IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court No.
District Court Case No. A-18-772761-C



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

v.

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

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# 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 13 (Exhibits 51-56)**

Michael A. Royal, Esq. (SBN 4370)
Gregory A. Miles, Esq. (SBN 4336)
ROYAL & MILES LLP
1522 W. Warm Springs Rd.
Henderson, Nevada 89014
Telephone: (702) 471-6777
Facsimile: (702) 531-6777
Email: mroyal@royalmileslaw.com
gmiles@royalmileslaw.com

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

DATED this 13 day of March, 2020.

ROYAL & MILES LLP

By: _____

Michael A. Royal, Esq. (SBN 4370)
Gregory A. Miles, Esq. (SBN 4336)
1522 W. Warm Springs Rd.
Henderson, NV 89014
(702) 471-6777
Counsel for Petitioners

## 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 13 (Exhibits 51-56), 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:

Keith E. Galliher, Jr., Esq.
THE GALLIHER LAW FIRM
1850 E. Sahara Avenue, Suite 107
Las Vegas, NV 89014
and
Sean K. Claggett, Esq.
William T. Sykes, Esq.
Geordan G. Logan, Esq.
CLAGGETT & SYKES LAW FIRM
4101 Meadows Lane, Suite 100
Las Vegas, NV 89107

*Attorneys for Real Party in Interest*

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

Ashley Schmitt
An employee of Royal & Miles LLP

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Q So do you actually know where the water would come from? Whether it would come from the ice or whether it would come from a bottle?
MR. ROYAL: Objection, form.
THE WITNESS: No. When the water spill is from a water cooler, you can see the water coming from it.
BY MR. GALLIHER:
Q When you say water cooler, what do you mean?
A An ice cooler.
Q So people carry ice coolers over those floors?
A Yes.
Q Now, have you ever seen anyone use the food court and leave the food court with drinks?
A Sometimes, yes.
Q And how about the Bouchon Bakery; have you ever seen anyone order drinks from the Bouchon Bakery and leave from it?
A No, hu-huh.
Q Have you ever seen anyone walk around with liquor or alcohol in a glass or cup?
A Everyone does it in the casino; yep.
Q So would it be fair to say that you have seen that?

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A Oh, yes.
Q Now I want you to isolate, on a given shift -- we'll say the day shift.
On the average, what's your best estimate of how many spills you would see during the day shift when you were a casino porter at the Venetian?
A Sometimes I did, but I did not work always at the same station.
Q Well, I understand. What I'm looking for is your best estimate of the number of times on one shift that you would see spills when you were employed at the Venetian.
MR. ROYAL: Object to form.
THE WITNESS: At times two or three times.
BY MR. GALLIHER:
Q Would that be an average?
A Yes.
Q And we're talking about spills that would be in the area that you were responsible for?
A The floor close to the food court and Lux Cafe, it's floor. But there are areas that are carpeted.
Q Well, I'm talking strictly about the marble floors.
A In rare occasions.

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Q So are you saying that on rare occasions, you would see spills on the floor, the marble floors, next to the Lux Cafe or the food court?
A Not spills -- spills, but say that someone just dropped a little bit of a soda.
Q And if someone dropped a little bit of soda, that's something that you would clean up?
A Yes, yes.
Q And why would you do that?
A Because I had to. I was being paid to do that.
Q And was there a concern about whether or not the floor was dangerous with that little bit of liquid on it?
MR. ROYAL: Objection, form.
THE WITNESS: Yes. It also gets stained.
BY MR. GALLIHER:
Q And is that why you cleaned it up, to protect the customers?
A Yes.
Q That was your job; right?
A Yes, and I would also get tips.
Q When you say you get tips, who would give you tips?
A The guests, when they say that you are

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keeping an eye to make sure that they didn't fall.
Q During your time at the Venetian, had you ever seen a customer fall on liquid on the marble floor?
A Yes.
Q And how many occasions?
A The one I recall is a lady that fell with a coffee.
Q And you recall a lady that fell with a coffee?
A Yes.
Q And how do you recall that?
A Well, we were cleaning and suddenly I think a lady came out with a coffee from a bakery, the Bouchon Bakery on the first floor.
Q And so was that a fall that you personally saw?
A Well, we saw her fall and we were close by. I had been checking the floor.
Q So is that the only time that you've seen a customer fall at the Venetian on the marble floor?
A Oh, many, but they were drunk.
Q So you've seen a lot of drunk people fall on the marble floor at the Venetian?
A No, just that they had fallen because they

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were drunk.
Q And how do you know that?
A Because you can see it.
Q Did you witness those falls?
A Yes.
Q So how many of these falls did you witness?
A Well, about three I would say, the ones that I watched.
Q When you saw these people that you described as drunk fall, were they hurt?
A These people were not alone. There were other drinkers.
Q All right. But my question is when you saw these people fall, were they hurt?
MR. ROYAL: Objection, form.
THE WITNESS: I don't know because we can't get involved with that. And if they're drunk, they get up. They are to get up on their own or someone picks them up.
BY MR. GALLIHER:
Q So it sounds to me like you are saying you don't know whether they were hurt or not.
A Well, no. No.
Q Is that right?
A Yes, because if they were drunk, they would

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just get up and go. We can't stick our hands in that situation.
Q I understand. But you don't know whether those people, when they got up, were hurt?
A No.
Q We're here today basically to -- because we're involved in a lawsuit as a result of a fall occurring on November 4, 2016. It happened in the early afternoon hours.
A Early wasn't it?
Q Yeah. Do you know?
A I was in that morning shift.
Q So how is it that you know which fall I'm talking about?
A Because I was sent the video.
Q And you were sent the video by whom?
A I don't know who.
Q So you've seen the video showing the fall?
A Yes.
Q So you didn't see the fall until you saw the video?
A No, I remember that lady.
Q Do you remember seeing the lady fall?
A Yes.
Q All right. So you were sent a video that

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showed a fall on November 4, 2016; right?
A Yes.
Q And you watched the video?
A Yes.
Q And that fall was a fall that you personally saw when it occurred?
A Yes. I was there.
Q So when you talked about a fall involving a lady with coffee, is that the fall you were talking about?
A She's the one.
Q So how is it that you determined that she fell carrying coffee?
A Because I was there.
Q Did anyone discuss this fall with you?
A No, but I remember it. But I no longer work at the Venetian.
Q I understand. Did you meet with anyone in preparation for today's deposition?
A I just received some documents stating that I had to come.
Q Did you -- so you did not meet with anyone to discuss today's deposition?
A No.
Q Did you discuss today's deposition with

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anyone over the telephone?
A I was only called and told to be here today.
Q So what I'm trying to determine is, where did you form your opinion that the lady was carrying coffee?
A Because I know that she was coming from purchasing coffee.
Q And you testified that she was coming from purchasing coffee at the Bouchon Bakery; right?
A I think so, because she was coming down next to the area where they sell coffee.
Q So you did not discuss your testimony of today's deposition with anyone before you showed up?
A No.
Q And I want to make sure I'm clear on this: That you personally witnessed this fall when it happened, separate and apart from what you saw in the video?
A Yes.
Q So you actually saw the fall twice. You saw the fall in person when it happened and then you saw it again on the video; is that right?
A Yes, yes. I was there. I was cleaning in the surroundings.
Q When the video was sent to you, was it sent

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to you in a letter?
A No.
Q How was it sent to you?
A I don't know. I received -- no. The next day I received these papers.
Q Well, my question was, how was the video sent to you?
A I don't know.
Q Well, did you receive it at your home?
A No, my phone.
Q All right. So the video that you described was sent to you on your telephone?
A Uh-huh, yes.
Q And you don't know who sent it?
A No.
Q Did the sender identify themselves in any way to tell you who sent it to you?
A No. I was only mailed these papers and then I was called from the telephone.
Q All right. When you say you were called from the telephone, did the call from the telephone result in the video being sent to you?
A I believe so. That's how I got it.
Q So when the person called you on the telephone, did they identify themselves?

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A Yes. I was told that it was from here.
Q From where?
A From this page, what it says on this page.
Q So did someone tell you that the video was coming from my office?
A No, no. I didn't pay attention. They only send me a video and this letter stating that I had to be here. And I don't know why I'm involved in this.
Q I'm still trying to figure out how you received the video.
So when the person called you on the telephone, did they -- how did they get your telephone number?
MR. ROYAL: I'm going to -- I'm sorry -- a belated objection as to form.
Go ahead.
BY MR. GALLIHER:
Q So when the person called, did you ask them how they got your telephone number?
A No, but since it was coming from the Venetian, they know my telephone number.
Q All right. So then, you knew that the video that was being sent to you on your telephone was coming from the Venetian; is that right?
A Yes.

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Q So when the person that talked to you on the telephone about this case, did they tell you they were from the Venetian?
A Yes. It was from the Venetian, about an accident that happened at the Venetian.
Q Did the video that was sent to you, was it accompanied by any type of a message?
A No.
Q No text or anything of that nature?
A No. I was only sent the video and that paper that I received.
Q All right. So you were sent the video, you were sent the paper, which is the subpoena to today's deposition.
A And I don't even know why.
Q And you weren't sent anything else?
A No. I don't even know why I'm here.
Q So have you understood all my questions today?
A Yes.
Q Anything you want me to repeat or rephrase for you?
A No.
MR. GALLIHER: Pass the witness.
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EXAMINATION
BY MR. ROYAL:
Q Okay. I just have a few questions for you.
A Again?
Q I'm going to show you -- strike that.
You testified that you saw a video, and I'm going to show you what's been identified -- I'm not sure how you want to do this, but I've got it right here.
MR. GALLIHER: Okay. Just for the record, you are showing her your -- the video on computer.
MR. ROYAL: Exactly.
BY MR. ROYAL:
Q So it's been identified as VEN019. And I have a laptop and I'm going to try and turn this so you can see it with the witness as best I can. A little bit tricky here. One second. You can scoot back just a little bit.
Okay. I'm just going to -- and what I'm going to do for the record, I'm just going to indicate numbers so we can identify what we're looking at. Right now it's paused. It's at 12:31:33 of the -- of the footage.
Do you recognize the area?
A That's in front of the Grand Lux Cafe.

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Q And when you said that you patrolled an area -- strike that. What would this --
When you're assigned to work this area, what would the area be called?
A Station 2.
Q Okay. And you kind of broadly told us what you did in Station 2. Did that include cleaning the restroom?
A No, not -- the bathrooms were something separate.
Q Okay. So you weren't cleaning bathrooms?
A No, no.
Q Do you know who was cleaning bathrooms on the day this happened?
A I don't remember.
Q Okay. So if you are not cleaning bathrooms, what was your general job -- strike that. Let me ask it again.
Looking at VEN019 at 12:31:33, does this depict an area that you would have been patrolling on the day of the incident?
A That's called the rotunda. It's a big round circle and then you take the hallway on the way to the corner. Around the corner by security that passes in front of the Grand Lux Cafe, that's Station 2.

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Q Okay. Okay. I'm going to let this run starting at 12:33:10, and I'm going to make it go a little bit faster to kind of move it along here.
There's a -- at 12:33:35, there's a woman approaching a man. He's looking down. Do you know who that woman is?
A No.
Q I want you to watch from the left over here. Okay. It's 12:33 -- I'm going to go back here, sorry. 12:33:52. I want -- there's a woman coming from the left with a broom and so forth.
Do you recognize that person?
A No. Maybe it was me.
Q Well, that's my question. I want you to watch again.
A I think I am.
Q Okay.
A Yes.
Q Do you think that was you?
A Yes, it's me. It's me.
Q So starting at -- I want to get the times right. So starting at 12:33:52, on the left side that's a person. You think that's you?
A I think so.
Q Okay. And what was -- what did you notice?

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What was that person doing?
A Me?
Q Yeah. What were you doing?
A Checking around.
Q Okay.
A We went to the bathroom to check the towels to get a clean towel.
Q Okay. Do you recall, or can you tell watching this at 12:33:52, whether or not you noticed there was anything on the floor in the area to your immediate right?
A No, no. I was -- I would have walked right over it.
Q You didn't see anything?
A No.
Q All right. You were -- okay.
I'm going to continue and we're now moving ahead to about 12:38:40, we'll call it. There is a woman depicted sitting on the floor and a couple of men in suit jackets.
Do you remember this scene as it's depicted here generally?
A You mean where she fell?
Q Yes. Do you remember seeing something similar to this?

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A That's not the lady that fell.
Q Well, okay. Let's move to --
A Or this is her.
Q Okay. At 12:39:37 we see a PAD -- a male PAD person. Do you know who that is kind of at the top of the screen? Okay. I'm just trying to identify people. Maybe you can't tell from this.
At 12:39:48, do you see yourself?
A Yes.
Q Okay. And that's you on the right?
A As I said, the other one is David.
Q There is a man with a bucket at 12:39:51. Who is that?
A That's David.
Q David Martinez?
A Yes, uh-huh.
Q Now he's pointing to someone at 12:40:01. Do you know who that is?
A I don't know.
Q Okay. Now, Mr. Martinez, you see him mopping up an area?
A But it wasn't wet there.
Q Okay. Do you know -- well, that was my question. You see him -- we're at 12:40:15. He's got a bucket.

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What's your recollection of what he was doing at this particular time depicted here on the video?
A It seems like she dropped something -- she spilled some coffee.
Q Okay. Did you actually see anything on the floor?
A No.
Q And then I'm going to fast-forward a little here. Okay. I'm going to go back.
At 12:41:07, do you see yourself?
A Before she fell, you mean?
Q No. I'm looking at -- right now it's at 12:41:09, the video. Do you see yourself in the video?
A Yes.
Q Okay, I'm going to let it run now. What are you doing?
A Drying whatever the other one has been cleaning.
Q Okay. So just tell me the process. You've got a towel on the floor that you are using under your foot.
A To dry whatever. To dry whatever is being wet by the other one with a bucket, but there was

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nothing there.
Q I see, okay.
So when Mr. Martinez goes over an area with a mop, your job was to follow with a dry towel?
A Well, yes. At that moment, yes.
Q Okay. Now I'm going to go back. I'm going to go back to -- okay. I'm going to go back to 12:36:49 and I want you to watch. I'm going to start it.
A They are in suits.
Q Is that something that you recall seeing, what we just watched there? I stopped it at 12:36:58.
A Yes. I remember the lady falling.
Q Did you ever talk to the lady who was --
A No, you can't. You can't.
Q Do you remember hearing any conversations between the lady who fell and anyone else as you were at the scene?
A No, because the security guards are the ones that speak to them.
Q Okay. You didn't hear any of the conversation?
A No.
Q Now, I heard you say something about shoes.
A Some people fake falls to get something,

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but...
Q Okay. So...
A What happened to -- the floor right there you see is waxed.
THE COURT REPORTER: I'm sorry, I'm having a hard time.
THE INTERPRETER: "It was waxed."
THE COURT REPORTER: Could you repeat the whole response?
MR. ROYAL: Well, I don't think there's a question pending, but go ahead.
THE WITNESS: The floor is heavy with wax right there.
BY MR. ROYAL:
Q Okay. Now, do you remember cleaning the area beyond what we watched on the video as you remember what you did?
A Yes. We clean the entire surroundings. People left beer, soda, coffee.
Q When you say the entire surroundings, what were you making reference to?
A Well, look, we have to be careful going around this column because the floor -- everything that has to do with cleaning.
Q Well, okay. I just want to make sure. I'm

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going to show you -- I'm just going to show this. I'm not going to run it at 12:43:17.
Okay. You mentioned something about beer, sodas and so forth. What are you making reference to?
A Right there at the corner, people leave beer cans, soda cans, so we have to clean it.
Q I meant in what we're looking at at 12:43:17. Do you see any beer cans or soda cans there?
A No, no. No, but this is the least busy time.
Q Okay. All right. I just want to focus on this time. So I'm clear with my question, do you remember completing the task of cleaning up this area or working with David Martinez after the woman got up and left?
A Well, yes. It was cleaned. We had to clean because she spilled coffee.
Q Okay. Other than her -- the woman spilling coffee, did you see anything else on the floor when you were cleaning after she fell?
A No, but we have to check everything anyway.
Q Okay. Now, earlier when you're talking about equipment, I heard you say you have cleaners, towels, broom and dust pans.

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A Yes.
Q Okay. Because I made a note here that I was confused whether you had a dust pan or dust mop.
A Dust pan.
Q So when I showed that video of you earlier walking around the area when you were carrying some things, can you tell us what you had in your hands?
A Dust pan and a broom.
Q Okay. You were also asked about the tower. Does that area have, like, the bridge? Does that have a bridge that goes over the Las Vegas Boulevard?
A No.
Q I wasn't clear what you meant by "tower." I know there's a bell tower or a clock tower.
A I was talking about the small tower where there was sun coming in.
Q Oh, I see what you mean. I see. I was confused.
A And now they have Bouchon Bakery around it, but the restaurant is at the small tower.
Q Okay. All right. You were asked earlier about when mops and a bucket would come to an area. And in this particular case, what we just saw in the video was a mop and a bucket came to the area.
A David is the one who brought it to see if

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there was a big spill.
Q Was there a big spill?
A No, no, there was not. I had just walked by that area.
Q Was there a little spill?
A No, no.
Q Were there pieces of ice that you found on the floor?
A No, no.
Q You testified about drunk people that you have seen in the past fall.
A Yes.
Q For any of those people, do you recall inquiring as to why they fell?
A No. What for? They drink and then they fall and then between each other, they pick up each other. They usually are not alone.
Q Okay. And I want to make sure I understand. When you were asked about falls and you said the lady that fell with coffee, is that the lady that we saw in the video that I showed you that's been marked as VEN019?
A Yes. I remember the lady falling.
Q And that's the lady you were making reference to?

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A Yes. It's the most recent. She's the one that I remember.
MR. ROYAL: Thanks. I'll pass.

FURTHER EXAMINATION
BY MR. GALLIHER:
Q I heard you remark during your testimony in response to Mr. Royal's question, some people, they fall to get something. What did you mean by that?
A Sometimes they look like they fall.
Q And is that what you saw in the video, someone who looked like they fell?
A I don't know. I don't know her intentions, but there was no water there.
Q Did she look like she fell or not?
A Yes, she slips, but it must have been her shoe. It wasn't water.
Q And you mentioned also that the area where the fall happened had been heavily waxed. What did you mean by that?
A I wasn't talking about that area in particular. Those floors are cleaned every night.
Q Are they waxed every night?
A No, no. They clean them with a machine.
Q And that's every night?

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A No. I don't recall.
Q Do you know one way or the other?
A Yes, they do it.
Q So as I understand what you are saying, you never saw anything liquid on the floor where the fall happened at any time that day; is that right?
MR. ROYAL: I object. Misstates testimony.
THE WITNESS: No, no, that is correct.
BY MR. GALLIHER:
Q All right. So you didn't see any water on the floor, you didn't see any coffee on the floor, you didn't see anything wet on the floor; is that right?
A No -- yes, that is correct.
Q So the only fluid you saw in connection with this fall on that day was a dry floor?
A Yes. I think what you see is that she slipped, but it was her shoe.
Q All right. So your testimony is that she didn't slip because she hit anything wet, she slipped because of her shoe?
A Because of her shoe.
Q All right. So the answer to my question is yes?
A Yes.
Q Thank you. Nothing further.

THE WITNESS: Is that it?
MR. ROYAL: Yes. Nothing for me.
MR. GALLIHER: Okay, we're done. Thank you.
(The deposition concluded at 3:09 p.m.)

REPORTER'S DECLARATION

STATE OF NEVADA)
)
COUNTY OF CLARK)

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

That I reported the taking of the deposition of the witness, MARIA CONSUELO CRUZ, commencing on Wednesday, April 17, 2019 at the hour of 2:00 p.m.

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

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

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

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

_____

Pauline C. May, CCR 286, RPR

*Surveillance Video*

EXHIBIT “F”

# EXHIBIT “G”

**OBJ**
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@royalmileslaw.com
*Attorneys for Defendants*
*VENETIAN CASINO RESORT, LLC and*
*LAS VEGAS SANDS, LLC*

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

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| JOYCE SEKERA, an Individual;<br><br>Plaintiff,<br><br>v.<br><br>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,<br><br>Defendants. | CASE NO.: A-18-772761-C<br>DEPT. NO.: XXV<br><br>***Hearing Requested*** |

**DEFENDANTS' LIMITED OBJECTION TO DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS DATED DECEMBER 2, 2019**

Defendants, VENETIAN CASINO RESORT, LLC, and LAS VEGAS SANDS, LLC (hereinafter collectively *"Venetian"*), by and through their counsel of record, Michael A. Royal, Esq., of ROYAL & MILES LLP, hereby files DEFENDANTS' OBJECTION TO DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATION DATED DECEMBER 2, 2019.

This Objection is based upon the Points and Authorities below, the papers and pleadings filed herein, and any oral argument allowed at the hearing on this matter.

DATED this 16 day of December, 2019.

**ROYAL & MILES LLP**

By _____

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

## MEMORANDUM OF POINTS AND AUTHORITIES

### I.

### NATURE OF OBJECTION

Defendants' limited objection relates to the scope of the Discovery Commissioner's ruling on the production of incident reports. First, Defendants object to the Discovery Commissioner's ruling that Defendants must produce reports of all incidents occurring on the casino floor level of the Venetian property, when the subject incident occurred in the Grand Lux rotunda area which Plaintiff claims to be especially dangerous because there is a food court and other establishments nearby. Defendants contend that other areas of the property outside the Grand Lux rotunda area where the subject incident occurred are not reasonably relevant to any issues in the case. This is especially significant where Plaintiff's own expert has demonstrated that the subject flooring tests differently in different areas of the property. Second, Defendants object to the Discovery Commissioner's ruling that Defendants must not only produce five (5) years of prior incident reports, but also subsequent incident reports from the date of the subject incident to the date of production (more than three years). Moreover, all of these documents, per the Discovery Commissioner, are to be produced in unredacted

form without any NRCP 26(c) protection whatsoever. The sole basis for ordering the production of subsequent incident reports as related by the Discovery Commissioner is the fact that Plaintiff has a claim for punitive damages.

Defendants previously provided Plaintiff with sixty-eight (68) prior incident reports from November 4, 2013 to November 4, 2016. Defendants do not object to providing an additional two (2) years of prior incident reports (from November 4, 2011 to November 4, 2013) in the Grand Lux rotunda area where the subject incident occurred; however, Defendants respectfully submit that the proper scope of discovery related to other incident reports in this matter would be to limit further production to the Grand Lux area for the five (5) years preceding the subject incident. Moreover, there is no good, legal basis for the Court to order the production of subsequent incident reports in a negligence case based on a slip/fall from a foreign substance. As to the Discovery Commissioner's order that any further reports be provided in unredacted form, there is a pending stay as to that particular issue granted by the Nevada Court of Appeals.

**II.**

**DECLARATION OF MICHAEL A. ROYAL**

STATE OF NEVADA )
) ss.
COUNTY OF CLARK )

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

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

///

///

2. I declare that the exhibits identified herein below are true and correct copies of documents produced in or otherwise related to this matter, and move the Court to take judicial notice of the following cases attached hereto.

| EXHIBIT | TITLE |
|---|---|
| A | Discovery Commissioner's Report and Recommendation, filed December 2, 2019 |
| B | Transcript of Proceedings Before Discovery Commissioner (September 18, 2019) |
| C | Transcript of Joyce Sekera Deposition (taken March 14, 2019), selected pages |
| D | Thomas Jennings Report (dated May 30, 2019) |
| E | Transcript of Thomas Jennings Deposition (taken July 2, 2019), selected pages |
| F | Thomas Jennings Report (dated December 28, 2018) |
| G | 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) |
| H | First Amended Complaint (filed June 28, 2019) |
| I | *Boucher v. Venetian Casino Resort, LLC*, Case No. A-18-773651-C, Order Regarding Plaintiff's Limited Objection to the Discovery Commissioner's Report and Recommendation on Plaintiff's Motion to Compel Production of Documents (filed October 29, 2019) |
| J | Petitioners' Emergency Petition for Writ of Mandamus and/or Writ of Prohibition Under NRAP Rules 21(a)(6) and 27(e) (filed 09.27.19) |
| K | Petitioners' Reply Brief, Appellate Court No. 79689-COA (filed 10.28.19) |

DATED this 16 day of December, 2019.

MICHAEL A. ROYAL

III.

**PERTINENT FACTS AND EVIDENCE**

Plaintiff has generally requested that Defendants produce information from 1999 to the present related to an assortment of materials. (*See* Exhibit A, *Discovery Commissioner's Report and Recommendation* (filed December 2, 2019) at 3:17-27; 4-6.) Defendants filed a motion for protective

order and Plaintiff filed a motion to compel. (*See id.* at 7:9-26.) The Discovery Commissioner ruled as follows in pertinent part:

> 1. Defendants be ordered to produce "unredacted records related to other incidents involving guests slipping and falling on the **Venetian common area marble floor on the casino level of the Venetian property** due to the existence of a foreign substance from November 4, 2013 to the present (only as of the date of production)." (*See id.* at 8:16-19. Emphasis added.)
>
> 2. Defendants produce records related to any coefficient of friction testing accomplished in the **Grand Lux area** of the Venetian property from November 4, 2011 to November 4, 2016, where such information was disclosed by Venetian pursuant to NRCP 16.1 or which is not otherwise protected in accordance with nRCP 26. (*See id.* at 8:25-28; 9:1-3. Emphasis added.)
>
> 3. Defendants produce records related to the removal of carpeting "limited to the **Grand Lux area of the Venetian property**" from November 4, 2011 to November 4, 2016. (*See id.* at 9:4-9. Emphasis added.)

The subject incident occurred in the Grand Lux rotunda area of the Venetian. (*See* Exhibit B, *Transcript of Proceedings Before Discovery Commissioner* (September 18, 2019) at 8:1-3.) The Discovery Commissioner limited Plaintiff's request for any coefficient of friction testing the Grand Lux area for the five (5) years preceding the subject incident. (*See id.* at 20:19-25; 21:1; *see also id.* 21:2-9, "Anything that was done in that [the Grand Lux rotunda] area".) The Commissioner further limited Plaintiff's inquiry about changes to the Venetian flooring (*i.e.* carpet to marble) to the Grand Lux rotunda area. (*See id.* at 21:2-25; 22:1-2.) The Commissioner initially ruled that the production of other incident reports would likewise be limited to the Grand Lux rotunda area. (*See id.* at 22:24-25; 23:1-13.) Then, after further discussion, the Commissioner expanded the scope of other incident reports to the entire casino level of the Venetian property "five years prior **to the present**, and pursuant to Judge Delaney's ruling, unredacted." (*See id.* at 27:1-8. Emphasis added.)

The Commissioner acknowledged that Plaintiff's claims arise from a temporary transient condition. (*See id.* at 30:17-25; 31:1-8.) However, the Commissioner ruled that Defendants must

produce subsequent incident reports based on the fact that Plaintiff has an existing punitive damages claim. (*See id.* at 27:14-25; 28:1; 32:19-25; 41:3-19.) The Commissioner did not otherwise set forth any legal basis for ruling that Defendants must now provide Plaintiff with unredacted subsequent incident reports in a case involving a slip and fall from an alleged foreign substance, simply because Plaintiff has a claim for punitive damages. There was no analysis of NRCP 26(b)(1) or review of Nevada case law on the subject. Indeed, Plaintiff did not present any Nevada law and no legal known legal precedent was relied upon by the Court on the issue of producing subsequent incident reports.

As discussed further herein below, Defendants contend that the following rulings by the Discovery Commissioner are **in error**:

1. That Defendants be ordered to provide copies of other incident reports in any areas outside the Grand Lux rotunda area of the property where Plaintiff's fall occurred; and

2, That Defendants be ordered to provide subsequent incident reports from November 4, 2015 to the present in a case based upon a slip and fall from a foreign substance based solely on an existing claim for punitive damages.

## III.

## DISCUSSION

### A. Standard of Review

Rule 26(b)(1), Nevada Rules of Civil Procedure, reads as follows:

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

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

1. **Relevancy**

Under the first prong of this test, for information to be discoverable, it must be "relevant to any party's claim or defense." (*Id.*) The phrase "reasonably calculated to lead to the discovery of admissible evidence" has been omitted from the previous rule. The word "relevant" has been provided as one of the driving factors in weighing discovery issues.

Recall that Plaintiff was not a normal guest/patron of the Venetian property at the time of the incident, but was instead a pseudo employee, someone assigned a Venetian employee parking pass and ID badge to gain special access to the property. She worked on property for nearly a year prior to the incident and, as discussed further herein, Plaintiff walked the Grand Lux rotunda area many hundreds of times without incident until November 4, 2016 - the only difference being the alleged existence of a foreign substance reportedly causing her to fall.

What is "relevant" about incidents occurring anywhere other than the Grand Lux rotunda area where Plaintiff fell? It is an area of which Plaintiff was extremely familiar in the course of her employment. There is no evidence that Plaintiff routinely ventured into any other areas of the Venetian property - to the contrary, it was her daily routine to traverse the Grand Lux rotunda area. What may have occurred in areas outside the Grand Lux rotunda area or on occasions following the subject incident is simply not "relevant".

As also discussed further herein below, Plaintiff has claimed to have reports of 196 prior incidents occurring in the Grand Lux rotunda area; therefore, Defendants respectfully submit that

Plaintiff is in possession of more than sufficient "relevant" information she needs to make her case for constructive notice and/or dangerous condition, with that information reportedly confined to the Grand Lux rotunda area.

2. **Proportionality**

Even if the Court deems the information "relevant", that alone is insufficient. Under the second part of the NRCP 26(b)(1) test, to be discoverable, information must be "proportional to the needs of the case." The rule provides six factors to consider: 1) "the importance of the issues at stake in action"; 2) "the amount in controversy"; 3) "the parties' relative access to relevant information"; 4) "the parties' resources; 5) the importance of the discovery in resolving the issues" and 6) "whether the burden or expense of the proposed discovery outweighs its likely benefit." Defendants have previously produced a total of sixty-eight (68) prior incident reports and Plaintiff claims to have a total of 196.[1] Requiring Defendants to produce additional prior incident reports beyond the Grand Lux rotunda area and beyond the date of the subject incident serves no good purpose other than to burden and harass Defendants.

Defendants note that NRCP 26(b)(2)(C) further limits discovery. It requires the Court to limit the frequency or extent of discovery if the Court determines that the discovery sought is (1) "unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive"; (2) "the party seeking discovery has had ample opportunity to obtain the information by discovery in the action;" or (3) "the proposed discovery is outside the scope permitted by Rule 26(b)(1)." Courts, thus, have a "duty to pare down overbroad discovery requests under Rule 26(b)(2)." (*See Rowlin v. Alabama Dep't. of Pub. Safety*, 200 F.R.D. 459, 461 (M.D. Ala. 2001) (referencing application of FRCP 26(b)(2)).) Rule 26 provides the Court

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[1]Pursuant to the DCRR, Plaintiff is to produce all of the other incident information she has collected to Defendants. (*See* Exhibit A at 9:26-28.)

with broad discretion to "tailor discovery narrowly" (*See Crawford-El v. Britton*, 523 U.S. 574, 599, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998).)

B. **Defendants Object to Producing Records of Other Incidents in Areas Outside the Grand Lux Rotunda Where the Subject Incident Occurred**

Defendants do not object to the Commissioner's ruling to produce prior incident reports from November 4, 2011 to November 4, 2016; however, Defendants take issue with the ruling that production is not limited to the Grand Lux rotunda area, but expands to all areas of the Venetian property on the casino level.

As Defendants previously noted, the Commissioner expressly limited Plaintiff's request for any coefficient of friction testing to the Grand Lux rotunda area. The Commissioner further limited Plaintiff's request for floor remodeling (*i.e.* changing carpeting to stone flooring) to the Grand Lux rotunda area. The ruling should likewise be limited to the Grand Lux area when it comes to the production of prior incident reports.

Plaintiff testified in deposition that she walked across the Grand Lux rotunda area daily to use the restroom where she was headed at the time of the subject area. (*See* Exhibit C, *Transcript of Joyce Sekera Deposition* (taken March 14, 2019) at 84:21-25; 85:1-9, 15-25; 86:1-25; 87:1-5; 88:7-14; 109:5-13.) Plaintiff testified that she was working five (5) to seven (7) days per week at her kiosk job from 9:00 am to 7:00 pm, sometimes as much as eighty (80) hours. (*See id.* at 57:5-20; 59:17-24; 75:5-25; 76:1-17.) Plaintiff would therefore have worked more than 200 days on property between December 28, 2015 and November 4, 2016, walking through the Grand Lux rotunda area several hundred times prior to the subject incident. There is no evidence that Plaintiff routinely walked through other areas of the Venetian property.

Plaintiff expert Thomas Jennings related in a report dated May 30, 2019 that he was aware of 196 slip and fall events between January 1, 2012 to August 5, 2016 occurring on Venetian property, "the majority of those occurring on the marble flooring within the same approximate area as Plaintiff's

slip and fall." (*See* Exhibit D, *Report of Thomas Jennings*, dated May 30, 2019) at 3.) When asked about this in his deposition of July 2, 2019, Mr. Jennings testified of his understanding that the alleged 196 prior incidents occurred in the "Grand Lux area." (*See* Exhibit E, *Transcript of Thomas Jennings Deposition* (taken July 2, 2019) at 84:7-25;85:1-3;86:12-19; 87:6-25; 88:1-3.)

Accordingly, Plaintiff provided her expert, Thomas Jennings, with a report purporting to document 196 prior incidents in the Grand Lux rotunda area, where Plaintiff's fall occurred, and Mr. Jennings presented opinions based on that information. Mr. Jennings also acknowledged that coefficient of friction testing on marble flooring throughout the property may vary depending on a variety of factors, explaining why his findings in the matter of *Smith v. Venetian* were so different. (*See id.* at 70:10-19; 71:11-25; 72:1-22; 73:1-9.)[2] Mr. Jennings further commented on the Grand Lux rotunda area as being unique in that there are food and beverage establishments available to patrons. (*Id.* at 63:22-25; 64:1-10; *see also* Exhibit F, *Report of Thomas Jennings*, dated December 28, 2018 at 3, "Within the general area of plaintiff's slip and fall incident are food courts, cafes, coffee bars and other operations that dispense beverages.")

The Court will recall that Plaintiff has asserted that the area of her fall is unique within the Venetian property due to the fact that it is located near a variety of food and beverage establishments, thereby triggering the self-serve mode of operation doctrine. (*See* Exhibit G, *Findings of Fact, Conclusions of Law and Order Granting Defendants' Motion for Partial Summary Judgment on Mode of Operation Theory of Liability* (July 23, 2019).) Those same dynamics are not found in other areas of the property.

Plaintiff claims to have evidence of more than 100 prior incidents in the Grand Lux rotunda area where she fell. It is an area of which Plaintiff, by virtue of her employment, is very familiar,

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[2]Mr. Jennings tested the marble flooring in the *Smith* litigation as .90 COF dry; .40 COF wet. He tested the flooring in the *Sekera* litigation as .70 COF dry and .33 COF wet.

having walked through it many hundreds of times prior to the incident. There is no reasonable basis for Plaintiff to have incident reports for any areas outside the Grand Lux area. The Discovery Commissioner limited Plaintiff's other requests to the Grand Lux rotunda area, but then expanded it throughout the property as to other incidents, which is overly broad and unnecessary. This is especially true in light of Eldorado Club, Inc. v. Graff, 78 Nev. 507, 511, 377 P.2d 174, 176 (1962) ("*it is error to receive 'notice evidence' of the type here [prior incident reports] for the purpose of establishing the defendant's duty*"). Accordingly, Defendants respectfully submit that the Discovery Commissioner's Report and Recommendation that Venetian be ordered to produce other incident reports for events occurring beyond the Grand Lux rotunda area should be reversed, with the Court limiting disclosure to the area where Plaintiff fell, which is surrounded by the food and beverage areas Plaintiff has so often highlighted.

C. **Defendants Object to Producing Records of Subsequent Incident Reports**

Defendants further respectfully disagree with the Commissioner's recommendation that they be ordered by the Court to produce unredacted subsequent incident reports for the entire casino level of the Venetian property, effectively order that Defendants produce more than eight (8) years of records. Defendants' objection is based on the fact that this is a negligence case arising from a slip and fall where Plaintiff claims to have encountered a temporary transitory condition - which Plaintiff claimed to have transferred to her pants and shirt after landing on the floor. (*See* Exhibit C at 90:13-23; 93:10-24. *See also* Exhibit H, *First Amended Complaint* at 3:4-22.)

The Discovery Commissioner agreed that she would not order the production of subsequent incident reports in a negligence case based on a temporary transitory condition such as liquid on a walkway. (*See* Exhibit A, at 41:3-19; *see also* Exhibit I, *Boucher v. Venetian Casino Resort, LLC*, Case No. A-18-773651-C, *Order Regarding Plaintiff's Limited Objection to the Discovery Commissioner's Report and Recommendation on Plaintiff's Motion to Compel Production of*

*Documents* (filed October 29, 2019) at 2:9-10 "Subsequent incident reports do not need to be provided, because liquid on a walkway is a transient condition.")

Plaintiff's argument on this issue before the Discovery Commissioner below was that Plaintiff fell due to a permanent condition, referring to cases such as *Ginnis v. Mapes Hotel Corp.*, 470 P.2d 135 (Nev. 1970) (strict product liability action based on a defective door). However, by Plaintiff's own admission, she walked successfully through the Grand Lux rotunda area hundreds of times without incident until allegedly encountering a liquid substance on November 4, 2016. Plaintiff's own expert, Mr. Jennings, testified that the floor in the Grand Lux rotunda area where Plaintiff fell is safe when dry. (*See* Exhibit E at 94:25; 95:1-3.) Plaintiff knew that from her own personal experience. The Discovery Commissioner did not agree with Plaintiff's argument that the subject flooring where Plaintiff fell constituted a permanent condition and, accordingly, not order the production of subsequent incidents on that basis. However, Defendants' insist that the Commissioner erred in ordering the production of subsequent incidents based on the fact that Plaintiff has an existing punitive damages claim.

As previously noted, *Eldorado Club, Inc.*, stands for the proposition that prior incident reports in a case like this one are not admissible to establish a defendant's duty. In *Reingold v. Wet 'n Wild Nev., Inc.*, 113 Nev. 967, 969-70, 944 P.2d 800, 802 (Nev. 1997), the court held that while evidence of subsequent incidents may be admissible to show a dangerous defective condition (citing *Ginnis*, supra), "evidence of subsequent accidents may not be admitted to demonstrate a defendant's knowledge of the condition prior to the instant accident." However, that is exactly why Plaintiff is seeking this subsequent incident information.

Plaintiff cited in her briefing with the Discovery Commissioner cases outside the jurisdiction of Nevada allowing for evidence of subsequent incidents; however, these all related to strict products liability (*Hilliard v. A. H. Robins Co.,* 148 Cal. App. 3d 374, 196 Cal. Rptr. 117 (Ct. App. 1983); *GM*

*Corp. v. Mosely*, 213 Ga. App. 875 (Ga. Ct. App. 1994); *Coale v. Dow Chem. Co.*, 701 P.2d 885 (Colo. App. 1985); *Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984); *Hoppe v. G.D. Searle & Co.*, 779 F. Supp. 1413 (SD NY 1991)); fraud (*Schaffer v. Edward D. Jones* & Co., 552 N.W.2nd 801 (S.D. 1996)), invasion of privacy (*Roth v. Farner-Bocken Co.*, 667 N.W.2d 651 (S.D. 2003)), workers compensation (*Boshears v. Saint-Gobain Calmar, Inc.*, 272 S.W.3d 215 (Mo. App. 2008)); post incident writings of an event containing admissions of the event (*Bergeson v. Dilworth*, 959 F.2d 245 (10th Cir. 1992)); concealment of evidence regarding an incident (*Wolfe v. McNeil-PPC, Inc.*, 773 F. Supp. 2d 561 (ED Pa. 2011). Plaintiff also referred to a case where admission of prior incident reports was properly excluded under FRE 403 (*Hill v. United States Truck, Inc.*, 2007 U.S. Dist. LEXIS 39197, 2007 WL 1574545). Yet, there are numerous cases in California and Nevada which hold otherwise.[3]

Missing from Plaintiff's legal discussion before the Discovery Commissioner below is any Nevada law supporting her contention that a punitive damages claim allowed to go forward in a negligence slip and fall case arising from an alleged foreign substance on the floor entitles her to evidence of subsequent incident reports. Using NRCP 26(b)(1) as a measuring stick, what possible relevance is there of prior incident reports in a negligence case? Further, how does production of this information meet the proportionality requirement of NRCP 26(b)(1)? Plaintiff did not say, and the

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[3]In *Rackliffe v. Rocha*, U.S. Dist. LEXIS 57394, *5 (E.D. CA April 24, 2012), the United States District Court for the Eastern District of California denied the plaintiff's motion to compel the production of subsequent incident reports, the plaintiff failing "to demonstrate how evidence regarding incidents that happened after the alleged incident against Plaintiff would demonstrate any motive or intent by Defendant." Also, there are numerous cases in the United States District Court, District of Nevada, where discovery regarding other incident reports has been denied in slip and fall accidents caused by a foreign substance or other temporary condition. ( *See, e.g.*, *Caballero v. Bodega Latina Corp.*, 2017 U.S. Dist. LEXIS 116869, 2017 WL 3174931 (D.Nev. July 25, 2017) (plaintiff slipped on a wet substance in produce department of supermarket); *Smith v. Wal-Mart Stores, Inc.*, 2014 U.S. Dist. LEXIS 83005, 2014 WL 2770691 (D.Nev. June 17, 2014) (plaintiff slipped on a piece of wet produce near the checkout registers); *Winfield v. Wal-Mart Stores*, 2017 U.S. Dist. LEXIS 127639, 2017 WL 3476243, *4 (D. Nev. Aug. 10, 2017) (plaintiff was not permitted to introduce evidence of prior accidents allegedly caused by wet substances on the floor; the court earlier having denied discovery regarding other prior incidents); and *Smith v. Wal-Mart Stores, Inc.*, Case. No. 2:11-cv-1520-MMD-RJJ, Order (ECF No. 39) (plaintiff slipped on a liquid substance on floor).

Discovery Commissioner did not ask. She simply ordered the production of unredacted subsequent incident reports throughout the casino level of the Venetian property based solely on the fact that there is an existing punitive damages claim.

Plaintiff is creating a template for all future litigants in this litigation in slip and fall claims - file for leave to add a claim of punitive damages, then if/when granted, demand production of unredacted subsequent incident reports to be shared with the entire legal community (both local and abroad).

Plaintiff, according to her expert, Mr. Jennings, purportedly has evidence of 196 prior incident reports in the Grand Lux rotunda. While Defendants dispute that wild assertion, Plaintiff presently has sufficient evidence to support her claim for punitive damages. If, however, the Court is inclined to uphold the Discovery Commissioner's ruling as to the production of subsequent incidents, Defendants would then move to limit the scope to the Grand Lux rotunda area where the subject incident occurred. Again, Plaintiff walked through this same area safely hundreds of times prior to the subject incident. The only difference on November 4, 2016 was that she allegedly encountered a foreign substance. There is no evidence that Plaintiff typically went to other areas of the Venetian property on a daily basis. Further, Mr. Jennings himself testified that the coefficient of friction in other areas of the property will vary depending on a variety of factors.

As there is no Nevada law supporting the Discovery Commissioner's order that Defendants produce subsequent incident reports under the circumstances, Defendants respectfully object to that portion of the Report and Recommendation, and hereby move this Honorable Court to strike that portion of the December 2, 2019 DCRR.

D. **Defendants Renew Objection on Privacy Grounds**

As the Court is aware, Defendants have petitioned the Appellate Court to review the issue of privacy related to the disclosure of private guest information found in prior incident reports, which is

presently pending. Defendants hereby reference the Court to the pleadings on file therein, and attach a copy of their initial petition and reply brief to address this issue. (*See* Exhibit J, *Petitioners' Emergency Petition for Writ of Mandamus and/or Writ of Prohibition Under NRAP Rules 21(a)(6) and 27(e)* (filed 09.27.19); Exhibit K, Petitioners' Reply Brief, Appellate Court No. 79689-COA (filed 10.28.19). The present recommendation by the Discovery Commissioner would provide Plaintiff with unredacted subsequent incident reports to ostensibly search for witnesses which, because they could be freely shared beyond this litigation, could be used by others to search for clients. While Defendants contend there is no legal, reasonable or rational basis to produce subsequent incident reports based on Plaintiff's punitive damages claim, if the Court adopts that portion of the DCRR, at a minimum, they should be produced in redacted form.

## V.

## CONCLUSION

Based on the foregoing, Defendants respectfully submit that the Discovery Commissioner was in error by not limiting the scope of prior incidents from November 4, 2011 to November 16, 2011 to the Grand Lux rotunda area where the subject incident occurred (as she did with respect to other discovery requests regarding coefficient of friction testing and floor remodeling), and further as to the production of subsequent incident reports in this negligence action. Defendants therefore move this Honorable Court to revise the pending discovery order accordingly.

DATED this 16 day of December, 2019.

**ROYAL & MILES LLP**

By _____

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

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 16 day of December, 2019, and pursuant to NRCP 5(b), I caused a true and correct copy of the foregoing **DEFENDANTS' LIMITED OBJECTION TO DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS DATED DECEMBER 2, 2019** 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 89104
*Attorneys for Plaintiff*
Facsimile: 702-735-0204
E-Service: all registered parties

Sean K. Claggett, Esq.
William T. Sykes, Esq.
Geordan G. Logan, Esq.
CLAGGETT & SYKES LAW FIRM
4101 Meadows Lane, Suite 100
Las Vegas, NV 89107
*Co-Counsel for Plaintiff*
Facsimile: 702-655-3763
E-Service: all registered parties

Ashley Schmitt
An employee of ROYAL & MILES LLP

# EXHIBIT “B”

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CLERK OF THE COURT

**TRAN**

DISTRICT COURT
CLARK COUNTY, NEVADA

| | |
|---|---|
| JOYCE SEKERA,<br>Plaintiff(s),<br>vs.<br>VENETIAN CASINO RESORT LLC,<br>Defendant(s). | Case No. A-18-772761-C<br>DEPT. XXV |

BEFORE THE HONORABLE ERIN TRUMAN,
DISCOVERY COMMISSIONER

WEDNESDAY, SEPTEMBER 18, 2019

***TRANSCRIPT OF PROCEEDINGS RE:***
**ALL PENDING MOTIONS**

APPEARANCES:

For the Plaintiff(s): KEITH E. GALLIHER, JR., ESQ.

For the Defendant(s): MICHAEL A. ROYAL, ESQ.

RECORDED BY: TRISHA GARCIA, COURT RECORDER

**LAS VEGAS, NEVADA, WEDNESDAY, SEPTEMBER 18, 2019**

[Proceeding commenced at 10:32 a.m.]

DISCOVERY COMMISSIONER: Sekera versus Venetian.

MR. GALLIHER: Good morning, Commissioner. Keith Galliher on behalf of the plaintiff.

DISCOVERY COMMISSIONER: Good morning.

MR. ROYAL: Mike Royal on behalf of Defendants, Your Honor.

DISCOVERY COMMISSIONER: All right. We have Plaintiffs' Motion to Compel Testimony and Documents. The Countermotion to Strike False Accusations levied by Plaintiff is off calendar, as it does not relate to the motion under EDCR 2.20(f). So I'm not going to consider the countermotion today.

So we've got Plaintiffs' Motion to Compel Testimony and Defendants' Motion for Protective Order. Where do you guys want to start?

MR. ROYAL: I'd like to start with the protective order, since we filed it first.

DISCOVERY COMMISSIONER: Okay.

MR. ROYAL: I mean, I --

MR. GALLIHER: Actually, I don't care. If he wants to start, it's fine with me.

DISCOVERY COMMISSIONER: All right.

MR. ROYAL: We're both going to, you know, get our --

DISCOVERY COMMISSIONER: We're going to get to all of it, so --

MR. GALLIHER: We'll do what we do.

DISCOVERY COMMISSIONER: Yeah, so -- and maybe it would be helpful for me to start by saying Judge Delaney has already made specific rulings in this case that I intend to follow. Obviously, they were inconsistent with the rulings that I made. But is -- as she is the trial judge, her rulings are, for now, the law of the case, and so we're going to comply with what she said.

So with regard to Defendants' Motion for Protective Order, as to Plaintiffs' Request for Production, I don't -- of the incident reports from May 1999 to the present, I am -- with that said, that we're going to follow what she's instructed, I will provide 2.34(e) relief if requested by Defendant to -- that you don't have to produce anything until it becomes an order of the Court, this Motion for Protective Order.

So with that said, why don't I give you a chance to proceed.

MR. ROYAL: Okay. Thank you, Your Honor.

You've -- first of all, by -- you've indicated that we're being asked to produce documents from May 1999 to the present. This is a slip-and-fall. It's a very typical slip-and-fall case. It's very simple negligence case. The plaintiff worked in the Venetian premises for almost a year. Prior to the incident, she walked across this area safely hundreds of times according to her own testimony. She

never had any issues until November 4, 2016, when, according to her and according to her counsel, she came into contact with a foreign substance on the floor, which caused her to slip and fall.

So this is a case that is -- that relates -- that arises from a temporary transitory condition. She -- according to their own experts, the floor is safe when it's dry. Their only issue is something gets introduced to it, then it becomes a slip hazard, and that's why they claim the plaintiff slipped and fell.

To this point, we've produced -- we have produced 68 -- to my count, 66 to 68, I've -- of prior incident reports going back three years. Which, by the way, we produced, which are outside the area of the incident. This incident occurred in the Grand Lux area, and according to their expert, Tom Jennings, he is in possession of 196 prior incidents occurring, according to his trial -- or deposition testimony, occurring strictly within the Grand Lux area.

DISCOVERY COMMISSIONER: All that 196 are in the Grand Lux area?

MR. ROYAL: That was his testimony. That was his testimony.

DISCOVERY COMMISSIONER: Okay.

MR. ROYAL: Okay. Now, he didn't produce any of the documents that he said that he looked at to come to that conclusion and to put that down in his May 30, 2019, report.

DISCOVERY COMMISSIONER: Because I thought the 196 was a spreadsheet that you provided.

MR. ROYAL: No.

DISCOVERY COMMISSIONER: No? Okay.

MR. ROYAL: That's not correct.

DISCOVERY COMMISSIONER: All right.

MR. ROYAL: The --

MR. GALLIHER: We -- just let me interrupt for a minute. We provided the spreadsheet to Mr. Jennings.

DISCOVERY COMMISSIONER: Okay.

MR. GALLIHER: He testified at deposition that reviewed the spreadsheet.

MR. ROYAL: Well, he testified that he got something from Mr. Galliher's office that he reviewed -- that he reviewed it, that he didn't save it, and he didn't bring it with him to his deposition. I didn't have an opportunity to review it with him, because he wasn't clear on everything other than he said they all occurred in this area, in this Grand Lux area.

Now, I subsequently got the spreadsheet from Mr. Galliher, looked at those 196, if you take out -- there's a whole bunch of duplicates and so forth from things we had already produced and with some -- they're not in addition to the 68, for example. But I could only come up with eight that say Grand Lux -- that say Grand Lux.

So I don't know where Mr. -- I don't know if he looked at a different list. I don't know what information that they have. All I'm saying is we have produced let's say 68 prior incident reports going

back three years preceding the incident, which are not limited to the Grand Lux area. They are -- they go to the Grand Hall or to areas -- other areas on the casino level.

They -- what they want, what they're asking for, essentially, is any kind of a slip-and-fall involving the marble floors in common areas anywhere within the property. And we think that's -- we just think that's -- it's asking too much, especially when you're going back to 1999.

If you --

DISCOVERY COMMISSIONER: Well, I'm going to limit -- if it'll -- I mean, I'm going to tell you this now. I'm going to limit it to five years before the incident at issue.

MR. ROYAL: That would be --

DISCOVERY COMMISSIONER: Well, let me let Mr. Galliher speak to that, because he looks like he's about to burst. So --

MR. GALLIHER: I'm not -- no, I'm not ready to burst.

DISCOVERY COMMISSIONER: Okay.

MR. GALLIHER: I am far too old to burst.

DISCOVERY COMMISSIONER: Okay.

MR. GALLIHER: Yeah, well, obviously, we're going to have a problem with that order.

DISCOVERY COMMISSIONER: Okay.

MR. GALLIHER: Because as we pointed out in our points and authorities, there's testimony from a casino executive at

Venetian, that approximately one year after the Palazzo opened, which would be about 2009, the Venetian actually tore up carpet on the floors in their casino and replaced the carpet with marble.

So, quite obviously, if there are a number of falls before this happened, and we believe there are a large number of falls that occurred on marble floors that are wet -- and by the way, that's the issue here. This is not a transient condition. This has already been established in the case. And what bothers me about the argument is Mr. Royal's rearguing things that have already been argued before the district judge, who has -- sustained, first of all, our Motion to Amend, to include the claim for punitive damages, and twice now, that decision has been attacked by Venetian. Both times Judge Delaney had upheld her initial decision. So we now have a viable claim for punitive damages, and she said that discovery will continue on the punitive damage claim. Which is what we're trying to do.

DISCOVERY COMMISSIONER: Okay.

MR. GALLIHER: So if we can establish that the Venetian, when it was built in 1999, when they installed these marble floors, and we have a history of a large number of falls on these marble floors -- and by the way, the marble floors are all uniform. There's no difference between the marble in the lobby versus the marble in the front of the Grand Lux Cafe, versus the marble in the casino. The marble is the same color, the same consistency, it's the same floor.

DISCOVERY COMMISSIONER: Did this incident occur in the area in front of the Grand Lux Cafe?

MR. GALLIHER: Yes.

DISCOVERY COMMISSIONER: Okay.

MR. GALLIHER: And that is a marble floor.

DISCOVERY COMMISSIONER: Okay.

MR. GALLIHER: And, of course, our position is that marble is marble, and there's no difference in the flooring. So all falls that occur on these marble floors when people come into contact with wet substances, are relevant to the issue of punitive damages. So if we are able to establish, for example, if there are 100, 200, 300 falls on these marble floors between 1999, when the hotel was built, and 2009, when the Venetian made a conscious decision to tear up the carpet and replace it with marble, don't you think that provides a predicate for punitive damages? It shows conscious disregard for the safety of its customers.

Therefore, it's not only relevant, it's clearly discoverable. Because we are -- we have a punitive damage claim. The Venetian keeps wanting to limit us in terms of our discovery, but as we pointed out in our briefing punitive damage claim opens up the whole group of possibilities for us to try to prove our punitive damages, and that includes going back to the time the hotel was built and these floors were installed in the first place.

But the other thing that's bothering me is that we -- the unredacted incident reports for the three years prior were ordered

by Judge Delaney back in May. We still don't have them. And we've had motion practice after motion practice, Motion to Rehear, Motion for Leave for -- to Rehear. And Judge Delaney had remained consistent and she has said, Venetian, you need to produce the unredacted incident reports.

The only thing that she said that should not be in the report is a date of birth and a Social Security number, and that information's not in the report anyway. So we're entitled to that information. It's now a filed order from Judge Delaney. There's no other way for the Venetian to attack it. So that's why it's a shame that we have to file a Motion to Compel after we've had a decision from the district judge several times now giving us the right to the unredacted reports.

And the other issue, of course, is -- that we've raised, is that we want to do a 30(b)(6) deposition. And we want to find out what the Venetian knew about the safety of its floors and when they knew it. And that is relevant to the punitive damage claim.

Just as the subsequent incident reports are relevant to the punitive damage claim. We've given the Court a lot of case authority to support our position. I haven't seen anything that does not support our position. We've even given you a Nevada Supreme Court case that says subsequent incidents are relevant, not only to the question of notice, but certainly relevant in connection with the punitive damage claim.

So I don't know, tell you the truth, I'm not sure why we're

here other than the fact that we keep, you know, requesting, requesting, requesting, and we keep getting No, we're not giving it to you. No, we're not giving it to you. File a motion, file a motion. So we're here.

DISCOVERY COMMISSIONER: Well, to the extent that you already had an order from Judge Delaney, rather than a Motion to Compel before me, I would recommend that it be refiled as -- I mean, you can file an order to show cause -- a Motion for an Order to Show Cause before the judge. I mean, I'm not going to reverse Judge Delaney on matters she's already determined in this case.

MR. GALLIHER: Well, I'm not asking you to do that. What I'm asking is --

DISCOVERY COMMISSIONER: I know you're not.

MR. GALLIHER: No.

DISCOVERY COMMISSIONER: But I'm just telling you I'm not going to.

MR. GALLIHER: No.

DISCOVERY COMMISSIONER: She's the judge in the case.

MR. GALLIHER: Right.

DISCOVERY COMMISSIONER: And so if she's already overruled my recommendation, I'm going to follow what she's done. And so if you -- rather than moving --

MR. GALLIHER: But you can set a deadline.

DISCOVERY COMMISSIONER: I'm sorry?

MR. GALLIHER: But you can set a deadline for the production of the reports, which is what I'm asking you to do.

DISCOVERY COMMISSIONER: Oh, that wasn't already done initially?

MR. GALLIHER: No.

DISCOVERY COMMISSIONER: Okay.

MR. GALLIHER: No. And so I'm asking you to set a deadline. And certainly they produced the redacted report, so they have them.

DISCOVERY COMMISSIONER: Okay.

MR. GALLIHER: So all we're asking for is the unredacted reports, and I'm asking you to set a deadline, say two weeks from now, when these reports --

DISCOVERY COMMISSIONER: Okay. Well, now we're getting into the Motion to Compel.

MR. GALLIHER: Okay.

DISCOVERY COMMISSIONER: I haven't given counsel an opportunity --

MR. GALLIHER: Understood.

DISCOVERY COMMISSIONER: -- to finish his Motion for Protection. So.

MR. GALLIHER: I'll sit down and shut up.

MR. ROYAL: We were in front of Judge Delaney on May 14th. She did not -- the order related to that -- his objection was not filed by the Court until July 31st.

DISCOVERY COMMISSIONER: Well, there's still an order that it hasn't been filed, isn't it? From the Motion for Reconsideration.

MR. ROYAL: Well, there was -- well, I filed a Motion for Reconsideration on OSC. Mr. Galliher, she set on a date -- or he -- they were in trial and he asked that we continue it. So we continued it out for, it turned out, about 30 days. We just had that hearing yesterday in front of the Court.

And during that particular discussion or hearing, she did not grant leave for the consideration. But we did -- she did suggest that we file a writ, which is what we are in the process of doing at this point.

DISCOVERY COMMISSIONER: Okay.

MR. ROYAL: And so it's not as though we're -- it's not as though we're just defiant, you know, with respect to the district judge. This was in front of the district judge yesterday. And so Mr. Galliher certainly could have brought this up and had this discussion and asked the judge to provide a deadline yesterday.

I would like to say, you know, something about -- something about these motions that have been in front of the judge with respect to punitive damages. I mean, she's just -- she has just ruled that they were allowed to amend the complaint to add punitive damages claim. She never said, has never said that this -- or established that this is anything other than a transient -- a temporary transient condition.

And so to the extent that counsel is suggesting that to the Court today, that's not correct. She's just simply said -- Tom Jennings, again, their expert has said, I've got 196 incident reports that occurred within a four-and-a-half-year period in the Grand Lux area. I'm not sure what it is, what more they need. But there is no evidence that there was ever any carpet in the area of the Grand Lux Cafe rotunda.

DISCOVERY COMMISSIONER: So that's not the area where it was ripped out.

MR. ROYAL: Right.

DISCOVERY COMMISSIONER: Okay.

MR. ROYAL: That's correct.

And so, further, Mr. Jennings testified he's an expert on another slip-and-fall case that occurred within 80 to 100 feet of this particular accident, also in the Grand Lux area. He testified that his findings on that particular area of the marble floor were much different than they were on our floor. And when I asked him about, Well, why would that be different? And he gave all kinds of reasons from care of the floor to amount of traffic and so forth.

So what Mr. Galliher's suggesting, that the floor's the same everywhere and it's going to test the same everywhere, I mean, that's just not -- that's not accurate.

What we're really looking for from the Court is some direction, some relief, so that we can go -- for example, we had this 30(b)(6) -- they set this 30(b)(6) deposition with 18 topics that

I've gone through with the Court.

DISCOVERY COMMISSIONER: Okay.

MR. ROYAL: Topics 6 to 18 all relate to management of the computer system going back to 1999. What kind of -- who manages the system internally, externally, consultants and so forth, employees, who's involved with all this. It's extremely broad.

They -- and one of the things that I expect counsel will say is that, Well, we can't trust them. We can't trust the Venetian, because they've withheld report, they've withheld information from us. And the Court will recall that previously when they brought a motion, they very inaccurately represented to the Court that we did not disclose 65 reports over the same period of time of those 66 and 68 reports that we previously produced. And then they had to come and say -- and advise the Court, okay, we're sorry, that's not accurate.

So they're not here today saying that they have any evidence that we're not producing documents, that we're doing something improper. We have produced 68 prior incident reports that are outside -- that are within and outside the Grand Lux area. What we're asking the Court is just limit the scope in the area where this occurred, limit it to five years, and we're fine. And we have no problem with that.

Now, is -- with respect to some of these other things, the carpeting, I mean, they're asking for --

DISCOVERY COMMISSIONER: Well, let's go through the

issues and I'll give you my recommendation and if you want to both discuss it, we can.

But with regard to Plaintiffs' Demand for Information Related to Incidents from May 1999 to the Present, I am going to protect that as written, but I think it's appropriate for -- given Judge Delaney's rulings, for Defendant to provide, from November 4th, 2011, to the present. Counsel in his affidavit stated that there was no water at the scene. And so I think that that -- with a permanent condition, which I think is, you know, if there's no water, it's not a transient condition, it's a permanent condition, that I think they're entitled to prior and subsequent. So I think for five years --

MR. ROYAL: But, Your Honor, that's --

DISCOVERY COMMISSIONER: -- prior to the present time.

MR. ROYAL: -- that's not their claim. Their claim is that there was water there. They have a witness who says there was water there. Just -- by the mere fact that we dispute their report doesn't mean -- I mean, the complaint itself says that there was a liquid substance. That doesn't -- just because we dispute their facts doesn't turn it into a permanent condition. They have a witness, Gary Schulman, who they -- who says, I saw it there.

And the plaintiff, in her own deposition testimony, I slipped. Not only did she slip, but her pants were wet. So it's not their contention that there was nothing there. The fact that we dispute it doesn't turn it into a permanent condition and certainly

shouldn't burden my client from having -- from now he has to produce subsequent incident reports.

DISCOVERY COMMISSIONER: Mr. Galliher?

MR. GALLIHER: My goodness, the law's so clear. We have a punitive damage claim. It needs to be recognized by Venetian. It's a punitive damage claim that's going to survive up until the time of trial. Now, whether it survives trial, I don't know, because we haven't discovered it yet. But the case law makes it very clear. Subsequent incident reports are discoverable and even admissible when you have a punitive damage claim. So that should be the end of the argument.

MR. ROYAL: That --

DISCOVERY COMMISSIONER: Okay. I'm going to -- my recommendation is going to be from November 4th, 2011, to the present, the reports. And because Judge Delaney had -- her ruling has been that they be unredacted, so that's what it will be.

With regard to number 2, Electronic Computer Data Information Related to Communications Pertaining to the Subject Floor with Consultants Other Than Experts Disclosed, Pursuant to 16.1. I think that that is too vague. I'm going to protect that as written. If there's some kind of alternative -- so I'm going to grant the motion as to that request.

If there's some alternative relief we can craft, I'm willing to entertain that, Mr. Galliher. But I think -- I'm not even sure what you're asking for there. Consulting experts, I'm not giving you that

information.

MR. GALLIHER: Understood. And I -- we don't want consulting experts.

DISCOVERY COMMISSIONER: So what -- well, because you said with consultants other than experts disclosed pursuant to NRCP 16.1.

MR. GALLIHER: Here's what –

DISCOVERY COMMISSIONER: It sounds like you're asking for consulting experts.

MR. GALLIHER: Yeah. Here's what we don't know. I mean, we've got --

DISCOVERY COMMISSIONER: What do you want? And let's see if we can craft it --

MR. GALLIHER: What I want --

DISCOVERY COMMISSIONER: Yes.

MR. GALLIHER: -- is this. The Venetian, we're talking about what a great burden it is for the Venetian to produce this information. They have a computerized system. My recall, it's called Alliance.

DISCOVERY COMMISSIONER: Okay.

MR. GALLIHER: It's been identified by a PMK in a deposition of the Venetian. And according to the PMK, every single bit of information regarding what we're looking for is contained on that computer system. And it can be accessed with the push of a button.

So if that is true, we'd be --

DISCOVERY COMMISSIONER: That seems a little oversimplified in my experience. But in any event, I'm listening.

MR. GALLIHER: All right. Again, I'm not a computer whiz. All I know is that it was -- according to this PMK person, it can be accessed very quickly.

DISCOVERY COMMISSIONER: Okay.

MR. GALLIHER: And if that's the case, I'll be more than happy with that information from the computer system. And again, we're going to quarrel --

DISCOVERY COMMISSIONER: Regarding what? What information in the computer system? Because you've asked for electronic computer data information related to communications pertaining to the subject flooring with consultants other than experts disclosed pursuant to NRCP 16.1.

MR. GALLIHER: Well, first of all, I don't know -- when we talk about consultants, I do not know whether the Venetian has had someone examine their floors and say, Look, there's a problem with these floors. I have recommendations to make concerning how we can make them safer. I don't know whether that's happened, because that information has not been disclosed. We've requested it.

So when we talk about -- I'm not talking about consulting experts; I'm talking about the Venetian hiring somebody that knows floors to come in, look at the floors, and say, Okay, what can we do

improve these floors and make them safer for our customers and guests? And if they haven't hired somebody to do that, very simple response: We haven't hired anybody.

If they have, that's not consulting expert stuff; that is simply business situation where they hired someone to look at their floors, and I'm entitled to find out whether that person that was hired came to the Venetian management and said, These marble floors are a problem. I recommend either, A, they be taken out and replaced with something safer, or, B, there are some substances out there that we can use to coat the floors to make them safer.

I don't know whether any of that's happened, because that's why we've made that request.

DISCOVERY COMMISSIONER: Okay. Mr. Royal?

MR. ROYAL: We already went through something like this with Mr. Elliott. And the Court will recall that they made these kind of allegations that Mr. Elliott was going to provide this kind of testimony. The very kind of testimony. Then we got his deposition and found out that he didn't -- that that wasn't the case at all, that he thought the Venetian -- and this was in 2009, and he thought the Venetian floors were fine, were -- in fact, they were exemplary. That was his testimony in that particular deposition.

I don't know what it is, necessarily, that he's asking for and I agree that it's vague. I'm not aware -- I can't -- I don't know who to bring to put on and present.

DISCOVERY COMMISSIONER: I'm going to protect this as

written. I think it's overly vague. If you want to depose someone, any -- I mean, if you want to craft something that says, like, any person who has knowledge that an expert told you to do X, Y, or Z to your floors, put -- it needs to be tailored to -- because as it's written, I think it's overly broad and vague, and I'm going to protect Number 2 as written.

MR. GALLIHER: We'll try to fine tune it.

DISCOVERY COMMISSIONER: Okay. So fine tune it, try to work together on it.

Number 3, Information Related to the Testing, Replacing Rlooring that is Not Within the Grand Lux Rotunda Area Where the Incident Occurred, all right. If testing occurred in the Grand Lux area anytime between 2011 to the present, I'm going to allow it. But not if it's in an area that's not at issue in this litigation.

MR. GALLIHER: So that would include all the remaining marble floors at the Venetian?

DISCOVERY COMMISSIONER: Yes.

MR. GALLIHER: Okay.

DISCOVERY COMMISSIONER: I think any testing that was done in the Grand Lux area for -- be prepared to testify regarding any testing that was done in the Grand Lux area from 2011 – I'm sorry, till 2016.

MR. ROYAL: Okay. Testing done from November 4, 2011 to --

DISCOVERY COMMISSIONER: To the date of the incident

at issue.

MR. ROYAL: And -- okay. And I want to make sure I'm clear on the record, it's the Grand Lux area?

DISCOVERY COMMISSIONER: Well, what are -- where -- the incident area, is that the --

MR. ROYAL: That's the -- it's called the Grand Lux rotunda.

DISCOVERY COMMISSIONER: Okay. The Grand Lux rotunda. Anything that was done in that area. Okay?

Information About Casino Flooring Changes on or About 2008 Which Did Not -- okay. And Defendant's position is that this did not impact the subject area. If there were not -- if there were not changes made -- were there any changes made to the area where the impact -- or where the incident occurred?

MR. GALLIHER: We don't know that yet, because we haven't been able to depose the person to find out exactly where the carpet was taken up and the marble was replaced.

MR. ROYAL: There's no testimony whatsoever that there was ever any carpeting in the Grand Lux rotunda. It's always been marble. The testimony he's referring to is testimony by someone who worked in the casino area. This is not the casino area. This is the Grand Lux rotunda.

DISCOVERY COMMISSIONER: Okay. I think that that's better. I'm going to protect that. I think that a better way to get at that discovery would be to ask questions regarding whether the

area at issue had ever been remodeled or had ever previously had carpet in it. So I'm going to protect 4.

Number 5, there is no -- I'm going to allow -- because discovery has already included reports -- so this is dealing with an order limiting the scope of Plaintiffs' discovery to the Grand Lux rotunda area where the subject incident occurred. I am going to allow any prior or subsequent reports that deal with slips and falls on the marble flooring.

MR. ROYAL: Within the Grand Lux area?

DISCOVERY COMMISSIONER: Within -- I'm going to let Mr. Galliher speak to that.

MR. GALLIHER: Well, as I --

DISCOVERY COMMISSIONER: They've already been produced. I mean, the documents have already been produced --

MR. GALLIHER: Yes.

DISCOVERY COMMISSIONER: -- to my understanding.

MR. GALLIHER: Some of them have. And we -- we're not sure how many more exist. But, certainly, we have requested all of the others, however many there may be. And the documents that have been produced already include slips and falls on marble flooring.

DISCOVERY COMMISSIONER: Okay.

MR. GALLIHER: And that's exactly what we're looking for.

DISCOVERY COMMISSIONER: And that's what the prior ruling was in this case. So I am going to allow it to be any incident

reports -- limited to the five years prior, going backwards, any incident -- prior incident reports five years prior to the present time for slips and falls on marble flooring at the Venetian.

MR. ROYAL: Well, Your Honor, I want to make sure I'm clear. I thought your initial order was that it was limited to the Grand Lux area. And this -- what you just said is all encompassing of the entire property.

DISCOVERY COMMISSIONER: Okay. Yeah. To the Grand -- I'm sorry, to the Grand Lux rotunda.

MR. GALLIHER: So you're not going to give us the reports regarding all of the other marble flooring?

DISCOVERY COMMISSIONER: Just to the area, to this Grand Lux marble flooring. I think that that's -- but you've already -- my understanding is you've already were produced the reports --

MR. ROYAL: We --

DISCOVERY COMMISSIONER: -- for all the marble flooring.

MR. GALLIHER: They have. Well --

MR. ROYAL: Well --

MR. GALLIHER: -- we don't know what they produced, but they produced floor falls --

DISCOVERY COMMISSIONER: Well, that was --

MR. GALLIHER: -- in other areas of the hotel on marble flooring.

MR. ROYAL: Okay. Your Honor, they're asking for -- again, they claim to have 106 -- 90 -- 196 prior incident reports over a five-year period for just the Grand Lux. Okay. So we're saying okay, that's fine. We'll go through and we'll find whatever we can, going back five years for the Grand Lux area.

The fact is that when we initially -- when we initially did this, we limited it to the casino level. And -- but, Your Honor, we've -- since then -- since then, Mr. Jennings has testified that his testing outside the Grand Lux area was way different than what we found in the Grand Lux area. And so we're just asking the Court to limit it. To limit it to five years within the Grand Lux area, the marble flooring there, and just --

DISCOVERY COMMISSIONER: So Jennings has already -- their expert has already said that the testing is different in the Grand Lux area than the other areas of the marble flooring casinos?

MR. ROYAL: Than in other area of the marble floor, that's correct.

MR. GALLIHER: Yeah. We're not in agreement with that. And unless -- it's interesting how this continues to be discussed. But Mr. Jennings made it very clear that he reviewed summaries of reports. And it was his understanding that the summary reports had to do with the Grand Lux area; they don't. He is now in the possession of the reports that have been produced, so he actually sees the actual reports, but he made it very clear. I reviewed his summary.

DISCOVERY COMMISSIONER: All right.

MR. GALLIHER: And he's going to clarify that.

DISCOVERY COMMISSIONER: The original recommendation was that -- the one that was objected to, and then Judge Delaney changed it to be unredacted, didn't that include all slips and falls on all marble flooring on the casino level?

MR. GALLIHER: It did.

MR. ROYAL: No, it did not, Your Honor.

MR. GALLIHER: Oh, it did too.

MR. ROYAL: Your Honor, I'd have to -- you know, I'd --

DISCOVERY COMMISSIONER: All right. I'm going to pull it up. Just a second. Because I'm not reversing what we've already decided.

MR. GALLIHER: Well, we wanted the reports -- we wanted the unredacted reports that were produced to us redacted, and those included falls on the casino floor.

DISCOVERY COMMISSIONER: Because I'm not changing from -- we're not rehashing what's already been decided in this case.

MR. ROYAL: Well, Your Honor, I'm not asking you to do that. Because what he's asking for now is in addition to what we previously produced. And we previously produced three years' worth of documents to counsel. They were redacted.

DISCOVERY COMMISSIONER: Which now need to be unredacted --

MR. ROYAL: That's correct.

DISCOVERY COMMISSIONER: -- pursuant to what Judge Delaney has ordered.

MR. ROYAL: That's correct. But now he's asking for something in addition. He's asking for another two years' of documents and we're asking the Court to limit that. That's a new ruling that has not been ruled on by this -- by the discovery commissioner or considered by the district court. So we're asking that -- and now, Your Honor, you're also ordering that we produce not just two years before, but then everything up to the present. And so that's new.

And so we're asking you to limit it to the Grand Lux area. And that would not be in any way -- it shouldn't have any impact on what you ordered previously as it relates to that three-year period.

MR. GALLIHER: And, of course, we respectfully disagree, because it should be -- we should have the order include all the marble flooring at the ground level at the Venetian, which is what was produced in the first place by the defense.

MR. ROYAL: And, by the way, they've never requested that. They've never had that specific request.

MR. GALLIHER: Actually, we have.

MR. ROYAL: We provided that --

MR. GALLIHER: Many times.

MR. ROYAL: -- as a courtesy. What they asked for was everything within the property.

DISCOVERY COMMISSIONER: Okay. All right. I'm going to limit it to the casino floor. That's -- the Grand Lux is on the casino floor, correct?

MR. GALLIHER: Yes.

DISCOVERY COMMISSIONER: Okay. I'm going to limit it to any slip-and-falls on the marble flooring on the casino level, five years prior to the present, and pursuant to Judge Delaney's ruling, unredacted. Okay.

MR. ROYAL: Just -- Your Honor, can I just ask for clarification --

Can I?

MR. GALLIHER: You -- go ahead.

MR. ROYAL: Okay. Thank you.

For clarification, the subsequent incidents that are being ordered that -- to be produced, is that based upon their punitive damages claim or is it based upon the Court's determination that it's --

DISCOVERY COMMISSIONER: The punitive damages claim.

MR. ROYAL: Okay. All right.

DISCOVERY COMMISSIONER: Which is still pending. Is it still active -- an active claim?

MR. GALLIHER: Yes. It survived two challenges from the Venetian. The claim is still alive for sure.

MR. ROYAL: Okay. It's a punitive damages claim based

on a negligence action of a temporary transient condition. I just want to make sure that's clear in front of the Court. This is not a products case, this is not a permanent condition-type case, this is a temporary transitory condition. So I just want to make sure that's clear.

DISCOVERY COMMISSIONER: Well, I think it's unclear. Because you're saying that the slip-and-fall was on the flooring, you're saying with no water, they're saying there is water. I mean, you've --

MR. ROYAL: But it's -- but, Your Honor, their complaint, the complaint does not even make the allegation this is a permanent condition. It is a slip-and-fall. It is a foreign substance on the floor. The fact -- again, we dispute facts --

DISCOVERY COMMISSIONER: Which you dispute that there was. So you're saying she slipped and fell on the perfectly dry floor, is that you're saying.

MR. ROYAL: I'm saying she slipped and fell for some reason other than, you know, I don't know why she slipped and fell. But --

DISCOVERY COMMISSIONER: Well, your affidavit said there was no foreign substance on the floor.

MR. ROYAL: Well, that's my opinion. But their experts have both testified that there was a foreign substance on the floor, Your Honor, both of them. And, in fact, their testimony has been -- Dr. Baker and Mr. Jennings both said there absolutely was

something on the floor. There had to be something on the floor. That's their position.

And so for counsel -- I just want to make sure it's very clear to the Court that this is an incident based upon their allegation that it's a foreign substance that caused her to slip and fall. She walked through that area hundreds of --

DISCOVERY COMMISSIONER: Well, I think it's your affidavit that's conflated the issue. Because you're saying there absolutely wasn't a foreign substance on the floor, which makes that, then you're saying she slipped and fell on the way it is all the time.

MR. ROYAL: I -- what I've said, Your Honor, it's -- there is a disagreement, there's a dispute in the facts. They've got an eyewitness. The first person who was there on the scene who said there was a big puddle of water. That's his testimony. That's Mr. Schulman's testimony. So we can't just pretend that that doesn't exist because we dispute the facts.

And so this is a case based upon a foreign substance. I just want to make it very clear that that is their claim, that's what their experts say, that's what their star witness says, that's what the plaintiff says. The fact that we dispute it doesn't transform it into a permanent condition or nor should it entitle them to subsequent incident reports.

I just want to make that clear, that's all.

DISCOVERY COMMISSIONER: Okay. Mr. Galliher?

MR. GALLIHER: Well, what's he's doing is misleading. Because, the bottom line is that -- you saw Commissioner Bulla's prior ruling against the Venetian, and she recognized, correctly, this is a continuing hazard. This is not a transitory condition; that's Mr. Royal's spin on it. The bottom line -- and --

DISCOVERY COMMISSIONER: Well, he's saying it's not a transient condition --

MR. GALLIHER: Well, but -- well, he is in his affidavit --

DISCOVERY COMMISSIONER: -- because there was nothing there.

MR. GALLIHER: -- but --

DISCOVERY COMMISSIONER: You're the one who's saying it is a transient condition.

MR. GALLIHER: No, no.

DISCOVERY COMMISSIONER: It's a little confusing. Usually, the defendant --

MR. GALLIHER: That's not what I'm saying. I'm saying it's not a transient condition. It's a continuous hazard.

DISCOVERY COMMISSIONER: But you're saying there was water present, which is a transient condition.

MR. GALLIHER: But he's -- well, it's not a transient condition if it's on an inherently dangerous floor. That's entirely different, as Commissioner Bulla recognized. That's not the same thing. And, by the way, Judge Delaney --

DISCOVERY COMMISSIONER: Well, I disagree.

MR. GALLIHER: -- recognized it, as well.

DISCOVERY COMMISSIONER: I disagree.

MR. GALLIHER: Well --

DISCOVERY COMMISSIONER: In my mind, if there's water present, it's a transient condition. If someone slips and falls on a floor that you're saying is always dangerous, whether it's dry, wet -- when it's dry, then that would be a different conversation we're having.

MR. GALLIHER: But we're not saying that, and we haven't said that. That's what Mr. Royal just said in his affidavit.

DISCOVERY COMMISSIONER: Mr. Royal's saying it.

MR. GALLIHER: I know.

DISCOVERY COMMISSIONER: Which is making this -- that's what's conflating the whole issue.

MR. GALLIHER: It -- well, that much I understand. Bottom line is that he's also presented his share of Venetian employees who have testified that the floor was dry. So, all right, so we have a contested issue. It's a jury argument. That's what it is. It's something we present at trial. But it should not affect our ability to discover our case. And that's what we're doing at this juncture, we're trying to discover the case, particularly our punitive damage claim, and we've cited cases all over the place in our motion practice that supports what we're doing here.

DISCOVERY COMMISSIONER: Okay. Mr. Royal?

MR. ROYAL: The plaintiff says it's -- it was due to a

foreign substance in the complaint. Even in the amended complaint it says that she slipped and fell due to a foreign substance. She testified she slipped and fell due to a foreign substance.

Other witnesses at the scene, Mr. Schulman, testified he saw -- he is the one person who did see it, and that's his testimony. And so, you know, I have a right to dispute the facts, Your Honor, but their own experts say there was water on the floor. And that's what caused the fall.

They didn't say -- they haven't testified that this is a dangerous floor that caused her to fall because it was dry; they say she slipped and fell because it was wet.

Mr. Jennings actually testified it's a safe floor when it's dry. He tested it that way. It doesn't become dangerous, in his opinion, until it becomes wet. That is the --

DISCOVERY COMMISSIONER: Okay.

MR. ROYAL: And therefore, it is a temporary transitory condition. That's the issue.

DISCOVERY COMMISSIONER: But the punitive damage claims --

MR. GALLIHER: I'm not going to bounce up and down.

DISCOVERY COMMISSIONER: The punitive damage -- you guys can stay seated -- the punitive damage claim is still at issue. And because of the punitive damage claim, I'm going to allow the subsequent reports.

MR. ROYAL: Okay. Thank you.

DISCOVERY COMMISSIONER: All right. You're requesting protection -- no, you're moving for an order, Defendants, directing Plaintiff to produce all information of prior incidents provided to Tom Jennings. Hasn't he already provided the e-mailed spreadsheets -- the e-mailed spreadsheet that he reviewed?

MR. ROYAL: The e-mails -- what I received was not what Mr. Jennings described. That's all. That's not what he described.

DISCOVERY COMMISSIONER: Okay.

MR. GALLIHER: I don't agree with that.

MR. ROYAL: Well, you weren't at the deposition --

DISCOVERY COMMISSIONER: Okay. Then I'm -- Tom Jennings is directed to produce all information of prior incidents that were provided to him and he reviewed prior to issuing his opinions.

MR. GALLIHER: And we have no problem with that.

DISCOVERY COMMISSIONER: Okay. Defendants are moving for an order that Plaintiff provide copies of all prior incidents reports in her possession not produced to Defendants.

Counsel?

MR. ROYAL: They've got this -- they've got these 196 reports, they produced those to the expert --

DISCOVERY COMMISSIONER: Do you have 196 reports, Mr. --

MR. GALLIHER: No, actually, we don't.

DISCOVERY COMMISSIONER: -- Galliher?

MR. GALLIHER: We have quite a few reports we've collected in the case from other counsel, as well. We don't have all of those 196, because I understand from Mr. Bochanis's office that he may not have been able to give those to us. So we don't have all of them.

However, these are the Venetian's reports.

DISCOVERY COMMISSIONER: Okay.

MR. GALLIHER: So are they asking us to --

DISCOVERY COMMISSIONER: But if you're using them for impeachment purposes, I mean, you have them. If you have them, produce them to Defendants.

MR. GALLIHER: We'll be happy to do that.

DISCOVERY COMMISSIONER: Okay.

MR. GALLIHER: But again, that was not the -- from our standpoint, Commissioner, that was not a problem. We can produce what we have.

DISCOVERY COMMISSIONER: All right.

MR. GALLIHER: But we pointed out that Venetian, basically, is asking us to produce the reports that they produced in other litigation.

DISCOVERY COMMISSIONER: Well, any reports, any prior incident reports in Defendant -- I'm sorry, in Plaintiffs' possession must be produced to Defendants.

And Number 8, Defendants are -- that's on my list, anyway. I don't know if it's Number 8 on yours. My -- I have written down, For Leave to Retake Mr. Jennings' Deposition for One Hour, With Plaintiff Bearing All Costs. That's quite an ask.

Mr. Royal?

MR. ROYAL: I only want that because he didn't have that -- any of that information present. I wasn't able to cross-examine him on these prior incidents.

DISCOVERY COMMISSIONER: Okay.

MR. ROYAL: Which is a big deal. I mean, he claims they were all there in the Grand Lux area, 196. And I ask him -- I ask him, you know, How did you receive them? What did they look like? I would just like to be able to finish – to complete my examination of Mr. Jennings, which I could have done at the time had it been produced.

MR. GALLIHER: And I have no problem with the deposition. But I do have a problem with having to pay for the deposition, because we didn't anything wrong.

DISCOVERY COMMISSIONER: Okay. I --

MR. GALLIHER: And of the 30(d)(2), they have not met the standard.

DISCOVERY COMMISSIONER: I am going to allow the deposition to continue. I am not going to require Plaintiffs to pay for it, because if you had been able to continue, you would have had to pay for the continued time. So there's really no prejudice to

the defendant for having you pay for the deposition to go forward.

Have we addressed everything now in your Motion for Protective Order and Motion to Compel?

MR. ROYAL: Well, we have -- and I may have missed this. The Topics 6 through 18 all relate to the computer data.

DISCOVERY COMMISSIONER: Okay. What day was that filed? I have to pull it up on here. So which date was your motion filed? This -- let's see.

MR. ROYAL: It was filed August 5th, 2019.

DISCOVERY COMMISSIONER: Let me just pull it up so I can look at the topics. Okay. And what page is that on?

[Pause in proceedings.]

MR. ROYAL: Excuse me.

DISCOVERY COMMISSIONER: Or -- it's an exhibit? Page 22 of the motion?

[Pause in proceedings.]

DISCOVERY COMMISSIONER: Okay. I see it. I'm here now. 6 through 18.

MR. GALLIHER: Is that where we are, page 22?

DISCOVERY COMMISSIONER: All right. So --

MR. ROYAL: I'm there. I'm sorry.

DISCOVERY COMMISSIONER: The identity -- okay. Page -- I'm sorry, page 22:

The identity of all employees who were responsible for managing and maintaining Venetian's technology

infrastructure.

I think that's overly broad. The technology infrastructure at the Venetian has far more components, I'm certain, than the communications area of the -- like, employee communications. What is it you're actually looking for? Because their technology includes all of their security, all of their financial stuff, like, this needs to be tailored.

So Topic Number 6 --

MR. GALLIHER: Might I suggest this --

DISCOVERY COMMISSIONER: Yes.

MR. GALLIHER: -- Commissioner, maybe to shortcut things with -- what we're really interested in is the information contained on the computerized Alliance system that the Venetian maintains. All of this -- of the other topics here pertain to us trying to verify that information. But I'm more than happy with simply an order that they produce the information on their Alliance system, by -- which, by the way, relates strictly to fall injury events or injury events.

DISCOVERY COMMISSIONER: So is the Alliance system their claims log system, for lack of a better word? Like how they --

MR. GALLIHER: That's --

DISCOVERY COMMISSIONER: -- how they document injury incident claims in the casinos?

MR. GALLIHER: That's my understanding. And it contains relevant information concerning those falls. It may even contain

copies of the reports.

DISCOVERY COMMISSIONER: Okay. So whey don't we just tailor it to be able to question the 30(b)(6) witness who has knowledge regarding the documenting of injuries and claims that occur in the Venetian casino property.

MR. GALLIHER: I'm fine with that.

DISCOVERY COMMISSIONER: And how those are electronically stored and can be searched and obtained. Is that what you're looking for?

MR. GALLIHER: That's what I'm looking for.

DISCOVERY COMMISSIONER: Okay. Does that take care of all of these different -- 6 through 18, if that's the topic?

MR. GALLIHER: It does. It's actually a better idea than we had.

DISCOVERY COMMISSIONER: Well, I'm here to help.

MR. ROYAL: Yeah, as long as we're going to --

DISCOVERY COMMISSIONER: If we're limiting it --

MR. ROYAL: Are we going to limit it --

DISCOVERY COMMISSIONER: We're limiting it to the person -- the 30(b)(6) witness who has knowledge of how the claims are reported, claims and injuries in the casino, the Venetian casino property are reported, documented, stored electronically, how they can be retrieved and identified. Does that cover it?

MR. GALLIHER: Yes. And hopefully there'll be a transcript, since my note-taking isn't so good.

MR. ROYAL: Your Honor --

DISCOVERY COMMISSIONER: And that will replace Topics 6 through 18.

MR. ROYAL: Right.

MR. GALLIHER: We're fine with that.

MR. ROYAL: Okay. And that works. Do we have a specified period of time?

DISCOVERY COMMISSIONER: The specified period of time would be five years prior to the incident to the present. Okay.

Does that cover everything then?

MR. GALLIHER: I think it does.

DISCOVERY COMMISSIONER: All right. Now we just have one more motion, right? Or are we -- is this --

MR. GALLIHER: I think it --

DISCOVERY COMMISSIONER: We covered everything in your --

MR. GALLIHER: I think it covered our Motion to Compel, as well.

DISCOVERY COMMISSIONER: -- Motion to Compel?

MR. GALLIHER: Sure. I think it covered that as well.

DISCOVERY COMMISSIONER: Okay. Because -- pursuant to -- this was the Motion to Compel Testimony and Documents, Plaintiffs' Motion to Compel. So just so we're clear on Defendants' Motion for Protective Order is granted in part, denied in part as stated.

And with regard to Plaintiffs' Motion to Compel Testimony and Documents, it's granted in part, denied in part. The judge has already -- the three main issues in that motion were the prior unredacted incident reports, which Judge Delaney has already determined, so those will be -- will be allowed.

The 30(b)(6) we've handled, and the subsequent incident reports we've handled. So that should take care of all of the Motion to Compel.

MR. GALLIHER: Yes. The only other thing I'd ask is can we still have, like, a two-week deadline to produce the unredacted reports?

DISCOVERY COMMISSIONER: Well, I'm going to provide alternative relief pursuant to EDCR 2.34(e) to Mr. Royal, because he's waiting from a final -- for a final order from Judge Delaney from yesterday, I believe. And so I'm going to provide him relief that those do not need to be produced until it has become a final order. That may be after a writ, since he intends to -- he's already articulated that he intends to take it up.

But pursuant to 2.34, he does not need to produce it until that has become a final order.

MR. GALLIHER: So can we have a date, then, after the order is signed?

DISCOVERY COMMISSIONER: Two weeks after the order is signed.

MR. GALLIHER: Okay.

DISCOVERY COMMISSIONER: And the writ would stay that period of time.

MR. ROYAL: Okay. Now, this is my last clarification, I want to make sure.

DISCOVERY COMMISSIONER: Okay.

MR. ROYAL: So it's five years to the present, casino level, marble floors, and not limited to the Grand Lux.

DISCOVERY COMMISSIONER: Yes.

MR. ROYAL: Okay. And --

MR. GALLIHER: Unredacted.

MR. ROYAL: Right. Unredacted.

DISCOVERY COMMISSIONER: Unredacted.

MR. ROYAL: And the -- and we're going -- the subsequent incidents are because even if this is a transitory -- temporary transitory condition, he's got a punitive damage claim, and therefore, those are to be produced.

DISCOVERY COMMISSIONER: The transitory, I would not allow them, but because of the punitive allegations that have not -- that have survived now two Motions to Dismiss, I'm going to allow.

MR. ROYAL: I understand. Okay.

And to the -- is this an ongoing duty? Do we have to -- I mean, when -- it says to the present, is it as of today? Is this going to go on through trial? Do I have to keep supplementing this response?

DISCOVERY COMMISSIONER: I think -- I would say

through today is probably -- or through the date of the production is probably sufficient.

MR. GALLIHER: And I'll -- I'm okay with through the date of production.

DISCOVERY COMMISSIONER: All right.

MR. ROYAL: Thank you.

MR. GALLIHER: Thank you.

DISCOVERY COMMISSIONER: Thank you. Have a great day, both of you.

MR. ROYAL: So Mr. Galliher will prepare or -- did I -- I'm sorry, I totally missed that. Who's --

DISCOVERY COMMISSIONER: You know, I didn't say. You know, since his is really all part of yours, I'm going to say -- I'm going to ask you, Mr. Royal, to prepare the report and recommendation.

MR. ROYAL: Okay. Thank you.

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DISCOVERY COMMISSIONER: And please have that submitted to Mr. Galliher for his review as to form and content and have it submitted to me within 14 days.

MR. GALLIHER: Thank you.

DISCOVERY COMMISSIONER: I am -- thank you.

[Proceeding concluded at 11:18 a.m.]

/ / /

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

Shawna Ortega, CET*562

# EXHIBIT “K”

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

Appellate Court No. 79689-COA
District Court Case No. A-18-772761-C



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

v.

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

# PETITIONERS' REPLY BRIEF

Michael A. Royal, Esq. (SBN 4370)
Gregory A. Miles, Esq. (SBN 4336)
ROYAL & MILES LLP
1522 W. Warm Springs Rd.
Henderson, Nevada 89014
Telephone: (702) 471-6777
Facsimile: (702) 531-6777
Email: mroyal@royalmileslaw.com
gmiles@royalmileslaw.com

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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. General Reply to Sekera's Answering Brief

Real-Party-in-Interest Joyce Sekera's Answering Brief is all noise with no signal, "full of sound and fury, signifying nothing" (Macbeth, Act 5, Scene 5, Lines 25-27). Petitioners' position is quite simple: the privacy rights of individuals wholly unaffiliated with the present litigation were not given the proper consideration by the District Court. The majority of the discussion in Sekera's Answering Brief is focused on irrelevant mudslinging; she devotes precious little discussion to explaining how her alleged need for this information outweighs the privacy interests of these unaffiliated individuals. Her only stated reason for desiring the private information of these unaffiliated individuals is to refute any claims of comparative fault. However, on its face this argument fails. Sekera does not provide a cogent rationale to explain why individuals who are not witnesses to the alleged slip-and-fall, or the circumstances leading up to the fall, will have any relevant information regarding any argument that she is comparatively at fault. It appears that the only reason Sekera is seeking the private information of these unaffiliated individuals is to disseminate it to other attorneys pursuing claims against Petitioners. This is not valid reason for violating the privacy rights of these unaffiliated individuals.

Sekera has taken the untenable position that NRCP 1 provides her with absolute rights to both obtain the private information of persons wholly unaffiliated with the present litigation and to share it with anyone of her choosing, whenever and however she pleases, without the slightest limitation or regard for the privacy rights of those persons. In so doing, Sekera has entirely avoided any analysis under NRCP 26(b)(1), determining that critical and fundamental discovery rule to be "irrelevant." (*See* RAB at 20.) Sekera is mistaken. Indeed, a fair reading of the applicable rules, related case law, and plain common sense supports Petitioners' position that the privacy rights of guests involved in other unrelated incidents – having provided Petitioners with information such as names, addresses, phone numbers, driver's license, dates of birth, medical history and other health related information associated with an EMT examination, etc. – deserve protection and must be given consideration when a plaintiff, such as Sekera, makes a carte blanch request for such information.

Sekera's argument to support her alleged need for the private information of perhaps hundreds of persons entirely unrelated to her November 4, 2016 incident is that it is necessary for her to defend against an affirmative defense of comparative fault – suggesting she needs persons involved in unrelated other incidents to testify that they likewise did not see anything on the floor prior to their alleged events occurring somewhere else on the property of Venetian Resort Hotel Casino

("Venetian"). This purported need is clearly without merit. The facts of completely different incidents, involving different circumstances, different locations, and different accident mechanisms have no tendency whatsoever to prove or disprove whether Sekera was comparatively negligent at the time of her accident.

Sekera also rightly notes that Petitioners dispute her claim that there was a foreign substance on the floor at all. (*See* RAB at 2.) Indeed, Petitioners are not asserting that Sekera should have seen a foreign substance on the floor; instead, Petitioners deny the existence of a foreign substance. Thus, Sekera's claim that she needs the other incident reports to defend against an affirmative defense of comparative fault is disingenuous and without merit.[1]

As nearly every case cited by both parties herein provides, a proper analysis of Rule 26(b)(1) in discovery disputes similar to the instant matter requires Sekera to demonstrate both the relevance and proportionality of the information sought. Sekera has not done that in either the District Court or her Answering Brief. Petitioners posit that this is because it would lead directly to a conclusion that

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[1] Sekera also argues she needs other incident information so "the public" will "know the magnitude of the problem of Venetian's floors." (See RAB at 7.) However, this argument appears to be solely directed to the challenge against Sekera circulating the redacted incident reports. While Petitioners dispute that this is a valid reason to permit discovery, it is clear that the redacted incident reports already produced by Petitioners, and already disseminated by Sekera's attorney, are sufficient to satisfy this "public notice" argument.

supports Petitioners' request to protect the private information of the unaffiliated individuals.

Instead of addressing the merits of the important privacy issues at hand, Sekera has chosen to provide a misleading and distorted view of the litigation and attack the character of Petitioners and their counsel. As discussed below, these are red herrings designed to mislead this Honorable Court by presenting Petitioners as bad actors unworthy of relief. While Petitioners believe these topics are not relevant to the issue before this Honorable Court, in an abundance of caution Petitioners will address these topics at the end of this brief. Suffice to say that while Sekera has repeatedly made improper reference to other cases presently litigated against Venetian, she has not produced one court order supporting her claim that there has been any kind of discovery abuse by Petitioners or Venetian. As for the assertion related to disgruntled former Venetian employee Gary Shulman, that is a matter presently pending before the District Court. It has nothing to do with any issue at hand. That stated, a full reading of the Shulman deposition transcript attached by Plaintiff, as explained briefly below, demonstrates that the facts are not as presented by Sekera in her Answering Brief.

This writ is not about alleged past discovery issues involving the parties, but the right of privacy by those persons involved in other incidents, which Sekera repeatedly demeans and grossly mischaracterizes as "**phonebook** ... plus date of

birth information." (*See* RAB 4. Emphasis added.) This misleading characterization completely fails to account for the context of the individual's private information being included in an accident report. The inclusion of the personally identifiable information in the context of an incident report maintained by the Venetian is clearly not the same as the information found in a "phonebook." Moreover, there is much more personal information within the subject incident reports than contact information, each of which note on every CR-1 form that they include "Protected Health Information." (*See* RAB, Appendix Vol. 1, APP129,-35, 37-38.) These documents also contain medical history information which, of course, is not found in a "phonebook." (*See id.* at APP 136.)[2]

Accordingly, Petitioners hereby implore this Honorable Court to focus on the privacy issues at hand, and not be distracted by Sekera's tactics.

## II. Response to Sekera's Given Procedural History

Petitioners brought a motion for protective order under NRCP 26(c) before the Discovery Commissioner which was appropriately granted by way of recommendation. (*See* Petitioners' Appendix, Vol. 1, Tab 14, VEN 201-06.)

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[2] Sekera enclosed only twelve (12) pages of more than 660 pages produced by Petitioners, which include many more examples of Acknowledge of First Aid Assistance & Advice to Seek Medical Care forms with completed medical history information, along with notes provided by the responding emergency medical technician. (*See* RAB, Appendix Vol. 1, APP127-38.) Also, contrary to Sekera's representation that driver's license information is not collected by Venetian, that is inconsistent with documents Sekera produced herein. (*See, i.e., id.* at APP130.)

During the March 13, 2019 hearing, the Discovery Commissioner weighed Sekera's alleged need for the private information of persons involved in other incidents against the privacy rights of these unrelated third parties and recommended protection. (*See* Petitioners' Appendix, Vol. 1, Tab 13, VEN 186-200.)

At the March 13, 2019 hearing, the Discovery Commissioner considered Sekera's argument that she needs the ability to contact persons involved in other incidents to respond to a comparative fault affirmative defense. However, the Discovery Commissioner stated: ". . . the comparative negligence of another party versus your own party wouldn't be relevant to this action." (*See id.* at VEN 194, ln 9-11.) The Discovery Commissioner further noted: "I do believe there . . . are privacy and HIPAA issues that are to be considered, and so my inclination is not to disclose the names and contact information for all people on all reports." (*See id.* at VEN 197, ln 24-25; 198, ln 1.) She further stated: "I am going to issue a protective order that the reports that are disclosed in this case are not to be circulated outside of this case and for use only in this case." (*See id.* at VEN 198, ln 1-5.)

In her answering brief, Sekera's counsel admits that the prior incident reports at issue were provided to another attorney, Peter Goldstein, Esq., who was involved in another case against the Venetian property, on February 7, 2019, after

the motion for protective order was filed with the Discovery Commissioner. (*See* RAB at 6.) To Petitioners' knowledge, this is the first time such an admission has occurred.

At the March 13, 2019 hearing before the Discovery Commissioner, Sekera did not advise the court that the information deemed protected was shared with Mr. Goldstein on February 7, 2019 or that it had already all been filed as an exhibit with the court in another proceeding by Mr. Goldstein. (*See id.* at VEN 186-200; Petitioners' Appendix, Appendix, Vol. 1, Tab 12, VEN 140-85 at VEN 141, ln 15-26, VEN 147, ln 12-13, VEN 173.) When the issue of sharing these documents was before the District Court at a hearing held on May 14, 2019, the following exchange between Sekera's counsel and the court occurred:

> MR. GALLIHER: .What happened when I got my redacted reports, I exchanged them with him (Attorney Peter Goldstein). He sent them to me -- **and by the way, there was no Protective Order in place. <u>There was no motion practice in place</u>, despite what's being represented.**
>
> THE COURT: I was going to say because I do have a counter motion for you --
>
> MR. GALLIHER: Yeah. I know.
>
> THE COURT: -- to comply with the Court order and a counter motion for sanctions related --
>
> MR. GALLIHER: This was done right upfront. **The minute I got the information, I -- I exchanged it with counsel**. George Bochanis also got a set. He exchanged

> a set. (Appendix, Vol. 2, Tab 15 at VEN 218, ln 2-13, emphasis added.)

Accordingly, while Sekera counsel now admits prior incident reports were, in fact, shared with Mr. Goldstein after the motion for protective order was filed and pending before the Discovery Commissioner, no explanation has been given as to why there was a complete failure by Sekera counsel to advise the court below as counsel has here. More importantly, what was the purpose behind Sekera's sharing of the information provided? How did it advance any interests of Sekera in her litigation against Petitioners? The District Judge below, after being advised by Petitioners of the actions taken by Sekera counsel, did not consider the conduct of counsel after determining that the documents at issue are unworthy of any protection whatsoever. (*See id.* at VEN 254, ln 17-23.) In so doing, the judge found that the persons identified in other incident reports have no privacy rights.

At the September 17, 2019 hearing on Petitioners' motion for reconsideration, the District Court judge opened the hearing by stating a belief that some kind of protection was already in place. (*See* Petitioners' Appendix, Vol. 3, Tab 20 at VEN 460, ln 4-25; VEN 461, ln 1-7.) Unfortunately, it was not. The motion for reconsideration was not granted, and this petition followed.

## III. Petitioners Demonstrated "Good Cause" for a Protective Order under NRCP 26(c) and the District Court Failed to Consider NRCP 26(b)(1) and Applicable Case Law When It Reversed the Discovery Commissioner's Report and Recommendation of April 4, 2019

Petitioners respectfully submit that they presented ample evidence that the privacy rights of third parties identified in incident reports regarding other alleged accidents are worthy of protection under NRCP 26(c) below. The District Court overruled the Discovery Commissioner's granting of a protective order, knowing full well that Sekera had already shared the deemed protected information and that she intends to continue doing so however she chooses, being unable to find any law in support of such protection. However, there is sufficient law in support of the protection recommended by the Discovery Commissioner.

In *RKF Retail Holdings, LLC v. Tropicana Las Vegas, Inc.*, 2017 U.S. Dist. LEXIS 104850 (D. Nev. July 6, 2017) (*19-*22) (quoting *In re Bard IVC Filters Prods. Liab. Litig.*, 317 F.R.D. 562, 563 (D.Ariz. 2016)), the court related the following in regards to the application of Rule 26(b)(1) to such issues:

> **Relevancy alone is no longer sufficient—discovery must also be proportional to the needs of the case.** The Advisory Committee Note makes clear, however, that the amendment does not place the burden of proving proportionality on the party seeking discovery. The amendment "does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations." Rule 26, Advis. Comm. Notes for 2015 Amends. **Rather, "[t]he parties**

> **and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes."** Bard, 317 F.R.D. at 564.
>
> Generally, the party opposing discovery has the burden of showing that it is irrelevant, overly broad, or unduly burdensome. Graham v. Casey's General Stores, 206 F.R.D. 251, 253-4 (S.D.Ind. 2000); Fosbre v. Las Vegas Sands Corp., 2016 U.S. Dist. LEXIS 1073, 2016 WL 54202, at *4 (D.Nev. Jan. 5, 2016); Izzo v. Wal-Mart Stores, Inc., 2016 U.S. Dist. LEXIS 17701,.2016 WL 593532, at *2 (D. Nev. Feb. 11, 2016). **When a request is overly broad on its face or when relevancy is not readily apparent, however, the party seeking discovery has the burden to show the relevancy of the request.** Desert Valley Painting & Drywall, Inc. v. United States, 2012 U.S. Dist. LEXIS 145771, 2012 WL 4792913, at *2 (D.Nev. Oct. 9, 2012) (citing Marook v. State Farm Mut. Auto. Ins. Co. 259 F.R.D. 388, 394-95 (N.D. Iowa 2009)). **The 2015 amendments to Rule 26(b) have not changed these basic rules, although they must now be applied with a greater degree of analysis and emphasis on proportionality.** (Emphasis added.)

Petitioners argued below that the requested information is irrelevant, overly broad and unduly burdensome – based in large part on the privacy issues presented. At that point, under Rule 26(b)(1), the burden then shifted and Sekera had to demonstrate relevance and proportionality. Sekera did not do that below, and has not attempted to do that here. She merely dismissed it as "irrelevant." (*See* RAB at 20.)

Keep in mind that Sekera's repeated use of "phonebook" to trivialize and marginalize the privacy rights of persons involved in other incidents in favor of her alleged absolute right to obtain the information is not limited to this litigation, but extends to her right to freely share it. Petitioners respectfully submit that Sekera is wrong, and that the district judge abused her discretion by reversing the Discovery Commissioner and ordering the production of unredacted information to be disclosed to Sekera without recognizing any privacy rights or granting any protection.

## IV. Nevada Favors the Protection of Private Information of Guests Identified in Other Incident Reports under NRCP 26(c)

Sekera's repeated use of "phonebook" to refer to the information at issue is inappropriate. A phonebook provides a name, address and phone number; however, it does not provide dates of birth, driver's license information, social security information, health history and medical examination information, nor does it connect the name, address and phone information to a specific event to be freely shared, without limitation.

Sekera asserts that Petitioners are mostly concerned with Sekera's unfettered interest in sharing the private information of Venetian guests. (*See* RAB at 15.) That is an incorrect characterization of the issue. Petitioners are concerned with protecting the privacy rights of Venetian guests involved in other incidents where they have provided information pertaining to injury related events, examination of

their physical condition, documentation of their medical history, etc. These guests have a reasonable expectation of privacy, which rights have not been fairly considered by the lower court.

Sekera asserts that there is no Nevada law protecting the information at issue. (*See* RAB at 21.) That is not only unfounded, but is belied by many of the cases Sekera relies upon in her Answer Brief.

First, in *Eldorado Club, Inv. v. Graff*, 78 Nev. 507, 377 P.2d 174 (Nev. 1962), the Nevada Supreme Court held that the use of prior incident reports in slip and fall cases such as this are inadmissible as evidence of constructive notice.[3] Therefore, the relevance of the information sought is questionable. Second, *Schlatter v. Eighth Judicial Dist. Court In and For Clark County*, 93 Nev. 189, 192, 561 P.2d 1342, 192-93 (1977), provides that discovery must be carefully tailored to protect privacy interests while meeting the needs of the party requesting the information. That is consistent with the balancing test required under NRCP 26(b)(1).

Sekera suggests that Petitioners did not fairly represent *Izzo v. Wal-Mart Stores, Inc.*, 2016 U.S. Dist. LEXIS 12210; 2016 WL 409694 (D. Nev. February 2,

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[3]*See Lologo v. Wal-Mart Stores, Inc.*, U.S. Dist. LEXIS 100559 (D.Nev July 29, 2016), the plaintiff (who slipped/fell at a Wal-Mart) sought to introduce evidence of prior incidents. Defendant's motion to exclude the evidence (citing *Eldorado Club, Inc.,* and FRE 402) was granted.

2016), to the Court in the petition. (*See* RAB at 23.) In *Izzo*, the plaintiff sought prior incident reports in slip/fall litigation. The Court, based in part on the defendant's desire to protect the privacy interests of guests, determined that the information previously produced to the plaintiff, which did not identify individuals involved in prior incidents, was sufficient. Similarly, here, Sekera already has the information she seeks. Petitioners argued below and again here that Venetian is likewise unduly burdened by the prospect of having prior guests being contacted not only by Sekera's counsel but by untold others litigating unrelated matters against Venetian. In fact, Plaintiff is now seeking unredacted subsequent incident reports where she likewise plans to contact witnesses and circulate information to other counsel all in the name of NRCP 1.[4]

Sekera also discredits *Bible v. Rio Props., Inc.*, 246 F.R.D. 614, 620-21 (C.D. Cal. 2007), by suggesting the decision is based on the California Constitution. While that is referenced in the body of the decision, the decision is based on a broader review of privacy under the Rule 26(b)(1) analysis:

> Finally, defendant objects that responsive documents invade third parties' privacy rights. In California, the right to privacy is set forth in Article I, Section I of the California Constitution, as defendant cites (despite claiming Nevada law applies). *See* Defendant's Supp.

[4] A Report and Recommendation granting Sekera's motion to compel unredacted subsequent incident reports to Sekera has been issued by the Discovery Commissioner and an objection will be filed once the Report and Recommendation is filed.

> Memo. at 4:11-12. However, **privacy is not an absolute right, but a right subject to invasion depending upon the circumstances.** *Heller v. Norcal Mut. Ins. Co., 8 Cal. 4th 30, 43-44, 32 Cal. Rptr. 2d 200, 207-08, 876 P.2d 999 (1994)*, cert. denied, *513 U.S. 1059, 115 S. Ct. 669, 130 L. Ed. 2d 602 (1994)*. **Thus, "the privilege is subject to balancing the needs of the litigation with the sensitivity of the information/records sought."** *Davis v. Leal, 43 F. Supp. 2d 1102, 1110 (E.D. Cal. 1999)*; see also *Pioneer Elecs. v. Superior Court, 40 Cal. 4th 360, 371-75, 53 Cal. Rptr. 3d 513, 520-24,150 P.3d 198 (2007)* **[**17]** (balancing privacy rights of putative class members with discovery rights of civil litigants). **Here, the rights of third parties can be adequately protected by permitting defendant to redact the guest's complaints and staff incident reports to protect the guest's name and personal information, such as address, date of birth, telephone number, and the like**. With the limitations set forth herein, the Court grants plaintiff's motion to compel, in part, and denies it, in part. (*Id.* at 620-21. Emphasis added.)

The *Bible* decision, therefore, is on point. It imposed the kind of balancing test under FRCP 26(b)(1) that should have been utilized below under NRCP 26(b)(1).

Sekera likewise dismisses *Rowland v. Paris Las Vegas*, 2015 U.S. Dist. LEXIS 105513; 2015 WL 4742502 (S.D. Cal. Aug 11, 2015), as a "rogue decision." (*See* RAB at 22, note 7.) However, the holding in *Rowland* is consistent with *Izzo* and *Bible* in its application of Nevada law on this issue. The following language is directly on point in support of Petitioners:

> Further, **the Court finds that requiring disclosure of the addresses and telephone numbers of prior hotel**

> **guests would violate the privacy rights of third parties**. "Federal courts ordinarily recognize a constitutionally-based right of privacy that can be raised in response to discovery requests." *Zuniga v. Western Apartments, 2014 U.S.Dist. LEXIS 83135, at *8 (C.D. Cal. Mar. 25, 2014)* (citing *A. Farber & Partners, Inc. v. Garber, 234 F.R.D.186, 191 (C.D. Cal. 2006))*. However, this right is not absolute; rather, it is subject to a balancing test. *Stallworth v. Brollini, 288 F.R.D. 439, 444 (N.D. Cal.2012)*. "**When the constitutional right of privacy is involved, 'the party 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, much less demonstrated that her need for the information outweighs the third party privacy interests.** Therefore, the Court will not require Defendant to produce addresses or telephone numbers in response to Interrogatory No. 5. Defendant is directed to file a supplemental response to Interrogatory No. 5, as limited by the Court. (*See id.* at *7-8. Emphasis added.)

Sekera further incorrectly suggests that the case of *Shaw v. Experian Info. Solutions, Inc.*, 306 F.R.D. 293 (SD. Cal. March 18, 2015), cited by Petitioners, does not support the petition before the Court. (*See* RAB at 23.) In so doing, Sekera writes: "The *Shaw* Court actually required the defendants disclose the 'names, addresses, and telephone number' of third-parties without a protective

order on the same." (*See id.*) To the contrary, the *Shaw* court held as follows: "the plaintiffs met the defendant's stated privacy concerns **by stating that they would accept the information in redacted form**." (*Shaw, supra*, at 299, emphasis added.) In other words, the *Shaw* court ensured that the privacy rights of third parties, such as those at issue here, were protected, something Sekera failed to note.

Petitioners refer the court to *Caballero v. Bodega Latina Corp.*, 2017 U.S. Dist. LEXIS 116869 (D. Nev. July 25, 2017). There, the plaintiff argued that her real issue for a slip/fall on a foreign substance was not just that the foreign substance was present, but that the floor was itself slippery and not appropriate for its intended use. Therefore, plaintiff argued that *Eldorado Club, Inc.* did not apply (as Sekera is arguing here). In *Caballero*, the court denied plaintiff's motion to compel the production of prior incidents, even in unredacted form, because she did "not meet her threshold burden to show the discovery she seeks to obtain is 'relevant to any party's claim or defense" under Rule 26(b)(1); therefore, the court did not even get to the proportionality part of the balancing test under the rule. (*See id.* at *22-23.) Here, the district court found the information to be relevant, but did not weigh the proportionality based on Plaintiff's invented need for the information to counter any potential comparative fault argument.

A review of some cases cited by Sekera is necessary. Sekera's reference to *Wauchop v. Domino's Pizza, Inc.*, 138 F.R.D. 539 (N.D. Ind. 1991), for example, misses the mark. There, the defendant sought protection of certain information to protect its own reputation, not because it desired to protect the privacy rights of customers. Further, the *Wauchop* case did not involve the dissemination of protected health information. Here, Petitioners desire to protect Venetian guests from being contacted and harassed not only by Sekera, but by multiple others in connection with some other incident. Petitioners are moving to protect the valued privacy of Venetian guests. That was not an issue in *Wauchop*. As it presently stands, this privacy interest is neither valued nor protected by the District Court below. Sekera has not presented any Nevada case law supporting such a result, nor has Sekera cited any Nevada law supporting the proposition that NRCP 1 trumps all arguments related to the protection of private information.

Sekera also cites to *Khalilpour v. Cellco P'ship*, 2010 U.S. Dist. LEXIS 43885* (N.D. Cal. April 1, 2010), which relates to a class action where information was sought to identify the class members. This case actually supports the pending petition. What Sekera failed to relay in citing to *Khalilpour* is that there was already a protective order in place. Pursuant to this extant protective order the information at issue was to be used strictly within the litigation.

Accordingly, the *Khalilpour* court recognized a protectable privacy interest. (*See id.* at *10-11.)

Sekera's reference to *Busse v. Motorola, Inc.*, 351 Ill. App. 3d 67, 813 N.E.2d 1013 (2004), oddly does not even address the discovery issues at hand, but instead considered a motion for summary judgment on a claim of privacy invasion in a tort action. (*See* RAB at 22.) The *Busse* court held that "Private facts must be alleged" by a plaintiff to meet the elements of the tort, noting: "Without private facts, the other three elements of the tort need not be reached." (*See id.* at 72, 813 N.E.2d at 1017.) The instant matter does not involve any claim for invasion of privacy or its needed elements. Here, the privacy issues involve the production of the private information of individuals unaffiliated with the present litigation, including personal events and health related information tied to each name with contact information, which are by their very nature "private."

The case of *Keel v. Quality Medical System, Inc.*, 515 So.2d 337 (Fla. Dist. Ct. App. 1987), cited by Sekera, is likewise inapplicable. (*See* RAB at 22.) The *Keel* decision (actually consisting of a single paragraph) relates to a restraining order preventing a former employee from contacting customers of his former employer. It has nothing to do with any issues presently before the court here.

The case of *Brignola v. Home Props., L.P.*, 2013 U.S. Dist. LEXIS 60282 (E.D. Pa. April 25, 2013), cited by Sekera, relates to a motion to dismiss filed by

the defendant in a cause of action related to debt collection. (*See* RAB at 22.) It does not address a discovery issue at all and contains no analysis under Rule 26(b)(1).

Sekera's reference to *Mount Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 2013 U.S. Dist. LEXIS 88239 (D.C. N.J. June 24, 2013), also supports Petitioners' position. (*See* RAB at 22.) While Sekera represents the case to stand for the proposition that concerns about protecting the privacy of contact information were "overblown", Sekera fails to relay that there was already a **confidentiality order** in place; therefore, the court recognized a protectable interest. It should be further noted that the *Mount Holly* case did not involve sensitive private health information provided by guests involved in an incident while visiting a business.

In *Henderson v. JPMorgan Chase Bank*, No. CV113428PSGPLAX, 2012 WL 12888829, at *4 (C.D. Cal. July 31, 2012), also cited by Sekera, the information at issue related to employees, not private party guests, and did not involve the dissemination of any private health information; therefore, it is not at all helpful. (*See* RAB at 24.) Also, Sekera fails to note that in *Henderson* there was already a working protective order in place regarding protection of personal contact information to address privacy concerns. Further, the court there noted that the plaintiff met the balancing test of Rule 26(b)(1) demonstrating a need for this

protected private information. (*See id.* at *16-17, citing *Knoll v. American Tel. & Tel. Co*, 176 F.3d 359, 365 (6th Cir 1999) (approving protective orders to protect non-parties from "the harm and embarrassment potentially caused by nonconfidential disclosure of their personnel files.")[5] Sekera has not done that here.

Sekera's reference to *Tierno v. Rite Aid Corp.*, 2008 U.S. Dist. LEXIS 58748 (N.D. Cal. July 31, 2008), is likewise misplaced. (See RAB at 24.) In citing to this case, Sekera again fails to advise the Court that there was already a protective order in place "to ensure that information is not misused". (*See id.* at *8-9, citing *Pioneer Electronics, Inc. v. Superior Court*, 40 Cal 4th 360, 371 (2007) ["privacy intrusion is minimized where safeguards that shield information from disclosure are in place"].) No such safeguards were provided by the District Court herein to protect against the misuse of private information.

In citing to *McArdle v. AT&T Mobility LLC*, 2010 U.S. Dist. LEXIS 47099 *10 (N.D. Cal. April 16, 2010), Sekera once again failed to advise that the private information at issue there was subject to a protective order "limited to Plaintiff and his counsel in this case." (*See* RAB at 24-25.) Again, no such order is in place protecting the privacy rights of Venetian guests here.

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[5]The court in *Knoll* upheld the district court's issuance of a protective order to protect the privacy of nonparty personnel files sought by the plaintiff.

The case of *Puerto v. Superior Court*, 158 Ca. App. 4th 1242, 70 Cal.Rptr. 3d 701 (2008), cited by Sekera, is also supportive of Petitioners' position. (*See* RAB at 25.) There, the California court acknowledged the privacy rights of persons identified in disclosures, stating that "the trial court was well within its discretion in concluding that the witnesses had a reasonable expectation of privacy in their addresses and phone numbers" and that the trial court was free to order protection of the information at issue. (*See Puerto* at 1252, 1259, 70 Cal.Rptr.3d at 708, 714.)

In reality, Sekera has not cited to any case law supporting her position that rights under NRCP 1 are superior to any privacy rights of persons involved in other incidents on Venetian property. Further, Sekera has failed entirely to establish why she needs contact information of persons involved in other incidents at all – other than to rebut a comparative fault defense by Petitioners. Again, since Petitioners deny there was any foreign substance on the floor at the time of Sekera's fall (something she insists is "important to note" at RAB 2), the other incident reports would not be relevant at all to her stated purpose, as Petitioners are not asserting Sekera should have seen something on the floor that did not exist. Regardless, Sekera has not established relevance or proportionality for this unredacted information under NRCP 26(b)(1), and most certainly has not justified

her alleged right to share this private information to whomever she desires, however and whenever she so desires.

Petitioners have demonstrated that the Nevada legislature has expressed an interest in protecting the privacy rights of private parties, referencing NRS § 603A. Further, Senate Bill 220 was recently signed into law, which relates to internet privacy rights, generally prohibiting website and online services from selling of personal data of users against a user's will.[6] This, again, demonstrates a desire by the Nevada legislature to protect private contact information of individuals, such as the information at issue in this writ proceeding. Most certainly, Sekera's alleged right to share personal data with anyone, anywhere, and in any way she desires is wholly inconsistent with the growing trend to protect this information.

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[6] SB 220, effective October 1, 2019, grants consumers the right to direct operators not to sell their covered information. The operator must honor the request only if the operator can reasonably verify the authenticity of the request and the identity of the consumer using commercially reasonable means. borrows the definition of "covered information" from existing Nevada law. "Covered information" under SB 220 includes the following: (1) a first and last name; (2) a physical address which includes the name of a street and the name of a city or town; (3) an e-mail address; (4) a telephone number; (5) a social security number; (6) an identifier that allows a specific person to be contacted; or (7) any other information concerning a person collected from the person through the Internet website or online service of the operator and maintained in combination with an identifier in a form that makes the information personally identifiable. (NV SB 220.)

## V. Sekera's References to Irrelevant and Misleading "Facts" Should be Wholly Disregarded

Sekera has introduced information which is not only irrelevant to the present writ, but which has been used for the sole purpose of distracting the Court from the issue at hand, and to unfairly malign both Petitioners and their counsel, suggesting that Petitioners are unworthy of fair adjudication here. Petitioners will respond to these allegations as briefly as possible.

### A. Sekera's references to other pending Venetian matters is inappropriate

Sekera has provided the Court with a false assertion that Venetian is somehow a bad actor because there were variances in incident reports produced in other cases occurring in different areas of the property on different dates and under different circumstances. (*See* RAB 10-11.) In so doing, Sekera has included a copy of a motion filed by Peter Goldstein, Esq., on February 13, 2019. (*See* RAB at 11.) Sekera failed to advise the Court that the motion filed by Mr. Goldstein, attached as APP224-35, was denied. (*See* Petitioners' Appendix, Vol. 4, Tab 23, VEN 496-98.)[7] In fact, as noted earlier, Sekera has not presented this Honorable Court with one order supporting her contention that Petitioners have been in any

[7] In attaching this motion, Sekera also failed to advise the Court that Mr. Goldstein filed all 660 pages of documents provided to him by Sekera's counsel on March 12, 2019, which were produced by Sekera counsel on February 7, 2019, after Petitioners' motion for protective order was filed and pending. (*See* Petitioners Appendix, Vol. 1, Tab 12, VEN 140-46.)

way sanctioned or admonished by the court below for alleged discovery abuses. Further, Sekera fails to note that in all other Venetian cases she has referenced, there are protective orders in place protecting the same type of information at issue here. This litigation is, in fact, the anomaly.

### B. Sekera's reference to Gary Shulman's testimony is inappropriate

For reasons Sekera cannot articulate or justify, she has dedicated space in her Answering Brief to falsely assert that witness Gary Shulman was instructed "to lie" by Venetian's counsel during a meeting on June 28, 2018. (*See* RAB at 11.) First, this allegation is untrue and is presently the subject of a motion before the District Court. It is therefore improper to raise it in response to this petition. Second, it has nothing to do with the privacy rights at issue before the Court. It is disappointing that Sekera would make this outrageous claim and force Petitioners to address it before this Honorable Court. However, Petitioners will do so out of necessity.

Venetian's counsel first met with Mr. Shulman in his capacity as a Venetian Table Games Supervisor on Venetian property on June 28, 2018. (*See* RAB Appendix 1, APP032, deposition at 21:6-25; 22:1-5; 51:3-25; 52-53; 55:3-25; 56-62.)[8] On June 29, 2018, Venetian's counsel sent correspondence to Mr. Shulman

[8] Mr. Shulman initially testified that his meeting with Venetian defense counsel was November 28, 2018. (*See* RAB Appendix 1, APP033, deposition at 21:6-25.)

confirming what Mr. Shulman related regarding his recollection of events during the June 28, 2018 meeting; *to wit:* that he had not identified a foreign substance on the floor, among other things. (*See id.* APP041-42, deposition at 57:8-25; 58-61; 62:1-15.) Mr. Shulman communicated with Venetian's counsel on numerous occasions following the June 28, 2018 meeting and never conveyed to defense counsel or anyone affiliated with Venetian any understanding that he had been told "to lie" in this litigation. (*See id.* APP042, deposition at 62:5-15.)

To Petitioners' knowledge, the first time Mr. Shulman alleged that he was told "to lie" by Venetian's counsel (and thereafter harassed, intimidated and terminated by Venetian for an alleged failure to comply) was in his private conference with Sekera's counsel one week preceding his April 17, 2019 deposition. (*See* deposition at APP040-42, deposition at 51:3-25; 52-61; 62: 1-15.) The first time Mr. Shulman related his scandalous claim to anyone affiliated with the Venetian was, by his own admission, in the April 17, 2018 deposition. (*See id.* APP041, deposition at 55:21-25; 56:1-12; 65:5-15.)

Indeed, Mr. Shulman had received the detailed correspondence of June 29, 2018 confirming defense counsel's understanding of his recollection of events, and despite multiple communications between June 28, 2018 and April 17, 2019, he failed to relay any concerns or convey any assertions to Venetian or its counsel

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He later acknowledged that the meeting was, in fact, in June 2018. (*Id.* APP040, deposition at 51:3-25; 52:1-25; 53:1-19.)

regarding his claim that he was told "to lie". (*See id.* at APP042, deposition at 59:3-25; 60:1-25; 61:1-25; 62:1-15.)[9]

Mr. Shulman was suspended by Venetian on or about November 20, 2018 for threatening a female supervisor. (*See* Petitioners Appendix, Vol. 4, Tab 25, VEN 510-12.) He was terminated on January 23, 2019. (*See id.*) On February 22, 2019, Mr. Shulman filed a complaint with the Nevada Equal Rights Commission ("NERC") asserting he was wrongfully terminated by Venetian. (*See* Petitioners Appendix, Vol. 4, Tab 25, VEN 513-14.) Interestingly, there is no mention in Mr. Shulman's NERC complaint of having been told "to lie" by Venetian's counsel at any time, nor is there any reference to the subject litigation at all. (*See id.*)[10]

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[9] Note further that the June 28, 2018 meeting occurred before Petitioners identified any witnesses pursuant to NRCP 16.1 (in which Mr. Shulman was named as a witness), approximately one month prior filing the Joint Case Conference Report. (*See* Petitioners Appendix, Vol. 4, Tab 24, VEN 499-508.)

[10] Mr. Shulman testified in deposition that he had a stellar record at Venetian prior to his meeting with Venetian defense counsel, but that shortly after his June 2018 meeting he was harassed at work and received multiple warnings leading to his termination. (*See* RAB Appendix 1, APP033-34, deposition at 23:2-25; 24:1-25; 25:20-25; 26:1-25; 27:1-25. *See also* Petitioners Appendix, Vol. 4, Tab 25, VEN 509.) Later in the deposition, Mr. Shulman recanted and said he had received a series of warnings prior to his one and only meeting with Venetian's counsel on June 28, 2018 – therefore completely discrediting his earlier claim of harassment and warnings occurring only after the June 28, 2018 meeting. (*See id.* APP040, deposition at 51:7-25; 52:1-25; 53:1-12.) Mr. Shulman ultimately blamed his termination on Venetian's alleged failure to appropriately deal with his chronic health issues and time he had taken off work under the Family and Medical Leave Act. (*See id.*, APP034, deposition at 28:1-22.) It should further be noted that Mr.

Sekera well knows that Mr. Shulman's assertion that he was told "to lie" by Venetian's counsel is spurious. Mr. Shulman is a disgruntled former employee who Sekera counsel met with privately to elicit arguably privileged information a week prior to Mr. Shulman's deposition without advising Venetian's defense counsel. This allegation has no place here.

It is very clear from a full and fair reading of the very deposition transcript Sekera produced with her Answering Brief that there is no merit these allegations. Yet, Sekera continues to use it as a weapon whenever possible in an effort to distort the issues and discredit Petitioners. It is off topic and manipulative. Petitioners have given it more attention that it deserves; however, salacious allegations of this nature sadly require a response. This assertion by Sekera should be wholly disregarded as having nothing to do with protecting the privacy rights of Venetian guests having absolutely no knowledge about Sekera's incident.

### C. The District Court's granting of leave to amend under NRCP 15 to add a punitive damages claim is irrelevant

Sekera's reference to having received leave to add a claim for punitive damages has nothing to do with the issue of protecting the privacy rights of individuals identified in other incident reports. The fact is that the District Court

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Shulman's suspension of November 20, 2018 occurred nearly five months prior to his April 17, 2019 deposition and his termination of January 23, 2019, occurred more than two months before his deposition was noticed by Sekera counsel. (*See* Petitioners Appendix, Vol. 4, Tab 26, VEN 515-17.)

judge granted leave under the low bar of NRCP 15. This amendment to the Complaint was not before the District Court on the underlying discovery motion and is irrelevant to the matter before this Honorable Court on this Writ Petition. To the extent Sekera introduces a new argument at any hearing on this Writ Petition, claiming she needs information for her punitive damages claim, that argument will not be well taken as the redacted incident reports already produced in this matter provide any information Sekera may need regarding other incidents.

## VI. CONCLUSION

This petition for relief relates directly to the privacy rights of guests involved in other incidents reported by owners and innkeepers, to protect them from the dissemination of personal information (*i.e.* incident facts, physical condition, health history, etc.), attached to their names and contact information. This is not "phonebook" information, as Sekera asserts. It is much more than that. Sekera did nothing below to demonstrate her right to this information balanced with the rights of non-employee guests involved in other incidents. Sekera did not meet the required criteria of NRCP 26(b)(1) once Petitioners demonstrated the "good cause" required under NRCP 26(c). The case law cited by both Petitioners and Sekera support protecting the information at issue. The Discovery Commissioner's recommendation of producing the other incident reports in redacted form with NRCP 26(c) protection by limiting the use of this information

to the present case was consistent with Nevada law and the interests of protecting individual privacy rights. Petitioners respectfully submit that the relief requested should be granted not just for Venetian guests, but for all like situated persons sharing personal information following an incident on the location of a Nevada property owner.

DATED this 28 day of October, 2019.

ROYAL & MILES LLP

By: _____

Michael A. Royal, Esq. (SBN 4370)
Gregory A. Miles, Esq. (SBN 4336)
1522 W. Warm Springs Rd.
Henderson, NV 89014
(702) 471-6777
Cousnel for Petitioners

## CERTIFICATE OF COMPLIANCE

STATE OF NEVADA )
) ss:
COUNTY OF CLARK )

I, Michael A. Royal, hereby affirm, testify and declare under penalty of perjury as follows:

1. I am an attorney licensed to practice in the State of Nevada, and am a member of the law firm of Royal & Miles LLP, attorneys for Petitioners VENETIAN CASINO RESORT, LLC, and LAS VEGAS SANDS, LLC.

2. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times Roman 14 point font.

3. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains **6,356 words** in compliance with NRAP 32(a)(1)(A)(ii) (having a word count of less than 7,000 words).

4. Finally, I hereby certify that I have read this Reply, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any

improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Further affiant sayeth naught.

MICHAEL A. ROYAL, ESQ.

SUBSCRIBED AND SWORN to before me by Michael A. Royal, Esq., on this 28 day of October, 2019.

ASHLEY SCHMITT
NOTARY PUBLIC
STATE OF NEVADA
Appt. No. 08-5493-1
My Appt. Expires Nov. 1, 2019

NOTARY PUBLIC in and for said County and State

## 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 28 day of October, 2019, I served true and correct copy of the foregoing PETITIONERS' REPLY BRIEF, by delivering the same via the Court's CM/ECF system which will send notification to the following:

Keith E. Galliher, Jr., Esq.
THE GALLIHER LAW FIRM
1850 E. Sahara Avenue, Suite 107
Las Vegas, NV 89014
*Attorneys for Real Party in Interest*

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

Ashley Schmitt
An employee of Royal & Miles LLP

# EXHIBIT “H”

**OBJ**
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@royalmileslaw.com
*Attorneys for Defendants*
*VENETIAN CASINO RESORT, LLC and*
*LAS VEGAS SANDS, LLC*

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

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| JOYCE SEKERA, an Individual;<br><br>Plaintiff,<br><br>v.<br><br>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,<br><br>Defendants. | CASE NO.: A-18-772761-C<br>DEPT. NO.: XXV<br><br>***Hearing Requested*** |

**DEFENDANTS' OBJECTION TO DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS DATED AUGUST 9, 2019**

Defendants, VENETIAN CASINO RESORT, LLC, and LAS VEGAS SANDS, LLC (hereinafter collectively *"Venetian"*), by and through their counsel of record, Michael A. Royal, Esq., of ROYAL & MILES LLP, hereby files DEFENDANTS' OBJECTION TO DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATION DATED AUGUST 9, 2019.

This Objection is based upon the Points and Authorities below, the papers and pleadings filed herein, and any oral argument allowed at the hearing on this matter.

DATED this 21 day of August, 2019.

**ROYAL & MILES LLP**

By _____

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

## MEMORANDUM OF POINTS AND AUTHORITIES

### I.

### NATURE OF OBJECTION

Defendants' objection relates solely to the issue of whether the communication between former employee Gary Shulman and defense counsel related to the subject litigation during his employment is protected by attorney/client privilege. Mr. Shulman was employed with Venetian as a Table Games Supervisor for approximately eleven (11) years on November 4, 2016 when the subject incident occurred.

Mr. Shulman responded to the incident, spoke with Plaintiff, contacted his immediate supervisor, contacted other Venetian employees to respond to the area, and waited at the scene until security arrived. On June 28, 2018, Mr. Shulman met with Venetian defense counsel at the Venetian property during his regular work shift to discuss his recollection of events. There was some follow up correspondence over the next few days, but no further communication between Mr. Shulman until March 2019, when he was contacted by defense counsel about scheduling his deposition. Unbeknownst initially to defense counsel, Mr. Shulman had been terminated on January 23, 2019. Mr.

Shulman therefore would not meet with defense counsel prior to his April 17, 2019 deposition. At the April 17, 2019 deposition, Mr. Shulman revealed that he had met privately with Plaintiff's counsel prior to the deposition and revealed his purported communications with defense counsel from the June 28, 2018 meeting. Defendants asserted privilege and instructed Mr. Shulman not to answer. Mr. Shulman testified over Defendants' objection. A motion to strike Mr. Shulman as a witness was filed with the Discovery Commissioner on May 17, 2019. During a hearing held on June 26, 2019, the Discovery Commissioner held that the communication between Mr. Shulman and defense counsel was not privileged because, in her view, Mr. Shulman was merely a percipient witness to an event which did not involve his employment. Defendants disagree, and therefore file this objection with the District Court.

## II.

## PERTINENT FACTS AND EVIDENCE

Mr. Shulman was working as a Table Games Supervisor for Venetian on November 4, 2016. (*See* Plaintiff's Opposition to Defendants' Motion to Strike, Exhibit 1, *Transcript of Gary Shulman Deposition* at 5, ln 6-8.) Mr. Shulman was in the area of the Grand Lux rotunda when Plaintiff slipped and fell. (*See* Defendants' Motion to Strike Witness, Exhibit C at 12:37:00.) Mr. Shulman responded to Plaintiff in order to assist her. (*See* Plaintiff's Opposition to Defendants' Motion to Strike, Exhibit 1, *Shulman deposition* at 8, ln 2-6.) Mr. Shulman went to alert personnel from Venetian's Public Area Department

**Mr. Shulman here at 12:37:01**

**Shulman at 12:37:51**

(*PAD*) to respond. (*See id.* at 8, ln 11-12; 11, ln 7-17.) Mr. Shulman also called Venetian Security Department to advise of the incident and request assistance. (*See id.* at 8, ln 12-14; 10, ln 24-25; 11, ln 1-6.) Mr. Shulman also recalled contacting his manager, Chris Tonemah, to advise her of the incident. (*See id.* at 11, ln 2-6.) Mr. Shulman testified that it is part of his responsibility as a Table Games Supervisor to contact Venetian PAD personnel when he becomes aware of a spill related incident. (*Id.* at 48, ln 15-16.) Mr. Shulman testified that remained at the scene of Plaintiff's fall for approximately ten (10) to fifteen (15 minutes. (*See id.* at 10, ln 21-23; 14, ln 10-12.) Mr. Shulman did not leave the scene until after both PAD and security had arrived. (*See id.* at 14, ln 17-23.)

**Shulman at 12:39:39**

**Shulman at 12:43:04**

On June 28, 2018, defense counsel met with Mr. Shulman at his place of employment for Venetian, during his work shift, to discuss his recollection of events. (*See* Defendants' Motion to Strike at 7, ln 26-28; 8, ln 1-6.) Correspondence was sent to Mr. Shulman the following day with a summary of understanding. (*See id.*) This meeting occurred approximately one (1) month prior to the filing of the Joint Case Conference Report.

On or about March 15, 2019, defense counsel reached out to Mr. Shulman in response to a request by Plaintiff's counsel to schedule his deposition. (*See id.* at 8, ln 7-14.) On March 25, 2019, defense counsel learned that Mr. Shulman was no longer employed with Venetian. (*See id.* at 8, ln 15-22.) Multiple efforts were made to meet with Mr. Shulman prior to his April 17, 2019 deposition, without success. (*See id.* at 8, ln 23-28; 9, ln 1-3.) At the April 17, 2019 deposition of Mr. Shulman,

defense counsel learned for the first time that Mr. Shulman had met privately with Mr. Galliher and told him of his alleged conversation with defense counsel on June 28, 2018. (*See id.* at 9, ln 4-17. *See also* Plaintiff's Objection to Motion to Strike, Exhibit 1 at 21, ln 6-25; 22, ln 1-25; 23, ln 1-25; 24, ln 1.)

In her deposition of July 12, 2019, former Venetian Casino Pit Manger, Chris Tonemah, testified that she supervised Gary Shulman for seventeen (17) years. (*See Objection* Exhibit A, *Transcript of Chris Tonemah*, taken July 12, 2019, at 10-22; 4, ln 13-16.) Ms. Tonemah testified that it was routine for her to receive calls from Venetian employees like Mr. Shulman when an incident occurs. (*See id.* at 6, ln 13-24.) It was, in fact, Mr. Shulman's responsibility as a Table Games Supervisor to contact her under the circumstances of November 4, 2016 involving the Plaintiff, according to Ms. Tonemah:

> *Q. So as I understand you are telling me, if there's a fall, if there is a spill,* ***it would be the obligation*** ***of your underlings in the casino to notify you*** *of that event?*
> *A. Uh-huh.*
> *Q. Is that yes?*
> *A. Yes.*
> *Q. And then your obligation at that point in time is to notify whom?*
> *A. I would notify surveillance.*
> *Q. And after you notify surveillance, would you notify anyone else?*
> *A. No . . .*

(*See id.* at 7, ln 4-16. Emphasis added.)

Sang Han was a Venetian Assistant Director of Housekeeping on November 4, 2016 when he happened to come upon the incident. (*See* Defendants' Motion to Strike Witness, Exhibit H, at 3, ln 14-25; 4, ln 1-2.) Mr. Han testified that he happened upon the scene and stopped to see what happened. (*Id.* at 8, ln 17-23.) Mr. Han was present at the scene for about three (3) minutes. (*See id.* at 6, ln 8-18.) During his May 6, 2019

**Sang Han at 12:40:37**

deposition, Mr. Galliher conceded that Mr. Sang's communications with defense counsel were privileged. (*See id.* at 5, ln 7-16.)

At the June 26, 2019 hearing, Mr. Galliher was asked by the Discovery Commissioner why he considered Mr. Sang's communications privileged but not Mr. Shulman's communications. (*See* Objection Exhibit B, *Transcript of Proceeding Before Discovery Commissioner (June 26, 2019)* at 15, ln 21-25; 16, ln 1-9.) Mr. Galliher responded that Mr. Sang *"was the head of housekeeping. He was the boss man of the department . . . that investigated the fall."* (*See id.* at 16, ln 7-24.) However, Mr. Han was neither the head of housekeeping nor did he in any way, shape or form investigate the fall. Again, Mr. Han testified he was only at the scene by happenstance and stayed for about three (3) minutes.

Contrary to Mr. Galliher's representation at the June 26, 2019 hearing, Mr. Han was literally a bystander/percipient witness, who did nothing but observe, ask a few questions, offered assistance, then departed the scene. (*See* Defendants' Motion to Strike Witness Exhibit C (12:39:42 - 12:42:42); Exhibit H at 6, ln 8-25; 7, ln 1-10; 8, ln 17-25; 9, ln 1-25; 10, ln 1-5; 11, ln 6-26; 13, ln 22-25; 14-17; 20, ln 1-25.) Further, Mr. Sang testified as follows:

> *BY MR. GALLIHER:*
> *Q.* *Just a couple more. I think we established earlier that* ***your job title as assistant manager of housekeeping did not include any supervisory control over the PAD employees; is that right?***
> *A.* *As the assistant director of housekeeping, I do not on a daily basis have direct control over PAD employees.*
> *Q.* ***So do you have any managerial control over them at any time?***
> *A.* ***The answer to the question would be no.***

(Defendants' Motion to Strike Witness, Exhibit H at 27, ln 22-25; 28, ln 1-7. Emphasis added.) Further, there has never been any evidence that Mr. Sang did anything other than appear at the scene for three (3) minutes, then depart without further involvement. He did not, as Mr. Galliher argued to the Discovery Commissioner, perform an investigation of the incident.

At the June 26, 2019 hearing, the Discovery Commissioner made the following findings:

> *DISCOVERY COMMISSIONER: I don't -- at this point, based on the case law before me, where -- I don't think that the reason the Venetian was asking him to meet with you was because of his corporate -- something that occurred in the course of his employment, like his corporate duties. I believe it was something that he observed, and* ***it wasn't that he was the investigator.*** *He was not the one who was responsible for cleaning it up. He was not the person who was responsible for monitoring the area. He happened to observe the fall or the events surrounding the fall and had knowledge as to what happened at the time. It wasn't based on his corporate duties. It was just based solely on his proximity to the event. And he wasn't testifying regarding his corporate duties or binding the corporation on any of the corporate policies and procedures. He was merely a witness as to the event, and so I don't believe, by nature of that, the entirety of his testimony was privileged.*

(*See* Objection Exhibit B at 22, ln 6-20.)

In the Discovery Commissioner's Report and Recommendation, the Discovery Commissioner wrote the following:

> *It is determined that Mr. Shulman was merely a percipient witness to an event that occurred while he was working at the Venetian in a matter that resulted in litigation being filed against Venetian that did not involve Mr. Shulman's employment; therefore, Mr. Shulman's communications with defense counsel are not privileged.*

(*See* Objection Exhibit C, *Discovery Commissioner's Report and Recommendation*, filed August 9, 2019, at 3, ln 23-25.)

Defendants contend that, contrary to the Discovery Commissioner's determination, Mr. Shulman was much more than a percipient witness. Once he came upon the scene, Mr. Shulman was obligated by his employment to contact his direct supervisor, Ms. Tonemah, alert PAD and security, and to stay with Plaintiff at the scene until responders arrived and took over control of the scene. Further, Defendants contend that Mr. Schulman was instructed by his superiors to meet with defense counsel on June 28, 2019 in the course of his employment for the specific purpose of discussing his role in the subject incident and recollection of events. In that capacity, given the totality of the circumstances, Mr. Schulman's communication with defense counsel was privileged, and Plaintiff's counsel should not have met privately with him prior to his April 17, 2019 deposition and elicited any

information related to Mr. Shulman's alleged communication with defense counsel, then have Mr. Shulman repeat the same on the record.

**II.**

**DECLARATION OF MICHAEL A. ROYAL, ESQ. PURSUANT TO NRS 53.045**

STATE OF NEVADA )
) ss.
COUNTY OF CLARK )

1. I am an attorney duly licensed to practice law in the State of Nevada and I am counsel for Defendants in connection with the above-captioned matter.

2. I declare that the additional exhibits identified in this Objection are true and correct copies of documents as purported herein.

| Exhibit | Document |
|---|---|
| A | Transcript of Chris Tonemah Deposition, taken July 12, 2019 |
| B | Transcript of Hearing Before the Discovery Commissioner, dated June 26, 2019, selected pages |
| C | Discovery Commissioner's Report and Recommendation, filed August 9, 2019 |
| D | Plaintiff's Reply in Support of Her Motion For Leave to Amend the Complaint, filed May 15, 2019 |

3. I declare under penalty of perjury under the law of the State of Nevada that the statements of fact as presented in this Objection are true and correct to the best of my knowledge.

Executed this 21 day of August, 2019.

MICHAEL A. ROYAL, ESQ.

**IV.**

**DISCUSSION**

Pursuant to EDCR 2.34(f), a party is allowed to *"file specific written objection to the recommendations"* of the Discovery Commissioner. Defendants have timely filed this objection and therefore move this Honorable Court for review.

A. **The Discovery Commissioner Incorrectly Determined That Communication Between Defense Counsel and Gary Shulman in the Course of His Employment Regarding the Subject Litigation are Not Protected as Privileged**

It is well settled law that communications between an attorney and the client in the course of a legal proceeding is privileged. That privilege extends to communications between legal counsel and corporate employees related to legal matters. This is especially the case in matters of ongoing litigation, and the privilege is not magically dissolved simply because an employee privy to privileged communication is terminated. In such circumstances, the former employee may certainly testify about facts in controversy; however, the employee is not free to reveal privileged communication.[1]

While an attorney may claim a privilege on the client's behalf, only the client has the ability to waive a privilege. (Manley v. State, 979 P.2d 703 (Nev. 1999). Corporate employees fall within the definition of *"representative"* of the client. (*See* Premiere Digital Access, Inc. v. Cent. Tel. Co., 360 F. Supp. 2d 1168 (D. Nev. 2005) (holding that a forwarded e-mail from in-house counsel was protected under Nevada law as a communication between a client's representative and a lawyer, and waiver can only be made by the client); *see also* Las Vegas Sands Corp. v. Eighth Judicial Dist. Court of Nev., 331 P.3d 905 (Nev. 2014) (attorney-client privilege belongs solely to the corporation).)[2]

The Supreme Court of the United States has held that communications between counsel representing a corporation in litigation and corporate employees are privileged. (*See* Upjohn Co. v. United States, 449 U.S. 383.) There, the Court related the following on the attorney/client privilege:

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[1]The general rule associated with attorney client privilege related to this matter are found in NRS 49.075, NRS 49.095 and NRS 49.105.

[2]In Las Vegas Sands Corp., *supra*, the Nevada Supreme Court held that former officers who become adverse to the corporate entity in litigation were not allowed to access and use privileged information. There, the court held to rule otherwise, *"would have a perverse chilling effect on candid communications between corporate managers and counsel."* (*See id.* at 913, *citing* Whitehead v. Nev. Comm'n on Judicial Discipline, 873 P.2d 946, 965 (Nev. 1994) (recognizing that the attorney-client privilege's purpose *"is to protect confidential communications between attorney and client".*)

> ***Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.*** *The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. As we stated last Term in Trammel v. United States, 445 U.S. 40, 51 (1980): "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in Fisher v. United States, 425 U.S. 391, 403 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys." This rationale for the privilege has long been recognized by the Court, see Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (privilege* ***"is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").*** *Admittedly complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the law, and not an individual; but this Court has assumed that the privilege applies when the client is a corporation, United States v. Louisville & Nashville R. Co., 236 U.S. 318, 336 (1915) . . . .*

(*Id.* at 389-90, emphasis added.)

The Court in Upjohn held that the privilege applies to communications between corporate counsel and a corporate employee where the communication concerns matters within the scope of the employee's corporate duties and is undertaken for the purpose of enabling counsel to provide legal advice to the corporation. (*See id.* at 394-95.) The same is true of a former employee of a corporation who possesses information within the scope of his or her prior corporate duties that counsel needs in order to advise the corporate client. (*See* In re Coordinated Pretrial Proceedings, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981)). The key consideration in Upjohn is that the current or former employee of a corporate client has information of the corporation that the corporation's counsel needs in order to advise his or her client.

In Wardleigh v. Second Jud. Dist Ct., 891 P.2d 1180 (Nev. 1995), the Nevada Supreme Court adopted United States Supreme Court's holding in Upjohn Co., *supra*, but rejected the "control group" test which only applied the privilege to a select group of managerial corporate employees. (*See id.* at 891 P.2d at 1185-85, citations omitted.) Instead, the Wardleigh court focused on the nature of the

subject matter sought in discovery for purposes of applying the attorney-client privilege. (*Id.*) The Wardleigh court held:

> *The Court in Upjohn appropriately noted that **only communications and not facts are subject to the privilege**. Thus, relevant facts known by a corporate employee of any status in the corporation would be discoverable even if such facts were related to the corporate attorney as part of the employee's communication with counsel. **The communication itself, however, would remain privileged**. 449 U.S. at 395-96.*

(*See id.* at 1184. Emphasis added.)

Here, Mr. Shulman was directed by Venetian to meet with its defense counsel for the express purpose of discussing the subject incident. Mr. Shulman was not just a percipient witness to the event, but remained at the scene for approximately ten (10) minutes and did as he was required by contacting various others to report the event, and to remain on scene until relief arrived. Further, Mr. Shulman was not at liberty to meet with Mr. Galliher prior to the April 17, 2019 deposition and relay the substance of his communications with defense counsel on and/or around June 28, 2018. The privilege was not Mr. Shulman's to waive. (*See* Las Vegas Sands Corp. v. Eighth Judicial Dist. Court of Nev., 331 P.3d 905 (Nev. 2014) (attorney-client privilege belongs solely to the corporation).)

The Ninth Circuit applies an eight-part test for the attorney client privilege:

> *(1) Where legal advice of any kind is sought, (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected, (7) from disclosure by himself or by the legal adviser, (8) unless the protection be waived.*

(United States v. Ruehle, 583 F.3d 600, 607 (9th Cir. 2005) (citation omitted).) Here, legal advice was sought by Defendants who engaged their counsel to meet with Mr. Shulman regarding his recollection of events and acts he took in the course and scope of his duty as a Table Games Supervisor on November 4, 2016. Defendants argue that this communication was privileged, which privilege extends to both the confidential disclosures made by a client to an attorney to obtain legal advice and the attorney's advice in response to such disclosures. (United States v. Bauer, 132 F.3d 504, 507 (9th Cir. 1997).)

Where an employer requires an employee to meet with counsel in the course of employment that involves litigation, the communication is privileged. In D.I. Chadbourne, Inc. v. Superior Court, 388 P.2d 700 (Cal. 1964), the California Supreme Court held:

> *Where the employee's connection with the matter grows out of his employment to the extent that his report or statement is required in the ordinary course of the corporation's business, **the employee is no longer an independent witness**, and his statement or report is that of the employer . . . . If, in the case of the employee last mentioned, **the employer requires (by standing rule or otherwise) that the employee make a report, the privilege of that report is to be determined by the employer's purpose in requiring the same; that is to say, if the employer directs the making of the report for confidential transmittal to its attorney, the communication may be privileged**;*

(*Id.* at 709, emphasis added.)

Here, Mr. Shulman was more than just an independent witness on November 4, 2016. Indeed, there were other independent witnesses depicted in the footage responding who, as mere percipient witnesses, were never identified. (*See* Defendants' Motion to Strike Witness at 12:37:00.) However, Mr. Shulman, as a Venetian Table Games Supervisor, went to the scene, called his supervisor, Ms. Tonemah, contacted surveillance, contacted security, and went into the nearby restroom area to summon PAD personnel to respond. (*See* Plaintiff's Opposition to Motion to Strike Witness, Exhibit 1 at 8, ln 2-14; 10, ln 24-25; 11, ln 1-17; 41, ln 16-23; 45, ln 12-19.) Mr. Shulman testified: *"I remember **instructing** a PAD person to come over [to the scene]."* (*See id.* at 46, ln 3-6. Emphasis added.) Mr. Shulman also spoke with Plaintiff repeatedly and waited at the scene for approximately ten (10) minutes until security arrived and spoke with Plaintiff and did not leave until both PAD and security arrived. (*See id.* at 10, ln 21-23; 14, ln 10-23; 40, ln 15-25; 41, ln 1-5; 42, ln 7-17.) In fact, Mr. Shulman acted in accordance with his duties as a Venetian Table Games Supervisor by following the above procedure. (*See e.g., id.* at 48, ln 11-25; *see also* Objection Exhibit A at 6, ln 13-25; 7 ln 1-16.)

On June 28, 2018, defense counsel met with Mr. Shulman at his place of employment for Venetian, during his work shift, to discuss his recollection of events and his involvement in the subject incident. (*See* Plaintiff's Objection to Motion to Strike Witness, Exhibit 1 at 21, ln 11-23; 22, ln 1-5.) This meeting occurred approximately one (1) month prior to the filing of the Joint Case Conference Report.

Mr. Shulman was terminated on or about January 23, 2019. At his April 17, 2019 deposition, Mr. Shulman, over Defendants' objection, related that he had met privately with Plaintiff's counsel prior to the deposition and related details of his alleged conversation with defense counsel on June 28, 2018. (*See id.* at 21, ln 6-25; 22, ln 1-25; 23, ln 1-25; 24, ln 1.)

Defendants assert that the communications between its counsel and Mr. Shulman during his employment were and remain privileged. He was not just a percipient witness to the event, but actually took required action in the course and scope of his responsibilities as a Venetian Table Games Supervisor which required him to contact others for the purpose of reporting the incident, directing PAD to the scene, and remaining with Plaintiff until security arrived. Defendants further assert a privilege based on the fact that Mr. Shulman was directed to meet with defense counsel by Defendants in the course and scope of his employment, which June 28, 2018 meeting occurred on Venetian property during Mr. Shulman's shift.

By contrast, the person Plaintiff's counsel claims to have a privilege, Han Sang, was a mere percipient witness who came upon the scene, spoke with some co-workers and the Plaintiff, then left without taking any further action. Mr. Sang did not investigate further, contrary to Mr. Galliher's representation to the Discovery Commissioner at the June 26, 2019 hearing.

In Plaintiff's Opposition to Defendants' Motion to Strike Witness, she failed to refer to Nevada case law. Instead, Plaintiff ignored Nevada law and looked to cases outside the jurisdiction. For example, Plaintiff cited Samaritan Found v. Goodfarb, 862 P.2d 870, 880 (Ariz. 1993), where the

Arizona Supreme Court held that statements made by hospital staff were not subject to attorney/client privilege. (*See* Plaintiff's Opposition at 5, ln 8-9.) However, Plaintiff failed to advise the Court that the Goodfarb decision was overturned by the Arizona Legislature in 1994, which addressed these circumstances as follows:

> *A. In a civil action an attorney shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment. An attorney's paralegal, assistant, secretary, stenographer or clerk shall not, without the consent of his employer, be examined concerning any fact the knowledge of which was acquired in such capacity.*
>
> *B. For purposes of subsection A,* ***any communication is privileged between an attorney for a corporation****, governmental entity, partnership, business, association or other similar entity or an employer and any employee, agent or member of the entity or employer regarding acts or omissions of or information obtained from the employee, agent or member if the communication is either:*
>
> *1.* ***For the purpose of providing legal advice to the entity or employer*** *or to the employee, agent or member.*
>
> *2.* ***For the purpose of obtaining information in order to provide legal advice to the entity or employer*** *or to the employee, agent or member.*
>
> *C. The privilege defined in this section shall not be construed to allow the employee to be relieved of a duty to disclose the facts solely because they have been communicated to an attorney.*

(*See* Salvation Army v. Bryson, 273 P.3d 656, 661-62 (Ariz 2012) (emphasis added) (holding that a district judge abused his discretion when ordering a nonprofit corporation to disclose summaries of interviews of corporation employees prepared by an investigator at the direction of legal counsel for the corporation).

The case of Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 197 (Tex. 1993), also cited by Plaintiff in the Opposition does not apply to the present circumstances. There, a non-lawyer took statements from four employee witnesses then later turned them over to an attorney in pre-litigation. The issue there surrounded the company's usual practice of obtaining statements as opposed to specifically collecting them in anticipation of litigation. The totality of the circumstances revealed the former; hence, the court found that no privilege attached. That reasoning is not remotely applicable here.

Plaintiff also cited the Court to Keefe v. Bernard, 774 N.W.2d 663 (Iowa 2009) in her Opposition, representing that it stands for the following proposition: *"interview between corporate counsel and corporate employee about events and actions witnessed not protected by attorney-client privilege."* (*See* Objection to Motion to Strike Witness at 5, ln 15-17.) In fact, the Keefe case arises from a defense attorney improperly meeting with a plaintiff's treating physician without notice to the other party under Iowa law in the course of the litigation which meeting was memorialized by the attorney's notes. The Court held that the communications between defense counsel and the doctor were protected but for anything the doctor related which were specific facts related to his recollection as a witness. Any other communications with legal were protected. While the notes prepared by defense were considered protected as work product, the defense was ordered to produce them for *in camera* review by the court and a redacted version was produced as a sanction for violation of Iowa law related to notice of the meeting. The case does not stand for the proposition represented by Plaintiff in the Opposition.

Plaintiff also cited to Monah v. W. Pennsylvania Hosp., 44 Pa. D&C.3d 513 (Pa. Com. Pl. 1987), which relates to a written statement provided by a nurse prior to litigation, which was provided to corporate counsel. (*See* Objection to Motion to Strike Witness at 5, ln 17-18.) This case did not address the issue of whether an employee meeting with corporate counsel in the course of litigation is protected communication under the Upjohn case. There, the court held that the pre-litigation written factual statements and observations by the nurse were discoverable. Here, Defendants are not suggesting that Mr. Shulman's testimony of facts and circumstances regarding his observations of the incident is privileged, they are asserting that his alleged exchange with defense counsel on June 28, 2019 and around thereto is privileged.

Plaintiff also cited to Diversified Indus., Inc. V. Meredith, 572 F.2d 596 (8th Cir. 1977), for the proposition that attorney/client privilege applies to *"an employee's corporate duties"* and not where

*"the employee functions merely asa a fortuitous witness."* (*See* Objection to Motion to Strike Witness at 5, ln 18-21.) However, the facts of that case related to certain communications between a corporation and outside counsel which were not made in anticipation of litigation or in the course of litigation. In fact, the page cited by Plaintiff in the Opposition, 609, does not even exist and the language placed in quotes by Plaintiff likewise is not found in the case.[3]

**B. Defendants Assert that Plaintiff's Counsel Improperly Elicited Privileged Communication From Gary Shulman and Agreed to Have Him Repeat It in Deposition**

If the Court agrees that a privilege exists, then it needs to move onto the next part of the motion before the Discovery Commissioner which she did not address related to the conduct of Plaintiff's counsel and impact on the litigation.

As noted, Mr. Galliher met with Mr. Shulman prior to the deposition and not only obtained Mr. Shulman's recollection of events, but obtained details of the alleged conversation Mr. Shulman had with defense counsel on June 28, 2018. Thus, Plaintiff's counsel orchestrated events to have Mr. Shulman testify in his April 17, 2019 deposition of communications he knew Defendants would assert to be privileged by Venetian.

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[3]The dissent in the Meredith case provides the following:

> *I would adopt the Seventh Circuit approach together with modifications suggested in 2 Weinstein's Evidence P503(b) [04] (1975).* ***I would first require the corporation to show that the lawyer was acting as a legal adviser when the communication was made.*** *The mere receipt by a lawyer of a routine report would not make the communication privileged. Second,* ***I would require that the subject matter of the communication be the performance by the employee of the duties of his employment.*** *This would remove from the scope of the privilege any communication which is within the employee's knowledge solely because he happened to witness or observe an event. Third,* ***the corporation must establish that the communication was not disseminated beyond those with the need to know.*** *I think it is clear that all of the requirements are met here.*

(Meredith, *supra*, at 572 F.2d at 606. (Emphasis added.).)

Pursuant to the Rule 4.2, Nevada Rules of Professional Conduct, Plaintiff's counsel was prohibited from eliciting confidential information from Mr. Shulman regarding the June 28, 2018 meeting with defense counsel. Comment 3 the ABA Model Rule 4.2 provides in pertinent part:

> *The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.*

Comment 7 of ABA Model Rule 4.2 reads as follows:

> *In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.*

Plaintiff's counsel was free to meet with Mr. Shulman prior to his April 17, 2019 deposition. However, counsel should have immediately stopped Mr. Shulman from revealing privileged communication during that meeting. Most certainly, Plaintiff's counsel should not have orchestrated an ambush by having Mr. Shulman testify of the same on the record. It unfairly placed Venetian in the position of having to prove up Mr. Shulman's perjured testimony by crossing him with other information that is otherwise deemed confidential.

**C. <u>Mr. Shulman Should Be Stricken as a Witness</u>**

Based on the foregoing, Venetian moves this Honorable court to strike Mr. Shulman from testifying in this matter as a witness. Again, the Discovery Commissioner did not get to this portion of Defendants' motion. Therefore, Defendants move the District Court for relief. Under the circumstances, if Mr. Shulman testifies, Defendants will be forced to impeach him with information that is otherwise deemed confidential. This also puts counsel for both parties in the position of

potentially having to testify as fact witnesses in the case. Defendants would be entitled to know what details Mr. Shulman provided to Plaintiff's counsel and defense counsel would have to testify regarding direct communications with Mr. Shulman to refute some of his baseless allegations.

At a minimum, Mr. Shulman's testimony regarding his alleged communication with defense counsel should be stricken. Plaintiff's counsel has filed his testimony with the court on numerous occasions. Plaintiff even used Mr. Shulman's deposition testimony regarding the June 28, 2018 meeting with defense counsel to support her motion for leave to amend the complaint to add a claim of punitive damages. (*See* Objection Exhibit D, *Plaintiff's Reply in Support of Her Motion for Leave to Amend the Complaint*, filed May 15, 2019, at 5, ln 3-17.) In so doing, Plaintiff knowingly made false allegations that Mr. Shulman had never received a written warning in the thirteen (13) years preceding his June 28, 2018 meeting with defense counsel and that he was terminated sixty (60) days thereafter. (*See id.*) Plaintiff's allegations are belied by Mr. Shulman's own deposition testimony, where he acknowledged on direct examination by Mr. Galliher that he began having problems, including warnings for his work performance, *"around March of 2018,"* at least three (3) months before his meeting with defense counsel. (*See* Plaintiff's Objection to Motion to Strike, Exhibit 1 at 16, ln 10-16. *See also id.* at 51, ln 20-25; 52, ln 1-9 (Mr. Shulman later noting he received three (3) warnings in May 2018, more than a month preceding his initial meeting with defense counsel in this matter).) Thus, the representations of Plaintiff in her May 15, 2019 filing with the Court were wholly untrue. Such salacious misrepresentations intended to place Defendants in a bad light for the purpose of persuading the court are inexcusable.

Mr. Shulman is an agitated former employee with an ax to grind, and Plaintiff's counsel took advantage of the situation. Plaintiff has exploited it even to inflame the Court to support a motion for leave to assert a claim of punitive damages.

Plaintiff should not be rewarded for this conduct. Defendants therefore respectfully submit that

this Court enter an order striking Mr. Shulman as a witness as a sanction under the given circumstances.

## V.

## CONCLUSION

Based on the foregoing, Defendants respectfully submit that the Discovery Commissioner was in error by not recognizing that a privilege existed in regards to the June 28, 2018 communication between Mr. Shulman and defense counsel, and that relief should have been granted by way of Mr. Shulman being stricken as a witness.

DATED this 21 day of August, 2019.

**ROYAL & MILES LLP**

By _____

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

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 22 day of August, 2019, and pursuant to NRCP 5(b), I caused a true and correct copy of the foregoing **DEFENDANTS' OBJECTION TO DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS DATED AUGUST 9, 2019** 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
E-Service: kgalliher@galliherlawfirm.com
dmooney@galliherlawfirm.com
gramos@galliherlawfirm.com
sray@galliherlawfirm.com

Ashley Schmitt
An employee of ROYAL & MILES LLP

# EXHIBIT “I”

**Deposition of:**

Thomas A. Jennings

**Case:**

Joyce Sekera v. Venetian Casino Resort, LLC, d/b/a The Venetian Las Vegas, et al.
A-18-772761-C

**Date:**

07/02/2019

occur when coefficient of friction was above .50?

A. Well, I believe I've talked with counsel about that following the result of the testing, that there are multiple reasons why people lose their balance and suddenly fall.

The layperson usually attributes it to a slip when, in fact, it is everything from a misstep to a scuff slip to a change of directional slip. All produce something similar to a slip. But it wasn't due to the fact that the walking surface fell below the standard for a slip-resistant walking surface.

Q. Okay. In those cases?

A. In those cases.

Q. Let me ask you about some of the other cases you've had.

Peter Goldstein -- or is it Goldberg?

A. Goldstein.

Q. Peter Goldstein, you're presently a retained expert in a case he's handling against the Venetian?

A. Yes, sir.

Q. The plaintiff's name is Carol Smith?

A. Yes, sir.

Q. You've been deposed in that case?

A. Yes.

Q. You have done an inspection in that case?

A. Yes.
Q. And you've prepared reports in that case?
A. Yes, sir.
Q. Okay. How many times have you been retained by Peter Goldstein in any cases against the Venetian?
A. Would be the first, I believe.
Q. Okay. How many cases with Peter Goldstein total where he's retained you as an expert?
A. Two or three over a 15-year period.
Q. Okay. And do they all relate to slip-and-falls or do they have various fact scenarios?
A. Good question, and I can't honestly recall.
Q. What other attorneys have you worked with on the plaintiff side in any cases you've handled against the Venetian? Let's just keep it related to marble floors.
A. Well, that would simply be Mr. Goldstein, as I recall, and Mr. Galliher. I've only done the two on that.
Q. Okay. So you've done two -- so you've been retained as an expert for the plaintiff in two cases against the Venetian related to slip-and-falls on marble floors?
A. Best of my recollection, that's correct.
Q. Okay. And you don't recall being retained by

A. Correct.

Q. Now, you did test it at .40 at least one direction; correct?

A. Correct.

Q. And according to the study that we just reviewed, in the 1983 study, .40 would have been -- at least they determined to be adequate; correct?

A. Under controlled conditions.

Q. Got it. Okay.

Now, let me ask you about the Smith case.

Where did the slip-and-fall occur in Smith, because I'm not actually familiar with that?

The Carol Smith case versus Venetian.

A. Oh, I believe it was over by the escalator to the right -- you know the escalator where you come down from the upper level?

Q. Yes.

Well, is this from the parking garage?

A. Yes.

Q. Okay. So I'm going to ask you a few landmarks.

Do you know where the JuiceFarm is, the Bouchon Bakery?

A. You're testing my memory. I don't pay attention to the occupancy by name.

Q. The reason I ask is because you make reference

to -- on page 3 of your report, you say, "Food courts, cafés, coffee bars, and other operations" --

A. Right.

Q. -- "that dispense beverages."

I'm wondering, did you observe that or were you told that information?

A. No, no, no. I've observed that. I've been to that property multiple times. I can't tell you the names of all those.

Q. Okay. All right. I got it.

You just say this happened -- the Carol Smith slip-and-fall you say happened somewhere around the base of the escalator that comes down from the parking garage escalator in the Venetian?

A. If you went down to the base of the escalator and turned right and then you walked a little bit towards the -- they have, like, a coffee bar that sits sort of behind the escalator, then there's, like, a little general store at the back, it would be right in that general vicinity as I recall the location.

Q. There's a shoe shine place there.

Do you remember that?

A. I do.

Q. Is that -- was it near the shoe shine place?

A. Near, but near to me is...

Q. Okay. Is it between the shoe shine place and the entry to the gift shop?

A. Approximately. That's close.

Q. Okay. So this would be maybe -- would it be, like, 100 feet or so away from the slip-and-fall that occurred in the Sekera case?

A. It's reasonable. Close.

Q. So the Smith case did not happen in the Grand Lux rotunda?

A. The same area where we're here today?

Q. Right.

A. No.

Q. Now, my understanding is when you did the dry test of the Smith case, it was .90 coefficient of friction?

A. Correct.

Q. When you did the wet test, it was .40 coefficient of friction?

A. Correct.

Q. Okay. And any explanation as to why it would be different -- your testing would be different in the Smith case versus the Sekera case?

A. Well --

MR. KUNZ: Speculation.

Go ahead.

THE WITNESS: From an engineering standpoint, sure, there's possibilities that can explain that. Mostly it would be: Is this area more transited by pedestrian traffic than the Sekera incident? Was the floor application put on by Venetian at the same level in that case as in this case?

So, yeah, there's multiple possibilities as to why you would have a discrepancy between 0.4 and 0.33. Frankly, it's not that far off.

BY MR. ROYAL:

Q. Okay. Now, you talk about floor applications, and you make mention of that on page 2 of your initial report?

A. Yes.

Q. You don't identify the floor applications specifically.

What floor applications are you talking about?

A. There are a number of commercial products by the dozen that can be applied to any walking surface that will increase the slip resistance level to 0.5 or higher. And depending on the product, it will retain that level even with a heavy volume of pedestrian traffic. It depends on the volume of traffic, it depends on the surface to which it's being applied, but there are those products out there. There's numbers of

A. It tells us that the English XL Tribometer, or the XL Tribometer as it's called, is a recognized valid instrument for slip resistance testing.

Q. I looked at that and maybe I missed it. I didn't see that particular equipment identified specifically there.

Is it or is it just about calibration?

A. No, no, no. F2508-11 is about the validation of variable instrument tribometers as an objective testing instrument for slip resistance. There's a history behind all of that, which I think you're probably aware of that.

Q. I wanted to ask you about -- can you just tell me, what's the DCOF versus the SCOF?

A. DCOF is the dynamic coefficient of friction and SCOF is the static coefficient of friction. The difference between the two is static coefficient of friction is the amount of force necessary to incipiate [sic] motion across the surface.

A dynamic coefficient of friction is the amount of force necessary to continue motion across the surface. Quite different.

Q. Okay. Which one applies here?

A. Static coefficient of friction.

Q. And explain why that is.

A. Because most heels slip first, simply cases of a walking surface not having the appropriate level of slip resistance to prevent a sudden slip.

And dynamic friction slip-and-falls would mean that you're on a sheet of ice and you're sort of skating across and you ultimately lose your balance and fall.

All studies that I have reviewed and all lectures I've attended through every engineering course at every school, static coefficient of friction is the primary -- in fact, 90-some percent cause of slips and falls, not dynamic friction.

Q. I'm just looking at an article from 2008 that makes reference to the dynamic coefficient of friction with a -- they have a wet value of .42 or greater coefficient of friction.

What would that relate to?

A. To me, that is a dynamic friction level. How they got it, what they used, how many tests did they provide, what was the surface, you really can't compare dynamic coefficient of friction and static coefficient of friction mathematically or in terms of reliability in predicting slip-and-fall events. They are two completely different physical efforts.

Q. Are you aware of the .42 coefficient of friction recommended level for flooring related to the

dynamic coefficient of friction that's been -- they make reference to a 2014 --

A. Yes. I have seen multiple articles like that, but, again, that presumes that someone is sliding across the floor and then proceeds to slip. No relation to static friction.

Q. Okay. All right. Let's go to the last page of your May 30th, 2019, report. Look at the last paragraph.

A. Yes, sir.

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

Did I read that correctly?

A. You did.

Q. What information are you drawing from?

A. I'm drawing from -- and this is post-December report. And everything that I base my initial opinions and conclusions are based on the materials sent to me at that time.

When I prepared this report, I was provided by Mr. Galliher's office a spreadsheet, a run sheet of

slip-and-fall events within that referenced time period at that same approximate area as Plaintiff's slip-and-fall.

Q. Did you bring that with you today?

A. I don't believe so. It was sent to me via an e-mail.

Q. Okay. If you relied on that, why didn't you make reference to that document, that information at the outset of your report of May 30th, 2019?

A. Just seemed the appropriate place to put it was at the end of the report.

Q. I mean, this is a rebuttal report.

A. Yes.

Q. And so as a rebuttal report, it is intended to rebut, as you're understanding --

A. Yes.

Q. -- opinions provided by Dr. Hayes; correct?

A. Yes.

Q. This information of 196 slip-and-fall events was not provided in Dr. Hayes' initial report; correct? That's not where you got the information?

A. Correct. That is true.

Q. This is additional information that you received from Mr. Galliher; correct?

A. Yes, sir.

Q. You didn't look at the actual reports, you just saw a spreadsheet?

A. Correct.

Q. Is that a spreadsheet that you can produce? You can produce it, right, after this deposition today?

A. If it has not auto-erased itself, yes, sir, I can do that.

Q. Okay. I'm going to ask you to do that --

A. Okay.

Q. -- since it's referenced in your report.

A. Sure.

Q. You make the comment here, "same approximate area."

A. Yes, sir.

Q. What are you talking about? What area? Is it the whole property or is it just in the Grand Lux rotunda? Where is it?

A. Within the Grand Lux area, based on what I reviewed in the details of each recorded incident.

Q. So you're -- I'm sorry. You say, "The details of each recorded incident."

Tell me what the spreadsheet looks like.

A. Well, a spreadsheet is a typical spreadsheet. It starts at a certain date and month, year. It specifies a location. It shows a slip-and-fall and it

just continues on like that within that same general location. That's how it was arranged as a spreadsheet.

Q. Okay. So did it identify people by name?

A. That, I don't recall. I think it was more event oriented, but it could have.

Q. Would it have included Lobby 1, Lobby 2, Lobby 3, that kind of information?

A. Yes, sir, I believe it did.

Q. Would it have included areas like the Grand Hall, the front desk, the porte-cochère?

A. No. It was simply addressed to the marble flooring, and as I recall, the vast majority were in the same general areas as Plaintiff's fall. I would have to pull the spreadsheet out to refresh my memory.

Q. Would you consider the Carol Smith fall to be in the same general area as Plaintiff's fall?

A. Yes, sir.

Q. So in your opinion, at least, based on your testimony, so I understand, when you say "same approximate area," the area where Carol Smith fell would be within this Grand Lux rotunda area?

A. Yes, sir.

Q. Okay. So you're saying, then, as I understand it, you received information from Mr. Galliher that there were 196 slip-and-fall events between January 1st,

2012, and August 5th, 2016, occurring in the vicinity of the Grand Lux rotunda?

A. Essentially that's correct, yes, sir.

Q. Okay. So I'm clear, do you know where the Grand Hall is, the entryway to the property?

A. To the property, yes, sir.

Q. So when you enter the property, there's a fountain, there's the front desk --

A. Yes, sir.

Q. -- there's a concierge desk to the right, and then if you go to the left as you enter, there's a huge grand hall with paintings on the ceiling.

A. There is, sir.

Q. Right?

A. Yep.

Q. All right. So when you say "same approximate area," if there were slip-and-falls there, they would be separate from the 196 slip-and-falls.

Would that be right?

A. I believe that's accurate.

Q. And if somebody slipped and fell somewhere in the front desk area, that would not be part of this 196 --

A. I believe --

Q. -- number?

A. I believe that's accurate, yes, sir.
Q. And if somebody slipped and fell at the Palazzo on a marble floor, that's not part of the 196?
A. That would be correct.
Q. And if somebody slipped and fell at a convention area on a marble floor, that would not be part of the 196?
A. As I recall. I'm going back on memory reading line after line. I believe that would be correct.
Q. Okay. Did you ask Mr. Galliher where he got this information?
A. No, sir. He said it was just provided to him under discovery and that was it.
Q. Okay. Are they numbered 1 through 96?
A. No. They're by date. I think I testified to that to start with. You have to start out with the date and then work your way out.
Q. Did you count them?
A. Yes, I did.
Q. Okay. So this is something you counted?
A. Yes, sir.
Q. All right. And did you see -- did you notice that all of these 196 slip-and-fall events, did they occur due to foreign substances on the floor?
A. Mostly that was the case, yes, sir. As I

recall, they were all due to liquid contaminants.

Q. Okay. No trip-and-falls, nobody fainting, no drunks, you know, swaying and falling to the floor that you can recall?

A. No, sir.

Q. And that's something that if you still have it, you will produce?

A. Yes, sir.

Q. When is the last time that you looked at that?

A. It would have been about a month ago prior to preparing the rebuttal report.

Q. All right. So you would have received it, what, about five to six weeks ago?

A. That's fair.

Q. Okay. Why would you think it would be erased?

A. Well, I have an auto-erase on my computer that after a certain period of time, the e-mails are discarded.

Q. What's it set for?

A. Usually 30 days.

Q. Okay. Is there any other information that Mr. Galliher's provided you with that you think may have been erased by your auto-erase?

A. No, sir.

Q. Is there any other information that you've been

# EXHIBIT “J”

**In the Matter Of:**

LIVIA FARINA vs DESERT PALACE, INC.

A542232

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**DAVID A. ELLIOTT, P.E.**

*February 13, 2009*

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foreseeable conditions are there.

Q. How about ANSI? First of all, the 0.6, is that a recommendation in ANSI or a requirement?

A. They don't mention .6 at all in ANSI.

Q. So they don't even have a measurement, a required measurement, for the friction rating?

A. No, sir. It just has to be slip resistant under the foreseeable conditions.

Q. And is there anything in ANSI that you believe mandates that the floor pass a wet test at 0.5 as opposed to a dry test?

MR. ZIMMERMAN: This is the floor in the vestibule?

BY MR. McGRATH:

Q. Any marble flooring in a public accomodation.

A. You know, I think we're just beating a dead horse here. I understand the definition of slip resistance, and what is slip resistant.

Being a pedestrian safety professional, I can tell you exactly what number, in my opinion, and the same opinion of everybody else that does this, is slip resistant.

It wouldn't do you any good to test a floor dry, because I can already tell you it's going to

be slip resistant when it's dry, but it's not going to do you any good, again, to take that same floor and run sprinklers on it all the time and tell people to walk across it, because we tested it dry. It makes no sense.

Q. Have you ever tested marble flooring in a casino in the Las Vegas area using the wet test where the marble flooring passed the 0.6 standard?

A. Never.

Q. How about the 0.5 standard?

A. No, sir. Marble is a horrible choice.

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

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

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

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

Q. But it's not marble flooring?

A. No, it's not marble flooring.

Q. Is it tile?

A. It's a ceramic tile.

Q. Any other properties that you can give me a specific example of where they don't use marble?

A. Well, no pool deck uses marble, obviously, and sidewalks accessing pool decks are concrete, and they usually have a very rough surface on them.

Whenever I've had a client that has had marble in their casino and I'm working for the defense, I've just told them that "Hey, this is slippery when it's wet. You shouldn't be using it. If you want to continue using it, you got to take certain things into account. You have to take other preventive measures to prevent slipping."

And sometimes they're receptive to those ideas and sometimes they're not. These are just my opinions as a pedestrian safety consultant.

Q. What are you assuming in terms of how far in terms of feet the plaintiff slipped -- withdraw the question.

I'm trying to ask you about the location of the slip-and-fall incident. How far into the property past the entrance door are you assuming that it occurred?

A. Well, if I remember right, the depth of that vestibule is about 12 feet, and it looks like she's maybe halfway, maybe a hair over halfway, so

Sean K. Claggett, Esq.
Nevada Bar No. 008407
William T. Sykes, Esq.
Nevada Bar No. 009916
Geordan G. Logan, Esq.
Nevada Bar No. 013910
CLAGGETT & SYKES LAW FIRM
4101 Meadows Lane, Suite 100
Las Vegas, Nevada 89107
(702) 655-2346 – Telephone
(702) 655-3763 – Facsimile
sclaggett@claggettlaw.com
wsykes@claggettlaw.com
glogan@claggettlaw.com

Keith E. Galliher, Jr., Esq.
Nevada Bar No. 220
Jeffrey L. Galliher, Esq.
Nevada Bar No. 8078
Kathleen H. Gallagher, Esq.
Nevada Bar No. 15043
THE GALLIHER LAW FIRM
1850 East Sahara Avenue, Suite 107
Las Vegas, Nevada 89104
(702) 735-0049 – Telephone
(702) 735-0204 – Facsimile
*Attorneys for Plaintiff*

DISTRICT COURT

CLARK COUNTY, NEVADA

| | |
|---|---|
| JOYCE SEKERA, an Individual,<br><br>Plaintiff,<br><br>v.<br><br>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,<br><br>Defendants. | CASE NO.: A-18-772761-C<br><br>DEPT. NO.: XXV<br><br>**Hearing Requested**<br><br>**PLAINTIFF'S RESPONSE TO DEFENDANT'S LIMITED OBJECTION TO DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS DATED DECEMBER 2, 2019** |

Pursuant to NRCP 16.3, Plaintiff JOYCE SEKERA submits her Response to Defendant's Limited Objection to Discovery Commissioner's Report and Recommendations from December 2, 2019.

DATED this 23rd day of December 2019.

CLAGGETT & SYKES LAW FIRM

*/s/ Geordan G. Logan*
Sean K. Claggett, Esq.
Nevada Bar No. 008407
William T. Sykes, Esq.
Nevada Bar No. 009916
Geordan G. Logan, Esq.
Nevada Bar No. 013910
4101 Meadows Lane, Suite 100
Las Vegas, Nevada 89107
(702) 655-2346 – Telephone

Keith E. Galliher, Jr., Esq.
Nevada Bar No. 220
Jeffrey L. Galliher, Esq.
Nevada Bar No. 8078
Kathleen H. Gallagher, Esq.
Nevada Bar No. 15043
THE GALLIHER LAW FIRM
1850 East Sahara Avenue, Suite 107
Las Vegas, Nevada 89104
(702) 735-0049 – Telephone
(702) 735-0204 – Facsimile
*Attorneys for Plaintiffs*

## MEMORANDUM OF POINTS AND AUTHORITIES

### I.

### INTRODUCTION

On August 5, 2019, Plaintiff filed a Motion to Compel Testimony and Documents, and on the same day, Defendants filed a Motion for Protective Order as to Plaintiff's Request for Production of Incident Reports from May 1999 to Present. The Discovery Commissioner heard these matters on September 18, 2019. On December 16, 2019, both Plaintiff and Defendant filed objections in response to the Discovery Commissioner's recommendations regarding discoverable material. Defendant made

two objections to the Discovery Commissioner's recommendations. Defendant objects to producing records of prior similar incidents outside of the Grand Lux Rotunda and also objects to producing records of similar incidents from the date of the subject incident forward to the present.

It should be noted that Plaintiff's Objection to Discovery Commissioner's Report and Recommendations Dated December 2, 2019 was filed on December 16, 2019, and the arguments presented there are fully incorporated in Plaintiff's Response to Defendant's Limited Objection to Discovery Commissioner's Report and Recommendations Dated December 2, 2019.

**II.**

**LEGAL ARGUMENT**

Plaintiff opposes Venetian's objection in its entirety. Venetian's reluctance to produce documents is little more than a calculated attempt to frustrate the Plaintiff and subvert this Court. Generally, a party "may obtain discovery regarding any . . . matter that is relevant to any party's claims or defenses and proportional to the needs of the case."[1] The Nevada rule on scope of discovery is modeled after the Federal rule, and federal interpretations are considered strongly persuasive.[2] Documents may be considered relevant for discovery purposes even if they will be inadmissible as not relevant for evidentiary purposes.[3]

Accordingly, Plaintiff argues that Venetian should produce reports of all similar incidents occurring on all marble flooring in public areas of the Venetian's premises. The marble flooring extends well beyond the arbitrarily defined borders encircling the Grand Lux Rotunda, and the marble on one side of the border does not lose its dangerous nature simply by virtue of its location. Furthermore, the extent of Venetian's knowledge as to the dangerous quality of its marble floors arises from its experiences with the marble flooring throughout the Venetian. This extensive knowledge is central to this case. What is more, reports should be produced up to the present because Plaintiff alleges that the floors are a dangerous condition.

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[1] NRCP 26(b)(1).

[2] See Fed. R. Civ. P. 26(b)(1); Exec. Mgmt. v. Ticor Title Ins. Co., 118 Nev. 46, 53, 38 P.3d 872, 876 (2002).

[3] Renfrow v. Redwood Fire & Cas. Ins. Co., 288 F.R.D. 514, 521 (D. Nev. 2013).

**A. DEFENDANT'S PRODUCTION OF INCIDENT REPORTS MUST NOT BE CONFINED TO THE GRAND LUX ROTUNDA BECAUSE THE ADDITIONAL REPORTS ESTABLISH DEFENDANT'S FULL KNOWLEDGE OF THE DANGEROUS CONDITION OF ITS MARBLE FLOORING.**

Venetian cites Eldorado Club, Inc. v. Graff for the proposition that requesting prior incidents in areas outside of the Grand Lux Rotunda is "overly broad and unnecessary."[4] Venetian misconstrues the holding in Eldorado Club. The issue there was whether it was an error to allow testimonial evidence at trial.[5] Furthermore, the hazard in Eldorado Club was the uncommon presence of a lettuce leaf on a loading ramp.[6] Here, Plaintiff alleges the hazard is a marble floor which becomes unreasonably and unnecessarily dangerous when it is wet, and as a result, people routinely slip and fall and injure themselves on the wet marble floor. Yet, even knowing of this dangerous condition, the Venetian persists in maintaining its marble floors in the same manner that it always has—indifferent to the floor's dangerous nature. It is Plaintiff's position that a reasonable property owner would either put in place policies and procedures to eliminate the hazard or change the floors so that they would be safe for the foreseeable capacity and type of traffic consistently navigating the property.

Plaintiff needs access to incident reports beyond the narrowly defined area of the Grand Lux Rotunda because the full extent of Venetian's knowledge of the dangerous condition of its polished marble flooring is a central issue in this case. Plaintiff needs incident reports of the slip and fall incidents which occurred on all marble floors in Venetian's public areas because Plaintiff needs to know what level of notice Venetian had with regard to the dangerous nature of its marble flooring. By limiting discovery to only one narrow area of the casino, the extent of Venetian's knowledge of its dangerous marble flooring would be confined to an illogical area near the subject incident. This arbitrary boundary presumes marble flooring within the boundary has dissimilar properties when wet than marble flooring outside the boundary. Consequently, this arbitrary boundary does not allow Plaintiff or the court to consider the full extent to which Venetian was aware of the danger created by either its choice of flooring or its policies and procedures to maintain the marble floors.

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[4] Def.'s Objection, p. 11:2–8.

[5] Eldorado Club v. Graff, 78 Nev. 507, 509, 377 P.2d 174, 175 (1962).

[6] Id.

Therefore, given the strong public policy of this State,[7] the Ninth Circuit,[8] and the United States Supreme Court[9] to hear cases on their merits, this Court should compel production of records of similar incidents occurring on the Venetian's premises in public areas with marble flooring.

**B. DEFENDANT'S PRODUCTIONS MUST EXTEND TO THE PRESENT BECAUSE PLAINTIFF ALLEGES THAT THE MARBLE FLOORS ARE A DANGEROUS CONDITION.**

Plaintiff should have access to incident reports through the present because Plaintiff alleges that the polished marble floors at Venetian are a dangerous condition. The Nevada Supreme Court has held that evidence of subsequent similar incidents may be admissible in premise liability cases when that evidence shows the existence of a dangerous defective condition.[10] While past incident reports establish a property owner's knowledge of the hazard, subsequent incidents can be used to show the existence of a defective and dangerous condition.[11] Plaintiff alleges that the marble flooring at Venetian presents a dangerous condition. She will need subsequent similar incidents to prove the extent and nature of the dangerous condition.

In its objection, Venetian makes a point of emphasizing Plaintiff's status as a "pseudo-employee" who walked the area "many hundreds of times without incident" until the day she slipped and fell on the wet marble floor.[12] Venetian seemingly argues that Plaintiff's good luck in not having previously encountered a slick marble floor at the Venetian somehow demonstrates that Venetian's marble flooring is not a hazard. The subsequent incident reports for the slip and falls occurring on the marble flooring in Venetian's public areas will likely refute Venetian's claim that one person's good

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[7] See, e.g., Yochum v. Davis, 98 Nev. 484, 487, 653 P.2d 1215, 1217 (1982) (noting the strong public policy favoring resolution of disputes on their merits).

[8] See, e.g., Allen v. Bayer Corp., 460 F.3d 1217, 1248 (9th Cir. Wash. 2006) (recognizing the public policy in favor of deciding disputes on the merits).

[9] See, e.g., Foman v. Davis, 371 U.S. 178, 181–82 (1962) (stating that it is "entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of mere technicalities").

[10] Reingold v. Wet 'n Wild Nev., Inc., 113 Nev. 967, 969–70, 944 P.2d 800, 802 (1997) *overruled on other grounds by* Bass-Davis v. Davis, 122 Nev. 442, 454, 134 P.3d 103, 110 (2006).

[11] Id. (citing Ginnis v. Mapes Hotel Corp., 86 Nev. 408, 415, 470 P.2d 135, 139 (1970)).

[12] Def.'s Objection, p. 7:12–18.

luck in traversing Venetian's marble floor without injury establishes that the Venetian's marble flooring is not dangerous.

Furthermore, the scope of discovery in Nevada is broader than the standard for admissibility at trial.[13] Therefore the production of subsequent incident reports recommended by the Discovery Commissioner is reasonable and likely to produce admissible evidence to the extent that it shows the dangerous condition of the marble flooring at Venetian.

## III.

## CONCLUSION

Based upon the foregoing, Plaintiff requests that the Court deny Defendant's Limited Objection to Discovery Commissioner's Report and Recommendations.

DATED THIS 23rd day of December 2019.

CLAGGETT & SYKES LAW FIRM

*/s/ Geordan G. Logan*
Sean K. Claggett, Esq.
Nevada Bar No. 008407
William T. Sykes, Esq.
Nevada Bar No. 009916
Geordan G. Logan, Esq.
Nevada Bar No. 013910
4101 Meadows Lane, Suite 100
Las Vegas, Nevada 89107
(702) 655-2346 – Telephone

Keith E. Galliher, Jr., Esq.
Nevada Bar No. 220
Kathleen H. Gallagher, Esq.
Nevada Bar No. 15043
THE GALLIHER LAW FIRM
1850 East Sahara Avenue, Suite 107
Las Vegas, Nevada 89104
(702) 735-0049 – Telephone
*Attorneys for Plaintiffs*

[13] Renfrow v. Redwood Fire & Cas. Ins. Co., 288 F.R.D. 514, 521 (D. Nev. 2013).

**CERTIFICATE OF SERVICE**

I hereby certify that on the 23rd day of December 2019, I caused a true and correct copy of the foregoing **PLAINTIFF'S RESPONSE TO DEFENDANT'S LIMITED OBJECTION TO DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS DATED DECEMBER 2, 2019** on the following person(s) by the following method(s) pursuant to NRCP 5(b):

***Via E-Service***
Michael A. Royal, Esq.
Gregory A. Miles, Esq.
Royal & Miles LLP
1522 W. Warm Springs Road
Henderson, Nevada 89014
*Attorney for Defendants*

CLAGGETT & SYKES LAW FIRM

/s/ *Maria Alvarez*
An Employee of CLAGGETT & SYKES LAW FIRM

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@royalmileslaw.com
*Attorneys for Defendants*
*VENETIAN CASINO RESORT, LLC and*
*LAS VEGAS SANDS, LLC*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

JOYCE SEKERA, an Individual;

Plaintiff,

v.

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

Defendants.

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

DEPARTMENT XXV
NOTICE OF HEARING
DATE 1/21/20 TIME 9:00 AM
APPROVED BY JG

Hearing Date: September 18, 2019
Hearing Time: 9:00 a.m.

**ORDER**

The Court, having reviewed the above report and recommendations prepared by the Discovery Commissioner and,

_____ No timely objection having been filed,

✓ink _____ After reviewing the objections to the Report and Recommendations and good cause appearing,

* * *

AND

_____ IT IS HEREBY ORDERED the Discovery Commissioner's Report and Recommendations are affirmed and adopted.

_____ IT IS HEREBY ORDERED the Discovery Commissioner's Report and Recommendations are affirmed and adopted as modified in the following manner. (attached hereto)

_____ IT IS HEREBY ORDERED this matter is remanded to the Discovery Commissioner for reconsideration or further action.

✓ IT IS HEREBY ORDERED that a hearing on the Discovery Commissioner's Report is set for January 21, 2020 at 9:00 a.m.

DATED this 27th day of Dec., 2019.

DISTRICT COURT JUDGE

**DCRR**
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@royalmileslaw.com
*Attorneys for Defendants*
*VENETIAN CASINO RESORT, LLC and*
*LAS VEGAS SANDS, LLC*

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

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| JOYCE SEKERA, an Individual;<br><br>Plaintiff,<br><br>v.<br><br>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,<br><br>Defendants. | CASE NO.: A-18-772761-C<br>DEPT. NO.: XXV |

**DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATION**

Date of Hearing: September 18, 2019
Time of Hearing: 9:00 a.m.

Appearance: Keith E. Galliher, Jr., Esq., for Plaintiff, JOYCE SEKERA

Michael A. Royal, Esq., Royal & Miles LLP, for Defendants VENETIAN CASINO RESORT, LLC and LAS VEGAS SANDS, LLC (collectively "*Venetian*)

I.

**PROCEDURAL HISTORY**

1. Venetian filed DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S SUBPOENA DUCES TECUM IMPROPERLY SERVED PURSUANT TO NRCP 45(A)(4)(A) AND MOTION FOR PROTECTIVE ORDER UNDER NRCP 26(c) RELATED TO PLAINTIFF'S DEMAND DEPOSITION AND DOCUMENTS FROM DEFENDANTS UNDER NRCP NRCP 30(B)6) AND NRCP 34 AND MOTION TO COMPEL PLAINTIFF TO PRODUCE ALL EVIDENCE OF PRIOR INCIDENTS AT VENETIAN NOT RECEIVED FROM DEFENDANTS IN THIS LITIGATION on August 5, 2019.

2. Plaintiff filed PLAINTIFF'S MOTION TO COMPEL TESTIMONY AND DOCUMENTS on August 5, 2019.

3. Venetian and Plaintiff filed oppositions which included countermotions for sanctions; the Discovery Commissioner refused to consider the countermotions pursuant to EDCR 2.20(f) as being insufficiently related to the subject matter of the pending motions.

II.

**FINDINGS**

1. Plaintiff claims to have fallen on Venetian premises on November 4, 2016 due to a temporary transitory condition which caused her to slip.

2. On January 4, 2019, Venetian produced to Plaintiff copies of sixty-four (64) prior incident reports from November 4, 2013 to November 4, 2016, redacted by Venetian to protect the identification of non-employees, responsive to Plaintiff's Production Request No. 7 requesting other incident reports on the Venetian property from November 4, 2011 to the present. (Venetian objected to producing incident reports occurring subsequent to the November 4, 2016 incident.)

3. On February 1, 2019, Venetian filed a motion for protective order as to the redacted prior incident reports produced on January 4, 2019, which was granted by the Discovery Commissioner in a Report and Recommendation filed April 4, 2019, with reports to remain redacted and to be protected under NRCP 26(c).

4. The District Court entered an order reversing the Discovery Commissioner's Report and Recommendation of April 4, 2019 in an order filed July 31, 2019, directing Venetian to provide Plaintiff with unredacted copies of all prior incident reports, with no protections requested by Venetian under NRCP 26(c). Venetian filed a motion for reconsideration, heard on September 17, 2019, which Judge Delaney denied.

5. The District Court's ruling related to Venetian's request for protection under NRCP 26(c) is the law of the case; therefore, no relief requested related to the protection of Venetian prior incident reports can be further considered by the Discovery Commissioner in this matter.

6. Plaintiff was granted leave by the District Court to file a First Amended Complaint to add a claim of punitive damages, which was filed on June 28, 2019.

7. Venetian filed a motion for protective order and Plaintiff filed a motion to compel on August 5, 2019 regarding Plaintiff's request for the production of certain information and documents from May 1999 to the present.

8. On May 31, 2019, Plaintiff served her sixth request for production with the following requests:

> REQUEST NO. 23: True and correct copies of any and all reports, documents, memoranda, or other information describing or referring to slip testing performed on the marble floors at the Venetian Hotel and Casino by any Plaintiff, or the Venetian, from January 1, 2000 to date.
>
> REQUEST NO. 24: Any and all communications, including correspondence, emails, internal communication, or other memoranda which refers to the safety of marble floors located within the Venetian Hotel and Casino from January 1, 2000 to date.

REQUEST NO. 25: Any and all transcripts, minutes, notes, emails, or correspondence which has as a subject matter, any meetings held by and between Venetian personnel, including management personnel, where the subject of the safety of the marble floors at the Venetian was discussed and evaluated from January 1, 2000 to date.

REQUEST NO. 26: Any and all correspondence, emails, memoranda, internal office correspondence, or other documents directed to the Venetian from a Contractor, Subcontractor, Flooring Expert, or similar entity which discusses or refers to the safety of marble floors located within the Venetian Hotel and Casino from January 1, 2000 to date.

REQUEST NO. 29: Any and all complaints submitted by guests or other individuals regarding safety of the marble floors.

REQUEST NO. 30: Any and all quotes and estimates and correspondence regarding quotes and estimates relating to the modification of the marble floors to increase their slip resistance.

9. On June 20, 2019, Plaintiff served Plaintiff's First Set of Interrogatories to Defendants with the following request:

INTERROGATORY NO. 1: Please identify by Plaintiffs name, case number and date of filing all complaints filed against the Venetian Casino Resort, LLC d/b/a The Venetian Las Vegas and/or Las Vegas Sands, LLC d/b/a The Venetian Las Vegas in the Clark County District Court for any and all slip and fall and/or trip and fall incidents occurring on marble flooring anywhere within The Venetian Casino Resort, LCC d/b/a The Venetian Las Vegas and/or Las Vegas Sands, LLC d/b/a The Venetian Las Vegas from January 1, 2000 to the present.

10. On July 17, 2019, Plaintiff served Plaintiff's Ninth Request for Production of Documents and Materials to Venetian. Request No. 35 sought the following production from Venetian:

REQUEST NO. 35: True and correct copies of any and all claim forms, legal actions, civil complaints, statements, security reports, computer generated lists, investigative documents or other memoranda which have, as its subject matter, slip and fall cases occurring on marble floors within the subject VENETIAN CASINO RESORT from the May 3, 1999 to the present.

11. On July 19, 2019, Plaintiff served Plaintiff's Tenth Request for Production of Documents and Materials to Defendant with the following request:

REQUEST NO. 36: True and correct copies of any and all entries and information contained in the Venetian's Alliance System regarding injury falls on marble flooring within the Venetian Las Vegas from January 1, 2000 to present.

12. On July 22, 2019, Plaintiff served Plaintiff's Second Set of Interrogatories to Defendants which reads as follows:

INTERROGATORY NO. 2: Please identify names, addresses and phone numbers of any and all individuals designated as safety engineers who perform(ed) accident checks at the Venetian from the year 2000 to the present.

13. On July 29, 2019, Plaintiff served Plaintiff's Eleventh Request for Production of Documents and Materials to Defendant with the following request.

REQUEST NO. 37: Any and all quotes, estimates, correspondence, emails, memorandums, minutes, file notes and/or other documentation related to Venetian's decision to remove and replace the carpet with marble flooring and Venetian's removal and replacement of carpet with marble flooring as referenced by Christina Tonemah in her deposition. (25: 9-26: 26; 1-6)

14. On July 30, 2019, Plaintiff served notice of an NRCP 30(b)(6) deposition under NRCP 45 issuance of a subpoena with eighteen (18) topics, as follows.

1) Total number of injury falls on marble floors located within The Venetian Las Vegas from November 4, 2013 to present.

2) Actions taken by The Venetian Las Vegas to change the coefficient of friction with respect to the marble floors within The Venetian Las Vegas from November 4, 2013 to present.

3) Measures taken to locate and produce security/incident injury fall reports by The Venetian Las Vegas as requested by Plaintiff in this Litigation.

4) Slip testing performed by The Venetian Las Vegas or it's representatives with respect to the marble floors within The Venetian Las Vegas from November 4, 2013 to present.

5) Any invoices or work orders with respect to the removal of carpet in pedestrian walkways and replaced with marble and/or granite flooring from November 4, 2006 to present.

6) The identity of all employees who were responsible for managing and maintaining Venetian's technology infrastructure.

7) The name, address and phone number of the specific employee(s) tasked with retrieving incident reports from Venetian's system for this litigation, the litigation in Smith v. Venetian (A-17-753362-C), Cohen v. Venetian (A-17-761036-C) and Boucher v. Venetian (A-18-773651-C) and the name address and phone number of the individual who assigned them this task.

8) The identity of all non-employee consultants, consulting firms, contractors or similar entities that were responsible for managing and maintaining Venetian's technology infrastructure.

9) Software used, including dates they were in use and any software modifications.

10) Identity of, description of and policies and procedures for the use of all internal systems for data management, complaint and report making, note keeping, minute/transcript taking and employee e-mail, messaging and other communication systems and description of all employee accounts for said systems.

11) Description of all cell phones, PDAs, digital convergence devices or other portable electronic devices and who they were/are issued to.

12) Physical location of electronic information and hard files and description of what information is kept in electronic form and what is kept in hard files.

13) Description of policies and procedures for performing back-ups.

14) Inventory of back-ups and when they were created.

15) User permissions for accessing, modifying, and deleting data.

16) Utilization of data deletion programs.

17) A listing of current and former personnel who have or had access to network resources, technology assets, back-up, and other systems operations.

18) Electronic records management policies and procedures.

15. Venetian sought relief from the scope of discovery requested by Plaintiff, contending that it was overbroad and unwarranted in a slip and fall case arising from a temporary transitory condition. Venetian further asserted that Plaintiff is not entitled to any incident reports occurring after November 4, 2016 based on the facts plead by Plaintiff in the Complaint and further as evidenced by Plaintiff's testimony, and the testimony of her experts and eyewitness at the scene, all of whom opined that Plaintiff slipped and fell due to a foreign substance on the marble floor. Therefore, Venetian moved for protection.

16. Venetian also moved to compel the production of all incident reports and information related to incident reports obtained by Plaintiff from any source, including but not limited to those produced to expert Thomas Jennings supporting his May 30, 2019 report, which documents were not produced to Venetian by Plaintiff prior to the time of Mr. Jennings' deposition taken July 2, 2019. Venetian further moved for an order compelling Mr. Jennings to appear again for deposition at Plaintiff's cost.

17. Plaintiff argued in her motion to compel that she is entitled to the broad scope of discovery requested because it is necessary to prove up her punitive damages claim allowed by the District Court and therefore moved to compel Venetian to produce the information at issue.

18. The parties also filed countermotions for sanctions which the Discovery Commissioner refused to hear pursuant to EDCR 2.20(f).

After reviewing the papers and pleadings on file, and consideration of arguments presented by counsel for the parties, the following recommendations are made.

## III.

## RECOMMENDATIONS

IT IS RECOMMENDED that the pending motions and countermotions filed by Plaintiff and Venetian (other than those not adjudicated pursuant to EDCR 2.20(f)), are GRANTED IN PART and DENIED IN PART as set forth specifically herein below.

IT IS FURTHER RECOMMENDED that, regarding Plaintiff's Production Request Nos. 7, 24, 29, 35, and 36, Interrogatory Nos. 1, 2, and NRCP 30(b)(6) Topic 1, based on Plaintiff's pending claim for punitive damages claim arising from the operative facts of a slip and fall on a liquid substance, in accordance with Judge Delaney's July 31, 2019 order, Venetian be ordered to produce to Plaintiff unredacted records related to other incidents involving guests slipping and falling on the Venetian common area marble floor on the casino level of the Venetian property due to the existence of a foreign substance from November 4, 2013 to the present (only as of the date of production).

IT IS FURTHER RECOMMENDED that, as to Plaintiff's request for documents and information from Venetian regarding actions to change the coefficient of friction of the marble flooring, Venetian's motion for protection be GRANTED as this request is vague and overly broad as written in the NRCP 30(b)(6) Topic 2 and Production Request No. 30.

IT IS FURTHER RECOMMENDED that, as to Plaintiff's request for information and documents related to the testing of Venetian marble flooring, as set forth in to NRCP 30(b)(6) Topic 4 and Production Request Nos. 23, 25, 26, Plaintiff's motion to compel be GRANTED to the extent that any testing for coefficient of friction was accomplished in the Grand Lux area of the

Venetian property from November 4, 2011 to November 4, 2016, where such information was disclosed by Venetian pursuant to NRCP 16.1 or which is not otherwise protected in accordance with NRCP 26.

IT IS FURTHER RECOMMENDED that, as to Plaintiff's request for information related to the removal of carpeting on the Venetian casino floor set forth in Production Request No. 37, and NRCP 30(b)(6) Topic 5, Venetian's motion for protection be GRANTED to the extent that the inquiry related the removal of carpeting be limited to the Grand Lux area of the Venetian property from November 4, 2011 to November 4, 2016.

IT IS FURTHER RECOMMENDED that, as to Production Request Nos. 35 and 36, together with NRCP 30(b)(6) Topics and 3, 6-18 regarding information related to computer data at the Venetian, the motion for protection be GRANTED, as this request is vague and overly broad; however, that Plaintiff be allowed to inquire of Venetian generally about the reporting of slip and fall claims on the casino level marble floor from November 4, 2011 to the present, how the information is collected and stored, and how it can be retrieved.

IT IS FURTHER RECOMMENDED that Venetian's motion to compel Plaintiff expert Thomas Jennings to produce all documents and information of prior incidents he has reviewed (as represented by Mr. Jennings in his May 30, 2019 report and in his July 2, 2019 deposition) be GRANTED.

IT IS FURTHER RECOMMENDED that Venetian's motion to retake the deposition of Mr. Jennings upon receipt of the prior incident information be GRANTED to the extent that Venetian is allowed to redepose Mr. Jennings; however, it is DENIED as to Venetian's request that Plaintiff pay the costs associated with the second Jennings deposition.

IT IS FURTHER RECOMMENDED that Venetian's motion to compel Plaintiff's production of all Venetian incident reports in her possession beyond those which have been produced by Venetian to Plaintiff in this litigation be GRANTED.

IT IS FURTHER RECOMMENDED that Venetian be granted relief from production of unredacted documents until fourteen days after Notice of Entry of Order related to the District Court's denial of Venetian's motion for reconsideration of the July 31, 2019 order.

IT IS FURTHER RECOMMENDED that Venetian be granted relief from production of documents related to the issues herein until it becomes a final order of the District Court.

IT IS FURTHER RECOMMENDED that all remaining issues in the pending motions are otherwise DENIED.

DATED this 27th day of November, 2019.

DISCOVERY COMMISSIONER

Submitted by:

**Royal & Miles LLP**

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

Reviewed by:

**THE GALLIHER LAW FIRM**

Keith E. Galliher, Jr., Esq.
Nevada Bar No. 220
1850 E. Sahara Avenue, Suite 107
Las Vegas, NV 89014
*Attorney for Plaintiff*

**Case Name**: Sekera v. Venetian Casino Resort, LLC
**Case No.**: A-18-772761-C

**NOTICE**

Pursuant to NRCP 16.3(c)(2), you are hereby notified that within fourteen (14) days after being served with a report any party may file and serve written objections to the recommendations. Written authorities may be filed with objections, but are not mandatory. If written authorities are filed, any other party may file and serve responding authorities within seven (7) days after being served with objections.

**Objection time will expire on** Dec. 16 **2019.**

A copy of the foregoing Discovery Commissioner's Report was:

_____ Mailed to Plaintiff/Defendant at the following address on the ____ day of _____ 2019:

✓ Electronically filed and served counsel on Dec. 2, 2019, Pursuant to N.E.F.C.R. Rule 9.

Natalie Lee
Commissioner Designee

# Register of Actions

## Case No. A-18-772761-C

**Joyce Sekera, Plaintiff(s) vs. Venetian Casino Resort LLC, Defendant(s)** §
§
§
§
§
§

| | |
|---|---|
| Case Type: | **Negligence - Premises Liability** |
| Date Filed: | **04/12/2018** |
| Location: | **Department 25** |
| Cross-Reference Case Number: | **A772761** |

### Party Information

| | | Lead Attorneys |
|---|---|---|
| **Defendant** | **Las Vegas Sands LLC *Doing Business As* Venetian Las Vegas** | **Michael A Royal** *Retained* 7024716777(W) |
| **Defendant** | **Venetian Casino Resort LLC *Doing Business As* Venetian Las Vegas** | **Michael A Royal** *Retained* 7024716777(W) |
| **Plaintiff** | **Sekera, Joyce** | **Keith E. Galliher, Jr.** *Retained* 7027350049(W) |

### Events & Orders of the Court

01/21/2020 **Objection to Discovery Commissioner's Report** (9:00 AM) (Judicial Officer Delaney, Kathleen E.)

**Minutes**

01/21/2020 9:00 AM

- Extensive arguments regarding the Discovery Commissioners recommendation Deft's. provide unredacted and unprotected reports for a period of 8 years, inclusive of reports up to the current date, the sharing of those documents, and ongoing Appeal. Additional arguments regarding subsequent changes to the flooring, testing of the surfaces, and the area to be tested. COURT STATED FINDINGS, and ADVISED, it was an error on the part of the Discovery Commissioner to extend the requirements for reports beyond the date of incident in the case. COURT ORDERS the limitation will be to the date of the incident and FIVE (5) years prior as originally determined by the Discovery Commissioner and not subsequent to that date. ADDITIONAL FINDINGS STATED. The scope of the area will be the Grand Lux Cafe area, that is where the incident occurred. To the extent the Discovery Commissioner's determinations allow for discovery of anything beyond the date of the incident or outside the Grand Lux area, that will be REVERSED. Whatever else the Discovery Commissioner allowed or ruled on, that will REMAIN. Additional argument regarding reports already provided and areas tested. COURT STATED FURTHER FINDINGS, and CLARIFIED, no discovery or reports on the area or timeframe outside what the Court has stated; unredacted, unprotected reports are to be provided, no information regarding testing outside the Grand Lux Cafe dome area to be included. Mr. Royal requested a Stay. COURT FURTHER ORDERED, Mr. Royal's Oral Request for a Stay, DENIED. Mr. Sykes is to prepare the Order, provide a copy to opposing counsel for review as to form and content, and return it back to the Court within 10 days. Competing Orders can be submitted if there is a dispute.

Parties Present

Return to Register of Actions

TRAN

IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

| | | |
|---|---|---|
| JOYCE SEKERA,<br><br>Plaintiff,<br><br>vs.<br><br>VENETIAN CASINO RESORT, LLC, ET AL,<br><br>Defendants. | ) | Case No. A-18-772761-C<br>Dept. No. 25 |

OBJECTION TO DISCOVERY COMMISSIONER'S REPORT

Before the Honorable Kathleen Delaney

Tuesday, January 21, 2020, 9:00 a.m.

Reporter's Transcript of Proceedings

REPORTED BY:

BILL NELSON, RMR, CCR #191
CERTIFIED COURT REPORTER

APPEARANCES:

For the Plaintiff: William Sykes, Esq.
George Kunz, Esq.

For the Defendants: Michael Royal, Esq.

Las Vegas, Nevada, Tuesday, January 21, 2020

* * * * *

THE COURT: Page 3, Sekera versus Venetian Casino.

MR. SYKES: William Sykes for the Plaintiff, and George Kunz.

MR. ROYAL: Mike Royal for the Defendants, Your Honor.

THE COURT: Good morning, everybody.

Good to see you.

Thank you.

So I guess I just want to make sure I'm not missing something, and there's not some confusion.

I just realized I probably should have called another matter.

The Discovery Commissioner's report recommendation has been disputed in some degree by both sides, and the concern's over the limitations placed on it on by both counsel on the discovery, and some limitations placed on the protection.

So we need to unpack that and kind of figure out where the dust is going to lay on that.

Obviously the easiest thing would be, you know the Discovery Commissioner did her job all good, especially in this case, but when it comes to these

type of things, these sort of nuances, it helps to have a complete record.

I do think it helps to have an opportunity to be heard from counsel where their concerns were.

But what is happening on the stay side on the appeals, or the appeals side?

MR. ROYAL: Your Honor, everything has been submitted, been briefed, and the Court of Appeals is still considering the issue related to discovery.

THE COURT: No indication of the oral argument or anything like that?

MR. SYKES: Not at this time.

THE COURT: So I should know this answer.

But you don't perceive that has any affect on this, and everything else is going forward?

Because I -- just there was some -- obviously what you're challenging is some overlapping with this.

MR. ROYAL: We certainly think that at least some of the issues at play here definitely are bootstrapping to what we have there.

THE COURT: That was my concern because as I went through the pleadings, as very thorough now as they are in this case, very thorough, I didn't really see a lot of acknowledgment like, oops, we want to

wait on this because the stay's out there, and we have all the arguments about why we shouldn't be more than five years, or should be less than five years, or shouldn't go forward in time, and all of those nuances, but I didn't really see how this might be impacted.

Of course I have no insight as to whether the Appellate Courts might do anything. It would be nice if we had some idea, but we have no idea.

MR. SYKES: Your Honor, with regard to that, I think the main issue that is up on the writ in front of Court of Appeals is whether or not the reports are going to be redacted or not is one of the primary issues.

THE COURT: But the Discovery Commissioner Truman did order unredacted here in response to some of these things.

So would your agreement be to provide them redacted, until it can be decided, or allow them to be -- I guess I'm looking at you -- but allow them to be provided redacted until decided, or hold off on that piece?

That's my concern.

MR. SYKES: It's my understanding, and counsel can correct me if I'm wrong, but there's no

real dispute as to producing unredacted reports, at least some have already been produced, and I think there is a dispute as to whether or not the reports should be provided subsequent to this incident, that is going to be a big issue.

I think we can address that today.

I don't know that we need to wait for the Court of Appeals to rule on the redaction issue.

MR. ROYAL: Your Honor, if I can respond to that.

THE COURT: Okay.

MR. ROYAL: We do not agree that we should produce documents in an unredacted form.

And the other issue before the Court of Appeals is, whether or not they should be protected.

So if we were to -- What the Discovery Commissioner essentially recommended is, that we produce unredacted reports for over a period of eight years, which would include reports up to today in unredacted form --

THE COURT: Right.

MR. ROYAL: -- and in an unprotected form.

So that they would have access to what happened today, or what have you, and do what they have done previously, which is share it with whoever

they want to share it with.

THE COURT: Here's the tricky part about the protection.

I get what you're saying, counsel, but I thought we had had a discussion about how that would be -- that information would be utilized, but maybe we didn't clarify our intent there, but if they get redacted, they can't follow up with the people and can't figure out what really happened in the cases, and that is clearly part of the need for discovery.

If you are just giving them a date and a brief synopsis, or whatever it is you're giving them, and have no way to contact anybody because you have no idea who these people are, it doesn't mean anything to the Plaintiffs.

The Court did allow punitive damages to remain, and these things are arguably relevant to that.

So I mean that is why it was ordered to be unredacted.

I don't know that when we previously ordered it we anticipated it being fully unprotected, but that's a different issue.

I guess my concern is, how do we do this?

One of the ways we could do this is, we

could just make a decision on everything the Discovery Commissioner ordered, and then to the extent that you have a concern about how what we ordered here today impacts what you're challenging, you add that to what is up on appeal.

I mean, that is generally what happens, right, you have your judgment, and that's challenged, and then you get a ruling on the fees and costs and retaxing of costs, and somebody doesn't like that outcome, and then they go and consolidate it, and the Court of Appeals deals with all of it, that almost seems like that is how we should do it just to have the cleanest record, because if I hold out, don't rule on some things waiting to see what the Court of Appeals does, and then I rule on other things, I don't know in practical terms how that is going to work anyway given one of the largest is the redaction.

I can certainly make a determination on the time scope, and certainly make a determination on location of incident scope, that seems to also be in dispute, whether it's limited to The Grand Lux area or casino as well, and make those rulings, but I think if we don't do the whole kit and caboodle, you don't have what you're going to have anything further

if you wish to based on the outcome to challenge, and then we don't really have a full understanding from the Court of Appeals either.

So the last thought on how we might structure today -- or just wait -- but that doesn't serve anybody's purposes I don't think.

You got to keep going forward with what you're doing.

MR. ROYAL: I think, Your Honor, in light of what we're both arguing for, I think the scope is obviously the biggest issue.

MR. SYKES: Yes.

MR. ROYAL: And the Court may determine if the Court -- depending on the Court's ruling today if -- it may not, it may or may not impact the issues that are presently before the Court of Appeals.

THE COURT: Right.

I think we should just go forward and make a decision on all of what is before us today without trying to carve out anything we think may be implicated by a future determination by the Court of Appeals, and if the outcome is such that you feel, counsel, that it should be added to what is before the Court of Appeals, then that would make sense to me and make the cleanest record.

So let's deal with all of it, and as I said, I sort of generalized it as to this time scope, and then the location scope, and that seems to be the biggest arguments the Plaintiff raises, and then with any further objections and response seems to be kind of what we're focusing on.

So you do want to start, counsel?

MR. SYKES: Yes, Your Honor.

Just briefly, we thoroughly briefed this issue, but out objection is fairly limited as to our primary objection to the Discovery Commissioner's report and recommendations is, she limits our ability to obtain coefficient of friction testing to the Grand Lux area, and there was also an issue of where they removed carpet, intentionally put the slick polished marble surface in this area, as well as other areas throughout casino, and she limited that to the Grand Lux area as well.

THE COURT: Let's hit the points as we go along what is being argued in opposition to your objection on that subject as pointed out by counsel.

Is there not some acknowledgment by the experts that different areas have different testing up to this point, and that it doesn't make sense to go beyond the scope of the area where the incident

occurred?

MR. SYKES: Yeah, I wanted to clarify that as well.

So the testimony, at least of our expert, there's a representation that our expert said this was a unique area.

Our expert didn't say that.

Our expert, what he said was, depending on the area, the slip resistance could change depending on different variables.

However, we would at least like the opportunity to determine what type of flooring they have throughout the Venetian. It's my understanding it's all polished marble.

If they want to make a distinction that it's not the same polished marble, has different slip resistance characteristics, coefficient of friction testing would prove or disprove that. I think it would be fairly simple for our expert to go out, do that testing, but it's my understanding the surfaces throughout the Venetian, at least the marble surfaces, if not identical, are substantially similar to the point were similar enough where we could consider slip-and-falls in those areas as well as giving notice to the Venetian, but they had a

hazardous condition, a continuous hazardous condition on their premises, so that was the basis to our objection of the Discovery Commissioner's ruling.

If they, the Venetian, wants to focus specifically on the Grand Lux rotunda area, I think there needs to be some type of showing the marble flooring elsewhere is somehow different, substantively different, with different slip resistance values, and I don't mean within a percentage point, I mean 20 percent different, 30 percent different, something like that, with a substantial difference between the marble because there's marble floors throughout, and I believe slip-and-falls throughout the property would provide notice to the Venetian that this polished marble floor presents a continuous hazard, and a defective condition on the premises.

THE COURT: Okay.

What about the timing?

It is a little hard for at first blush to take a look at this and say, there's any relevance to what occurred subsequent.

If your argument is when this incident occurred, they were on notice that this was a problem, they had been arguably from your perspective

were not acknowledging, not dealing with what they needed to see as a recurring problem, how would what occurred subsequent have anything to do with that argument?

MR. SYKES: Yes, to address that question there's three main issues that go to that issue.

First, the reason why it's relevant, it's a continuous hazard and a defective condition on the premises, and there were slip-and-falls occurring subsequent to our client's slip-and-fall would tend to prove that -- or show it's an ongoing hazard, a continuous hazard, and a defective condition on the premises. So there's that.

Second, it goes to punitive damages as to the reprehensibility of the conduct of the Venetian.

If the Venetian is continuing to allow the dangerous condition to exist, and people are continuing to fall, slip-and-fall on the premises and get injured, and be taken away in an ambulance, or at least report injuries to the EMTs, I think that goes to the reprehensibility of the Venetian's conduct, and we provided case law in support of that in the brief.

THE COURT: Now, were you also asking to go further back in time since five years prior to the

incident?

MR. SYKES: We were.

And the reason for that is, that we did have some testimony from employees of the Venetian, one former EMT said they responded to 150 and 175 falls, and that started in 2008.

Then there was evidence that the floor was changed from carpet to marble I think as early as 2013, maybe a little later than that, and it's my understanding that the slip-and-falls, the amount of slip-and-falls significantly increased, and the Venetian did nothing to fix it, so that was our client's, our concern with that particular issue as well.

THE COURT: Okay.

Anything else you want to highlight?

MR. SYKES: Yes.

The third point, I don't know to the extent this was addressed in the briefing, but I wanted to bring it up, the Venetian seems to have an affirmative defense in this case, Judge, that our client walked through this area hundreds of times before she slipped and fell and never had a problem, and therefore the floor is safe. That is kind of the argument they are making, even include it -- they

reference it a couple times in their briefing.

We should be allowed to rebut that argument and rebut that affirmative defense, and bring up the totality of the falls, not only from before the incident, but after the incident, and show there's a pattern here, a trend here, of people slipping and falling throughout the casino floor, it wasn't just my client just because she didn't -- or slipped once, and in 200 steps, or whatever their argument is, it doesn't mean other people didn't slip in that very same area, or throughout the casino floor.

So it's our position they opened the door, Judge.

If they are going to make that argument at trial, they are going to argue we didn't have actual notice, didn't have constructive notice -- and by the way, the Plaintiffs walked through there hundreds of times and didn't slip and fall before, therefore it's safe.

We should be able to bring up the total number of falls both before and after her incident because they will try to make it sound like she wasn't paying attention, she was being clumsy, and it was just an isolated incident, where I think we can demonstrate it's not an isolated incident, people

slipped before and after, and we don't mean a couple, hundreds before, and probably hundreds after.

THE COURT: Okay.

Counsel.

MR. ROYAL: The representations there was an increase in slip-and-falls after some change in flooring is completely unfounded.

I think what we have to remember is, that the Plaintiff has testified, and we know she worked at the property for almost a year prior to the incident, and yes, she made probably more than a thousand trips through this Grand Lux area successfully, not only without slipping and falling herself, but without ever seeing any kind of a foreign substance on the floor, without seeing anyone slip and fall, without hearing about any kind of slip-and-falls, and yes, that is we certainly want to bring that up.

We also want to bring up the fact that in this particular case all 11 of the people who were present at the scene after the incident -- or rather of the 11 -- Let me say that again.

All 11 of the people present at the scene have been deposed in this case. Of those 11, 10 have verified -- or at least they verified they did not

see anything on the floor.

There's one person who testified there was something on the floor, and his testimony is completely rebutted just by reviewing the video evidence.

Now, as to some of these issues, I think the fact is that the testimony that Plaintiff has given is that she reported to her post daily, she walked through this Grand Lux area back and forth at least twice daily for hundreds of days prior to the incident, that is the area in question.

There's no testimony that she was walking up and down other areas of the property, and so that particular information about other slip-and-falls in other areas of the property is simply from our position not relevant.

Also, the testimony of Tom Jennings in his deposition in the Smith case he performed coefficient of friction testing in an area which he said was within 80 to 100 feet of the area where Miss Sekera fell. His coefficient of friction testing was different, and was significantly different.

He tested dry point 90, tested dry in the area of 0.070, that is a significant difference, and so he testified that -- I asked him what the

differences would be, and he testified there is a lot of them, it could be pedestrian traffic, could be how the floors are cleaned, could be the shoes and so forth that are worn, and he tested this area -- and by the way this their expert has tested the area where the Plaintiff fell, so where -- or where is it going to get us from a relevancy standpoint for expert testing in other areas outside The Grand Lux?

They are going to want testing done on the 10th floor, testing done in the front desk area, testing done wherever, which is not anywhere near where the Plaintiff at least testified she's been in this case.

THE COURT: You brought up Mr. Jennings. There were obviously a couple of aspects of the Discovery Commissioner's report and recommendation dealt with Mr. Jennings being able to be re-deposed, getting additional information.

Is that in dispute here?

I didn't see that being disputed here.

MR. SYKES: Not necessarily, Judge.

And I think what it was, there's a number of incident reports out there we have possession of, some I believe they have possession of, additional reports that have yet to be produced, and so I think

what it was, was once those reports were produced, that they would have an opportunity to depose Mr. Jennings at least on those, that new information is my understanding.

THE COURT: Okay.

MR. SYKES: I don't know if there's a dispute as to that, but that's my understanding.

THE COURT: I didn't see that being really referenced here.

MR. ROYAL: What is supposed to occur under the Discovery Commissioner's report and recommendation is, that the Plaintiff is supposed to produce every single report that they gave -- that they have in their possession, they've obtained, we're supposed to get those, that is not in dispute, there's no objection to that, and we haven't received those yet.

MR. SYKES: That's correct.

MR. ROYAL: We're waiting to get those before we take Mr. Jennings' deposition, but since you brought up Mr. Jennings, he testified that in a four year -- or four-and-a-half year period that there were 196 incidents in The Grand Lux area, that was his testimony.

Now we dispute that, but that's his

testimony, and we don't have those documents yet, and when we get those, we will retake his deposition, but I think that goes to -- again, it goes to our position that the scope should be limited to The Grand Lux area, the scope of all the issues related to the flooring in this case.

You know the Discovery Commissioner actually initially limited the scope of the other incident reports to The Grand Lux area, until she was advised by counsel that in our initial disclosure we produced some reports outside the area of the Grand Lux, which we did as a courtesy to counsel.

We did not feel we had to do that the second time around in this battle, and she changed her mind, she essentially made a waiver kind of an argument, well if you produce some stuff outside before, now you have to produce another five years.

THE COURT: Okay.

Anything else you want to tell us?

MR. ROYAL: I'm sorry, Your Honor.

I just wanted to say, as far as the subsequent incident reports, that is all based on the Discovery Commissioner -- remember this is a transient condition.

Now they keep using the word, defective.

There's nothing defective about it for millions of people that walked through the Venetian that don't slip and fall. But that is what this is.

So the Discovery Commissioner indicated she would not provide or order or recommend subsequent incident reports under circumstances of a transient condition such as what we have here.

The only reason she ordered that is because of the fact there's a punitive damages claim the Court has allowed to be filed, and I just, Your Honor -- there's no -- at least I can't find any -- Nevada Law that supports that.

THE COURT: Okay.

Anything else, counsel?

MR. SYKES: Yes, Your Honor.

Just as a reminder, this was something addressed in prior motion practice, and was stated the Plaintiff should be allowed to conduct discovery to support the punitive damages claim.

Again, it goes back too reprehensibility of conduct of the Venetian.

I don't understand why the Venetian is attempting to hide these additional slip and fall reports, it's quite concerning to me because it tends to indicate to me that they have a lot more actual

constructive notice than they are representing to the Court and will represent to the jury if this goes to a trial. I have a very strong concern with that.

If their question -- or issue is admissibility, that is not the standard.

The standard is, whether it's proportional and whether it's relevant to the case, and it most certainly is, particularly with regard to their argument our client walked through there hundreds of times, and now they are saying thousands of times, and didn't slip before, therefore the floor is safe.

If that's the argument, we should be entitled to rebut that argument, know how many people have slipped and fallen on the casino floor.

If they want to argue the slip resistance is different, we can send experts out to do that testing, it wouldn't be that difficult to perform, and they can argue over whether or not it's similar enough, and we can hash that out.

But this is a case where there was a significant injury. The client is scheduled to have a fusion surgery, she did have a spinal injury, there's an indication she hit her head on a pillar and did sustain significant injuries as a result of this slip-and-fall, so it's not -- we're not arguing

on a sprain/strain here, and at this point this is information that needs to be provided, we need to have the opportunity to rebut their argument.

Otherwise, we go into trial with one arm behind our backs, they get to say our client walked through the area thousands of time, but we don't get to talk about all the slip-and-falls that happened.

So at a minimum it's discovery, whether or not it comes down to being admissible, that depends on what is ultimately discovered, so I think at a minimum we should be entitled to at least see the information.

If the Defendant's asking for some type of protective order, that is something we can address, but at a minimum we should be at least be able to see the information, the slip-and-falls, and go from there.

THE COURT: All right.

I want to make sure I address each of the topics, so I'm going to tell you my thoughts, and if I miss anything, you let me know, so we can get your verification.

I do think that it's an error on the part of the Discovery Commissioner to extend the requirement for reports beyond the date of the

incident in the case. I don't understand coming forward to the present, I really don't.

I understand the argument that we're trying to show that this was, or is, a defective condition, that this is reprehensible conduct, but the reality is your argument about that what was existing prior to your client's incident, what occurred subsequent to that I don't see being relevant, and think it blows this thing up to a different proportion to where we originally argued we were -- as far as all of the instances occurred prior they had not revealed, and arguably again I'm not saying these are the findings made, but the arguments about all these incidents prior to, they knew this condition and should have corrected the condition before my client fell and didn't do that, the subsequent you still get where you need to go counsel for your client with what the Discovery Commissioner or what was allowed in terms of the five years prior to the incident, but the additional up to the present, I think that is in error, so the limitation will be to the date of the incident and five years prior, as originally determined by the Discovery Commissioner, and not subsequent to that date.

To the extent that addresses any other

issues with regard to the arguments about whether testing should be produced, or the concern the Discovery Commissioner granted protection, at least so far as to the vagueness of the coefficient of friction testing, I don't think that that is necessary really to anything subsequent.

The only issue about -- the other issue of scope, which is does it stay in The Grand Lux area, or also implicates the casino, I think it stays in the Grand Lux area, that is where the incident occurred, where the situation is, I don't think they need to prove the other areas are different.

The point is, you got a client fell in a particular area, you got an argument there were lots of other slip-and-falls in that area, it's not addressed, it creates a condition for folks, it's hazardous, and they knew about it, didn't fix it, this case needs to be limited to that area, not the other areas of the casino where they might have put down carpet or similar marble.

I already -- I think it was the right thing to do, so I'm not questioning that, but I already allowed the scope of this case -- I think it is far beyond what other folks might have allowed in the sense of saying, yes, of course you can look at it,

you got a punitive damages claim, you can look at all of these other things in these reports and know they shouldn't have to be redacted because you should be able to contact these folks, find out what occurred in those cases, but it's still a relevant time period that you need to be looking at, and to me that is when the incident occurred, and prior, and in the area where the incident occurred.

So to the extent the Discovery Commissioner determinations -- allows for discovery of anything beyond the date of the incident, or outside of the Grand Lux area, that will be reversed.

Whatever else the Discovery Commissioner allowed to take place or ruled on should remain.

Do you need further clarification on that?

We can go one by one on the report and recommendations.

I think it's understood once I find those limitations what is impacted there.

MR. SYKES: They did produce slip-and-fall reports occurred outside of the Grand Lux area initially in this case.

Are we still allowed to reference those areas?

In their initial disclosures they did

disclose slip-and-falls on marble outside of the Grand Lux area. Are we still allowed to conduct discovery into those incidence?

THE COURT: To what end, counsel?

I'm not likely to revisit this issue, and whether they produced those things or not, I don't think it is a waiver to open the door because again you are still under the umbrella of what is relevant.

If the Court made a determination the only thing relevant is the Grand Lux area, whatever else they produced is irrelevant, I don't see why you should be able to conduct discovery in that area -- or why it would be have some utility to you they produced documentation. I guess arguably you could conduct discovery on whatever it is they produced to you, but at this point seems to me that the Court's determination here in dealing with this Discovery Commissioner's report and recommendation is to say, the relevant areas, and what is even calculated to lead to relevant information is the Grand Lux area only, and that time frame only. I don't see where you get a benefit looking at the others.

If you're looking for me to have a ruling that you can't do discovery on those things, show me in the Discovery Commissioner's report and

recommendation where that is addressed, and I can tell you how I think that should be resolved, but it's not addressed in there.

I know it was addressed in there as perhaps some justification to allow the other discovery, but I'm not allowing that now, but in terms of just dealing with what already is produced, that may need to be like subject to how you conduct your discovery in the future in some requested protection in the future.

I just want to keep this record clean by dealing with the Discovery Commissioner's report and recommendation, not okay, what does this mean to that because that muddies the waters, I think.

MR. SYKES: One other question.

To the extent there's coefficient of friction testing from another part of the casino floor, that is substantially similar or identical to that of the Grand Lux Cafe, are we allowed to conduct discovery into that?

THE COURT: How would you have that?

You mean something they already produced indicates they have done that testing?

Because at this point again if the Court's saying the primary findings if you will is the Grand

Lux area only, and time frame is incident prior only, then would you be saying you would want to do coefficient friction in these other areas as part of your discovery, or have you already been provided evidence that has occurred?

MR. SYKES: Probably a little bit of both.

I don't know the answer at this point in time, but it's possible one of our expert may have access to that information, I don't know, I'd have to go ask.

And we would obviously like the opportunity to conduct full coefficient of friction testing of other parts of the casino to see if the floors are identical or similar.

THE COURT: Let me give counsel an opportunity to say anything you want to say.

MR. ROYAL: Your Honor, we produced -- Obviously I questioned Mr. Jennings about some prior testing he did at the property that was close by the Grand Lux, but it was technically outside it, but beyond that we maybe produced maybe one other report also from the Smith case, but that is all the production we've done.

I should add that -- Strike that.

I won't add that.

The only thing I would add is, as relates to the two years beyond the five years, can I just suggest that they be -- or we can produce those timely to counsel, if they can be produced in redacted form with a protective order, at least temporarily until we get some kind of a ruling from the Court of Appeals?

THE COURT: The way it's going to go is, the time frame that was decided by the Discovery Commissioner, which as I understand it was from the incident, five years prior, but not the time frame forward.

And it's unredacted is how the Court ordered the stuff to go before, and it's I guess you used the term unprotected, it's also that, and -- but it's not the future, it's only from the incident prior.

And I guess to eliminate any -- I guess to try to continue to shape this properly, I will say, no testing of any areas outside the Grand Lux dome area that is irrelevant to this area where the slip-and-fall occurred.

And I would say, no to conducting discovery on what might have been produced related to that area.

Now the Court's making a determination for clarification purposes. Its intent was the discovery be to the area in question.

This idea that we're going to say, wait a minute, they have now placed -- or might have the same or some similar marble in other areas that aren't implicated by this slip-and-fall is part of the thing that stands out, counsel forms my decision, there is a lot of the discussion about like, look, you got fast food areas, and people can go get drinks and are walking through here, and they are spilling things, and you should know all of that, it's very unique to this area that you are asking.

This idea now to go and say, we want to look at marble in the casino, and marble other places, and think it's the same, and would be the same problem, and have issues, and they should have known this, that it's relevant to this, it's too much of a stretch.

I have already given you what you need to have to show of that particular area and those particular circumstances in that particular area why on that particular day you argue it wasn't safe, it was a condition that they should have known and had fixed, and it's a problem because of the marble,

because of spillage, because of whatever, and they knew it because all these things occurred prior and didn't fix it, but it's limited to that.

So I don't see any discovery being relevant or appropriate to any marble areas outside that area, and for any testing to take place to try to show similarity to that marble outside that area.

MR. SYKES: One thing I wanted to clarify, Judge, and I know it was represented in a brief our expert said the Grand Lux was in the area, he did not say that, one thing to keep in mind is that there's no public area in the Venetian I'm aware of where drinks are banned, it's my understanding drinks are served on the casino floor, drinks are served at the tables --

THE COURT: I get all that.

MR. SYKES: -- throughout.

THE COURT: But that is not the point, counsel.

I understand what you want to do, but I have to have some semblance of structure on this thing, and this is not a discovery on the entire Venetian Casino where they might have marble.

This is a discovery of an area of the Venetian Hotel where a slip-and-fall occurred, and

your concerns about that period, because whether or not drinks are served elsewhere, and whether or not there might be similar marble elsewhere, it's the confluence of all of the things unique to that area that matter, not all these other areas.

So I really do think that is a sufficient explanation, goes far beyond the scope of what is necessary, and I think you have more than enough information looking at the five years prior, and in that area, and the unredacted to be able to go and do follow-up with those people to see what that is to try to prove your theory of the case, and I think otherwise it keeps it to a reasonable limitation.

This idea of there's marble other places in the Venetian, and there might have been slip-and-falls other places in the Venetian, and might be drinks served other places, that is really neither here nor there for this incident, and what occurred related to this incident, and where it occurred.

I have to reign it in now for everybody.

MR. SYKES: With regard to the two years, I think the missing reports counsel was mentioning at this point, we would agree to accept the unredacted copies, be willing not to produce those outside of

the case, until we get a ruling from the Court of Appeals.

THE COURT: I think that seems fair.

You can write that up in your order.

I'm going to -- because I mean, I know both sides sort of objected, but I guess at this point I'll put the burden on Plaintiffs to let Mr. Royal have a chance to see the order obviously, an add anything, the reports for the missing time frame that need to be produced unredacted, at least until the Court of Appeals makes a ruling in your case.

Anything else?

MR. ROYAL: Yeah.

Could we just redact them and produce them as they were previously if that's our stipulation?

That way I won't have to ask the Court for a stay and file something --

THE COURT: No.

I understand why you want to redact them, but that is not the ruling in the case, and until the Court of Appeals Court says so, it's not the ruling in the case, and if that's what they say, that's what they say, I'll live with that, but they need to get it, this case needs to move forward.

And if they are not going to go outside the

case, your bigger concern is they are sharing with other members of the Plaintiff's bar they are not going to do that, that will be written in the order, so it needs to be provided.

MR. ROYAL: I just want to for the record ask the Court if we could get like a brief stay from the order allowing us to bring this up --

THE COURT: It's going to take a while for the order to be printed, and I want it in ten days, you got basically ten days, it's not going to take a long time, you have written very voluminous briefings, got a good staff there, know what to do.

If you want to try to dispute it, you can put something together, so the second it's signed you can take something up.

The Court of Appeals already granted the stay related to that stuff.

If you're adding more to it, I'm sure they will do the same thing, but you can put in if you want in the order the Court declined your oral request for a stay at this time, so it already shows because I think that is how Rule 8 or 9, whichever one it is that sort of says, you don't have to come back to the District Court and ask for the stay if there's a futile issue, and it would be basically

futile, you can go get it from them.

Okay. I think we got what we need.

MR. ROYAL: Thank you.

THE COURT: If there are any disputes about the order, send me your competing letter, and we'll take care of it.

MR. SYKES: Thank you, Judge.

THE COURT: Thank you.

(Proceedings concluded.)

REPORTER'S CERTIFICATE

I, Bill Nelson, a Certified Court Reporter in and for the State of Nevada, hereby certify that pursuant to NRS 2398.030 I have not included the Social Security number of any person within this document.

I further Certify that I am not a relative or employee of any party involved in said action, not a person financially interested in said action.

_____/s/ Bill Nelson_____

Bill Nelson, RMR, CCR 191

C E R T I F I C A T E

STATE OF NEVADA )
) ss.
CLARK COUNTY )

I, Bill Nelson, RMR, CCR 191, do hereby certify that I reported the foregoing proceedings; that the same is true and correct as reflected by my original machine shorthand notes taken at said time and place.

/s/ Bill Nelson

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Bill Nelson, RMR, CCR 191
Certified Court Reporter
Las Vegas, Nevada

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## V



## W



## Y

**ORDR**
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) 571-6777
Email: mroyal@royalmileslaw.com
*Attorneys for Defendants*
*VENETIAN CASINO RESORT, LLC and*
*LAS VEGAS SANDS, LLC*

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

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

JOYCE SEKERA, an Individual;

Plaintiff,

v.

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

Defendants.

CASE NO.: A-18-772761-C
DEPT. NO.: 24

**ORDER ON OBJECTIONS TO THE DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATION DATED DECEMBER 2, 2019**

Plaintiff JOYCE SEKERA by and through her counsel of record, Claggett & Sykes Law Firm and The Galliher Law Firm, filed PLAINTIFF'S OBJECTION TO THE DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS DATED DECEMBER 2, 2019 ON DECEMBER 16, 2019 on December 16, 2019, and Defendants VENETIAN CASINO RESORT, LLC and LAS VEGAS SANDS, LLC (hereinafter collectively referred to as "Venetian"), by and through their counsel of record, Royal & Miles LLP, filed DEFENDANTS' LIMITED OBJECTION TO DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS DATED DECEMBER

2, 2019. Both parties timely filed responses to the respective objections. This matter came before the Court for hearing at 9:00 am on January 21, 2020. William T. Sykes, Esq., and Geordan G. Logan, Esq., of the Claggett & Sykes Law Firm, appeared on behalf of the Plaintiff, and Michael A. Royal, Esq., of Royal & Miles LLP appeared on behalf of the Defendants.

The issues raised by the parties in the Discovery Commissioner's Report and Recommendation of December 2, 2019 go to the scope of discovery to be allowed regarding the subject incident of November 4, 2016, which occurred within the Grand Lux rotunda dome of the Venetian property. (The Discovery Commissioner's Report and Recommendation of December 2, 2019 is hereinafter referenced as "DCRR".)

Plaintiff moved the Discovery Commissioner to order that Venetian produce documents related to prior and subsequent incident reports of slip and falls on marble flooring, along with other information related to the installation, care and coefficient of friction testing of marble flooring on the Venetian property (including the alleged removal of carpeting in the casino area and replacement with a marble flooring in 2008), from January 2000 to the present. Plaintiff further moved to expand the scope of other marble floor slip and fall incident reports beyond the casino level of the Venetian property. Plaintiff argued that this broad scope of discovery is necessary for her to establish a case for punitive damages under NRS 42.005 (more specifically to address "the reprehensibility of conduct" by Venetian).

Venetian moved the Discovery Commissioner to limit the scope of all discovery regarding the Venetian marble flooring to the Grand Lux rotunda dome area where the subject incident occurred, and to limit the production of Grand Lux rotunda dome area marble floor guest incident reports to the preceding five years, from November 4, 2011 to November 4. 2016.

The Discovery Commissioner recommended the following pertaining to contested issues raised herein by the parties:

1. Plaintiff's request that Venetian produce evidence of coefficient of friction testing is limited to the Grand Lux rotunda dome area from November 4, 2011 to November 4, 2016 to the extent it was disclosed pursuant to NRCP 16.1 and which is not otherwise protected in accordance with NRCP 26;

2. Plaintiff's request that Venetian produce evidence of changes to the casino level flooring is limited to the Grand Lux rotunda dome area from November 4, 2011 to November 4, 2016;

3. Plaintiff's request for evidence of other incidents extends to all slip and falls on marble flooring on the Venetian casino level and limited in time from November 4, 2011 to the present; and

4. All documents produced by Venetian related to incident reports from November 4, 2011 to the present are to be produced unredacted without protections sought by Venetian under NRCP 26(c).

IT IS HEREBY ORDERED that the Objections filed by the parties are GRANTED IN PART and DENIED IN PART.

IT IS FURTHER HEREBY ORDERED that the DCRR is hereby modified and adopted as follows: Venetian must produce prior incident reports limited to the Grand Lux rotunda dome area from November 4, 2011 to November 4, 2016. Plaintiff's request for documents outside this given scope is hereby DENIED.

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IT IS FURTHER HEREBY ORDERED that the DCRR is otherwise adopted by the Court, including the order requiring that Venetian produce reports of prior incidents in unredacted form without requested NRCP 26(c) protection. Venetian's motion to stay this part of the Order pending a decision by the Nevada Court of Appeals in a writ presently before it to address this issue (case no. 79689-COA) is hereby DENIED.

DATED this 11th day of March, 2020.

DISTRICT COURT JUDGE

JG

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:

**CLAGGETT & SYKES LAW FIRM**

Sean K. Claggett, Esq.
William T. Sykes, Esq.
Geordan G. Logan, Esq.
CLAGGETT & SYKES LAW FIRM
4101 Meadows Lane, Suite 100
Las Vegas, NV 89107
*Attorneys for Plaintiff*

**THE GALLIHER LAW FIRM**

Keith E. Galliher, Jr., Esq.
Nevada Bar No. 220
1850 E. Sahara Avenue, Suite 107
Las Vegas, NV 89014
*Attorneys for Plaintiff*