

1
2 IN THE SUPREME COURT OF THE STATE OF NEVADA

3
4 Supreme Court No. Electronically Filed
District Court Case No. A-18-77276-1 Mar 17 2020 02:19 p.m.
5 Elizabeth A. Brown
Clerk of Supreme Court

6 VENETIAN CASINO RESORT, LLC, a Nevada limited liability company;
7 LAS VEGAS SANDS, LLC, a Nevada limited liability company,
8 Petitioners,

9 v.

10 EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND
11 FOR THE COUNTY OF CLARK, AND THE HONORABLE KATHLEEN
12 DELANEY in her capacity as District Judge,
Respondent,
13 JOYCE SEKERA, an individual,
14 Real Party in Interest

15
16 **APPENDIX TO PETITIONERS' EMERGENCY PETITION FOR WRIT OF**
17 **MANDAMUS AND/OR WRIT OF PROHIBITION UNDER NRAP RULES**
18 **21(a)(6) AND 27(e) AND ALTERNATIVE EMERGENCY MOTION TO STAY**
19 **UNDER NRAP RULES 8 AND 27(e).**
Volume 7 (Exhibits 40-42)

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Petitioners, VENETIAN CASINO RESORT, LLC and LAS VEGAS SANDS, LLC, by and through their counsel of record, Royal & Miles LLP, hereby submit is Appendix in compliance with Nevada Rule of Appellate Procedure 30.

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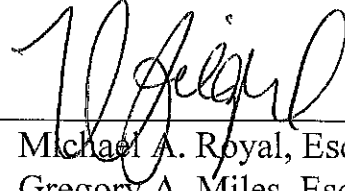
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1 The Appendix shall be contained in 13 separate volumes in accordance with
2 NRAP 30(c)(3) (2013), each volume containing no more than 250 pages.

3
4 DATED this 13 day of March, 2020.

5 ROYAL & MILES LLP

6
7
8 By: 

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the law firm of Royal & Miles LLP, attorney's for Petitioners, VENETIAN CASINO RESORT, LLC and LAS VEGAS SANDS, LLC, and that on the 17 day of March, 2020, I served true and correct copy of the foregoing APPENDIX TO PETITIONERS' EMERGENCY PETITION FOR WRIT OF MANDAMUS AND/OR WRIT OF PROHIBITION UNDER NRAP RULES 21(a)(6) AND 27(e) AND ALTERNATIVE EMERGENCY MOTION TO STAY UNDER NRAP RULES 8 AND 27(e) Volume 7 (Exhibits 40-42), by electronically filed with the Clerk of the Court by using ECF service which will provide copies to all counsel of record registered to the receive CM/ECF notification and by delivering the same via U.S. Mail addressed to the following:

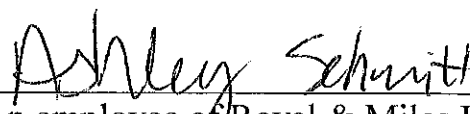
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Honorable Kathleen Delaney
Eighth Jud. District Court, Dept. 25
200 Lewis Avenue
Las Vegas, NV 89155
Respondent

Attorneys for Real Party in Interest


An employee of Royal & Miles LLP

1 when wet, constitutes an unreasonably dangerous condition. That the Venetian knows this and is
2 negligent in maintaining the floor (as products are available to make the floor more slip resistant when
3 wet) and is negligent in the training of Casino employees to mitigate the substantial risk that exists to
4 patrons when liquid is spilled on the marble flooring. The videos and the prior incidents go to notice
5 and Defendants have refused to stipulate to the admission of the prior incident reports, or even to discuss
6 the subject of admissibility nor has it produced the videos pertaining to the prior incidents. Plaintiff filed
7 two previous motions to compel prior incident reports and the videos that pertain to those reports. In the
8 Discovery Commissioner Report and Recommendation filed 12/27/2018, (see Exhibit 2) the Discovery
9 Commissioner made the following findings:

10
11 "there is a difference between a permanent condition and a transitory condition. If it is transitory, the
12 issue is whether or not the employees had reasonable notice of water on the floor to clean it up, so other
13 slip and falls are not relevant to the notice in that case. Here, Plaintiff is making the argument that the
14 Venetian's marble floor, in and of itself is not a problem, but turns into a fall hazard every time water
15 goes on the flooring, and that it is foreseeable people will bring in water bottles or drinks on the casino
16 floor which will end up on the floor, so the Discovery Commissioner finds the video is discoverable, with
17 certain exceptions."

18 On July 2, 2018, the Discovery Commissioner ordered Defendant to produce:

19 (3) Incident reports from five years prior to the incident (2011 - 2016) of slip and falls on the
20 marble floors located in Lobby 1, and

21 (4) Incident reports from three years prior to the incident (2015 - 2016) of slip and falls on
22 marble floors anywhere on the property.

23 See EXHIBIT 1 (July Discovery Commissioner's Order)

24 On November 29, 2018, the Discovery Commission ordered Defendant to produce video
25 footage. See EXHIBIT 2 (November Discovery Commissioner's R&R).

26 Defendant has repeatedly acted in bad faith and engaged in misleading and fraudulent discovery
27 tactics. Plaintiff has had to file two separate motions to compel, on March 28, 2018, and September 27,
28 2018, respectively. See Docket.

1 **III. Willful Failure to Produce Evidence and Cooperate**

2 Defendant has failed to comply with any of the above orders. Defendant produced prior reports
3 of slip and falls on the marble floor in lobby one from 2014 to 2016, and zero reports from 2011 to
4 2014.

5 Defendant produced 25 incident reports to Plaintiff, ranging from 7/10/2014 -- 5/25/2019, of slip
6 and falls on marble floors in both the lobby and other lobbies with marble floors. See EXHIBIT 3 (excel
7 spreadsheet of incident reports produced in Smith Case). Plaintiff recently became aware that the
8 incident reports produced are incomplete and deficient and Defendant failed to produce 35
9 reports from the same time period that they did produce in a different case, all those reports also
10 deal with slip and falls on wet marble floors. It is shocking that Defendants violated court orders and
11 selectively produced what they deemed to be discoverable to the Plaintiff. Moreover Defendant has
12 failed to produce any video footage that comply with the Discovery Commissioner's report and
13 recommendation, even though the District Court affirmed that recommendation on January 22, 2019.
14 *Goldstein Decl.* at 3, 4. Furthermore, Defendant has failed to supplement its disclosures and produce
15 additional reports knowing full well that the production to the Plaintiff in this case was grossly deficient.
16 One can only discern that Defendant intended to mislead Plaintiff and the Court by producing less than
17 half of the slip and fall incidents relevant to the discovery requests. Plaintiff requests that Defendants be
18 punished for this egregious conduct as enumerated below.

19
20 **IV. Discovery of Additional Incident Reports, Intentionally Omitted and Willfully**
21 **Suppressed by Defendant**

22 Keith Gallher, Esq. represents the Plaintiff in the pending case *Joyce Nakara v. Venetian Casino*
23 *Resort*, case no. A-18-772761-C, another slip and fall case against the same Defendant filed subsequent
24 to *Smith v. Venetian*. Mr. Gallher and Mr. Goldstein discussed their respective cases and what the
25 Venetian produced with regard to prior slip and fall incident reports on February 7, 2019. Mr. Goldstein
26 learned that Venetian produced twice as many prior incident reports to Mr. Gallher in *Nakara* than what
27 was produced in *Smith*. Mr. Gallher produced those prior reports to Mr. Goldstein's office on February
28 7, 2019. They contain 600 pages of PDP documents of prior slip and falls on wet marble floors.

1 Moreover, Mr. Gallagher took the deposition of a former EMT/security officer whose testimony
2 suggested that there may have been as many as 300 to 400 falls on marble floors at the Venetian within
3 the last eight years. Goldstein Decl. at 5, 6, 7, 8.

4 After comparing and compiling the prior incident reports from both cases it was clear that
5 Venetian produced 55 additional incident reports to Keith Gallagher in Byers Sekera v. Venetian of slip
6 and falls on marble floors in both Lobby 1 and other lobbies with marble flooring on the property from
7 2013-2016 that were produced by the Venetian yet were not produced in this case. See EXHIBIT 4 (the
8 of incident reports produced in Sekera case containing 61 prior reports in a spreadsheet with a column
9 indicating which incidents were not produced in Smith.). More than half of the Sekera reports were
10 intentionally omitted and not produced in the Smith case.

11
12 **V. Plaintiff Has Been Harmed and Prejudiced by Defendant's Deceit**

13 This case has been ongoing since March 2017 and discovery has been conducted with
14 incomplete and misleading information. Discovery closes on February 14, 2019. Depositions of expert
15 witnesses have been conducted based upon false and incomplete information. All previous discovery has
16 been severely tainted and compromised as result of Defendant's deceitful discovery tactics.

17 Plaintiff has relied on the incomplete and misleading reports produced by Defendant, and has
18 been severely prejudiced due to Defendant's willful and intentional suppression of evidence. If
19 Defendant's Answer is not stricken as a sanction for abusive litigation tactics, Plaintiff must re-conduct
20 its expert witness depositions and further discovery must be performed in light of this new information.
21 This is an extreme burden to Plaintiff in both time and expense, resulting in severe prejudice. Should
22 this motion be granted Plaintiff will submit a memorandum of fees and costs for the experts' retention
23 fees, expert depositions and attorney's fees incurred by conducting discovery based on misleading and
24 incomplete prior reports. Strikingly, during the depositions of Plaintiff's experts, one of defense
25 counsel's main lines of examination consisted of asking whether falls once or twice per month, rather
26 than nine or more per month constitute a danger knowing that his questions were based on false and
27 fraudulent discovery.

VI. Plaintiff Requests Terminating Sanctions

Defendant had these additional incident reports in its possession yet failed to produce them in discovery. Defendant has also completely failed to make any attempts to provide the ordered video footage, to review and approve the proposed order after it objected to the discovery Commissioner's report and recommendation or to engage in a good faith discussion of how to admit the prior falls into evidence since the names of the victims of the prior falls were redacted. We can infer the bad intent in this case. Defendant clearly found that it was better to be deceitful and attempt to hide evidence that would harm their case than comply with discovery orders or to produce required documents in discovery. It is impossible to know whether or not the *Sufara* case contains all the prior reports. At this point, nothing the Defendant produced in this case can be relied upon as true and correct. Defendant's deceit should not go unpunished. Even Defendant's rationale and argument for redacting the names of the victims of the prior falls is specious. Plaintiff believes that Defendant never obtained or attempted to obtain medical records pursuant to the HIPAA requests that it had prior fall victims of the dangerous slippery floor sign in order to shield providing the names of the victims in discovery. This is another example of the subterfuge that Defendant has engaged in to hide its clear liability and justify the following findings against Defendant:

- (i) a willful suppression of evidence occurred; and
- (ii) strike Defendant's Answer and affirmative defenses on liability and allow the case to proceed to trial on damages only;
- (iii) in absence of striking Defendant's Answer, allow for the additional incident reports produced in the *Sufara* case to be admitted into evidence in this case and require Defendant to produce videos associated with those omitted incident reports;
- (iv) award costs for expert witness fees, both past and prospective;
- (v) issue monetary sanctions for attorney fees against Defendant for its willful violation of multiple Discovery Orders and violations of relevant discovery rules.

VII. Willful Violation of Discovery Order

NRCP 37 provides for discovery sanctions for a party's willful violation of a discovery order and it is within the district court's "inherent equitable powers" to disallow a defense for abusive litigation practices. *Young v. Johnny Kleber Bldg. Ins.*, 109 Nev. 83, 92, 737 P.2d 777, 793 (1987).

1 (quotation omitted):

2 It is undisputed that Defendant has willfully violated multiple discovery orders. Defendant
3 failed to produce video footage and has attempted to mislead this Court by its selective production of
4 incident reports and failed in its duty to supplement its disclosures in discovery.

5 **A. Legal Standard.**

6 NRCP 37(c)(1) sets forth the appropriate sanctions for parties who fail to disclose and/or to
7 supplement disclosures of information required by NRCP 16.1 and 26(c)(1) and (2). NRCP 37(c)(1)
8 provides in pertinent part:

9 **(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.**

10 (1) A party without substantial justification fails to disclose information required by
11 Rule 16.1, 16.2, or 26(c)(1), or to amend a prior response to discovery as required by
12 Rule 26(c)(2), is not, unless such failure is harmless, permitted to use as evidence at a
13 trial, or a hearing, or on a motion any witness or information not so disclosed. In
14 addition to or in lieu of this sanction, the court, on motion or after affording an
15 opportunity to be heard, may impose other appropriate sanctions. In addition to
16 requiring payment of reasonable expenses, including attorney's fees, caused by the
17 failure, these sanctions may include any of the sanctions authorized under Rule
18 37(b)(2)(A), (B), and (C) and may include informing the jury of the failure to make
19 the disclosure.

20 In addition to informing the jury of the failure to make a disclosure, pursuant to NRCP 37(c)(1), the
21 following sanctions are authorized under NRCP 37(b)(2):

22 (A) An order that the matters regarding which the order was made or any other
23 designated facts shall be taken to be established for the purposes of the action in
24 accordance with the claim or the party obtaining the order;

25 (B) An order refusing to allow the disobedient party to support or oppose designated
26 claims or defenses, or prohibiting that party from introducing designated matters in
27 evidence;

28 (C) An order striking out pleadings or parts thereof, or staying further proceedings until
29 the order is obeyed, or dismissing the action or proceeding or any part thereof, or
30 rendering a judgment by default against the disobedient party;

31 NRCP 37(b)(2)(A), (B), and (C) (emphasis added).

32 Discovery sanctions are within the power of the district court, and the Supreme Court will not
33 reverse particular sanctions imposed absent a showing of abuse of discretion. *ENVI Corp. v. Service*

1 *Central Corp.*, 111 Nev. 866, 869, 900 P.2d 323, 325 (1995). While Nevada case law specific to
2 FRCP 37(e)(1) is limited, the Nevada Supreme Court has a long-standing history relying on case law
3 interpreting its Federal counterpart, when interpreting the Nevada Rules of Civil Procedure. *See e.g.*
4 *Cougan v. Gustavson*, 108 Nev. 517, 835 P.2d 795 (1992); *Benefer v. Tarrick*, 107 Nev. 625, 817 P.2d
5 1176 (1991). Federal courts have consistently held that Rule 37(e)(1) gave "teeth" to the disclosure
6 requirements mandated by the Rules of Civil Procedure. *Int'l By Molly Ltd. v. Deckers Outdoor*
7 *Corp.*, 259 F.3d 1101, 1106 (9th Cir.2011). The rule was "explicitly designed to punish negligent or
8 abusive behavior during discovery and to prevent any party from gaining an advantage as a result of
9 discovery antics." *Sanchez v. Shykar Corp.*, 2012 WL 1570565, at *2 (C.D. Cal. May 2, 2012) quoting
10 *Int'l By Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d at 1106.
11

12
13 Further, the Ninth Circuit has held that the burden is on the party who failed to comply with its
14 discovery obligations to demonstrate that it fits on of the two exceptions to sanctions. *Id.* At 1107
15 ("Implicit in Rule 37(e)(1) is that the burden is on the party facing sanctions to prove harmlessness").
16 Indeed, the burden is on the proponent of the evidence to demonstrate that the failure to disclose was
17 either substantially justified or harmless. *Id.* Moreover, according to the Ninth Circuit, a district court
18 need not find willfulness or bad faith to impose sanctions pursuant to Rule 37(e)(1). *Hoffman v. Clear*
19 *Protective Services, Inc.*, 541 F.3d 1175, 1179 (9th Cir. 2008).
20

21 B. Willful Suppression of Evidence

22 Alternatively, Plaintiff is requesting that a rebuttable presumption be granted against Defendant
23 for willfully and intentionally omitting the additional incident reports as well as the surveillance video.
24 Pursuant to Rules 47-250, it shall be a disputable presumption that "evidence willfully suppressed would
25 be adverse if produced and a recommendation that all the prior incident reports be admitted into
26 evidence."
27

28 In *Ross-Decker v. Davis*, 534 F.3d 102, the court clarified the distinction that must be drawn
between awarding a party a "rebuttable presumption" versus an "adverse inference." The court noted

1 that NRS 47.250(3) creates a rebuttable presumption when evidence is willfully suppressed or destroyed
2 with an intent to harm. See *Ross-Davis*, 134 F.3d at 187.

3 In this case, the evidence indicates that Defendant willfully omitted the inclusion of additional
4 incident reports that it actually had in its possession. This is worse than destroying evidence through the
5 general course of business. Defendant had the information and failed to produce it.

6 7 8 **VIII. Conclusion**

9 In summary, Defendant had these additional incident reports in its possession yet failed to
10 produce them in Discovery. Defendant has also completely failed to make any attempts to provide the
11 ordered video footage. We can infer the bad intent in this case. Defendant clearly found that it was
12 better to be dishonest and attempt to hide evidence that would harm their case than comply with
13 discovery orders or to produce required documents in discovery. It is difficult to know whether or not
14 the *Sykora* case contains all the prior reports. At this point, nothing the Defendant produced can be
15 relied on. Accordingly Plaintiff respectfully requests that this court grant her Motion and find:

- 16 (i) a willful suppression of evidence occurred; and
- 17 (ii) recommend the District Court strike Defendant's Answer and affirmative defenses on
- 18 liability and allow the case to proceed to trial on damages only;
- 19 (iii) recommend allowing for the additional incident reports produced in the *Sykora* case to be
- 20 admitted into evidence in this case and require Defendant to produce videos associated with
- 21 those omitted incident reports;
- 22 (iv) award costs for expert witness fees, both past and prospective;
- 23 (v) issue monetary sanctions for attorney fees against Defendant for its willful violation of
- 24 multiple Discovery Orders and violations of relevant discovery rules.

25 Dated: February 23, 2019

PETER GOLDSTEIN LAW CORPORATION

26 Signed: 

27 PETER GOLDSTEIN, SEIN 6892

28 Attorney for Plaintiff

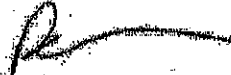
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2
3 **DECLARATION OF PETER GOLDSTEIN**

4 I, Peter Goldstein, declare as follows:

- 5 1. I am an attorney duly licensed to practice law in Nevada, and am counsel of record
6 for Plaintiff. I have personal knowledge of all matters stated herein that I know to be true.
- 7 2. The exhibits attached hereto are true and correct copies of the originals of those
8 documents that I have kept in my office file for this matter in the ordinary course of
9 business.
- 10 Exhibit 1 is the Discovery Commissioner's Report and Recommendations
11 from May 2, 2018.
- 12 Exhibit 2 is the Discovery Commissioner's Report and Recommendations
13 from October 31, 2018.
- 14 Exhibit 3 is a spreadsheet documenting the incident reports disclosed to
15 Plaintiff in the Smith v. Venetian case.
- 16 Exhibit 4 is a spreadsheet documenting the incident reports from Sekera v.
17 Venetian and a column of what was not disclosed in Smith v. Venetian.
- 18 Exhibit 5 is Plaintiff's proposed Order regarding the Defendant's
19 Objection to the Discovery Commissioner's Report and Recommendation, as well
20 as correspondence with my office and the Defendant, which has gone unanswered.
- 21 3. Defendant has failed to produce any video footage.
- 22 4. Defendant has failed to produce any incident reports from 2011 - 2013.
- 23 5. Mr. Keith Gallagher provided additional incident reports of slip and falls on
24 marble floor on property, produced by the Venetian in the case Sekera v. Venetian, Case
25 No. A-18-272761-G, on February 7, 2019.
- 26 6. I can provide PDF copies of all incident reports disclosed in the Smith v. Venetian
27 and Sekera v. Venetian cases, if required by the Court.
- 28 7. Defendant has refused to discuss the admissibility of prior reports.
- 29 8. Defendant has refused to respond to the proposed order submitted to them on
30 February 4, 2019.

1
2 I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and
3 correct.
4

5 Dated February 13, 2019 at Las Vegas, Nevada.
6

7
8 Signed: 
9

10 Peter Goldstein, Declarant
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CERTIFICATE OF SERVICE

Pursuant to Rule 5(b) of the Nevada Rules of Civil Procedure and (M.R.P.R. 5(b)) I certify that I am an employee of Peter Goldstein Law Corporation and that on February 13, 2019, I served a true and correct copy of the foregoing document entitled PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR TERMINATING SANCTIONS, MONETARY SANCTIONS FOR WILLFUL SUPPRESSION OF EVIDENCE PURSUANT TO NRCP RULE 37 upon all parties listed below, via the following means:

____ Via U.S. Mail by placing said document in a sealed envelope, with postage prepaid (M.R.C.P. 5(b))
☒ Via Electronic Filing (M.R.P.R. 5(b))
☒ Via Electronic Service (M.R.P.R. 9)
____ Via Facsimile (E.D.C.R. 7.26(c))

Michael Edwards
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Liam Madsen
Ryan Leavell
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Email: rleavell@messner.com
Attorney for Venetian Casino Resort, LLC

2/13/19
Date


Joseph J. Jordan
An employee of the Law Office of Peter Goldstein

EXHIBIT 10

Steven D. Grierson

MAMC
FARHAN R. NAQVI
Nevada Bar No. 8589
SARAH M. BANDA
Nevada Bar No. 11909
NAQVI INJURY LAW
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naqvi@naqvilaw.com
sarah@naqvilaw.com
Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

ANGELICA BOUCHER, individually,
Plaintiff,

vs.

VENETIAN CASINO RESORT, LLC d/b/a
VENETIAN RESORT HOTEL CASINO
d/b/a THE VENETIAN d/b/a THE
VENETIAN/THE PALAZZO; LAS VEGAS
SANDS, LLC d/b/a VENETIAN RESORT
HOTEL CASINO / PALAZZO RESORT
HOTEL CASINO d/b/a THE VENETIAN
CASINO d/b/a VENETIAN CASINO
RESORT; LAS VEGAS SANDS CORP.;
DOES 1 through 100 and ROE
CORPORATIONS 1 through 100, inclusive,

Defendants.

Case No.: A-18-773651-C
Dept. No.: X

**PLAINTIFF'S MOTION TO AMEND
COMPLAINT TO INCLUDE PUNITIVE
DAMAGES**

HEARING REQUESTED

Plaintiff ANGELICA BOUCHER, by and through her attorneys of record, FARHAN R.
NAQVI and SARAH M. BANDA of NAQVI INJURY LAW, hereby moves this Court pursuant
to Nevada Rule of Civil Procedure 15 to amend the Complaint to include punitive damages

VENETIAN

Responding Defendant reserves the right to supplement this response pursuant to the Nevada Rules of Civil Procedure.

RESPONSE TO REQUEST NO. 10:

Defendant objects to this request as overbroad, irrelevant, and to the extent it is not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections, please *see* Defendant's First Supplemental Early Case Conference List of Witnesses and Production of Documents at Bates Nos. VEN1423-VEN11782. Discovery is continuing and ongoing. Responding Defendant reserves the right to supplement this response pursuant to the Nevada Rules of Civil Procedure.¹⁹

The Defendant disclosed thirty-one (31) slip and fall incidents on the marble flooring in the Venetian, twenty-eight (28) of which occurred within two years of the incident at issue.²⁰ In the five (5) months preceding the subject incident, the Venetian responded to at least eight (8) known incidents involving patrons slipping on a liquid substance and falling to the ground.²¹

After taking the highly evasive depositions of two current Venetian Employees who responded to the incident (i.e. Emily Whiddon and Patrick Overfield), Plaintiff suspected that the Defendant had not produced all prior incidents involving slip and falls on the marble tile in the Venetian. After further researching the issue, the results are alarming and concerning, as outlined below.

Undisclosed Prior Incidents

A large concern in this case is the Defendant's failure to produce relevant prior incidents, which appears to be the Defendant's modus operandi. For example, a very recent review of the court filings revealed numerous incidents that were not disclosed, a few of which are outlined below:

¹⁹ See Defendant Venetian Casino Resort, LLC's Responses to Plaintiff's First Request for Production, attached hereto as *Exhibit 8*.

²⁰ See Venetian Security reports (7/22/11 – 5/25/16), collectively attached hereto as *Exhibit 9*.

²¹ See Venetian Security reports (2/20/16 – 5/25/16), collectively attached hereto as *Exhibit 9*.



- Joan Gartner v. Venetian, A-13-689661-C, which alleges a slip and fall on clear liquid in the Grand Lobby on September 18, 2012. Venetian was also represented by Messner Reeves LLP in this case.²²
- Bertha Matz v. Sands d/b/a Venetian, A-15-719757, which alleges a slip and fall on liquid in the lobby on June 23, 2013. Venetian was also represented by Messner Reeves LLP in this case.²³
- Nancy Rucker v. Venetian, A-15-729566-C, which alleges a slip and fall on clear liquid in the lobby on August 23, 2014. Venetian was also represented by Messner Reeves LLP in this case.²⁴

Additionally, the recent review of public records demonstrates that Defendant's modus operandi of hiding relevant prior incident reports has been raised in another matter, Sekera v. Venetian, A-18-772761-C.²⁵ In Sekera, Plaintiff's counsel spoke with counsel in another Venetian matter (the Smith case) and realized that Venetian was not producing all incident reports in all cases. For example, upon information and belief, Venetian produced 4 incident reports in the Smith case that were not produced in the Sekera case and, even more alarmingly, *Venetian produced 36 incident reports in Sekera that were not produced in Smith.* The Plaintiff in Sekera created and filed the following table with its Motion for Leave to Amend Complaint.²⁶

²² See Defendant Venetian Casino Resort, LLC's Motion in Limine to Preclude Any Arguments Regarding Alleged Spoliation of Evidence, Case No. A-13-689661-C, attached hereto as *Exhibit 10*.

²³ See JCCR, Case No. A-15-719757-C, attached hereto as *Exhibit 11*.

²⁴ See Complaint, Case No. A-15-729566-C, attached hereto as *Exhibit 12*.

²⁵ See Plaintiff's Motion for Leave to Amend Complaint, Case No. A-18-772761-C, pertinent parts attached hereto as *Exhibit 13*.

²⁶ See Plaintiff's Motion for Leave to Amend Complaint, Case No. A-18-772761-C, pertinent parts attached hereto as *Exhibit 13 (Exhibit 7, sub-exhibit 4 to said Motion)*.

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Incident Reports From Joyce Sekora v. Venetian Compared With Carol Smith v. Venetian

<u>Date of Incident</u>	<u>Incident Report ID</u>	<u>Location at Venetian</u>	<u>Disclosed in SMITH case?</u>
1 11/24/2013	1311V-5502	Grand Lux Café	No
2 11/24/2013	1311V-5588	Grand Hall	No
3 1/28/2014	1401V-5589	Lobby 1	No
4 5/2/2014	1405V-0423	Grand Hall	No
5 5/3/2014	1405V-0887	Grand Hall	No
6 5/3/2014	1405V-0704	Lobby 1	No
7 5/24/2014	1405V-5900	Lobby 1	No
8 6/28/2014	1406V-6987	Grand Lux Café	No
9 7/5/2014	1407V-1121	Lobby 1	No
10 7/30/2014	1407V-2272	Grand Lux Café	Yes
11 7/30/2014	1407V-2142	Grand Hall	No
12 7/13/2014	1407V-8057	Lobby 1	Yes
13 7/18/2014	1407V-4395	Lobby 1	No
14 7/25/2014	1407V-6125	Lobby 1	No
15 7/25/2014	1407V-6151	Grand Hall	No
16 7/29/2014	1407V-7161	Lobby 1	Yes
17 7/30/2014	1407V-7375	Lobby 1	No
18 8/4/2014	1408V-0843	Lobby 1	No
19 8/5/2014	1408V-1688	Lobby 1	No
20 8/28/2014	1408V-7104	Venetian Tower	Yes
21 8/31/2014	1408V-7791	Lobby 1	Yes
22 9/13/2014	1409V-2807	Lobby 1	No
23 9/15/2014	1409V-6261	Lobby 1	No
24 9/30/2014	1409V-6750	Grand Hall	No
25 10/11/2014	1410V-2258	Lobby 1	No
26 12/23/2014	1412V-4685	Lobby 1	No
27 1/17/2015	1501V-3857	Lobby 1	Yes
28 1/31/2015	1501V-6887	Lobby 1	No
29 1/9/2015	1502V-1809	Lobby 1	Yes
30 2/26/2015	1502V-4322	Lobby 1	Yes
31 3/8/2015	1503V-1561	Grand Hall	No
32 3/23/2015	1503V-9040	Lobby 1	No
33 4/24/2015	1504V-5395	Grand Hall	Yes
34 5/9/2015	1505V-0844	Grand Hall	No
35 5/22/2015	1505V-5319	Lobby 1	Yes
36 5/29/2015	1505V-7253	Lobby 1	No
37 5/30/2015	1505V-7906	Lobby 1	Yes
38 6/12/2015	1506V-2824	Lobby 1	No
39 6/30/2015	1506V-7489	Lobby 1	Yes
40 7/5/2015	1507V-1236	Venetian Tower	Yes
41 7/19/2015	1507V-5024	Grand Hall	No
42 7/19/2015	1507V-5121	Venetian Tower	Yes
43 7/26/2015	1507V-5392	Entrance/Lobby	No
44 8/2/2015	1508V-0357	Lobby 1	No
45 8/8/2015	1508V-1866	Grand Hall	No
46 8/8/2015	1508V-1869	Lobby 1	Yes
47 8/28/2015	1508V-7246	Lobby 1	Yes
48 9/6/2015	1508V-1497	Lobby 1	Yes
49 9/19/2015	1508V-3312	Grand Hall	No
50 12/27/2015	1512V-5875	Lobby 1	No
51 2/20/2016	1602V-4290	Lobby 1	Yes
52 3/6/2016	1603V-1233	Lobby 1	Yes
53 3/25/2016	1603V-5018	Lobby 1	Yes
54 4/9/2016	1604V-1950	Grand Hall	No
55 4/9/2016	1604V-1926	Lobby 1	Yes
56 4/10/2016	1604V-2136	Grand Hall	No
57 4/12/2016	1604V-2459	Lobby 1	Yes
58 5/5/2016	1605V-0852	Lobby 1	Yes
59 5/25/2016	1605V-5069	Lobby 1	Yes
60 7/7/2016	1607V-1506	Lobby 1	SMITH

36 Total Not Disclosed in Smith

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1 From this table, the Defendant has not produced the following **32 incident reports** in the instant
2 case: 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 13, 14, 15, 17, 18, 19, 22, 23, 24, 25, 26, 28, 31, 32, 34, 36, 41,
3 43, 45, 49, 54, and 56. Also, of note, is that the Defendant did not disclose the instant case in
4 Sekera even though the instant case occurred merely a month before said incident.

5
6 Plaintiff's counsel sent an email to defense counsel on June 12, 2019 at 4:43 p.m. which
7 stated as follows: "In the meantime, I wanted to request that you also check with your client and
8 confirm that there are not any additional incident reports related to slip and falls on the marble
9 that have not been disclosed. I believe you produced 31 prior incidents in your First
10 Supplement."²⁷ Rather than confirming that all incident reports have been produced, Defendant
11 makes veiled allegations of impropriety against Plaintiff's counsel through the following
12 email,²⁸

13
14 I am writing to follow up with you regarding an additional issue you raised during our telephone conference yesterday. As we discussed Defendant's
15 responses to Plaintiff's Requests for Production of Documents in the *Bausher v. Venetian* case, you stated that you have Venetian incident reports or documents
16 produced by Venetian in several different, active lawsuits currently pending against Venetian. Specifically, you claimed that by comparing Venetian's
17 production of these incident reports among the various cases, you identified inconsistencies among Venetian's disclosures -- the context of your statement
18 seemed to imply some degree of impropriety by Venetian that could be at issue in this case.

19 Considering the substance of your statements during our June 14, 2019 telephone conference, it appears that you -- or your law firm -- have obtained Venetian's
20 private/protected documents and information from unrelated, third-party sources, which is quite concerning to say the least.

21 In light of your claim that you contested Venetian's production of private/protected documents in extraneous, unrelated cases, further claiming that you
22 identified inconsistencies among Venetian's documents produced among the various cases, we request that you immediately contact our office in writing,
23 and provide the following information with respect to Venetian Casino Resort (including Palazzo, Las Vegas Sands Corp., and any related company)

- 24 (1) Specifically identify each and every document produced by Venetian, Palazzo, or any subsidiary of Las Vegas Sands Corp. in any other civil action, that
25 was obtained by you (or your law firm obtained, received or reviewed that was provided by any source other than the Venetian or its representative(s), or
26 that was obtained by you or your law firm from any source other than the Venetian outside of a civil action in which your firm actively appeared;
- 27 (2) Specifically identify all attorneys, law firms, or third-parties from whom you received such documents or protected information; and
- 28 (3) Identify the date each document was received and the format in which it was received (paper, mail, email, electronically, etc.).

Please let me know if you have any questions.

Truly,

David Pritchett

²⁷ See Email from Sarah M. Banda, Esq. (6/12/19), attached as *Exhibit 14*.

²⁸ See Email from David P. Pritchett, Esq. (6/12/19), attached as *Exhibit 15*.

VENETIAN

1 The email, in addition to misquoting Plaintiff's counsel as Plaintiff's counsel merely said that
2 she believes there are other incidents that have not been disclosed, indirectly acknowledges that
3 the Defendant has other incident reports and/or prior incident information that it has
4 intentionally withheld. However, instead of disclosing the same, Defendant makes allegations
5 that Plaintiff somehow obtained Venetian's private/protected documents. This too is untrue, as
6 all the information attached to this Motion and all information Plaintiff is aware of was obtained
7 through a recent search of public records and cases on the Court website.
8

9 To date, Defendant Venetian has engaged in a deliberate pattern of evasive discovery
10 abuse. For example, on June 14, 2019, the Discovery Commission heard the Plaintiff's Motion
11 to Compel Production of Documents, which was largely granted, and requested that the Court
12 compel items, such as the insurance policies, which the Defendant has yet to produce even
13 though this case has been pending for over a year.²⁹ The gamesmanship that has ensued thus far
14 in the discovery process leads the Plaintiff to believe that the failure to produce prior incident
15 reports is deliberate and further evidence of Defendant's belief that the rules do not apply to the
16 Venetian. Therefore, Plaintiff has reason to believe Defendant Venetian is withholding
17 additional highly relevant documents regarding prior similar incidents.
18

19
20 **The Incident at Issue**

21 This matter arises from an incident that occurred on June 11, 2016 at approximately 2:36
22 p.m. on the premises of the Venetian Resort Hotel Casino located at 3355 S. Las Vegas
23 Boulevard, Las Vegas, Nevada 89109.³⁰ On said date, Plaintiff was visiting the subject location
24 when she slipped and fell on a wet and slippery walking surface in the lobby area. The Venetian
25
26

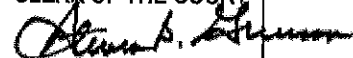
27
28 ²⁹ See Plaintiff's Motion to Compel Production of Documents, pleading only, attached hereto as *Exhibit 16*.

³⁰ See Venetian Incident Report related to the instant case, attached hereto as *Exhibit 17*.

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

Electronically Filed
8/5/2019 11:34 AM
Steven D. Grierson
CLERK OF THE COURT



Joyce Sekera, Plaintiff(s)

vs.

Venetian Casino Resort LLC, Defendant(s)

Case No.: A-18-772761-C

Department 25

NOTICE OF HEARING

Please be advised that the Plaintiff's Motion to Compel Testimony and Documents in the above-entitled matter is set for hearing as follows:

Date: September 06, 2019

Time: 9:00 AM

Location: RJC Level 5 Hearing Room
Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89101

NOTE: Under NEFCR 9(d), if a party is not receiving electronic service through the Eighth Judicial District Court Electronic Filing System, the movant requesting a hearing must serve this notice on the party by traditional means.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Joshua Raak
Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 9(b) of the Nevada Electronic Filing and Conversion Rules a copy of this Notice of Hearing was electronically served to all registered users on this case in the Eighth Judicial District Court Electronic Filing System.

By: /s/ Joshua Raak
Deputy Clerk of the Court



1 **OPPC**

2 Michael A. Royal, Esq.

3 Nevada Bar No. 4370

4 Gregory A. Miles, Esq.

5 Nevada Bar No. 4336

6 **ROYAL & MILES LLP**

7 1522 West Warm Springs Road

8 Henderson Nevada 89014

9 Tel: (702) 471-6777

10 Fax: (702) 531-6777

11 Email: mroyal@royalmilesllp.com

12 *Attorneys for Defendants*

13 *VENETIAN CASINO RESORT, LLC and*

14 *LAS VEGAS SANDS, LLC*

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 JOYCE SEKERA, an Individual;

CASE NO.: A-18-772761-C

DEPT. NO.: XXV

18 Plaintiff,

19 v.

20 VENETIAN CASINO RESORT, LLC, d/b/a
21 THE VENETIAN LAS VEGAS, a Nevada
22 Limited Liability Company; LAS VEGAS
23 SANDS, LLC d/b/a THE VENETIAN LAS
24 VEGAS, a Nevada Limited Liability Company;
25 YET UNKNOWN EMPLOYEE; DOES I
26 through X, inclusive,

Before the Discovery Commissioner

Hearing Date: September 6, 2019

Hearing Time: 9:00 am

27 Defendants.

28 **OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL TESTIMONY AND
DOCUMENTS AND COUNTERMOTION TO STRIKE FALSE ACCUSATIONS LEVIED
BY PLAINTIFF IN "I. INTRODUCTION" AND "LEGAL ARGUMENT" SECTION
"III.D." WITH APPROPRIATE SANCTIONS**

29 COMES NOW, Defendants, VENETIAN CASINO RESORT, LLC, and LAS VEGAS
30 SANDS, LLC (collectively referenced herein as *Venetian*), by and through their counsel, ROYAL &
31 MILES LLP, and hereby file this OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL
32 TESTIMONY AND DOCUMENTS AND COUNTERMOTION TO STRIKE FALSE

ROYAL & MILES LLP
1522 W Warm Springs Road
Henderson NV 89014
Tel: (702) 471-6777 • Fax: (702) 531-6777

1 ACCUSATIONS LEVIED BY PLAINTIFF IN "I. INTRODUCTION" AND "LEGAL ARGUMENT"
2 SECTION "III.D." WITH APPROPRIATE SANCTIONS.

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

6 DATED this 13 day of August, 2019.

8 ROYAL & MILES LLP

9 By

10 Michael A. Royal, Esq.
11 Nevada Bar No. 4370
12 1522 W. Warm Springs Rd.
13 Henderson, NV 89014
14 Attorney for Defendants
VENETIAN CASINO RESORT, LLC and
LAS VEGAS SANDS, LLC

15 DECLARATION OF MICHAEL A. ROYAL, ESQ.

16 STATE OF NEVADA)
17) ss.
18 COUNTY OF CLARK)

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

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

23 2. This action arises out of an alleged incident involving a floor located within a common
24 area of the Venetian casino on November 4, 2016, when Plaintiff claims to have slipped and fallen due
25 to a foreign substance on the marble floor located in the Grand Lux rotunda area of the property. The
26 accident facts are disputed. The incident is captured on surveillance, which has previously been
27 submitted to the Court for review.
28

1 3. On January 4, 2019, Defendants provided Supplemental Responses to Plaintiff's
2 Requests for Production of Documents and Materials to Defendant related to Plaintiff's request for
3 prior incident reports from November 4, 2013 to present. (*See* Exhibit A, Response No. 7.)
4 Defendants objected to the vast overreaching scope of Plaintiff's request, which was not limited to any
5 factually similar event in or around the same area prior and subsequently to the subject incident, and
6 was therefore not reasonably calculated to lead to the discovery of admissible evidence. (*See id.*)
7 Nevertheless, Defendants provided Plaintiff with sixty-four (64) prior incident reports in redacted form.
8

9 4. Defendants filed a motion for protective order related to the prior incident reports on
10 February 1, 2019 related to the sixty-four (64) redacted prior incident reports. The Discovery
11 Commissioner agreed that the prior incident reports were to remain in redacted form and that they were
12 not to be shared by Plaintiff. However, while the motion was pending, Plaintiff shared them all with
13 attorneys representing clients in other presently pending cases against Defendants. In fact, the day
14 preceding the March 13, 2019 hearing before the Discovery Commissioner, all sixty-four (64) redacted
15 prior incident reports were filed by Peter Goldstein, Esq., plaintiff's counsel in another case to support
16 a motion against Venetian in the matter of *Carol Smith v. Venetian Casino Resort, LLC*, case no. A-17-
17 753362-C. Mr. Galliher did not advise Defendants or the Discovery Commissioner of the disclosure
18 and public filing of the very same documents the Court then determined to be afforded production
19 under NRCP 26(c)
20
21

22 5. At the March 13, 2019 hearing, Mr. Galliher, Keith Galliher, Esq., advised the
23 Discovery Commissioner that when comparing Venetian's prior incident reports with those received
24 by Peter Goldstein, Esq., in the *Smith* matter, there were only four (4) additional reports he felt should
25 have been part of the sixty-four (64) prior incident reports disclosed by Defendants in this matter.
26 (*See* Exhibit B, *Transcript of Hearing Before Discovery Commissioner*, dated May 13, 2019, at 7, ln
27 13-21.)
28

1 6. On March 25, 2019, I sent correspondence to Mr. Galliher responsive to his incorrect
2 representation at the March 13, 2019 hearing related to the alleged four (4) undisclosed prior incident
3 reports. (See Exhibit C.)

4 7. Plaintiff's objection to the DCRR regarding the redacted prior incident reports was
5 heard on May 14, 2019, in which the District Judge reversed the DCRR and ordered production of
6 unredacted reports by Defendants. During that hearing, Mr. Galliher incorrectly represented that he
7 provided Mr. Goldstein with the redacted prior incident reports which were the subject of Defendants'
8 motion for protective order before the motion was filed with the Discovery Commissioner on February
9 1, 2019. (See Exhibit D, *Transcript of Proceeding - Objection to DCRR*, dated May 14, 2019, at 12,
10 in 11-13.) Based on a declaration filed by Mr. Goldstein, this representation Mr. Galliher made to the
11 Court was quite incorrect. (See Exhibit E, *Declaration of Peter Goldstein, Esq.*, dated February 13,
12 2019; Exhibit F, *Plaintiff's Reply to Defendant Venetian Casino Resort, LLC's Opposition to*
13 *Plaintiff's Motion for Terminating Sanctions*, filed March 12, 2019, *Smith v. VCR*, case no. A-17-
14 753362-C, at 2-3, Exhibits 10-11.)

15 8. The order reversing the April 2, 2019 DCRR was filed on July 31, 2019. (See Exhibit
16 G, *Order*, filed July 31, 2019.) Defendants have filed a motion for reconsideration on an order
17 shortening time.

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

23 *And that is the Venetian in the mid-2000s -- 2005, 2006, 2007 -- hired David*
24 *Elliott . . . to evaluate their floors at the Venetian and make recommendations*
25 *concerning how they can make the floors safer. The one thing we've determined so*
26 *far, Mr. Elliot told him that under no circumstances is marble an acceptable surface*

1 for a floor such as a hotel/casino like the Venetian. He made recommendations
2 concerning how they could go from marble to tile and increase the co-efficient of
3 friction -- slip resistance -- to the .5 industry standard from where it is now.

4 (See Exhibit H, *Transcript of Hearing on Motion for Leave to Amend*, dated May 28, 2019 hearing,
5 at 14, ln 10-23, emphasis added.)

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

8 11. A transcript of the David Elliott deposition was obtained subsequent to the May 28,
9 2019 hearing. (Exhibit I, *Transcript of David Elliott (taken February 13, 2009)*, in *Farina v. Desert*
10 *Palace, Inc.*, case no. A542232, attached hereto.)

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

13 Q. Essentially if you don't have carpet down, it's slippery when it's wet,
14 right?

15 A. No, sir. There's other tile that you can use that is very aesthetically
16 pleasing that will meet that standard.

17 Q. Give me some examples, if you don't mind.

18 A. You can go into the Venetian. I do a lot of work for the Venetian and
19 consulting and litigation, and their tile is slip resistant when wet, and it looks good.

20 Q. But it's not marble flooring?

21 A. No, it's not marble flooring.

22 Q. Is it tile?

23 A. It's a ceramic tile.

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

25 13. Defendants filed a motion for reconsideration related to the Court's granting Plaintiff's
26 motion for leave to add a claim of punitive damages on July 3, 2019, which was heard on July 30,
27 2019. Judge Delaney denied the motion.

28 14. I received correspondence from Mr. Galliher dated June 25, 2019 in which he accused
Defendants of not producing sixty-five (65) prior incident reports in addition to the sixty-four (64)
previously produced. (See Exhibit J, *Correspondence from Keith Galliher, Esq., to Michael Royal*,

1 Esq., dated 06.25.19.) Mr. Galliher did not produce any documents supporting the information
2 presented in the chart produced in his June 25, 2019 correspondence.

3 15. On July 1, 2019, Plaintiff filed Plaintiff's Motion to Compel Testimony and Documents
4 wherein Plaintiff falsely accused Defendants of failing to provide forty-six (46) prior incident reports
5 (having reduced the number from sixty-five (65) without explanation). (A copy of Plaintiff's July 1,
6 2019 motion, without exhibits, is attached hereto as Exhibit K.)

7
8 16. Defendants filed an opposition to the July 1, 2019 motion to compel, noting that
9 Plaintiff had completely misrepresented the facts regarding the alleged "undisclosed" prior incident
10 reports. (See Exhibit L, *Opposition to Plaintiff's Motion to Compel Testimony and Documents and*
11 *Counter-motion*, filed July 12, 2019, (without exhibits) at 10-12, 19-22.)

12 17. After Defendants exposed Plaintiff's motion based on massive misinformation, Plaintiff
13 withdrew the allegation from her previous motion to compel. (See Exhibit M, *Plaintiff's Reply in*
14 *Support of Her Motion to Compel Testimony and Documents*, filed July 25, 2019, without exhibits,
15 at 4.) There, Plaintiff wrote the following:

16
17 *After a careful review of the previously disclosed table, the undersigned owes Venetian*
18 *and this Honorable Court an apology. The undersigned misinterpreted the notations*
19 *of staff on the comparison table they put together and in hindsight should have spent*
20 *more time studying the table and/or clarified the table summaries with staff before*
21 *filing this motion. Since the filing of this motion Venetian has produced all*
22 *additional responsive reports. Plaintiff therefore withdraws this portion of her motion.*
23 *(Id. at 4, ln 5-10. Emphasis added.)*

24 18. Defendants did not produce any additional responsive reports to Plaintiff as a result of
25 her filing the July 1, 2019 motion to compel. Thus, it appears that Plaintiff actually attempted to cover
26 up one misrepresentation to the Court by creating another one.

27 19. In the Amended Complaint, filed June 28, 2019, Plaintiff claims that "In the three years
28 prior to Plaintiff's fall there were at least 73 injury slip and falls on the marble floor in Venetian."
(See Exhibit N, *Amended Complaint*, filed June 28, 2019, at 4 ln 2-3.) This is not accurate by

1 Plaintiff's own admission in her July 25, 2019 filing with the Court. (See Exhibit M at 4, ln 5-10.)

2 20. In light of the above, it was therefore shocking to read the following from page five (5)
3 of Plaintiff's Motion to Compel Testimony and Documents filed August 5, 2019:

4 *Based on Venetian's evasive behavior, Plaintiff attempted to verify that the 64 incident*
5 *reports were all of the reports responsive to Plaintiff's request These efforts*
6 *revealed 65 undisclosed reports responsive to the request in this case as well as the*
7 *failure to produce over 30 reports responsive to requests for production in Smith v.*
8 *Venetian, Cohen v. Venetian and Boucher v. Venetian. Venetian still has not*
9 *produced those 65 missing reports. . . .*

10 (See Plaintiff's Motion to Compel at 5, ln 11-18. Emphasis added.) Therefore, in less than two (2)
11 weeks following Plaintiff's *apology* to both Defendants and the Court for her prior misrepresentation,
12 Plaintiff has presented it yet again.

13 21. Mr. Galliher is known to have already shared unredacted information in his possession
14 with attorneys representing plaintiff *Smith v. Venetian* (A-17-753362-C), *Cohen v. Venetian*
15 (A-17-761036-C) and *Boucher v. Venetian* (A-18-773651-C). Mr. Galliher has recently acknowledged
16 that he is presently in the process of "mining" information from Venetian. This goes beyond normal
17 discovery and the facts of this case, but is intended to build a repository for other cases as well.

18 22. Plaintiff's representation in her motion under *I. INTRODUCTION* is by false by
19 Plaintiff's own admission. (See Exhibit M at 4, ln 5-10.) Therefore, having Plaintiff once again use
20 this false allegation as a prelude to her motion to compel is deeply troubling.¹

21 23. This is not an isolated incident, as Plaintiff's expert, Tom Jennings, has likewise
22 provided unsupported, inflated numbers of prior incidents. In a report dated May 30, 2019, Mr.
23 Jennings made the following proclamation:

24 ///

25 ///

26 _____

27
28 ¹Note that while Plaintiff's makes the false assertion of sixty-five (65) "undisclosed" reports,
she does not move for an order compelling production. She is simply poisoning the well.

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

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

6 24. At the July 2, 2019 deposition, Mr. Jennings testified that the alleged 196 prior slip and
7 fall incidents referenced in his May 30, 2019 rebuttal report were limited to the Grand Lux rotunda area
8 where Plaintiff fell, and that they all were due to slips on foreign substances. (See Exhibit P,
9 *Transcript of Tom Jennings Deposition*, taken July 2, 2019, at 84, ln 7-25; 85, ln 1-5; 86, ln 12-19; 87,
10 ln 23-25; 88, ln 1-3; 89, ln 18-25; 90, ln 1.)

11 24. On or about July 22, 2019, I received the documents reportedly sent by Mr. Galliher to
12 Mr. Jennings related to the May 30, 2019 rebuttal report. (See Exhibit Q, *Correspondence from*
13 *Galliher Law Firm to Thomas Jennings*, dated May 31, 2019, PLTF 626-46.)

14 25. The documents provided by Mr. Galliher related to documents he sent to Mr. Jennings
15 reportedly documenting 196 prior incidents in the Grand Lux rotunda area from January 1, 2012 to
16 August 5, 2015 actually total 140 once all duplicates and triplicates are eliminated. Further, of the 140,
17 only eight (8) reference the *Grand Lux* area. It is therefore unclear how Plaintiff and Mr. Jennings
18 present numbers (under oath in the case of Mr. Jennings or as an officer of the court in the case of Mr.
19 Galliher) from sixty-five (65) "*undisclosed*" prior incident reports or 196 incident reports exclusively
20 in the *Grand Lux* area - which neither representations are remotely correct.

21 26. In this matter, Defendants have produced a total of sixty-six (66) identified prior
22 incident reports related to slip and falls in the Venetian casino level area.²

23 27. In his deposition of July 2, 2019, Mr. Jennings testified that he is also retained as an
24 expert in the matter of *Smith*, *supra*. (See Exhibit P at 16, ln 18-25; 17, ln 1-3, ln 20-24; 70-73.) Mr.
25
26
27
28

²Two (2) more were identified and produced since the March 13, 2019 hearing.

1 Jennings testified that his testing for coefficient of friction testing in the *Smith* matter, which is
2 relatively close in proximity to the *Sekera* area, tested .90 COF dry, well above the .70 COF dry test
3 in the *Sekera* fall area; yet, Mr. Jennings does not consider the *Smith* fall to be within the *Grand Lux*
4 *rotunda* area. (See *id.* at 71, ln 11-25; 72, ln 1-25; 73, ln 1-9.) Mr. Jennings testified that the
5 difference in his testing of these two areas on the Venetian marble floor 100 feet of each other in 2018
6 was due to a myriad of factors, including amount of travel through area, differences in floor care, etc.
7 (See *id.* at 72, ln 20-25; 73, ln 1-6.)

9 28. Neither Mr. Galliher nor anyone from the Galliher Law Firm contacted me to discuss
10 the alleged issue with "*undisclosed*" prior incident reports addressed on pages 5, 12-13 of the pending
11 motion. Notably, it is not addressed by Mr. Galliher in his August 5, 2019 affidavit. Therefore, there
12 was no EDCR 2.34 conference address those matters.

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

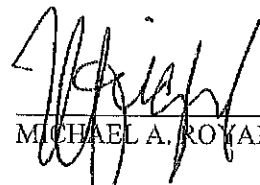
15 30. I declare that true and correct copies of the following exhibits are attached hereto in
16 support of this Opposition.
17

EXHIBIT	TITLE
A	Supplemental Responses to Plaintiff's Requests for Production of Documents and Materials to Defendant, served 01.04.19
B	Transcript of Hearing Before Discovery Commissioner, dated 03.13.19, selected pages
C	Correspondence from Michael Royal, Esq., to Keith Galliher, Esq., dated 03.25.19
D	Transcript of Proceeding - Objection to DCRR, dated May 14, 2019, selected pages
E	Declaration of Peter Goldstein, Esq., dated February 13, 2019
F	Plaintiff's Reply to Defendant Venetian Casino Resort, LLC's Opposition to Plaintiff's Motion for Terminating Sanctions, filed March 12, 2019, <i>Smith v. VCR</i> , case no. A-17-753362-C
G	Order, filed July 31, 2019

1	EXHIBIT	TITLE
2	H	Transcript of Hearing on Motion for Leave to Amend, dated May 28, 2019, selected pages
3		
4	I	Transcript of David Elliott (taken February 13, 2009), in <i>Farina v. Desert Palace, Inc.</i> , case no. A542232, selected pages
5	J	Correspondence from Keith Galliher, Esq., to Michael Royal, Esq., dated 06.25.19
6	K	Plaintiff's Motion to Compel Testimony and Documents, filed July 1, 2019 (without exhibits)
7		
8	L	Opposition to Plaintiff's Motion to Compel Testimony and Documents and Countermotion, filed July 12, 2019 (without exhibits)
9	M	Reply to Opposition to Plaintiff's Motion to Compel Testimony and Documents and Opposition to Countermotion, filed July 25, 2019 (without exhibits)
10		
11	N	Amended Complaint, filed June 28, 2019
12	O	Expert Rebuttal Report, Thomas Jennings (dated 05.30.19)
13	P	Transcript of Tom Jennings Deposition, taken July 2, 2019, selected pages
14	Q	Correspondence from Galliher Law Firm to Thomas Jennings, dated May 31, 2019, PLTF 626-46
15	R	Discovery Commissioner's Report and Recommendation, filed July 9, 2019, in <i>Boucher v. Venetian Casino Resort, LLC</i> , case no. A-18-773651-C
16		
17	S	Findings of Fact, Conclusions of Law and Order Granting Defendants' Motion for Partial Summary Judgment on Mode of Operation Theory of Liability, filed July 23, 2019
18		
19	T	Privacy Policy, The Venetian Resort Las Vegas (July 7, 2019), https://www.venetian.com/policy.html
20	U	Las Vegas Sands Corp. Annual Report 2018
21	V	Zurich American Insurance Policy, No. GLO 0171169-02 at VEN 1453.
22	W	Minutes from Discovery Commissioner Hearing, dated June 26, 2019
23	X	Plaintiff's Motion for Leave to Amend the Complaint, filed April 22, 2019 (without exhibits)
24		
25	Y	Transcript of Proceeding - Motion for Leave to Amend, dated May 28, 2019, selected pages
26	Z	Transcript of Gary Shulman Deposition, taken April 17, 2019, selected pages
27	AA	VCR Team Member Discipline History (Gary Shulman)
28		

EXHIBIT	TITLE
BB	Plaintiff's Reply in Support of Her Motion for Leave to Amend the Complaint, filed May 15, 2019, without exhibits
CC	Transcript of Proceeding - Motion to Strike Gary Shulman as Witness, June 26, 2019, selected pages
DD	Transcript of Proceeding - Motion to Continue, dated July 30, 2019, selected pages

Executed on 13 day of August, 2019.


MICHAEL A. ROYAL, ESQ.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF RELEVANT FACTS

This litigation arises from a November 4, 2016 incident occurring when Plaintiff fell in a lobby area of the Venetian while taking a break from her work station where she was employed as a salesperson for Brand Vegas, LLC, working pursuant to an agreement between Venetian and her employer to sell tickets to Venetian events. At around 12:37 pm, as Plaintiff was en route to the women's bathroom located on the Venetian casino level area known as the Grand Lux rotunda. Plaintiff had walked the area successfully hundreds of times on prior occasions, but claims she fell on November 4, 2016 from a foreign substance on the floor.

Venetian has produced sixty-six (66) prior reports from November 4, 2013 through November 4, 2016 related to incidents occurring in the common area of the Venetian casino level area where the subject incident occurred. Plaintiff's expert Tom Jennings claims to have 196 reports of prior incidents in the Grand Lux rotunda area alone. While Defendants take issue with those inflated numbers, Mr. Jennings made the point that even his testing of the same floor 100 feet from the subject incident was different by .20 COF dry, which he based on a multiple of factors, including amount of use. Therefore,

1 Mr. Jennings has made the case for Venetian that all incidents sought by Plaintiff should be limited
2 to the Grand Lux rotunda area where the subject incident occurred, and not expanded to the entire
3 property where even Mr. Jennings agrees facts and circumstances are not the same.

4 II.

5 NATURE OF OPPOSITION

6
7 Defendants contend that the issue surrounding the production of unredacted reports to those
8 produced responsive to Plaintiff's Production Request No. 7 remains an open issue. Defendants have
9 filed a motion for reconsideration which is pending with the district court. As for the alleged *sixty-five*
10 (65) "undisclosed" prior incidents described by Plaintiff, that is an outright misrepresentation designed
11 to put Defendants in a bad light. It should be stricken and, as discussed further below in Defendants'
12 counter-motion, is worthy of sanctions.

13
14 In truth, Plaintiff claims to have evidence of 196 prior similar incidents in the Grand Lux
15 rotunda area where the subject incident occurred in the five (5) years preceding the subject incident.
16 That is more than sufficient for Plaintiff to make her case for constructive notice. However, these prior
17 incident reports are not admissible at trial under Eldorado Club, Inc. v. Graff, 78 Nev. 507, 511, 377
18 P.2d 174, 176 (1962) ("it is error to receive 'notice evidence' of the type here [prior incident reports]
19 for the purpose of establishing the defendant's duty"). This is especially true here since the Court held
20 that the mode of operation theory of liability does not apply to these circumstances. (See Exhibit S,
21 *Findings of Fact, Conclusions of Law and Order Granting Defendants' Motion for Partial Summary*
22 *Judgment on Mode of Operation Theory of Liability*, filed July 23, 2019.) Therefore, they arguably
23 do not meet the criteria of relevance and admissibility under NRCP 26(b)(1). Plaintiff already has the
24 information she needs for prior incidents, which leaves the issue of subsequent incidents.

25
26 This Court has previously held that negligence cases arising from temporary transient
27 conditions like this do not open the way for plaintiffs to obtain evidence of subsequent incident reports.
28

1 (See Exhibit R.) There is no reasonable basis to allow Plaintiff to obtain incident reports subsequent
2 to her fall. Regarding Plaintiff's request for any slip testing of the marble flooring, Defendants have
3 produced what information they have pursuant to NRCP 16.1, which includes testing post incident
4 which has been disclosed pursuant to NRCP 16.1. This includes areas outside the *Grand Lux* rotunda
5 area where the subject incident occurred.

6
7 Plaintiff did not comply with EDCR 2.34 as to the issue of prior incidents reportedly
8 "undisclosed"; therefore, it is not properly before the Court. That stated, Defendants move the Court
9 for relief to stop the ongoing harassment by Plaintiff surrounding prior reports.

10 III.

11 LEGAL ANALYSIS

12 A. Information Sought by Plaintiff Must Meet the Relevance and Proportional Factors of 13 NRCP 26(b)(1)

14 The new version of NRCP 26(b)(1) reads as follows:

15 *Unless otherwise limited by order of the court in accordance with these rules, the scope*
16 *of discovery is as follows: Parties may obtain discovery regarding any nonprivileged*
17 *matter that is relevant to any party's claims or defenses and proportional to the needs*
18 *of the case, considering the importance of the issues at stake in the action, the*
19 *amount in controversy, the parties' relative access to relevant information, the*
20 *parties' resources, the importance of the discovery in resolving the issues, and*
whether the burden or expense of the proposed discovery outweighs its likely benefit.
Information within this scope of discovery need not be admissible in evidence to be
discoverable. (Emphasis added.)

21 Thus, Plaintiff must demonstrate that the desired discovery is **relevant** to her claims here and
22 that it is **proportional** to the needs of the case with five factors: 1) importance of issues at stake; 2)
23 amount in controversy; 3) parties' relative access to relevant information; 4) parties' resources; the
24 importance of the discovery in resolving contested issues; and 5) the burden of proposed discovery vs.
25 the likely benefit.

26
27 Plaintiff claims to have sustained injuries primarily to her neck and back. Her known treatment
28 is approximately \$80,000, to date, thus far all conservative in nature nearly three (3) years post

1 incident. Mr. Galliher claims to have knowledge of hundreds of prior incidents beyond the sixty-four
2 (64) produced by Defendants, which she has never produced.

3 Plaintiff cannot use the *mode of operation* theory of liability to demonstrate notice, but must
4 rely on actual and constructive notice. The prior incident reports under the circumstances are not
5 admissible for that purpose under Eldorado Club, Inc., *supra*. As noted further below, the burden upon
6 Defendants to produce unredacted information of prior incident reports which are not reasonably
7 calculated to be admissible at trial (which guest information Defendants desire to protect) greatly
8 outweighs the need and likely benefit to Plaintiff of obtaining this information.

10 In Izzo v. Wal-Mart Stores, Inc., 2016 U.S. Dist. LEXIS 12210; 2016 WL 409694, the plaintiff,
11 who slipped and fell on a clear liquid within a Las Vegas Wal-Mart store on May 18, 2013, filed a
12 motion to compel the defendant to produce evidence of prior claims and incidents for the three (3)
13 years preceding the subject incident. The court evaluated the claim under FRCP 26(b)(1) in light of
14 Nevada law as set forth in Eldorado Club, Inc., *supra*. There, the defense had previously produced a
15 list of prior reported slip and falls (as opposed to the actual individual incident reports). The defense
16 argued that the potential value of the information sought by the plaintiff was outweighed by the
17 burden on the defendant to gather the information and its adverse impact on the privacy rights
18 of third parties. The court denied plaintiff's motion to compel, concluding as follows: "*In*
19 *considering the totality of the circumstances, the Court concludes that the value of the material sought*
20 *is outweighed by Defendant's burden of providing it.*" (*Id.* at 4, 2016 U.S. Dist LEXIS at *11.) This
21 is the very argument Defendants are making here. Plaintiff must set forth a reason why she needs
22 discovery beyond what has been produced by Defendants. If she is already in possession of 196 prior
23 incident reports for the five (5) years within the area where Plaintiff fell, then she has enough to make
24 her notice argument.

25
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1 B. The Issue of Unredacted Reports is Presently Before the District Court

2 The Discovery Commissioner previously ruled in Defendants' favor on this issue and it was
3 thereafter presented to the District Court on May 14, 2019. Counsel prepared competing orders for the
4 judge's signature. The order was not filed until July 31, 2019. Defendants have filed a motion for
5 reconsideration on an order shortening time, as Defendants contend that this information should be
6 protected pursuant to NRCP 26(c) and remain redacted as per the Discovery Commissioner's Report
7 and Recommendation of April 2, 2019. However, since Plaintiff has raised this issue again before the
8 Discovery Commissioner, Defendants offer the following by way of response, which in part tracks
9 Defendants's argument in the motion for reconsideration pending before the District Court.
10

11 1. Privacy Rights of Non-Party Individuals in Unrelated Matters Are Worthy of
12 NRCP 26(c) Protection.

13 In Rowland v. Paris Las Vegas, 2015 U.S. Dist. LEXIS 105513; 2015 WL 4742502, plaintiff
14 sued the defendant for injuries after slipping and falling on a recently polished tile floor. The plaintiff
15 sought to compel the defendant to identify by name (with phone numbers and addresses) any person
16 who had complained that the subject flooring was slippery. The court not only found the request to
17 be overly broad, but also determined that it violated the privacy rights of the persons involved. It
18 explained as follows:
19

20 *Further, the Court finds that requiring disclosure of the addresses and telephone*
21 *numbers of prior hotel guests would violate the privacy rights of third parties.*
22 *"Federal courts ordinarily recognize a constitutionally-based right of privacy that can*
23 *be raised in response to discovery requests." Zuniga v. Western Apartments, 2014 U.S.*
24 *Dist. LEXIS 83135, at *8 (C.D. Cal. Mar. 25, 2014) (citing A. Farber & Partners, Inc.*
25 *v. Garber, 234 F.R.D. 186, 191 (C.D. Cal. 2006)). However, this right is not absolute;*
26 *rather, it is subject to a balancing test. Stallworth v. Brollini, 288 F.R.D. 439, 444*
27 *(N.D. Cal. 2012). "When the constitutional right of privacy is involved, 'the party*
28 *seeking discovery must demonstrate a compelling need for discovery, and that*
compelling need must be so strong as to outweigh the privacy right when these two
competing interests are carefully balanced.'" Artis v. Deere & Co., 276 F.R.D. 348,
352 (N.D. Cal. 2011) (quoting Wiegele v. Fedex Ground Package Sys., 2007 U.S. Dist.
*LEXIS 9444, at *2 (S.D. Cal. Feb. 8, 2007)). "Compelled discovery within the realm*
of the right of privacy 'cannot be justified solely on the ground that it may lead to
relevant information.' Id. Here, Plaintiff has not addressed these privacy concerns,

1 *much less demonstrated that her need for the information outweighs the third party*
2 *privacy interests. Therefore, the Court will not require Defendant to produce*
3 *addresses or telephone numbers in response to Interrogatory No. 5.*

4 (*Id.* at *7. Emphasis added.)

5 What has Plaintiff done to demonstrate a “*compelling need for discovery*” of the names of prior
6 Venetian guests involved in incidents under 26(b)(1) in light of Eldorado Club, Inc.? She has not
7 presented anything which would allow the Court to carefully consider the balance of interests
8 surrounding the subject guest information.

9 In *Bible v. Rio Props., Inc.*, 246 F.R.D. 614, 2007 U.S. Dist. LEXIS 80017, the United States
10 District Court for the Central District of California that a guest who fell at the Rio Hotel in Las Vegas
11 on May 27, 2006 was only entitled to **redacted** prior incident reports produced in discovery to protect
12 guest privacy rights. Like the court in Rowland, *supra*, the Bible court balanced the right to privacy
13 of those identified on prior incident reports with the need for the plaintiff to have their contact
14 information. It concluded:

15
16 *Here, the rights of third parties can be adequately protected by permitting defendant*
17 *to redact the guest's complaints and staff incident reports to protect the guest's name*
18 *and personal information, such as address, date of birth, telephone number, and the*
19 *like. With the limitations set forth herein, the Court grants plaintiff's motion to compel,*
20 *in part, and denies it, in part.*

21 (*Id.* at 620-21, 2007 U.S. Dis. LEXIS 80017 at *16-17. Emphasis added.)³

22 Federal courts in other jurisdictions have likewise agreed. In Dowell v Griffin, 275 F.R.D. 613,
23 620 (S.D. Cal. 2011), while ordering production of reports arising from other complaints, the court
24 specifically held that “*Plaintiff has no need of sensitive personal information that may be found . . .*”

25
26 ³See also Lologo v. Wal-Mart Stores, Inc., 2016 U.S. Dist. LEXIS 100559; 2016 WL 4084035
27 (the defense’s motion in limine to exclude all evidence of prior slip/fall incidents involving a
28 temporary transitory condition of a foreign substance was granted, based on the Nevada court’s ruling
in Eldorado Club, Inc.); Caballero v. Bodega Latina Corp., 2017 U.S. Dist. LEXIS 116869, 2017 WL
3174931 (plaintiff denied requested prior incident reports under the *relevancy* requirement of FRCP
26(b)(1), relying on Eldorado Club, Inc., *supra*).

1 Thus, any phone number, address, date of birth, social security number, or credit card number
2 should be redacted." (*Id.* Emphasis added). The court went further to protect the confidentiality of
3 information so produced by ordering that only the plaintiff, his counsel, and experts have access to the
4 redacted materials, and that any copies be returned to the defendant at the conclusion of the case. (*Id.*)

5 This is the protection sought by Defendants here.

6
7 Similarly, in Shaw v. Experian Info. Sols., Inc., 306 F.R.D. 293, 299 (S.D. Cal. 2015), the
8 California federal district court ordered that certain banking records produced by the defendant with
9 the limitation that any *private identifying information* was to be redacted. The *Shaw* court noted that
10 the redaction of private personal information adequately addressed the defendant's concerns for
11 privacy. Again, this is all Defendants are seeking presently from the district court.

12 The above cases support Defendants' position in this case - that protection of sensitive personal
13 information of anyone not a party to this suit should be redacted. Certainly, under Eldorado Club, Inc.,
14 which provides the prior incident reports in circumstances such as those present here are not
15 admissible, it is questionable whether Plaintiff has a right to them at all.

16
17 The incident reports at issue in this case contain the sensitive, and private information of
18 individuals who are not parties to this lawsuit, and who are not believed to have any information, facts
19 or circumstances surrounding Plaintiff's allegations. The only *benefit* sought by Plaintiff here is her
20 desire to contact hundreds of persons to apparently find someone who knows something about the
21 subject incident or perhaps to have someone wholly unrelated to the incident describe how or why
22 Plaintiff fell. In addition, Plaintiff plans to share all private guest information with other attorneys her
23 counsel desires, to be filed again and again with the court in various litigated matters. Plaintiff's
24 curiosity and her counsel's desire to "*mine*" information to share with multiple other attorneys within
25 the local plaintiff's bar is not enough to outweigh the rights of privacy by those guests identified in
26 prior incident reports.
27
28

1 2. **Venetian Has Business Interests to Protect Private Guest Information**

2 It is Venetian's policy to protect against the dissemination or disclosure of its guests' or
3 visitors' personal, private, and confidential information. Second, mass dissemination of Venetian's
4 guests' private information is the equivalent to a data breach, thereby exposing Venetian to additional
5 third-party claims. Plaintiff has recently requested that Defendants re-produce all of Venetian incident
6 reports involving slips/falls on the marble flooring from May 1999 to the present, without the
7 redactions of Defendant's guests' private, confidential, and protected personal information, which
8 inherently includes medical or health related information. Defendant opposes Plaintiff's request and
9 has filed a motion for protective order that is presently before the Discovery Commissioner.
10 Furthermore, Defendants do not have the guests'/visitors' authority to disseminate their personal,
11 private information to any other party.
12

13 **Absent a showing by Plaintiff of a substantial need for the personal information**
14 **pertaining to third-parties that were not involved in the subject incident, Plaintiff should not be**
15 **provided the same.** Because Defendants must seek and obtain a waiver with respect to disclosure of
16 a third-party's personal information, Plaintiff should identify any such need on a case-by-case, or
17 incident-by-incident basis.
18

19 As established below, good-cause exists for to support an order providing that Venetian's
20 guests' respective personal, private information contained in Incident Reports remain redacted.
21

22 **Venetian's Data Privacy Policy** ("Privacy Policy") states in relevant part, as follows:
23 *This is the Data Privacy Policy ("Privacy Policy") of Venetian Casino Resort, LLC*
24 *and its parent, affiliate and subsidiary entities (collectively, the "Company") located*
25 *in the United States. ... This Privacy Policy applies to activities the Company engages*
26 *in on its websites and activities that are offline or unrelated to our websites, as*
27 *applicable. We are providing this notice to explain our information practices and the*
28 *choices you can make about the way your information is collected and used.*

This Privacy Policy sets forth the principles that govern our treatment of personal data.
We expect all employees and those with whom we share personal data to adhere to this
Privacy Policy.

1 ~~The Company is committed to protecting the information that our guests, prospective~~
2 ~~guests, patrons, employees, suppliers and others who do business with the Company.~~
3 ~~This Privacy Policy describes the information that Venetian~~
4 ~~collects from its guests, patrons, employees, suppliers and others who do business with the Company.~~

5 (See Exhibit T, *Privacy Policy*, *The Venetian Resort Las Vegas* (July 7, 2019),
6 <https://www.venetian.com/policy.html> at 1. Emphasis added.)

7 Venetian's Privacy Policy describes to Venetian's guests (and prospective guests) that Venetian
8 collects its guests' personal data or information, stating in relevant part as follows:

9 *We only collect personal data that you provide to us, or that we are authorized to*
10 *obtain by you or by law. For example, we obtain credit information to evaluate*
11 *applications for credit, and we obtain background check information for employment*
12 *applications. The type of personal data we collect from you will depend on how you*
13 *are interacting with us using our website, products, or services. For example, we may*
14 *collect different information from you when you make reservations, purchase gift*
15 *certificates or merchandise, participate in a contest, or contact us with requests,*
16 *feedback, or suggestions. The information we collect may include your name, title,*
17 *email address, mailing information, phone number, fax number, credit card*
18 *information, travel details (flight number and details, points of origin and destination),*
19 *room preferences, and other information you voluntarily provide.*

20 (*Id.* at 3.)

21 Venetian's Privacy Policy includes offering Venetian's guests an opportunity to choose what
22 personal information, if any, is shared with outside entities. Specifically, Venetian's Privacy Policy
23 provides the following:

24 For all personal data that we have about you, you have the following rights and/or
25 choices that we will accommodate where your requests meet legal and regulatory
26 requirements and do not risk making other data less secure or changing other data:

27 ***Opt Out, Object, Withdraw Consent:*** *You can always choose not to disclose certain*
28 *information to us. Where we rely on your consent to process your personal data, you*
29 *have the right to withdraw or decline consent at any time. If you have provided us*
30 *with your email address and you would like to stop receiving marketing emails from*
31 *us, click on the unsubscribe link at the bottom of any of our email communications. If*
32 *you do not wish to receive marketing communications from us via direct mail, or if you*
33 *want to request that we do not share your contact information with our marketing*
34 *partners, please contact us using the methods in the Contact Us section and include*
35 *your name, address, and any other specific contact information that you wish to*
36 *restrict.*

37 ***Access, Correct, Update, Restrict Processing, Erase:*** *You may have the right to access,*

1 correct, and update your information. You also may request that we restrict processing
2 of your information or erase it. To ensure that all of your personal data is correct and
3 up to date, or to ask that we restrict processing or erase your information, please
4 contact us using the methods in the Contact Us section below.

(Id. at 7.)

5 Likewise, Defendants identify the importance of its Privacy Policy in their annual disclosures.
6 Defendant's 2018 Annual Disclosures provide in relevant part as follows:

7 *Our failure to maintain the integrity of our information and information systems, which*
8 *contain legally protected information about us and others, could happen in a variety*
9 *of ways, including as a result of unauthorized access, breach of our cybersecurity*
10 *systems and measures, or other disruption or corruption of our information systems,*
11 *software or data, or access to information stored outside of our information systems,*
12 *and could impair our ability to conduct our business operations, delay our ability to*
13 *recognize revenue, compromise the integrity of our business and services, result in*
14 *significant data losses and the theft of our IP, damage our reputation, expose us to*
15 *liability to third parties, regulatory fines and penalties, and require us to incur*
16 *significant costs to maintain the privacy and security of our information, network and*
17 *data.*

18 *Our business requires the collection and retention of large volumes of data and*
19 *non-electronic information, including credit card numbers and other legally protected*
20 *information about people in various information systems we maintain and in those*
21 *maintained by third parties with whom we contract and may share data. We also*
22 *maintain important internal company information such as legally protected*
23 *information about our employees and information relating to our operations. The*
24 *integrity and protection of that legally protected information about people and*
25 *company information are important to us. Our collection of such legally protected*
26 *information about people and company information is subject to extensive regulation*
27 *by private groups such as the payment card industry as well as domestic and foreign*
28 *governmental authorities, including gaming authorities. If a cybersecurity or privacy*
event occurs, we may be unable to satisfy applicable laws and regulations or the
expectation of regulators, employees, customers or other impacted individuals.

(See Exhibit U, Las Vegas Sands Corp. Annual Report 2018 at 32.)

23 Lastly, and perhaps most importantly, mass disclosure of Venetian's guests' personal
24 information subjects Defendants to additional direct liability from those whose personal, private
25 information is disclosed without first granting their respective consent or authority. As noted in
26 Defendants' casualty insurance policy, Defendant is not insured for the following:

27 ***"Personal and advertising injury" arising out of any access to or disclosure of any***
28

1 *person's or organization's confidential or personal information, including patents,*
2 *trade secrets, processing methods, customer lists, financial information, credit card*
3 *information, health information or any other type of nonpublic information. This*
4 *exclusion applies even if damages are claimed for notification costs, credit monitoring*
5 *expenses, forensic expenses, public relations expenses or any other loss, cost or*
6 *expense incurred by you or others arising out of any access to or disclosure of any*
7 *person's or organization's confidential or personal information.*

8 (See Exhibit V, Zurich American Insurance Policy, No. GLO 0171169-02 at VEN 1453. Emphasis
9 added.) Therefore, where Venetian is forced to provide personal information of its guests, which
10 information is then disseminated indiscriminately as will most certainly happen here, Venetian is not
11 only subject to litigation by may not have insurance coverage related to any such action.

12 These are the primary arguments presented to the District Court regarding Defendants' desire
13 for protection of this information under NRCP 26(c). Defendants are in the process of exhausting
14 remedies and are merely suggesting that this issue is not yet ripe to be before the Discovery
15 Commissioner.

16 B. Rule 30(b)(6) Deposition Topics

17 Plaintiff has attached an April 5, 2019 request for NRCP 30(b)(6) deposition as Exhibit 5 to
18 the pending motion, which has only four (4) topics. As noted in a separate motion for protective order
19 filed by Defendants on August 5, 2019, Plaintiff's number of topics has actually increased to eighteen
20 (18), where she is seeking twenty (20) years of information from May 1999 to the present.

21 1. Plaintiff is Not Entitled to Discovery of Subsequent Incidents

22 As noted further below, Defendants object to producing information related to subsequent
23 incidents in this matter. First, it is a slip and fall from a temporary transitory condition. Therefore,
24 evidence of subsequent incidents will not help Plaintiff establish constructive or actual notice. It does
25 not meet the requirements of NRCP 26(b)(1) of **relevance** or **proportionality**. This is merely a *mining*
26 operation by Mr. Galliher which goes well beyond this particular litigation and is an abuse of the
27 discovery process.
28

2. **Defendants Have Produced NRCP 16.1 Expert Reports In Their Possession**

Regarding Plaintiff's demand for testing of coefficient of friction, the Court has previously determined that production of such testing is privileged unless it is produced pursuant to NRCP 16.1. (See Exhibit W, *Minutes from Discovery Commissioner Hearing*, June 26, 2019.) Defendants have previously produced to Plaintiff coefficient of friction testing from Tom Jennings and Joseph Cohen, Ph.D., in the *Smith* litigation, performed in 2018. This testing, along with testing performed in the instant litigation, are all of the known tests performed and produced pursuant to NRCP 16.1 in the time period requested. If Plaintiff is requesting slip testing performed by expert consultants not identified pursuant to NRCP 16.1 from November 4, 2013 to present, then Defendants assert a privilege to the extent any exist.⁴

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

Plaintiff rightly notes in the motion to compel that there is no Nevada law supporting her motion for an order compelling Defendants to produce subsequent incident reports under the present circumstances where Plaintiff claims to have slipped and fallen due to a foreign substance on the floor. Keep in mind that Plaintiff presented to Venetian property approximately six (6) days per week from December 28, 2015 to November 4, 2016 and walked through the subject Grand Lux rotunda area hundreds without incident. Then, on November 4, 2016, she allegedly encountered a liquid substance

23 ⁴Under NRCP 26(b)(4)(D)(ii) of the Nevada Rules of Civil Procedure, a party may not discover
24 facts known or opinions held by an expert who is not expected to be called as a witness at trial except
25 upon a showing of exceptional circumstances. In fact, under NRCP 26(b)(3), Plaintiff is not entitled
26 to drafts of any reports or disclosures required under NRCP 16., 16.2(d), 16.2(e), 16.205(d), 16.205(e),
27 or NRCP 26(b)(1), *"regardless of the form in which the draft is recorded."* Further, NRCP 26(b)(3)
28 protects communications between a party's attorney and any retained expert witness, with only a few
exceptions. Under NRCP 26(b)(4)(D), *"a party may not, by interrogatories or deposition, discover
facts known or opinions held by an expert who has been retained or specifically employed by another
party in anticipation of litigation or to prepare for trial and who is not expected to be called as a
witness at trial."*

1 and then fell. Those facts alone provide that there is nothing wrong with the Venetian floor until the
2 substance was allegedly introduced. So, what would the production of subsequent incidents do for
3 Plaintiff? What has she done to meet the relevance and proportionality requirements of NRCP
4 26(b)(1)?

5 The leading case cited by Plaintiff, *Hilliard v. A. H Robins Co.*, 148 Cal. App. 3d 374, 196 Cal.
6 Rptr. 117 (Ct. App. 1983), is a product defect case. None of the string of cases cited by Plaintiff
7 thereafter support her assertion that she is entitled to subsequent incident reports in a simple negligence
8 case such as this. (See Plaintiff's Motion to Compel at 15-16 (*Schaffer v. Edward D. Jones & Co.*,
9 1996 SD 94, 552 N.W.2d 801 (1996) (securities fraud); *Roth v. Farner-Bocken Co.*, 667 N.W.2d 651
10 (S.D. 2003) (wrongful termination, discrimination); *Boshears v. Saint Gobain Calmar, Inc.*, 272 S.W.3d
11 215, 226 (Mo. Ct. App. 2008) (negligence action arising from explosion with discovery allowed to
12 address subsequent remedial measures); *Bergeson v. Dilworth*, 959 F.2d 245 (10th Cir. 1992) (relates
13 to the admission of post incident letters written by others related to the subject incident relevant to the
14 subject event); *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1249 (10th Cir. 2000) (product defect case);
15 *GM Corp. v. Mosely*, 213 Ga. App. 875 (Ga. Ct. App. 1994) (product defect case); *Wolfe v.*
16 *McNeil-PPC Inc.*, 773 F. Supp.2d 561 (E.D. Pa. 2011) (product defect case); *Coale v. Dow Chem. Co.*,
17 701 P.2d 885 (Colo.App. 1985) (product defect case); *Palmer v. A.H Robins Co.*, 684 P.2d 187 (Colo.
18 1984) (product defect case); *Hoppe v. G.D. Searle & Co.*, 779 F.Supp. 1413 (S.D.N.Y. 1991) (product
19 defect case).)

20 Defendants cannot find one Nevada case supporting Plaintiff's motion to compel them to
21 produce subsequent incident reports in a simple negligence action such as this one. What punitive
22 conduct has Plaintiff presented in her Amended Complaint? She claims "*there were at least 73 injury*
23 *slip and falls on the marble floors in Venetian*" in the three years prior to her slip and fall. (See Exhibit
24 N at 4, ln 2-3.) First, by Plaintiff's own admission, the number 73 is false, as Defendants have
25
26
27
28

1 produced only sixty-six (66) total and Plaintiff stated to the Court on July 25, 2019 that Venetian had
2 produced all known information regarding prior falls from November 4, 2013 to November 4, 2016.
3 (See Exhibit M at 4, ln 4-10.) That stated, millions of people walk through the Venetian annually. It
4 is a very large property. Plaintiff has evidence of sixty-six (66) prior incidents and that is enough to
5 trigger punitive damages? Again note that of the alleged 196 prior incidents which Plaintiff reportedly
6 produced to Mr. Jennings, only eight (8) identified as *Grand Lux*. Plaintiff is playing games and is
7 hoping to persuade the Court to play along with her *mining* expedition.
8

9 The Discovery Commissioner has previously ruled on this very issue: *Subsequent incident*
10 *reports do not need to be provided, because liquid on a walkway is a transient condition.* (See
11 Exhibit R at 3, ln 17-18.) There is no basis to support Plaintiff's motion to compel the production of
12 subsequent incident reports in a slip and fall case from a temporary transitory condition based on
13 negligence.
14

15 D. **Plaintiff is Not Entitled to Request Information Related to What Measures Were Taken**
16 **to Locate and Produce Security Incident Reports**

17 This section of Plaintiff's motion is most interesting as she once again resurrects her blatant
18 misrepresentation that Venetian has withheld prior incident reports. She writes:

19 *Venetian has shown time and again in this case, in Cohen v. Venetian, in Smith v.*
20 *Venetian and in Boucher v. Venetian, that it simply cannot be trusted to fully and*
21 *fairly disclose incident reports. As previously discussed, Plaintiff has repeatedly*
22 *caught Venetian selectively disclosing incident reports. Venetian initially disclosed 64*
23 *redacted reports. After consulting with counsel in the Smith v. Venetian matter and*
24 *the Cohen v. Venetian matter and sorting through prior court filings Plaintiffs counsel*
25 *discovered that the Venetian left out numerous reports responsive to Plaintiffs*
26 *Request for Production No. 7. Venetian did the same thing in Smith v. Venetian,*
27 *leaving out 35 incident reports and also in Boucher v. Venetian, leaving out 32 incident*
28 *reports. (See, e.g. Motion for Case Ending Sanctions in Smith v. Venetian attached as*
Exhibit "9" at 4:7-10, 5:5, and; Excerpts of Motion to Amend in Boucher v. Venetian
attached as Exhibit "10" at 7:19-11:19.)

From these filings it is evident that Venetian has engaged in a deliberate pattern of evasive
discovery abuse in at least four cases in the last 6 months and therefore cannot be trusted
to fairly disclose documents.

1 || (See Plaintiff's Motion to Compel at 12, ln 16-27; 14, ln 1. Emphasis added.)

2 Plaintiff then requests NRCP 37(b) sanctions. (*Id.*) Unfortunately, Plaintiff was not finished
3 with her inflammatory and unsubstantiated allegations. She continues:

Venetian chose to engage in a game of "hide the ball." This choice makes it necessary
for Plaintiff to ask about the measures Venetian took to locate and produce incident
~~not known by anyone~~
ensure that Venetian complies with the Discovery Rules.

(*Id.* at 13, ln 8-12. Emphasis added.)

Again, to put this into proper perspective, Plaintiff humbly acknowledged to the Court on July 25, 2019 that Venetian has provided all known incident reports. (*See* Exhibit M at 4, ln 4-10.) How, then, does Plaintiff return to this Honorable Court less than two (2) weeks later and present this kind of scandalous report in order to persuade the Court to rule in her favor? It is just beyond the pale.

Plaintiff's motion to compel this information is not supported by the law. Plaintiff has not met the factors of NRCP 16.1 of relevance and proportionality. Worse, she has badly misrepresented the facts to the Court. For that reason alone, Plaintiff's motion should be denied. In fact, Plaintiff's entire motion to compel is without merit and should be denied in its entirety.

18 COUNTERMOTION TO STRIKE FALSE ACCUSATIONS LEVIED BY PLAINTIFF IN
19 "I. INTRODUCTION" AND "LEGAL ARGUMENT" SECTION "III.D." WITH
APPROPRIATE SANCTIONS

Defendants have been unfairly accused and maligned by Plaintiff in the motion to compel. Defendants therefore move to strike the false allegations set forth by Plaintiff related to Defendants' alleged failure to produce any prior incident reports between November 4, 2013 and November 4, 2016. These false allegations are presented to the Court for one purpose - the put Venetian in a bad light, in inflame the Court and obtain a desired ruling in Plaintiff's favor.

As noted above, Plaintiff was apparently so embarrassed by falsely accusing Defendants of failing to produce "*undisclosed*" prior incident reports in the previous motion to compel filed on July 1, 2019 that she offered apologies to the Court as well as to Defendants. (See Exhibit M at 4, ln 4-10.)

1 In so doing, however, Plaintiff made another false statement: "*Since the filing of this motion Venetian*
2 *has produced all additional responsive reports.*" (See *id.* at 4, ln 8-9.) So, in an apparent effort to
3 save face, Plaintiff covered up a lie with another lie. To be clear, Defendants have not provided
4 Plaintiff with any "*additional responsive reports*" between July 1, 2019 and July 25, 2019. Plaintiff
5 should be ordered to account for that false representation.
6

7 Defendants would likely have simply let that bogus comment by Plaintiff slide were it not for
8 the fact that she turned around and, despite her representation that Venetian had been wholly compliant
9 with production of prior incident reports as of July 25, 2019, now claims just the opposite. In fact,
10 Plaintiff now claims that Venetian cannot be trusted and must be punished because it has NOT
11 complied with requests for prior incidents. (See Motion to Compel at 12-13.)
12

13 Unfortunately, this is not the first time Plaintiff has misrepresented facts to the Court in order
14 to sway it to act in her favor, which is what makes this latest episode all the more troubling - as it is
15 clearly not unintentional.

16 1. March 13, 2019 Hearing - Motion for Protective Order

17 At the March 13, 2019 hearing before the Discovery Commissioner, Mr. Galliher did not advise
18 the Court that he had provided copies of all sixty-four (64) redacted prior incident reports to Peter
19 Goldstein, Esq., on February 7, 2019, six (6) days after the motion for protective order was filed by
20 Defendants, nor did he advise the Court that one day prior to the hearing, March 12, 2019, Mr.
21 Goldstein had filed all sixty-four (64) prior incident reports with the court in the *Smith* litigation to
22 support a motion. During the March 13, 2019 hearing, Mr. Galliher argued that Defendants had only
23 produced sixty-two (62) reports over five (5) years. (See Exhibit B at 7, ln 13-21.) In fact, Defendants
24 produced sixty-four (64) reports over three (3) years. Mr. Galliher then falsely alleged that there were
25 (4) reports he obtained from Mr. Goldstein that Venetian had not provided. (See *id.*) The
26 representation was not true and Defendants were forced to respond to reconcile the matter.
27
28

1 (See Exhibit C.) It was not until later that I discovered that Mr. Galliher had delivered a copy of all
2 the prior incident reports at issue before the Discovery Commissioner to Mr. Goldstein on February
3 7, 2019. (Exhibit E; Exhibit V at 2-3, with attached Exhibits 10-11.) Thus, when Mr. Galliher stood
4 before the Discovery Commissioner on March 13, 2019, he did not advise the Court or defense counsel
5 of the above, and said nothing of what he had done by producing deemed protected to documents to
6 Mr. Goldstein when the Court granted the protective order.
7

8 2. May 14, 2019 Hearing on Plaintiff's Objection to DCRR

9 At the May 14, 2019 hearing on Plaintiff's objection to the April 2, 2019 DCRR granting the
10 NRCP 26(c) protective order on prior incidents, Mr. Galliher represented: "*This was done right up-*
11 *front. The minute I got the information, I - I exchanged it with counsel [Peter Goldstein]. George*
12 *Bochanis also got a set.*" (See Exhibit D, *Transcript of Proceeding - Objection to DCRR*, dated May
13 14, 2019, at 12, ln 11-13.) Mr. Galliher also related to the Court that he shared information with Mr.
14 Goldstein and others "*well before there was any talk about a Protective Order*" and that it was
15 "*shared well before there was ever a motion practice filed before the Discovery Commissioner.*" (See
16 *id.* at 16, ln 1-6.) That is false, considering the motion for protective order was filed on February 1,
17 2019 and the prior incident reports were not produced to Mr. Goldstein until February 7, 2019.
18 (See Exhibit E.)
19

20 3. Motion for Leave to File Amended Complaint

21 Plaintiff filed a motion with the court for leave to allege punitive damages against Venetian.
22 In so doing, Plaintiff falsely reported that there were "*466-700 injury falls in the last five years*" and
23 that Venetian had only disclosed sixty-four (64) of those reports. (See Exhibit X, *Plaintiff's Motion*
24 *for Leave to Amend the Complaint*, filed April 22, 2019, at 2, 16-27. Emphasis added.) Mr. Galliher
25 has no evidence to support this claim. This is especially evident in light of Plaintiff's admission that
26 the sixty-four (64) prior incident reports produced as of July 25, 2019 is correct and deemed to be in
27
28

1 full compliance. (See Exhibit M, ln 4-10.) At the May 28, 2019 hearing on the motion, Mr. Galliher
2 also misrepresented to the Court that David Elliott, PE, had some ten (10) years previous advised
3 Venetian to change out all its marble flooring because it was deemed so dangerous. (See Exhibit Y,
4 *Transcript of Proceeding n Motion for Leave to Amend*, dated May 28, 2019, at 14, ln 8-23.) That
5 representation was completely false. (See Exhibit I.) However, it appears to have been made for the
6 purpose of swaying the Court to grant the motion. Mr. Galliher further falsely represented to the Court
7 that former Venetian employee, Gary Shulman, was: "*Harassed and eventually fired . . . who had*
8 *never received written warnings in his 13 years of work for Venetian.*" (See Exhibit Y at 8, ln 22-25.)
9 Mr. Galliher was at Mr. Shulman's deposition taken on April 17, 2019 and was, therefore, well aware
10 that Mr. Shulman acknowledged that he had numerous warnings in his employment with Venetian well
11 before he was terminated. (See Exhibit Z, *Transcript of Gary Shulman Deposition*, taken April 17,
12 2019, at 16, ln 10-16; 51, ln 15-25; 52, ln 1-12 (testifying that he had multiple disciplinary warnings
13 prior to June 2018); Exhibit AA, *VCR Team Member Discipline History (Gary Shulman)*. See also
14 Exhibit BB, *Plaintiff's Reply in Support of Her Motion for Leave to Amend the Complaint*, filed May
15 15, 2019 (without exhibits), at 5, ln 15-17, Mr. Galliher falsely asserting that Mr. Shulman was
16 terminated "*within 60 days of his dispute with Mr. Royal*" which counsel knew to be incorrect, as Mr.
17 Shulman was actually terminated seven (7) months after his June 28, 2018 meeting with defense
18 counsel, only after he threatened a co-worker.)⁵

21
22 4. **Motion to Strike Gary Shulman as Witness**

23 Defendants filed a motion to strike Gary Shulman as a witness and for a protective order, which
24 was heard by the Discovery Commissioner on June 26, 2019. (See Exhibit CC, *Transcript of*
25 *Proceeding - Motion to Strike Gary Shulman as Witness*, June 26, 2019.) During the hearing, Mr.
26

27
28 ⁵Also in the Reply, Mr. Galliher again falsely asserted there were 466-700 injury slip/falls at Venetian for the preceding five years, and that the sixty-four produced by Venetian was a small fraction of what has occurred. (See Exhibit Z at 2, ln 21-27.)

1 Galliher was expressly asked why he considered communications between Venetian counsel and
2 employee Sang Han privileged, but not between Mr. Shulman and defense counsel. (*See id.* at 16, ln
3 7-9.) Mr. Galliher responded that Mr. Han was “*the head of housekeeping . . . the boss man of the*
4 *department . . . that investigated the fall.*” (*See id.* at 16, ln 7-16.) That information was completely
5 false. As counsel is aware, from having taking Mr. Han’s deposition, Mr. Han was an assistant director
6 of housekeeping, was on a break, was a mere percipient witness to the incident (coming upon the scene
7 moments after it occurred) and did not perform any investigation of the fall. That representation was
8 grossly misleading and was not at all inconsequential.

10 5. Hearing on Plaintiff’s Motion to Continue

11 At the July 30, 2019 hearing on Plaintiff’s Motion to Continue Trial and Extend Discovery
12 Deadlines, Mr. Galliher made the following misrepresentation to the Court regarding Plaintiff’s
13 apparent desire to now have surgery: “*So we saw the July note [from Dr. Smith, recommending*
14 *surgery] and it was like, okay. And she was redeposed. She testified, hey, if I’m going to have to have*
15 *this done, I’ll have it done. So we know she’s going to have surgery.*” (Exhibit DD, *Transcript of*
16 *Proceeding - Motion to Continue*, July 30, 2019 at 28, ln 10-13. Emphasis added.) In fact, Plaintiff
17 was not redeposed and, therefore, could not have so testified. When confronted by the Court with this
18 statement, Mr. Galliher excused himself with the following: “*He [defense counsel] redeposed Mr.*
19 *Schulman. He’s redeposed several witnesses.*” (*See id.* at 33, ln 6-16.) In fact, as Plaintiff is well
20 aware, Defendants have not redeposed any witnesses.

21 The above are only a few examples of the pattern Mr. Galliher has followed when it comes to
22 representations to the Court. Per NRCP 11(b), counsel signing a brief filed with the Court certifies
23 “*that to the best of the person’s knowledge, information, and belief, formed after an inquiry*
24 *reasonable under the circumstances . . .*” that the allegations are not presented for any improper
25 purpose, the claims are not nonfrivolous and have evidentiary support. Here, in the instant motion,
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27
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1 Plaintiff has once again falsely accused Defendants of withholding sixty-five (65) prior incident reports
2 and used that false information to present Defendants in a bad light. It is simply unfair and it forces
3 Defendants to expend a great deal of time and resources responding to them, as has occurred here.

4 Defendants therefore move for an order striking Plaintiff's false accusations in the pending
5 motion regarding the alleged failure to produce prior incident reports. Defendants further move for
6 a finding that Plaintiff now has in her possession all incident reports to which she is entitled under the
7 circumstances of the case, in light of Venetian's full production (by Plaintiff's admission) for the years
8 November 4, 2013 to November 4, 2016, plus Plaintiff's reported possession of 196 prior incident
9 reports in the Grand Lux rotunda area per testimony from expert Tom Jennings (as Defendants are
10 being harassed with discovery seeking information back to May 1999). Alternatively Defendants
11 further move for an order limiting all future discovery regarding prior incidents to the Grand Lux
12 rotunda area where the subject incident occurred (and where Mr. Jennings claims the 196 prior
13 incidents referenced in his May 30, 2019 report occurred). Finally, Defendants move for sanctions
14 against Plaintiff for forcing them to once again respond to her previously acknowledged unfounded
15 allegations related to alleged refusal to provide "*undisclosed*" prior incident reports.
16
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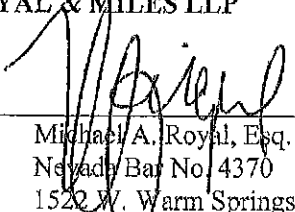
27 IV.
28

1 CONCLUSION

2 Based on the foregoing, Defendants hereby respectfully submit that Plaintiff's Motion to
3 Compel Production of Testimony and Documents must be denied in its entirety. Defendants further
4 hereby move by way of counter motion for an order finding that Plaintiff has received all incident
5 reports to which she is entitled in the course of discovery and for appropriate monetary sanctions for
6 forcing Defendants to respond to Plaintiff's frivolous claims.
7

8 DATED this 13 day of August, 2019.

9 ROYAL & MILES LLP

10
11 By 

12 Michael A. Royal, Esq.

13 Nevada Bar No. 4370

14 1522 W. Warm Springs Rd.

15 Henderson, NV 89014

16 *Attorney for Defendants*

17 *VENETIAN CASINO RESORT, LLC and*

18 *LAS VEGAS SANDS, LLC*
19
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14 day of August, 2019, and pursuant to NRCP 5(b), I caused a true and correct copy of the foregoing **OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL TESTIMONY AND DOCUMENTS AND COUNTERMOTION TO STRIKE FALSE ACCUSATIONS LEVIED BY PLAINTIFF IN "I. INTRODUCTION" AND "LEGAL ARGUMENT" SECTION "III.D." WITH APPROPRIATE SANCTIONS** to be served as follows:

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

_____ to be served via facsimile; and/or

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

_____ to be hand delivered;

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

Keith E. Galliher, Jr., Esq.
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An employee of ROYAL & MILES LLP

EXHIBIT “A”

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RFP

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VENETIAN CASINO RESORT, LLC and
LAS VEGAS SANDS, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

JOYCE SEKERA, an Individual;

Plaintiff,

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

v.

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

Defendants.

**SUPPLEMENTAL RESPONSES TO PLAINTIFF'S REQUESTS FOR PRODUCTION OF
DOCUMENTS AND MATERIALS TO DEFENDANT**

TO: Plaintiff JOYCE SEKERA; and

TO: Keith E. Galliher, Jr., Esq.; her attorney:

Pursuant to Rules 26 and 36 of the Nevada Rules of Civil Procedure, Defendant VENETIAN
CASINO RESORT, LLC, and LAS VEGAS SANDS, LLC, by and through their counsel, ROYAL &
MILES LLP, responds to Plaintiff's first requests for production of documents and materials as
follows:

1 **REQUEST NO. 1:**

2 All written, oral, or recorded statements made by any party, witness, or any other person or
3 persons with knowledge of the incident described in Plaintiffs Complaint.

4 **RESPONSE NO. 1:**

5 Defendants object to the extent this request seeks information protected by attorney/client
6 privilege and/or attorney work product privilege. Without waiving said objection, Defendants refer
7 to their disclosures pursuant to NRCP 16.1, documents 2-9, and all supplements thereto. Discovery
8 is continuing.

9
10 **REQUEST NO. 2:**

11 Any and all accident and investigative reports, films, video tapes, charts, plats, drawings, maps
12 or pictures and/or photographs of any kind which has, as its subject matter, the incident described in
13 Plaintiffs Complaint.

14
15 **RESPONSE NO. 2:**

16 See Response No. 1.

17 **REQUEST NO. 3:**

18 A complete copy of the Defendant's insurance carriers and/or risk management pre-litigation
19 claim file.

20
21 **RESPONSE NO. 3:**

22 Objection. This request lacks foundation, assumes facts not in evidence, seeks information that
23 is protected from disclosure by the attorney/client and/or attorney work product doctrine. Without
24 waiving said objection all known discoverable documents regarding the investigation of the loss have
25 been produced. See Defendants' NRCP 16.1 early case conference disclosures, documents 2-9, and
26 all supplements thereto. Discovery is continuing.

27

28

1 **REQUEST NO. 4:**

2 The names of all expert witnesses or consultants that Defendant will use at the time of trial
3 along with any reports produced by the same.

4 **RESPONSE NO. 4:**

5 Objection. This request is premature. Defendants' expert disclosures containing the requested
6 information will take place as set forth in the court's scheduling order. It is also an improper request
7 for production of documents.
8

9 **REQUEST NO. 5:**

10 Any and all sweep sheets, sweep logs, or other similar documentation which reflects the
11 maintenance and/or cleaning of the flooring located within the VENETIAN CASINO RESORT
12 described in Plaintiffs Complaint for the day before, day of, and day after the incident described
13 therein.
14

15 **RESPONSE NO. 5:**

16 Defendants object to the extent this request lacks foundation, assumes facts not in evidence,
17 is overly broad, vague and ambiguous. This request also presupposes that there was a foreign
18 substance on the floor causing Plaintiff's fall, which Defendants deny. It also incorrectly identifies the
19 subject premises as *VENETIAN CASINO RESORT*. This request further seeks information not
20 reasonably calculated to lead to the discovery of admissible evidence (*i.e.* documents related to
21 November 5, 2016). Without waiving said objection, Defendants respond as follows: *See* documents
22 identified pursuant to NRCp 16.1, bates numbers VEN 044-106. Discovery is continuing.
23

24 **REQUEST NO. 6:**

25 True and correct copies of any and all manuals, documents, pamphlets, flyers, or other
26 memorandum which has, as its subject matter, the standard operating procedures with respect to the
27
28

1 maintenance, cleaning and sweeping of the floors with respect to the VENETIAN CASINO RESORT
2 in which the fall occurred.

3 **RESPONSE NO. 6:**

4 Defendant objects to the extent this request lacks foundation, assumes facts not in evidence,
5 and is further overly broad, vague and ambiguous. This request also presupposes that there was a
6 foreign substance on the floor causing Plaintiff's fall, which Defendants deny, also incorrectly identifies
7 the subject premises as *VENETIAN CASINO RESORT*. This request further seeks information not
8 reasonably calculated to lead to the discovery of admissible evidence. Without waiving said objection,
9 Defendant responds as follows: *See Response No. 5.*

11 **REQUEST NO. 7:**

12 True and correct copies of any and all claim forms, legal actions, civil complaints, statements,
13 security reports, computer generated lists, investigative documents or other memoranda which have,
14 as its subject matter, slip and fall cases occurring on marble floors within the subject VENETIAN
15 CASINO RESORT within three years prior to the incident described in Plaintiffs Complaint, to the
16 present.

18 **RESPONSE NO. 7:**

19 Defendants object to the extent this request lacks foundation, assumes facts not in
20 evidence, is overly broad, vague and ambiguous, unduly burdensome and presupposes there was
21 a foreign substance on the floor causing Plaintiff's fall, which Defendants deny. It also
22 incorrectly identifies the subject premises as *VENETIAN CASINO RESORT*. This request
23 further seeks access to information which is equally available to Plaintiff via public records, and
24 otherwise seeks information that is not reasonably calculated to lead to the discovery of
25 admissible evidence. Defendant objects as the request as over broad and not properly tailored
26 to the issues in this case. Without waiving said objection, Defendants respond as follows: Please
27
28

1 see Defendants' 5th Supplement to NRCP 16.1 Disclosure and all supplements thereto.

2 Discovery is continuing.

3 **REQUEST NO. 8:**

4 Any and all documents, information, memoranda, paperwork, or other material which relates
5 to establishes, or otherwise pertains to the affirmative defenses alleged by the Defendant herein.

6 **RESPONSE NO. 8:**

7 See Response No. 1.

8 **REQUEST NO. 9:**

9 Any surveillance video showing the Plaintiffs fall at the VENETIAN CASINO RESORT
10 from any other angle, other than the one shown in the video surveillance produced by the
11 Defendants thus far.

12 **RESPONSE NO. 9:**

13 Defendants object to the extent this request incorrectly identifies the subject premises as
14 *VENETIAN CASINO RESORT*, and further that the term "*surveillance video*" is itself overly broad
15 and seeks information outside Defendants' knowledge, custody and control (*i.e.* videos taken by other
16 persons on the subject premises at the time). Without waiving said objection, Defendants respond as
17 follows: All known surveillance related to this matter was produced as Document No. 9 in Defendants'
18 NRCP 16.1 disclosure. Discovery is continuing.

19 **REQUEST NO. 10:**

20 Any other witnesses, documents, or other disclosures required by NRCP 16.1.

21 ///

22 ///

23 ///

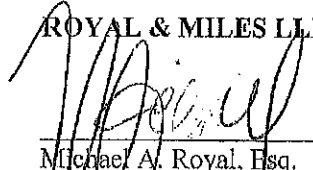
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1 **RESPONSE NO. 10:**

2 See Response No. 1.

3 DATED this 3 day of January, 2019.

4 **ROYAL & MILES LLP**

5
6 By: 

7 Michael A. Royal, Esq.

8 Nevada Bar No. 4370

9 Gregory A. Miles, Esq.

10 Nevada Bar No. 4336

11 1522 W. Warm Springs Road

12 Henderson, NV 89014

13 *Attorneys for Defendants*

14 *VENETIAN CASINO RESORT, LLC and*

15 *LAS VEGAS SANDS, LLC*

1 **CERTIFICATE OF SERVICE**

2 I HEREBY CERTIFY that on the 4 day of January, 2019, and pursuant to NRCP 5(b), I
3 caused a true and correct copy of the foregoing **SUPPLEMENTAL RESPONSES TO**
4 **PLAINTIFF'S REQUESTS FOR PRODUCTION OF DOCUMENTS AND MATERIALS TO**
5 **DEFENDANT** to be served as follows:

6
7 _____ by placing same to be deposited for mailing in the United States Mail, in a sealed
8 envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

9 _____ to be served via facsimile; and/or

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

12 _____ to be hand delivered;

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

14 Keith E. Galliher, Jr., Esq.
15 THE GALLIHER LAW FIRM
16 1850 E. Sahara Avenue, Suite 107
Las Vegas, NV 89014
Attorneys for Plaintiff

17 Facsimile: 702-735-0204

18 E-Service: kgalliher@galliherlawfirm.com
dmooney@galliherlawfirm.com
19 gramos@galliherlawfirm.com
20 sray@galliherlawfirm.com

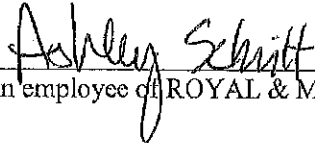
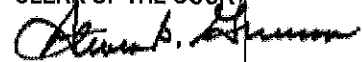
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23 An employee of ROYAL & MILES LLP
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EXHIBIT “B”



1 RTRAN

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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7 JOYCE SEKERA,

8 Plaintiff,

9 vs.

10 VENETIAN CASINO RESORT
11 LLC, ET AL.,

12 Defendants.

CASE NO.: A-18-772761

DEPT. XXV

13
14 BEFORE THE HON. ERIN TRUMAN, DISCOVERY COMMISSIONER
15 WEDNESDAY, MARCH 13, 2019

16 **RECORDER'S TRANSCRIPT OF HEARING**
17 **DEFENDANT'S MOTION FOR PROTECTIVE ORDER**

18
19 APPEARANCES:

20 For the Plaintiff:

KEITH E. GALLIHER, JR., ESQ.

21
22 For the Defendants:

MICHAEL A. ROYAL, ESQ.

23
24 RECORDED BY: FRANCESCA HAAK, COURT RECORDER
25

1 to someone upstairs. While they're talking, one of the women who sees
2 the fall walks over, points to the spill, and the guy, the security officer,
3 looks at it, then summons porters who come to the scene, one of the
4 porters takes out a mop, mops up the spill, another walks on with some
5 towels and wipes up the spill around the very area where my client fell.
6 That's pretty clear, that this was a slip and fall on water.

7 Now, here's the problem. The Venetian has polished marble
8 floors throughout its entire ground floor and also on the Bouchon floor,
9 which I think is floor number 10. They're very pretty, very attractive, and,
10 as the expert report attached to our opposition shows, also very slippery
11 when wet.

12 So when we talk about a transitory condition, not really. This
13 is a marble floor that's been at The Venetian from the get-go.

14 And then we start talking about the number of falls. Well, I
15 deposed their -- one EMT security officer who said that during the nine
16 years that he had been there he had personally investigated 100 --
17 approximately 100 injury falls on the marble floors at The Venetian.

18 Now, there are two EMT security officers per shift, sometimes
19 three, so if we do the math, we've got at least six security officers
20 working the three shifts at The Venetian, up to nine. So if we do that
21 math -- this one's -- this fellow has investigated personally 100 injury
22 falls, and we assume he's average -- then that means that there are
23 somewhere between 600 and 900.

24 DISCOVERY COMMISSIONER: Well, didn't three respond to
25 this one alone, and so that would be a, you know --

1 MR. GALLIHER: Well, no, no. Those weren't the same
2 security people.

3 DISCOVERY COMMISSIONER: Oh.

4 MR. GALLIHER: See, there -- The Venetian, Commissioner,
5 has security officers/EMTs. They are the ones that go to the injury
6 falls -- the other people do not -- because they're trained. Well, that's
7 who I deposed. So he's the one that told me under oath two security
8 officers/EMTs per shift, sometimes three, three shifts, very simple math.

9 Now we go from 100 falls investigated by one, to somewhere
10 around 900, and then we take it and we back out the nine years and
11 make it five -- 'cause that's what I was looking for. We're somewhere
12 between five, six hundred falls at The Venetian.

13 Now, what I received was 62 reports for a five-year period.
14 Well, that doesn't compute with my math, so the other thing that -- and
15 we talk about sharing information. Peter Goldstein has a case against
16 Venetian. In that case The Venetian furnished him 26 reports for the
17 same time frame. Well, how does that happen? Then what we did is we
18 compared the reports that he received with reports that we received. He
19 didn't get 26 of ours, we didn't get four of his; well, how does that
20 happen? Then we find out there's three defense firms representing The
21 Venetian in these three different cases; they're all different.

22 So what we're finding and what I'm alleging in this situation is
23 what The Venetian is doing is they're selectively distributing reports to
24 their defense firm to distribute to the Plaintiffs in individual cases, and
25 they're not giving everybody all the reports. It's very easy to determine

1 when I get a situation like this and I compare and find that Mr. Goldstein,
2 who got 26 has four I don't have for the same time frame. A couple of
3 them were on the same day; I got the one in the afternoon; he got the
4 one in the morning. Well, sorry, it's not Mr. Royal's fault. The
5 Venetian's not a good corporate citizen, that's for sure. They are
6 withholding these reports and selectively giving them to the Plaintiffs'
7 attorneys through the different defense firms that they're hiring. So
8 that's why this information needs to be disclosed.

9 But also, when we talk about the identification of the people
10 who fell -- you have probably tried slip and fall cases, I've tried my
11 share -- what does a defense attorney normally do in these cases?
12 They try to establish comparative negligence, particularly if there's liquid
13 on the floor. Well, weren't you looking where you were walking? Didn't
14 you see the spill on the floor? Why didn't you see it? It was right there.
15 Look at it. Comparative negligence, that's what this is about.

16 So if we have the identity of people who previously fell on
17 these same floors at The Venetian in liquid, we put on five of 'em or ten
18 of 'em to say -- very simple questioning -- what's your name; did you
19 stay at The Venetian; were you walking through The Venetian; did you
20 fall; did you fall on liquid; were you injured; did you see the liquid before
21 you fell; pass the witness.

22 DISCOVERY COMMISSIONER: Don't you already have an
23 expert who's going to testify regarding the coefficient of friction or, as
24 you allege --

25 MR. GALLIHER: Sure.

EXHIBIT “C”

Michael A. Royal*
Gregory A. Miles*

*Also Admitted in Utah



ROYAL & MILES LLP

1522 W. Warm Springs Road
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Email:
mroyal@royalmilesllp.com

March 25, 2019

Sent Via US Mail &

Facsimile: 702-735-0204

Keith E. Galliher, Jr., Esq.
THE GALLIHER LAW FIRM
1850 E. Sahara Avenue, Suite 107
Las Vegas, NV 89014
Attorney for Plaintiff

Re: *Venetian adv. Sekera, Joyce*

Our Clients: VENETIAN CASINO RESORT, LLC and
LAS VEGAS SANDS, LLC

Date of Incident: November 4, 2016

Our File No.: 3837-18

Dear Keith:

I have been through all prior incident reports that, to my knowledge, were produced in the *VCR adv. Carol Smith* matter you raised before the Discovery Commissioner. Since you did not identify the documents for either the Court or me, I went through each of them and identified three matters that pre-date November 3, 2013, and one that occurred on the fifth floor of the parking garage. None of these reports are responsive to your production request. Consequently, I have no additional documents to provide related to production from the *VCR adv. Carol Smith* litigation. If you have other information that is inconsistent with the above, please advise.

Very truly yours,

ROYAL & MILES LLP

Michael A. Royal, Esq.

MAR/as

VEN 1053

TRANSACTION REPORT

MAR/25/2019/MON 10:21 AM

FAX (TX)

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Michael A. Royal*
Gregory A. Miles*
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1522 W. Warm Springs Road
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mroyal@royalmilesllp.com

FAX COVER SHEET

To: Keith E. Galliher, Jr., Esq.
THE GALLIHER LAW FIRM **Fax No:** 702-735-0204

From: Michael A. Royal, Esq.
Assistant: Ashley Schmitt

Date: March 25, 2019

File No: 3837-18

Subject: Venetian adv. Sekera

Number of Pages 2
(including cover):

Message: Please see attached correspondence dated March 25, 2019; your immediate attention is appreciated. Thank you!

NOTE: If you experience any problems in receiving this transmission, please call (702) 471-6777. If we do not hear from you, we will assume that you have received all pages, and that they are legible.

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EXHIBIT “D”

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DISTRICT COURT
CLARK COUNTY, NEVADA

Joyce Sekera,
Plaintiff,
vs.
Venetian Casino Resort, LLC,
Defendant.

Case No. A-18-773761
Dept. No. XXV

Before the Honorable KATHLEEN E. DELANEY
Tuesday, May 14, 2019, 9:00 A.M.
Reporter's Transcript of Proceedings

OBJECTION TO DISCOVERY COMMISSIONER'S REPORT

APPEARANCES:

For the Plaintiff: KEITH E. GALLIHER, JR., ESQ.
KATHLEEN GALLAGHER, ESQ.
Attorneys at Law

For the Defendant: MICHAEL A. ROYAL, ESQ.
Attorney at Law

REPORTED BY: RENEE SILVAGGIO, C.C.R. No. 122

1 Las Vegas, Clark County, Nevada

2 Tuesday, May 14, 2019, 9:00 A.M.

3 P R O C E E D I N G S

4 * * * * *

5 THE COURT: Page 2, Sekera versus Venetian
6 Casino Resort from the 9:00 o'clock.

7 MR. GALLIHER: Thankfully, at my age, I'm still
8 awake.

9 THE COURT: That makes one of us. I, too, drove
10 in from California this morning and that's all I can do.

11 MR. GALLIHER: Your Honor, Keith Galliher on
12 behalf of plaintiff. And I'd like to introduce Kathleen
13 Gallagher to the Court. She is actually not a relative.

14 THE COURT: What?

15 MR. GALLIHER: I know.

16 THE COURT: I thought you were telling me
17 something --

18 MR. GALLIHER: I know. I know.

19 THE COURT: -- well, you did said Gallagher.

20 MR. GALLIHER: Yeah. Different -- different
21 spelling.

22 But just by way of background, Kathleen finished
23 college, two years at the University of Oregon; came to Las
24 Vegas, attended Boyd School of Law, went to the night program;
25 worked full time at a law office, receptionist, paralegal, law

1 can't use it outside the litigation. You can't give it to
2 anybody else who's involved in litigation against the Venetian.
3 You have to keep it in this litigation.

4 And my response was: I can't agree to that
5 because I do not think that a Protective Order is proper in
6 this case given the nature of what we're asking for, injury
7 incident reports.

8 There are a number of pending lawsuits against
9 the Venetian as a result of these floors and people slipping on
10 these floors.

11 And, I mean, the Court should be aware that as
12 members of the Nevada Justice Association, we all share
13 information concerning our cases. We share briefing, we share
14 experts and we share discovery that, in fact, we collected in
15 our case.

16 And as the Court would note from the objection
17 that we filed, and by the way, giving credit where credit is
18 due, Kathleen wrote the objection. She researched it and wrote
19 it. And I thought she did an excellent job.

20 The bottom line is that the cases in this
21 country are uniform, that a Protective Order is not proper in a
22 situation like this because what it does is it increases
23 discovery costs.

24 For example, in this case, I received 64 prior
25 fall reports redacted. Attorney Goldstein had another case

1 against the Venetian. He received 32. Same time frames.

2 What happened when I got my redacted reports, I
3 exchanged them with him. He sent them to me -- and by the way,
4 there was no Protective Order in place. There was no motion
5 practice in place, despite what's being represented.

6 THE COURT: I was going to say because I do have
7 a counter motion for you --

8 MR. GALLIHER: Yeah. I know.

9 THE COURT: -- to comply with the Court order
10 and a counter motion for sanctions related --

11 MR. GALLIHER: This was done right upfront. The
12 minute I got the information, I -- I exchanged it with counsel.
13 George Bochanis also got a set. He exchanged a set.

14 So what we did is we got a set and compared
15 notes. And lo and behold, what we find is I don't have four of
16 the reports that Mr. Goldstein has. He doesn't have 35 of the
17 reports that I have. And Mr. Bochanis has about 11 that I
18 don't have.

19 So what we're finding is this -- and the
20 interesting thing about this is that the Venetian, when they
21 defend these cases, they always retain different defense firms.
22 So they don't retain the same firm to represent them in
23 defending these cases.

24 Now, why do I think that's the case?

25 Well, gee, if you have an ethical defense lawyer

1 and in one case you send them 32 reports for the same time
2 frame and the next case you send them 64 reports, the first
3 thing he's going to ask is: Well, what are you doing? Why
4 don't I have all the reports?

5 And the other thing that troubles me in the case
6 is I took the deposition of EMT Security Guard Larson, and
7 that's referenced in the motion practice. And Mr. Larson
8 testified that he had investigated -- his best estimate was a
9 hundred injury falls himself as an EMT security guard being
10 employed with the Venetian for a period of nine years.

11 Well, he's one of two or three EMT security
12 guards per shift. There are three shifts. So if we assume
13 that he's an average EMT security guard, that means that there
14 is somewhere between 600 and 900 injury falls on these floors
15 at the Venetian during the nine-year time frame. If we narrow
16 it down to the five years that we requested, we'll estimate a
17 suite of 500 falls.

18 Well, I got 64 reports, and the reports I got
19 were not the same reports as Mr. Goldstein got, were not the
20 same reports that Mr. Bochanis got.

21 So obviously from my perspective, it was: Well,
22 why would I stipulate to a Protective Order in this case given
23 what we know is the situation? And we argued this before
24 Commissioner Truman.

25 And, quite frankly, what happened is that the

1 Protective Order argument was made in the reply to the
2 opposition to the initial motion that was filed. The
3 Protective Order that was sought at issue was: We want to be
4 able to submit redacted reports. That was the issue.

5 I responded and said: No, there's no privacy
6 issue here.

7 And HIPAA certainly doesn't apply. We're not
8 talking about a medical facility.

9 So -- and the Social Security Numbers are not on
10 the reports, so that's not at issue.

11 The only thing we want is contact information.
12 We want a name and address of the person who fell.

13 Well, in response to our opposition for the
14 first time in the reply, the argument was expanded. Now, it's,
15 like -- because at that point in time the defense learned that
16 we had shared information with the other two attorneys and
17 apparently that upset the Venetian. So now the game changes.

18 Now, it's, like, well, you know what? We want a
19 Protective Order because we don't want you to be able to
20 disclose this information to any other attorney that's involved
21 in litigation against the Venetian.

22 Well, as we pointed out in our objection, that's
23 completely contrary to the uniform case law throughout the
24 country. There are no cases that we located in which a Court
25 upheld a Protective Order of that nature.

1 Well, we didn't get a chance to brief that
2 because it was a reply in motion practice.

3 So we went in and argued the issue, and we lost
4 the issue before Commissioner Truman. And, quite frankly,
5 Commissioner Truman was just flat wrong.

6 So the bottom line is that the order was issued.
7 And then on top of it, it's now been magnified even further by
8 the defense because now I'm supposed to go out and I -- and I
9 violated her order -- it wasn't an order. It was a report and
10 recommendation.

11 And I had to go out now and I have to request
12 all that information, all those reports back from counsel. I'm
13 not sure why because that was never even argued before the
14 Discovery Commissioner.

15 So all of a sudden, from a situation where we
16 have a -- a Protective Order that should not have been issued,
17 period, with respect to sharing information or with respect to
18 redacted reports, that's now been expanded by the defense into
19 this -- and I'm a little surprised because Mike Royal and I,
20 believe it or not, get along quite well.

21 And I'm reading this and it's, like, oh, well, I
22 had no idea I was so clever. I didn't realize that I was that
23 smart and that disingenuous; but I guess maybe, perhaps,
24 Mr. Royal thinks I am.

25 But the bottom line is that the reports that we

1 received, redacted reports, were shared well before there was
2 any talk about a Protective Order. So I'm not in violation of
3 anything.

4 The information was also shared well before
5 there was ever a motion practice filed before the Discovery
6 Commissioner. And the only reason that was filed was because I
7 refused to stipulate to a Protective Order which precluded me
8 from sharing information.

9 So the bottom line is all of this now has been
10 expanded far beyond -- I'm not even going to address the
11 Schulman deposition. I think that's a subject of separate
12 motion, a separate proceeding. I think that Mr. Royal's
13 position was completely wrong in that situation.

14 I'm addressing right now the proprietary nature
15 of a Discovery Commissioner Report and Recommendation that
16 tells me I can't get unredacted reports so I can contact these
17 people and present them, subject to the Court's discretion at
18 trial, to show notice, foreseeability and comparative
19 negligence, or the absence of --

20 THE COURT: But, Mr. Galliher, the order would
21 let you do that if you just needed the names and the
22 information for contact purposes for this litigation.

23 But what you're suggesting is, is that it's
24 really two-fold: Like you could have what you need for this
25 litigation, but you've already shared it and you want to

1 continue to share it and you want to support your bar by -- by
2 sharing this information.

3 Is that what you meant by saying it creates some
4 form of efficiency or judicial or partly economy because then
5 all of the same information would be out there amongst all the
6 same plaintiffs attorneys.

7 MR. GALLIHER: Well, actually the
8 recommendation, of course, is that the reports remain redacted.
9 The recommendation is not that I get the names and addresses of
10 the people who fell. The Report and Recommendation denies me
11 that.

12 THE COURT: Fair enough.

13 As you said, you were talking about negotiating
14 a Protective Order but you didn't agree, and that would have
15 been a negotiated matter.

16 MR. GALLIHER: Right.

17 THE COURT: But you got it or you did not get
18 it?

19 MR. GALLIHER: No, I didn't.

20 I still don't have the names and addresses of
21 the people who fell.

22 THE COURT: I think that -- okay. And this is
23 why we have oral argument, because I thought I connected
24 properly to the fact that you only got a redacted and that was
25 what was ordered.

1 But then when you started arguing and you said
2 you shared it and that may have upset them, that struck me as:
3 Okay. Well, wait a minute. Maybe there was some sharing of it
4 in an unredacted form and that's what -- you know, to you, and
5 then that's what -- you know, you're upset because you shared
6 that with the others. So you only received the redacted.

7 MR. GALLIHER: Yeah. We've never seen an
8 unredacted report -- Injury Incident Report from the Venetian
9 as requested.

10 And -- and we go right back to the question
11 of -- and we've argued this in our -- our objection. Kathleen
12 did an excellent job of briefing the issue. It violates
13 NRCP-1, it violates the case law that we cited, which is
14 universal.

15 The reason that you are allowed to do what we do
16 is you share the -- share information. Remember, we're suing a
17 big corporate defendant. And they're being sued a lot.

18 We've -- we've identified five or six pending
19 lawsuits that we didn't know about, additional reports we
20 didn't know about in our opposition -- or our objection because
21 Kathleen did the research and located the information.

22 So our position is that the case law makes it
23 very clear that this type of sharing of information is
24 encouraged because it decreases discovery costs.

25 Otherwise, if you allow this situation where we

1 cannot disseminate the information that we've uncovered in this
2 case to other attorneys who are suing the Venetian, then that
3 forces us, all of us, to discover information ourselves in each
4 case unilaterally without sharing information or relying upon
5 information that's received from other people, other attorneys
6 involved in the case.

7 And what makes that even worse is that the
8 second purpose of all of this is to do exactly what we did:
9 Crosscheck, make sure that the corporate defendant is being
10 honest and forthright in giving you the information that you've
11 requested.

12 And the best way for us to determine that is to
13 compare what we received with what other attorneys suing the
14 Venetian have received. And what we find in this case is it's
15 not the same. So --

16 THE COURT: And interestingly, Mr. Royal says
17 that it's exactly what you did, which is why we need the
18 Protective Order to begin with because things shouldn't be
19 shared.

20 No, I appreciate it. I think you covered
21 everything very well. I think I have a few questions.

22 You -- there was a couple of procedural things.
23 I didn't know if you wanted to address them now, or we'll just
24 as we kind of wrap up, we'll go over it. But there was the
25 challenge that the counter motions really -- that you

1 brought -- the counter motions could not be added here.

2 MR. GALLIHER: Well, in reality, there should
3 have been an objection. And if the Court ordered, there should
4 have been a response to the objection. That's all that should
5 be here.

6 What happened is that the defense filed the
7 counter motion. They filed a counter motion and we filed a
8 response to that motion to strike because our argument was --

9 THE COURT: And I have that motion to strike --

10 MR. GALLIHER: -- that that should not have been
11 filed. That all we should have had here today would have been
12 the objection and the response to the objection and nothing
13 else. So that's why we filed a Motion to Strike.

14 THE COURT: Well, and uniquely our rules until
15 the recent incarnation of the rules I don't think even allowed
16 for a response to the objection.

17 MR. GALLIHER: Right.

18 THE COURT: But the new rules do. And everybody
19 always did it, so, you know, it is what it is.

20 MR. GALLIHER: And I'm fine with that.

21 But the rest of the -- the rest of -- everything
22 after what should have been the response really has no place
23 here, which is why we filed the Motion to Strike.

24 And the -- for example, the deposition shouldn't
25 be here. It could be raised before the Discovery Commissioner,

1 if, in fact, the defense really feels they have a valid
2 argument. I don't think they do.

3 So the bottom line is the Commissioner's Report
4 and Recommendation, which is flat wrong, she got it wrong. I'm
5 not blaming her for that because she didn't have all the
6 briefing that you have before you at the time she made the
7 decision. It was raised in reply for the first time.

8 So now that we've got the Venetian's position,
9 which is, you know, you can't distribute this to anybody else,
10 we've researched the law. The law does not support that
11 decision as we've cited in our brief.

12 Numerous cases throughout the country have said
13 we actually encourage this because it reduces discovery costs,
14 number one. And number two, it enables the attorneys suing the
15 corporate entity to crosscheck whether or not the information
16 they're receiving in discovery is accurate.

17 Submitted.

18 THE COURT: All right. Thank you.

19 Ms. Gallagher, did he miss anything? Is there
20 something else that we should cover?

21 I'm kind of being facetious.

22 MR. GALLIHER: I don't have a problem with that.
23 I don't mind being reminded.

24 MS. GALLAGHER: I was just going to say --

25 THE COURT: I'm sorry. It was a poor joke. I

1 just -- yeah, because he credited you with writing so much, I
2 thought in case he missed something.

3 But, of course, it's -- it's just a summary. I
4 was only joking. But thank you for your efforts and thank you,
5 Mr. Galliher, for your argument.

6 Mr. Royal, and wherever you want to start.
7 We've got some procedural, obviously, arguments and I know you
8 cited to 2.20 for, you know, bringing a counter motion that
9 relates and some other things that it is.

10 Under the current rules, it does contemplate
11 that there's an objection that there was either a response to
12 the objection and that's how you would resolve these issues.

13 I don't know whether I have a ton of heartburn
14 that you raised the issues the way that you did. It's just
15 whether or not, you know, we're going to address them here or
16 not. But however you want to start -- wherever you want to
17 start.

18 MR. ROYAL: Your Honor, the reason I -- the
19 reason I filed the counter motion is because it's so closely
20 connected to -- to the timeline of events that are at issue
21 here.

22 I mean, when Mr. -- -- when Mr. Galliher says he
23 -- the way he presents this is that I sandbagged -- that the --
24 you know, the defendant sandbagged before going before the
25 Discovery Commissioner.

1 This was -- I actually sent him correspondence
2 on December 17th, 2018. I let him know from the very beginning
3 that my client wanted this information to be protected. So I
4 sent him a letter with a copy of a Protective Order, a draft,
5 for him to look at. He contacted me and indicated he's not
6 going to do that. We had a 2.34.

7 I went ahead and I -- you know, and I frankly
8 just decided I will go ahead and give him redacted copies and
9 see if that satisfies the situation.

10 He contacted me -- that was on January 4th.

11 He contacted me and said: Okay, I'm not
12 satisfied. You're not allowed to do this.

13 I -- and I said: Well, why? Why? You've got
14 the prior incidents. Okay? You've got whatever it is that you
15 need to make your notice arguments.

16 No, no, no. I need to be able to contact every
17 one of these people and maybe even their relatives and
18 witnesses, whatever, and I need to be able to talk to them
19 about the case. Every one of these people are potential
20 witnesses.

21 And I said: Well, we're not going to agree to
22 that. You know, and so we had a -- we had a -- you know, we
23 had another 2.34. And we agreed that I would file a motion for
24 Protective Order.

25 Now, I sent him a letter on January 23rd

1 again --

2 THE COURT: You agreed to file a motion for the
3 Protective Order. You did not agree to the Protective Order.

4 MR. ROYAL: I'm sorry. Thank you, Your Honor.

5 THE COURT: No, no. You said it that way. I
6 was just confirming for the record that's how I heard it. It
7 was that the understanding was you couldn't resolve it.

8 MR. ROYAL: Right.

9 THE COURT: So you were going to do a motion and
10 that's -- we're reconfirming it.

11 MR. ROYAL: Some of the correspondence that
12 I've -- that I've provided to the Court, e-mailed -- or a
13 letter, or whatever, e-mail to Mr. Galliher, Mr. Galliher
14 writes me back and one of the things he said was: Go ahead and
15 file your motion. I don't believe the Discovery Commissioner
16 is going to agree with you.

17 Okay. Fine. All right. That's why we file
18 motions.

19 The motion was then filed on February 1st. So
20 when Mr. Galliher today represented before the Court, I didn't
21 provide any of this information -- or rather I provided this
22 information before there was any motion practice. That's what
23 he just said.

24 Now, what I -- what I have provided the Court is
25 an affidavit from Mr. Goldstein, who said he first met with

1 Mr. Galliher on February 7th, 2019. So that would be six days
2 after we filed the motion. It would be well after the time
3 that Mr. Galliher and I had a discussion about whether or not
4 my client wanted this information to be protected.

5 He understood -- he understood from the very
6 beginning, at least from December 17th, 2018, that this
7 information was something my client wanted protected. He
8 understood that.

9 Now, if he shared the information with
10 Mr. Goldstein, maybe if he could show that he did that between
11 January 4th and maybe January 23rd, that would be one thing.
12 But that's not what happened, and that's not what at least the
13 evidence we have -- the Court has before it shows.

14 We agreed on January 23rd, I would file a
15 motion. I filed a motion on February 1st. He met with
16 Mr. Galliher -- or, sorry, Mr. Galliher met with Mr. Goldstein
17 on February 7th, and that's when they had their exchange.

18 By the way, I didn't know that. I didn't know
19 that when I filed the motion. I thought that we -- it was just
20 going to be a simple motion before the Court and we were just
21 going to try to get this resolved.

22 What it looks like happened from my perspective
23 is that once Mr. Galliher was aware we were going to be filing
24 the motion, he wanted to go ahead and do a preemptive exchange
25 with Mr. Goldstein, Mr. Bochanis and whoever else just to hedge

1 his bets in case the Court granted the motion.

2 And so then he files his opposition. I filed my
3 reply. And at the time I filed my reply, I did not know that
4 Mr. Goldstein had actually used information about this, the
5 subject of the motion for Protective Order. I didn't know that
6 until after I filed my reply.

7 So you'll see, Your Honor, that I actually filed
8 an addendum to the reply to let the Discovery Commissioner
9 know: Hey, I just found out, Mr. Goldstein and Mr. -- I mean,
10 while this motion is pending, they're exchanging information.

11 So when we got to the hearing, that's when
12 Mr. Galliher -- that's when Mr. Galliher, for the first time,
13 is talking about his explanation of why he needs this other
14 information. Oh, and Mr. Goldstein only got 32, and, of
15 course, I gave him 64.

16 So I gave him 64 and I'm the bad guy because I
17 actually gave him twice as many as whatever Mr. Goldstein got.
18 And he's trying to suggest to the Discovery Commissioner that
19 there's some nefarious plan by my client.

20 And all I can tell, Your Honor, is at the time,
21 at the time that I argued this, that we argued this before the
22 Discovery Commissioner on March 13th, 2019, I did not know -- I
23 did not know that on March 12th, the day before, March 12th,
24 2019, that Mr. Goldstein had taken all 64, 660 pages of those
25 documents provided to him by Mr. Galliher while this motion was

EXHIBIT “E”

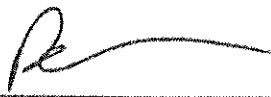
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1. I am an attorney duly licensed to practice law in Nevada and am counsel of record for Plaintiff. I have personal knowledge of all matters stated herein that I know to be true.
2. The exhibits attached hereto are true and correct copies of the originals of those documents that I have kept in my office file for this matter in the ordinary course of business.
 - Exhibit 1 is the Discovery Commissioner's Report and Recommendations from May 2, 2018.
 - Exhibit 2 is the Discovery Commissioner's Report and Recommendations from October 31, 2018.
 - Exhibit 3 is a spreadsheet documenting the incident reports disclosed to Plaintiff in the Smith v. Venetian case.
 - Exhibit 4 is a spreadsheet documenting incident reports from Sekera v. Venetian and a column of what was not disclosed in Smith v. Venetian.
 - Exhibit 5 is Plaintiff's proposed Order regarding the Defendant's Objection to the Discovery Commissioner's Report and Recommendation, as well as correspondence with my office and the Defense, which has gone unanswered.
3. Defendant has failed to produce any video footage.
4. Defendant has failed to produce any incident reports from 2011 – 2013.
5. Mr. Keith Gallagher provided additional incident reports of slip and falls on marble floors on property, produced by the Venetian in the case Sekera v. Venetian, Case No. A-18-772761-C, on February 7, 2019.
6. I can provide PDF copies of all incident reports disclosed in the Smith v. Venetian and Sekera v. Venetian cases, if required by the Court.
7. Defendant has refused to discuss the admissibility of prior reports.
8. Defendant has refused to respond to the proposed order, submitted to them on February 4, 2019.

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I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Dated February 13, 2019 at Las Vegas, Nevada.

Signed: 

Peter Goldstein, Declarant

EXHIBIT “F”

Steven D. Grierson

1 **ROPP**
2 Peter Goldstein, Esq. (SBN 6992)
3 **PETER GOLDSTEIN LAW CORPORATION**
4 10785 W Twain Ave, Ste. 230
5 Las Vegas, Nevada 89135
6 Email: peter@petergoldsteinlaw.com
7 Tel: 702.474.6400
8 Fax: 888.400.8799
9 Attorney for Plaintiff
10 **CAROL SMITH**

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

9 **CAROL SMITH, an individual,**

10 **Plaintiff,**

11 **vs.**

12 **VENETIAN CASINO RESORT, LLC; and**
13 **DOES 1 through 50, inclusive,**

14 **Defendants.**

Case No.: A-17-753362-C
Dept. No.: X

Discovery Commissioner

**PLAINTIFF'S REPLY TO
DEFENDANT VENETIAN CASINO
RESORT, LLC'S OPPOSITION TO
PLAINTIFF'S MOTION FOR
TERMINATING SANCTIONS,
MONETARY SANCTIONS FOR
WILLFUL SUPPRESSION OF
EVIDENCE PURSUANT TO NRCP
RULE 37**

Date of Hearing: March 20, 2019
Time of Hearing: 9:00 a.m.

15 Plaintiff, CAROL SMITH, by and through her attorney of record, PETER GOLDSTEIN, ESQ.,
16
17
18 hereby submit Plaintiff's Reply to Defendant Venetian Casino Resort, LLC's Opposition to Plaintiff's
19
20 Motion for Termination Sanctions, Monetary Sanctions for Willful Suppression of Evidence Pursuant to
21
22 NRCP Rule 37.

23 Dated: 3.12.19

PETER GOLDSTEIN LAW CORPORATION

24 BY: *Peter Goldstein*
25 PETER GOLDSTEIN, ESQ.
26 Attorney for Plaintiff
27
28

1 **I. The Incident Reports In The Sekera Case And The Smith Case All Involve Falls**
2 **On Marble Floors**

3 Defendant argues that the discovery issues involving *Sekera v Venetian*, Case No. A-18-772761-
4 C and *Smith v Venetian* are not identical, but “rather are different”. The discovery requests and
5 responses involve prior falls on marble floors in lobbies of the Venetian Hotel and Casino primarily for
6 2014 to 2016. In request number 7, *Sekera* requested slip and fall incident reports on marble floors in the
7 Venetian Hotel and Casino for three years prior to the date of the *Sekera* incident (November 4, 2016).
8 Venetian provided 64 prior reports and 660 pages of documents in its Responses and Supplemental
9 Responses to Request for Production of Documents No. 7, see Exhibits 7 and 8. It is undisputed that 25
10 reports were produced in Smith for falls reports from 2014 to 2016, no reports were produced for the
11 two year period of time 2011 to 2013 for falls in Lobby One, see Exhibit 9, Defendant’s Ninth
12 Supplemental Disclosure.

13 Plaintiff will bring 660 bates stamped pages of documents produced by Defendant Venetian in
14 *Sekera v. Venetian*, to the hearing as they are responsive to the previous fall incident requests and
15 responses in Smith and directly relate to notice and knowledge of prior falls on wet marble floors (Ex.
16 10 not attached) but Plaintiff also attaches another spreadsheet of the incident reports, Exhibit 11,
17 showing the *Sekera* falls in black and the *Smith* falls in red. The *Sekura* reports were produced in
18 response to a request for prior falls on marble floors for a three-year period before November 14, 2016
19 and 56 involved falling on wet floors. Defendant’s argument that the cases differ in facts, circumstances,
20 allegations, discovery, orders, is more than misleading, it is flat out false. Of the 60 plus incident reports
21 disclosed in the 660 pages of documents, only four do not specifically state that Venetian patrons
22 slipped on a liquid on a marble floor. Of those four, two do not specify the reason for the fall and two
23 state that the individual tripped over their feet. Though, in those two reports, it is noted that the floor was
24 recently cleaned, so a wet floor cannot be ruled out. For example, an incident report, not disclosed in this

1 case, dated 11/24/2013 the author of the narrative states "impossible to see because of the shiny floor
2 until the liquid was encountered".

3 This cannot be viewed as an innocent mistake. The Venetian generates and maintains incident
4 reports of injured persons. Venetian failed to provide 36 incident reports involving falls to Plaintiff in
5 this case for the time period requested on marble floors. Additionally, of the 36 non-disclosed incident
6 reports which Defendant argues are not similar situations, 14 reported the impact from their falls
7 resulted in specific complaints of knee injuries, similar to Plaintiff.
8

9 Defendant's "understanding" of what it produced is not the question. Defendant cannot hide
10 behind the fact that they produced less than half as many reports, within the same time frame as another
11 case for the same discovery requests. It is simply inexcusable and Defendant implicitly concedes it has
12 no defense by failing to provide any reasonable explanation. In an effort to obfuscate, Defendant
13 conflates whether evidence is admissible or discoverable which is not the point. The sheer number of
14 prior fall reports speaks to their admissibility at trial. As the court stated in *Eldorado v. Graff* (1962) 78
15 Nev 507:
16

17 "The admissibility of evidence of prior accidents in this kind of a case, to show notice or
18 knowledge of the danger causing the accident, is generally confined to situations where there are
19 conditions of permanency. See annot. 70 A.L.R.2d 167. Evidence of the type here in question is
20 usually excluded where it relates to a temporary condition which might or might not exist from
21 one day to the other unless, of course, **there is proper showing that the conditions**
22 **surrounding the prior occurrences have continued and persisted.**" Moore v. American
23 Stores Co., 169 Md. 541, 182 A. 436; Boles v. Montgomery Ward & Co., 153 Ohio St. 381, 92
24 N.W.2d 9; Montgomery Ward & Co. v. Wright, 70 Ariz. 319, 220 P.2d 225.
25

26 Defendant's motive for not producing the reports and to minimize the number of prior reports is
27 so they can argue that the prior occurrences are less than actually exists so that the prior reports would
28

1 not be admissible at trial. This would be consistent with their failure to meet and confer regarding a
2 stipulation on the admissibility of the prior reports even though the Discovery Commissioner required
3 them to do so.

4 Similar to the Defendant's Opposition to Plaintiff's Motion for Disqualification, it rambles
5 between ad hominem attacks without any semblance of organized or cogent points and authorities. For
6 example, Defendant attack on Plaintiff's expert, Fred Hueston has nothing to do with the issues
7 presented in Plaintiff's Motion. Defendant falsely accuses Plaintiff of concealing information from the
8 Court without any basis. Fred Hueston's expert testimony concerns his opinions about the treatment,
9 maintenance and application of polymer to the marble floor in order to increase friction coefficient. He
10 is not testifying as an expert about anything other than his expertise in the area of marble flooring
11 treatment and maintenance. One of his opinions is that the product which Defendant utilizes to clean the
12 marble floors is V2, but after cleaning they fail to apply the V3 polymer which the manufacturer
13 recommends to help traction. This was admitted by defendant in its response to Request for Admissions,
14 set 3.
15

16
17 Defendant argues that the main line of questioning of Plaintiff's expert was the number of
18 incidents and gratuitously inserted an argument without any evidentiary support that the marble floors
19 were built within building codes which have been approved. This is unsupported hyperbole and lacks
20 evidentiary support.
21

22 Defendant then confuses and conflates the mode of operation theory of liability with the fact that
23 the marble floors are inherently dangerous when wet and are a serious slip hazard. It wasn't until 2012
24 when we heard the term in Nevada, the mode of operations, a legal variation to the traditional approach
25 to premises liability. Customarily, a business will only be held liable for a dangerous condition on its
26 floor (e.g., foreign substance) caused by someone other than an employee when the business had actual
27 or constructive notice of the condition and failed to remedy or warn of it. See *Sprague v. Lucky Store*,
28

1 *Inc.*, 109 Nev. 247, 849 P.2d 320 (1993). However, the Nevada Supreme Court first departed from
2 tradition in *Sprague*, based on an approach near identical to the mode of operations. Even in the absence
3 of constructive notice, the court looked at Lucky's "chronic hazard" from its self-service produce area.
4 Continual debris from falling items onto the store's floor required more than sweeping; rather, a jury
5 could continue that further precautions were necessary. In *FGA, Inc. v. Giglio*, 278 P.3d 490, 128 Nev.
6 Adv. Op. 26 (Nev. June 14, 2012), the Nevada Supreme Court stated it had "implicitly adopted the mode
7 of operation approach" with its *Sprague* ruling. *Id.*, 278 P.3d at 497.
8
9

10 Plaintiff's Motion did not misrepresent the fact that Defendant failed to produce video footage in
11 violation of the Court Order. Defendant never responded to the proposed Order contained in the email
12 which Plaintiff's counsel submitted to defense counsel. Regardless, that Order has been signed by the
13 Court, and attached as Exhibit 10.
14

15 This litigation has been ongoing for years and been the subject of two discovery hearings with
16 the Discovery Commissioner and one by the District Court Judge, accordingly there is no requirement to
17 further meet and confer. Plaintiff relied on representations that the reports produced were true and
18 correct, and constituted all prior incidents involving falls on liquids on marble floors of the five lobbies
19 that contain marble tile. The reports disclosed in this Smith case are simply false and this Motion
20 demonstrates that defendants have engaged in flagrant discovery abuse. Plaintiff's Motion does not take
21 issue with the protective order, which was simply for the purpose of allowing redacted names of the
22 persons involved.
23
24

25 **II. The Prior Falls Should Be Admitted As Evidence At Trial To Prove Notice And**
26 **Knowledge Of The Dangerous Condition.**
27
28

1 The court in *Reingold v Wet and Wild* previously held that **evidence** of subsequent, similar
2 accidents involving the same condition may be relevant on the issues of causation and whether there is a
3 defective and dangerous condition. *Ginnis v. Mapes Hotel Corp.*, 86 Nev. 408, 415, 470 P.2d 135, 139
4 (1970).

5 NRS 47.250(3) does provide for a disputable presumption "[t]hat **evidence willfully**
6 **suppressed** would be adverse if produced." The district court apparently believed that
7 "**willful suppression**" requires more than following the company's normal records destruction policy.
8 We disagree. There is no dispute that the records were "**willfully**" or intentionally destroyed. Wet 'N
9 Wild claimed that all records are destroyed at the end of each season. This policy means that the
10 accident records are destroyed even before the statute of limitations has run on any potential litigation
11 for that season. It appears that this records destruction policy was deliberately designed to prevent
12 production of records in any subsequent litigation. Deliberate destruction of records before the statute of
13 limitations has run on the incidents described in those records amounts to **suppression of evidence**. If
14 Wet 'N Wild chooses such a records destruction policy, it must accept the adverse inferences of the
15 policy.
16
17

18 Additionally, *Ault v. International Harvester Company*, 13 Cal.3d 113, 117 Cal.Rptr. 812, 817,
19 528 P.2d 1148, 1153 (1974), held that the lower court did not err by admitting **evidence** of both prior
20 and *subsequent* accidents to prove a defective condition or cause of the accident. The court noted that
21 the purpose of providing **evidence** of the other accidents was to show that all the accidents, including the
22 one in litigation, occurred due to the dangerous condition. *Id.*

23
24 The United States Supreme Court stated that:

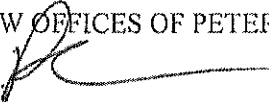
25 [The other accidents] were proved simply as circumstances which, with other **evidence**, tended
26 to show the dangerous character of the sidewalk.... *The frequency of accidents at a particular place*
27 *would seem to be good evidence of its dangerous character*—at least, it is some **evidence** to that effect.
28

1 *District of Columbia v. Arms*, 107 U.S. 519, 524-25, 2 S.Ct. 840, 844-46, 27 L.Ed. 618 (1883).

2
3 Defendant clearly found that it was better to be deceitful and attempt to hide evidence that would
4 harm their case than comply with discovery orders.
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10 DATED: 3:12.19

LAW OFFICES OF PETER GOLDSTEIN

11 BY 

12 PETER GOLDSTEIN, ESQ.
13 Attorney for Plaintiff
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1. I am an attorney duly licensed to practice law in Nevada and am counsel of record for Plaintiff. I have personal knowledge of all matters stated herein that I know to be true.
2. Exhibit 7 is Defendant's Response to Request for Production of Documents in *Sekera v. Venetian*.
3. Exhibit 8 is Defendant's Supplemental Response to Request for Production of Documents in *Sekera v. Venetian*.
4. Exhibit 9 is a true and correct copy of Defendants' Ninth Supplemental Disclosures in *Smith v. Venetian*.
5. Exhibit 10 is a CD of 660 bates stamped pages of documents produced by Defendant in *Sekera v. Venetian*.
6. Exhibit 11 is a detailed spreadsheet of incident reports disclosed in both the *Sekera v. Venetian* and *Smith v. Venetian* cases.

Dated March 12, 2019 at Las Vegas, Nevada.

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1
2 CERTIFICATE OF SERVICE
3

4 Pursuant to Rule 5(b) of the Nevada Rules of Civil Procedure and [N.E.F.R. 9(b)] I certify that
5 I am an employee of Peter Goldstein Law Corporation and that on March 12, 2019, I served a true
6 and correct copy of the foregoing document entitled **PLAINTIFF'S REPLY TO DEFENDANT**
7 **VENETIAN CASINO RESORT, LLC'S OPPOSITION TO PLAINTIFF'S MOTION FOR**
8 **TERMINATING SANCTIONS, MONETARY SANCTIONS FOR WILLFUL SUPPRESSION**
9 **OF EVIDENCE PURSUANT TO NRCP RULE 27.** upon all parties listed below, via the following
10 means:
11

12 _____ Via U.S. Mail by placing said document in a sealed envelope, with postage prepaid [N.R.C.P. 5(B)]

13 X Via Electronic Filing [N.E.F.R. 9(b)]

14 X Via Electronic Service [N.E.F.R. 9]

15 _____ Via Facsimile [E.D.C.R. 7.26(a)]
16

17 Michael Edwards
18 Lisa Thayer
19 Lani Maile
20 Ryan Loosvelt
21 MESSNER REEVES LLP
22 8945 W. Russel Road, Suite 300
23 Las Vegas, Nevada 89148
24 Tel: (702) 363-5100
25 Fax: (702) 363-5101
26 Email: medwards@messner.com
27 Email: lthayer@messner.com
28 Email: lmaile@messner.com
Email: RLoosvelt@messner.com
Attorney for Venetian Casino Resort, LLC

29 3/12/19
Date

Jocelynn Jordan
Jocelynn Jordan
An employee of the Law Office of Peter Goldstein

EXHIBIT 7

ROYAL & MILES LLP
1522 W Warm Springs Road
Henderson NV 89014
Tel: (702) 471-6777 ♦ Fax: (702) 531-6777

RFP

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Attorneys for Defendants
VENETIAN CASINO RESORT, LLC and
LAS VEGAS SANDS, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

JOYCE SEKERA, an Individual;

CASE NO.: A-18-772761-C

Plaintiff,

DEPT. NO.: XXV

v.

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

Defendants.

**RESPONSES TO PLAINTIFF'S REQUESTS FOR PRODUCTION OF DOCUMENTS
AND MATERIALS TO DEFENDANT**

TO: Plaintiff JOYCE SEKERA; and

TO: Keith E. Galliher, Jr., Esq.; her attorney:

Pursuant to Rules 26 and 36 of the Nevada Rules of Civil Procedure, Defendant VENETIAN
CASINO RESORT, LLC, and LAS VEGAS SANDS, LLC, by and through their counsel, ROYAL &
MILES LLP, responds to Plaintiff's first requests for production of documents and materials as
follows:

1 **REQUEST NO. 1:**

2 All written, oral, or recorded statements made by any party, witness, or any other person or
3 persons with knowledge of the incident described in Plaintiffs Complaint.

4 **RESPONSE NO. 1:**

5 Defendants object to the extent this request seeks information protected by attorney/client
6 privilege and/or attorney work product privilege. Without waiving said objection, Defendants refer
7 to their disclosures pursuant to NRCP 16.1, documents 2-9, and all supplements thereto. Discovery
8 is continuing.
9

10 **REQUEST NO. 2:**

11 Any and all accident and investigative reports, films, video tapes, charts, plats, drawings, maps
12 or pictures and/or photographs of any kind which has, as its subject matter, the incident described in
13 Plaintiffs Complaint.
14

15 **RESPONSE NO. 2:**

16 See Response No. 1.

17 **REQUEST NO. 3:**

18 A complete copy of the Defendant's insurance carriers and/or risk management pre-litigation
19 claim file.
20

21 **RESPONSE NO. 3:**

22 Objection. This request lacks foundation, assumes facts not in evidence, seeks information that
23 is protected from disclosure by the attorney/client and/or attorney work product doctrine. Without
24 waiving said objection all known discoverable documents regarding the investigation of the loss have
25 been produced. See Defendants' NRCP 16.1 early case conference disclosures, documents 2-9, and
26 all supplements thereto. Discovery is continuing.
27
28

1 **REQUEST NO. 4:**

2 The names of all expert witnesses or consultants that Defendant will use at the time of trial
3 along with any reports produced by the same.

4 **RESPONSE NO. 4:**

5 Objection. This request is premature. Defendants' expert disclosures containing the requested
6 information will take place as set forth in the court's scheduling order. It is also an improper request
7 for production of documents.
8

9 **REQUEST NO. 5:**

10 Any and all sweep sheets, sweep logs, or other similar documentation which reflects the
11 maintenance and/or cleaning of the flooring located within the VENETIAN CASINO RESORT
12 described in Plaintiffs Complaint for the day before, day of, and day after the incident described
13 therein.
14

15 **RESPONSE NO. 5:**

16 Defendants object to the extent this request lacks foundation, assumes facts not in evidence,
17 is overly broad, vague and ambiguous. This request also presupposes that there was a foreign
18 substance on the floor causing Plaintiffs fall, which Defendants deny. It also incorrectly identifies the
19 subject premises as *VENETIAN CASINO RESORT*. This request further seeks information not
20 reasonably calculated to lead to the discovery of admissible evidence (*i.e.* documents related to
21 November 5, 2016). Without waiving said objection, Defendants respond as follows: *See* documents
22 identified pursuant to NRCP 16.1, bates numbers VEN 044-106. Discovery is continuing.
23

24 **REQUEST NO. 6:**

25 True and correct copies of any and all manuals, documents, pamphlets, flyers, or other
26 memorandum which has, as its subject matter, the standard operating procedures with respect to the
27
28

1 maintenance, cleaning and sweeping of the floors with respect to the VENETIAN CASINO RESORT
2 in which the fall occurred.

3 **RESPONSE NO. 6:**

4 Defendant objects to the extent this request lacks foundation, assumes facts not in evidence,
5 and is further overly broad, vague and ambiguous. This request also presupposes that there was a
6 foreign substance on the floor causing Plaintiff's fall, which Defendants deny. also incorrectly identifies
7 the subject premises as *VENETIAN CASINO RESORT*. This request further seeks information not
8 reasonably calculated to lead to the discovery of admissible evidence. Without waiving said objection,
9 Defendant responds as follows: *See Response No. 5.*

11 **REQUEST NO. 7:**

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

18 **RESPONSE NO. 7:**

19 Defendants object to the extent this request lacks foundation, assumes facts not in evidence,
20 is overly broad, vague and ambiguous, unduly burdensome and presupposes there was a foreign
21 substance on the floor causing Plaintiff's fall, which Defendants deny. It also incorrectly identifies the
22 subject premises as *VENETIAN CASINO RESORT*. This request further seeks access to information
23 which is equally available to Plaintiff via public records, and otherwise seeks information that is not
24 reasonably calculated to lead to the discovery of admissible evidence. Defendant objects as the request
25 as over broad and not properly tailored to the issues in this case. Without waiving said objection,
26
27
28

1 Defendant responds as follows: Defendant is in the process of making a good faith effort to identify
2 information responsive to this request and will respond as soon as the information is collected.
3 Discovery is continuing.

4 **REQUEST NO. 8:**

5 Any and all documents, information, memoranda, paperwork, or other material which relates
6 to establishes, or otherwise pertains to the affirmative defenses alleged by the Defendant herein.

7 **RESPONSE NO. 8:**

8 See Response No. 1.

9 **REQUEST NO. 9:**

10 Any surveillance video showing the Plaintiffs fall at the VENETIAN CASINO RESORT
11 from any other angle, other than the one shown in the video surveillance produced by the
12 Defendants thus far.

13 **RESPONSE NO. 9:**

14 Defendants object to the extent this request incorrectly identifies the subject premises as
15 *VENETIAN CASINO RESORT*, and further that the term "*surveillance video*" is itself overly broad
16 and seeks information outside Defendants' knowledge, custody and control (*i.e.* videos taken by other
17 persons on the subject premises at the time). Without waiving said objection, Defendants respond as
18 follows: All known surveillance related to this matter was produced as Document No. 9 in Defendants'
19 NRCP 16.1 disclosure. Discovery is continuing.

20 **REQUEST NO. 10:**

21 Any other witnesses, documents, or other disclosures required by NRCP 16.1.

22 ///

23 ///

24 ///

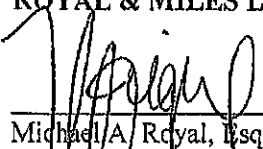
25

1 **RESPONSE NO. 10:**

2 See Response No. 1.

3 DATED this 9 day of October, 2018.

4 **ROYAL & MILES LLP**

6 By: 

7 Michael A. Royal, Esq.

8 Nevada Bar No. 4370

9 Gregory A. Miles, Esq.

10 Nevada Bar No. 4336

11 1522 W. Warm Springs Road

12 Henderson, NV 89014

13 *Attorneys for Defendants*

14 *VENETIAN CASINO RESORT, LLC and*

15 *LAS VEGAS SANDS, LLC*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9 day of October, 2018, and pursuant to NRCP 5(b), I caused a true and correct copy of the foregoing **RESPONSES TO PLAINTIFF'S REQUESTS FOR PRODUCTION OF DOCUMENTS AND MATERIALS TO DEFENDANT** to be served as follows:

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

 to be served via facsimile; and/or

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

 to be hand delivered;

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

Keith E. Galliher, Jr., Esq.
THE GALLIHER LAW FIRM
1850 E. Sahara Avenue, Suite 107
Las Vegas, NV 89014
Attorneys for Plaintiff
Facsimile: 702-735-0204
Email: kgalliher@galliherlawfirm.com

Ashley Schiff
An employee of ROYAL & MILES LLP

EXHIBIT 8

ROYAL & MILES LLP
1522 W Warm Springs Road
Henderson NV 89014
Tel: (702) 471-6777 ♦ Fax: (702) 531-6777

RFP

Michael A. Royal, Esq.

Nevada Bar No. 4370

Gregory A. Miles, Esq.

Nevada Bar No. 4336

ROYAL & MILES LLP

1522 West Warm Springs Road

Henderson Nevada 89014

Tel: 702-471-6777

Fax: 702-531-6777

Email: mroyal@royalmilesllp.com

Attorneys for Defendants

VENETIAN CASINO RESORT, LLC and

LAS VEGAS SANDS, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

JOYCE SEKERA, an Individual;

CASE NO.: A-18-772761-C

DEPT. NO.: XXV

Plaintiff,

v.

VENETIAN CASINO RESORT, LLC, d/b/a
THE VENETIAN LAS VEGAS, a Nevada
Limited Liability Company; LAS VEGAS
SANDS, LLC d/b/a THE VENETIAN LAS
VEGAS, a Nevada Limited Liability Company;
YET UNKNOWN EMPLOYEE; DOES 1
through X, inclusive,

Defendants.

**SUPPLEMENTAL RESPONSES TO PLAINTIFF'S REQUESTS FOR PRODUCTION OF
DOCUMENTS AND MATERIALS TO DEFENDANT**

TO: Plaintiff JOYCE SEKERA; and

TO: Keith E. Galliher, Jr., Esq.; her attorney;

Pursuant to Rules 26 and 36 of the Nevada Rules of Civil Procedure, Defendant VENETIAN
CASINO RESORT, LLC, and LAS VEGAS SANDS, LLC, by and through their counsel, ROYAL &
MILES LLP, responds to Plaintiff's first requests for production of documents and materials as
follows:

1 **REQUEST NO. 1:**

2 All written, oral, or recorded statements made by any party, witness, or any other person or
3 persons with knowledge of the incident described in Plaintiffs Complaint.

4 **RESPONSE NO. 1:**

5 Defendants object to the extent this request seeks information protected by attorney/client
6 privilege and/or attorney work product privilege. Without waiving said objection, Defendants refer
7 to their disclosures pursuant to NRCP 16.1, documents 2-9, and all supplements thereto. Discovery
8 is continuing.

10 **REQUEST NO. 2:**

11 Any and all accident and investigative reports, films, video tapes, charts, plats, drawings, maps
12 or pictures and/or photographs of any kind which has, as its subject matter, the incident described in
13 Plaintiffs Complaint.

14 **RESPONSE NO. 2:**

15 See Response No. 1.

17 **REQUEST NO. 3:**

18 A complete copy of the Defendant's insurance carriers and/or risk management pre-litigation
19 claim file.

20 **RESPONSE NO. 3:**

21 Objection. This request lacks foundation, assumes facts not in evidence, seeks information that
22 is protected from disclosure by the attorney/client and/or attorney work product doctrine. Without
23 waiving said objection all known discoverable documents regarding the investigation of the loss have
24 been produced. See Defendants' NRCP 16.1 early case conference disclosures, documents 2-9, and
25 all supplements thereto. Discovery is continuing.

1 **REQUEST NO. 4:**

2 The names of all expert witnesses or consultants that Defendant will use at the time of trial
3 along with any reports produced by the same.

4 **RESPONSE NO. 4:**

5 Objection. This request is premature. Defendants' expert disclosures containing the requested
6 information will take place as set forth in the court's scheduling order. It is also an improper request
7 for production of documents.
8

9 **REQUEST NO. 5:**

10 Any and all sweep sheets, sweep logs, or other similar documentation which reflects the
11 maintenance and/or cleaning of the flooring located within the VENETIAN CASINO RESORT
12 described in Plaintiffs Complaint for the day before, day of, and day after the incident described
13 therein.
14

15 **RESPONSE NO. 5:**

16 Defendants object to the extent this request lacks foundation, assumes facts not in evidence,
17 is overly broad, vague and ambiguous. This request also presupposes that there was a foreign
18 substance on the floor causing Plaintiff's fall, which Defendants deny. It also incorrectly identifies the
19 subject premises as *VENETIAN CASINO RESORT*. This request further seeks information not
20 reasonably calculated to lead to the discovery of admissible evidence (*i.e.* documents related to
21 November 5, 2016). Without waiving said objection, Defendants respond as follows: *See* documents
22 identified pursuant to NRCP 16.1, bates numbers VEN 044-106. Discovery is continuing.
23

24 **REQUEST NO. 6:**

25 True and correct copies of any and all manuals, documents, pamphlets, flyers, or other
26 memorandum which has, as its subject matter, the standard operating procedures with respect to the
27
28

1 maintenance, cleaning and sweeping of the floors with respect to the VENETIAN CASINO RESORT
2 in which the fall occurred.

3 **RESPONSE NO. 6:**

4 Defendant objects to the extent this request lacks foundation, assumes facts not in evidence,
5 and is further overly broad, vague and ambiguous. This request also presupposes that there was a
6 foreign substance on the floor causing Plaintiff's fall, which Defendants deny, also incorrectly identifies
7 the subject premises as *VENETIAN CASINO RESORT*. This request further seeks information not
8 reasonably calculated to lead to the discovery of admissible evidence. Without waiving said objection,
9 Defendant responds as follows: *See* Response No. 5.

11 **REQUEST NO. 7:**

12 True and correct copies of any and all claim forms, legal actions, civil complaints, statements,
13 security reports, computer generated lists, investigative documents or other memoranda which have,
14 as its subject matter, slip and fall cases occurring on marble floors within the subject VENETIAN
15 CASINO RESORT within three years prior to the incident described in Plaintiffs Complaint, to the
16 present.

18 **RESPONSE NO. 7:**

19 Defendants object to the extent this request lacks foundation, assumes facts not in
20 evidence, is overly broad, vague and ambiguous, unduly burdensome and presupposes there was
21 a foreign substance on the floor causing Plaintiff's fall, which Defendants deny. It also
22 incorrectly identifies the subject premises as *VENETIAN CASINO RESORT*. This request
23 further seeks access to information which is equally available to Plaintiff via public records, and
24 otherwise seeks information that is not reasonably calculated to lead to the discovery of
25 admissible evidence. Defendant objects as the request as over broad and not properly tailored
26 to the issues in this case. Without waiving said objection, Defendants respond as follows: Please
27
28

1 see Defendants' 5th Supplement to NRCP 16.1 Disclosure and all supplements thereto.

2 Discovery is continuing.

3 REQUEST NO. 8:

4 Any and all documents, information, memoranda, paperwork, or other material which relates
5 to establishes, or otherwise pertains to the affirmative defenses alleged by the Defendant herein.
6

7 RESPONSE NO. 8:

8 See Response No. 1.

9 REQUEST NO. 9:

10 Any surveillance video showing the Plaintiffs fall at the VENETIAN CASINO RESORT
11 from any other angle, other than the one shown in the video surveillance produced by the
12 Defendants thus far.
13

14 RESPONSE NO. 9:

15 Defendants object to the extent this request incorrectly identifies the subject premises as
16 *VENETIAN CASINO RESORT*, and further that the term "*surveillance video*" is itself overly broad
17 and seeks information outside Defendants' knowledge, custody and control (*i.e.* videos taken by other
18 persons on the subject premises at the time). Without waiving said objection, Defendants respond as
19 follows: All known surveillance related to this matter was produced as Document No. 9 in Defendants'
20 NRCP 16.1 disclosure. Discovery is continuing.
21

22 REQUEST NO. 10:

23 Any other witnesses, documents, or other disclosures required by NRCP 16.1.

24 ///

25 ///

26 ///

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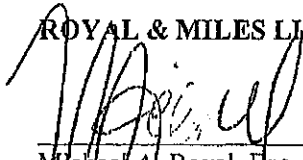
28

1 **RESPONSE NO. 10:**

2 See Response No. 1.

3 DATED this 3 day of January, 2019.

4 **ROYAL & MILES LLP**

6 By: 

7 Michael A. Royal, Esq.

8 Nevada Bar No. 4370

Gregory A. Miles, Esq.

Nevada Bar No. 4336

1522 W. Warm Springs Road

Henderson, NV 89014

Attorneys for Defendants

VENETIAN CASINO RESORT, LLC and

LAS VEGAS SANDS, LLC

1 CERTIFICATE OF SERVICE

2 I HEREBY CERTIFY that on the 4 day of January, 2019, and pursuant to NRCp 5(b), I
3 caused a true and correct copy of the foregoing **SUPPLEMENTAL RESPONSES TO**
4 **PLAINTIFF'S REQUESTS FOR PRODUCTION OF DOCUMENTS AND MATERIALS TO**
5 **DEFENDANT** to be served as follows:

6
7 ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed
8 envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

9 ☐ to be served via facsimile; and/or

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

12 ☐ to be hand delivered;

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

14 Keith E. Galliher, Jr., Esq.
15 THE GALLIHER LAW FIRM
16 1850 E. Sahara Avenue, Suite 107
Las Vegas, NV 89014

17 *Attorneys for Plaintiff*

Facsimile: 702-735-0204

18 E-Service: kgalliher@galliherlawfirm.com
19 dmooney@galliherlawfirm.com
20 gramos@galliherlawfirm.com
21 sray@galliherlawfirm.com

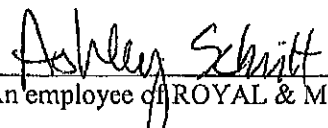
22 
23 An employee of ROYAL & MILES LLP
24
25
26
27
28

EXHIBIT 9

1 **ECCD**
MARK B. SCHELLERUP
2 Nevada Bar No. 7170
ANDREW R. GUZIK
3 Nevada Bar No. 12758
MESSNER REEVES LLP
4 8945 W. Russell Road, Suite 300
Las Vegas, Nevada 89148
5 Telephone: (702) 363-5100
Facsimile: (702) 363-5101
6 Email: mschellerup@messner.com
Email: aguzik@messner.com
7 Attorneys for Venetian Casino Resort, LLC

8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

10
11 CAROL SMITH, an individual,
12 Plaintiff,
13 vs.
14 VENETIAN CASINO RESORT, LLC; and
15 DOES 1 through 50, inclusive,
16 Defendant(s).

Case No.: A-17-753362-C
Dept. No.: X

**DEFENDANT'S NINTH
SUPPLEMENTAL EARLY CASE
CONFERENCE STATEMENT LIST OF
WITNESSES, EXHIBITS AND
PRODUCTION OF DOCUMENTS**

17
18 Defendant VENETIAN CASINO RESORT, LLC, by and through its attorneys of record,
19 Messner Reeves, LLP, hereby serves their Ninth Supplemental Early Case Conference Statement
20 List of Witnesses, Exhibits and Production of Documents with respect to the above captioned action.

21 New items in [BOLD]

22 **WITNESSES**

- 23 1. Security Officer, Patrick Overfield, Security Department of Venetian, c/o Messner
24 Reeves LLP, 8945 W. Russell Rd., Suite 300, Las Vegas, Nevada 89148. Expected to testify
25 regarding the facts and circumstances surrounding the subject incident, any investigation regarding
26 the subject incident, any interaction with the Plaintiff or witnesses, the Incident Report.
- 27 2. Rafael Chavez, Facilities Department of Palazzo, c/o Messner Reeves LLP, 8945 W.
28 Russell Rd., Suite 300, Las Vegas, Nevada 89148. Expected to testify regarding the facts and

1 circumstances surrounding the subject incident, the inspection conducted after the alleged incident,
2 the Accident Scene Check report which he authored, any interaction with the Plaintiff or any
3 witnesses.

4 3. Security Officer, Michael Chreene, Security Department of Venetian, c/o Messner
5 Reeves LLP, 8945 W. Russell Rd., Suite 300, Las Vegas, Nevada 89148. Expected to testify
6 regarding the facts and circumstances surrounding the subject incident, any investigation regarding
7 the subject incident, any interaction with the Plaintiff or witnesses, the Incident Report.

8 4. Person Most Knowledgeable, PAD Department of Venetian, c/o Messner Reeves
9 LLP, 8945 W. Russell Road, Suite 300, Las Vegas, Nevada 89148. Expected to testify regarding
10 the policies and procedures regarding floor maintenance in the area where this incident occurred.

11 5. Person Most Knowledgeable, Security Department of Venetian, c/o Messner Reeves
12 LLP, 8945 W. Russell Road, Suite 300, Las Vegas, Nevada 89148. Expected to testify regarding
13 the facts and circumstances surrounding the subject incident.

14 6. Carol Smith, Plaintiff, c/o PETER GOLDSTEIN LAW CORP, 10795 W. Twain,
15 #110, Las Vegas, NV 89135. Ms. Smith is the named Plaintiff in this matter and is expected to
16 testify regarding her interaction with security personnel, her visit to the Venetian, any conversations
17 she may have had with anyone relating to the subject incident, her medical treatment and medical
18 history and any other facts and circumstances surrounding the subject incident.

19 7. Plaintiff's medical providers.

20 8. Any witnesses identified by any party to this action.

21 9. Any necessary rebuttal witnesses.

22 Defendant hereby reserves the right to amend and/or supplement its Early Case Conference
23 Statement List of Witnesses, Exhibits and Production of Documents as it uncovers additional
24 information through discovery of this matter and it reserves the right to object to Plaintiff's
25 witnesses.

26 **EXHIBITS/DOCUMENTS**

27 A. Plaintiff's First Amended Complaint [Bates No. VEN001-VEN005]
28

- 1 B. Medical records produced with letter from Peter Goldstein dated 10/25/16 (letter
2 included) [Bates No. VEN006-VEN0027]
- 3 C. Venetian Incident Report w/ color photographs [Bates No. VEN028-VEN037]
- 4 D. Copy of Voluntary Statement authored by Carol Smith [Bates No. VEN038]
- 5 E. Copy of Accident Scene Check [Bates No. VEN039]
- 6 F. Copy of Letter of Representation from Peter Goldstein dated 7/19/16 [Bates No.
7 VEN040]
- 8 G. Copy of letter from Venetian to Peter Goldstein dated 8/2/16 [Bates No. VEN041]
- 9 H. Copy of letter from Venetian to Peter Goldstein dated 4/17/17 [Bates No. VEN042]
- 10 I. Copy of surveillance video [Bates No. VEN043]
- 11 J. Copy of records from Irvine Unified School District [Bates No VEN044-VEN132]
- 12 K. Copy of records from State of the Art Physical Therapy [Bates No. VEN133-
13 VEN223]
- 14 L. Copy of records from Orthopedic Surgery Center of Orange County [Bates No.
15 VEN224-VEN303]
- 16 M. Copy of records from State of the Art Physical Therapy [Bates No. VEN304-
17 VEN370]
- 18 N. Copy of Incident Reports of slip and falls for ~~two~~ FIVE (5) years prior to this
19 alleged incident, in the area where Plaintiff's incident occurred (with all personal information
20 redacted) [Bates No. VEN371-VEN499]
- 21 O. Copy of Preventing Slip, Trips & Falls [Bates No. VEN500-VEN510]
- 22 P. Copy of floor cleaner product documents [Bates No. VEN511-VEN522]
- 23 P. Copy of Public Area's Department Work Slips for two-years prior to incident
24 [Bates No. VEN523-VEN1750]
- 25 Q. Copy of Preventing Slips, Trips and Falls Lesson Plan [Bates No. VEN1751-
26 VEN1753]
- 27 R. Copy of Lobby 2 Day Shift Specialist Workslip [Bates No. VEN1754]
- 28 ///

- 1 S. Copy of Day Shift Schedule for 7/7/2016 [Bates No. VEN1755]
2 T. Copy of Slip & Fall Training Video [Bates No. VEN1756]
3 U. Copy of medical records from Newport Orthopedic Institute [Bates No. VEN1757-
4 VEN1891]

- 5 V. Copy of similar incident reports 7/7/14-7/7/16 with personal information
6 redacted [Bates No. VEN1892-VEN2251]

7 Defendant hereby reserves the right to amend and/or supplement its Early Case Conference
8 Statement List of Witnesses, Exhibits and Production of Documents as it uncovers additional
9 information through discovery of this matter and it reserves the right to object to Plaintiff's exhibits
10 and documents.

11 DATED this 8th day of June, 2018

12
13 MESSNER REEVES, LLP

14 By 
15 MARK B. SCHELLERUP
16 Nevada Bar No. 7170
17 ANDREW R. GUZIK
18 Nevada Bar No. 12758
19 8945 W. Russell Road, Suite 300
20 Las Vegas, NV 89148
21 Telephone: (702) 363-5100
22 Facsimile: (702) 363-5101
23 Attorneys for Venetian Casino Resort, LLC
24
25
26
27
28

PROOF OF SERVICE
LV-Smith v. Venetian Casino Resort, LLC
Case No.: A-17-753362-C

The undersigned does hereby declare that I am over the age of eighteen (18) years and not a party to the within entitled action. I am employed by Messner Reeves LLP, 8945 W. Russell Road, Suite 300, Las Vegas, Nevada 89148. I am readily familiar with Messner Reeves LLP's practice for collection and processing of documents for delivery by way of the service indicated below.

On June 11, 2018, I served the following document(s):

**DEFENDANT'S NINTH SUPPLEMENTAL EARLY CASE CONFERENCE STATEMENT
LIST OF WITNESSES, EXHIBITS AND PRODUCTION
OF DOCUMENTS**

on the interested party(ies) in this action as follows:

Peter Goldstein
Nevada Bar No. 6992
PETER GOLDSTEIN LAW CORP
10795 W. Twain Avenue, #110
Las Vegas, NV 89135
Telephone: (702) 474-6400
Facsimile: (888) 400-8799
Attorneys for Plaintiff

By U.S. Mail and Electronic Service. Pursuant to Administrative Order 14-2 and Rule 9 of the NEFCR, I caused said documents(s) to be transmitted to the person(s) identified in the E-Service List for this captioned case in Odyssey E-File & Serve of the Eighth Judicial District Court, County of Clark, State of Nevada. A service transmission report reported service as complete and a copy of the service transmission report will be maintained with the document(s) in this office.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Executed on June 11, 2018, at Las Vegas, Nevada.


An employee of MESSNER REEVES LLP

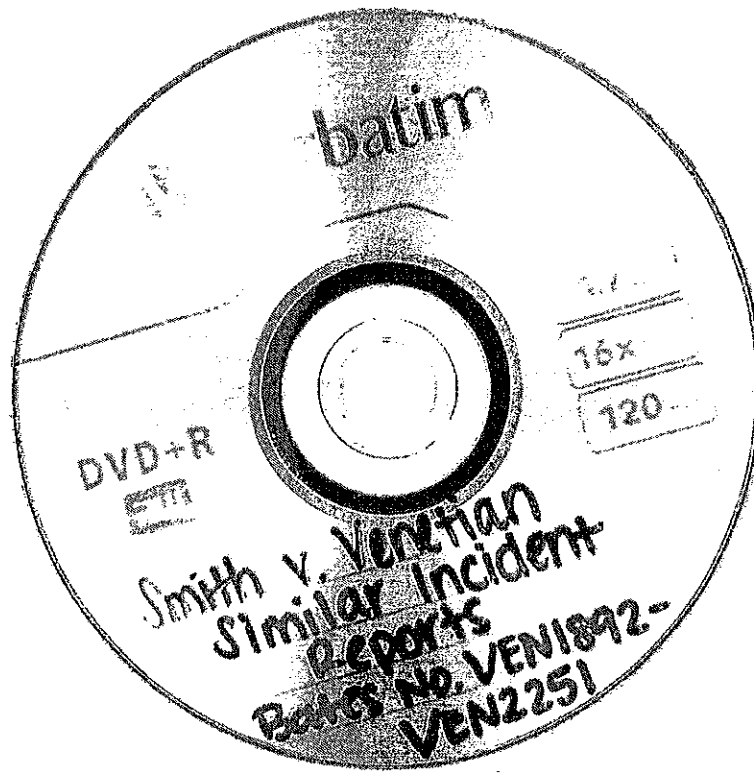


EXHIBIT 10

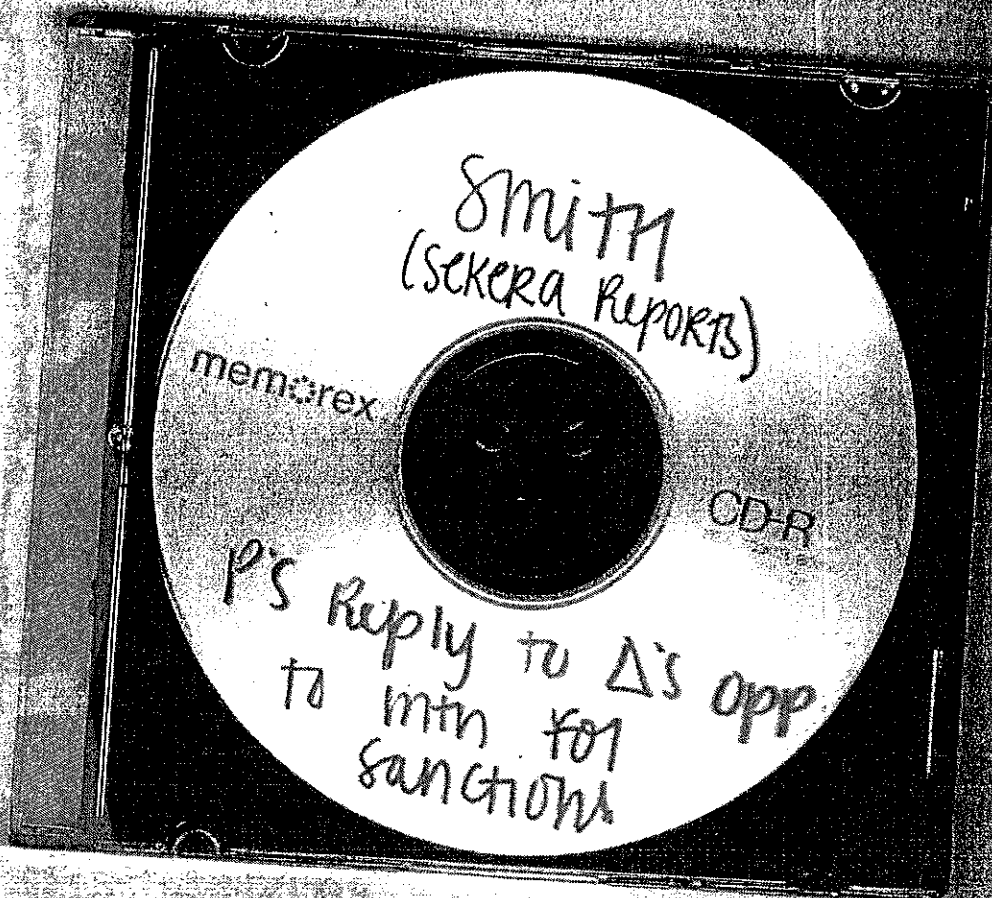


EXHIBIT 11

SEKERA FALLS

Sekera v. Venetian reports are in black
Smith v. Venetian reports are in red

DATE	TIME	REPORT	LOCATION	COMMENTS	SECURITY
11-24-13	5:27 a.m.	1311V-5502	Grand Luxe Café	Slip and fall	Mary Ros Eve Gizelbach Ryan Meyer J. Lopez report writer
11-24-13	1:54 p.m.	1311V-5538	Grand Hall	Slipped in apple cider given out by elves who are employees	Devon O'Brien manager Christopher Mosier asst. security manager G. Rescigno report writer David Magnism
1-26-14	12:28 a.m.	1401V-5339	Lobby 1	Water on marble	Conie Klaver Joe Barrett facilities senior watch L. Sivrais report writer Joe Barrett
5-2-14	4:42 p.m.	1405V-0423	Grand Hall LV	Water on marble	Manny Arguello R. Marquez report writer David Boyko
5-3-14	3:36 p.m.	1405V-0687	Grand Hall	Wet marble	Thomas Harris security officer Gary Rescigno security EMT T. McFate report writer Derek Santillan facilities Christopher Daniels Derek Santillan
5-3-14	4:47 p.m.	1405V-0704	Lobby 1	Water on marble	Karen Sidhoo front desk manager Tim Alvonells security shift manager T. Morgan report writer Sean Pemberton
5-24-14	9:49 p.m.	1405V-5900	Lobby 1	Wet marble	Conic Kulver Nicholas Coronado Andres Florentino J. Lopez report writer John Burnett security officer Brittany Peck front desk manager Sean Pemberton engineer
6-28-14	2:10 p.m.	1406V-66937	Grand Luxe Café	Wet marble	
7-5-14	6:05 p.m.	1407V-1121	Lobby 1	Liquid stated he had fallen yesterday see report	

				1407V-0807 (missing this report)	L. Sivas report writer
7-10-14	1:25 PM	1407V-2272	Grand Luxe	Water on floor	J. Larson report writer T. Mofate EMT/SO Merrick Anderson Facilities Eng.
7-10-14	12:30 a.m.	1407V-2142	Grand Hall	Drink on floor Prior to victim slipping group of unknown males with "yard" like drink spilled on floor	Sang Han front desk manager E. Giselback report writer
7-13-14	8:02	1407V-3057	Lobby 1	Liquid	Jacob Johnson Asst. Sec. Mngr. Brittany Peck Front desk mngr. Taylor McFate, EMT S.O. G. Rescigno Report writer
7-13-14	8:02 a.m.	1407V-3057	Lobby 1	liquid marble	Jacob Johnson asst. security manager Brittany Peck front desk manager Tyler McFate EMT security G. Rescigno report writer
7-18-14	7:14 p.m.	1407V-4386	Venetian front desk	Fall happened at 6:00 p.m. victim stated there was a guy there said his buddy dropped his bottle of alcohol and left it there	Tim Avonellos security shift manager Conie Kluver front desk manager K.T. Morgan report writer
7-25-14	5:31 p.m.	1407V-6125	Lobby 1	Wet marble	Amy McCaslin front desk manager Kyle Donaldson Asst. security manager T. Morgan report writer
7-25-14	7:59	1407V-6151	Grand Hall	Liquid Victim Luz Gamino (unredacted)	Allen Backman facilities L. Sivas report writer
7-29-14	2:47 p.m.	1407V-7161	Lobby 1	Liquid	Thomas Labert Front Desk Mngr. Christopher Molser Asst. Sec Mngr. Sean Pemberton Eng. G. Rescigno Report writer Chris Malcom S.O.
7-29-14	2:47 p.m.	1407V-7161	Lobby 1	Liquid	Thomas Lambert front desk manager Christopher Mosier asst. security manager Sean Pemberton engineer

					G. Rescigno Chris Malcom security officer
7-30-14	9:55 a.m.	1407V-7375	Lobby 1	Water fluid was spilled by unknown male at 9:48	Mary Rosk front desk manager Joseph Florio security officer Joseph Larson EMT security officer T. McFate report writer Abinael Suarez internal maintenance PAD
8-4-14	4:31 a.m.	1408V-0843	Lobby 1	Tripped over own feet	Mary Ros front desk manager John Ballesteros facilities team member E. Gizebach report writer
8-5-14	5:08 a.m.	1408V-1088	Lobby 1	Tripped over own feet Marc Fesel engineer no defects but a wet floor	Mary Ros front desk manager Garry Lee security officer E. Gizebach report writer
8-28-14	10:30 p.m.	1408V-7104	Venetian Tower	Fall reported next morning. Fall occurred near bathroom by Grand Luxe	Mary Ros, Front Desk Monte McAnulty Facilities J. Larson, Report Writer 1/7/15
8-28-14	10:30 p.m.	1408V-7104	11 Venetian Tower 121	Fall reported next morning. Fall occurred near bathrooms by Grand Luxe	Mary Ros front desk manager Monte McAnulty facilities J. Larson report writer
8-31-14	2:43 p.m.	1408V-7791	Lobby 1	large water spill	Jacob Johnson Asst. Sec. Mgr. Archie Balon, S.O. G. Rescigno, report writer Derek Santillan, Facilities
8-31-14	2:43 p.m.	1408V-7791	Lobby 1	Large water spill	Jacob Johnson asst. security manager Archie Balon security officer G. Rescigno report writer Derek Santillon facilities
9-13-14	3:17 p.m.	1409V2807	Grand Hall	Slipped due to water or drink spill that another guest caused. Tyler Corbely had notified security earlier about his stand by due to this fluid spill	Jacob Johnson asst. security manager Tyler Corbely field training officer G. Rescigno report writer

9-15-14	5:29 a.m.	1409V-3261	Lobby 1	3 piles of feces slip and fall	Nicholas Coronado Mary Ros Hinkle Z. Hakim report writer Rosa Estela facilities
9-30-14	1:30	1409V-6750	Grand Hall	Slip and fall on marble, "I slipped on something spilled on marble" pictures of liquid looks like milk	George Valley security manager Jonathan Derleth front desk manager John Wells security officer Z. Hakim report writer James Guernick security officer
10-11-14	2:08 a.m.	1410V-2293	Lobby 1	Tripped over feet	Nachely front desk manager Zachary Hakim EMT security E. Gizelbach report writer Rudy Conception facilities engineer
12-23-14	5:24 p.m.	1412V-4685	Lobby 1	Liquid Ashay Shah minor (not redacted) Jignesh Shah father	Sang Han hotel manager Tim Avonellos security shift manager L. Sivrains report writer Derek Sentillan facilities
1-17-15	11:49 p.m.	1501V-3857	Venetian Front Office	Liquid	Nicolas Coronado, asst. mgr. Jonathan Deruth, Front desk mgr. Jose Lopez, EMT Sec. Z. Hakim Report Writer Theodore Reash, Facilities
1-17-15	11:49 p.m.	1501V-3857	Venetian front office	Liquid	Nicholas Coronado asst. manager Jonathan Deruth front desk manager Jose Lopez EMT security Z. Hakim report writer Theodore Eash facilities
1-31-15	2:53 p.m.	1501V-6887	Lobby 1	Water "there appeared to be water all over immediate area"	Tim Alvanellos security shift manager Thomas Lambert front desk manager L. Dozier report writer
2-9-15	1:37 p.m.	1502V-1803	Lobby 1	Liquid	Eric Wennerberg security officer Rudy Conception senior watch Eve Gizelbach report writer
2-9-15	1:37 a.m.	1502V-1803	Lobby 1	Liquid	Eric Wennerberg, S.O. Rady Conception. Senior Watch E. Gizelbach Report writer

2-20-15	1:28 p.m.	1502V-4322	Lobby 1	Liquid. Slipped on spilled beverage	Jacob Johnson Asst. Sec. Mngr. Brittany Peck, Front Desk L. Dozier. Report writer
2-20-15	1:28 p.m.	1502V-4322	Lobby 1	Liquid. Slipped on spilled beverage	Jacob Johnson asst. security manager Brittany Peck front desk manager L. Dozier report writer
3-8-15	8:45 a.m.	1503V-1561	Grand Hall	Slip. "I observed a wet sticky spot on marble floor"	Melissa Perry front desk manager Bryan Greenfield facilities E. Gizelbach report writer
3-23-15	3:18 a.m.	1503V-5040	Lobby 1	Slip. "appeared to have red sauce or grease on marble" previous injury under report #1503V-5119 (we don't have report) stated she had been injured earlier that morning at 3:00 a.m. when she slipped and fell in pasta sauce	Nathan Beyers front desk manager Gary Lee security officer E. Gizelbach report writer James Stoyer facilities engineer
4-24-15	3:25p.m.	1504V-5396	Grand Hall	Slip. Broken bottle of alcohol	Sang Han front desk manager Melissa Perry front desk manager Lynn Sivrais EMT Security G. Rescigno report writer Rodolfo Storio
4-24-15	3:25 p.m.	1504V-5396	Grand Hall	Broken Bottle of Alcohol	Sang Han, Front Desk Mngr. Melissa Perry Front Desk Mngr. Lynn Sivrais, EMT S.O. V-5319G. Rescigno Report writer Rodolfo Stoino
5-3-15	1:08 p.m.	1505V-0844	Grand Hall	Slip. "small puddles of what appeared to be a clear liquid"	Jacob Johnson asst. security manager Tyler Corbaley field training officer G. Rescigno report writer
5-22-15	4:43 p.m.	1505V-5319	Lobby 1	Water on floor	Thomas Lambert Front Desk Tony Bersano Asst. Sec. Mngr. Crystal Clanton S.O. J. Lopez Report writer Jeffrey Dunihoo, S.O.
5-22-15	4:43 a.m.	1505V-5319	Lobby 1	Water on floor	Thomas Lamber front desk manager

					Tony Bersano asst. security manager Crystal Clanton security officer J. Lopez report writer Jeffrey Dunilio security officer
5-29-15	7:36 a.m.	1505V-7253	Lobby 1	Slip	Christopher Molier asst. security manager Francesca Comeli front desk manager G. Rescigno report writer Steve Hansen facilities
5-30-15	4:35 p.m.	1505V-7506	Lobby 1	Slip Water	Tony Bersano, Asst. Sec. Mngr. Thomas Lambert, Front Desk Mngr. Michael Perez, S.O. D. Davila Report writer Heather Kaufmann, S.O. Zachary Hakim, EMT S.O.
5-30-15	4:35	1505V-7506	Lobby 1	Slip water	Anthony Bersano asst. security manager Thomas Lambert front desk manager Zachary Hakim security officer EMT Michael Perez security officer Heather Kaufmann security officer S. Davila report writer John Ballesteros facilities
6-12-15	12:51 p.m.	1506V-7480	Lobby 1	Liquid	Antonio Lopez David Magnuson A. Lopez report writer
6-12-15	5:51 p.m.	1506V-2824	Lobby 1	Wet floor. "so much foot traffic I asked two males to stand by spill" "The spill was mall comprised of droplets of what seemed to be water stretching about a foot and a half in a straight line on the tile"	Antonio Lopez security officer David Magnuson A. Lopez report writer
6-30-15	11:38 a.m.	1506V-7480	Lobby 1	Slip and fall "small pool of clear liquid on marble flooring nearby"	Mary Ros front desk manager Gary Rescigno Security/EMT John Wells Security Officer J. Larson Report writer

6-30-15	11:58 a.m.	1506V-7480	Lobby 1	Slip and fall. "small pool of clear liquid on marble flooring nearby"	Mary Ros front desk manager Gary Rescigno security EMT John Wells security officer J. Larson report writer Bryan Greenfield facilities
7-5-15	12:40 p.m.	1507V-1236	6 Venezia Tower 417 Lobby 4	Slip and fall on water	Jacob Johnson Asst. Security Manager K Ecnanneste facilities G. Rescigno Report writer
7-5-15	12:40 p.m.	1507V-1236	6 Venezia Tower 417 Lobby 4	Slip and fall on water	Jacob Johnson asst. security manager Keenan Meste facilities G. Rescigno report writer
7-19-15	8:18 a.m.	1507V-5121	19 Venetian Tower 129 Lobby 1	Liquid	Melissa Perry Front desk manager Jacob Johnson Asst. Security manager L. Dozier report writer Jeffrey Dumlhoo security officer Richard Heleman
7-19-15	1:47 a.m.	1507V-5024	Grand Hall	Slip and fall	Nicholas Coronado asst. manager S Tevan security L. Lopez report writer Brian Corpas security officer
7-19-15	8:18 a.m.	1507V-5121	Venetian Tower 129	Slip and fall. Liquid on floor at approximately 7:05	Jacob Johnson asst. security manager L. Dozier report writer Jeffrey Dumlhoo security officer Richard Heleman Melissa Perry
7-20-15	5:36 a.m.	1507V-5392	Main entrance	Slip and fall. Sofia Lovgren victim (unredacted) Swedish passport	Julianne Edward front desk manager Nicholas Coronado asst. manager James Stoyer facilities J. Burnett report writer Eric Wenneberg security officer
8-2-15	10:48 a.m.	1508V-0357	Lobby 1	Slip and fall. Puddle of water on floor	Comie Klayer M. Criddle report writer
8-8-15	1:30 p.m.	1508V-1866	Grand Hall	Slip and fall	Jacob Johnson asst. security manager Jonathan Derleth front desk manager L. Dozier report writer Glen Helman facilities
8-8-15	2:00 p.m.	1508V-1869	Lobby 1	Slip and fall.	Jacob Johnson Asst. Security Manager

				Upon contacting surveillance I was advised an unknown guest had dropped a bucket	Brittany Peck Front desk manager Allan Hill security officer G. Rescigno report writer
8-8-15	2:00 p.m.	1508V-1869	Lobby 1	Slip and fall. Upon contacting surveillance I was advised an unknown guest had dropped a bucket	Jacob Johnson asst. security manager Brittany Peck front desk manager Allan Hill security officer G. Rescigno report writer
8-14-15	1:40 a.m.	1508V2554	17 Palazzo Tower 141	Slip and fall on water Susan hammonds (unredacted)	Michael Perez security officer Eddie Hoang security manager Mathan Byers facilities Marc Fesel facilities
8-29-15	11:34 a.m.	1508V-7246	Lobby 1	Slip and fall clear liquid. "significant pool of water"	Tim Alvonnello Security shift manager Thomas Lambert front desk manager D. Cabada report writer Marc Fesel facilities Joseph De Jesus security/EMT
8-29-15	11:34 p.m.	1508V-7246	Lobby 1	Slip and fall clear liquid. "significant pool of water"	Tim Alvonnello security shift manager Thomas Lambert front desk manager D. Cabada report writer Marc Fesel facilities Joseph De Jesus security officer EMT
9-6-15	6:39 p.m.	1509V-1497	Lobby 1	Slip and fall wet floor. Spilled drink on floor	Tim Alvonnello security shift manager Nachely Martinez front desk manager J. De Jesus report writer Catherine Carlson security officer
9-6-15	6:39 p.m.	1509V-1497	Lobby 1	Slip and fall wet floor. Spilled drink on floor	Tim Alvonnello security shift manager Nachely Martinez front desk manager Joseph De Jesus report writer Catherine Carlson security officer Derek Sanfilian facilities
9-13-15	11:26 p.m.	1509V-3312	Grand Hall	Slip and fall red liquid	Mathew Kaufman security manager Thomas Lambert front desk manager D. Cabada report writer Jose Lopez security officer Peter Guagiardo facilities
12-27-15	3:32 p.m.	1512V-5875	Lobby 1	Slip and fall clear liquid	Thomas Lambert front desk manager

				Tim Alvonellos security shift manager D. Cabada report writer Shane Navara facilities
2-20-16	2:56 p.m.	1602V-4290	1 Guest services podium	Liquid fall occurred earlier in day at 11:45 – 12:05 “very wet floor” Jacob Johnson asst. Security manager Devon O’Brien G. Rescigno report writer
2-20-16	2:56 p.m.	1602V-4290	Guest service podium	Jacob Johnson asst. Security manager Devon O’Brien G. Rescigno report writer
3-6-16	1:59 p.m.	1603V-1233	Lobby 1	Liquid Jacob Johnson Asst. security manager Kyle Kirchmeier VIP Services D. Winn report writer Rafael Chavez facilities
3-6-16	1:59 p.m.	1603V-1233	Lobby 1	Liquid Jacob Johnson security manager Kyle Kirchmeier VIP services D. Winn report writer Raphael Chavez facilities
3-18-16	2:57 p.m.	1603V-3584	5 th floor of the garage elevator lobby	Cup of coffee spilled on floor. Fall occurred earlier in the day 11:45 – 12:00 Seljika Bucalo security officer David Boko facilities D. Wi report writer Devin O’Brien front desk manager Jacob Johnson security manager
3-25-16	1:14 p.m.	1603V-5018	Lobby 1	Slip and fall. Puddle of clear liquid Sharry Kim front desk supervisor Rafael Chavez facilities J. Larson report writer
3-25-16	1:14	1603V-5018	Lobby 1	Slip and fall. Puddle of clear liquid Sharry Kim front desk supervisor Rafael Chavez facilities J. Larson report writer
4-9-16	7:34 p.m.	1604V-1926	Lobby 1	Male walker between wet floor signs Matthew Kaufman security manager C. Reanos report writer
4-9-16	2:44 p.m.	1604V-1850	Grand Hall	Slip and fall. Puddle of water Archie Balon security officer Jacob Johnson security manger D. Winn report writer Raphael Chavez facilities
4-9-16	7:34 p.m.	1604V-1926	Lobby	Slip and fall. Walked between wet floor signs Matthew Kaufman security manager C. Reanos report writer
4-10-16	1:51 p.m.	1604V-2136	Grand Hall	Slip and fall Nicole Floyd George Valley security manger

				Jason Palm guest (unredacted)	D. Winn report writer Shane Navara Facilities Sharry Kim front desk manager
4-12-16	3:40 p.m.	1604V-2459	Control 1	Slip and fall. Occurred on 4/10/16 SO "Felix" was attempting to stop foot traffic when he slipped and fell	Matthew Kaufman asst. manager Albert Liu D. Cabda report writer
4-12-16	3:40 p.m.	1604V-2459	1 control	Slip and fall. Occurred on 4/10/16 SO "Felix" was attempting to stop foot traffic when he slipped and fell	Matthew Kaufman asst. manager Albert Liu D. Cabada report writer Felix Escobar security officer
5-5-16	9:12 p.m.	1605V-0952	Lobby 1	Slip and fall. Picture of red solo cup and liquid on floor	Tim Alvonnello security shift manager Royce Phung front desk manager J. Buscemi report writer James Johnson security officer
5-5-16	9:12 p.m.	1605V-0952	Lobby 1	Slip and fall. Picture of red solo cup and liquid on floor	Tim Alvonnello security shift manager Royce Phung front desk manager J. Buscemi report writer James Johnson security officer Shane Navara facilities
5-12-16	12:56 a.m.	1605V-5069	Lobby 1	Liquid	Amy McCaslin front desk manager Nicolas Coronado security manager John Ballesteros facilities J. Dietrich report writer Joseph Barr-Wilson
5-25-16	12:56 a.m.	1605V-5069	Lobby 1	Slip and fall earlier in day approx. 6:49	Ay McCaslin front desk manager Nicholas Coronado security manager John Bullesteros facilities J. Dietrich report writer Eve Gizelbach EMT security officer Joseph Barr-Wilson security officer
7-7-16	12:15 p.m.	1607V-1506	Lobby 1	Slip and fall. Large wet area	Jacob Johnson security manager Michael Chrene security officer R. Overfield report writer Raphel Chavez facilities

7-15-16	11:25 p.m.	1607V-3405	Lobby 1	Slip and fall. Ice cream on floor	Tim Alvonellos security shift manager Jonathan Derfeth front desk manager J. De Jesus report writer David Cabada EMT security officer Loren Harper security officer Rosa Estela facilities
8-5-16	11:07	1608V-0995	Casino	Slip and fall. Wet spill extended entire length of pit 9 guest walked into wet area and slipped and fell	Anthony Bersano asst. security manager Nathan Beyers front desk manager D. Cabada report writer Joseph De Jesus EMT security officer Dale Keezer field training officer Amber Platt security officer Laterrious Robinson field training officer Eddie Hinton facilities
8-5-16	5:04 p.m.	1608V-0947	Lobby 1	Slip and fall. Large pool of water	Tim Alvonellos security shift manager Monique Heng front desk manager J. De Jesus report writer Justin Vasquez security officer David Cabada EMT security officer Shane Naema facilities

EXHIBIT “G”

Steven D. Grierson

ORDR

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Nevada Bar No. 4370

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Nevada Bar No. 4336

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Attorneys for Defendants

VENETIAN CASINO RESORT, LLC and

LAS VEGAS SANDS, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

JOYCE SEKERA, an Individual;

Plaintiff,

v.

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

Defendants.

CASE NO.: A-18-772761-C

DEPT. NO.: 2425

ORDER

Plaintiff Joyce Sekera's Objection to the Discovery Commissioner's Report and Recommendation on Defendant Venetian's Protective Order came before the Court for hearing at 9:00 a.m. on May 14, 2019. Keith E. Galliher, Jr., Esq., and Kathleen H. Gallagher, Esq., of the Galliher Law firm, appeared on behalf of the Plaintiff JOYCE SEKERA. Michael A. Royal, Esq., of Royal & Miles LLP appeared on behalf of Defendants VENETIAN CASINO RESORT, LLC, and LAS VEGAS SANDS, LLC (hereinafter collectively *Venetian*). Also before the Court was Defendant's Countermotion to Strike Facts, Defendants' Countermotion for Order Directing Return of All

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MAY 20 2019

Case Number: A-18-772761-C

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ROYAL & MILES LLP
1522 W Warm Springs Road
Henderson NV 89014
Tel: (702) 471-6777 ♦ Fax: (702) 531-6777

1 Protected Information, Defendant's Countermotion for Sanctions, and Plaintiffs Motion to Strike
2 Defendant's Countermotions.

3 The Discovery Commissioner ordered that guest information in Venetian's prior incident
4 reports from November 4, 2013 to November 4, 2016 remain redacted, as produced by Defendants,
5 and that the redacted reports be subject to a protective order pursuant to NRCP 26(c). In her Objection,
6 Plaintiff contended that the Recommendation violates NRCP 1 which states that the Nevada Rules of
7 Civil Procedure "should be construed, administered, and employed by the court and the parties to
8 secure the just, speedy, and inexpensive determination of every action and proceeding." Additionally,
9 Plaintiff contends the Discovery Commissioner's ruling violates the uniform holding across the country
10 that the risk or certainty that a party receiving discovery will share it with others alone does not
11 constitute good cause for a protective order.
12

13 Defendants argued that the prior incident reports contain sensitive personal, private information
14 related to prior guests and other non-employees which should be subject to an NRCP 26(c) protective
15 order. Defendants argued that the information includes personal contact data, dates of birth, Social
16 Security numbers, and health related reporting obtained by responding EMTs. Defendants further
17 argued that Plaintiff had already shared the subject information with attorneys handling litigation in
18 other ongoing related matters involving Venetian, regardless of the pending Discovery Commissioner's
19 Report and Recommendation, and expressed concern that unredacted reports produced to Plaintiff
20 would likewise be freely shared in the same manner, further invading the privacy rights of Defendants'
21 guests, which Defendants assert an obligation to protect unless Plaintiff can demonstrate that any prior
22 incident is "substantially similar" in area and circumstances to the subject incident (*citing Schlatter v.*
23 *Eighth Judicial Dist. Court*, 93 Nev. 189, 192 (1977); the Health Insurance Portability and
24 Accountability Act of 1996 (HIPAA) (See 42 USCS. § 1320d et seq.; 45 C.F.R. §§160-164; and to
25 various Nevada cases related to invasion of privacy). Defendants also sought to protect the unredacted
26
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1 information based on Plaintiff's showing of relevancy to the pending action, arguing that Plaintiff is
2 using the discovery process to mine information for distribution to other attorneys in the legal
3 community and the world at large, asserting that the balance of Plaintiff's need for the personal
4 information at issue does not outweigh the right of privacy by those identified individuals.

5 IT IS HEREBY ORDERED that Plaintiff's Objection is GRANTED, the Discovery
6 Commissioner's Report and Recommendation of April 2, 2019 is REVERSED in its entirety. The
7 Court has determined that there is no legal basis to preclude Plaintiff from knowing the identity of the
8 individuals contained in the incident reports as this information is relevant discovery. There is also
9 no legal basis to preclude Plaintiff from sharing the unredacted incident reports with persons not
10 involved in this litigation. However, the Court strongly cautions Plaintiff to be careful with how she
11 shares and uses this information.
12

13 IT IS FURTHER ORDERED that Defendant's Countermotion for Sanctions is DENIED. The
14 Court finds that Plaintiff did not act inappropriately by sharing the redacted reports at issue with other
15 counsel on February 7, 2019 or by failing to advise the Discovery Commissioner at the March 13, 2019
16 hearing that all of the redacted reports at issue were filed with the Court in their entirety by plaintiff's
17 counsel in the matter of Carol Smith v. Venetian, case no. A-17-753362-C, on March 12, 2019.
18 Plaintiff further did not violate the Protective Order by failing to request a stay of the ruling by the
19 Discovery Commissioner under EDCR 2.34(f) or by failing to request back the information disclosed
20 before the Protective Order was issued by the Discovery Commissioner.
21

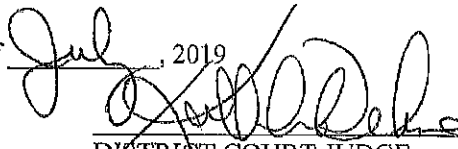
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IT IS FURTHER ORDERED Defendant's Counter-motion to Strike Facts, Defendant's Counter-motion for Order Directing Return of All Protected Information and Plaintiff's Motion to Strike Defendant's Counter-motions are DENIED.

DATED this 30th day of July, 2019

DISTRICT COURT JUDGE

Submitted by:

ROYAL & MILES LLP



Michael A. Royal, Esq.
Nevada Bar No. 4370
Gregory A. Miles, Esq.
Nevada Bar No. 4336
1522 W. Warm Springs Road
Henderson, NV 89014
Attorneys for Defendants

Reviewed by:

THE GALLIHER LAW FIRM

[Reviewed but would not sign]

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1850 E. Sahara Avenue, Suite 107
Las Vegas, NV 89014
Attorneys for Plaintiff

EXHIBIT “H”

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

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

JOYCE SEKERA,)
)
Plaintiff,)
)
vs.)
)
VENETIAN CASINO RESORT,)
)
Defendant.)
_____)

REPORTER'S TRANSCRIPT
OF
PLTF'S MOTION TO AMEND
DEFT'S MOTION TO STRIKE

BEFORE THE HONORABLE KATHLEEN DELANEY
DISTRICT COURT JUDGE

DATED: TUESDAY, MAY 28, 2019

REPORTED BY: SHARON HOWARD, C.C.R. NO. 745

1 APPEARANCES:

2 For the Plaintiff:

KEITH GALLIHER, ESQ.

3 KATHLEEN GALLIHER, ESQ.

4
5 For the Defendant:

MICHAEL ROYAL, ESQ.

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1 to do with that. And they're using that to say, and, by
2 the way, it's a pattern of bad conduct by Venetian and
3 therefore you should grant our motion for leave to
4 amend.

5 If the court is not inclined to consider those
6 things, such as representations about Venetian purposely
7 omitting reports, in violation of discovery commissions
8 report and recommendation. Venetian violating court
9 orders in Smith vs. Venetian, which there's no evidence of
10 that. I don't know why that belongs in the reply in
11 support of this motion. They said, Venetian did not
12 review the discrepancy and provide, quote, all reports
13 deemed responsive to Plaintiff's request for prior
14 incident reports. There's no evidence of that, your
15 Honor. To the contrary. To the contrary we did respond
16 as the discovery commissioner asked us to. Sent a letter
17 to Mr. Galliher in that regard.

18 They've made other statements regarding counsel.
19 Counsel lied to the court. Venetian frivolously filed
20 motions for sanctions. Venetian unjustly accused
21 undersigned and Mr. Goldstein of criminal conspiracy and
22 implied professional responsibility violations. Harassed
23 and eventually fired Mr. Shulman, an employee, who had
24 never received written warnings in his 13 years of work
25 for Venetian. Venetian is an awful corporate citizen.

1 Also, by the way, there are two security guards/EMTs
2 per shift at the Venetian, sometimes 3. So if we take 2
3 or 3 times 3 shifts, let's do the math.

4 Now, it goes from -- I'm assuming he's an average
5 security officer and EMT. We go from 100 to 900 injury
6 falls over a 9 year time frame. You add that into the 20
7 years Venetian has been open with the same floors, now
8 we're at 1,500 injury falls at the Venetian.

9 THE COURT: So we've gone from the number of
10 reports and the concern that some of the reports were left
11 out -- which number is significantly less than the number
12 you're quoting now -- to some extrapolation of testimony
13 of, well, I think it's probably about this many I've done.
14 If there's this many of me, then it's this many things.

15 MR. GALLIHER: That's not what he said. He was
16 very definite. I went over and over it with him in his
17 deposition. There was no, maybe, there's a hundred. A
18 hundred was minimum. So in his deposition testimony he's
19 not indefinite. He is very, very sure of what he's
20 testified to.

21 Let's take a look at that information first. Okay.
22 Then we've got the 73 injury fall reports, which is what
23 we discovered. Then we've got the porter's testimony.

24 Now, these again are Venetian employees who testified
25 that their supervisor informed them that the marble floors

1 at the Venetian are very dangerous, very dangerous. And
2 if there is a spot of water, a slight amount of water on
3 the floor a customer can slip and fall. This is coming
4 from management. So it's not like they don't know that
5 their floors are very, very dangerous to their customers.
6 So that's coming again from their own employees'
7 testimony.

8 Then we've got the David Elliot situation. This is
9 something which is recent which we have yet to discover,
10 but we intend to. And that is the Venetian in the
11 mid-2000s -- 2005, 2006, 2007 -- hired David Elliot -- who
12 the court is probably familiar with. He's a court
13 qualified bio-mechanical engineer, PE. They hired him to
14 evaluate their floors at the Venetian and make
15 recommendations concerning how they can make the floors
16 safer.

17 The one thing we've determined so far, Mr. Elliot
18 told him that under no circumstances is marble an
19 acceptable surface for a floor such as a hotel/casino like
20 the Venetian. He made recommendations concerning how they
21 could go from marble to tile and increase the co-efficient
22 of friction -- slip resistance -- to the .5 industry
23 standard from where it is now.

24 As we know from Dr. Jennings report the slip testing.
25 When wet the slip resistance was .33. It's far below the

1 industry average. Now we've got the Venetian hiring
2 somebody, who's an expert, to come in and advise
3 concerning the floors and how to make them safer. Nothing
4 has changed. The floors are still marble. They're still
5 not slip resistant. We've got that information as well.

6 Also we've got the fact that there are now coatings
7 available for these types of marble floors. And if you
8 use a coating on the marble floors you can make them more
9 slip resistant. And the Venetian has elected -- what we
10 know so far -- remember, we're talking about an amendment,
11 so we need an opportunity to discover information. But
12 what we know is that the Venetian has not utilized all of
13 the substances available to it to coat the marble floors
14 and, perhaps, make them more slip resistant.

15 THE COURT: Let me turn your argument back to
16 you, Mr. Galliher, that you made to Mr. Royal on his
17 motion, which was like where is the law to support this.

18 You know that if we're going to have punitives that
19 ultimately -- and it's a viable claim in a case, then it's
20 ultimately going to have to be proven by clear and
21 convincing evidence that there was oppression, fraud,
22 malice. That type of things. What you're arguing is just
23 sheer quantity of accident and that that converts what
24 occurred here into oppression, fraud, or malice. Where is
25 the case law that would support, in a negligence action,

1 THE COURT: It's not the numbers. It's the
2 question of whether the current or former employees have
3 testimony that this is a known hazardous condition that
4 could have been ameliorated. It hasn't been. There's
5 been decision making. The evidence will bear out there's
6 that, as alleged -- and again, standard to amend is very
7 low.

8 I hear you, obviously. There's got to be some
9 discussion about whether or not there's any kind of
10 prejudice or undue delay, this type of thing. At this
11 point in litigation, I'm not sure we have that concern.

12 He's indicated in his argument that you should be
13 proving that up against them to prevent the amendment.
14 But at the end of the day, I'm not sure I see that as much
15 as I see is there any potential liability for this claim.
16 If there is, and the standard is low, they should be able
17 to explore it. If the evidence doesn't pan out, Mr.
18 Galliher is right, it will be kicked out on summary
19 judgment.

20 It's very hard to make a decision at this stage of
21 the case not to allow some exploration of this in light
22 of, at least, not just the numbers but in light of what
23 has been asserted to be the testimony of some of these
24 witnesses.

25 MR. ROYAL: One of the things he represented to

1 the court about what the PAD people said is also
2 incorrect. They didn't say they had been told by
3 supervisors it's slippery when wet. They're testifying
4 about their own experience.

5 Your Honor, I guess I'm concerned that every
6 single -- this is as simple a negligence case as you have.
7 He wants to try every case but the actual one that we
8 have. So what this is going to turn into is a huge
9 discovery deal where Mr. Galliher is going to now he's
10 seeking subsequent incidents and he's going to be making
11 demands to prove up his punitive damage claim, financials
12 and all kinds of stuff that he otherwise wouldn't be
13 entitled to in a simple negligence case.

14 If he had brought a claim for punitive damages in his
15 original complaint, we'd be filing a motion for summary
16 judgment today. He does not have and has not presented
17 evidence that would remotely support a punitive damages
18 claim.

19 I want to point out to the court there's no evidence
20 of conscious disregard. There's no evidence of even
21 something beyond gross negligence in this case. It's a
22 simple slip and fall that an expert will testify to that
23 if dry -- and we believe there's sufficient evidence that
24 it was -- that it's absolutely safe.

25 Also I'll just point out to the court there is no

1 national standard of .50 coefficient of friction. It's
2 not something Mr. Jennings is going to be able to
3 support.

4 MR. GALLIHER: You don't need to hear further
5 from me.

6 THE COURT: So this is a very difficult call to
7 make in all candor because I know and I respect the
8 consequences of allowing this amendment. I will also be
9 candid that coming in here today my inclination was
10 against it because I think we start from the premise this
11 is a negligence claim. It is an uphill battle to be able
12 to get a punitive damages allegation in a negligence
13 claim. And there has to be far, far more evidence to
14 support a punitive damages claim than could ever be there
15 to support or would ever be there to support a negligence
16 claim.

17 So, you know, there's a lot of talking about numbers.
18 There's no doubt in my mind the vast majority of that, if
19 not all of that, is purely speculative and extrapolations
20 from some personal experiences but not necessarily numbers
21 that we rely on to consider granting the motion to
22 amend.

23 I think what ultimately just tipped the scale over to
24 the side of it is appropriate to allow the amendment --
25 again, I do this with trepidation, because I will tell you

1 though I will be a very strong watch dog about this ever
2 getting before a finder of fact if there is not evidence
3 to support a punitive damages claim. And it's not the
4 same standard. It's not going to be the same standard as
5 this motion to amend. And there had better be substantial
6 evidence that will allow for that to get to the trier of
7 fact.

8 Should you be able to explore it, I think the Tichner
9 (ph) case and the cases cited do show that it is possible
10 to have a punitive damages claim in a case such as this.
11 And to the extent that there is some evidence indicated
12 now that there could be implied malice, that there could
13 otherwise be knowledge of possible harmful consequences
14 and a willful and deliberate failure to act, which is the
15 language that we see in cases where punitive damages were
16 found in negligence cases and/or statutory requirement for
17 punitive damages, I think it would be abuse of my
18 discretion not to grant the amendment.

19 The standard met to allow for amendment is here.
20 That there isn't evidence of undue delay or prejudice.
21 And while it's not going to be, perhaps, pretty, this
22 discovery, I think at the end of the day, with what's been
23 alleged, it would do a disservice to this case if I didn't
24 allow there to be some exploration to see if there's
25 evidence that could support the damages claim.

1 So in that regard I think the proper call to make is
2 to allow the amendment to include punitive damages. Allow
3 it to be filed as requested and see where discovery
4 goes.

5 If the evidence is not there, if we are talking about
6 multiple accidents but nothing more than that, it's very
7 hard for this court to see how punitive damages will ever
8 get to the fact finder. That's where I think the
9 potential harm to a large operation lies. The discovery
10 and the fact there may have been decisions made and some
11 sort of willful, deliberate failure to act to avoid
12 harmful circumstances, whether or not that's there or not,
13 we'll find out. I think it is appropriate to allow
14 exploration at this stage.

15 MR. GALLIHER: Thank you.

16 THE COURT: I'll grant the motion. Mr.
17 Galliher, you'll prepare the order.

18 MR. ROYAL: Your Honor, my only concern relates
19 to the prior motion that we had, prior decision that
20 relates to protective order we were seeking. Counsel is
21 going to be seeking subsequent incident reports, I'm sure,
22 as a result of this ruling.

23 THE COURT: That prior order still stands. I
24 made it clear to Mr. Galliher what he can use in support
25 and what he cannot.

1 MR. GALLIHER: That's a discovery commissioner
2 issue. We're going to be filing a motion to compel and
3 some other matters in this case as well, but that's not
4 before the court.

5 THE COURT: We do have the order the court
6 issued before that tells you what your disclosure scope is
7 and is not. And the fact that what you'd engaged in
8 before is not something the court is expecting you to be
9 engage in going forward. I expect that to be honored.

10 The prior order still stands. I appreciate that
11 clarification.

12 MR. GALLIHER: Thank you, your Honor.

13 THE COURT: Thank you, Counsel.

14
15
16
17
18 * * * * *

EXHIBIT “I”

In the Matter Of:

LIVIA FARINA vs DESERT PALACE, INC.

A542232

DAVID A. ELLIOTT, P.E.

February 13, 2009



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DISTRICT COURT

CLARK COUNTY, NEVADA

LIVIA FARINA,

Plaintiff;

vs.

CASE NO. A542232

DEPT. NO. XII

DESERT PALACE, INC. dba
CAESARS PALACE HOTEL AND
CASINO, and DOES 1 through 20,
inclusive,

Defendants.

DEPOSITION OF DAVID ALLEN ELLIOTT, P.E.

Taken on Friday, February 13, 2009

At 12:16 p.m.

At 2300 West Sahara Avenue
Suite 770
Las Vegas, Nevada

Reported by: John L. Nagle, CCR 211



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By Mr. McGrath

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1 DAVID ALLEN ELLIOTT, P.E.,
2 having been first duly sworn, was
3 examined and testified as follows:
4

5 EXAMINATION

6 BY MR. McGRATH:

7 Q. Good afternoon, Mr. Elliot. Could you
8 please state your full name for the record?

9 A. Yes. It's David Allen Elliott, A-l-l-e-n
10 and E-l-l-o-i-t-t.

11 Q. My name is Tom McGrath. I'm here for
12 defendant Desert Palace, Inc. It's my understanding
13 you've been designated as an expert by the plaintiffs
14 in this case.

15 How many times have you been deposed
16 before?

17 A. Over a hundred.

18 Q. Are you comfortable, then, with me
19 skipping the admonitions which explain to you the
20 deposition process?

21 A. I am.

22 Q. Okay. Good.

23 Can you briefly summarize for me, starting
24 after high school, your educational background?

25 A. Starting after high school, I went to

1 school at the University of Arkansas, where I obtained
2 a Bachelor of Science degree in mechanical engineering.

3 While I was there, I also received the
4 National Engineering Merit Award and I was an Academic
5 All-American.

6 My studies there were primarily in
7 mechanical engineering, and for those who don't know
8 that, that deals with physics, dynamics, statics,
9 strength of materials, and design safety.

10 Q. I'm sorry to interrupt. Go ahead.

11 A. From there, I worked at General Dynamics
12 in Fort Worth, Texas, where I was an advanced design
13 engineer. I did work on the F-16 designs and the YF-22
14 designs.

15 I also had to design proof stations, which
16 involved a lot of training right there in-house for
17 ergonomics and human factors, and I also had to
18 reconstruct mid-air collisions of airplanes when they
19 do shows and things that you never hear about on the
20 news.

21 From there, I went to work at Renfro
22 Engineering, where I did design work a little bit, but
23 mostly it was accident reconstruction.

24 Vehicle dynamics was really heavy there.
25 We did a lot of rollover-type cases, ATV dynamics.



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1 And then I came here and worked for
2 WM Morrison & Associates for a short time before
3 starting my own business.

4 Q. How long have you been in Nevada? I'm
5 sorry to interrupt.

6 A. I've been here since 1995.

7 Q. Do you currently hold any licenses in
8 engineering?

9 A. Yes. I have a professional engineering
10 license in mechanical engineering in the state of
11 Nevada.

12 Q. Well, this is compound, but have either of
13 those licenses ever been revoked or suspended?

14 A. No, sir.

15 Q. They're in good standing?

16 A. Yes, sir.

17 Q. How many times have you testified at trial
18 as an expert?

19 A. Over 50.

20 Q. When you've testified as an expert, has it
21 been in the field or concerning the field of
22 biomechanics?

23 A. Yes.

24 Q. Of the 50 times you've testified in trial,
25 can you give me an estimate of how many times you were

1 testifying on behalf of the plaintiff as opposed to the
2 defendant?

3 A. Probably -- you know, I might be better
4 off counting that, because just -- I know where you're
5 going.

6 I'd say that probably 85 percent of the
7 work I bring in is for defendants, and 15 percent is
8 for plaintiffs, and that's not by choice. It's just
9 how it comes in.

10 When it comes to trial, it seems like it's
11 probably pretty close to 50/50 when it actually comes
12 down to testifying.

13 Q. Understood.

14 Have you ever testified at trial on behalf
15 of a plaintiff where Mr. Zimmerman was the attorney for
16 the plaintiff?

17 A. No, I don't believe I ever have.

18 Q. How many cases currently do you have open
19 with Mr. Zimmerman's office?

20 A. This is the only one that I'm aware of.

21 Q. What was the last Nevada case that you
22 testified at trial at as an expert?

23 A. It was last week. I don't remember the
24 name. Let me see if it's in my list.

25 Q. You don't need to find it. I'm just kind

1 of getting a general overview here.

2 A. I've testified twice in the last three
3 weeks in trial.

4 Q. I see you brought a three-ring binder with
5 you today.

6 A. I did.

7 Q. Does this three-ring binder hold all of
8 the documents that you have retained for your file on
9 this case?

10 A. Yeah. There's some other documents that
11 would be in books if I had to refer to them or if
12 someone wanted to look at them, but this is everything
13 I need to testify.

14 Q. When you're talking about the books that
15 aren't in there, these are books and treatises that
16 you're relying on in part for your opinions?

17 A. Sure.

18 Q. Do you mind if I just open this up? I'd
19 like to briefly kind of summarize what's in here --

20 A. Be my guest.

21 Q. -- if that's possible.

22 I see color photographs, and I have read
23 your report. Are there any color photographs in here
24 that depict the other casinos that I believe you
25 indicated you investigated to determine whether they



1 put mats down on the marble floors?

2 A. Yes, sir.

3 Q. And then there's also photos of the site
4 where the incident occurred?

5 A. Yes, sir.

6 Q. And then I see you have your October 13,
7 2008, report in here. Do you have your billings in
8 here?

9 A. No. They're maintained on computer. We
10 don't ever print them out, but I could get you a copy
11 if you'd like.

12 Q. That's okay for now.

13 Do you know off the top of your head the
14 approximate amount of time you've billed on this file?
15 I'm not asking the amount, just the hours.

16 A. No, sir. It was quite a bit, you know,
17 because we had the walk-around looking at all those
18 casinos, and we visited the site twice.

19 I could call my secretary and ask her and
20 she could tell you exactly, if you want to know.

21 Q. Does the file also include documents that
22 you were provided by plaintiff's attorney that they
23 received from the defendants' production of documents
24 in this case, or at least a portion of them?

25 A. It's my understanding that some of these

1 documents came from defendants' production.

2 Q. What I'm specifically interested in
3 knowing, if you have copies in there, is there's some
4 spec sheets that have been referenced in Mr. Moffott's
5 deposition regarding the specifications for the marble
6 flooring.

7 What I'm trying to find out is what spec
8 sheets you have and, therefore, determine what you're
9 relying on in forming your opinions in this case.

10 A. I think it all starts right here with
11 Allard Design or Allard & Conversano.

12 Q. These were provided to you by counsel?

13 A. That's correct.

14 Q. Did you attempt to review the approved
15 plans and specifications for the Caesars Palace that
16 are applicable to the area in question?

17 A. No. I haven't seen any approved plans.
18 This is what was requested, and it was what was
19 provided.

20 Q. So you don't know if the specifications
21 that you have in your file that are on Allard &
22 Conversano letterhead were actually part of the
23 approved plans and specifications for the project?

24 A. I don't know one way or the other.

25 Q. Have you looked at the flooring



1 subcontract for the Caesars Palace project?

2 A. If it's included in the documents you
3 provided, I did, but I didn't rely on that for
4 anything.

5 This was just -- I just noted in here that
6 they wanted a wet .6 coefficient of friction or slip
7 resistance.

8 Q. There's quite a lot of documents in here,
9 and we have quite a lot of this stuff. I'm not going
10 to mark this as an exhibit. I'm just going to ask that
11 you agree to maintain your file and that if you add
12 anything to it, you or your counsel indicate to defense
13 counsel what has been added to it.

14 A. Okay.

15 Q. I want to try to summarize what I think
16 you're going to be offering opinions at trial, so this
17 is agree/disagree questions.

18 You're going to be offering opinions about
19 the cause of plaintiff's slip and fall, correct?

20 A. Correct.

21 Q. And that includes opinions regarding the
22 coefficient friction rating for the marble flooring
23 where she slipped?

24 MR. ZIMMERMAN: Do you mean coefficient of
25 friction?



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1 MR. McGRATH: Yes.

2 THE WITNESS: No. It would be slip
3 resistance.

4 BY MR. McGRATH:

5 Q. That's a better term, "slip resistance"?

6 A. It is.

7 Q. Have you reviewed the video surveillance
8 that depicts the plaintiff immediately before and
9 during the slip-and-fall incident?

10 A. I've reviewed a provided DVD with some
11 surveillance footage that shows the incident to some
12 degree, but I only have one view. I don't know if
13 there's other views that exist.

14 Q. Then are you also offering opinions
15 relating to the standard of care that's applicable to
16 the owner of a casino as it relates to the safety of
17 the flooring surfaces?

18 A. I think to some degree. I think that
19 there's another expert that's an architect that may
20 cover that more thoroughly, but I'll be going through
21 the standards and what they say and how they would
22 apply to this situation.

23 Q. The reason I ask that question is we
24 deposed Mr. Moffott, and I understand that he's
25 offering opinions on that subject. This is my summary



1 of what he said, but he seems to be relying on you for
2 the wet test that you conducted on the floor.

3 Do you agree with that?

4 A. Well, I can't say what he's thinking of,
5 but I did do wet testing, and he mentioned it in his
6 report.

7 Q. But he didn't participate in the wet
8 testing, correct?

9 A. No, sir.

10 Q. Okay. And I think he's also relying on
11 you for the survey that you discuss in your report
12 regarding what other casino properties do in terms of
13 putting mats down on marble floors.

14 MR. ZIMMERMAN: Well, that misstates what
15 the testimony is. It's not what he talked about. He
16 didn't talk about putting mats down on floors. He
17 talked about different types of flooring surfaces and
18 different types of slip-resistant preventive measures.
19 You say putting mats down, so it misstates what Moffott
20 said.

21 BY MR. McGRATH:

22 Q. Do you understand the question?

23 A. I do, and I think what would be the
24 easiest thing here would be I can't -- I can't tell you
25 what Mr. Moffott relied upon, and I'm not going to



1 comment upon his opinions.

2 But I can tell you what I -- well, you've
3 asked -- you said and it's true that Mr. Moffott is
4 relying on this. I don't know if he's relying. I did
5 it. And I did it for myself. What he relied upon in
6 my file, you'd have to ask him.

7 Q. Let's ask the question another way.

8 You're not relying on any surveys
9 Mr. Moffott conducted regarding what casinos do with
10 their marble flooring in terms of making it more slip
11 resistance?

12 A. No, I'm not relying on anything of
13 Mr. Moffott.

14 Q. Let's turn to your October 13, 2008,
15 report.

16 A. Okay.

17 Q. Do you have that in your file?

18 A. I do.

19 Q. First of all, when did you conduct the wet
20 testing of the flooring area in question?

21 A. It would have been during my first
22 inspection, which is on March 24th, 2008.

23 Q. How many times did you visit this area for
24 the specific purpose of working on this case?

25 A. Two times.

1 Q. And the first time you went there, you did
2 the wet test?

3 A. That's right.

4 Q. How did you determine what areas of the
5 floor to test?

6 A. Well, it was my understanding that she
7 entered through the double doors that were the handicap
8 entrance, and there's a variety of tile there.

9 It's mostly homogenous, so I just tested a
10 likely area where a person may be walking, and I tested
11 all the different colors of tile that were available.

12 And I would expect that every spot on that
13 tile would be the same as what I measured, because all
14 three tiles measured the same thing.

15 Q. And I notice that in your report, is it
16 fair to say that you apply no significance to the fact
17 that the tiles have different color in certain areas in
18 terms of slip resistance?

19 A. Right. I negated the possibility that
20 there may be a difference in slip resistance on the
21 various tile by testing all of them. I didn't go in
22 with the perception they would all be the same. That's
23 why I tested each one.

24 Q. Now, what wet testing procedure did you
25 apply?



1 A. I followed the procedure that you find in
2 ASTM F1679, which pertains specifically to the English
3 XL.

4 Q. And when you say it pertains to it, can
5 you elaborate for me? What do you mean by that?

6 A. It gives you the guidelines for the
7 testing procedure, the things that should be followed,
8 the way you prepare the machine, the way you prepare
9 the test foot, what you set the pressure at. It's
10 just -- it's basically an instruction guide for
11 operating the English XL.

12 Q. Did you conduct any dry test?

13 A. No, I didn't.

14 Q. Why not?

15 A. Because the slip and fall didn't occur on
16 a dry floor.

17 Q. Are there any regulations, written
18 regulations, that you're aware of, that require an
19 owner who puts a marble floor in his property to
20 install it in a manner that the slip resistance would
21 pass the wet test that you conducted?

22 A. Yes, I believe so.

23 Q. Could you tell me what those are?

24 A. You find it -- you're just talking about
25 marble?



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1 Q. Correct.

2 A. You'll find language to that effect in the
3 ADAAG manual.

4 MR. ZIMMERMAN: What does "ADAAG" stand
5 for?

6 MR. McGRATH: Thank you.

7 THE WITNESS: It stands for Americans With
8 Disabilities Act Accessibility Guideline.

9 BY MR. McGRATH:

10 Q. Is that the same as the ADA?

11 A. Well, the ADA is the group. The ADAAG is
12 the publication.

13 Q. And do you know if the -- I'm going to use
14 ADAAG instead of ADA. Do you know if the ADAAG was --
15 well, first of all, has that been adopted by Clark
16 County?

17 A. Yes, it has. It's a federal standard.

18 Q. So when this marble flooring was
19 installed, do you believe that the contractors were
20 required to comply with ADAAG?

21 A. Yes, because not only is the ADAAG manual
22 there, but you also have ANSI 81 -- 87 -- 117.1, which
23 is essentially exactly the same as the ADAAG manual,
24 and that has been officially adopted by Clark County.

25 Q. Who promulgates 117.1?



1 A. ANSI.

2 Q. And tell us what "ANSI" stands for.

3 A. American National Standards Institute.

4 Q. So it's your testimony that both ADAAG and
5 ANSI require marble flooring installed in public
6 accommodations to pass the wet test similar to the one
7 you conducted at Caesars Palace?

8 A. I think I probably need to clean up your
9 statement a little bit.

10 Q. Thank you.

11 A. It would require that you provide flooring
12 that is slip resistant under the foreseeable
13 conditions.

14 Q. So is that another way of telling me that
15 if it's foreseeable that the floor is going to have
16 some type of liquid substance on it at any time, that
17 the marble flooring must comply with the wet test
18 standards?

19 A. No, I don't think so.

20 Q. Why is that an incorrect statement?

21 A. Because there's other things you can do
22 to -- for example, you can etch marble. You can groove
23 it.

24 You could apply a sealant that contains an
25 aggregate. You could have mats and runners over it.

1 You could have a doorman that's right there to
2 instantly clean up any spill that he sees.

3 But in the situation we have here, that
4 the area doesn't appear to be policed that often, and
5 given the time it took them to respond to the plaintiff
6 in this case, I'd say that they really don't have the
7 opportunity to clean up spills in this arena in a
8 timely manner.

9 And it's foreseeable that that area could
10 become wet from water tracked in from rain or from
11 someone spilling a drink or someone throwing up, as in
12 this case.

13 And since they're not able to police that
14 in a timely manner, I think that they should have
15 provided a floor that would be slip resistant under
16 those foreseeable conditions.

17 Q. Do you know what time the slip-and-fall
18 incident occurred?

19 A. Well, on the tape I remember it was
20 something like 18 -- I can't remember. It was in the
21 evening, early evening, maybe 10:00.

22 Q. 10:00 p.m.?

23 A. Yeah. I don't know what time it was.

24 Q. When you conducted your surveys of the
25 other casinos, did you go to these casinos at the same

1 time that this incident occurred?

2 A. No, sir. I went to the casinos during
3 working hours.

4 Q. Casinos are open 24 hours a day, right?

5 A. Right.

6 Q. So what do you mean by working hours, your
7 working hours?

8 A. Yes.

9 Q. You didn't go to any of these casinos at
10 10:00 at night, right?

11 A. Well, I've been to all the casinos
12 probably at least once in my life, but not with the
13 intention of doing a survey of how they watch their
14 floors or prepare -- and prepare those floors.

15 Q. When you visited these casinos with the
16 intention of doing the survey, did you go to any of
17 them at 10:00 at night?

18 A. No, I didn't.

19 Q. Did your survey attempt to determine
20 whether other casinos had doormen present for the
21 purpose of identifying spills and cleaning them up?

22 A. Well, yes. There's one hotel I could
23 think of in particular that does.

24 Q. Other than this October 13, 2008, report,
25 did you make any written notes or another report

1 regarding the results of your survey?

2 A. I have notes from it.

3 Q. Are your notes in your file?

4 A. Yes, sir.

5 Q. Can you find those for me?

6 A. This page, the back of this page, and that
7 page.

8 MR. McGRATH: I would like to ask our
9 court reporter -- well, we can take break or even do
10 this afterwards, but I would like to mark that as a
11 separate exhibit. I believe we're on No. 40. Let's
12 say 41, just in case, okay?

13 We're going to mark as Exhibit 41 a
14 two-page document that has handwritten notations on the
15 back, at least of one of the pages. It has Farina
16 Caesars Palace --

17 BY MR. McGRATH:

18 Q. Can you read that for me? I need
19 bifocals.

20 A. Yeah. I'm getting to that point, too. It
21 says "Farina v. Caesars Palace, Comparable Hotel
22 Entryway Analysis."

23 Q. And if you wouldn't mind, would you go
24 through each of the columns that you appeared to create
25 and tell me what the columns indicate? I don't want

1 you to read the name of each casino, but just tell me
2 the subjects or categories.

3 A. Okay. The categories are the name of the
4 casino; the address of the casino; what type of entry
5 it had, whether it was a double-door entry, meaning it
6 has a vestibule; what sort of flooring surfaces they
7 had at the entrance just off the exterior.

8 Q. I'm sorry to interrupt you.

9 So the fifth column from left to right is
10 the column that shows what type of flooring surface was
11 present at the casino you investigated?

12 A. Right. Flooring surfaces. Some casinos
13 have various surfaces.

14 Q. Okay.

15 A. And then they just have was nonslip
16 material used and what it was, and then any other given
17 notes that you might find.

18 Q. Now, how were you able to tell whether
19 nonslip-resistance material was used?

20 A. Well, based on my experience, I've tested
21 lots and lots of different flooring, and I can tell you
22 that carpet, you can pretty much count on being slip
23 resistant under any condition for a contaminant like a
24 spill. I guess if you were to spill motor oil on it,
25 it might not be.

1 Q. Let me ask a better question. Well,
2 slip-resistant material includes carpet, but could it
3 also include any type of sealant that a layperson could
4 not identify?

5 A. Well, the sealant -- I guess I'd have to
6 give you a little background in slip resistance. For
7 dry slip resistance, I can't think of a single walking
8 surface that you would find that's not slip resistant
9 when clean and dry.

10 And you can put sealants and other sort of
11 waxes on there that will actually make it more slip
12 resistant when dry, but they're not going to do
13 anything for you at all in the wet sense unless you add
14 an aggregate to it that's stuck to the surface and that
15 requires a lot of maintenance, because it will get worn
16 off.

17 And when you coat something with a
18 sealant, you're actually filling the surface
19 disparities that are naturally present on the surface
20 and can potentially make it more slippery in a wet
21 condition.

22 So when you add this nonslip wax to the
23 surface, you might make it more slip resistant dry, but
24 you're making it less slip resistant wet.

25 Q. Did any of the casinos that you

1 investigated that did use some type of slip-resistant
2 material use anything other than carpet?

3 A. There were tiles that were -- that were --
4 had greater surface disparities than the marble. There
5 were grates, things of that nature, that wouldn't allow
6 the buildup of a contaminant, that the contaminant
7 would fall right through.

8 Q. So tile flooring? When you say tile, is
9 it tile flooring?

10 A. Right. There's tile out there that is
11 slip resistant when wet.

12 Q. Well, is it your opinion that the
13 slip-resistant material only needs to be applied at or
14 near entrances, or do you have to put it on every
15 section of marble flooring in the property?

16 A. Well, I think that kind of goes back to my
17 answer a while ago. I think that it depends on the
18 circumstance.

19 I think that entrances to buildings,
20 particularly if they're not monitored, would -- you'd
21 have a duty to put in a nonslip flooring.

22 Q. Was it raining on any of the days that you
23 visited these other casinos specifically to conduct
24 this survey?

25 A. No, sir.

1 Q. Do you know if it was raining on the day
2 plaintiff's slip-and-fall incident occurred?

3 A. It's my understanding that it didn't.

4 Q. Is it your opinion that owners of casinos
5 should be putting down carpets, whether it's raining or
6 not or whether there's inclement weather or not?

7 MR. ZIMMERMAN: I'm sorry. It's vague and
8 ambiguous as to where. You mean at the entry area?

9 MR. McGRATH: At the entry vestibule
10 areas. Yes.

11 THE WITNESS: I would say if you're going
12 to put down something like marble that's -- such as we
13 had at Caesars Palace, that it would be my opinion that
14 yes, you should have some sort of additive
15 slip-resistant feature, whether it be a mat or runner,
16 or you etch it or replace it with a slip-resistant
17 tile.

18 BY MR. McGRATH:

19 Q. And that's regardless of whether it's
20 raining or not?

21 A. Right, because it's very foreseeable that
22 someone could throw up or spill a drink in the
23 entryway, and it's just in an area that they're not
24 going to catch.

25 Q. Okay. In looking back at what we've

1 marked as Exhibit 41, and in that sixth column
2 regarding the slip-resistant material, some of the
3 columns are blank --

4 A. Right.

5 Q. -- for the properties. What does that
6 indicate?

7 A. Well, the initial matrix you see there was
8 provided to me just as a guide of what my clients, the
9 Zimmerman law firm, wanted, and I basically just
10 collected the information I felt was important.

11 Q. Well, if you look at, say, for example,
12 New York-New York --

13 A. Uh-huh.

14 Q. -- it looks like there's no indication of
15 whether they used slip-resistant material at all.

16 A. They didn't. New York-New York is one of
17 the few hotels in this town that I found that is very
18 similar to Caesars Palace.

19 Q. Okay. So if it's blank, that means they
20 didn't do anything at all?

21 A. I'd have to look at each one specifically.

22 Q. The ones that I see that are blank are
23 Golden Nugget.

24 A. No. The Golden Nugget has a great system.
25 They have runners and attendants.

1 Q. But that's not indicated in this chart
2 here?

3 A. I didn't do that chart.

4 Q. Did you prepare anything that's in written
5 form that would tell me, for example, what you found at
6 the Golden Nugget when you investigated it?

7 A. Sure. That would be in the downtown
8 section. It says Golden Nugget entry type is -- it's a
9 double door. It's -- the flooring surface are mats,
10 carpet, carpet, permanent runners.

11 And there is marble. I didn't put that
12 down, but they have the mats and runners. Nonslip
13 material used, carpets, and there are attendants there.

14 Q. I thought I noticed that you conducted
15 this survey in May of 2008; is that correct?

16 A. No. That would have been done -- let me
17 see here. Yeah. It was done on May 5th and May 13th.
18 My apologies.

19 Q. So all the properties you visited for the
20 specific purpose of conducting this survey, you did
21 that all in two days?

22 A. Two separate days, yes.

23 Q. On two separate days. I'm sorry.

24 And did you go to Caesars Palace to
25 investigate the entrance to the vestibule area where

1 the incident occurred on either of those two days?

2 A. No, sir.

3 Q. On the first day you went there to do your
4 wet test, did you observe any carpet or any other
5 slip-resistant material in that area?

6 A. No.

7 MR. ZIMMERMAN: You mean in the vestibule
8 area?

9 MR. McGRATH: Yes.

10 BY MR. McGRATH:

11 Q. Unless I specify otherwise -- and your
12 counsel can object whenever he wants, obviously --
13 that's what I'm talking about, is the vestibule area.

14 MR. ZIMMERMAN: I just wanted it to be
15 clear because the lobby has carpet in with the tile,
16 and I didn't know if you were referring to that.

17 MR. McGRATH: And I wasn't, but thank you.

18 BY MR. McGRATH:

19 Q. I want to go back to something, the ADAAG
20 manual, which is part of ADA, right?

21 A. That's their publication, yes.

22 Q. I want to make sure that it's your opinion
23 that's required, not just recommended, because when I
24 deposed Mr. Moffott -- and we were talking perhaps
25 about something different, but I think what we were

1 talking about was ADA Section 4.5, and he acknowledged
2 to me that that's a recommended, not required,
3 regulation.

4 A. Well, the actual numbers they give are
5 recommended.

6 Q. So ADAAG is recommended, correct?

7 A. The number is recommended. The overall --
8 the overall meaning of the document is not.

9 Q. When you say "the number is recommended,"
10 what are you specifically talking about?

11 A. The number they threw out there of .6,
12 that's their recommendation, but the bottom line is
13 they want it to be slip resistant under the foreseeable
14 conditions.

15 Q. Okay. So what you're telling me is that
16 it is not required in Clark County that if you're going
17 to install a marble floor in a public accomodation
18 building, that it meet a 0.6 wet testing score?

19 A. No. The number that's been accepted by
20 the court system of the United States and is accepted
21 by all professional safety individuals is .5.

22 Q. Okay. I'm sorry to interrupt. Go ahead.

23 A. The .6 is just something that they threw
24 out there because it's recognized that people who
25 ambulate in a pathological manner or abnormal manner

1 would require greater traction, and so they just pumped
2 it up a little bit from the .5 that's already been
3 accepted.

4 If you want to read directly from 4.5, it
5 says, "Slip resistance is based on the frictional force
6 necessary to keep a shoe heel or crush tip from
7 slipping on a walking surface under conditions likely
8 to be found on the surface."

9 And the recommendation they make is slip
10 resistance should be specified according to the
11 conditions likely to be found on the surface.

12 Exterior routes and spaces that are not
13 protected, such as lobbies, entrances, bathing
14 facilities and other areas where floor surfaces are
15 often wet, should have a higher level of slip
16 resistance.

17 Q. Does ADAAG expressly say anything about
18 whether the 0.5 that's required is a 0.5 under a wet
19 test or a dry test?

20 A. It doesn't specify. It says, "Under the
21 foreseeable conditions."

22 Q. And if I understand you correctly, it's
23 your position or it's your opinion that -- well, let's
24 back up a little bit.

25 Just so I understand what your opinion is

1 based upon, what are the factors that make it
2 foreseeable that a floor will be wet as opposed to dry?

3 A. That would be responsible engineering,
4 responsible design. You'd look at this, and I don't
5 think anybody would argue with the fact that it's
6 likely that a drink would be spilled in an entryway of
7 a casino, that water could be tracked into an entryway
8 of a casino, that someone could vomit in the entryway
9 of a casino.

10 Q. Let me ask a better question.

11 Is it your opinion that the wet test
12 criteria applies to any public accommodation building
13 because it's foreseeable that any guest of a public
14 accomodation can spill a drink?

15 A. It would depend on your ability to police
16 up the drink. If you have somebody that's vigilant,
17 that's standing there, I would say that you could
18 probably let it go.

19 But in this case we didn't have that. I
20 think you have a duty to provide slip-resistant
21 flooring in public places.

22 Q. But you do agree that ADAAG does not
23 expressly indicate whether the 0.5 that you say is
24 required is measured by a wet test or a dry test?

25 A. No, it doesn't specify. It's for whatever

1 foreseeable conditions are there.

2 Q. How about ANSI? First of all, the 0.6, is
3 that a recommendation in ANSI or a requirement?

4 A. They don't mention .6 at all in ANSI.

5 Q. So they don't even have a measurement, a
6 required measurement, for the friction rating?

7 A. No, sir. It just has to be slip resistant
8 under the foreseeable conditions.

9 Q. And is there anything in ANSI that you
10 believe mandates that the floor pass a wet test at 0.5
11 as opposed to a dry test?

12 MR. ZIMMERMAN: This is the floor in the
13 vestibule?

14 BY MR. McGRATH:

15 Q. Any marble flooring in a public
16 accomodation.

17 A. You know, I think we're just beating a
18 dead horse here. I understand the definition of slip
19 resistance, and what is slip resistant.

20 Being a pedestrian safety professional, I
21 can tell you exactly what number, in my opinion, and
22 the same opinion of everybody else that does this, is
23 slip resistant.

24 It wouldn't do you any good to test a
25 floor dry, because I can already tell you it's going to

1 be slip resistant when it's dry, but it's not going to
2 do you any good, again, to take that same floor and run
3 sprinklers on it all the time and tell people to walk
4 across it, because we tested it dry. It makes no
5 sense.

6 Q. Have you ever tested marble flooring in a
7 casino in the Las Vegas area using the wet test where
8 the marble flooring passed the 0.6 standard?

9 A. Never.

10 Q. How about the 0.5 standard?

11 A. No, sir. Marble is a horrible choice.

12 Q. Essentially if you don't have carpet down,
13 it's slippery when it's wet, right?

14 A. No, sir. There's other tile that you can
15 use that is very aesthetically pleasing that will meet
16 that standard.

17 Q. Give me some examples, if you don't mind.

18 A. You can go into the Venetian. I do a lot
19 of work for the Venetian and consulting and litigation,
20 and their tile is slip resistant when wet, and it looks
21 good.

22 Q. But it's not marble flooring?

23 A. No, it's not marble flooring.

24 Q. Is it tile?

25 A. It's a ceramic tile.

1 Q. Any other properties that you can give me
2 a specific example of where they don't use marble?

3 A. Well, no pool deck uses marble, obviously,
4 and sidewalks accessing pool decks are concrete, and
5 they usually have a very rough surface on them.

6 Whenever I've had a client that has had
7 marble in their casino and I'm working for the defense,
8 I've just told them that "Hey, this is slippery when
9 it's wet. You shouldn't be using it. If you want to
10 continue using it, you got to take certain things into
11 account. You have to take other preventive measures to
12 prevent slipping."

13 And sometimes they're receptive to those
14 ideas and sometimes they're not. These are just my
15 opinions as a pedestrian safety consultant.

16 Q. What are you assuming in terms of how far
17 in terms of feet the plaintiff slipped -- withdraw the
18 question.

19 I'm trying to ask you about the location
20 of the slip-and-fall incident. How far into the
21 property past the entrance door are you assuming that
22 it occurred?

23 A. Well, if I remember right, the depth of
24 that vestibule is about 12 feet, and it looks like
25 she's maybe halfway, maybe a hair over halfway, so

1 runners.

2 Q. But is it your opinion that you have to
3 put down mats and runners over every section of marble
4 flooring in the property or just near the entrances?

5 A. That's up to the discretion of the hotel.
6 I mean, whatever they're comfortable with, if they
7 think they can police that area.

8 I would think that a spill would be more
9 recognized if it happened in the actual foyer beyond
10 the vestibule because we've got people that work for
11 the hotel right there.

12 But that's still no guarantee because,
13 again, in this case we had someone break her hip and
14 laying on the floor for 10 to 15 minutes before anybody
15 even came to help her, and that's an emergency
16 situation.

17 A little spill on the ground, I don't
18 think anybody would really take that seriously until
19 someone breaks their hip.

20 Q. You don't have any information about how
21 long the vomit was on the surface before the plaintiff
22 slipped on it, correct?

23 A. I do.

24 Q. Oh, you do?

25 A. Yeah.



1 Q. What is that information?

2 A. It's about -- from the videotape, I saw
3 the woman vomit in the video.

4 Q. Okay. How much time elapsed -- based on
5 what you reviewed in the videotape, how much time
6 elapsed between the time the woman got sick and Ms.
7 Farina came along and slipped?

8 A. It was a short amount of time. It was a
9 little less than a minute.

10 Q. Your October 13 report indicates that you
11 came back to the property on April 1, 2008. What was
12 the purpose of that second visit?

13 A. When I went back out there the second
14 time -- and it is April 1 -- was just to look at it at
15 night in the conditions that were present supposedly at
16 the time, and just to get an idea of that.

17 I took some pictures, tried to get
18 pictures that looked like that, but you really can't
19 take photographs at night, particularly color
20 photographs, and say at all that they represent what a
21 person may or may not see because film and digital
22 cameras are all color adjusted for sunlight, which is a
23 broad spectrum. It has all sorts of different colors.

24 If your area is, say, lit by sodium
25 lights, the film will look different.

1 Q. What time in the evening did you visit the
2 property on April 1?

3 A. It was -- I don't remember specifically,
4 but it was dark. It was fully nighttime.

5 Q. Assuming you could tell who was an
6 employee of Caesars Palace, did you see anything that
7 indicated to you that there was an employee stationed
8 at that vestibule entrance that you visited on April 1?

9 A. No. There was no employee there that I
10 saw.

11 Q. And when you reviewed the DVD of the
12 incident -- now I understand that you reviewed the
13 video at least a minute before her slip and fall -- how
14 much total time on the video did you review?

15 A. Well, I reviewed it all at once just to
16 make sure I got everything, but I focused primarily on
17 the time of the vomit and the time when Ms. Farina was
18 walking up to the entry vestibule, entering the entry
19 vestibule and falling. That was the area I
20 concentrated on.

21 Q. Did you observe depicted in the videotape
22 someone who you believed to be an employee or who you
23 assumed to be an employee of Caesars Palace in the area
24 anytime before Mrs. Farina's slip-and-fall incident?

25 A. I didn't look for it with that -- in that

1 respect, but I didn't see anybody that clearly looked
2 like a casino employee to me.

3 Q. And am I correct in assuming that you
4 didn't attempt to review the video to the extent it
5 depicts time anytime five minutes or further back
6 before the incident occurred?

7 MR. ZIMMERMAN: It assumes that that was
8 provided.

9 MR. McGRATH: I understand.

10 THE WITNESS: I don't remember how much
11 was provided beforehand, but I know that I didn't have
12 to go very far to the point where the lady threw up.

13 BY MR. McGRATH:

14 Q. Okay. The 88 photographs that you
15 reference on page 2 of your October 13 report, Bullet
16 Point Item No. 4 regarding your surveys of the other
17 casinos -- I don't want to look through all 88 of them
18 right now -- I just want to know, when you took a
19 photo, was it to document whether there was or wasn't
20 some type of slip-resistant material?

21 A. Yes. It was to show the entryway, and as
22 you can see, my notes are somewhat chicken scratch
23 because they're just notes to remind me of what's going
24 on, but the real proof is in the pictures.

25 Q. And you took a picture of every area you

1 visited on the casinos that are listed in Exhibit 41?

2 A. Yes, sir.

3 Q. I think we already discussed this, but you
4 reviewed provided specifications and bid forms prepared
5 by Allard & Conversano Design. That's the specs we've
6 already discussed that are in your folder, correct?

7 A. Yes, sir.

8 Q. And you haven't reviewed anything that's
9 not in the folder that came from Allard & Conversano
10 Design?

11 A. No, sir.

12 MR. ZIMMERMAN: Can we go back one second?
13 You had asked questions about what standards he had
14 reviewed, and he started to give testimony about that,
15 and then you've gone now to a different subject.

16 I just wanted to make sure whether you had
17 finished your answer on that, because I know he
18 interrupted you. Were there any other standards that
19 you had in your book?

20 THE WITNESS: Well, yes. I have quite a
21 few standards that I've copied.

22 MR. ZIMMERMAN: Okay. So he can, if he
23 chooses to, ask you questions about that.

24 BY MR. McGRATH:

25 Q. And these are standards that apply to a

1 wet test?

2 A. Yes.

3 Q. I will get to that.

4 A. Okay.

5 MR. ZIMMERMAN: I just wanted to make sure
6 that you didn't then ask him, "Well, have you told me
7 everything," because I think that's what you tend to
8 do.

9 BY MR. McGRATH:

10 Q. You indicated that you reviewed a
11 transcript of the deposition of Donald Trujillo. First
12 of all, was that important to you in any respect in
13 terms of the opinions you're going to offer at trial?

14 A. Let me take a look at my notes for a
15 minute and make sure.

16 It's not essential to my opinions. It's
17 just basically he's the director of public areas, and
18 he indicated that the site would be dust mopped three
19 times a day.

20 He's been there since the Augustus Tower
21 opened. He's aware of other slip-and-fall incidents
22 that have occurred in the vicinity of the subject
23 incident. Things of that nature.

24 But as far as anything of the meat of my
25 opinions, no.

1 Q. Is the same true in terms of you've
2 indicated you reviewed the deposition of Richard
3 Duclos, D-u-c-l-o-s.

4 A. I understand that he's a surveillance guy,
5 and he just basically said that he had footage on
6 Camera 2102, that he couldn't say if any other camera
7 was checked by someone other than himself.

8 He says that he saw Caesars employees put
9 down mats when it rains outside, along with wet floor
10 signs.

11 He says unfortunately guests frequently
12 spill liquid on the flooring surfaces throughout the
13 premises. Vomit is not as common.

14 Just basically -- nothing that's really
15 substantial to my opinions, but as I said, the people
16 are aware that slip and falls occur and that people
17 spill drinks. It doesn't take a genius to know that
18 that's going to happen in this environment.

19 Q. Let's turn to page 3 of your October 13
20 report, under the section with the heading
21 "Discussion." Would it be easier if I gave you this
22 copy, instead of turning that thing around?

23 A. Sure.

24 Q. I'm going to read the very first sentence.
25 "The three described test areas proved to not provide

1 slip resistance consistent with the industry accepted
2 minimum required value of 0.50 when contaminated with
3 tap water."

4 I think we've kind of discussed this
5 already, but I want to make sure I understand if
6 there's any additional reason why you're using the word
7 "required" as opposed to "recommended."

8 A. Because I know what's required to keep
9 people from slipping.

10 Q. Okay. As an engineer, in other words, you
11 know that if there's water or any liquid on marble
12 flooring, it's going to be slippery. Is that what you
13 mean by that?

14 A. Well, I didn't go in there with that
15 immediate assumption. I did the testing to prove it,
16 but yeah, I would say that any marble that's not
17 treated in a manner that I've described in my report
18 will not be slip resistant when wet.

19 Q. What written or codified industry accepted
20 minimum required value requires 0.50?

21 A. Well, there's OSHA standards that require
22 0.50 when wet. There's -- and, you know, it sort of
23 falls under the blanket because you don't want to --
24 you don't want to limit it.

25 You have to have the foreseeable

1 conditions, and it's got to be slip resistant. The
2 definition of "slip resistant" is clearly defined. I
3 understand it completely.

4 Q. Let me ask a better question.

5 What written or codified standards
6 expressly state that marble flooring must meet a 0.50
7 slip-resistant standard?

8 A. There is nothing that says that marble
9 flooring has to meet specifically 0.5, but that's the
10 number, as I said, that's been accepted by the U.S.
11 court systems for over 50 years. No one has ever
12 challenged it.

13 It's the number that's been accepted by
14 professionals in the pedestrian safety industry, and
15 it's not based -- it's not a number that's just grabbed
16 out of nowhere. It's a scientific number.

17 Q. Well, when you say it's been accepted by
18 the U.S. court systems, what do you mean by that? On
19 the cases you've testified at trial, the juries decided
20 that that's the standard or the judges decided?

21 A. No. It's the number that's always been
22 accepted. If you -- just like primary perception and
23 reaction for an automobile accident is accepted at 1.5.
24 Nobody challenges that.

25 Q. We're not going to do this very long, but

1 in law school I learned that you either get laws out of
2 statutes or cases or there's things called standard of
3 care.

4 There's no case law that you're relying on
5 that says 0.50 is the accepted standard, right?

6 A. Well, there is things, but not
7 specifically marble floors. That's what you asked
8 about.

9 So if you want -- if you're looking for a
10 statement that says "Marble floors, 0.5, wet," you're
11 not going to find that.

12 Q. On the second paragraph of your report,
13 you write, "Because the depth between the inner and
14 outer doors of the vestibule was only approximately
15 12.5" --

16 Is that --

17 A. Feet.

18 Q. -- "feet, Ms. Farina would have had little
19 chance to visually notice the vomit, as it would have
20 been well beneath her Frankfort plane as she focused
21 upon the inner door, which would have been her next
22 visual target as she entered and began to transverse
23 the vestibule."

24 As I read this sentence, the first thing
25 that comes to mind is that it seems that you were

1 offering opinions that are outside the scope of your
2 expertise, and what I mean specifically is you're
3 assuming where she would be looking.

4 MR. ZIMMERMAN: That's argumentative.
5 He's a human factors biomechanical expert.

6 BY MR. McGRATH:

7 Q. That's what I want you to explain to me.
8 Does part of the field of biomechanics include how
9 people walk?

10 A. Absolutely.

11 Q. Where their eyes are directed when they're
12 walking?

13 A. Absolutely.

14 Q. Other than looking at the video, what
15 other information are you relying upon to form the
16 opinion that her field of vision would not have been
17 directed at the spill area when she entered the
18 vestibule area?

19 A. Well, you could find that in any book on
20 human factors that deals with the way people take
21 information with their eyes, and it's simply that you
22 have what's called a cone of vision.

23 And people always think of peripheral
24 vision as just being far left and far right, but you
25 also have peripheral vision high and low, and in order

1 to see something in your peripheral vision, it has to
2 have great contrast.

3 And people, when they walk, they look out.
4 They don't -- especially if they have a new target, the
5 handle at the next door they're going to grab. They
6 don't walk looking at their feet.

7 So you have what's called the Frankfort
8 plane that sort of defines your lower peripheral
9 vision, and it's basically a line that goes from your
10 ear hole to the bottom of your orbit, and anything
11 that's below that is going to be in your peripheral
12 vision. It's going to require very high contrast,
13 usually motion, for you to detect it.

14 When you walk in the door, that door is
15 tinted, and you can't really see anything through that
16 door when you open it.

17 Now you've opened it and you've got 12
18 feet before the next door. If you're walking normally,
19 you're going to focus out in the distance. You're not
20 going to look at your feet. Or you're going to focus
21 right where you're going to grab.

22 And you can figure out where a person's
23 peripheral vision starts and where their central vision
24 starts based on how tall they are and the Frankfort
25 plane and how far that Frankfort plane will extend.

1 Anything that's below that, a person is
2 not likely to perceive unless it is in high contrast.

3 Q. When you reviewed the video surveillance
4 DVD, were you able to discern the color of the marble
5 flooring where the spill area was?

6 A. I don't recall that I could discern one
7 way or the other. I wasn't looking to see if I could
8 discern that.

9 Q. Were you able to discern where the spill
10 was?

11 A. No, I couldn't see where the spill was.

12 Q. Is that part of the reason you're assuming
13 there was no -- I think your word was there was no
14 contrast between the vomit and the marble flooring?

15 A. Well, no, that's not my reasoning. I
16 mean, I know what color the flooring was, and I'm
17 assuming that this, being vomit, was probably from a
18 lot of alcoholic drinks, so it was probably pretty much
19 alcohol.

20 But liquids don't show up that well on
21 floors. A lot of times I'll do testing, and during the
22 test, I'll take pictures of the test I'm doing, and
23 it's very hard to see the water on the floor in my
24 photographs.

25 You'd have to have great contrast, like

1 stark white on top of the black, green on top of red,
2 where everything is red and all of a sudden you've got
3 a green spot, or something that's moving. Moving is
4 the best contrast.

5 Q. This isn't water, though. We're talking
6 about vomit. So you're not assuming it was colorless?

7 A. No, but I think it would be very hard to
8 pick up. And the other thing is that it would never be
9 in her central vision.

10 It -- she would never have the opportunity
11 to look right at that and say, "Hey, that's vomit on
12 the floor. I better watch out."

13 Q. Just so I understand, once she opens the
14 door -- this is a hypothetical. Once she opens the
15 door, where is her field of direction at that point?
16 What I mean by that is, how many feet off in the
17 distance is her field of vision?

18 A. Well, you can -- your eye is taking
19 information for everything that you can see, but
20 whether it actually perceives that and sends
21 information to your brain on what it is depends on the
22 strength of the signal.

23 In this case it's going to be the strength
24 of the contrast. When she walks through that door, as
25 I said, when that spill would be maybe within her

1 central vision, she's probably too far away for it to
2 be in contrast.

3 And we know that the doors are tinted, and
4 she comes into the door, and now with the next door,
5 she will be focusing on where she's going to place her
6 hand.

7 And if she wasn't doing that, she's still
8 going to be looking off in the distance, and the spill
9 is below that. Is it within her visual plane? Sure.
10 But it's in her peripherals.

11 Q. When you say she's going to be looking off
12 in the distance, how many feet off in the distance are
13 you assuming most people in that situation would be
14 looking?

15 A. They look quite a ways down, and it
16 depends on their height.

17 Q. Twenty feet? She's only 4'11", correct?

18 A. Well, if we were to do the calculation --

19 Q. You're going to do a calculation for a
20 4'11" person?

21 A. Yeah.

22 Q. Okay. Thank you.

23 (Discussion off the record.)

24 THE WITNESS: If you have a person that's
25 4'11", their central vision is going to extend -- or

1 their peripheral vision will extend out about 17 to 25
2 feet from where they're currently standing.

3 BY MR. McGRATH:

4 Q. Okay.

5 A. So anything that's less than 17 feet, you
6 could be pretty sure that they won't pick it up unless
7 it's in high contrast.

8 Q. Unless it's in their central vision?

9 A. Well, in order for it to be in their
10 central vision, they would have to look down on the
11 ground.

12 Q. If it was 12 feet in front of them, they
13 wouldn't have to look right down at the ground.

14 I understand what you've been saying about
15 the Frank -- is it the Frankfurt field of vision?

16 A. Frankfurt plane.

17 Q. Another way of asking these questions is
18 to try to find out how far off in the distance that
19 begins.

20 A. Right. And it could begin as close as --
21 for a 4'11" person, it could begin as close as 17 feet.

22 Q. If you go down to the last paragraph of
23 page 3 of your October 13 report -- and we've talked
24 about these already, the specs and bid forms in your
25 file from Allard & Conversano Design. In your report,

1 you say that those documents indicate that the flooring
2 must be tested to meet a 0.6 wet coefficient of
3 friction.

4 MR. ZIMMERMAN: You misstated it. It said
5 must be treated. You said tested.

6 BY MR. McGRATH:

7 Q. I'm sorry. Must be treated. I agree.

8 Can you find for me the exact
9 specifications that you're relying on to support your
10 opinion that the project specifications required the
11 marble flooring to meet a 0.6 wet coefficient of
12 friction?

13 A. Well, it's exactly what it says. It's the
14 documents that I reviewed from Allard & Conversano
15 Design. I have to take all these pictures out.

16 Q. What I'm really trying to get at is, is
17 there just one spec or is there more than one that says
18 that?

19 A. Well, they all basically say it. It just
20 says -- under "Notes," it says, "Stone flooring must be
21 treated to meet .6 wet coefficient of friction ADA.
22 Finish may require adjustment and/or slip-resistant
23 topical post-installation procedure.

24 Q. And you don't know if that was actually a
25 part of the approved set of plans and specifications?

1 You're assuming that, correct?

2 A. Well, I'm just reading what it says.

3 Q. No, I understand that, but what you're
4 reading, you don't know if that was a part of the
5 approved plans and specifications for the project?

6 A. No, I don't know, but --

7 MR. ZIMMERMAN: If you had produced those,
8 then he may.

9 MR. McGRATH: It's a speaking objection.

10 THE WITNESS: That's what I was going to
11 say, is just that this is what these documents said,
12 and if there's other documents that have greater weight
13 than these, they probably should have been provided
14 with the disclosure of documents.

15 This is what I'm relying on. I didn't use
16 it for any of my opinions whether the floor was safe or
17 not. I'm just saying that the person who made out this
18 form was aware of what the ADA recommendation is, and
19 they understand that those areas could become wet, and
20 those are foreseeable conditions, so, therefore, they
21 would have to be in a wet condition.

22 BY MR. McGRATH:

23 Q. Well, you believe that the marble flooring
24 can't pass that standard, correct?

25 A. That's not what I said. I said you'd have

1 to etch it. You'd have to do something. The marble
2 the way it is, it will never pass unless you do
3 something to it.

4 Q. When you etch it, what does it typically
5 look like after you're done etching it?

6 A. It's dull, a matte finish. It's not as
7 aesthetically pleasing, but are we talking about
8 aesthetics or safety?

9 Q. Well, is it your opinion that if this is,
10 in fact, what Allard & Conversano was requiring, that
11 it was negligent on their part to do so because marble
12 flooring can't pass that criteria unless you etch it,
13 as you've described?

14 A. I mean, what they're saying is that finish
15 may require adjustment and/or slip-resistant topical
16 post-installation procedure, so they're recognizing
17 that -- well, they're saying it may not meet this, but
18 I think they probably know it's not going to.

19 Q. If you wrote that, you wouldn't use the
20 word "may," would you? You'd say "definitely will
21 require"?

22 A. I wouldn't have written this thing in the
23 first place. I wouldn't have recommended marble.

24 Q. That's where I'm going. You think it's
25 negligent for a designer to recommend marble in a

1 public accomodation building like this one unless they
2 say you've got to put carpets and mats down?

3 A. No. I think you have to consider the
4 area, and in this case we have an entry vestibule that
5 has no surveilliance within it. You can't see through
6 it.

7 The only way that hotel management is
8 going to find out about a spill that's in there is if
9 the person that created the spill told them or somebody
10 else walked in and noticed it.

11 And I wouldn't think anybody is going to
12 notice it walking through there except for the person
13 that vomited, until somebody falls on it, and in that
14 area you're going to have falls when spills occur.

15 You know, you look at all those documents
16 that I was provided for other instant reports involving
17 falls, and almost every one of them, it says
18 specifically occurred on a wet surface. There's some
19 that doesn't say one way or the other, but --

20 Q. It doesn't surprise you, does it?

21 A. What's that?

22 Q. That it occurs on a wet surface.

23 A. No. That's my whole philosophy, that dry
24 surfaces are not slippery. Wet surfaces can be,
25 depending on their surface disparities.

1 Q. But most people know wet marble is going
2 to be slippery?

3 A. If it's shiny, smooth marble, yeah, it's
4 going to be slippery, but you'd have to have the
5 foreknowledge that it's wet.

6 Q. You didn't review any documents that
7 indicated one way or the other whether the marble
8 flooring was tested by the flooring contractor after it
9 was installed, to meet the Allard specification?

10 A. No, I didn't see that, but if there's
11 somebody out there that says that it did, I will say
12 they're a liar.

13 Q. Let's assume hypothetically that somebody
14 tested it and it did pass the test. Would the owner
15 have to do anything in terms of maintenance to maintain
16 the slip resistance of the original installation?

17 I guess it's not a fair hypothetical
18 because you already assume there's no way it's going to
19 pass the test, but assuming it did immediately after
20 it's constructed, would you expect the slip resistance
21 to fade or wear away?

22 A. Again, it depends. There's a lot of
23 factors. If -- for example, limestone could start
24 off -- this isn't limestone, obviously, but it could
25 start off smooth, and as people walk on it and water

1 gets on it, it becomes actually more rough.

2 There might be some things that may become
3 more polished and you actually wear away the surface
4 disparities with your feet almost like you're honing
5 it.

6 Q. Would you recommend to any architect that
7 was going to specify marble flooring in a public
8 accomodation that it not only be tested after
9 installation, but every six months, every three months,
10 to ensure that it has maintained its slip resistance?

11 A. Well, I think you have to start at the
12 beginning. I would never recommend marble for this
13 area.

14 But if -- and if my clients -- if I was a
15 marble installer or a floor installer, which I'm not,
16 and a client said, "I want marble in this entry
17 vestibule," I'd say, "It's against my conscience. I
18 can't put it in there, unless we totally dull it down
19 and make it look kind of ugly, or I could recommend
20 other things you could put in there, but I would not
21 install marble in that specific area."

22 Q. You don't know one way or another whether
23 the owner asked for marble or it was proposed by a
24 designer or contractor?

25 A. It's of no issue to me.

1 Q. But in your mind, any of the designers
2 that are involved in either suggesting marble flooring
3 or approving the suggestion by somebody else are doing
4 something you wouldn't recommend?

5 A. Well, for that area, yeah, but I think
6 that the person that wrote this out had some knowledge
7 of pedestrian safety, and I think that they were
8 covering their butt by saying that the finish may have
9 to be treated and taken care of.

10 Because I think anybody that cares about
11 pedestrian safety is going to know that shiny marble is
12 not going to be slip resistant under contaminated
13 conditions.

14 Q. Have you reviewed the report by the
15 defense experts, S.C. Wright Construction, regarding
16 their dry testing --

17 A. I have.

18 Q. -- of the vestibule area?

19 A. I have.

20 Q. Do you recall their conclusions or
21 opinions as to why wet testing should not be the
22 applicable standard?

23 A. Because they don't know what they're
24 talking about.

25 Q. I understand.

1 What I want you to do is tell me why you
2 disagree with their opinions and conclusions in that
3 regard.

4 A. Let me get down here to the report.

5 Q. Do you have that in there? Because I
6 don't have an extra copy. I think what we're focusing
7 on is the last paragraph of the first page continuing
8 on to the second.

9 A. I'd like to start off by saying if they
10 think they're going to argue with me about this stuff,
11 they're barking up the wrong tree because, number one,
12 I was taught directly by William English how to use the
13 English XL. I am certified. They're not. They were
14 not taught by William English. They're not a member of
15 F13.

16 Q. What is F13?

17 A. It's Pedestrian Walkway Safety and
18 Traction. It's a division of ASTM. And the guy is a
19 member of ASTM, but he's in construction, not
20 pedestrian safety.

21 Also, I've been the chairman of the
22 standard that governs the English XL. I've written
23 standards for pedestrian safety for ASTM.

24 We'll just get down here to --

25 Q. That's something different than what I'm



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1 looking at. Why don't I give you my copy. What I want
2 you to do is review the beginning of this last
3 paragraph on page 1 of their December 3, 2008, report,
4 which I see you have a December 31. So this is a
5 preliminary that I'm looking at.

6 MR. ZIMMERMAN: I'd like to see the one
7 that wasn't produced that you have.

8 BY MR. McGRATH:

9 Q. Take a look at it. You guys can make
10 copies afterwards.

11 A. Okay. What was your question?

12 Q. My question is, they're saying that you
13 cannot use the wet test because you're -- they're
14 explaining that it is William English, inventor of the
15 English 40 and author of the book "Pedestrian Slip
16 Resistance, How To Measure It and How To Improve It,"
17 defines SCOF as "The force required to initiate
18 relative motion between an object and a surface it is
19 in intimate contact with. It is inherent that the two
20 surfaces must be in direct contact with each other. If
21 there is anything on the interface, you are not
22 measuring SCOF. One cannot take an SCOF reading on a
23 wet floor. It is for this reason that recent ASTM
24 standards for SCOF measurements specify dry conditions
25 only."



1 The way I understand that is they're
2 saying if there's liquid between your measuring device
3 and the floor, you're putting something in between and
4 then you're not getting a true measurement.

5 A. What they've done is -- they're either
6 intentionally trying to mislead the reader or they
7 don't know what they're talking about, because they
8 just took a small snippet that kind of meets what
9 they're trying to say.

10 I agree with that. I agree that if you
11 are measuring a dry surface with the English XL, that
12 you're measuring SCOF.

13 I agree that if you have anything in
14 between preventing intimate contact between the two
15 surfaces, you're not testing SCOF.

16 That's why in the beginning I said we're
17 testing slip resistance. SCOF is for pacts. It's for
18 people that aren't educated in this business.

19 We all know that SCOF has nothing to do
20 with pedestrian safety because in order to measure
21 SCOF, like you pointed out, the surface has to be dry.
22 And dry surfaces are not slippery, so it's not even
23 interesting to a person that's involved in pedestrian
24 safety.

25 He goes on to say that -- he starts

1 talking about that when you measure it wet, that you're
2 measuring DCOF. You're not.

3 Q. What is DCOF?

4 A. Dynamic coefficient of friction, and that
5 has nothing to do with pedestrian safety either,
6 because dynamic coefficient of friction is the measure
7 of the force required to keep an object in sliding
8 motion at a given acceleration or velocity once sliding
9 has occurred.

10 Q. My question is not meant to be
11 argumentative, but I'm asking it because you've
12 testified that you have been involved in writing
13 pedestrian safety standards for the ASTM.

14 A. That's correct.

15 Q. How come the ASTM standards, then, don't
16 expressly state that the wet testing is the applicable
17 standard for measuring the coefficient of friction?

18 A. There is nothing that says that that's
19 what you're supposed to do except for the equipment
20 that cannot measure anything wet.

21 Q. My question is, why not?

22 A. Well, there's a lot of reasons. I mean,
23 if you want to get all into it -- there's equipment out
24 there that's manufactured by people that want to
25 continue manufacturing it, and it's only good for

1 testing dry surfaces, because in order to accurately
2 meter a wet surface, you have to apply the vertical
3 forces and the horizontal forces at exactly the same
4 moment in time.

5 If you take and you set a test block down
6 on a wet surface and then you test it, it's invalid
7 because there's a phenomenon called stiction where
8 there's a cohesion, and it gives you false high
9 numbers.

10 That's why William English and
11 Mr. Brungraber invented their machines, which do apply
12 the forces, and those are the only two machines that
13 are approved for wet testing.

14 I mean, it says specifically, "Do not use
15 the EPS for wet testing. Do not use the Model 80.
16 Don't use the Tortus," but what it does say is you can
17 use the English XL or the Brungraber Mark III or II. I
18 use the English XL.

19 Q. I want to make sure I understand
20 something. So arriving at your opinions regarding the
21 application of the wet testing to the marble flooring,
22 I think we've already discussed, you're relying on the
23 ADAAG manual?

24 A. Right.

25 Q. You're relying on ANSI?

1 A. Right.

2 Q. And ASTM?

3 A. Right.

4 Q. Anything else?

5 A. OSHA.

6 Q. What OSHA standard specifically?

7 A. OSHA 1926.754, Section C, paragraph 3.

8 And it says specifically that "You have to achieve a
9 minimum average slip resistance of .5 when measured
10 with an English XL tribometer or equivalent tester on a
11 wetted surface."

12 Q. Why is that applicable to this case here?
13 When I hear OSHA, I think of worker safety standards.

14 A. Well, it's another standard that's talking
15 about pedestrian safety. I mean, you think that a
16 person at a job has a greater right to safety than a
17 guest at a hotel?

18 Q. It probably was a poor question. I mean,
19 why do you believe OSHA applies to an owner building a
20 casino -- well, not building a casino, but after the
21 construction is complete, why is OSHA applicable to
22 anything?

23 A. It's not directly applicable. It's a
24 standard for occupational safety and health, but it's a
25 standard that's out there that says specifically --

1 where your expert says there is no standard, that says
2 wet testing or .5. It says exactly that. He's not
3 aware of what standards are out there.

4 You know, we can stick our heads in the
5 sand all we want and we can argue over .5. We can
6 argue over .6. We can argue over slip resistance.

7 I use the definition for slip resistant
8 that's accepted by ADA, by ANSI, by ASTM. And I know
9 as a pedestrian safety expert, who is thoroughly
10 involved in gait analysis, what is required to make a
11 safe walking surface.

12 It does us no good to measure a surface
13 dry and say this is a great surface when it's going to
14 be wet sometimes and it's not so great then.

15 Q. I understand your opinion and I understand
16 your testimony. The only thing -- you keep saying
17 "required," and I think we've established that those
18 are all accepted standards that are recommended by ANSI
19 and ADA.

20 A. When I say "required," it's what I know to
21 be the requirement to prevent people from slipping.

22 Q. I understand.

23 Okay. If you give me a moment, I just
24 want to look through the file.

25 And you said that your billings are not

1 included in here, correct?

2 A. No. I can provide those to you, though.

3 Q. What's your hourly rate for your work on
4 this case?

5 A. It's the same as every case. It's 250 an
6 hour and 350 an hour for testimony.

7 Q. Okay. And trial time?

8 A. It's 350 an hour.

9 Q. It's 350 also?

10 A. Well, the 350 an hour is specifically for
11 the amount of time I'm sitting on the stand. All the
12 rest, if I'm sitting in the hallway, it's 250.

13 Q. First of all, did you notice the plaintiff
14 to have any discernible gait as she opened the door and
15 before she actually slipped and fell?

16 A. Yeah. I read your medical doctor's
17 report, and I noticed something there.

18 Q. Did you factor that in in terms of
19 arriving at your opinions as to why she slipped and
20 fell?

21 A. No, because if you have a Trendelenberg
22 gait, you could likely have a greater traction demand,
23 and that's why the ADA standard wants to pump it up a
24 little bit. I'm not holding them to that. I'm only
25 holding them to .5.

1 Q. Did you observe what looked like to you to
2 be a Trendelen gait?

3 A. Trendelenberg?

4 Q. Yeah, sorry.

5 A. Maybe ever so slightly. What we have
6 is -- there's two types of gait analysis you can do.
7 There's observational gait analysis, and there's
8 scientific gait analysis.

9 Scientific gait analysis involves kinetics
10 and kinematics that are determined from a force plate
11 and motion capture systems, whereas observational gait
12 analysis is where you do nothing more than watch a
13 person walk.

14 Q. That's all you could do here, right?

15 A. Right. And we're kind of at a little bit
16 of a disadvantage in that observational gait analysis
17 should be done from directly behind a person, and
18 obviously you wouldn't want that person to be carrying
19 anything. She's got a bag in her -- or something in
20 her right hand.

21 But what I can see there is that if there
22 is a slight waddling, it's on the right side, and what
23 would that indicate is that when she's walking, when
24 she's in stance phase with her right leg, it looks like
25 her body leans ever so slightly to the right, and then

1 when she's in stance with the left, it returns to
2 vertical.

3 And what that would indicate is that she
4 has a deficiency in her hip abductors on her right
5 side.

6 Now, it's ever so slight because it's
7 almost imperceivable, and it could be caused by her
8 carrying that bag on the right side.

9 But in this case she fractured her left
10 hip. The left hip is the dominant hip, if you look at
11 the video. Her left hip is the good hip, prior to the
12 accident.

13 Q. What you observed relating to her right
14 hip or maybe related to the slight gait you observed,
15 was that a factor that caused her to slip?

16 A. It may have been. I don't know.

17 Q. You don't know. How about the fact that
18 she's holding -- I believe she's holding a drink, but
19 she's holding an item other than just having the purse
20 or the bag around her right shoulder. She's also got
21 an item in her right hand.

22 A. Well --

23 Q. Correct?

24 A. She's got a -- she had a drink in her left
25 hand.

1 Q. I apologize.

2 So you observe her to be holding a drink
3 in her left hand, and then she had a bag around her
4 right shoulder?

5 A. Okay. Just to straighten this up, I can
6 observe the bag on her right shoulder. I can't observe
7 anything in her left hand, but her deposition testimony
8 was such that she said she had a drink in her left
9 hand.

10 Q. Would the fact that someone was carrying a
11 drink in a hand contribute to or increase the
12 likelihood that they would slip and fall?

13 A. To my knowledge, there's been no studies
14 done that indicate whether carrying a drink has any
15 effect one way or another. I would think not.

16 The bag, it would depend on how heavy it
17 is and a lot of other factors.

18 Q. So there's been no studies done on whether
19 someone holding a drink is more or less likely to lose
20 their balance?

21 A. Yeah, I would say that it would make no
22 difference.

23 Q. Tell me, because you're an expert and I'm
24 just as a layperson, it seems to me sometimes people
25 try to avoid spilling a drink, and they might slip and



1 fall because they try to avoid spilling a drink. Is
2 that something that's completely an unreasonable
3 assumption?

4 MR. ZIMMERMAN: And might slip and fall on
5 vomit? Incomplete hypothetical.

6 THE WITNESS: In this case we know that
7 she slipped on vomit. I don't think a person would be
8 too concerned about their drink unless they're on
9 unsure footing.

10 I think if you have good traction
11 underneath and you're walking in a normal manner, I
12 think that your drink is probably pretty safe and so
13 are you.

14 BY MR. McGRATH:

15 Q. But for someone who steps on a floor
16 surface that's wet if they're holding a drink in one
17 hand, in your opinion, does that make it more or less
18 likely that they're going to fall?

19 A. It would be my opinion, just based on the
20 things I know, that it probably wouldn't make any
21 difference because you're most likely going to drop
22 that drink once you begin to slip and fall.

23 Q. And we at least have established that you
24 think or believe that her left hip was her good hip
25 before the incident.

1 A. Oh, clearly.

2 Q. Did she slip on her right foot or her left
3 foot, if you could tell?

4 A. Her left foot slipped.

5 Q. And you didn't observe her right foot to
6 slip on anything?

7 A. No. It was during stance phase with her
8 left foot that the slip occurred.

9 Q. And describe for me how she fell in terms
10 of the mechanics, what you observed.

11 A. It's very hard to see exactly what
12 happened, but from watching her walk and when she began
13 to fall, it is evident to me that it occurred when the
14 left foot was in stance, and it looked as if she fell
15 to her left onto her left hip.

16 Q. When you say left foot was in stance, does
17 that mean her left leg is extended straight?

18 A. No. It's on the ground and her right foot
19 is in swing, was in the swing phase.

20 Q. I think that's all I have. I want to
21 thank you for coming here today..

22 A. Okay.

23 Q. It looks like we went an hour and 35
24 minutes, so could you give me, so we have it on the
25 record, your tax ID number, if you have it handy?



1 A. Sure. I know it. It's 86-0884947.

2 Q. Thank you again. It's Dr. Elliot?

3 A. It's just David.

4 Q. Thank you for being here today.

5 MR. GOLDMAN: The plaintiff reserves the
6 right to have Mr. Elliot review his deposition
7 transcript and make any changes he desires to make.

8 BY MR. McGRATH:

9 Q. I'd just ask before we go off the record
10 again that you maintain this file and that if you add
11 anything to it, you indicate to counsel so that we know
12 if there's anything else put into the file.

13 A. Okay.

14 MR. ZIMMERMAN: Are you going to give us a
15 copy of that --

16 MR. GOLDMAN: Are we off the record? Are
17 you done?

18 MR. McGRATH: Yes.

19 THE COURT REPORTER: Do you want a copy?

20 MR. GOLDMAN: No.

21 (Deposition Exhibit 41 marked.)

22 (Whereupon the deposition
23 was concluded at 1:35 p.m.)

24

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DEPOSITION CORRECTION SHEET

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DEPONENT'S SIGNATURE:

STATE OF COUNTY OF

Subscribed and sworn to before me this day
of , 2009.

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CERTIFICATE OF DEPONENT

I, DAVID ALLEN ELLIOTT, P.E., deponent herein,
do hereby certify and declare the within and foregoing
transcription to be my deposition in said action; that
I have read, corrected, and do hereby affix my
signature to said deposition.

DAVID ALLEN ELLIOTT, P.E.

Subscribed and sworn to before me this
day of , 2009.

Notary Public

REPORTER'S CERTIFICATE

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

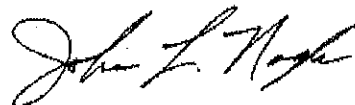
I, John L. Nagle, a duly commissioned Notary Public, Clark County, State of Nevada, do hereby certify:

That I reported the taking of the deposition of DAVID ALLEN ELLIOTT, P.E., on Friday, February 13, 2009, commencing at the hour of 12:16 p.m. That prior to being examined, the witness was by me duly sworn to testify to the truth, the whole truth, and nothing but the truth.

That I thereafter transcribed my said shorthand notes into typewriting and that the typewritten transcript of said deposition is a complete, true and accurate transcription of my said shorthand notes taken down at said time.

I further certify that I am not a relative or employee of an attorney or counsel involved in said action, nor a person financially interested in said action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in my office in the County of Clark, State of Nevada, this 21st day of February, 2009.



John L. Nagle, CCR 211

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