sup>

22          TKE has, ***without question***, known the October 19 Petition’s factual statements were untrue  
23          since ***at least November 19, 2018***, when TKE counsel Mr. Michalek filed the above-cited  
24          affidavit with this Court acknowledging they were untrue (and, therein, he acknowledges that the  
25          ‘error’ was discovered on or about November 17, 2018). Yet TKE has failed to make any effort  
26          to withdraw or otherwise correct the Petition, leaving the Nevada appellate courts with an *ex*  
27          *parte* filing falsely claiming Plaintiffs’ undersigned counsel was not telling the truth about the  
28

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<sup>4</sup> See attached hereto as **Exhibit 1-C** a copy of TKE’s November 19, 2018 Errata and Mr. Michalek’s affidavit, at page 3 of the Errata.

1 emails – when, in fact, it was TKE’s statements that were untrue. Plaintiffs sent an NRCP 11  
2 letter to TKE on December 26, 2018.<sup>5</sup>

3 It should be noted that the Golden Nugget defendants are not blameless bystanders. They  
4 were aware—at least by the November 2 Notice of Transfer—that Plaintiffs were not served and  
5 that, pursuant to the docket, the Nugget defendants’ own counsel were listed as representing  
6 Plaintiffs, which they clearly do not. Given the Nugget defendants’ and TKE’s coordinated  
7 efforts to keep Mr. Turner’s covert 2017 inspection of the subject escalator secret from Plaintiffs,  
8 the Nugget defendants’ inaction is unsurprising.

9 D. TKE MADE THE *VERY SAME FALSE REPRESENTATIONS* TO THIS COURT AT THE  
10 AUGUST 6, 2018 HEARING ON PLAINTIFFS’ MOTION FOR LEAVE TO AMEND; THE ONLY  
11 DIFFERENCE OF THOSE ASSERTIONS: TKE CLAIMED THE EMAILS CAME FROM TKE, NOT  
GOLDEN NUGGET, AS DISCOVERY RESPONSES

12 Plaintiffs obtained the transcript of the August 6, 2018 hearing before this Court  
13 regarding Plaintiffs’ motion for leave to amend the first amended complaint. TKE’s  
14 representations to Her Honor then mirror TKE’s current false representations to the Nevada  
15 appellate courts, except as to the alleged source of the emails:

16 THE COURT: What do we do about the -- do you agree on the subsequent  
e-mails only more recently being disclosed, which showed tie-ins between --

17 MS. MASTANGELO: No. I produced those e-mails in response to  
Golden Nugget’s request for production long ago.

18 THE COURT: What would long ago be? Well, I -- they weren’t 16.1  
19 disclosures back at the beginning of this case in ’16?

20 MS. MASTRANGELO: We produced our maintenance records in 16.1,  
we --

21 THE COURT: Complete?

22 MS. MASTRANGELO: Complete. There are some maintenance --

23 THE COURT: Or in -- because he -- he is -- because counsel --

24 MS. MASTRANGELO: -- records that don’t exist because of the passage  
of time. We produced everything surrounding this incident, Judge. We produced  
the correspondence from KONE, the escalator manufacturer, directing their client,  
their customer, Golden Nugget’s, as well as the maintenance company, to replace  
these steps. We produced all that long ago. And I don’t have the exact date that  
they were produced. He says November of ’17. I believe it was prior to that. But

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26  
27 <sup>5</sup> See attached hereto as **Exhibit 1-E** a copy of Plaintiffs’ December 26, 2018 NRCP 11  
correspondence to TKE.

1 even November of '17, he waited another seven, eight months before filing this  
2 motion.<sup>6</sup>

3 To this Court in August of 2018, TKE asserted that it was TKE's own production in response to  
4 RFPs where the magic emails resided and were produced "long ago." To the Nevada Supreme  
5 Court today, TKE has asserted that Golden Nugget produced the emails. Both versions are false,  
6 for different reasons. And, of course, TKE went on to make similar false statements of fact—  
7 again—in Motion in Limine #7 – and then retract them, while maintaining the same false claims  
8 and questioning the candor of undersigned counsel in *ex parte* communications to the Nevada  
9 Supreme Court. TKE maintains those false claims regarding the emails today, despite knowing  
10 of their falsity since at least the November 19 affidavit of Mr. Michalek.

11 E. ***THE ANALYSIS OF TKE'S OPPOSITION COULD END HERE:*** THIS COURT HAS NO  
12 ASSURANCE REGARDING THE TRUTHFULNESS OF TKE'S REPRESENTATIONS, AND  
13 TKE'S ***FRAUD UPON THE COURT*** CONTINUES TODAY, IN THE PENDING FALSE  
14 STATEMENTS BEFORE NEVADA'S APPELLATE COURTS; AS SUCH, PLAINTIFFS'  
15 EMERGENCY MOTION AND THE EVIDENCE ATTACHED TO IT ARE OPPOSED BY WORDS,  
16 SENTENCES, AND PARAGRAPHS THAT REQUIRE SUSPICION AND MEAN NOTHING

17 TKE has a fundamental and persistent penchant for making false statements in pleadings  
18 to various Nevada courts—and, as noted in Plaintiffs' Emergency Motion—that tendency  
19 certainly extended to TKE's false discovery response to Plaintiffs' requests and concealment of  
20 Mr. Dutcher's (and other TKE employees') emails from Plaintiffs until discovery closed.  
21 Indeed, TKE's words lack the sound and the fury—they are immediately hollow from immediate  
22 contradictions with other statement(s) made before some other tribunal and/or in some other  
23 context.

24 With this latest discovery of the *ex parte* communications to the Nevada Supreme Court  
25 and all of the prior incidents before this Court taken in totality, the conclusion that TKE has  
26 perpetrated a fraud upon this Court (and the Nevada Supreme Court) and should be sanctioned is  
27 inescapable. That discovery should be re-opened to fully flesh out TKE's false statements and  
28 concealed-under-the-surface emails is a given. TKE's brief and unsupported opposition does

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29 <sup>6</sup> See attached hereto as **Exhibit 1-D** a copy of the Transcript from the August 6, 2018  
30 Hearing on Plaintiffs' Motion for Leave to Amend, at 10:25-11:22.

1 little to diminish Plaintiffs' Motion and the attached evidence; indeed, the information  
2 discovered after the Motion was submitted and the calendar call regarding TKE's pending *ex*  
3 *parte* false statements only fortifies the Motion and the bases for sanctions against TKE.

4 **II. Standing Alone on Its Merits, TKE's Opposition Still Fails for Its Illogical**  
5 **Assumptions, Unanswered Questions regarding TKE's Incomplete and Egregiously**  
6 **Late Disclosure of Emails, and Unsupported Assertions**

7 A. TKE'S BRIEF OPPOSITION CONSISTS LARGELY OF UNSUPPORTED STATEMENTS,  
8 IGNORES LARGE PORTIONS OF THE MOTION, AND EXPECTS PLAINTIFFS TO SIMPLY  
9 ACCEPT TKE'S STATEMENTS AS TRUE

10 TKE represents that "[t]he search was performed through [TKE's] archival back up  
11 system" (Opp. 4:22-23) and provides no details as to the scope of that search or whether that  
12 search included efforts to locate other TKE employee emails. The Opposition largely consists of  
13 unsupported statements that say and mean very little (especially in light of TKE's omnipresent  
14 false statements). For example, in Argument A, TKE states: "While some additional emails  
15 were located from a deleted data base [sic] in 2018, there is no new, different, or additional  
16 information contained within those emails which was not previously known to Plaintiffs'  
17 counsel. Therefore, Plaintiffs have not been harmed in any way." Opp. 5:13-16. This statement  
18 lacks any value, and it is unsupported by the Affidavit provided in Exhibit H, which only  
19 addresses an archival backup system and does not provide any details regarding or even mention  
20 "a deleted data base [sic]."

21 TKE also claims in Argument A (Opp. 5:5-16) that, although "Mr. Dutcher's emails were  
22 produced later in the litigation, they contain no information which Plaintiffs had not already  
23 received." TKE conveniently claims without support that "Mr. Dutcher's emails were produced"  
24 – when the reality is that only a handful of emails from a few days in the Summer of 2015 were  
25 produced, after repeated false claims that they did not exist.

26 TKE's opposition also ignores the Motion's undisputed facts (and citations to Mr.  
27 Dutcher's sworn testimony) regarding Mr. Dutcher's external emails to Golden Nugget  
28 personnel, completely omits any discussion or reference to Mr. Dutcher's TKE-supplied phone

1 that crashed and rendered Mr. Dutcher's emails inaccessible, the missing emails from Mr.  
2 Dutcher's supervisors Mr. Panero and Mr. Olsen, and among/between other TKE personnel.  
3 TKE also leaves substantial questions unanswered, including, for example, when Mr. Dutcher's  
4 emails were located, and whether other employees' emails are accessible in any way. (There is a  
5 vague reference to "2018" (Opp. 4:19-20) but no specific details as to what date Mr. Dutcher's  
6 emails were located.) The Opposition's lack of detail and support is, standing alone, a fatal flaw.

7 B. AT BEST, TKE'S ASSERTIONS ARE ILLOGICAL AND SELF-SERVING

8 In Argument Section B, on page 5, TKE dismisses the emails produced in November of  
9 2018 by claiming they post-dated Plaintiff's incident. Indeed, the emails TKE belatedly  
10 produced in November do post-date Mr. Brown's May 2015 incident—but that was entirely of  
11 TKE's own doing. TKE only produced emails from a sliver of Mr. Dutcher's eight years of  
12 service on the subject escalator, and lied previously regarding the very existence of Mr.  
13 Dutcher's emails; given these two unassailable truths, it would be the height of folly to simply  
14 accept TKE's self-serving and illogical claim that there are no other emails, and that all the  
15 emails are irrelevant to showing notice of a defective condition. TKE uses narrow and false  
16 initial premises to quickly reach incomplete and faulty conclusions that serves only TKE.

17 This tactic is best personified in TKE's argument that Plaintiffs are somehow responsible  
18 for TKE's concealment and are to be blamed for failing to file a motion re the missing emails  
19 prior to discovery. Prior to that point, TKE represented on many occasions – including in the  
20 October 30, 2018 correspondence to Plaintiffs (Exhibit 1-F to the Motion) – that Mr. Dutcher's  
21 emails likely did not exist or did not exist, full stop. Plaintiffs were entitled to believe that  
22 TKE's representations were based on reasonable inquiry, and that they were in fact true.  
23 Plaintiffs did not learn until after the close of discovery that TKE's representations were false.  
24 TKE cannot communicate false statements and then later take the position that Plaintiffs get no  
25 relief because Plaintiffs did not assume TKE was lying.

26  
27 ///



1 C. NOT SURPRISINGLY, TKE’S RELIANCE ON THE *YOUNG V. JOHNNY RIBEIRO* CASE IS  
2 ERRONEOUS

3 *Johnny Ribeiro* deals with NRCP 37(b)(2), which relates to “failure to comply with a court  
4 order.” Plaintiffs in their motion sought relief under NRCP 37(c), which relates to “**failure to**  
5 **disclose; false or misleading disclosure; refusal to admit.**” TKE fails to acknowledge and  
6 otherwise ignores that Plaintiffs expressly predicated their request for sanctions on TKE’s  
7 violation of Rule 37(c)(1), rather than Rule 37(b)(2).

8 Even if TKE’s opposition can escape the shadow of TKE’s continuing ex parte false  
9 statements—which it cannot—it nonetheless fails on its merits.

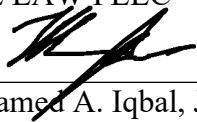
### 10 III. CONCLUSION

11 For the reasons set forth above, Plaintiffs’ Motion should be GRANTED.

12 Dated December 28, 2018.

Respectfully Submitted,

IQBAL LAW PLLC

13 By:   
14 Mohamed A. Iqbal, Jr. (NSB# 10623)

15 *Attorneys for Plaintiffs*



# **EXHIBIT 1**

# **EXHIBIT 1**

JNB02340

**DECL**  
IQBAL LAW PLLC  
Mohamed A. Iqbal, Jr. (NSB #10623)  
Christopher Mathews (NSB #10674)  
101 Convention Center Dr., Suite 1175  
Las Vegas, Nevada 89109  
1-(702) 750-2950 (Tel); 1-(702) 825-2841 (V-Fax)  
*info@ilawlv.com*  
*Attorneys for Plaintiffs*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

JOE N. BROWN, an individual, and his Wife,  
NETTIE J. BROWN, an individual

Plaintiffs,

vs.

LANDRY'S, INC., a foreign corporation;  
GOLDEN NUGGET, INC. a Nevada  
corporation, d/b/a GOLDEN NUGGET  
LAUGHLIN; GNL, CORP., a Nevada  
corporation; THYSENKRUPP ELEVATOR  
CORP., a foreign corporation; DOE  
INDIVIDUALS 1-100,  
ROE BUSINESS ENTITIES 1-100,

Defendants.

AND RELATED CASES

Case No.: A-16-739887-C  
Dept. No.: XXXI

**Date of hearing: January 8, 2018**  
**Time of hearing: 9:00 a.m.**

**DECLARATION OF MOHAMED A. IQBAL, JR., ESQ.  
IN SUPPORT OF PLAINTIFFS' REPLY IN SUPPORT OF EMERGENCY MOTION  
FOR REOPENING DISCOVERY, COURT INTERVENTION, AND SANCTIONS ON  
ORDER SHORTENING TIME**

I, MOHAMED A. IQBAL, JR., under penalty of perjury, declare and say:

1. I am an attorney duly licensed to practice law in the State of Nevada and am the principal for Iqbal Law PLLC, counsel of record for Plaintiffs JOE BROWN and NETTIE BROWN in case number A-16-739887-C currently pending before the Eighth Judicial District Court of Nevada. I make this declaration in support of Plaintiffs' Reply in Support of Emergency Motion

1 for Reopening Discovery, Court Intervention, and Sanctions on Order Shortening Time.  
2 Thyssenkrupp Elevator Corporation will be referenced herein as “TKE.”

3 2. I have personal knowledge as to the facts set forth in this declaration. If called upon to  
4 testify, I could and would do so competently and would similarly testify to the subsequent facts  
5 as set forth in this declaration.

6 3. Exhibit 1-A to this Declaration contains a true and correct copy of the Nevada Appellate  
7 Court Docket Sheet, as of December 5, 2018, and of a November 2, 2018 Notice of Transfer to  
8 Court of Appeals.

9 4. Exhibit 1-B to this Declaration is a true and correct copy of TKE’s October 19, 2018  
10 Petition for Writ of Mandamus in the Supreme Court of Nevada.

11 5. Exhibit 1-C to this Declaration is a true and correct copy of TKE’s November 19, 2018  
12 Errata to TKE’s Motion in Limine #7, including an affidavit from Charles A. Michalek.

13 6. Exhibit 1-D to this Declaration is a true and correct copy of the Transcript from the  
14 August 6, 2018 Hearing on Plaintiffs’ Motion for Leave to File Second Amended Complaint.

15 7. Exhibit 1-E to this Declaration is a true and correct copy of Plaintiffs’ December 26,  
16 2018 NRCP 11 correspondence to TKE.

17 Dated December 28, 2018.

18  
19  
20 /s/ Mohamed A. Iqbal, Jr.  
21 MOHAMED A. IQBAL, JR.  
22  
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# **EXHIBIT 1-A**

# **EXHIBIT 1-A**

JNB02343

## Nevada Appellate Court Docket Sheet

**Docket: 77211 THYSSENKRUPP ELEV. CORP. VS. DIST. CT. (BROWN)**

THYSSENKRUPP ELEVATOR CORPORATION,  
Petitioner,  
vs.

**Appellate Court No. 77211**

Consolidated With:

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND  
FOR THE COUNTY OF CLARK; AND THE HONORABLE JOANNA KISHNER,  
DISTRICT JUDGE,  
Respondents,  
and  
JOE N. BROWN, AN INDIVIDUAL; AND NETTIE J. BROWN, AN INDIVIDUAL,  
Real Parties in Interest.

### Counsel

Rebecca Mastrangelo, Las Vegas, NV, as counsel for Petitioner  
Charles Michalek, Las Vegas, NV, as counsel for Petitioner  
Annalisa Grant, Las Vegas, NV, as counsel for Real Party in Interest  
Alexandra McLeod, Las Vegas, NV, as counsel for Real Party in Interest

### Case Information

**Panel:** Panel

**Panel Members:**

**Disqualification:**

**Case Status:** Transferred to Court of Appeals

**Category:** Original Proceeding

**Type:** Mandamus

**Submitted:**

**Date Submitted:**

**Oral Argument:**

**Sett. Notice Issued:**

**Sett. Judge:**

**Sett. Status:**

**Related Appellate Court Cases:** 77211-COA

### District Court Case Information

**Case Number:** A739887

**Case Title:**

**Judicial District:** Eighth Judicial District

**Division:** **County:** Clark Co.

**Sitting Judge:** Joanna Kishner

**Replaced By:**

**Notice of Appeal Filed:**

**Judgment Appealed From Filed:**

### Docket Entries

**Date**

**Docket Entries**

JNB02344

10-19-2018 Filed Petition for Writ of Mandamus. 18-41186

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10-19-2018 Filing fee paid. E-Payment \$250.00 from Rebecca L. Mastrangelo.

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10-19-2018 Filed Petitioner's Appendix to Petition for Writ of Mandamus - Volume I. 18-41187

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10-19-2018 Filed Petitioner's Appendix to Petition for Writ of Mandamus - Volume II. 18-41188

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11-02-2018 Issued Notice of Transfer Case to Court of Appeals. 18-43064

**IN THE SUPREME COURT OF THE STATE OF NEVADA  
OFFICE OF THE CLERK**

THYSSENKRUPP ELEVATOR  
CORPORATION,  
Petitioner,  
vs.  
THE EIGHTH JUDICIAL DISTRICT COURT  
OF THE STATE OF NEVADA, IN AND FOR  
THE COUNTY OF CLARK; AND THE  
HONORABLE JOANNA KISHNER, DISTRICT  
JUDGE,  
Respondents,  
and  
JOE N. BROWN, AN INDIVIDUAL; AND  
NETTIE J. BROWN, AN INDIVIDUAL,  
Real Parties in Interest.

**Supreme Court No. 77211**  
District Court Case No. A739887

**NOTICE OF TRANSFER TO COURT OF APPEALS**

TO: Hon. Joanna Kishner, District Judge  
Rogers, Mastrangelo, Carvalho & Mitchell, Ltd. \ Rebecca L. Mastrangelo, Charles  
A. Michalek  
Grant & Associates \ Annalisa N. Grant, Alexandra B. McLeod  
Steven D. Grierson, Eighth District Court Clerk

Pursuant to NRAP 17(b), the Supreme Court has decided to transfer this matter to the Court of Appeals. Accordingly, any filings in this matter from this date forward shall be entitled "In the Court of Appeals of the State of Nevada." NRAP 17(e).

DATE: November 02, 2018

Elizabeth A. Brown, Clerk of Court

By: Amanda Ingersoll  
Chief Deputy Clerk

Notification List

Electronic  
Rogers, Mastrangelo, Carvalho & Mitchell, Ltd. \ Rebecca L. Mastrangelo  
Rogers, Mastrangelo, Carvalho & Mitchell, Ltd. \ Charles A. Michalek  
Grant & Associates \ Alexandra B. McLeod

18-43064  
**JNB02346**

Paper

Hon. Joanna Kishner, District Judge

Grant & Associates \ Annalisa N. Grant

Steven D. Grierson, Eighth District Court Clerk



# **EXHIBIT 1-B**

# **EXHIBIT 1-B**

JNB02348



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**VERIFIED PETITION FOR WRIT OF MANDAMUS**

Petitioner/Third-Party Defendant, THYSSENKRUPP ELEVATOR CORPORATION, by and through its counsel of record, Rebecca L. Mastrangelo, Esq., and Charles A. Michalek, Esq., of the law firm of Rogers, Mastrangelo, Carvalho & Mitchell, hereby respectfully submits this Petition for Writ of Mandamus. Petitioner provides the Court with the following affidavit in support of this verified Petition:

1. Petitioner herein is Third-Party Defendant below, in the case of Joe N. Brown, an individual, and his wife, Nettie J. Brown, an individual, Plaintiffs, v. Landry's, Inc., a foreign corporation; Golden Nugget, Inc., a Nevada corporation d/b/a Golden Nugget Laughlin; GNL Corp., a Nevada corporation; DOE Individuals 1-100; ROE Business Entities 1-100, Defendants. (District Court Case No. A-16-739887-C.)

2. The action below involves a fall by Plaintiff Joe Brown which occurred on an escalator at the Golden Nugget Laughlin ("GNL") on **May 12, 2015**. Plaintiffs' Complaint was filed on **July 12, 2016** (1 P.A. 0001-0006) and their First Amended Complaint was filed on **September 1, 2016**. (1 P.A. 0009-0014.)

3. Plaintiffs' First Amended Complaint alleges that Defendants GNL, Golden Nugget and Landry's owed Plaintiffs a duty of care, and that they negligently designed, installed, operated and maintained the stairs, railings and /or escalators,

1 causing injuries and damages to Plaintiffs. Notably, although DOE Defendants are  
2 named in the caption of the First Amended Complaint, no specific allegations of  
3 negligence are alleged against any DOE Defendant in the body of the First Amended  
4 Complaint. (1 P.A. 0009-0014.)

5  
6 4. Plaintiffs were provided documents pursuant to NRCP 16.1 on  
7 **November 9, 2016**, including the maintenance agreement between GNL and  
8 ThyssenKrupp Elevator Corporation (“TKE”). (1 P.A. 0029-0140.)

9  
10 5. After Plaintiffs filed suit against GNL, GNL then filed a Third-Party  
11 Complaint against TKE alleging breach of contract, breach of express and implied  
12 warranties, and seeking apportionment and contribution as well as equitable  
13 indemnification against TKE. (1 P.A. 0144-0153.)

14  
15 6. TKE filed its Answer to the Third Party Complaint on **February 17,**  
16 **2017**, three months prior to the running of the two-year statute of limitations codified  
17 in NRS 11.190(4)(e). (1 P.A. 0154-0159.) The Answer admitted that TKE was  
18 responsible for maintenance on the subject escalator. (1 P.A. 0155.)

19  
20 7. Plaintiffs allowed the statute of limitations to expire without moving to  
21 amend their Complaint to assert a direct cause of action against TKE. Plaintiffs  
22 waited until **July 4, 2018 at 12:01 a.m.** to file a Motion to Amend. (1 P.A. 0183-  
23 0195.)

24  
25 8. The trial court granted Plaintiffs’ motion, stating that the “totality” of the  
26 circumstances justified amendment of the Complaint. (2 P.A. 0409.)



1           9.     However, the order drafted by Plaintiffs' counsel, and signed by the  
2 court, included many findings of fact and conclusions of law that were never  
3 discussed at the hearing, nor made the basis of the court's ruling. (2 P.A. 0411-0416.)  
4

5           10.    As an example, the order claims that discovery was not produced  
6 showing that TKE knew there were "cracks" in the escalator steps until months after  
7 the statute of limitations expired. (2 P.A. 0413.) However, GNL produced an email  
8 from TKE which addressed that very issue. (1 P.A. 0105.) This production was  
9 provided to Plaintiff on **November 9, 2016**.  
10

11           11.    Although Petitioners have the ability to appeal a final judgment, an  
12 appeal does not always constitute an adequate and speedy remedy that precludes writ  
13 relief, depending on the circumstances. Petitioner contends that no factual dispute  
14 exists concerning the above stated facts, and the district court was obligated to  
15 dismiss an action pursuant to clear authority under a statute or rule. Alternatively,  
16 Petitioner contends that resolution of the interaction between third-party defendants  
17 under NRCP 14 and the statute of limitations is an important issue of law that needs  
18 clarification, and considerations of sound judicial economy and administration  
19 militate in favor of granting this petition. *Nevada Checker Cab Corp. v. Eighth*  
20 *Judicial Dist. Court of State, ex rel. County of Clark*, 2016 WL 482099, at \*1 (Nev.  
21 Feb. 3, 2016) citing *State v. Eighth Judicial Dist. Court* (Anzalone ), 118 Nev. 140,  
22 147, 42 P.3d 233, 238 (2002).  
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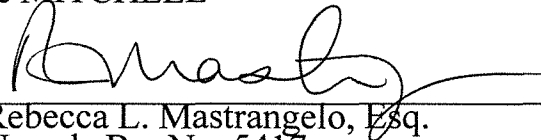
26           12     Petitioner believes that this Writ is presumptively retained by the  
27  
28

1 Supreme Court pursuant to NRAP 17(a)(11) as a question of statewide public  
2 importance.

3 **WHEREFORE**, based on the accompanying Points and Authorities, Petitioner  
4 respectfully requests this Court to grant the Petition for Writ of Mandamus.  
5

6 DATED this 16<sup>th</sup> day of October, 2018.

7 ROGERS, MASTRANGELO, CARVALHO  
8 & MITCHELL

9 

10 Rebecca L. Mastrangelo, Esq.

11 Nevada Bar No. 5417

12 Charles A. Michalek, Esq.

13 Nevada Bar No. 5721

14 700 S. Third Street

15 Las Vegas, Nevada 89101

16 Attorney for Petitioners

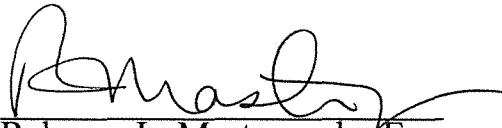
17 THYSSENKRUPP ELEVATOR  
18 CORPORATION

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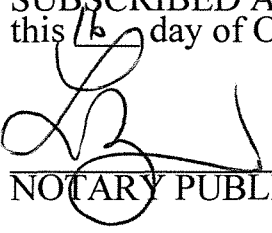
## VERIFICATION

Under the penalty of perjury, the undersigned declares that she is the attorney of record for Petitioners named in the foregoing Writ Petition and knows the contents thereof; that the pleading is true of her own knowledge, except as to those matters stated on information and belief, and that as such matters she believes to be true. This verification is made by the undersigned attorney pursuant to N.R.S. 15.010, on the ground that the matters stated, and relied upon, in the foregoing petition are all contained in the prior pleadings and other record of the district court, true and correct copies of which have been attached hereto.

Executed this 16<sup>th</sup> day of October, 2018.

  
Rebecca L. Mastrangelo, Esq.

SUBSCRIBED AND SWORN to before me  
this 16 day of October, 2018.

  
NOTARY PUBLIC



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**ROUTING STATEMENT (NRAP 17 STATEMENT)**

Petitioner believes that this Writ is presumptively retained by the Supreme Court pursuant to NRAP 17(a)(11) as a question of statewide public importance, as there is a conflicting application between NRCP 10, 14 and 15.

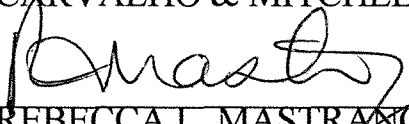
**NRAP 26.1 DISCLOSURE STATEMENT**

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Petitioner Thyssenkrupp Elevator corp is wholly owned by Thyssenkrupp Americas Corp which is 100% owned by Thyssenkrupp North America which is 100% owned by Thyssenkrupp AG.
2. Respondents were separately represented by current counsel in matters before the District Court, the law firm of ROGERS, MASTRANGELO, CARVALHO & MITCHELL, Rebecca Mastrangelo and Charles Michalek.

DATED this 16 day of October, 2018.

ROGERS, MASTRANGELO,  
CARVALHO & MITCHELL

  
REBECCA L. MASTRANGELO, ESQ.  
Nevada Bar No. 5417  
CHARLES A. MICHALEK  
Nevada Bar No. 5721  
700 S. Third Street  
Las Vegas, Nevada 89101  
Attorneys for Petitioners

1                   **POINTS AND AUTHORITIES IN SUPPORT OF**  
2                   **PETITION FOR WRIT OF MANDAMUS**

3 **I.     STATEMENT OF FACTS**

4         **A.     Facts of the Underlying Premises Liability Case**

5             This case involves an incident which occurred on May 12, 2015, on the down  
6 escalator at the Golden Nugget Laughlin (“GNL”). Plaintiffs’ First Amended  
7 Complaint, filed on September 1, 2016, alleges as follows (1 P.A. 0011):

- 8
- 9             11.    Joe Brown, who suffered shrapnel wounds in his legs while serving  
10               overseas and uses a cane when he walks, boarded the Laughlin escalator  
11               last.
- 12            12.    When Joe Brown stepped onto the Laughlin Nuggets Escalator, the stair  
13               he stood on was loose and unstable.
- 14            13.    Because the Laughlin Nugget escalator stairwell was narrow, Joe Brown  
15               was unable to steady himself with his cane. He reached for the escalator  
16               handrail, but was blocked by a stationary metal railing running the  
17               length of the escalator and was unable to steady himself with the  
18               handrail.
- 19            14.    As a result, Joe Brown lost his balance and fell down the Laughlin  
20               Nugget escalator.

21             Plaintiffs’ First Amended Complaint alleges that Defendants GNL, Golden  
22 Nugget and Landry’s owed Plaintiffs a duty of care, and that they negligently  
23 designed, installed, operated and maintained the stairs, railings and /or escalators,  
24 causing injuries and damages to Plaintiffs. Notably, although DOE Defendants are  
25 named in the First Amended Complaint, no specific allegations of negligence are  
26 alleged against them. Thyssenkrupp Elevator Corporation (“TKE”) was never named  
27 in the First Amended Complaint in any capacity. (1 P.A. 0009-0014.) As outlined by  
28 TKE at the hearing, Plaintiffs never intended to bring a cause of action against any

1 maintenance company, because the complaint did not include any proper DOE  
2 allegations which would have been required to utilize NRCP 10. (2 P.A. 0404):

3 This motion, as far as Thyssenkrupp is concerned, is not even a close call.

4 The whole purpose of naming Doe defendants in a complaint is when you  
5 don't know the identity of that defendant and later you find out who it is and  
6 you substitute. Here, he knew the identity well before the statute of  
7 limitations ran. He's always known the identity. Thyssenkrupp has been in  
8 this case before the statute of limitations ran, and even when Thyssenkrupp  
9 got in the case, he waited another year and a half to file this motion.

10 So even if you had everything else working, Judge, he still hasn't named any  
11 allegations against Doe Defendant Escalator Maintenance Company in  
12 either the first amended complaint or the original complaint. There is  
13 nothing in there that says maintenance company was negligent. Nothing in  
14 there at all. That does not satisfy Nurenberger, it does not satisfy his Doe  
15 defendant allegations.

16 DOE Defendants are only present in the caption of the First Amended  
17 Complaint, and in one generic paragraph, which states that these unnamed  
18 Defendants are somehow responsible for the incident, without actually explaining  
19 why. (1 P.A. 0010):

20 The true names and capacities of Defendants DOE Individuals 1 through  
21 100, are presently unknown to Plaintiffs, who therefore sues said  
22 Defendants by such fictitious names. Plaintiff is informed and believes, and  
23 thereupon alleges that each Defendant designated as DOE Individuals 1  
24 through 100 are legally responsible for the events referred to herein. The  
25 First Amended Complaint will be amended to include them when their true  
26 names and capacities become known.

27 Several months prior to the running of the statute of limitations, Plaintiffs  
28 were made aware that Thyssenkrupp was the maintenance company responsible  
for servicing the subject escalator. (1 P.A. 0155.) Defendant GNL provided  
Plaintiffs a copy of the maintenance agreement and the service records on  
November 9, 2016. (1 P.A. 0029-0140.)

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Plaintiffs' claims are for personal injuries and are thus governed by the two-year statute of limitations codified in NRS 11.190(4)(e). The statute of limitations had clearly expired prior to Plaintiffs' Motion to Amend, which was untimely and did not comply with Nevada law. Plaintiffs waited until July 4, 2018, to move to amend the complaint to bring in TKE as a Defendant. (1 P.A. 0183-0195.) TKE opposed the motion. (2 P.A. 0307-0326.) Plaintiffs filed a reply. (2 P.A. 0383-0394.)

1 they knew of Thyssenkrupp, but claimed ignorance as to its role in maintenance of  
2 the property, and also argued for a lack of prejudice to TKE. (2 P.A. 0407-0408):

3 THE COURT: Part of Thyssenkrupp's argument is on the Roes, right?  
4 So paragraph 7 is your Roes.

5 The true names and capacities of Defendants DOE Individuals 1 through  
6 100, are presently unknown to Plaintiffs, who therefore sues said  
7 Defendants by such fictitious names. Plaintiff is informed and believes, and  
8 thereupon alleges that each Defendant designated as DOE Individuals 1  
9 through 100 are legally responsible for the events referred to herein. The  
10 First Amended Complaint will be amended to include them when their true  
11 names and capacities become known.

12 So would you argue that that is or is not sufficient to put –

13 Mr. Iqbal: Your Honor, under – under the standard we – we knew of  
14 Thyssenkrupp, obviously, they were brought in. We did not know  
15 their role in – in the defects, we did not know their role in the  
16 maintenance, we did not know that these e-mails were going back and  
17 forth and that they sat on their hands, Your Honor.

18 And do when you look at 15(a), when you look at Costello, you can  
19 relate back, you can relate back when the – when there's no prejudice.  
20 And they've literally conducted discovery, which is still ongoing, as  
21 if they've been in this – against Plaintiffs.

22 Plaintiffs were on notice of the alleged role of Thyssenkrupp long before the  
23 statute ran. Defendant GNL served its Initial List of Witnesses and Documents  
24 pursuant to NRCP 16.1 on **November 9, 2016**, which documents included the  
25 maintenance agreement between GNL and TKE pertaining to the subject escalator  
26 as well as the escalator service records. (1 P.A. 0029-0140.) Thus, Plaintiffs were  
27 specifically on notice that there was an escalator maintenance company  
28 potentially responsible for the injury. Yet, Plaintiffs waited until **July 4, 2018 at**  
**12:01 a.m.** to file a Motion to Amend. (1 P.A. 0183.)

At the hearing, it was the determination of the trial court that “all the  
circumstances” justified an allowance of amendment of the complaint. (2 P.A.



1 0409). This ruling was in error, as the court never made findings that complied  
2 with the standards under either NRCP 15 (*Costello v. Casler*, 127 Nev. 436,  
3 440–41, 254 P.3d 631, 634 (2011)) or NRCP 10 (*Nurenberger Hercules-Werke*  
4 *GMBH v. Virostek*, 107 Nev. 873, 881, 822 P.2d 1100 (1991)). The district court  
5 was obligated to deny Plaintiffs leave to amend, pursuant to these clear authorities.  
6

7 Subsequent to the hearing, Plaintiffs’ counsel drafted an order for the trial  
8 court’s signature. ( 2 P.A. 0411-0416). The order states that maintenance of the  
9 escalators “has always been an issue known to the parties in this case,” and that  
10 the interest of justice requires TKE’s inclusion as a direct defendant. (2 P.A.  
11 0415.)  
12

13 The order also alleges several other “factual findings,” that the trial court  
14 never addressed nor found at the hearing. The order states that Plaintiffs were  
15 unaware of TKE’s role in the maintenance of the escalator until after the pleadings  
16 were filed, that TKE did not allege or demonstrate prejudice, and that TKE  
17 withheld evidence concerning its culpability, which was a “basis” for permitting  
18 the amendment. (2 P.A. 0411-0416.) This assertion is untrue, as Plaintiffs’  
19 received the so called “hidden” documents in the very first ECC production by  
20 GNL on November 9, 2016. (1 P.A. 0105-0119.) What the order does not address  
21 is the actual factors required by NRCP 15 or NRCP 10 in allowing amendment of  
22 the complaint and the prejudice due to the running of the statute of limitations.  
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## II.

### STANDARD OF REVIEW

“A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion.” *Humphries v. Eighth Judicial Dist. Court*, 129 Nev., Adv. Op. 85, 312 P.3d 484, 486 (2013) (quoting *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (footnote omitted)); see also NRS 34.160. “Normally, this court will not entertain a writ petition challenging the denial of a motion to dismiss,” *Buckwalter v. Eighth Judicial Dist. Court*, 126 Nev. 200, 201, 234 P.3d 920, 921 (2010), but may do so when “(1) no factual dispute exists and the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule; or (2) an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition,” *Nevada Checker Cab Corp. v. Eighth Judicial Dist. Court of State, ex rel. County of Clark*, 66349, 2016 WL 482099, at \*1 (Nev. Feb. 3, 2016); *State v. Eighth Judicial Dist. Court (Anzalone)*, 118 Nev. 140, 147, 42 P.3d 233, 238 (2002). See also *Gardner on Behalf of L.G. v. Eighth Judicial Dist. Court in & for County of Clark*, 405 P.3d 651, 654 (Nev. 2017) (writ petition challenging a district court's denial of leave to amend their complaint).

In the present case, there are no factual disputes concerning the First Amended Complaint and the ECC documents and Third-Party Complaint (and

1 Answer thereto) establishing notice prior to the running of the statute of  
2 limitations. Under clear Nevada law, TKE asserts that the district court was  
3 obligated to deny leave to amend based upon long standing case authorities.  
4

5 Pursuant to NRAP 17(a)(11), the relationship between NRCP 14 and NRCP  
6 15 is an important issue that needs clarification and/or is of public importance, and  
7 so writ relief would be appropriate under this alternate scenario:

8 We acknowledge that the ability to appeal a final judgment may not always  
9 constitute an adequate and speedy remedy that precludes writ relief,  
10 depending on the “underlying proceedings’ status, the types of issues raised  
11 in the writ petition, and whether a future appeal will permit this court to  
12 meaningfully review the issues presented.” *D.R. Horton v. Dist. Ct.*, 123  
13 Nev. 468, 474–75, 168 P.3d 731, 736 (2007). Thus, we may consider writ  
14 petitions challenging the admission or exclusion of evidence when “an  
15 important issue of law needs clarification and public policy is served by this  
16 court’s invocation of its original jurisdiction,” *Sonia F. v. Dist. Ct.*, 125  
17 Nev. 38, —, 215 P.3d 705, 707 (2009) (quoting Mineral County, 117  
18 Nev. at 243, 20 P.3d at 805), or when the issue is “one of first impression  
19 and of fundamental public importance,” *County of Clark v. Upchurch*, 114  
20 Nev. 749, 753, 961 P.2d 754, 757 (1998). We may also consider whether  
21 resolution of the writ petition will mitigate or resolve related or future  
22 litigation. *Id.* Ultimately, however, our analysis turns on the promotion of  
23 judicial economy. *Smith v. District Court*, 113 Nev. 1343, 1345, 950 P.2d  
24 280, 281 (1997) (“The interests of judicial economy ... will remain the  
25 primary standard by which this court exercises its discretion.”).

26 *Williams v. Eight Judicial Dist. Court of State, ex rel. County of Clark*, 127 Nev.  
27 Adv. Op. 45, 262 P.3d 360, 364 65 (2011). In *Williams*, this Court allowed a  
28 writ petition concerning the scope of a nurse’s testimony as to medical causation:

29 We conclude that an exception to our normal rule rejecting writ petitions  
30 challenging evidentiary rulings is necessary in this matter, and we exercise  
31 our discretion to consider these writ petitions. These petitions involve issues  
32 of first impression regarding whether a nurse can offer expert testimony  
33 about medical causation and the appropriate standard for defense expert  
34 testimony regarding alternative theories of medical causation, and these  
35 issues have the potential of being repeated in the many endoscopy cases  
36 pending before the district court. We also conclude that, in this narrow  
37 instance, waiting for an appeal to resolve these issues does not provide the  
38 parties with an adequate or speedy remedy because the ongoing litigation of  
39 multiple cases in the district court and conflicts in evidentiary rulings limits

1 our ability to meaningfully review the issues on appeal. We reemphasize,  
2 however, that generally this court will not consider writ petitions  
3 challenging evidentiary rulings, as those rulings are discretionary and there  
4 typically is an adequate remedy in the form of an appeal following an  
5 adverse final judgment. However, in the interest of judicial economy, it is  
6 necessary to resolve the issues presented in these writs.

7 Id. at 365. The present case presents issues of significant import and presents  
8 issues that present public policy concerns as well as judicial economy, and the  
9 relationship between NRCP Rules 14 and 15. The Supreme Court should thus  
10 retain jurisdiction of this writ pursuant to NRAP 17(a)(11).

### 11 III.

#### 12 STATEMENT AS TO WHY THE WRIT SHOULD ISSUE

13 TKE requests that this writ be granted for the following reasons:

- 14 1. The trial court's granting of amendment of the Complaint was  
15 improper under either NRCP 15 or NRCP 10;
- 16 2. The applicable statute of limitations expired;
- 17 3. Plaintiffs' failure to sue Thyssenkrupp prior to the running of the  
18 statute of limitations was a legal choice pursuant to *Reid v. Royal Ins.*  
19 *Co.*, 80 Nev. 137, 390 P.2d 45 (1964);
- 20 4. Plaintiffs' original pleadings did not name specific DOE Defendants  
21 to comply with NRCP 10, but instead utilized them as a catch-all as a  
22 precaution in violation of *Nurenberger* and *Cruz v. Durbin*, 2014 WL  
23 5449710, at \*3–4 (D. Nev. Oct. 17, 2014); and
- 24 5. Plaintiffs did not exercise reasonable diligence in moving to amend.

25 Plaintiffs should not have been allowed to amend their complaint to name  
26 Thyssenkrupp as a Defendant, as Plaintiffs had sufficient knowledge of  
27 Thyssenkrupp's role in the maintenance of the subject escalator well prior to the  
28 running of the statute, and Plaintiffs deliberately chose not to sue Thyssenkrupp  
before the statute ran. See *Reid v. Royal Ins. Co.*, 80 Nev. 137, 141, 390 P.2d 45,

1 47 (1964). As a Third-Party Defendant of which Plaintiffs knew but failed to  
2 timely sue, Thyssenkrupp was allowed to rely upon the running of the statute of  
3 limitations, and will now be unfairly prejudiced if a direct action is now allowed  
4 against it.  
5

6 An amended pleading adding a defendant that is filed after the statute of  
7 limitations has run will relate back to the date of the original pleading under  
8 NRCP 15(c) if “the proper defendant (1) receives actual notice of the action; (2)  
9 knows that it is the proper party; and (3) has not been misled to its prejudice by the  
10 amendment.” *Costello v. Casler*, 127 Nev. 436, 440–41, 254 P.3d 631, 634  
11 (2011). NRCP 15(c) is to be liberally construed to allow relation back of the  
12 amended pleading where the opposing party will be put to no disadvantage. Here,  
13 TKE will clearly be disadvantaged, as the statute has run. *Grice v. CVR Energy,*  
14 *Inc*, 2016 WL 7495818, at \*2 (N.D. Okla. Dec. 30, 2016).  
15  
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17 Additionally, Plaintiffs’ proposed Second Amended Complaint could not  
18 be proper under NRCP 10, which requires compliance with the factors outlined in  
19 *Nurenberger Hercules–Werke GMBH v. Virostek*, 107 Nev. 873, 881, 882 P.2d  
20 1100 (1991). Plaintiffs’ original and First Amended Complaints did not comply  
21 with these factors, as there were no identifiers for DOE Defendants and no actual  
22 allegations contained in the complaint against them. Finally, the motion was  
23 untimely, as Plaintiffs waited more than a year to file it.  
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1 IV.

2 LEGAL ARGUMENT

3 **A. Leave to amend Plaintiffs' Complaint under NRCP 15 should have been**  
4 **denied as the statute of limitations had run.**

5 NRCP 15(a) provides that leave to amend a complaint shall be “freely given  
6 when justice so requires.” However, leave to amend should not be granted if the  
7 proposed amendment would be futile. See *Halcrow, Inc. v. Eighth Jud. Dist. Ct.*,  
8 129 Nev. 394, 398, 302 P.3d 1148, 1152 (2013), as corrected (Aug. 14, 2013);  
9 *Allum v. Valley Bank of Nev.*, 109 Nev. 280, 287, 849 P.2d 297, 302 (1993). A  
10 proposed amendment may be deemed futile if the plaintiff seeks to amend the  
11 complaint in order to plead an impermissible claim. See *Soebbing v. Carpet Barn,*  
12 *Inc.*, 109 Nev. 78, 84, 847 P.2d 731, 736 (1993).

15 Where claims are barred by the statute of limitations, the trial court may  
16 dismiss the plaintiff's claims without leave to amend because the amendment  
17 would be futile. *Andersen v. Portland Saturday Mkt.*, 2018 WL 2917357, at \*2 (D.  
18 Or. June 11, 2018), citing *Platt Elec. Supply Inc. v. EOFF Elec. Inc.*, 522 F.3d  
19 1049, 1060 (9th Cir. 2008). See also *Deutsch v. Turner Corp.*, 324 F.3d 692, 718  
20 n. 20 (9th Cir. 2003) (denying leave to amend in part because the 10-year statute  
21 of limitations on the claim had run and thus, “permitting Deutsch to amend his  
22 complaint would be futile”); *American Stock Exchange, LLC v. Mopex, Inc.*, 230  
23 F.Supp.2d 333, 337 (S.D.N.Y. 2002) (denying leave to amend to add a new claim  
24 “[b]ecause amending its pleading to assert this time-barred claim would be  
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1 futile”); *In re Dynamic Random Access Memory Antitrust Litigation*, 516  
2 F.Supp.2d 1072, 1113 (N.D. Cal. 2007) (denying leave to amend as futile in part  
3 because “the statute of limitations bars the claim”).  
4

5 Several months prior to the running of the statute of limitations, Plaintiffs  
6 were made aware that Thyssenkrupp was the maintenance company responsible  
7 for servicing the subject escalator through records provided by Defendant GNL,  
8 including a copy of the maintenance agreement and the service records produced  
9 on **November 9, 2016**. (1 P.A. 0029-0140.) Plaintiffs did not choose to amend  
10 their complaint following this production.  
11

12 GNL then filed a Third-Party Complaint against Thyssenkrupp, which  
13 Thyssenkrupp answered on February 17, 2017, admitting that Thyssenkrupp  
14 maintained the subject escalator pursuant to the produced maintenance agreement.  
15 (1 P.A. 0154-0159). Plaintiffs did not amend the complaint following this  
16 admission.  
17

18 The two-year statute of limitations codified in NRS 11.190(4)(e) ran on  
19 May 15, 2017. Plaintiffs waited until **July 4, 2018**, to move to amend the  
20 complaint to bring in Thyssenkrupp as a Defendant. As a Third-Party Defendant  
21 under NRCP 14, Thyssenkrupp was entitled to rely upon the running of the statute  
22 of limitations as a basis for denial of leave to amend. *Grice v. CVR Energy, Inc*,  
23 2016 WL 7495818, at \*2 (N.D. Okla. Dec. 30, 2016). Thus, amendment of  
24 Plaintiffs’ Complaint would be futile and leave should have been denied. The trial  
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1 court never addressed the running of the statute of limitations, and the cases cited  
2 in TKE's opposition which stated that the running of the statute of limitations  
3 would bar an untimely Third-Party Complaint. (2 P.A. 0307-0326.)  
4

5 **1. Leave to amend to add a new party can be governed by NRCP 15**  
6 **only if compliance with Costello is shown.**

7 Although not directly specified, NRCP 15 allows the relation back effect of  
8 NRCP 15(c) to apply to the addition or substitution of parties. *Costello v. Casler*,  
9 127 Nev. 436, 440, 254 P.3d 631, 634 (2011). Pursuant to *Costello*, an amended  
10 pleading adding a defendant that is filed after the statute of limitations has run will  
11 relate back to the date of the original pleading under NRCP 15(c) if "the proper  
12 defendant (1) receives actual notice of the action; (2) knows that it is the proper  
13 party; and (3) has not been misled to its prejudice by the amendment." Id. at 634.  
14

15 Federal law allows for the addition of new parties following the running of  
16 the statute of limitations pursuant to FCRP 15(c), which states:  
17

18 (c) Relation Back of Amendments.

19 (1) When an Amendment Relates Back. An amendment to a pleading  
relates back to the date of the original pleading when:

20 (A) the law that provides the applicable statute of limitations  
21 allows relation back;

22 (B) the amendment asserts a claim or defense that arose out of  
the conduct, transaction, or occurrence set out--or attempted to  
23 be set out--in the original pleading; or

24 (C) the amendment changes the party or the naming of the  
party against whom a claim is asserted, if Rule 15(c)(1)(B) is  
25 satisfied and if, within the period provided by Rule 4(m) for  
serving the summons and complaint, the party to be brought in  
26 by amendment:



1 (i) received such notice of the action that it will not be  
2 prejudiced in defending on the merits; and

3 (ii) knew or should have known that the action would  
4 have been brought against it, but for a mistake  
concerning the proper party's identity.

5 Thus, for purposes of amendment under NRCP 15, both Nevada and federal  
6 law require that the defendant know that it is a proper party, and suffer no  
7 prejudice with the amendment. The *Costello* court allowed relation back because  
8 the proposed complaint effected no real change in the parties, as the complaint  
9 simply substituted the estate for the deceased defendant. *Costello v. Casler*, 127 at  
10 442–43, 254 P.3d at 636:

12 Allowing the amendment to relate back to the date of the original complaint  
13 will not prejudice Casler's estate or American Family Insurance. Although,  
14 in order to pursue her claim, Costello was required to name Casler's estate,  
15 the substance of the proposed amended complaint effected no real change as  
16 Costello's claim remained the same. American Family Insurance would  
17 presumably be required to defend the suit regardless of whether Casler was  
18 dead or alive. Further, there is no allegation that the amendment would  
19 cause any real prejudice to the estate or American Family Insurance. As a  
20 result, the requirements of Echols are met—through American Family  
21 Insurance, the estate had actual notice of the action, knew it was the proper  
party, and will suffer no prejudice from the amended pleading. We  
emphasize that the approach we adopt to relation back under NRCP 15(c)  
does not transform an insurer into an agent for service of process. We are  
dealing with the notice and knowledge requirements of NRCP 15(c) and  
whether, on the facts before us, they were met for purposes of relation back.  
We hold that they were. We therefore conclude that the district court erred  
in denying Costello leave to amend her complaint to add Casler's estate as a  
defendant. Consequently, summary judgment was improper.

22 The circumstances in the present case are far different from *Costello*. Case  
23 law from numerous jurisdictions holds that the relation back effect of FRCP 15  
24 does not apply to third-party defendants added under FRCP 14. See *Frankel v.*  
25 *Back*, 37 F.R.D. 545, 548–49 (E.D. Pa. 1965).  
26

Moreover, Plaintiffs knew of Thyssenkrupp's identity and role in the maintenance of the subject escalator before the running of the statute, but failed to timely sue it. Plaintiffs must be held to that choice. TKE would now be unfairly prejudiced if amendment of the complaint is allowed.

**2. The relation back effect of FRCP 15 does not apply to a Third-Party Defendant added under FRCP 14.**

The relation back effect of FRCP 15 does not apply to a Third-Party Defendant added under FRCP 14. See *Frankel v. Back*, 37 F.R.D. 545, 548–49 (E.D. Pa. 1965) (emphasis added):

In the instant case, plaintiff never filed a claim against the third party defendant so that the requested amendment would amount to an original claim against the third party defendant after the statute of limitations has run and not the amendment of a pleading already filed setting forth a claim against the third party defendant.

On the basis of the foregoing opinion, the plaintiff's motion to amend his complaint to assert a claim against the third party defendant directly should be denied.

See also *Grice v. CVR Energy, Inc.*, 2016 WL 7495818, at \*2 (N.D. Okla. Dec. 30, 2016):

Put differently, when a plaintiff seeks to charge a third-party defendant with liability after a statute of limitations has run, such claim is barred, whether raised under Rule 14(a) or otherwise.

See also *Coons v. Indus. Knife Co., Inc.*, 620 F.3d 38, 43 (1st Cir. 2010):

The district court carefully considered the parties' arguments as they were presented. It first rejected Coons's Rule 14 argument, and rightly so. Rule 14(a)(3) delineates the circumstances in which a plaintiff may assert claims against a newly added third-party defendant, but it has nothing to say about whether such third-party claims are timely. See *D'Onofrio Constr. Co. v. Recon Co.*, 255 F.2d 904, 910 (1st Cir.1958) (noting that "Rule 14 does not purport to deal with the statute of limitations"); 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1459 (3d ed. 2010) ("The fact that [a] third party has been brought into the action does not revive any claims the original plaintiff may have had against the third party that should have been asserted earlier but have become

unenforceable.”). The question of timeliness is governed by the applicable statute of limitations, subject to the relation back doctrines of Rule 15(c).

TKE is not, and has never been, a direct Defendant, but only a Third-Party Defendant under NRCP 14. And, as a Third-Party Defendant under NRCP 14, TKE is entitled to assert the expiration of the statute of limitations as to any direct claim against it by Plaintiffs. See e.g., *Bishop v. Atmos Energy Corp.*, 161 F.R.D. 339, 340–41 (W.D. Ky. 1995); citing Wright & Miller, Federal Practice and Procedure, § 1459, p. 450; 3 Moore's Federal Practice § 14.09; and *Frankel v. Back*, 37 F.R.D. 545, 547–48 (E.D.Pa.1965) (holding that a statute of limitation will bar untimely claims asserted by plaintiffs against third-party defendants). See also *Netherlands Ins. Co. v. MD Plumbing & Heating, LLC*, 2011 WL 832555, at \*2 (D. Conn. Mar. 3, 2011):

As this Court has previously had occasion to recognize, it is well established that under Rule 14(a)(3), “any claim existing between plaintiff and the third-party defendant is subject to the applicable statute of limitations; the statute is neither tolled nor waived upon the third-party defendant's entry into the action but continues to run until the plaintiff actually asserts the claim against the third-party defendant, or, if the time period runs before the action is commenced, serves as a bar to the claim at the outset.” 6 Charles Alan Wright, Arthur R. Miller & Mary Kaye Kane, Federal Practice and Procedure § 1459, at 526 (3d ed.2010); see *Gouveia v. Sig Simonazzi North America, Inc.*, No. 3:03cv597 (MRK), 2005 WL 293506, at \*2 (D.Conn. Jan. 11, 2005) (denying leave to amend complaint to add direct claims against a third-party defendant where the statute of limitations on those claims had run).

See also *Fed. Ins. Co. v. Lighthouse Const., Inc.*, 230 F.R.D. 387, 390 (D. Del. 2005):

Courts interpreting Rule 14(a) have not permitted the rule to be used to add a claim which is barred by the applicable statute of limitations. See e.g. *Dysart v. Marriott Corp.*, 103 F.R.D. 15, 18 (E.D.Pa.1984) (permitting plaintiff to file a claim against third-party defendant under Rule 14(a) “at

any time before the statute of limitations has run”); *Carroll v. USA*, 149 F.R.D. 524, 527 (W.D.La.1993) (holding that Rule 14(a) “does not envision the revival of an action barred by the statute of limitations”). In this case, Federal's claim arose from the partial roof collapse on February 17, 2003. The applicable statute of limitations for this action is two years as provided in 10 Del. C. § 8107. However, Federal did not file its Motion For Leave To File Rule 14(a) Claim Against East Coast until March 8, 2005, shortly after the expiration of the two-year limitations period. Federal has not made any argument that the statute of limitations should be tolled, and therefore, the Court concludes that Federal's claim against East Coast is barred by the statute of limitations.

Plaintiffs were aware of TKE's role in maintaining the subject escalator as Plaintiffs were provided with the maintenance agreement on November 9, 2016, long before the running of the statute of limitations. (1 P.A. 0029-0140). Additionally, TKE answered the Third-Party Complaint on February 17, 2017, admitting that it maintained the escalator in question. (1 P.A. 0154-0159).

The statute of limitations expired on May 11, 2017. Thus, Plaintiffs had an abundance of time within which to file a direct action against TKE, but decided not to do so. A plaintiff does not have to accept a third-party defendant into its case if it does not wish to do so. This decision by the Brown Plaintiffs was not a mistake, but a deliberate choice. See *Reid v. Royal Ins. Co.*, 80 Nev. 137, 141, 390 P.2d 45, 47 (1964):

However, if a new party is impleaded, it is optional with the plaintiff whether he will accept the third-party defendant as a defendant in his (the plaintiff's) case. The rule is clear in this respect. It states: ‘The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.

Because of these clearly defined principles, it is apparent, in the case before us, that the judgment for the plaintiffs against the third-party defendant (subcontractor) cannot stand. The plaintiffs never sought to impose a liability upon the subcontractor. Even after the subcontractor was impleaded by the named defendant (contractor) the plaintiffs did not choose to amend their complaint to accept the subcontractor as an additional defendant in

1 their case. We can only conclude that they were satisfied with the validity of  
2 their case against the general contractor and were willing to win or lose on  
that claim for relief.

3 **3. TKE could not have known that Plaintiffs would seek to add it as**  
4 **a Defendant once the statute ran, and such amendment is now**  
5 **unfairly prejudicial.**

6 TKE could not have known that Plaintiffs would seek to hold it liable after  
7 the filing of the Third-Party Complaint, and TKE was clearly allowed to rely upon  
8 the absence of such allegations when the statute of limitations ran on May 11,  
9 2017, more than a year prior to Plaintiffs filing of their Motion to Amend. See  
10 *Curry v. Johns-Manville Corp.*, 93 F.R.D. 623, 626–27 (E.D. Pa. 1982) (emphasis  
11 added):  
12

13 Moreover, the more reasonable inference to draw from the circumstances of  
14 this case is that third-party defendants had no reason to know, prior to the  
15 filing of plaintiffs' motion for leave to amend, that plaintiffs wished to assert  
16 direct claims against them. Plaintiffs presumably made some determination  
17 prior to filing their complaint of who most likely sold the products to which  
18 Mr. Curry was exposed. Tactical considerations may have entered into  
19 plaintiffs' decision to sue only the original defendants, instead of launching  
20 a broader attack on the asbestos industry. Pacor's decision to bring  
21 additional parties into the suit may also have been based in part on tactical  
22 considerations. To the extent Pacor's joinder of additional asbestos sellers  
23 was based on better information than that hitherto available to plaintiffs,  
24 plaintiffs certainly knew the identities of these additional companies by  
25 June of 1981. At that point, plaintiffs had four months within which to move  
26 for leave to amend before October 17, 1981, when their cause of action  
27 would arguably become barred according to the allegations of their own  
28 complaint. However, plaintiffs made no attempt to assert direct claims  
against the third parties until November. Under these circumstances,  
third-party defendants may have inferred quite reasonably that plaintiffs'  
failure to take prompt action to assert direct claims against them was a  
matter of deliberate tactical choice, not error.

25 Plaintiffs knew, almost from the beginning of this litigation, that TKE was a  
26 potential party. Plaintiffs chose not to sue TKE before the statute ran, even after  
27  
28

1 TKE was made a Third-Party Defendant. Plaintiffs must live with the deliberate  
2 choice that they made. See *Netherlands Ins. Co. v. MD Plumbing & Heating, LLC*,  
3 2011 WL 832555, at \*3 (D. Conn. Mar. 3, 2011):

4  
5 While Netherlands Insurance is surely correct that Allied Sprinkler and  
6 Central Connecticut Fire both had notice such that they would not be  
7 prejudiced in defending claims brought directly by Netherlands Insurance,  
8 see Fed.R.Civ.P. 15(c)(1)(C)(i), the Court concludes that Netherlands  
9 Insurance has not—and indeed cannot—make the required showing under  
10 Rule 15(c)(1)(C)(ii). Just like the plaintiff in *Gouveia*, Netherlands  
11 Insurance knew the identity of Allied Sprinkler and Central Connecticut  
12 Fire long before the statute of limitations ran on the claims it now seeks to  
13 bring against those third-party defendants. See 2005 WL 293506, at \*4.

14 Under that circumstance—that is, where a plaintiff knows the identity of the  
15 third-party defendant before the statute of limitations runs, but waits until  
16 after the statute of limitations has run to bring direct claims against the  
17 third-party defendant—the plaintiff's failure to name to proper defendant  
18 results from the plaintiff's own choice, and not from “a mistake concerning  
19 the proper party's identity.” Fed.R.Civ.P. 15(c)(1)(C)(ii); see *Gouveia*, 2005  
20 WL 293506, at \*4 (citing, among others, *Rendell-Speranza v. Nassim*, 107  
21 F.3d 913, 918–19 (D.C.Cir.1997); *Lundy v. Adamar of New Jersey, Inc.*, 34  
22 F.3d 1173, 1183 (3d Cir.1994); *Cornwell v. Robinson*, 23 F.3d 694, 705 (2d  
23 Cir.1994)). Netherlands Insurance had ample time to assert timely direct  
24 claims, but it chose not to do so. See *Gouveia*, 2005 WL 293506, at \*4.

25 For those reasons, Netherlands Insurance Co.'s Motion for Leave to File  
26 Claims Against Third-Party Defendants [doc. # 56] is DENIED.

27 The trial court's order never addressed this issue, despite *Costello* requiring  
28 that a party actually know that it was a proper party meant to be sued by Plaintiffs.  
NRCP 15(c) only allows for relation-back of an amendment if “the proper  
defendant (1) receives actual notice of the action; (2) knows that it is the proper  
party; and (3) has not been misled to its prejudice by the amendment.” *Costello v.*  
*Casler*, 127 Nev. 436, 440–41, 254 P.3d 631, 634 (2011). Plaintiffs cannot comply  
with these factors.

1 TKE did receive notice of the action prior to the running of the statute of  
2 limitations. However, this factor does not favor Plaintiffs, as they had sufficient  
3 time to add TKE as a direct defendant, but chose not to. By allowing the statute to  
4 run, TKE believed that Plaintiffs' choice of direct defendants had been made as in  
5 *Reid v. Royal Ins. Co.*, 80 Nev. 137, 141, 390 P.2d 45, 47 (1964) ("We can only  
6 conclude that they were satisfied with the validity of their case against the general  
7 contractor and were willing to win or lose on that claim for relief.").

8  
9  
10 Finally, the trial court's order never addressed prejudice, despite the fact  
11 that the statute of limitations had run. The "findings" allege that TKE never  
12 claimed prejudice. This is untrue. TKE alleged prejudice citing the running of the  
13 statute of limitations, and the same case law and arguments, as presented in this  
14 writ. (2 P.A. 0307-0326.) TKE specifically argued that the statute of limitations  
15 was an allowed defense under NRCP 14, which prevented relation back of the  
16 amendment in this case. (2 P.A. 0310-0314.)

17  
18 TKE would now be unfairly prejudiced if Plaintiffs' amendment is allowed.  
19 As a Third-Party Defendant, TKE is only liable if GNL is found responsible.  
20 *Spearman v. Pender Cnty. Bd. of Educ.*, 623 S.E.2d 331, 333 (N.C. App 2006)( "If  
21 the original defendant is not liable to the original plaintiff, the third-party  
22 defendant is not liable to the original defendant.").

23  
24  
25 If Plaintiffs wanted TKE as a direct defendant, then Plaintiffs could have  
26 moved to amend the Complaint before the statute ran. They chose not to do so. If  
27

1 Plaintiffs even intended to later add any maintenance company as a direct  
2 defendant, then Plaintiffs could have properly included DOE Defendants in their  
3 initial pleadings. They failed to do so. Allowing amendment in spite of Plaintiffs'  
4 failures would deprive TKE of essential fairness, and it violates the purpose  
5 behind the statute of limitations. See *Giovanelli v. D. Simmons Gen. Contracting*,  
6 2010 WL 988544, at \*1 (D.N.J. Mar. 15, 2010):

7  
8 The Third Circuit has pointed out that “statutes of limitations ensure that  
9 defendants are protected against the prejudice of having to defend against  
10 stale claims, as well as the notion that, at some point, claims should be laid  
11 to rest so that security and stability can be restored to human affairs.”  
12 *Nelson v. County of Allegheny*, 60 F.3d 1010, 1014 (3d Cir.1995) (citation  
13 and quotations omitted). “In order to preserve this protection, the  
14 relation-back rule requires plaintiffs to show that the already commenced  
15 action sufficiently embraces the amended claims so that defendants are not  
16 unfairly prejudiced by these late-coming plaintiffs and that plaintiffs have  
17 not slept on their rights.” *Id.*

18 More specifically, it is not a “mistake” when a plaintiff is aware of his  
19 injury, but fails to use the time provided by the statute of limitations to  
20 investigate his claim to identify the proper parties purportedly responsible  
21 for his injuries. *Id.* at 1015 (finding that it was not a mistake to name a  
22 defendant where the plaintiffs had “ample time—the time dictated by the  
23 relevant statute ...—in which to file their claims,” but they failed to add their  
24 names to the complaint until after expiration of the statute of limitations).  
25 “Although the relation-back rule ameliorates the effect of statutes of  
26 limitations, it does not save the claims of complainants who have sat on  
27 their rights.” *Id.*

28 The Third Circuit has held that a plaintiff's lack of knowledge of a particular  
defendant's identity can be a mistake under Rule (15)(c)(1)(C). See  
*Singletary v. Pennsylvania Dept. of Corrections*, 266 F.3d 186, 201 (3d  
Cir.2001) (discussing *Varlack v. SWC Caribbean, Inc.*, 550 F.2d 171, 175  
(3d Cir.1977)). In such cases, however, the plaintiff has pleaded “unknown  
defendants” or “John Doe” defendants, which indicates an intention to  
preserve claims against yet-to-be identified potential defendants who may  
have contributed to plaintiff's injuries. See *id.* As noted above, in his three  
complaints, plaintiff never included a fictitious party designation, which  
evidences a confidence that he filed suit against the proper parties rather  
than considering the possibility he was making a “mistake” as to the identity  
of his alleged tortfeasors. Furthermore, even if plaintiff did include a “John  
Doe” party, he must have provided a description sufficient for  
identification. Not providing a sufficient description would “completely  
eviscerate the statute of limitations.” *Slater v. Skyhawk Transp., Inc.*, 187  
F.R.D. 185, 198 (D.N.J.1999) (citations omitted) (explaining that without



1 such a rule, a “plaintiff could file a complaint on the last day before the  
2 statute of limitations would run alleging merely that he was injured in a  
3 particular situation and that ‘John Doe(s) were negligent and responsible for  
4 plaintiff’s loss.’ He later could amend to include both defendants’ names and  
5 the bases of responsibility”). Additionally, plaintiff must have provide  
6 evidence of due diligence in ascertaining the proper defendants. “If a  
7 plaintiff did not use diligence, and a court still permitted him or her to  
8 amend his or her original complaint to name a previously unknown  
9 defendant, it would not only fail to penalize delay on the plaintiff’s part, but  
10 would also disregard considerations of essential fairness to the defendant,  
11 thereby violating the purpose behind the statute of limitations.” *Mears v.*  
12 *Sandoz Pharmaceuticals, Inc.*, 300 N.J.Super. 622, 693 A.2d 558, 562–63  
13 (N.J.Super.Ct.App.Div.1997) ((internal quotations and citations omitted)).  
14 Plaintiff failed to follow any of these procedures.

15 Plaintiffs chose not to sue Thyssenkrupp before the statute ran. This was a  
16 deliberate choice per *Reid*. The trial court’s order did not consider or address the  
17 effect of NRCP 14 upon the ability of Plaintiffs to amend the complaint.

18 **4. Plaintiffs’ Motion to Amend was clearly untimely.**

19 Leave to amend under NRCP 15 was not proper, as Plaintiffs were clearly  
20 untimely in seeking leave to amend. Even if the Motion is considered timely filed  
21 on **July 4, 2018**, Plaintiffs waited for more than a year after TKE was added as a  
22 Third-Party Defendant to bring the Motion. (1 P.A. 0183-0195.) Plaintiffs unduly  
23 delayed seeking amendment under NRCP 15 and cannot claim reasonable  
24 diligence. To determine reasonable diligence, courts consider three factors.

25 *Sparks v. Alpha Tau Omega Fraternity, Inc.*, 127 Nev. 287, 295, 255 P.3d 238,  
26 243 (2011):

- 27 1. whether the party unreasonably delayed amending the pleadings to  
28 reflect the true identity of a defendant once it became known,
2. whether the plaintiff utilized “ ‘judicial mechanisms such as  
discovery’ ” to inquire into a defendant’s true identity, and
3. whether a defendant concealed its identity or otherwise obstructed the  
plaintiff’s investigation as to its identity.

1 Defendant TKE never concealed its identity or otherwise obstructed  
2 Plaintiffs' investigation of this incident. Plaintiffs' argument at the hearing  
3 asserted that Plaintiffs did not know of TKE's alleged role in the maintenance of  
4 the escalator . (2 P.A. 0408):

6 MR. IQBAL: Your Honor, under -- under the standard, we -- we knew of  
7 Thyssenkrupp, obviously, they were brought in. We did not know of their  
8 role in -- in the defects, we did not know their role in the  
9 maintenance, we did not know that these e-mails were going back and forth  
10 and that they sat on their hands, Your Honor.

11 This argument is belied by the produced ECC documents, and the  
12 subsequent admission in TKE's Answer to the Third-Party Complaint wherein  
13 TKE admitted (months before the statute of limitations ran) that it maintained the  
14 escalator in question at all relevant times. (1 P.A. 0155.)

15 Plaintiffs were clearly on notice of TKE's maintenance of the subject  
16 escalator yet they waited more than a year thereafter to request court approval for  
17 the second amendment of the Complaint. Plaintiffs cannot show reasonable  
18 diligence because they failed to promptly move to amend under *Sparks*.

19 **5. TKE never improperly withheld any safety information.**

20 The trial court's order states that TKE withheld knowledge of "cracks" in  
21 the escalator stairs until the statute of limitations had expired. (2 P.A. 0413.)  
22 Plaintiffs argued that both GNL and TKE "hid" emails until the statute of  
23 limitations had expired. (2 P.A. 0401):

25 Now, what -- the difference again is the strength of the evidence that was  
26 hidden from Plaintiffs for six months after that statute of limitations passed  
27 with -- with Thyssen. And -- and Nugget separately, in February of '07 --

1 '17, in March of '17 stated we're not aware of any mechanical problems, this,  
2 that, and everything.

3 What do we get in November 6th? We get explicit e-mails that both parties  
4 hid -- both parties hid. I mean, I don't know if it gets any better than this. "A  
5 serious safety issue for the riding passengers." The escalator steps are  
6 "obsolete, prone to cracking." You know, there's a difference between that  
7 affidavit that was at issue in the earlier case and the strength of the evidence  
8 here, the posture of the parties, and the diligence that Plaintiffs have shown  
9 here. So it's -- Thyssen really can't complain about time when their second  
10 supplemental with all of those juicy e-mails that, by the way, back and forth  
11 between them and Golden Nugget, Nugget didn't share either with  
12 Plaintiffs, until that second supplemental came out. So you can't complain  
13 about time when you've -- when you've hidden evidence for six months.

14 This argument is absolutely untrue. Plaintiffs were aware that TKE was  
15 concerned about cracks in the escalator stairs because GNL produced the email  
16 from TKE discussing the issue on November 9, 2016. (1 P.A. 0105-0119.)

17 TKE asserted at the hearing that Plaintiffs were aware of these emails far  
18 earlier than November 2017. (2 P.A. 0405). In fact, it was **November of 2016**  
19 when Plaintiff first received these emails. (1 P.A. 0105-0119).

20 Contrary to Plaintiffs' arguments at the hearing, and the "findings of fact"  
21 drafted by Plaintiffs' counsel, Plaintiffs were clearly put on notice of TKE's role  
22 in the maintenance of the escalator, and that TKE recommended replacement of  
23 escalator stairs, prior to the running of the statute of limitations. These documents  
24 were never "hidden" as Plaintiffs argued, and as the order improperly reflects.  
25 Plaintiffs' decision not to sue TKE was simply based on their own choice (or lack  
26 of diligence), and not on any withholding of evidence.

27 **B. Amendment of Plaintiffs' Complaint fails to comply with NRCP 10.**

28 Amendment of the Complaint to add TKE as a direct Defendant is also  
improper under NRCP 10 and *Nurenberger Hercules-Werke GMBH v. Virostek*,

1 107 Nev. 873, 881, 882 P.2d 1100 (1991). This decision, which has been good law  
2 in the State of Nevada for 27 years, created a three-part test for whether an  
3 amended pleading, which adds a new party, relates back to an original pleading.  
4 This Court held that the amended pleading will relate back only if the plaintiff:  
5 (1) originally plead “fictitious or doe defendants in the caption of the complaint;”  
6 (2) originally plead “the basis for naming defendants by other than their true  
7 identity, and clearly specifying the connection between the intended defendants  
8 and the conduct, activity, or omission upon which the cause of action is based;”  
9 and (3) exercised “reasonable diligence in ascertaining the true identity of the  
10 intended defendants and promptly moving to amend the complaint in order to  
11 substitute the actual for the fictional.” *Id.*

12 While Plaintiffs’ initial Complaint contained DOE/ROE Defendants, the  
13 Complaint did not plead the basis for naming such Defendants by other than their  
14 true identity, nor did the Complaint clearly specify the connection between the  
15 intended Defendants and the conduct, activity, or omission. The DOE paragraph at  
16 issue in *Nurenberger* stated:

17 Fictitious Defendants DOES I-V, XYZ Partnerships I-V and ABC  
18 Corporations I-V are those parties whose identities currently are unknown  
19 to Plaintiff but who may have caused or contributed to the conduct and or  
20 omissions complained of by Plaintiff herein. When the true names of those  
21 fictitious Defendants are discovered, they will be substituted into this  
22 Complaint accordingly.

23 Very similarly, Plaintiffs’ DOE paragraph in the instant case states (1 P.A. 0010):

24 The true names and capacities of Defendants DOE Individuals 1 through  
25 100, are presently unknown to Plaintiffs, who therefore sues said  
26 Defendants by such fictitious names. Plaintiff is informed and believes, and  
27

1 thereupon alleges that each Defendant designated as DOE Individuals 1  
2 through 100 are legally responsible for the events referred to herein. The  
3 First Amended Complaint will be amended to include them when their true  
4 names and capacities become known.

5 Plaintiffs' vague DOE/ROE allegations did not indicate the basis for naming  
6 the DOE Defendants by other than their true identity, nor did the Complaint  
7 specify any connection between the intended Defendants and the conduct or  
8 activity upon which the cause of action is based. Thus, Plaintiffs' originally plead  
9 DOE/ROE paragraph is insufficient to allow relation back of the amendment under  
10 NRCP 10. See *Cruz v. Durbin*, 2014 WL 5449710, at \*3–4 (D. Nev. Oct. 17,  
11 2014):

12 Neither prong is satisfied. Regarding the second prong, Cruz's original  
13 complaint named Roe Defendants that "are responsible in some manner" for  
14 the accident. (Compl. (# 1–3) at ¶ 5). This generalized allegation is what  
15 Nurenberger precludes: precautionary placeholders. To satisfy  
16 Nurenberger's second prong, the original pleading must allege facts that  
17 point to an intended-but-presently-unidentified defendant. Nurenberger  
18 states that the original pleading must show who the "intended," "target[ed],"  
19 or "contemplate[d]" defendant is, "notwithstanding the uncertainty of their  
20 true identit[y]". Nurenberger, 107 Nev. at 880–81 (citations omitted).

21 Additionally, the body of Plaintiffs' First Amended Complaint only asserts  
22 actual allegations against Defendants GNL and Landrys. There are no other  
23 specific allegations against any other Defendant, not even a DOE or ROE  
24 Defendant. (1 P.A. 0009-0014.) Nevada case law clearly provides that DOE  
25 Defendants are not allowed to be utilized simply as a precautionary measure to  
26 avoid the statute of limitations. *Nurenberger Hercules-Werke GMBH v. Virostek*,  
27 *supra* at 1105-06:

28 First, and most obvious, the rule we now provide is applicable only where a  
plaintiff has utilized the pleading latitude afforded by Rule 10(a). Second, it  
should be clear that fictitious defendants may not be properly included in a

1 complaint merely as a precautionary measure in the event theories of  
2 liability other than those set forth in the complaint are later sought to be  
3 added by amendment. In other words, there must be a clear correlation  
4 between the fictitious defendants and the pleaded factual basis for liability.  
5 This element of the rule supplies the basis for recognizing the intended  
6 defendants who, in legal contemplation, are parties to the cause of action.

7 Pursuant to *Nurenberger* and *Cruz*, such allegations are what these cases  
8 specifically prohibit, including DOE Defendants in a complaint listed merely as a  
9 precautionary measure. Plaintiffs' First Amended Complaint did not identify any  
10 DOE defendant as a potential defendant, with the intention to conduct discovery,  
11 and then substitute the true name for a DOE defendant as required by

*Nurenberger*:

12 Third, and last, Rule 10(a) was not intended to reward indolence or lack of  
13 diligence by giving plaintiffs an automatic method of circumventing statutes  
14 of limitations. Plaintiffs utilizing the pleading latitude provided by Rule  
15 10(a) must exercise reasonable diligence in pursuing discovery and other  
16 means of ascertaining the true identity of the intended defendants, and then  
17 promptly move to amend their complaints pursuant to Rule 10(a).

18 Plaintiffs never intended to utilize NRCP 10 as a method to substitute TKE  
19 for a DOE Defendant. Plaintiffs did not intend to exercise reasonable diligence in  
20 conducting discovery of the escalator maintenance company's name because they  
21 already knew it was TKE, yet they did not sue TKE in the Complaint nor First  
22 Amended Complaint nor after TKE became a Third-Party Defendant, nor before  
23 the running of the statute of limitations.

24 Plaintiffs did not fail to name TKE because they lacked information as to  
25 TKE's identity. They already knew it. This knowledge and intent precludes  
26 amendment under NRCP 10(a). See *Ocasio v. Perez*, 2017 WL 1097190, at \*6 (D.  
27  
28

1 Nev. Mar. 22, 2017), appeal dismissed sub nom. *Ocasio v. Gruner*, 17-15741,  
2 2017 WL 3124200 (9th Cir. June 15, 2017):

3 Rule 10(a) cannot avail Plaintiff here, however, because this is not a case  
4 where “despite reasonable diligence, the true identity of culpable parties is  
5 uncertain or unknown to plaintiff.” *Nurenberger*, 822 P.2d at 1103. Indeed,  
6 Plaintiff admits that his original Complaint failed to name Tanner not  
7 because he lacked information to discover Tanner's identity, but because  
8 “Plaintiff did not have his notes with him at the time he drafted the  
9 complaint and was writing it off the top of his head.” (Resp. 14:19–21).

10 Consequently, Plaintiff cannot invoke Rule 10(a) to avoid the statute of  
11 limitations as to Tanner, and the Court therefore DISMISSES Plaintiff's  
12 claims against Tanner with prejudice.

13 The allegations in Plaintiffs' First Amended Complaint, the ECC  
14 production, and the delay by Plaintiffs are clearly adverse to any purported  
15 intention to timely and properly discover and plead the true name of an unknown  
16 escalator maintenance company. All of the actual evidence shows that Plaintiffs  
17 included DOE Defendants in the initial Complaint as a mere precaution or as part  
18 of a cut and paste form, which is clearly insufficient under *Nurenberger*.

19 In addition, under NRCP 10(a), Plaintiffs must be proactive. Plaintiffs  
20 cannot wait for unknown defendants to be made known, but they must proactively  
21 seek to identify such defendants if they want the protections of NRCP 10(a).

22 *Sparks v. Alpha Tau Omega Fraternity, Inc.*, 127 Nev. 287, 294, 255 P.3d 238,  
23 243 (2011):

24 In *Nurenberger*, we recognized that plaintiffs must proactively seek to  
25 identify unknown defendants in order for an amendment made pursuant to  
26 NRCP 10(a) to relate back to the filing date of the original complaint, and  
27 we therefore included a reasonable diligence requirement as the third factor.  
28 107 Nev. at 881, 822 P.2d at 1105. The reasonable diligence requirement is  
intended to guard against the abuse of Doe and Roe defendants as  
placeholders during the commencement of litigation and “was not intended

1 to reward indolence or lack of diligence by giving plaintiffs an automatic  
2 method of circumventing statutes of limitations.”

3 Waiting more than a year after the statute of limitations ran to move to  
4 amend the Complaint is not timely. The trial court’s decision was in error when it  
5 allowed for amendment of the Complaint.

6 The trial court transcript does not justify the trial court’s ruling allowing  
7 amendment of the Complaint. The trial court correctly stated the lack of specificity  
8 contained in Plaintiff’s DOE paragraph. (2 P.A. 0407-0408):  
9

10 THE COURT: Part of Thyssenkrupp’s argument is on the Roes, right? So  
11 paragraph 7 is your Roes.

12 The true names and capacities of Defendants DOE Individuals 1 through  
13 100, are presently unknown to Plaintiffs, who therefore sues said  
14 Defendants by such fictitious names. Plaintiff is informed and believes, and  
15 thereupon alleges that each Defendant designated as DOE Individuals 1  
16 through 100 are legally responsible for the events referred to herein. The  
17 First Amended Complaint will be amended to include them when their true  
18 names and capacities become known. So would you argue that that is or is  
19 not sufficient to put –

20 However, the trial court then found that “all the circumstances” justified  
21 amendment. But the applicable law under NRCP 10 requires actual compliance  
22 with the *Nurenberger* factors. These factors were not satisfied.  
23

24 Despite the trial court discussing NRCP 10 and DOE defendants at the  
25 hearing, the court never addressed any of the *Nurenberger* factors in the order  
26 itself. There are no findings of fact or conclusions of law addressing whether the  
27 plaintiff (1) originally plead “fictitious or doe defendants in the caption of the  
28 complaint,” (2) originally plead “the basis for naming defendants by other than  
their true identity, and clearly specifying the connection between the intended  
defendants and the conduct, activity, or omission upon which the cause of action is



1 based” and (3) exercised “reasonable diligence in ascertaining the true identity of  
2 the intended defendants and promptly moving to amend the complaint in order to  
3 substitute the actual for the fictional.” *Nurenberger, supra*.

4  
5 By failing to include any findings on the proper standard under NRCP 10,  
6 the order allowing amendment cannot be upheld as in compliance with  
7 *Neurenberger*. Thus, TKE is entitled to dismissal of the Second Amended  
8 Complaint, to the extent that it is a direct defendant.  
9

#### 10 IV.

#### 11 CONCLUSION

12 Thyssenkrupp Elevator Corporation requests this writ Petition be granted.  
13 The trial court’s order never addressed the proper standards for amendment under  
14 NRCP 10, 14 or 15, and did not account for the prejudice to TKE as a result of the  
15 running of the statute of limitations. The trial courts order did not show  
16 compliance with any of the applicable rules by Plaintiffs, and Plaintiffs should not  
17 have been allowed to amend the complaint to add TKE as a direct defendant.  
18

19 DATED this \_\_\_\_ day of October, 2018.

20 ROGERS, MASTRANGELO,  
21 CARVALHO & MITCHELL

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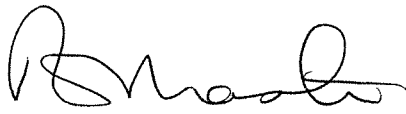
1                                   **CERTIFICATE OF COMPLIANCE**

2           I hereby certify that this Petition complies with the formatting requirements  
3 of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle  
4 requirements of NRAP 32(a) (6) because this brief has been prepared in a  
5 proportionally spaced typeface using WordPerfect 11 Times New Roman 14 pt  
6 font. I further certify that this brief complies with the page or type volume  
7 limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted  
8 by NRAP 32(a)(7)(c) it does not exceed 30 pages.

9           I hereby certify that I have read this Petition, and to the best of my  
10 knowledge, information, and belief, it is not frivolous or interposed for any  
11 improper purpose. I further certify that this brief complies with all applicable  
12 Nevada Rules of Appellate Procedure, in particular, N.R.A.P. 28(e), which  
13 requires every assertion in the brief regarding matters in the record to be supported  
14 by a reference to the page of the transcript or appendix where the matter relied on  
15 is to be found. I understand that I may be subject to sanctions in the event that the  
16 accompanying brief is not in conformity with the requirements of the Nevada  
17 Rules of Appellate Procedure.

18           DATED this 16<sup>th</sup> day of October, 2018.

19                                   ROGERS, MASTRANGELO,  
20                                   CARVALHO & MITCHELL

21                                   

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24                                   Charles A. Michalek, Esq.  
25                                   Nevada Bar No. 5721  
26                                   700 S. Third Street  
27                                   Las Vegas, Nevada 89101  
28                                   Attorney for Petitioners  
                                  THYSSENKRUPP ELEVATOR  
                                  CORPORATION

1                   **ADDENDUM OF NEVADA AND FEDERAL RULES**

2   FRCP 14

3   (a) When a Defending Party May Bring in a Third Party.

4       (1) Timing of the Summons and Complaint. A defending party may, as  
5       third-party plaintiff, serve a summons and complaint on a nonparty who is  
6       or may be liable to it for all or part of the claim against it. But the  
7       third-party plaintiff must, by motion, obtain the court's leave if it files the  
8       third-party complaint more than 14 days after serving its original answer.

9       (2) Third-Party Defendant's Claims and Defenses. The person served with  
10      the summons and third-party complaint--the "third-party defendant":

11           (A) must assert any defense against the third-party plaintiff's claim  
12           under Rule 12;

13           (B) must assert any counterclaim against the third-party plaintiff  
14           under Rule 13(a), and may assert any counterclaim against the  
15           third-party plaintiff under Rule 13(b) or any crossclaim against  
16           another third-party defendant under Rule 13(g);

17           (C) may assert against the plaintiff any defense that the third-party  
18           plaintiff has to the plaintiff's claim; and

19           (D) may also assert against the plaintiff any claim arising out of the  
20           transaction or occurrence that is the subject matter of the plaintiff's  
21           claim against the third-party plaintiff.

22       (3) Plaintiff's Claims Against a Third-Party Defendant. The plaintiff may  
23       assert against the third-party defendant any claim arising out of the  
24       transaction or occurrence that is the subject matter of the plaintiff's claim  
25       against the third-party plaintiff. The third-party defendant must then assert  
26       any defense under Rule 12 and any counterclaim under Rule 13(a), and may  
27       assert any counterclaim under Rule 13(b) or any crossclaim under Rule  
28       13(g).

      (4) Motion to Strike, Sever, or Try Separately. Any party may move to strike  
      the third-party claim, to sever it, or to try it separately.

      (5) Third-Party Defendant's Claim Against a Nonparty. A third-party  
      defendant may proceed under this rule against a nonparty who is or may be  
      liable to the third-party defendant for all or part of any claim against it.

      (6) Third-Party Complaint In Rem. If it is within the admiralty or maritime  
      jurisdiction, a third-party complaint may be in rem. In that event, a reference  
      in this rule to the "summons" includes the warrant of arrest, and a reference  
      to the defendant or third-party plaintiff includes, when appropriate, a person  
      who asserts a right under Supplemental Rule C(6)(a)(i) in the property  
      arrested.

      (b) When a Plaintiff May Bring in a Third Party. When a claim is asserted against  
      a plaintiff, the plaintiff may bring in a third party if this rule would allow a  
      defendant to do so.

1 FRCP 15

2 (a) Amendments Before Trial.

3 (1) Amending as a Matter of Course. A party may amend its pleading once  
4 as a matter of course within:

5 (A) 21 days after serving it, or

6 (B) if the pleading is one to which a responsive pleading is required,  
7 21 days after service of a responsive pleading or 21 days after service  
8 of a motion under Rule 12(b), (e), or (f), whichever is earlier.

9 (2) Other Amendments. In all other cases, a party may amend its pleading  
10 only with the opposing party's written consent or the court's leave. The court  
11 should freely give leave when justice so requires.

12 (3) Time to Respond. Unless the court orders otherwise, any required  
13 response to an amended pleading must be made within the time remaining to  
14 respond to the original pleading or within 14 days after service of the  
15 amended pleading, whichever is later.

16 (b) Amendments During and After Trial.

17 (1) Based on an Objection at Trial. If, at trial, a party objects that evidence  
18 is not within the issues raised in the pleadings, the court may permit the  
19 pleadings to be amended. The court should freely permit an amendment  
20 when doing so will aid in presenting the merits and the objecting party fails  
21 to satisfy the court that the evidence would prejudice that party's action or  
22 defense on the merits. The court may grant a continuance to enable the  
23 objecting party to meet the evidence.

24 (2) For Issues Tried by Consent. When an issue not raised by the pleadings  
25 is tried by the parties' express or implied consent, it must be treated in all  
26 respects as if raised in the pleadings. A party may move--at any time, even  
27 after judgment--to amend the pleadings to conform them to the evidence and  
28 to raise an unpleaded issue. But failure to amend does not affect the result of  
the trial of that issue.

(c) Relation Back of Amendments.

(1) When an Amendment Relates Back. An amendment to a pleading relates  
back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows  
relation back;

(B) the amendment asserts a claim or defense that arose out of the  
conduct, transaction, or occurrence set out--or attempted to be set  
out--in the original pleading; or

(C) the amendment changes the party or the naming of the party  
against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and  
if, within the period provided by Rule 4(m) for serving the summons  
and complaint, the party to be brought in by amendment:

1 (i) received such notice of the action that it will not be  
2 prejudiced in defending on the merits; and

3 (ii) knew or should have known that the action would have  
4 been brought against it, but for a mistake concerning the proper  
5 party's identity.

6 (2) Notice to the United States. When the United States or a United States  
7 officer or agency is added as a defendant by amendment, the notice  
8 requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated  
9 period, process was delivered or mailed to the United States attorney or the  
10 United States attorney's designee, to the Attorney General of the United  
11 States, or to the officer or agency.

12 (d) Supplemental Pleadings. On motion and reasonable notice, the court may, on  
13 just terms, permit a party to serve a supplemental pleading setting out any  
14 transaction, occurrence, or event that happened after the date of the pleading to be  
15 supplemented. The court may permit supplementation even though the original  
16 pleading is defective in stating a claim or defense. The court may order that the  
17 opposing party plead to the supplemental pleading within a specified time.

#### 18 NRCP 10

19 (a) Caption; Names of Parties. Every pleading shall contain a caption setting forth  
20 the name of the court and county, the title of the action, the file number, and a  
21 designation as in Rule 7(a). In the complaint the title of the action shall include the  
22 names of all the parties, but in other pleadings it is sufficient to state the name of  
23 the first party on each side with an appropriate indication of other parties. A party  
24 whose name is not known may be designated by any name, and when the true  
25 name is discovered, the pleading may be amended accordingly.

26 (b) Paragraphs; Separate Statements. All averments of claim or defense shall be  
27 made in numbered paragraphs, the contents of each of which shall be limited as far  
28 as practicable to a statement of a single set of circumstances; and a paragraph may  
be referred to by number in all succeeding pleadings. Each claim founded upon a  
separate transaction or occurrence and each defense other than denials shall be  
stated in a separate count or defense whenever a separation facilitates the clear  
presentation of the matters set forth.

(c) Adoption by Reference; Exhibits. Statements in a pleading may be adopted by  
reference in a different part of the same pleading or in another pleading or in any  
motion. A copy of any written instrument which is an exhibit to a pleading is a  
part thereof for all purposes.

#### NRCP 14

(a) When Defendant May Bring in Third Party. At any time after  
commencement of the action a defending party, as a third-party plaintiff, may  
cause a summons and complaint to be served upon a person not a party to the  
action who is or may be liable to the third-party plaintiff for all or part of the  
plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not  
obtain leave to make the service if the third-party plaintiff files the third-party  
complaint not later than 10 days after serving the original answer. Otherwise the  
third-party plaintiff must obtain leave on motion upon notice to all parties to the  
action. The person served with the summons and third-party complaint, hereinafter

called the third-party defendant, shall make any defenses to the third-party plaintiff's claim as provided in Rule 12 and any counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert any defenses as provided in Rule 12 and any counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to the third-party defendant for all or part of the claim made in the action against the third-party defendant.

(b) When Plaintiff May Bring in Third Party. When a counterclaim is asserted against a plaintiff, the plaintiff may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

#### NRCP 15

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

1  
2 (d) Supplemental Pleadings. Upon motion of a party the court may, upon  
3 reasonable notice and upon such terms as are just, permit the party to serve a  
4 supplemental pleading setting forth transactions or occurrences or events which  
5 have happened since the date of the pleading sought to be supplemented.  
6 Permission may be granted even though the original pleading is defective in its  
7 statement of a claim for relief or defense. If the court deems it advisable that the  
8 adverse party plead to the supplemental pleading, it shall so order, specifying the  
9 time therefor.  
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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(a), and EDCR 7.26(a), I hereby certify that I am an  
3 employee of Rogers, Mastrangelo, Carvalho & Mitchell, and on the 18 day of  
4 October, 2018, a true and correct copy of the foregoing **PETITION FOR WRIT**  
5 **OF MANDAMUS; MEMORANDUM OF POINTS AND AUTHORITIES;**  
6 **SUPPORTING EXHIBITS** was served via Supreme Court E-Service and/or  
7 Hand Delivery, upon the following:

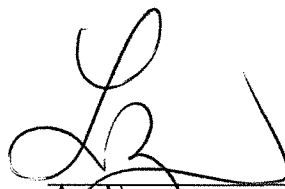
8 **Served Via Supreme Court Electronic Service**

9 Mohamed A. Iqbal, Jr., Esq.  
10 Christopher Mathews, Esq.  
11 101 Convention Center Drive, Suite 1175  
12 Las Vegas, Nevada 89109  
13 Attorneys for Plaintiffs

14 Annalisa N. Grant, Esq.  
15 Alexandra McLeod, Esq.  
16 GRANT & ASSOCIATES  
17 7455 Arroyo Crossing Parkway, Suite 300  
18 Las Vegas, Nevada 89113  
19 Attorneys for Defendant/Third-Party Plaintiff

20 **Served Via Hand Delivery**

21 Judge Joanna Kishner  
22 Regional Justice Center  
23 200 Lewis Avenue  
24 Las Vegas, Nevada 89155  
25 District Court Judge

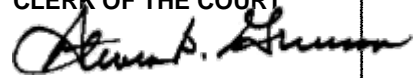
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27 An Employee of  
28 Rogers, Mastrangelo, Carvalho & Mitchell



# **EXHIBIT 1-C**

# **EXHIBIT 1-C**



REBECCA L. MASTRANGELO, ESQ.  
Nevada Bar No. 5417  
ROGERS, MASTRANGELO, CARVALHO & MITCHELL  
700 South Third Street  
Las Vegas, Nevada 89101  
Phone (702) 383-3400  
Fax (702) 384-1460  
rmastrangelo@rmcmlaw.com  
Attorneys for Defendant/Third-Party Defendant  
THYSSENKRUPP ELEVATOR CORPORATION

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

JOE N. BROWN, an individual, and his wife,  
NETTIE J. BROWN, an individual,

Plaintiffs,

vs.

LANDRY'S INC., a foreign corporation;  
GOLDEN NUGGET, INC., a Nevada  
corporation d/b/a GOLDEN NUGGET  
LAUGHLIN; GNL, CORP., a Nevada  
corporation; DOE INDIVIDUALS 1-100,  
ROE BUSINESS ENTITIES 1-100,

Defendants.

GNL, CORP., a Nevada corporation;

Third-Party Plaintiff,

vs.

THYSSENKRUPP ELEVATOR CORPORATION  
a foreign corporation; DOES 1-75; ROE  
CORPORATIONS 1-75 and ROE  
CORPORATIONS 1-25,

Third-Party Defendants.

CASE NO.: A-16-739887-C

DEPT. NO.: XXXI

Date of Hearing: 12/18/18  
Time of Hearing: 9:00 a.m.

**DEFENDANT/THIRD PARTY DEFENDANT THYSSENKRUPP ELEVATOR  
CORPORATION'S ERRATA TO MOTION IN LIMINE #7 RE: CLAIM THAT  
THYSSENKRUPP "HID" OR FAILED TO PRODUCE EVIDENCE**

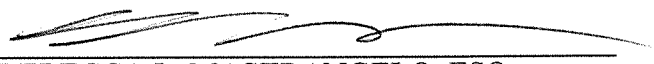
**JNB02397**

1 Defendant/Third-Party Defendant, thyssenkrupp Elevator Corporation ("TKE"), by and  
2 through its attorney of record, REBECCA L. MASTRANGELO, ESQ., of the law firm of ROGERS,  
3 MASTRANGELO, CARVALHO & MITCHELL, hereby submits its Errata to Motion in Limine #7  
4 re: Claim that thyssenkrupp "hid" or failed to produce evidence.

5 This Errata is based upon the pleadings and papers on file herein, the accompanying  
6 Memorandum of Points and Authorities and oral argument, if any, at the time of the hearing on this  
7 matter.

8 DATED this 9 day of November, 2018.

9  
10 ROGERS, MASTRANGELO, CARVALHO  
& MITCHELL

11  
12   
REBECCA L. MASTRANGELO, ESQ.  
Nevada Bar No. 5417  
13 CHARLES A. MICHALEK, ESQ.  
Nevada Bar No. 5721  
14 700 S. Third Street  
Las Vegas, Nevada 89101  
15 Attorney for Defendant/Third-Party Defendant  
16 THYSSENKRUPP ELEVATOR CORPORATION

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**AFFIDAVIT OF COUNSEL IN SUPPORT OF ERRATA**

STATE OF NEVADA       )  
  ) ss:  
COUNTY OF CLARK       )

CHARLES A. MICHALEK, being first duly sworn, deposes and says:

1. That your Affiant is an attorney licensed to practice law in all the courts in the State of Nevada;

2. That your Affiant is counsel responsible for drafting and preparing Motion in Limine #7 in the above captioned matter;

3. That prior to filing said Motion, Affiant received a copy of GNL's first ECC production. This copy unintentionally had additional documents attached to the end of the production, which led counsel to believe that the additional documents were a part of the initial production. These additional documents included emails between TKE and GNL concerning the escalator, and are a subject of the motion.

4. Based on the copy provided, undersigned counsel wrote the motion, believing that the emails had been produced prior to the running of the statute of limitations. On the weekend of November 17, undersigned counsel discovered the error. In order to inform the court of the actual facts of the production, counsel is submitting this affidavit and errata.

5. Plaintiff's counsel, Mohhamed Iqbal, Esq. was apparently not provided with a copy of the emails referenced in Motion in Limine #7 until TKE produced them on November 6, 2017. Undersigned counsel regrets the error and accepts responsibility for it.

6. Counsel withdraws that portion of the motion which argues that the emails were produced earlier than November 6, 2017. However, TKE still believes that Motion in Limine #7

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1 has merit. Defendant TKE did not hide, destroy or fail to produce any relevant evidence.

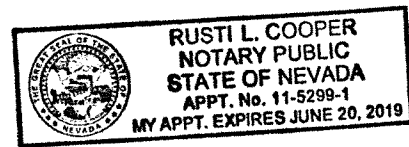
2 FURTHER AFFIANT SAYETH NAUGHT.

3 DATED this 19 day of November, 2018.

4  
5 

6 CHARLES A. MICHALEK, ESQ.

7  
8 SUBSCRIBED AND SWORN to before me  
9 this 19 day of November, 2018.



10 

11 Notary Public

12 **POINTS AND AUTHORITIES**

13  
14 As stated in the attached affidavit of counsel, Motion in Limine #7 contained an argument  
15 that Plaintiff received emails between TKE and GNL prior to the running of the statute of  
16 limitations. This assertion was untrue, and was the result of error on counsel's part. Counsel was  
17 provided a copy of a document production which contained additional documents attached to the  
18 end of the production. Counsel did not notice the error until November 17, 2018, at which time  
19 counsel immediately took steps to rectify the error, by preparing this errata and affidavit.

20 Any argument in Motion in Limine #7 that Plaintiff received the emails prior to  
21 November 6, 2017, is withdrawn. However, TKE still believes that the Motion has merit, in that  
22 TKE never hid, destroyed, or failed to produce any relevant documents, and a sanction under  
23 *Bass-Davis v. Davis*, 122 Nev. 442, 448-49, 134 P.3d 103, 106-07 (2006) therefore is not

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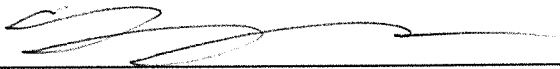
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1 warranted. Counsel apologizes for the error, and submits this affidavit and errata pursuant to  
2 counsel's duty of candor to this court.

3 DATED this 19<sup>th</sup> day of November, 2018.

4 ROGERS, MASTRANGELO, CARVALHO  
5 & MITCHELL

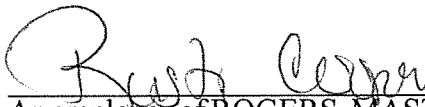
6   
7 REBECCA L. MASTRANGELO, ESQ.  
8 Nevada Bar No. 5417  
9 CHARLES A. MICHALEK, ESQ.  
10 Nevada Bar No. 5721  
11 700 S. Third Street  
12 Las Vegas, Nevada 89101  
13 Attorney for Defendant/Third-Party Defendant  
14 THYSSENKRUPP ELEVATOR CORPORATION  
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1 **CERTIFICATE OF SERVICE**

2 Pursuant to N.R.C.P. 5(a), E.D.C.R. 7.26(a), and Rule 9 of the N.E.F.C.R. I hereby certify  
3 that I am an employee of Rogers, Mastrangelo, Carvalho & Mitchell, and on the 19 day of  
4 November, 2018, a true and correct copy of the foregoing **DEFENDANT/THIRD PARTY**  
5 **DEFENDANT THYSSENKRUPP ELEVATOR CORPORATION'S ERRATA TO MOTION**  
6 **IN LIMINE #7 RE: CLAIM THAT THYSSENKRUPP "HID" OR FAILED TO PRODUCE**  
7 **EVIDENCE** was served via electronic means with the Eighth Judicial District Court, addressed as  
8 follows, upon the following counsel of record:

9  
10 Mohamed A. Iqbal, Jr., Esq.  
11 Christopher Mathews, Esq.  
12 101 Convention Center Drive, Suite 1175  
13 Las Vegas, Nevada 89109  
14 Attorneys for Plaintiffs

15 Annalisa N. Grant, Esq.  
16 Alexandra B. McLeod, Esq.  
17 GRANT & ASSOCIATES  
18 7455 Arroyo Crossing Parkway, Suite 300  
19 Las Vegas, Nevada 89113  
20 Attorneys for Defendant/Third-Party Plaintiff

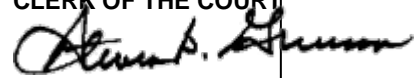
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An employee of ROGERS, MASTRANGELO, CARVALHO  
& MITCHELL

# **EXHIBIT 1-D**

# **EXHIBIT 1-D**

JNB02403





1 **RTRAN**

2  
3 **DISTRICT COURT**  
4 **CLARK COUNTY, NEVADA**

5 **JOE BROWN,**

6 **Plaintiff(s),**

7 **vs.**

8 **LANDRY'S INC.,**

9 **Defendant(s).**

Case No. A-16-739887-C

DEPT. XXXI

10  
11  
12 **BEFORE THE HONORABLE JOANNA S. KISHNER,**  
13 **DISTRICT COURT JUDGE**

14  
15 **TUESDAY, AUGUST 7, 2018**

16  
17 ***TRANSCRIPT OF PROCEEDINGS RE:***  
18 **PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED**  
19 **COMPLAINT**

20  
21 **(Appearances on page 2.)**

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25 **RECORDED BY: SANDRA HARRELL, COURT RECORDER**

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APPEARANCES:

For the Plaintiff(s):	MOHAMED A. IQBAL, ESQ.
For the Defendant(s), Golden Nugget, Inc. and Landry's Inc., and the Defendant(s) and Third Party Plaintiff(s), GNL Corp:	ALEXANDRA B. McLEOD, ESQ.
For the Third Party Defendant(s), Thyssenkrupp Elevator Corporation:	REBECCA L. MASTRANGELO

1 **LAS VEGAS, NEVADA, TUESDAY, AUGUST 7, 2018**

2 [Proceedings commenced at 9:31 a.m.]

3  
4 THE COURT: Page 10, *Joe Brown vs. Landry's*, 739167.

5 MS. MASTRANGELO: Good morning, Your Honor. Rebecca  
6 Mastrangelo for Thyssenkrupp Elevator.

7 MS. McLEOD: Good morning, Your Honor. Alexandra  
8 McLeod from Grant & Associates, 8185, on behalf of the Golden Nugget  
9 defendants.

10 MR. IQBAL: Good morning, Your Honor. Mohammed Iqbal  
11 on behalf of Plaintiffs, 10623.

12 THE COURT: Okay. Motion for Leave to File Second  
13 Amended Complaint. So I got oppositions to this one. I have two  
14 different types of oppositions. I've got one opposition, untimely, under  
15 the NRCP 15 standpoint, and I've got the other opposition that statute of  
16 limitations has run, so you can't amend to add somebody who's not in  
17 the first one.

18 Go ahead, counsel.

19 MR. IQBAL: Yes. Thank you, Your Honor.

20 So Plaintiffs move to amend their existing pleadings to add  
21 further detail regarding Gold -- the Golden Nugget entities, and then to  
22 name third party Thyssenkrupp as a direct defendant.

23 THE COURT: Okay.

24 MR. IQBAL: Based on Thyssen's and Nugget's knowledge of  
25 the dangerous and defective condition of the escalator and their

1 awareness of the risk posed to the public by those defects, and their  
2 failure to remedy the problems, which resulted in the devastating injuries  
3 to Plaintiff.

4 Now, Your Honor correctly stated the positions of -- of the  
5 oppositions. And going to 15(a), the 15(a) argument by Thyssen. So  
6 Thyssen relies on inapplicable federal law, citing federal district court  
7 cases, as we point out in the reply, based on Federal 15(c) parts and  
8 subparts.

9 Now, Nevada 15(c) is one sentence. They have a footnote  
10 about the accord and respect that Nevada law gives to federal, but  
11 only when the applicable rule mirrors the federal rule. Here, there's a  
12 substantial difference. Again, the federal 15(c) has two major subparts,  
13 has sub-subparts, and then sub-sub-subparts. Nevada has one  
14 sentence under 15(c).

15 So the reliance on the federal district court cases to push this  
16 to a 10 -- Rule 10 analysis is simply wrong. You -- you cannot deny a  
17 Nevada amendment based on a subpart of Rule 15(c) that doesn't exist  
18 in this state. Because Nevada's 15(c) has no subparts.

19 And so yeah, the Delaware case that they cite, it's based  
20 on 15(c)(3), the Connecticut case, 15(c)(1)(C)(ii). That's simply  
21 inapplicable.

22 So then we turn to the question of whether Nevada law allows  
23 amendments under 15(a). Thyssen argues no. And they cite  
24 *Nurenberger*. They cite *Nurenberger* and they say -- they argue:

25 "Has been good law in Nevada for 27 years."

1 Wrong again. The -- the critical parts of *Nurenberger* relevant  
2 to this analysis were overturned in *Costello*. The Supreme Court in  
3 *Costello* expressly disavowed what it called dicta in the *Nurenberger*  
4 decision, suggesting that 15 -- Rule 15 did not apply. The *Costello*  
5 court, the controlling opinion in Nevada today, said no, it -- it does apply.  
6 And *Costello's* a 2011 case.

7 So, ultimately, when we look at a 15(a) analysis, Your Honor,  
8 the key issue is permitting an amendment when there is a lack of  
9 prejudice. *Costello* allows relation back where the opposing party will  
10 not be put -- will be put at no disadvantage. There has been no  
11 prejudice -- viable prejudice alleged by allowing the proposed  
12 amendment to go forward, nor could they plausibly do so. Here's why.

13 The maintenance of the escalator that broke Plaintiff's neck  
14 was placed squarely at issue by Plaintiffs in the operative complaint, the  
15 first amended complaint. As the alleged maintainer of the escalator,  
16 Thyssen knew that it would have to account for the diligence of its  
17 maintenance. Thyssen admitted in its opposition that it's "been involved  
18 in this matter since nearly the beginning." Thyssen has had every  
19 opportunity to participate in discovery and has done so.

20 And moreover, Thyssen's defense against the third party  
21 complaint from Nugget hasn't been to go after Nugget. They have  
22 attacked Plaintiff's underlying bases. So where they -- if they were an  
23 official party, their -- their discovery efforts would not have been any  
24 different. There would be no prejudice with the amendment going  
25 forward.

1 THE COURT: Why didn't it come in earlier? Why didn't you  
2 seek to bring them in earlier?

3 MR. IQBAL: Your Honor, part of that was because there was  
4 a lot of evidence that was hidden. There was a lot of evidence hidden  
5 as -- as discussed in the reply until six months after that -- that statute of  
6 limitations ran. We -- we've been aggressive in discovery. The -- the  
7 evidence, the e-mails explicitly -- you're talking about the safety  
8 concerns for the riding public were -- were offered in a second  
9 supplemental from Thyssen November 6th, 2017. In less than a month,  
10 we -- we issued a -- a six-part, multi-part 2.34 discovery letter to -- to  
11 Nugget, we have continued those efforts and we've issued discovery to  
12 Thyssen. Those discovery efforts continue. Even as -- as recent as  
13 May 7th, we do a deposition in New York of Thyssen's engineer at that  
14 time. And he talks about e-mails that he has sent back and forth. We  
15 haven't gotten those e-mails.

16 After that May 7th deposition, in June, we -- we -- again, after  
17 getting the transcript, we again then issued discovery requests to  
18 Thyssen. So the diligence is there.

19 And -- and the difference between the MGM case that you had  
20 and this one, our -- our party, Plaintiff, an individual, did not have  
21 access. Thyssen had responsibilities under 16.1. Their April 15 --  
22 Rule 16 initial disclosures had some documents, some portions of the  
23 maintenance log. But not critical portions of the maintenance log  
24 showing that just a few -- just days after Plaintiff's injury, it was  
25 determined that the steps were cracked.

1 Now, what -- the difference again is the strength of the  
2 evidence that was hidden from Plaintiffs for six months after that statute  
3 of limitations passed with -- with Thyssen. And -- and Nugget  
4 separately, in February of '07 -- '17, in March of '17 stated we're not  
5 aware of any mechanical problems, this, that, and everything.

6 What do we get in November 6th? We get explicit e-mails that  
7 both parties hid -- both parties hid. I mean, I don't know if it gets any  
8 better than this.

9 "A serious safety issue for the riding passengers." The  
10 escalator steps are "obsolete, prone to cracking."

11 You know, there's a difference between that affidavit that was  
12 at issue in the earlier case and the strength of the evidence here, the  
13 posture of the parties, and the diligence that Plaintiffs have shown here.  
14 So it's -- Thyssen really can't complain about time when their second  
15 supplemental with all of those juicy e-mails that, by the way, back and  
16 forth between them and Golden Nugget, Nugget didn't share either with  
17 Plaintiffs, until that second supplemental came out. So you can't  
18 complain about time when you've -- when you've hidden evidence for six  
19 months.

20 And -- and so when you look at it, the Rule 15(c) analysis  
21 under the federal rules is -- is wrong. The *Nurenberger* analysis is also  
22 wrong, because they don't cite *Costello*, which is the actual controlling  
23 law. And then you have that additional third component of hiding these  
24 relevant e-mails and evidence.

25 Now, that -- that's with -- that's with Thyssen. So what -- what

1 you're left with then is 15(a), as justice requires. Liberally construed as  
2 justice requires. We've been in front of Your Honor on -- on Motions to  
3 Dismiss, summary judgment on the Nugget entities. This has been a --  
4 a very heavily litigated case. And -- and so there's no dilatory motive,  
5 there's no bad faith. This is -- this is simply preserving the -- the right --  
6 and again, we're not saying we're -- we're entitled to -- to a decision on  
7 punitive damages. That would be inappropriate. That's a jury decision.  
8 That's for the trier of fact. This is simply that this should go to the jury.

9 Now, switching to the Nugget entities and their opposition,  
10 their opposition -- here we go. They misstate the punitive damages  
11 standard. They're citing a 1984 case and they're saying:

12 "Plaintiff's burden to establish the defendants acted  
13 intentionally, willfully, and deliberately, knowing that such conduct  
14 would be harmful to Plaintiff specifically."

15 Page 6, lines 6 and 7 of their opposition.

16 That is wrong. Nevada's punitive damages rule, the statute,  
17 was changed in 1995, 11 years after the case cited by Golden Nugget.  
18 It's: Or despicable conduct which is engaged in with a conscious  
19 disregard of the rights or safety of others.

20 Now, let's go back to that case that Nevada --

21 THE COURT: Counsel. Counsel.

22 MR. IQBAL: I'm sorry.

23 THE COURT: I really appreciate you giving a seminar. When  
24 I have my 9:00s -- remember I said I was calling the ones I thought were  
25 going to be quicker so that we could get --



1 MR. IQBAL: Absolutely, Your Honor.

2 THE COURT: -- the other people, I've got to get them. And I  
3 appreciate it. If you think it's going to take long, what I can do is I can  
4 pause you right now, finish up my other 9:00s, get them in and out of  
5 here, and then circle back to you all. It -- because I didn't know that this  
6 was one that people would take more than just about five minutes on  
7 each side, because that's normally what we do for --

8 MR. IQBAL: I appreciate that, Your Honor.

9 THE COURT: -- I want to make sure everyone gets fully  
10 heard. Yeah.

11 MR. IQBAL: Absolutely.

12 THE COURT: So I want to make sure everyone gets fully  
13 heard. What --

14 MR. IQBAL: And I -- I can even stop right now and ask if the  
15 court has any questions for Plaintiffs, and then I can sit down.

16 THE COURT: Sure. That's fine. I didn't want to cut you off if  
17 you want more time. I just want to try and allocate for everybody else's  
18 schedules as well.

19 MR. IQBAL: Absolutely. I'll -- I'll just close by saying just like  
20 with Thyssen, Golden Nugget has the completely wrong standard for  
21 punitive damages and we're entitled to it.

22 THE COURT: Okay. Thank you so much.

23 So let's each respond briefly, he gets final word, and then the  
24 court will make a ruling.

25 Go ahead, counsel. Who's going first? Thyssen? Okay.

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MS. MASTRANGELO: Five minutes, Your Honor.

None of counsel's arguments has addressed the issue we're here for today. Neither the motion nor the reply address the statute of limitations. Neither the motion nor the reply addressed his failure to properly identify Doe defendants and allegations against them. And neither the motion nor the reply address the mandates of *Nurenberger*, which is still good law. I've been to the Supreme Court more times on *Nurenberger* than any other issue, and it remains good law till today.

This motion, as far as Thyssenkrupp is concerned, is not even a close call. The whole purpose of naming Doe defendants in a complaint is when you don't know the identity of that defendant and later you find out who it is and you substitute. Here, he knew the identity well before the statute of limitations ran. He's always known the identity. Thyssenkrupp has been in this case before the statute of limitations ran, and even when Thyssenkrupp got in the case, he waited another year and a half to file this motion.

So even if you had everything else working, Judge, he still hasn't named any allegations against Doe Defendant Escalator Maintenance Company in either the first amended complaint or the original complaint. There is nothing in there that says maintenance company was negligent. Nothing in there at all. That does not satisfy *Nurenberger*, it does not satisfy his Doe defendant allegations.

It's just under any liberal -- under the most liberal interpretation of the law, this motion has to be denied.

THE COURT: What do we do about the -- do you agree on

1 the subsequent e-mails only more recently being disclosed, which  
2 showed tie-ins between --

3 MS. MASTRANGELO: No. I produced those e-mails in  
4 response to Golden Nugget's request for production long ago.

5 THE COURT: What would long ago be? Well, I -- they  
6 weren't 16.1 disclosures back at the beginning of this case in '16?

7 MS. MASTRANGELO: We produced our maintenance  
8 records in 16.1, we --

9 THE COURT: Complete?

10 MS. MASTRANGELO: Complete. There are some  
11 maintenance --

12 THE COURT: Or in -- because he -- he is -- because  
13 counsel --

14 MS. MASTRANGELO: -- records that don't exist because of  
15 the passage of time. We produced everything surrounding this incident,  
16 Judge. We produced the correspondence from KONE, the escalator  
17 manufacturer, directing their client, their customer, Golden Nugget's, as  
18 well as the maintenance company, to replace these steps. We produced  
19 all that long ago. And I don't have the exact date that they were  
20 produced. He says November of '17. I believe it was prior to that. But  
21 even November of '17, he waited another seven, eight months before  
22 filing this motion.

23 And again, it all goes back to the Doe defendants in the  
24 original complaint, Judge. That's what you have to base it on. When the  
25 statute of limitations ran, we have to -- the only way he can

1 Thyssenkrupp in is Doe and Roe allegations. He did not say one single  
2 Doe was an escalator maintenance company, he did not make a single  
3 allegation of negligence against a maintenance company.

4 THE COURT: Okay.

5 MS. MASTRANGELO: Those claims just can't be part of this  
6 case.

7 THE COURT: Okay. Appreciate it.

8 Your argument's different. Go ahead.

9 MS. McLEOD: The proposed changes to Plaintiff's complaint  
10 with respect to the Golden Nugget entities are less comprehensive than  
11 that of Thyssenkrupp. But the standard here is not that justice allows  
12 amendment, but requires amendment. And another topic that Plaintiff  
13 failed to address either in their motion or their reply, is the futility of the  
14 amendments that they're seeking and the fact that should the court allow  
15 the second amended complaint, think both defendants will have reasons  
16 to file motions on that complaint.

17 With regard to the allegations and punitive damages  
18 allegations, the standard, as far as I know and as I've argued  
19 successfully in other departments, is the *Countrywide* case, which was  
20 not addressed by Plaintiff in their motion. And when it was brought up in  
21 opposition, it was not brought up or addressed in their reply.

22 The -- even the proposed second amended complaint states a  
23 cause of action for negligence and loss of consortium. Those causes of  
24 action do not, under *Countrywide*, they're insufficient to support a claim  
25 of punitive damages. Plaintiff completely sidesteps that argument and

1 completely fails to address the precedent of the *Countrywide* case. We  
2 echo the sentiments of our -- our co-defendant and we believe that this  
3 proposed amendment should be disallowed as futile.

4 MR. IQBAL: Your Honor, very quickly.

5 THE COURT: Yeah, of course.

6 MR. IQBAL: Counsel just said that we ignored *Countrywide*.  
7 It's in our reply, page 8 of 12, lines 14 to 22.

8 THE COURT: Sure.

9 MR. IQBAL: And then going to Thyssenkrupp's argument that  
10 this was produced long ago, April 18, 2017, was their Rule 16. The  
11 second supplemental was November 6, 2017. We didn't sit on our  
12 hands after that, because we just got a few e-mails. We sent out  
13 exhaustive discovery, and based on those e-mails, started doing multiple  
14 depositions, which we've done. So there's been no diligence.

15 I just wanted to correct the record, Your Honor. Thank you.

16 THE COURT: Sure. All right. Got a couple of questions.  
17 With reference back to the first amended complaint. Okay.

18 MR. IQBAL: Yes.

19 THE COURT: Part of Thyssenkrupp's argument is on the  
20 Roes, right? So paragraph 7 is your Roes.

21 The true names and capacity of each defendant Roe business  
22 entities 1 through 100 are presently unknown to Plaintiffs, who  
23 therefore sue said defendants by such fictitious names. Defendants  
24 are informed and believed and therefore allege that each defendant  
25 designated Roe Business Entities 1 through 100 are legally

1 responsible for the events referred to herein. The first amended  
2 complaint will be amended to include them when their true names  
3 and capacities become known.

4 So would you argue that that is or is not sufficient to put --

5 MR. IQBAL: Your Honor, under -- under the standard, we --  
6 we knew of Thyssenkrupp, obviously, they were brought in. We did not  
7 know of their role in -- in the defects, we did not role -- know their role in  
8 the maintenance, we did not know that these e-mails were going back  
9 and forth and that they sat on their hands, Your Honor.

10 And so when you look at 15(a), when you look at *Costello*, you  
11 can relate back, you can relate back when the -- when there's no  
12 prejudice. And they've literally conducted discovery, which is still  
13 ongoing, as if they've been in this -- against Plaintiffs.

14 Separately, even under *Nurenberger*, which again, *Costello*, it  
15 clearly points out, is -- is dicta and overruled, even under *Nurenberger*,  
16 even under that flawed analysis that Thyssen has, you -- let me -- let me  
17 quote it and then I'll sit down.

18 THE COURT: Yeah, sure.

19 MR. IQBAL: *Nurenberger* holds the right to amend and relate  
20 back shall rarely be denied Plaintiffs irrespective of the extent of the  
21 delay whenever the intended defendant has sought in any way to  
22 mislead or deceive the complaining party.

23 That's *Nurenberger*, if they want to rely on that. And what did  
24 we do, Your Honor? We -- we added actual transcripts from the  
25 depositions of their own engineer and their own second supplemental,

1 which was e-served on November -- November 6th, 2017. And the  
2 evidence is -- is staring all of us in the face.

3 Thank you, Your Honor.

4 THE COURT: And the court agrees. The court's going to  
5 grant the Motion for Leave for the Second Amended Complaint in its  
6 entirety. While the court's appreciative of the excellent oral arguments in  
7 the pleadings of all the parties, since there's reference, I mean, each  
8 case is different. I have to look at the facts in each case. I have to look  
9 at the diligence in each case. I have to look at the information that's  
10 available in each case.

11 And in this case, when I look at the totality and look in the  
12 applicable case law, that would be what this court has to analyze, this  
13 court's going to find it's appropriate for the Motion for Leave the Second  
14 Amended Complaint. This is very different from the other case. I've got  
15 to get Thyssenkrupp in there. When I look at the Golden Nugget, it is --  
16 while it's excellently been drafted, it's still -- a plethora of Supreme Court  
17 and appellate court cases says that this court should grant the Motion for  
18 Leave the Second Amended Complaint. The court's going to grant.

19 Is that going to be filed 10 days from this entry of order? Or  
20 how much time do you need to file it? And if whatever time you say, I'm  
21 going to ask the other parties what they -- their viewpoint is.

22 MR. IQBAL: Your Honor, 10 days is -- is perfectly fine.

23 THE COURT: 10 days from notice of entry?

24 MR. IQBAL: 10 business days under the -- under the rule.

25 THE COURT: Yeah. Does that work for the other parties?

1 MS. MASTRANGELO: Doesn't make a difference to me,  
2 Judge.

3 MS. McLEOD: That's fine.

4 THE COURT: Okay. So then when you draft your order, put  
5 that the -- the second amendment's going to be filed within 10 business  
6 days after Notice of Entry of order. And you all might want to stay tuned  
7 on a lot of those NRCP changes coming down the pike.

8 Have a great one. Thank you so very much.

9 MR. IQBAL: Thank you, Your Honor.

10 [Proceedings concluded at 9:53 a.m.]

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18 ATTEST: I do hereby certify that I have truly and correctly transcribed the  
19 audio/video proceedings in the above-entitled case to the best of my  
20 ability.

21 

22 \_\_\_\_\_  
23 Shawna Ortega, CET\*562  
24  
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**EXHIBIT 1-E**

**EXHIBIT 1-E**

JNB02420

IQBAL LAW PLLC

December 26, 2018

Rebecca Mastrangelo  
ROGERS, MASTRANGELO, CARVALHO & MITCHELL  
700 South 3<sup>rd</sup> Street  
Las Vegas, Nevada 89101  
*Attorneys for Defendant/Third-Party Defendant*  
*Thyssenkrupp Elevator Corporation*

*via E-Service*

**Re: Nev. R. Civ. P. 11 re TKE's *ex parte* communications and false statements in *ThyssenKrupp Elevator Corporation v. Eighth Judicial District Court*, Case no. 77211-COA, an appeal from *Brown v. Landry's, Inc. et al.*, Case no. A-16-739887-C**

Dear Rebecca:

I'm writing to you pursuant to Nev. R. Civ. P. 11 regarding your *ex parte* Petition for Writ of Mandamus ("Petition") styled *ThyssenKrupp Elevator Corporation v. Eighth Judicial District Court*, Case No. 77211-COA, now pending before the Nevada Court of Appeals.

At the outset, I note that your Petition was filed *ex parte* because you apparently failed to correctly identify counsel for the real parties in interest, Joe and Nettie Brown, who have not been properly served. The appellate docket lists Annalisa Grant and Alexandra McLeod as counsel for the Browns, when in fact they are not; and you have been on notice of this issue since least November 2, 2018, when you received the notice of transfer from the Nevada Supreme Court to the Nevada Court of Appeals.

More substantively: your Petition contains numerous factual contentions which are false; were made by you with knowledge of their falsity, or without a reasonable inquiry as to their truth; which have, in any event, been known to you to be false since at least November 19, 2018; and which have not been voluntarily corrected by you, despite the fact that they publicly ***and untruthfully*** accuse my colleague, Mohamed A. Iqbal, Jr., of having made false representations to the trial court.

By way of example: your Petition represents that "GNL produced an email from TKE which addressed [cracks in the escalator steps]. This production was provided to Plaintiff [*sic*] on **November 9, 2016.**" Petition at vii:5-10 (citations omitted; emphasis in original). This statement is false in that the emails at issue were not produced until almost a year later, on November 6, 2017. Further, you either knew the assertion in the Petition was false or did not have a good-faith basis formed on reasonable inquiry for believing it to be true.

Similarly, concerning the trial court's Order granting Plaintiffs leave to file their Second Amended Complaint, you wrote "[t]he order also alleges ... that TKE withheld evidence concerning its culpability, which was a 'basis' for permitting the amendment. This assertion is untrue, as Plaintiffs' received [*sic*] the so-called 'hidden' documents in the very first ECC production by GNL on November 9, 2016." Petition at 5:13-22 (citations omitted). This statement is, as you know, also untrue.

Concerning your client's failure to provide relevant documents prior to the running of the statute of limitations, you wrote, *inter alia*, "Defendant TKE never concealed its identity or otherwise obstructed Plaintiffs' investigation of this incident." Petition at 22:1-2. In fact, as you are well aware,

your client did not produce the key emails at issue during the trial court hearing until after the running of the statute of limitations – and your client withheld additional emails until long after the close of discovery, despite your personal representations to Mr. Iqbal and to me that such emails likely did not exist.

Concerning Mr. Iqbal's arguments before the trial court, you wrote that his "argument [that TKE failed to produce key emails regarding cracks in the escalator steps] is absolutely untrue. Plaintiffs were aware that TKE was concerned about cracks in the escalator stairs because GNL produced the email from TKE discussing the issue on November 9, 2016." Petition at 23:8-11 (emphasis in original). In fact, GNL did not produce the email in question then, and you never had a good-faith basis for believing that they did. Mr. Iqbal's argument was true, and you knew or should have known at the time you filed your Petition that it was true.

Concerning your own argument to the trial court, however, you wrote "TKE asserted at the hearing that Plaintiffs were aware of these emails far earlier than November 2017. In fact, it was **November of 2016** when Plaintiff [sic] first received these emails." Petition at 23:12-15 (emphasis in original). Despite your evident eagerness to accuse Mr. Iqbal of making "absolutely untrue" statements to the trial court, it was **your own** assertions regarding the emails' date of production that were false – first, when you told the trial court that the emails were produced far earlier than November 2017, and second, when you told the appellate courts that they were produced in November 2016.

Finally, you asserted "Plaintiffs' decision not to sue TKE was simply based on their own choice (or lack of diligence), and not on any withholding of evidence." Petition at 23:20-23. In fact, TKE repeatedly failed to produce relevant, discoverable evidence, including emails, throughout the course of this case. Your Petition is thus incomplete and misleading at best, and you are well aware of that fact.

These are, of course, a mere handful of examples of the false statements regarding your client's withholding of evidence that litter the pages of your Petition. You knew or should have known that these statements were untrue when you made them. ***You have without question known they were untrue*** since at least November 19, 2018, when your colleague Charles A. Michalek filed his affidavit with the trial court acknowledging they were untrue. Yet you have failed to make any effort to withdraw or otherwise correct your Petition, leaving the Nevada appellate courts with an *ex parte* filing falsely claiming Mr. Iqbal was not telling the truth about the emails – when in fact, as you know, it was your statements that were untrue.

Please let me know at your earliest convenience what you intend to do to correct the record. I expect you to act within 10 days of receipt of this letter.

Sincerely,

/s/ Christopher Mathews

Christopher Mathews

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A-16-739887-C      Joe Brown, Plaintiff(s)  
vs.  
Landry's Inc., Defendant(s)

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January 08, 2019      09:00 AM      Plaintiffs' Emergency Motion For Reopening Discovery, Court Intervention, And Sanctions On Order Shortening Time

HEARD BY:      Kishner, Joanna S.      COURTROOM: RJC Courtroom 12B

COURT CLERK: Jolley, Tena

RECORDER:      Harrell, Sandra

REPORTER:

**PARTIES PRESENT:**

Alexandra B. McLeod      Attorney for Defendant, Third Party Plaintiff

Mohamed A. Iqbal      Attorney for Plaintiff

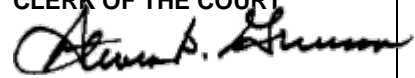
Rebecca L. Mastrangelo      Attorney for Defendant, Third Party Defendant

**JOURNAL ENTRIES**

After the Court's consideration of the papers submitted by counsel in connection with this matter, and, having heard the oral arguments presented by Mr. Iqbal, Ms. McLeod and Ms. Mastrangelo, the COURT ORDERED, Plaintiffs' Emergency Motion for Reopening Discovery, Court Intervention, and Sanctions GRANTED; limited discovery is reopened, a new trial date will be set, and based on the lack of due diligence, SANCTIONS Defendant Tyssenkrupp Elevator Corporation for plaintiff counsel's attorney's fees for today's hearing, including the preparation of the motion and reply, as well as the costs of deposition transcript for deposing or redeposing the witnesses as to the Exhibit G emails and the individuals identified therein. Mr Iqbal to prepare the Order, circulating to opposing counsel and provide it back to the Court in accordance with EDCR 7.21.

COURT FURTHER ORDERED matter SET for Status Check and DIRECTED counsel to confer and send the Court a letter requesting a telephonic conference be set within the next two weeks for setting limited discovery deadlines and scheduling a new trial date.

1/25/19 (CHAMBERS) STATUS CHECK: LETTER FROM COUNSEL TO SET TELEPHONIC CONFERENCE FOR SETTING LIMITED DISCOVERY DEADLINES AND RESET TRIAL DATES



NEOJ  
IQBAL LAW PLLC  
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*Attorneys for Plaintiffs Joe N. Brown and Nettie J. Brown*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

JOE N. BROWN, an individual and his Wife,  
NETTIE J. BROWN, an individual,

Plaintiffs,

vs.

LANDRY'S, INC., a foreign corporation;  
GOLDEN NUGGETT, INC., a Nevada  
corporation, d/b/a GOLDEN NUGGET  
LAUGHLIN; GNL, CORP.; a Nevada  
corporation; THYSSENKRUPP ELEVATOR  
CORP., a foreign corporation; DOE  
INDIVIDUALS 1-100; ROE BUSINESS  
ENTITIES 1-100,

Defendants.

AND ASSOCIATED CASES

Case No.: A-16-739887-C  
Dept. No.: XXXI

**NOTICE OF ENTRY OF ORDER  
GRANTING EMERGENCY MOTION  
FOR REOPENING DISCOVERY, COURT  
INTERVENTION, AND SANCTIONS ON  
ORDER SHORTENING TIME**

PLEASE TAKE NOTICE that the Order Granting Emergency Motion for Reopening  
Discovery, Court Intervention, and Sanctions on Order Shortening Time has been entered on  
February 11, 2019, a copy of which is attached hereto as **Exhibit A**.

Dated: February 11, 2019.

Respectfully Submitted,

IQBAL LAW PLLC

By: /s/ Mohamed A. Iqbal, Jr.  
Mohamed A. Iqbal, Jr. (NSB #10623)

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**CERTIFICATE OF SERVICE**

I certify that I served the foregoing **NOTICE OF ENTRY OF ORDER GRANTING EMERGENCY MOTION FOR REOPENING DISCOVERY, COURT INTERVENTION, AND SANCTIONS ON ORDER SHORTENING TIME** on all counsel of record in this matter using the Court's e-file/e-service system on February 11, 2019.

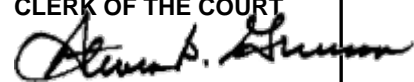
By: /s/ Marie-Claire Alsanjakli  
An employee of IQBAL LAW PLLC

I LAW LV

# **EXHIBIT A**

# **EXHIBIT A**

JNB02426



**ORDR**

IQBAL LAW PLLC

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*Attorneys for Plaintiffs Joe N. Brown and Nettie J. Brown*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

JOE N. BROWN, an individual and his Wife,  
NETTIE J. BROWN, an individual,

Plaintiffs,

vs.

LANDRY'S, INC., a foreign corporation;  
GOLDEN NUGGETT, INC., a Nevada  
corporation, d/b/a GOLDEN NUGGET  
LAUGHLIN; GNL, CORP., a Nevada  
corporation; THYSSENKRUPP ELEVATOR  
CORP., a foreign corporation; DOE  
INDIVIDUALS 1-100; ROE BUSINESS  
ENTITIES 1-100,

Defendants.

AND ASSOCIATED CASES

Case No.: A-16-739887-C

Dept. No.: XXXI

**ORDER GRANTING EMERGENCY  
MOTION FOR REOPENING  
DISCOVERY, COURT INTERVENTION,  
AND SANCTIONS ON ORDER  
SHORTENING TIME**

On January 8, 2019, the Court considered the Emergency Motion for Reopening Discovery, Court Intervention, and Sanctions on Order Shortening Time ("Motion") filed by Plaintiffs Joe N. Brown and Nettie J. Brown (collectively, "Plaintiffs") on December 10, 2018. Mohamed A. Iqbal, Jr., Esq., appeared on behalf of the Plaintiffs; Alexandra B. McLeod, Esq., appeared on behalf of Landry's Inc., Golden Nugget, Inc., and GNL, Corp. (collectively, the "Nugget Defendants"); and

**ORDER GRANTING EMERGENCY MOTION FOR REOPENING DISCOVERY,  
COURT INTERVENTION, AND SANCTIONS ON ORDER SHORTENING TIME**

(1 of 6)

FEB 08 '19 PM 04:28\*

JNB02427 



1 Rebecca L. Mastrangelo, Esq., appeared on behalf of Thyssenkrupp Elevator Corporation  
2 ("TKE").

3 Having considered the Motion, the opposition papers filed by TKE and the joinder thereto  
4 filed by the Nugget Defendants, and the reply brief filed by Plaintiffs in response; the evidence  
5 submitted by the parties; the records of this Court; and the arguments of counsel, the Court enters  
6 the following essential:

7 **FINDINGS OF FACT**

8 1. Between 2010 and 2018, TKE technician Chris Dutcher ("Dutcher") was primarily  
9 responsible for servicing escalators at the Golden Nugget hotel, resort, and casino in Laughlin,  
10 Nevada (the "Laughlin Nugget").

11 2. Plaintiffs filed their initial complaint in this case on July 12, 2016, and subsequently  
12 filed two amended complaints. Each of these pleadings alleges Plaintiffs were injured by defects  
13 in the design, operation, and/or maintenance of the "down" escalator at the Laughlin Nugget.

14 3. Defendant GNL Corp. filed a third-party complaint against TKE on January 23,  
15 2017, alleging TKE was responsible for maintaining the escalator in question.

16 4. TKE contends that sometime in 2017, its counsel asked "that anyone in the [TKE]  
17 Las Vegas office who had responsibility for the [Laughlin Nugget] escalators search their  
18 computers (and hard files) for any emails (or other documentation) pertaining to the down escalator  
19 at issue." TKE does not contend it directed searches of mobile devices such as cell phones or  
20 tablets, or archival records, nor that it directed its information technology ("IT") personnel to  
21 participate in the search.

22 5. Documents discovered in this search were produced as a supplement to TKE's  
23 initial discovery disclosures on November 6, 2017.

24 6. Plaintiffs served discovery requests to TKE in January 2018, including seven  
25 document requests seeking emails and other documents exchanged by various persons employed  
26 by TKE and/or the Nugget Defendants. Plaintiffs specifically requested emails exchanged by

27 **ORDER GRANTING EMERGENCY MOTION FOR REOPENING DISCOVERY,**  
28 **COURT INTERVENTION, AND SANCTIONS ON ORDER SHORTENING TIME**

(2 of 6)

JNB02428

1 Dutcher, Larry Panaro ("Panaro"), Scott Olsen ("Olsen"), Don Hartmann ("Hartmann"), and  
2 others.

3 7. TKE responded to Plaintiffs' document requests in February 2018, by claiming it  
4 "[had] not located" any responsive documents other than those already produced.

5 8. Discovery proceeded pursuant to various stipulated orders of this Court. Plaintiffs  
6 deposed Hartmann in January 2018 and Dutcher in May 2018. Plaintiffs also engaged, pursuant  
7 to EDCR 2.34, in further efforts to obtain the emails and other documents sought by Plaintiffs'  
8 discovery requests.

9 9. After the close of discovery, TKE's counsel wrote to Plaintiffs' counsel to advise  
10 that emails sent by Dutcher to TKE persons already "would have been produced," and that neither  
11 Olsen, Panaro, or "anyone else" in TKE's Las Vegas office "has any additional emails" pertaining  
12 to the escalator. TKE further advised that emails to Hartmann should be in the possession of the  
13 Nugget Defendants. TKE's letter concluded that "it is highly unlikely that Chris Dutcher sent any  
14 emails pertaining to the escalator."

15 10. On November 16, 2018, TKE produced more than 40 additional pages of emails,  
16 color photographs, and other documents exchanged in 2015 between Dutcher, Panaro, and Olsen  
17 concerning the escalators at the Laughlin Nugget (the "November 2018 Disclosure"). Some of the  
18 emails reference bulletins and proposals concerning the escalator, including a proposal prepared  
19 for the Nugget Defendants' Hartmann, and a planned discussion between Panaro and Hartmann.

20 11. After receiving and reviewing the additional emails and documents from TKE,  
21 Plaintiffs timely filed this Motion.

22 12. The Court offered TKE the opportunity to present testimony and other evidence at  
23 an evidentiary hearing on the Motion; but TKE declined the Court's offer.

24 13. Any of the foregoing findings of fact which should more appropriately be  
25 denominated conclusions of law shall be so construed.

26 The Court therefore enters the following essential:

27 **ORDER GRANTING EMERGENCY MOTION FOR REOPENING DISCOVERY,**  
28 **COURT INTERVENTION, AND SANCTIONS ON ORDER SHORTENING TIME**

(3 of 6)

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**CONCLUSIONS OF LAW**

1. Parties have an obligation to take affirmative steps to preserve evidence when they are on notice that litigation is reasonably foreseeable. *Bass-Davis v. Davis*, 134 P.3d 103, 108 (Nev. 2006). This includes documents, tangible items, and information relevant to litigation that are reasonably calculated to lead to the discovery of admissible evidence. *Id.*

2. Emails, photographs, and other documents relating to alleged defects in and operational issues with the “down” escalator at the Laughlin Nugget should have been preserved and produced by TKE pursuant to Nev. R. Civ. P. 16.1; in response to Plaintiffs’ discovery requests of January 2018; or both.

3. TKE had an affirmative obligation to determine from its personnel what relevant, discoverable evidence was in their possession, to preserve it, and to provide it to the Plaintiffs. This obligation includes making an inquiry of TKE’s IT personnel.

4. Although the Court does not on the record presently before it find TKE acted in bad faith, it nonetheless concludes that TKE failed to meet its discovery obligations and in so doing hindered Plaintiffs’ discovery and the adjudication of this case.

5. Accordingly, the Court finds that sanctions against TKE as set forth in the Court’s decretal paragraphs below are appropriate. Nev. R. Civ. P. 26(g)(3); *Young v. Johnny Ribeiro Bldg., Inc.*, 787 P.2d 777, 780 (Nev. 1990).

6. Any of the foregoing conclusions of law which should more appropriately be denominated findings of fact shall be so construed.

Now, therefore, good cause appearing,

**IT IS HEREBY ORDERED, DECREED, AND ADJUDGED** that Plaintiffs’ Motion is **GRANTED** as follows:

1. The Court issued a new scheduling order and set an April 22, 2019 trial date, but will consider a stipulation or motion practice from the parties.

**ORDER GRANTING EMERGENCY MOTION FOR REOPENING DISCOVERY,  
COURT INTERVENTION, AND SANCTIONS ON ORDER SHORTENING TIME**

(4 of 6)

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February 8, 2019

IQBAL LAW PLLC

 2/8/19

By: /s/ Mohamed A. Iqbal, Jr.  
Mohamed A. Iqbal, Jr. (NSB #10623)  
Christopher Mathews (NSB #10674)

*Attorneys for Plaintiffs Joe N. Brown and Nettie J. Brown*

February 8, 2019

GRANT & ASSOCIATES


I LAW LV

By: \_\_\_\_\_  
Alexandra B. McLeod (NSB #8185)  
Sarah B. Hartig (NSB #10070)  
*Attorneys for Defendants/Third-Party Plaintiffs,  
GNL Corp., Landry's, Inc. & Golden Nugget, Inc.*

February 8, 2019

ROGERS, MASTRANGELO, CARVALHO & MITCHELL

By: /s/ (Ms. Mastrangelo authorized sig. via email to Mr. Iqbal)  
Rebecca L. Mastrangelo (NSB #5417)  
*Attorneys for Defendant/Third-Party Defendant  
Thyssenkrupp Elevator Corporation*

 2/8/19

1  
2  
3  
4 February 8, 2019

5 IQBAL LAW PLLC

6 By: /s/ Mohamed A. Iqbal, Jr.

7 Mohamed A. Iqbal, Jr. (NSB #10623)

8 Christopher Mathews (NSB #10674)

9 *Attorneys for Plaintiffs Joe N. Brown and Nettie J. Brown*

10 February 8, 2019

11 GRANT & ASSOCIATES

12  
13 By: Alexandra B. McLeod

14 Alexandra B. McLeod (NSB #8185)

15 Sarah B. Hartig (NSB #10070)

16 *Attorneys for Defendants/Third-Party Plaintiffs,  
GNL Corp., Landry's, Inc. & Golden Nugget, Inc.*

17  
18 February 8, 2019

19 ROGERS, MASTRANGELO, CARVALHO & MITCHELL

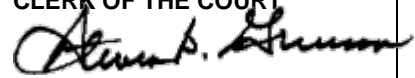
20  
21 By: \_\_\_\_\_

22 Rebecca L. Mastrangelo (NSB #5417)

23 *Attorneys for Defendant/Third-Party Defendant  
Thyssenkrupp Elevator Corporation*

24  
25  
26  
27 **ORDER GRANTING EMERGENCY MOTION FOR REOPENING DISCOVERY,  
28 COURT INTERVENTION, AND SANCTIONS ON ORDER SHORTENING TIME**  
(6 of 6)

JNB02433



OML  
IQBAL LAW PLLC  
Mohamed A. Iqbal, Jr. (NSB #10623)  
Christopher Mathews (NSB #10674)  
101 Convention Center Dr., Suite 1175  
Las Vegas, Nevada 89109  
1-(702) 750-2950 (Tel); 1-(702) 825-2841 (V-Fax)  
[info@ilawlv.com](mailto:info@ilawlv.com)  
*Attorneys for Plaintiffs*

DISTRICT COURT  
CLARK COUNTY, NEVADA

JOE N. BROWN, an individual, and his Wife, NETTIE J. BROWN, an individual  Plaintiffs,  vs.  LANDRY'S, INC., a foreign corporation; GOLDEN NUGGET, INC. a Nevada corporation, d/b/a GOLDEN NUGGET LAUGHLIN; GNL, CORP., a Nevada corporation; THYSSENKRUPP ELEVATOR CORP., a foreign corporation; DOE INDIVIDUALS 1-100, ROE BUSINESS ENTITIES 1-100,  Defendants.  AND RELATED CASES	Case No.: A-16-739887-C Dept. No.: XXXI  <b>PLAINTIFFS' OPPOSITION TO DEFENDANT/THIRD PARTY DEFENDANT THYSSENKRUPP ELEVATOR CORPORATION'S MOTION IN LIMINE #7 RE: CLAIM THAT THYSSENKRUPP "HID" OR FAILED TO PRODUCE EVIDENCE</b>  <b>Date of hearing: March 28, 2019 Time of hearing: 10:00 a.m.</b>
---	--

Plaintiffs Joe N. Brown and Nettie J. Brown ("Plaintiffs") hereby file this Opposition to Motion *in Limine* #7 Re: Claim That Thyssenkrupp "Hid" or Failed to Produce Evidence ("TKE MiL #7") filed by Defendant/Third Party Defendant Thyssenkrupp Elevator Corp. ("TKE").

///

**PLAINTIFFS' OPPOSITION TO DEFENDANT/THIRD PARTY DEFENDANT  
THYSSENKRUPP ELEVATOR CORPORATION'S MOTION IN LIMINE #7 RE:  
CLAIM THAT THYSSENKRUPP "HID" OR FAILED TO PRODUCE EVIDENCE**

## I. INTRODUCTION

TKE MiL #7, filed on November 13, 2018, contends that Plaintiffs should be prohibited from offering “any evidence or arguments” that TKE hid or failed to produce documents in this case. TKE MiL #7 at 4:12-13. The Motion rests on two assertions of fact that:

(1) despite this Court’s finding that TKE filed to produce evidence of its culpability until after the statute of limitations had run, Plaintiffs supposedly “received the so called ‘hidden’ documents in the very first ECC production by [co-defendant] GNL [Corp.] on November 9, 2016”; and

(2) “at no time did Defendant TKE hide documents or fail to comply with discovery obligations.”

*Id.* at 4:4-9. Moreover, TKE contends, if Plaintiffs had evidence TKE withheld or failed to produce discoverable material, they should have taken it up with the Discovery Commissioner “or this Court.” *Id.* at 4:9-11.

On November 19, 2018, TKE submitted an “errata” which *admitted that the primary factual basis* for TKE MiL #7 – TKE’s assertion that the emails were received prior to the running of the statute – “was untrue.” *See* Defendant/Third Party Defendant Thyssenkrupp Elevator Corp.’s Errata to Motion *in Limine* #7 Re: Claim That Thyssenkrupp “Hid” or Failed to Produce Evidence (“Errata”) at 4:13-15.<sup>1</sup> The Errata further states that any “argument in [TKE MiL #7] that Plaintiff received the emails prior to November 6, 2017, is withdrawn.” Errata at 4:19-20. TKE went on to state that despite the now-admitted falsity of the primary basis for its motion, “TKE still believes that the Motion has merit, in that TKE never hid, destroyed, or failed to produce any relevant documents,” *id.* at 4:20-21.

---

<sup>1</sup> See TKE’s Errata attached hereto as Exhibit A.



1 On February 11, 2019, this Court entered an order sanctioning TKE for failing to produce  
2 *additional* relevant, discoverable emails in its possession. As the Court is aware from briefings  
3 on the matter, it appears that at least one electronic device, a cell phone used by TKE engineer  
4 Chris Dutcher, may have been disabled or damaged and its contents lost.<sup>2</sup> The Court specifically  
5 found that TKE's failure to fulfill its obligations in discovery "hindered Plaintiffs' discovery and  
6 the adjudication of this case." The Court also reopened discovery, and that discovery is pending.  
7 Order Granting Emergency Motion for Reopening Discovery, Court Intervention, and Sanctions  
8 on Order Shortening Time, at 4:13-15 (the "Sanctions Order").

9 **II. LAW AND ARGUMENT: TKE'S 1<sup>ST</sup> BASIS FOR TKE MiL #7 IS FALSE, BASED**  
10 **ON TKE'S OWN ADMISSIONS, AND TKE'S 2<sup>ND</sup> BASIS IS FALSE BASED ON**  
11 **THE EVIDENCE AND THE COURT'S RECENT SANCTION ORDER**

12 The passage of time has not been kind to TKE MiL #7. The first purported basis for the  
13 motion, TKE's claim that Plaintiffs were provided certain emails well before the running of the  
14 statute of limitations, was *not true when made* and TKE was forced to admit that it was untrue.<sup>3</sup>  
15 The second basis for TKE MiL #7, that "at no time did Defendant TKE hide documents or fail to  
16 comply with discovery obligations," was contrary to the evidence in this case and this Court's  
17 then-existing findings; contradicted by TKE's subsequent admission in the Errata that the emails  
18 TKE claimed had been provided prior to the running of the statute were instead withheld until after  
19 the statute expired; and further contradicted by the Court's Sanctions Order.

---

20 <sup>2</sup> TKE's technician assigned to the subject escalator at the Golden Nugget Laughlin for  
21 eight years, from 2010 to 2018, Christopher Dutcher, testified that his iPhone crashed in mid-2017  
22 and he cannot retrieve emails (Dutcher Deposition, Exhibit 1-C to Plaintiffs' Emergency Motion  
23 for Reopening Discovery, Court Intervention, and Sanctions on Order Shortening Time, filed on  
24 December 10, at 72:12-73:24, partially re-attached hereto as **Exhibit B**); Dutcher further testified  
25 that as of May 14, 2018 deposition, he had no idea what even happened to his emails regarding the  
26 subject escalator. Exhibit B, Dutcher Deposition, at 72:4-7.

27 <sup>3</sup> Remarkably, TKE made the same false claim in its now-defunct request for a writ of  
28 mandamus against this Court and let that claim stand until Plaintiffs demanded they withdraw it.  
See Motion for Withdrawal of Petition for Writ of Mandamus, Nev. S. Ct. Case No. 77211, filed  
January 10, 2019.

**PLAINTIFFS' OPPOSITION TO DEFENDANT/THIRD PARTY DEFENDANT  
THYSSENKRUPP ELEVATOR CORPORATION'S MOTION IN LIMINE #7 RE:  
CLAIM THAT THYSSENKRUPP "HID" OR FAILED TO PRODUCE EVIDENCE**

As the factual claims supporting TKE MiL #7 are not true, the motion should be denied.

**III. CONCLUSION**

For all the foregoing reasons, TKE MiL #7 should be DENIED.

Dated February 15, 2019.

Respectfully Submitted,

IQBAL LAW PLLC

By: /s/ Mohamed A. Iqbal, Jr.

Mohamed A. Iqbal, Jr. (NSB #10623)

Christopher Mathews (NSB #10674)

*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of IQBAL LAW PLLC, and that on this 15th day of February 2019, I caused to be served a true and correct copy of the foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANT/THIRD PARTY DEFENDANT THYSSENKRUPP ELEVATOR CORPORATION'S MOTION IN LIMINE #7 RE: CLAIM THAT THYSSENKRUPP "HID" OR FAILED TO PRODUCE EVIDENCE** by transmitting the same via the Court's electronic filing services to the Counsel and other recipients set forth on the service list.

/s/ Marie-Claire Alsanjakli

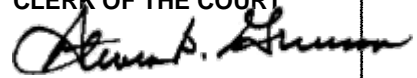
An employee of IQBAL LAW PLLC

**PLAINTIFFS' OPPOSITION TO DEFENDANT/THIRD PARTY DEFENDANT  
THYSSENKRUPP ELEVATOR CORPORATION'S MOTION IN LIMINE #7 RE:  
CLAIM THAT THYSSENKRUPP "HID" OR FAILED TO PRODUCE EVIDENCE**

# **EXHIBIT A**

# **EXHIBIT A**

JNB02438



REBECCA L. MASTRANGELO, ESQ.  
Nevada Bar No. 5417  
ROGERS, MASTRANGELO, CARVALHO & MITCHELL  
700 South Third Street  
Las Vegas, Nevada 89101  
Phone (702) 383-3400  
Fax (702) 384-1460  
rmastrangelo@rmcmlaw.com  
Attorneys for Defendant/Third-Party Defendant  
THYSSENKRUPP ELEVATOR CORPORATION

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

JOE N. BROWN, an individual, and his wife,  
NETTIE J. BROWN, an individual,

Plaintiffs,

vs.

LANDRY'S INC., a foreign corporation;  
GOLDEN NUGGET, INC., a Nevada  
corporation d/b/a GOLDEN NUGGET  
LAUGHLIN; GNL, CORP., a Nevada  
corporation; DOE INDIVIDUALS 1-100,  
ROE BUSINESS ENTITIES 1-100,

Defendants.

GNL, CORP., a Nevada corporation;

Third-Party Plaintiff,

vs.

THYSSENKRUPP ELEVATOR CORPORATION  
a foreign corporation; DOES 1-75; ROE  
CORPORATIONS 1-75 and ROE  
CORPORATIONS 1-25,

Third-Party Defendants.

CASE NO.: A-16-739887-C

DEPT. NO.: XXXI

Date of Hearing: 12/18/18  
Time of Hearing: 9:00 a.m.

**DEFENDANT/THIRD PARTY DEFENDANT THYSSENKRUPP ELEVATOR  
CORPORATION'S ERRATA TO MOTION IN LIMINE #7 RE: CLAIM THAT  
THYSSENKRUPP "HID" OR FAILED TO PRODUCE EVIDENCE**

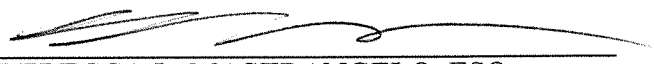
**JNB02439**

1 Defendant/Third-Party Defendant, thyssenkrupp Elevator Corporation ("TKE"), by and  
2 through its attorney of record, REBECCA L. MASTRANGELO, ESQ., of the law firm of ROGERS,  
3 MASTRANGELO, CARVALHO & MITCHELL, hereby submits its Errata to Motion in Limine #7  
4 re: Claim that thyssenkrupp "hid" or failed to produce evidence.

5 This Errata is based upon the pleadings and papers on file herein, the accompanying  
6 Memorandum of Points and Authorities and oral argument, if any, at the time of the hearing on this  
7 matter.

8 DATED this 9 day of November, 2018.

9  
10 ROGERS, MASTRANGELO, CARVALHO  
& MITCHELL

11  
12   
REBECCA L. MASTRANGELO, ESQ.  
Nevada Bar No. 5417  
13 CHARLES A. MICHALEK, ESQ.  
Nevada Bar No. 5721  
14 700 S. Third Street  
Las Vegas, Nevada 89101  
15 Attorney for Defendant/Third-Party Defendant  
16 THYSENKRUPP ELEVATOR CORPORATION

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**AFFIDAVIT OF COUNSEL IN SUPPORT OF ERRATA**

STATE OF NEVADA       )  
  ) ss:  
COUNTY OF CLARK       )

CHARLES A. MICHALEK, being first duly sworn, deposes and says:

1. That your Affiant is an attorney licensed to practice law in all the courts in the State of Nevada;

2. That your Affiant is counsel responsible for drafting and preparing Motion in Limine #7 in the above captioned matter;

3. That prior to filing said Motion, Affiant received a copy of GNL's first ECC production. This copy unintentionally had additional documents attached to the end of the production, which led counsel to believe that the additional documents were a part of the initial production. These additional documents included emails between TKE and GNL concerning the escalator, and are a subject of the motion.

4. Based on the copy provided, undersigned counsel wrote the motion, believing that the emails had been produced prior to the running of the statute of limitations. On the weekend of November 17, undersigned counsel discovered the error. In order to inform the court of the actual facts of the production, counsel is submitting this affidavit and errata.

5. Plaintiff's counsel, Mohhamed Iqbal, Esq. was apparently not provided with a copy of the emails referenced in Motion in Limine #7 until TKE produced them on November 6, 2017. Undersigned counsel regrets the error and accepts responsibility for it.

6. Counsel withdraws that portion of the motion which argues that the emails were produced earlier than November 6, 2017. However, TKE still believes that Motion in Limine #7

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1 has merit. Defendant TKE did not hide, destroy or fail to produce any relevant evidence.

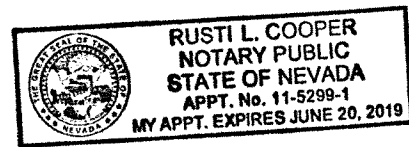
2 FURTHER AFFIANT SAYETH NAUGHT.

3 DATED this 19 day of November, 2018.

4  
5 

6 CHARLES A. MICHALEK, ESQ.

7  
8 SUBSCRIBED AND SWORN to before me  
9 this 19 day of November, 2018.



10 

11 Notary Public

12 **POINTS AND AUTHORITIES**

13  
14 As stated in the attached affidavit of counsel, Motion in Limine #7 contained an argument  
15 that Plaintiff received emails between TKE and GNL prior to the running of the statute of  
16 limitations. This assertion was untrue, and was the result of error on counsel's part. Counsel was  
17 provided a copy of a document production which contained additional documents attached to the  
18 end of the production. Counsel did not notice the error until November 17, 2018, at which time  
19 counsel immediately took steps to rectify the error, by preparing this errata and affidavit.

20 Any argument in Motion in Limine #7 that Plaintiff received the emails prior to  
21 November 6, 2017, is withdrawn. However, TKE still believes that the Motion has merit, in that  
22 TKE never hid, destroyed, or failed to produce any relevant documents, and a sanction under  
23 *Bass-Davis v. Davis*, 122 Nev. 442, 448-49, 134 P.3d 103, 106-07 (2006) therefore is not

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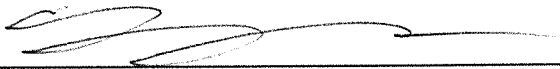
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27 ///

1 warranted. Counsel apologizes for the error, and submits this affidavit and errata pursuant to  
2 counsel's duty of candor to this court.

3 DATED this 19<sup>th</sup> day of November, 2018.

4 ROGERS, MASTRANGELO, CARVALHO  
5 & MITCHELL

6   
7 REBECCA L. MASTRANGELO, ESQ.  
8 Nevada Bar No. 5417  
9 CHARLES A. MICHALEK, ESQ.  
10 Nevada Bar No. 5721  
11 700 S. Third Street  
12 Las Vegas, Nevada 89101  
13 Attorney for Defendant/Third-Party Defendant  
14 THYSSENKRUPP ELEVATOR CORPORATION  
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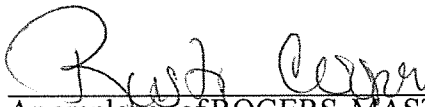


1 **CERTIFICATE OF SERVICE**

2 Pursuant to N.R.C.P. 5(a), E.D.C.R. 7.26(a), and Rule 9 of the N.E.F.C.R. I hereby certify  
3 that I am an employee of Rogers, Mastrangelo, Carvalho & Mitchell, and on the 19 day of  
4 November, 2018, a true and correct copy of the foregoing **DEFENDANT/THIRD PARTY**  
5 **DEFENDANT THYSSENKRUPP ELEVATOR CORPORATION'S ERRATA TO MOTION**  
6 **IN LIMINE #7 RE: CLAIM THAT THYSSENKRUPP "HID" OR FAILED TO PRODUCE**  
7 **EVIDENCE** was served via electronic means with the Eighth Judicial District Court, addressed as  
8 follows, upon the following counsel of record:

9  
10 Mohamed A. Iqbal, Jr., Esq.  
11 Christopher Mathews, Esq.  
12 101 Convention Center Drive, Suite 1175  
13 Las Vegas, Nevada 89109  
14 Attorneys for Plaintiffs

15 Annalisa N. Grant, Esq.  
16 Alexandra B. McLeod, Esq.  
17 GRANT & ASSOCIATES  
18 7455 Arroyo Crossing Parkway, Suite 300  
19 Las Vegas, Nevada 89113  
20 Attorneys for Defendant/Third-Party Plaintiff

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28  
  
An employee of ROGERS, MASTRANGELO, CARVALHO  
& MITCHELL

# **EXHIBIT B**

# **EXHIBIT B**

JNB02445

1                   A.   In my company phone.

2                   Q.   Okay.   Okay.   Did you find any e-mails?

3                   A.   I don't believe I found anything.

4                   Q.   Okay.   So do you have any idea what  
5 happened to those e-mails that you sent regarding  
6 the Laughlin Nugget escalators?

7                   A.   No.

8                   Q.   How long of a search did you do?

9                   A.   I typed in Golden Nugget escalators,  
10 and that's all I did.

11                  Q.   Okay.   So you used one search term?

12                  A.   Yes -- a few search terms, but my  
13 device crashed before that time, so I lost all the  
14 information regarding any work e-mails.

15                  Q.   When did your device crash?

16                  A.   Last year.

17                  Q.   Do you remember roughly what time?

18                  A.   No.

19                  Q.   Okay.   Was it at the end of the year,  
20 right before you got transferred to New York, or  
21 was it early on in 2017?

22                  A.   It was probably in the middle of the  
23 year, last year.

24                  Q.   Okay.   And after your device crashed,  
25 were you able to turn on the device?

1                   A. I was able to reboot it and enter my  
2                   e-mail in and all that information, do a hard  
3                   reset --

4                   Q. Okay.

5                   A. -- but all the information was lost  
6                   previous to that.

7                   Q. Okay. Okay. So --

8                   A. On my end.

9                   Q. On your end.

10                  So your e-mails prior to the middle of  
11                  2017, you -- you weren't able to find any?

12                  A. I have no access.

13                  Q. No access. Okay. Okay.

14                  And do you know how long e-mails stay on  
15                  the Thyssen Cloud?

16                  A. No idea.

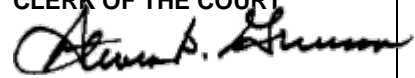
17                  Q. Okay. Has -- have you taken any -- any  
18                  steps to -- to retrieve the e-mails prior to the  
19                  middle of last year?

20                  A. No.

21                  Q. So when you did the search, it was only  
22                  for the e-mails that were available after the  
23                  crash?

24                  A. Yes.

25                  Q. Okay. Besides checking your e-mail,



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DISTRICT COURT  
CLARK COUNTY, NEVADA

JOE N. BROWN, an individual, and his Wife,  
NETTIE J. BROWN, an individual,

Plaintiffs,

vs.

LANDRY'S, INC., a foreign corporation;  
GOLDEN NUGGET, INC. a Nevada  
corporation, d/b/a GOLDEN NUGGET  
LAUGHLIN; GNL, CORP., a Nevada  
corporation; THYSSENKRUPP ELEVATOR  
CORP., a foreign corporation; DOE  
INDIVIDUALS 1-100,  
ROE BUSINESS ENTITIES 1-100,

Defendants.

AND RELATED CASES

Case No.: A-16-739887-C  
Dept. No.: XXXI

**PLAINTIFFS' OPPOSITION TO  
DEFENDANT/THIRD PARTY  
DEFENDANT THYSSENKRUPP  
ELEVATOR CORPORATION'S MOTION  
IN LIMINE #8 RE: EXCLUDE [sic] THE  
TESTIMONY OF SHEILA NABORS  
SWETT**

**Date of hearing: March 28, 2019  
Time of hearing: 10:00 a.m.**

Plaintiffs Joe N. Brown and Nettie J. Brown ("Plaintiffs") hereby file this Opposition to Motion *in Limine* #8 Re: Exclude [sic] the Testimony of Sheila Nabors Swett ("TKE MiL #8") filed by Defendant/Third Party Defendant Thyssenkrupp Elevator Corp. ("TKE").

///

**PLAINTIFFS' OPPOSITION TO DEFENDANT/THIRD PARTY DEFENDANT  
THYSSENKRUPP ELEVATOR CORPORATION'S MOTION IN LIMINE #8 RE:  
EXCLUDE [sic] THE TESTIMONY OF SHEILA NABORS SWETT**

1       **I. INTRODUCTION**

2           TKE MiL #8 asserts that Plaintiffs’ expert witness, Sheila N. Swett, should not be permitted  
3       to testify, asserting that she lacks specialized knowledge regarding escalator safety and so cannot  
4       qualify as an expert under NRS 50.275. TKE MiL #8 at 9:16-21. The motion further claims that  
5       Ms. Swett should be forbidden from testifying because “Ms. Swett admitted that the alleged ‘dirty’  
6       condition of the escalator did not cause Plaintiff’s fall.” *Id.* at 10:26-27.

7           Regrettably, TKE’s brief includes recitations of Ms. Swett’s experience and opinion that  
8       bear *little resemblance* to her report or her testimony. Ms. Swett testified extensively concerning  
9       her decades of experience designing, inspecting, and issuing permits for escalators, and her service  
10      on the engineering code subcommittees that set standards for escalator maintenance and  
11      inspection. Her opinion – clearly stated in her expert report and at her deposition – is that  
12      Plaintiffs’ injuries were caused by cracked steps in the down escalator at the Golden Nugget in  
13      Laughlin, and had the escalator been properly maintained the incident would not have occurred.

14           Ms. Swett is qualified to testify under Nevada law. Her opinions are precisely the sort  
15      contemplated by NRS 50.275. TKE is entitled to disagree with her opinions, and to resist them if  
16      it can through cross-examination or the presentation of contrary evidence; but it is not entitled to  
17      exclusion of her testimony.

18       **II. LAW AND ARGUMENT: TKE’S MiL #8 RELIES ON CAREFULLY CURATED**  
19       **PORTIONS OF MS. SWETT’S TESTIMONY AND QUALIFICATIONS, AND IT**  
20       **FAILS UPON A PLAIN AND UNEDITED REVIEW OF HER TESTIMONY AND**  
21       **QUALIFICATIONS**

22           TKE’s brief begins with an attack on Ms. Swett’s qualifications carefully-edited to omit  
23      portions of her testimony regarding her experience. TKE MiL #8 at 4:15-22. The ellipses in this  
24      passage omits her testimony that she designed escalators, including “all the ones Dover [Elevator  
25      Company] ever did.” *See* TKE MiL #8, Exhibit B, at 44:6-11. In addition, Ms. Swett has served  
26      as an alternate or member of ASME code subcommittees on elevator and escalator maintenance  
27      and inspection. *Id.*, Exhibit B, at 45:2-22.

28           **PLAINTIFFS’ OPPOSITION TO DEFENDANT/THIRD PARTY DEFENDANT**  
29           **THYSSENKRUPP ELEVATOR CORPORATION’S MOTION IN LIMINE #8 RE:**  
30           **EXCLUDE [*sic*] THE TESTIMONY OF SHEILA NABORS SWETT**

1 TKE also elected to omit references to Ms. Swett's work as an inspector of escalators in  
2 Alabama, Missouri, and Texas: she testified that she inspects about 100 escalators per year and  
3 has inspected 800-1,000 escalators during the course of her career. *Id.*, Exhibit B, at 145:11-146:2.  
4 Further, she is responsible for issuing permits and citations for escalators, *id.*, Exhibit B, at 148:18-  
5 24, and has authority – which she has exercised within the past year – to shut down escalators as  
6 a third-party inspector on behalf of the states where she works. *Id.*, Exhibit B, at 147:5-10. TKE's  
7 claim that she "has no relevant escalator maintenance experience," TKE MiL #8 at 9:16-18 is thus  
8 – to be charitable – ***highly misleading***. In reality, she has "special knowledge, skill, experience,  
9 training or education" in the fields of escalator design, maintenance, inspection, and safety, just as  
10 envisioned by NRS 50.275.

11 TKE's brief concludes by mischaracterizing Ms. Swett's opinion: she did not testify that  
12 Plaintiff's injuries resulted from dirt, but rather cracks in the escalator steps that were (i) a known  
13 issue with the type of escalator in use and (ii) were known by the Defendants to have previously  
14 plagued the down escalator at the Golden Nugget in Laughlin. TKE MiL #8, Exhibit B, at 114:7-  
15 22. She specifically opined that because cracking is "a known issue for that step ... they should  
16 have looked for those cracks." *Id.*, Exhibit B, at 126:16-18. In fact, evidence previously provided  
17 to the Court in motion practice shows that Defendants were aware that the steps had experienced  
18 cracking before, a point mentioned by Ms. Swett in her testimony. *Id.*, Exhibit B, at 114:19-22.<sup>1</sup>

19 TKE's arguments about dirt are simply strawmen. Ms. Swett concluded TKE "failed to  
20 watch over and do adequate preventive maintenance specifically on the step and roller assemblies  
21 having had prior knowledge of occurrences and replaced some of them in 2012. This placed the  
22 riding public in known danger." *Id.*, Exhibit A, at Bates No. JNB\_002308. The issue was the  
23 Defendants' failure to maintain the escalator "in a safe operating condition" in light of its known

24 <sup>1</sup> As the Court is aware, evidence held by TKE and not produced until after the close of  
25 discovery has necessitated reopening discovery on this issue; additional evidence developed in this  
26 area may, of course, impact Ms. Swett's opinion.

1 defects. *Id.* TKE undoubtedly does not like this conclusion, but it is well-founded in the evidence  
2 and within Ms. Swett's area of expertise.

3 **III. CONCLUSION**

4 For all the foregoing reasons, TKE MiL #8 should be DENIED.

5 Dated February 15, 2019.

Respectfully Submitted,

6 IQBAL LAW PLLC

7 By: /s/ Mohamed A. Iqbal, Jr.

8 Mohamed A. Iqbal, Jr. (NSB #10623)

9 Christopher Mathews (NSB #10674)

*Attorneys for Plaintiffs*

10  
11  
12 **CERTIFICATE OF SERVICE**

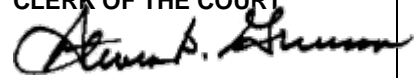
13 I HEREBY CERTIFY that I am an employee of IQBAL LAW PLLC, and that on this 15th day of  
14 February 2019, I caused to be served a true and correct copy of the foregoing **PLAINTIFFS'**  
15 **OPPOSITION TO DEFENDANT/THIRD PARTY DEFENDANT THYSSENKRUPP**  
16 **ELEVATOR CORPORATION'S MOTION IN LIMINE #8 RE: EXCLUDE [sic] THE**  
17 **TESTIMONY OF SHEILA NABORS SWETT**, by transmitting the same via the Court's  
18 electronic filing services to the Counsel and other recipients set forth on the service list.

19  
20 /s/ Marie-Claire Alsanjakli

21 An employee of IQBAL LAW PLLC

22  
23  
24  
25 **PLAINTIFFS' OPPOSITION TO DEFENDANT/THIRD PARTY DEFENDANT**  
26 **THYSSENKRUPP ELEVATOR CORPORATION'S MOTION IN LIMINE #8 RE:**  
27 **EXCLUDE [sic] THE TESTIMONY OF SHEILA NABORS SWETT**





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DISTRICT COURT  
CLARK COUNTY, NEVADA

JOE N. BROWN, an individual, and his Wife, NETTIE J. BROWN, an individual  Plaintiffs,  vs.  LANDRY'S, INC., a foreign corporation; GOLDEN NUGGET, INC. a Nevada corporation, d/b/a GOLDEN NUGGET LAUGHLIN; GNL, CORP., a Nevada corporation; THYSSENKRUPP ELEVATOR CORP., a foreign corporation; DOE INDIVIDUALS 1-100, ROE BUSINESS ENTITIES 1-100,  Defendants.  AND RELATED CASES	Case No.: A-16-739887-C Dept. No.: XXXI  <b>PLAINTIFFS' OPPOSITION TO DEFENDANT/THIRD PARTY DEFENDANT THYSSENKRUPP ELEVATOR CORPORATION'S MOTION IN LIMINE #3 RE: RESPONSIBILITY AVOIDANCE AND REPTILE THEORY [sic] ARGUMENTS</b>  <b>Date of hearing: March 28, 2019 Time of hearing: 10:00 a.m.</b>
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Plaintiffs Joe N. Brown and Nettie J. Brown ("Plaintiffs") hereby file this Opposition to Motion *in Limine* #3 Re: Responsibility Avoidance and Reptile Theory (*sic*) Arguments ("TKE MiL #3") filed by Defendant/Third Party Defendant Thyssenkrupp Elevator Corp. ("TKE").

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**PLAINTIFFS' OPPOSITION TO DEFENDANT/THIRD PARTY DEFENDANT  
THYSSENKRUPP ELEVATOR CORPORATION'S MOTION IN LIMINE #3 RE:  
RESPONSIBILITY AVOIDANCE AND REPTILE THEORY [sic] ARGUMENTS**

1       **I. INTRODUCTION**

2           TKE MiL #3 asserts that TKE’s lawyer “has been involved in past trials wherein plaintiffs  
3 have attempted to argue that the Defendant has ‘refused to accept responsibility’ for an accident  
4 or incident,” TKE MiL #3 at 3:27-28. According to TKE, Plaintiffs must be “precluded” from  
5 making such arguments. *Id.* at 4:3-4. The motion also contains a request – not mentioned in the  
6 caption or in the opening discussion of relief sought – for an instruction against urging potential  
7 jurors in *voir dire* to “rat out” jurors who fail to follow the law. *Id.* at 11:24-12:27.

8           The bulk of TKE’s brief is given over to a lengthy disquisition on what TKE calls “reptile  
9 strategy.” *See generally id.* at pp. 6-11 and 13-14. This strategy is allegedly set forth in a 2009  
10 book by authors David Ball and Don C. Keenan, *id.* at 6:26-27; however, TKE MiL #3 notably  
11 contains no excerpts from the book nor any affidavits or other evidence concerning its contents.

12       **II. LAW AND ARGUMENT: TKE’S CONCLUSORY ASSERTIONS CONTRADICT**  
13       **NEVADA LAW**

14           To the extent TKE MiL #3 seeks a prohibition against disparaging parties for exercising  
15 their right to trial, Plaintiffs have no quarrel; and in fact, would expect the Court’s ruling on the  
16 matter to extend to all the parties. Parties have a fundamental right to seek to vindicate their rights  
17 in court. However, the assertion in TKE’s brief that counsel “are prohibited from inviting a jury  
18 to look disparagingly on anyone who appears in a courtroom in the United States – including the  
19 Defendant – to exercise their right to defend themselves,” TKE MiL #3 at 6:14-16, takes that  
20 argument a step too far. While it may be inappropriate to disparage someone *for* exercising their  
21 right to defend, it is not at all inappropriate to comment on a defendant’s culpability for the acts or  
22 omissions that form the basis for plaintiffs’ claims or to thus “disparage” a defendant for its  
23 conduct.

24           TKE argues at length (*see generally* TKE MiL pp. 6-9) that Plaintiffs must be barred from  
25 citing any “safety rules.” Not surprisingly, there is no citation whatsoever to *any legal authority*  
26 in this section of TKE’s brief; apparently not even one court in the United States in the decade

27       **PLAINTIFFS’ OPPOSITION TO DEFENDANT/THIRD PARTY DEFENDANT**  
28       **THYSSENKRUPP ELEVATOR CORPORATION’S MOTION IN LIMINE #3 RE:**  
      **RESPONSIBILITY AVOIDANCE AND REPTILE THEORY [*sic*] ARGUMENTS**

1 since publication of the book referenced by TKE has adopted the rule urged by TKE MiL #3. In  
2 fact, to the extent TKE cites any legal authority at all, it reaches outside this state for rules that are  
3 flatly *contrary* to Nevada law. TKE argues, for example, that a jury must not be allowed to “make  
4 an example of a tort defendant,” TKE MiL #3 at 9:8-9, when in fact Nevada law explicitly allows  
5 for awarding exemplary damages “for the sake of example and by way of punishing the defendant.”  
6 NRS 42.005(1).

7 TKE also argues that Plaintiffs cannot urge the jurors to consider any “potential harms and  
8 losses that could have occurred in the community” because it would be “irrelevant and unfairly  
9 prejudicial”. TKE MiL #3 at 11:5-18. Once again, TKE is wrong. When determining “whether  
10 a defendant's conduct is so reprehensible as to warrant the imposition of punitive damages” the  
11 trier of fact “may consider evidence ... that may show that the defendants' conduct, which harmed  
12 the plaintiffs, may also present a substantial risk *to the general public.*” *Wyeth v. Rowatt*, 244  
13 P.3d 765, 783 n.11 (Nev. 2010)(emphasis added and internal citation omitted). This is particularly  
14 significant here, as evidence (including TKE’s own documents cited in previous briefing before  
15 the Court) shows all of the Defendants were aware of defects in the down escalator at the Golden  
16 Nugget in Laughlin that placed the public at serious risk.

17 To the extent that the Court would admonish all parties against disparaging each other  
18 simply for having gone to court, Plaintiffs would welcome such an order. The specific requests in  
19 TKE MiL #3, however are – to the extent they are even spelled out in TKE’s brief – contrary to  
20 settled Nevada law. The remainder of TKE MiL #3, to the extent that it seeks a general prohibition  
21 against tactics contained in a book not provided the Court, is simply too vague to be granted.

22  
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27 **PLAINTIFFS’ OPPOSITION TO DEFENDANT/THIRD PARTY DEFENDANT**  
28 **THYSSENKRUPP ELEVATOR CORPORATION’S MOTION IN LIMINE #3 RE:**  
**RESPONSIBILITY AVOIDANCE AND REPTILE THEORY [sic] ARGUMENTS**

1     **III.     CONCLUSION**

2             For all the foregoing reasons, TKE MiL #3 should be DENIED.

3     Dated February 15, 2019.

Respectfully Submitted,

4             IQBAL LAW PLLC

5             By: /s/ Mohamed A. Iqbal, Jr.

6                     Mohamed A. Iqbal, Jr. (NSB #10623)

7                     Christopher Mathews (NSB #10674)

*Attorneys for Plaintiffs*

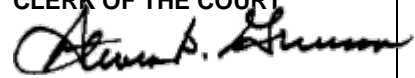
8                     **CERTIFICATE OF SERVICE**

9     I HEREBY CERTIFY that I am an employee of IQBAL LAW PLLC, and that on this 15th day of  
10    February 2019, I caused to be served a true and correct copy of the foregoing **PLAINTIFFS’**  
11    **OPPOSITION TO DEFENDANT/THIRD PARTY DEFENDANT THYSSENKRUPP**  
12    **ELEVATOR CORPORATION’S MOTION IN LIMINE #3 RE: RESPONSIBILITY**  
13    **AVOIDANCE AND REPTILE THEORY [sic] ARGUMENTS**, by transmitting the same via  
14    the Court’s electronic filing services to the Counsel and other recipients set forth on the service  
15    list.  
16

17  
18                     /s/ Marie-Claire Alsanjakli

19                     An employee of IQBAL LAW PLLC

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27             **PLAINTIFFS’ OPPOSITION TO DEFENDANT/THIRD PARTY DEFENDANT**  
28             **THYSSENKRUPP ELEVATOR CORPORATION’S MOTION IN LIMINE #3 RE:**  
              **RESPONSIBILITY AVOIDANCE AND REPTILE THEORY [sic] ARGUMENTS**



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*Attorneys for Plaintiffs*

DISTRICT COURT

CLARK COUNTY, NEVADA

JOE N. BROWN, an individual, and his Wife, NETTIE J. BROWN, an individual  Plaintiffs,  vs.  LANDRY'S, INC., a foreign corporation; GOLDEN NUGGET, INC. a Nevada corporation, d/b/a GOLDEN NUGGET LAUGHLIN; GNL, CORP., a Nevada corporation; THYSSENKRUPP ELEVATOR CORP., a foreign corporation; DOE INDIVIDUALS 1-100, ROE BUSINESS ENTITIES 1-100,  Defendants.  AND RELATED CASES	Case No.: A-16-739887-C Dept. No.: XXXI  <b>PLAINTIFFS' OPPOSITION TO DEFENDANT/THIRD PARTY DEFENDANT THYSSENKRUPP ELEVATOR CORPORATION'S MOTION IN LIMINE #6 RE: EXCLUSION OF EVIDENCE OF SUBSEQUENT INCIDENTS</b>  <b>Date of hearing: March 28, 2019 Time of hearing: 10:00 a.m.</b>
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Plaintiffs Joe N. Brown and Nettie J. Brown ("Plaintiffs") hereby file this Opposition to Motion *in Limine* #6 Re: Exclusion of Evidence of Subsequent Incidents ("TKE MiL #6") filed by Defendant/Third Party Defendant Thyssenkrupp Elevator Corp. ("TKE").

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**PLAINTIFFS' OPPOSITION TO DEFENDANT/THIRD PARTY DEFENDANT  
THYSSENKRUPP ELEVATOR CORPORATION'S MOTION IN LIMINE #6 RE:  
EXCLUSION OF EVIDENCE OF SUBSEQUENT INCIDENTS**

1       **I. INTRODUCTION**

2           TKE MiL #6, filed on November 13, 2018, contends that Plaintiffs should be prohibited  
3       from offering evidence concerning a second incident in which patrons were injured on the same  
4       escalator that injured Plaintiff Joe N. Brown (“Joe Brown”). TKE argues this incident could not  
5       “relate to notice of the prior condition of the escalator,” and thus should be excluded. TKE MiL  
6       #6 at 3:27-4:3. The motion contains no other grounds for exclusion.

7       **II. LAW AND ARGUMENT: TKE’S MOTION FAILS ON THE VERY CASELAW IT**  
8       **CITES**

9           TKE contends that evidence of other incidents is “irrelevant and inadmissible.” TKE MiL  
10       #6 at 5:17-21, relying principally on a memorandum opinion in *Lologo v. Wal-Mart Stores, Inc.*,  
11       2016 U.S. Dist. LEXIS 100559 at \*9 (D. Nev., July 29, 2016) for this proposition. However, as  
12       that court observed, to “exclude evidence on a motion in limine the evidence must be inadmissible  
13       on all potential grounds.” *Id.* at \*4. Thus, even if evidence of the subsequent incident does not in  
14       itself show *knowledge* of a prior condition, it may still be admissible for other reasons. *Id.* at \*5.

15           The Nevada Supreme Court has held that “evidence of subsequent, similar accidents  
16       involving the same condition may be relevant on the issues of causation and whether there is a  
17       defective and dangerous condition.” *Reingold v. Wet ‘N Wild Nevada, Inc.*, 944 P.2d 800, 802  
18       (Nev. 1997). Here, the existence of a dangerous condition at the time of Joe Brown’s injury has  
19       been repeatedly denied by the defendants.

20           For example: in their pending motion for summary judgment, the defendants contend that  
21       all of the steps on the down escalator were replaced in 2012; that the day after the May 12, 2015,  
22       incident that broke Joe Brown’s neck, a state inspector “specifically ‘checked the [escalator] steps  
23       to make sure they were in good working order’”; and that the inspector “found no malfunctions or  
24       violations, and placed the down escalator back in service.” *See* Defendants’ Motion for Summary

25  
26           **PLAINTIFFS’ OPPOSITION TO DEFENDANT/THIRD PARTY DEFENDANT**  
27           **THYSSENKRUPP ELEVATOR CORPORATION’S MOTION IN LIMINE #6 RE:**  
28           **EXCLUSION OF EVIDENCE OF SUBSEQUENT INCIDENTS**

1 Judgment on Liability and Punitive Damages (“MSJ”) at 5:3-5; 6:10-18.<sup>1</sup> The defendants argue  
2 this means there were no problems with the escalator at the time of the incident: “The requirements  
3 for equipment shut off means that the subject “down” escalator, once turned back on, would have  
4 been in the same condition at the time of inspection as the time of Plaintiff’s fall,” and further  
5 contend, based on the inspector’s action, that the escalator “was safe for public use” at the time  
6 Plaintiff JNB was injured. MSJ at 10:5-12. Thus, the question of causation remains at issue.

7 During discovery, TKE engineer Chris Dutcher testified that there was another accident  
8 occurred involving the same escalator on May 25, 2012. The same state inspector examined the  
9 escalator and issued a notice of violation because the escalator’s step chain was out of compliance  
10 with state standards. See Exhibit A attached hereto, the Transcript of Deposition of Chris Dutcher  
11 (“Dutcher Dep. Tr.”) at 184:11-19. The inspector did not, however, observe any cracked steps;  
12 these were discovered by Dutcher a day or two later. Dutcher Dep. Tr. at 163:4-14, 174:7-11.  
13 These cracks affected 40 of the escalator’s 57 steps, such that they posed “a serious safety issue  
14 for the riding passengers.” MSJ, Exhibit M (email from TKE to GNL, and attached documents).  
15 Internal TKE emails (not produced by TKE until after the close of discovery) indicate that at least  
16 35 of the steps on the down escalator were of an older, obsolete design; this design is known to be  
17 prone to cracking. Discovery on this subject is still ongoing.

18 Mr. Dutcher testified that in his opinion as the person responsible servicing the escalator  
19 for eight years (2010-2018), those cracks formed prior to May 7, 2015. Dutcher Dep. Tr. at 174:12-  
20 175:5. The fact that cracked steps posing “a serious safety issue” for the public were observed on  
21

---

22  
23 <sup>1</sup> The MSJ was filed by the Defendants Landry’s Inc., Golden Nugget Inc., and GNL, Corp  
24 (the “Nugget Defendants”); but TKE specifically adopted and incorporated by reference the facts  
25 alleged by the Nugget Defendants. See e.g. Defendant/Third Party Defendant Thyssenkrupp  
26 Elevator Corp.’s Joinder In, and Additional Points and Authorities in Support of, Defendant GNL,  
Corp.’s [*sic*] Motion for Summary Judgment on Punitive Damages (“Joinder”) at 4:7-9; see also  
Joinder at 8:8-14 (further asserting the steps “were replaced in 2012” and relying on the state  
inspection following the injuries to Joe Brown).

1 May 27, 2015, less than two weeks after Joe Brown was injured, lends credence to Plaintiffs'  
2 contention (supported by Mr. Dutcher) that the cracks were present on May 12, 2015. None of the  
3 defendants have conceded that this defect existed at the time of Joe Brown's injury, thus placing  
4 this element of causation at issue.

5 Moreover, the fact that the state inspector failed to observe that over 70% of the steps on  
6 the down escalator displayed cracks (causing what TKE's personnel describe as "a serious safety  
7 issue" for the public) and missed that fact even after two injury accidents in quick succession—  
8 calls into question the validity of his observations and the weight, if any, to be accorded his  
9 judgment. Evidence suggesting the inspector was inattentive, unobservant, or just plain wrong is  
10 admissible to undercut the defendants' reliance on his supposed clean bill of health for their  
11 equipment, and on his findings that the escalator was at *any* point "in perfect working order." MSJ  
12 at 9:26-27.

13 Because the subsequent incident tends to establish causation (a matter at issue because the  
14 defendants refuse to concede it) and to impeach the conclusions of the state inspector (at issue  
15 because the defendants rely on them), it does not meet the "inadmissible on all potential grounds"  
16 standard required for exclusion on a motion *in limine* set forth in *Lologo*, 2016 U.S. Dist. LEXIS  
17 100559 at \*4.

18 **III. CONCLUSION**

19 For all the foregoing reasons, TKE MiL #6 should be DENIED.

20 Dated February 15, 2019.

Respectfully submitted,

21 IQBAL LAW PLLC

22 By: /s/ Mohamed A. Iqbal, Jr.

23 Mohamed A. Iqbal, Jr. (NSB #10623)

24 Christopher Mathews (NSB #10674)

*Attorneys for Plaintiffs*

25  
26 **PLAINTIFFS' OPPOSITION TO DEFENDANT/THIRD PARTY DEFENDANT**  
27 **THYSSENKRUPP ELEVATOR CORPORATION'S MOTION IN LIMINE #6 RE:**  
28 **EXCLUSION OF EVIDENCE OF SUBSEQUENT INCIDENTS**



1 **CERTIFICATE OF SERVICE**

2 I HEREBY CERTIFY that I am an employee of IQBAL LAW PLLC, and that on this 15th day of  
3 February 2019, I caused to be served a true and correct copy of the foregoing **PLAINTIFFS’**  
4 **OPPOSITION TO DEFENDANT/THIRD PARTY DEFENDANT THYSSENKRUPP**  
5 **ELEVATOR CORPORATION’S MOTION IN LIMINE #6 RE: EXCLUSION OF**  
6 **EVIDENCE OF SUBSEQUENT INCIDENTS** by transmitting the same via the Court’s  
7 electronic filing services to the Counsel and other recipients set forth on the service list.  
8

9  
10 /s/ Marie-Claire Alsanjakli  
11 An employee of IQBAL LAW PLLC  
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26 **PLAINTIFFS’ OPPOSITION TO DEFENDANT/THIRD PARTY DEFENDANT**  
27 **THYSSENKRUPP ELEVATOR CORPORATION’S MOTION IN LIMINE #6 RE:**  
28 **EXCLUSION OF EVIDENCE OF SUBSEQUENT INCIDENTS**

# **EXHIBIT A**

# **EXHIBIT A**

JNB02461

1 DISTRICT COURT  
CLARK COUNTY, NEVADA  
2 -----x  
JOE N. BROWN, an individual, and  
3 his Wife, NETTIE J. BROWN, an individual,  
4 Plaintiffs,  
Case No.: A-16-739887-C  
5 -against- Dept. No.: XXXI  
6 LANDRY'S, INC., a foreign corporation;  
GOLDEN NUGGET, INC., a Nevada  
7 corporation, d/b/a GOLDEN NUGGET  
LAUGHLIN; GNL, CORP.; DOE INDIVIDUALS  
8 1-100; ROE BUSINESS ENTITIES 1-100,  
Defendants.

9 -----x  
AND ASSOCIATED CASES  
10 -----x

11 May 14, 2018

12 10:07 a.m.

13  
14 Deposition of CHRIS DUTCHER, held at the offices of  
15 ThyssenKrupp, 519 8th Avenue, 6th Floor, New York, New York,  
16 pursuant to Notice, before Renate Reid, Registered Professional  
17 Reporter and Notary Public of the State of New York.

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1 A P P E A R A N C E S:

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1                   A.   So it was after.

2                   BY MR. IQBAL:

3                   Q.   It was after.

4                   It was during --

5                   A.   We identified the cracked steps

6                   after --

7                   Q.   After.

8                   A.   -- the incident.

9                   Q.   After the incident.

10                  Either 5/27 or 5/28, correct?

11                  A.   Yes.

12                  Q.   Not during the inspection with the  
13                  state inspector on the 25th, correct?

14                  A.   Correct.

15                  Q.   So going back to 2014, the middle  
16                  entry, dated 5/12/2015, what does, if you know,  
17                  "UNOC" mean?

18                  A.   Unoccupied.

19                  Q.   Unoccupied.

20                  What does that -- what does that mean?

21                  A.   Normally, they shouldn't have wrote it  
22                  in here; but normally it's for an elevator, like,  
23                  if someone is trapped inside an elevator, or if an  
24                  elevator shut down, they'll say unoccupied.  If  
25                  it's occupied, it's a higher response, a quicker

1 So you went out there May 7, 2015,  
2 correct?

3 A. Yes.

4 Q. And you were just looking at the  
5 rollers?

6 A. Yes.

7 Q. Okay. And then, at the end of May, as  
8 we established, sometime around May 27th, you  
9 discussed the cracked steps with Don Hartmann,  
10 correct?

11 A. Yes.

12 Q. Okay. So is it your personal belief,  
13 based on the fact that for eight years you were  
14 the one inspecting and handling the down escalator  
15 and the up escalator at the Nugget for Thyssen --  
16 is it your belief that the cracks in the steps on  
17 the down escalator were formed sometime between  
18 May 7, 2015, and May 12, 2015?

19 A. No.

20 MS. MCLEOD: Same objection; also,  
21 argumentative.

22 THE REPORTER: Also what?

23 MR. IQBAL: Argumentative.

24 BY MR. IQBAL:

25 Q. You said no, right?

1                   **A. Right.**

2                   Q. So given your almost ten years of  
3 experience now, is it your belief that the cracks  
4 formed sometime before May 7, 2015?

5                   **A. Yes.**

6                   Q. Okay. The last entry on this page  
7 shows that you were called -- before we get to  
8 that -- I'm sorry -- let's go back to May 7th.  
9 The description says, "The down esc handrail  
10 squeaking too much." And it says, "Caller, Don."

11                   Is it safe to assume that was Don  
12 Hartmann?

13                   **A. It was.**

14                   Q. Okay.

15                   **A. And he believed the handrail was making**  
16 **a squeaking sound.**

17                   Q. And when you got there, you disagreed  
18 with that assessment, correct?

19                   **A. Correct.**

20                   Q. And, in your belief, it was the step  
21 rollers, and they needed grease?

22                   **A. Yes.**

23                   Q. Okay. And you applied the grease?

24                   **A. I did.**

25                   Q. Okay. So just two weeks before that,

1 written up by the state."

2 Do you see that?

3 **A. Yes.**

4 Q. Okay. And given that you've done a  
5 bunch of these entries, I'm just going to ask you  
6 to look at the resolution that says "Replace step  
7 chain."

8 Can we assume that the step chain was  
9 replaced on June 8, 2015?

10 **A. Yes.**

11 Q. And this is the step-chain issue that  
12 the state shut down the escalator on the 26th of  
13 May, correct?

14 **A. For the violation.**

15 Q. Yes.

16 **A. Yes. But they didn't shut down the**  
17 **escalator.**

18 Q. Okay.

19 **A. They left it in service.**

20 Q. But the violation occurred on the 26th,  
21 and then the repair occurred on June 12th --  
22 June 8th?

23 **A. Yes.**

24 Q. Okay. Now, when we go back to

25 JNB 2018, at the bottom, you -- you testified that