

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No.

KEOLIS TRANSIT SERVICES, LLC,

Electronically Filed
Aug 27 2020 12:50 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Petitioner,

v.

THE EIGHT JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN
AND FOR THE COUNTY OF CLARK; AND THE HONORABLE RICHARD
SCOTTI, DEPT. II,

Respondents,

and

SHAY TOTH,

Real Party in Interest.

PETITIONER'S APPENDIX

ANDREW R. MUEHLBAUER, ESQ.
Nevada Bar No. 10161
SEAN P. CONNELL, ESQ.
Nevada Bar No. 7311
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Attorneys for Petitioner Keolis Transit Services, LLC

Description	Date Filed	Tab	Page Number
Complaint	6/21/2019	1	001
Discovery Commissioner's Report and Recommendation on Plaintiff's Motion to Compel	5/26/2020	8	095
Notice of Entry of Order for District Court's Order on Discovery Commissioner's Report and Recommendations on Plaintiff's Motion to Compel	7/31/2020	12	172
Petitioner's Answer to Plaintiff's Complaint	8/6/2019	2	007
Petitioner's Opposition to Plaintiff's Motion to Compel	4/6/2020	6	062
Petitioner's Opposition to Plaintiff's Objection to Discovery Commissioner's Report and Recommendations on Plaintiff's Motion to Compel	6/16/2020	10	148
Plaintiff's Motion to Compel	3/23/2020	5	020
Plaintiff's Objection to Discovery Commissioner's Report and Recommendation on Plaintiff's Motion to Compel	6/2/2020	9	100
Plaintiff's Reply in Support of Her Motion to Compel	4/16/2020	7	087
Plaintiff's Reply in Support of Her Objection to Discovery Commissioner's Report and Recommendations on Plaintiff's Motion to Compel	6/26/2020	11	168
Plaintiff's Request for Exemption from Arbitration	8/22/2019	3	012
Pretrial Order	11/8/2019	4	016

TAB 1



CASE NO: A-19-797214-C
Department 2

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Attorney for Plaintiff
SHAY TOTH

DISTRICT COURT
CLARK COUNTY, NEVADA

SHAY TOTH, an Individual,

Plaintiff,

v.

Case No. :
Dept. No. :

**COMPLAINT FOR MONEY
DAMAGES**

ANDRE RAMON PETWAY, an Individual;
KEOLIS TRANSIT SERVICES, a Delaware
Limited Liability Company; DOES I through
X; and ROE CORPORATIONS XI through
XX, Inclusive;

Defendants.

Plaintiff, SHAY TOTH, by and through her attorney, Cliff W. Marcek, Esq., alleges
against Defendants, ANDRE PETWAY and KEOLIS TRANSIT SERVICES, and each of
them, as follows:

1. Plaintiff, Shay Toth (hereinafter "Plaintiff" or "Ms. Toth"), at all times herein
mentioned, is and was a resident of Clark County, State of Nevada.

2. At the time of the crash on July 1, 2017, Defendant Andre Petway (hereinafter
"Defendant" or "Mr. Petway") was a resident of Clark County, State of Nevada.

3. Keolis Transit Services (hereafter "Keolis") is and was a Delaware limited
liability company, authorized to conduct and doing business in the state of Nevada.

4. Pursuant to Nev.R.Civ.P. 10(a) and *Nurenberger Hercules-Werke GMBH v.
Virotek*, 107 Nev. 873, 822 P.2d 1100 (1991), the identity of defendants designated as
DOES I through X are unknown at the present time; however, it is alleged and believed

1 these defendants were involved in the initiation, approval, support or execution of the
2 wrongful acts upon which this litigation is premised, or of similar actions directed against
3 Plaintiff about which he is presently unaware. These defendants are in some manner
4 negligently, vicariously or statutorily responsible for the events and happenings referred to
5 and caused damages proximately to Plaintiff herein. As the specific identities of these
6 parties are revealed through the course of discovery, the DOE appellation will be replaced to
7 identify these parties by their true names and capacities.

8 5. Pursuant to Nev.R.Civ.P. 10(a) and *Nurenberger Hercules-Werke GMBH v.*
9 *Virostek*, 107 Nev. 873, 822 P.2d 1100 (1991), the identity of defendants designated as ROE
10 CORPORATIONS XI through XX are unknown at the present time; however, it is alleged
11 and believed these defendants were involved in the initiation, approval, support or execution
12 of the wrongful acts upon which this litigation is premised, or of similar actions directed
13 against Plaintiff about which he is presently unaware. These defendants are in some manner
14 negligently, vicariously or statutorily responsible for the events and happenings referred to
15 and caused damages proximately to Plaintiff herein. As the specific identities of these
16 parties are revealed through the course of discovery, the ROE appellation will be replaced to
17 identify these parties by their true names and capacities.

18 FACTS

19 6. On or about July 1, 2017, at approximately 6:47 p.m., Ms. Toth was driving a
20 white 2015 Toyota Corolla, bearing vehicle license number 821ZAZ.

21 7. Defendant, Mr. Petway, was driving a white 2013 Dodge Grand Caravan,
22 bearing vehicle license number 773YYW owned and operated by Keolis.

23 8. Ms. Toth was facing northbound on Boulder Highway, waiting to turn left
24 onto Sahara, when Mr. Petway carelessly ran into the back of her vehicle.

25 9. Mr. Petway violated NRS 484B.127 by following too closely behind Ms.
26 Toth's vehicle, which establishes that Defendants were negligent per se for the crash.

1 10. At the time of the crash, Andre Petway was an employee of Keolis, was
2 driving the vehicle with the permission of Keolis and was in the course and scope of
3 employment.

4 11. As a direct and proximate result of the negligence of Defendants, Plaintiff
5 suffered severe and serious injuries to her body, has had to engage the services of physicians
6 and other health care providers, and has incurred damages in excess of Fifteen Thousand
7 (\$15,000) Dollars.

8 12. Ms. Toth has been required to retain the services of an attorney to prosecute
9 this action, and the Court should order that Defendants pay reasonable attorney's fees to her,
10 together with costs of suit incurred herein.

11 **FIRST CLAIM FOR RELIEF**
12 *Negligence – Andre Petway and Keolis*

13 13. Plaintiff incorporates and re-alleges each paragraph above as though fully set
14 forth herein.

15 14. Defendant Andre Petway's driving was negligent and careless, causing a
16 motor vehicle crash between his vehicle and Ms. Toth's vehicle.

17 15. Mr. Petway had a duty to drive with due care and to follow the traffic safety
18 rules.

19 16. Mr. Petway and Keolis breached their duty to drive and operate the vehicle
20 with due care when Mr. Petway followed too closely to Ms. Toth's vehicle, failed to stop in
21 time, and rear-ended Ms. Toth's vehicle.

22 17. The negligence of Mr. Petway is imputed to Keolis and Keolis is liable under
23 the doctrine of respondeat superior

24 18. As a direct and proximate result of the negligence of the defendants, Ms. Toth
25 suffered severed and serious bodily injuries, has had to engage the services of physicians
26 and other healthcare providers, and has incurred damages in excess of \$15,000.

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SECOND CLAIM FOR RELIEF

Negligent Hiring, Training, and Supervision – Keolis Transit Services

19. Plaintiff incorporates and re-alleges each paragraph above as though fully set forth herein.

20. Keolis had a duty to protect Ms. Toth from harm resulting from its employees and to properly hire, train and supervise its employees.

21. Keolis breached its duty to Ms. Toth by negligently hiring Mr. Petway, and failing to properly train Mr. Petway on proper driving and safety techniques.

22. Keolis further breached its duty to Ms. Toth by failing to properly supervise Mr. Petway while he was driving, in the course of his employment with Keolis.

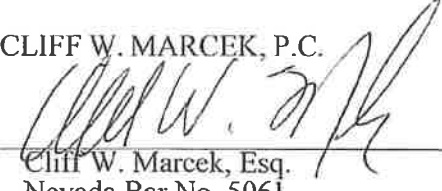
23. As a direct and proximate result of the negligent hiring, training, and supervision of Defendant, Ms. Toth has suffered severe and serious bodily injuries, has had to engage the services of physicians and other healthcare providers, and has incurred damages in excess of \$15,000.

WHEREFORE, Plaintiff prays for judgment against Defendants, jointly and severally, as follows:

1. For general and special damages;
2. For an award of attorney's fees;
3. For costs of suit; and
4. For other such and further relief as the Court may deem just and proper.

Dated this 19 day of June, 2019.

CLIFF W. MARCEK, P.C.


Cliff W. Marcek, Esq.

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Attorney for Plaintiff
SHAY TOTH

DISTRICT COURT

CLARK COUNTY, NEVADA

CASE NO: A-19-797214-C

SHAY TOTH, an Individual,

Case No. :

Plaintiff,

Dept. No. : Department 2

v.

ANDRE RAMON PETWAY, an Individual;
KEOLIS TRANSIT SERVICES, a Delaware
Limited Liability Company; DOES I through
X; and ROE CORPORATIONS XI through
XX, Inclusive;

Defendants.

**NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU
WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS.
READ THE INFORMATION BELOW.**

TO THE DEFENDANT(S): A civil Complaint has been filed by the Plaintiff(s)
against you for the relief set forth in the Complaint.

KEOLIS TRANSIT SERVICES, LLC

1. If you intend to defend this lawsuit, within 20 days after this Summons is
served on you, exclusive of the day of service, you must do the following:

a. File with the Clerk of this Court, whose address is shown below, a
formal written response to the Complaint in accordance with the rules of the Court, with the
appropriate filing fee.

b. Serve a copy of your response upon the attorney whose name and
address is shown below.

CLIFF W. MARCEK, ESQ.
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2. Unless you respond, your default will be entered upon application of the Plaintiff(s) and failure to so respond will result in a judgment of default against you for the relief demanded in the Complaint, which could result in the taking of money or property or other relief requested in the Complaint.

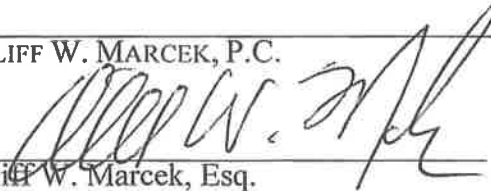
3. If you intend to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time.

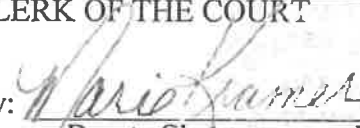
4. The State of Nevada, its political subdivisions, agencies, officers, employees, board members, commission members and legislators, each have 45 days after service of this Summons within which to file an Answer or other responsive pleading to the Complaint.

STEVEN D. GRIERSON

CLIFF W. MARCEK, P.C.

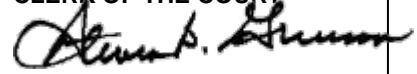
CLERK OF THE COURT


Cliff W. Marcek, Esq.
Nevada Bar No. 5061
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By:  6/21/2019
Deputy Clerk Date
Marie Kramer
Regional Justice Center
200 Lewis Avenue
Las Vegas, NV 89155

Attorney for Plaintiff
SHAY TOTH

TAB 2



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sean@mlollegal.com

Attorneys for Defendant
Keolis Transit Services, LLC

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

SHAY TOTH, an Individual,

Plaintiff,

v.

ANDRE RAMON PETWAY, an Individual;
KEOLIS TRANSIT SERVICES, a Delaware
Limited Liability Company; DOES I through X; and
ROE CORPORATIONS XI through XX, Inclusive;

Defendants.

CASE NO.: A-19-797214-C

DEPT. NO.: 2

**DEFENDANT KEOLIS TRANSIT
SERVICES, LLC'S ANSWER TO
COMPLAINT FOR MONEY
DAMAGES**

**DEFENDANT KEOLIS TRANSIT SERVICES, LLC'S ANSWER TO COMPLAINT
FOR MONEY DAMAGES**

COMES NOW Defendant KEOLIS TRANSIT SERVICES, LLC, erroneously sued and served herein as KEOLIS TRANSIT SERVICES (hereinafter "Defendant"), by and through its counsel of record, the law firm of Muehlbauer Law Office, Ltd., and file its Answer as follows:

1. Answering Paragraph 1 of Plaintiff's Complaint, Defendant states that it is without sufficient knowledge or information to form a belief as to the truth of the averment contained therein

1 and therefore denies same.

2 2. Answering Paragraph 2 of Plaintiff's Complaint, Defendant states that it is without
3 sufficient knowledge or information to form a belief as to the truth of the averment contained therein
4 and therefore denies same.

5 3. Answering Paragraph 3 of Plaintiff's Complaint, Defendant admits.

6 4. Answering Paragraph 4 of Plaintiff's Complaint, Defendant states that it is without
7 sufficient knowledge or information to form a belief as to the truth of the averment contained therein
8 and therefore denies same.

9 5. Answering Paragraph 5 of Plaintiff's Complaint, Defendant states that it is without
10 sufficient knowledge or information to form a belief as to the truth of the averment contained therein
11 and therefore denies same.

12
13 **FACTS**

14 6. Answering Paragraph 6 of Plaintiff's Complaint, Defendant admits.

15 7. Answering Paragraph 7 of Plaintiff's Complaint, Defendant admits that the vehicle
16 identified was owned by Keolis

17 8. Answering Paragraph 8 of Plaintiff's Complaint, Defendant states that it is without
18 sufficient knowledge or information to form a belief as to the truth of the averment contained therein
19 and therefore denies same.

20 9. Answering Paragraph 9 of Plaintiff's Complaint, Defendant states that it is without
21 sufficient knowledge or information to form a belief as to the truth of the averment contained therein
22 and therefore denies same.

23 10. Answering Paragraph 10 of Plaintiff's Complaint, Defendant admits that the vehicle
24 was driven by Mr. Petway with permission of Keolis but states that it is without sufficient knowledge
25 or information to form a belief as to the truth of the remaining averments contained therein and
26 therefore denies same.

27 11. Answering Paragraph 11 of Plaintiff's Complaint, Defendant specifically denies each
28 and every allegation contained therein.

12. Answering Paragraph 12 of Plaintiff's Complaint, Defendant specifically denies each and every allegation contained therein.

FIRST CLAIM FOR RELIEF

Negligence – Andre Petway and Keolis

13. Answering Paragraph 13 of Plaintiff's Complaint, Defendant incorporates its answers contained in Paragraphs 1-12 by reference as though fully set forth herein.

14. Answering Paragraph 14 of Plaintiff's Complaint, Defendant states that it is without sufficient knowledge or information to form a belief as to the truth of the averment contained therein and therefore denies same.

15. Answering Paragraph 15 of Plaintiff's Complaint, Defendant admits that all persons, including Mr. Petway, have an ongoing duty to act reasonably under the circumstances, but denies the remaining allegations contained therein.

16. Answering Paragraph 16 of Plaintiff's Complaint, Defendant states that it is without sufficient knowledge or information to form a belief as to the truth of the averment contained therein and therefore denies same.

17. Answering Paragraph 17 of Plaintiff's Complaint, Defendant admits that Mr. Petway was an employee of Defendant but states that the remainder of this Paragraph contains purely legal arguments and not factual allegations and therefore no response is required; to the extent a response is deemed required, Defendant states that it is without sufficient knowledge or information to form a belief as to the truth of the averment contained therein and therefore denies same.

18. Answering Paragraph 18 of Plaintiff's Complaint, Defendant specifically denies each and every allegation contained therein.

SECOND CLAIM FOR RELIEF

Negligent Hiring, Training, and Supervision – Keolis Transit Services

19. Answering Paragraph 19 of Plaintiff's Complaint, Defendant incorporates its answers contained in Paragraphs 1-18 by reference as though fully set forth herein.

20. Answering Paragraph 20 of Plaintiff's Complaint, Defendant states that this Paragraph contains purely legal allegations instead of factual allegations and therefore no response is required; to the extent a response is deemed required, Defendant admits that it has a duty to act reasonably at all times, but denies any remaining allegations contained therein.

21. Answering Paragraph 21 of Plaintiff's Complaint, Defendant specifically denies each and every allegation contained therein.

22. Answering Paragraph 22 of Plaintiff's Complaint, Defendant specifically denies each and every allegation contained therein.

23. Answering Paragraph 23 of Plaintiff's Complaint, Defendant specifically denies each and every allegation contained therein.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Plaintiff's Complaint and each and every cause of action therein fails to state a claim against Defendant upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Defendant is informed and believes, and thereon alleges, that Plaintiff did not exercise ordinary care, caution, or prudence in this incident and the resulting accident and damages, if any, were proximately caused and contributed to by Plaintiff's own negligence and any recovery by Plaintiff should be proportionally reduced or entirely barred based on such negligence.

THIRD AFFIRMATIVE DEFENSE

Defendant is informed and believes, and thereon alleges, that as to each alleged cause of action, Plaintiff has failed, refused, and neglected to take reasonable steps to mitigate her alleged damages, if any, thus barring or diminishing Plaintiff's recovery herein.

FOURTH AFFIRMATIVE DEFENSE

The damages and injuries sustained by Plaintiff, if any, were the result of an unavoidable accident.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's damages, if any, were caused in whole or in part by preexisting physical, mental,

1 and/or emotional conditions and are not the responsibility of Defendant.

2
3 **SIXTH AFFIRMATIVE DEFENSE**

4 Defendant is informed and believes, and thereon alleges, that the injuries and damages of
5 which the Plaintiff complains, if any, were proximately caused by or contributed to by the acts of other
6 parties, persons, or other entities, who were not Defendant nor its employees or agents and that said
7 acts were an intervening and superseding cause of the injuries and damages, if any, of which the
8 Plaintiff complains.

9 Pursuant to N.R.C.P. 8, as amended, all possible affirmative defenses may not have been
10 alleged herein insofar as sufficient facts were not available for Defendant after reasonable inquiry.

11
12 **WHEREFORE**, Defendant prays for:

- 13 1. Judgment against Plaintiff;
14 2. Costs of suit incurred herein, including reasonable attorneys' fees; and
15 3. Such other and further relief as the Court deems just and proper.
16

17 Dated: August 6, 2019

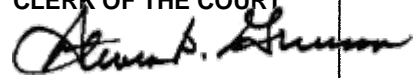
MUEHLBAUER LAW OFFICE, LTD.

18
19 By: 

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*Attorneys for Defendant Keolis Transit
Services, LLC*

TAB 3



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10 Attorney for Plaintiff
11 SHAY TOTH

12 **DISTRICT COURT**

13 **CLARK COUNTY, NEVADA**

14 SHAY TOTH, an Individual,

15 Plaintiff,

16 v.

17 ANDRE RAMON PETWAY, an Individual;
18 KEOLIS TRANSIT SERVICES, a Delaware
19 Limited Liability Company; DOES I through
20 X; and ROE CORPORATIONS XI through
21 XX, Inclusive;

22 Defendants.

Case No. : A-19-797214-C

Dept. No. : 2

**REQUEST FOR EXEMPTION
FROM ARBITRATION**

23 Plaintiff, Shay Toth, by and through her attorney of record, Cliff W. Marcek, Esq.,
24 hereby requests the above entitled matter be exempted from arbitration pursuant to Nevada
25 Arbitration Rules 3 and 5, as this case:

- 26 1. _____ presents a significant issue of public policy;
- 27 2. X involves an amount in excess of \$50,000 per Plaintiff, exclusive of
28 interest and costs;
3. _____ presents unusual circumstances which constitute good cause for removal
from the program.
4. _____ exempt from arbitration pursuant to Nevada Arbitration Rule 3.

///

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FACTS

On or about July 1, 2017, at approximately 6:47 p.m., Plaintiff, Shay Toth (hereafter “Ms. Toth”) was driving a white 2015 Toyota Corolla, bearing vehicle license number 821ZAZ. Defendant, Andre Petway (hereafter “Mr. Petway”) was the permissive driver of a white 2013 Dodge Grand Caravan, bearing vehicle license number 773YYW owned and operated by Keolis Transit Services (hereafter “Keolis”), a Delaware limited liability company authorized to conduct and doing business in the state of Nevada.

Ms. Toth was facing northbound on Boulder Highway, waiting to turn left onto Sahara, when Mr. Petway carelessly ran into the back of her vehicle at a high rate of speed causing significant damage to Ms. Toth and her vehicle. As a direct and proximate result of the negligence of the Defendants, Ms. Toth suffered severe and serious injuries to her body, has had to undergo back surgery, and has had to engage the services of physicians and other health care providers. Ms. Toth has incurred damages in excess of Fifty Thousand (\$50,000) Dollars.

Ms. Toth’s medical bills are as follows:

Complete Care Injury Center	\$5,222.00
Simon Med Imaging	\$11,144.12
UMC Hospital	\$4,610.46
Capanna International Neuroscience Consultants	\$735.00
EMP of Clark	\$472.50
Huntridge Pharmacy	\$310.99
Nevada Comprehensive Pain Center	\$28,000.00
Advanced Orthopedics & Sports Medicine	\$625.00
Dr. Enrico Fazzini (Neurologist)	\$9,962.00
Don Nobis Progressive Physical Therapy	\$34,160.00
CVS	\$22.22
Dr. Chopra Neurocare of Nevada	\$8,915.00
Western Regional Center for Spine/ Las Vegas Neurological	\$47,710.00
New Eyes Las Vegas	\$205.00
Khavkin Clinic	\$829.00
Valley Hospital Medical Center	\$105,341.04
Surgical Anesthesia Services, LLP	\$4,500.00
Desert View Home Health	\$1,600.00
Lyons Home Health Physical Therapy	\$7,650.00
Insourc Diagnostics	\$2,185.00

TOTAL: \$274,199.33

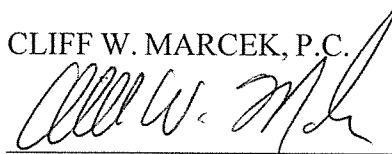
1 Ms. Toth's medical specials alone exceed \$50,000. Moreover, she has a significant
2 amount of general damages for pain and suffering.

3 I hereby certify pursuant to N.R.C.P. 11 this case to be within the exemption(s)
4 marked above and am aware of the sanctions which may be imposed against any attorney or
5 party who without good cause of justification attempts to remove a case from the arbitration
6 program.

7 I further certify pursuant to NRS Chapter 239B and NRS 603A.040 that this
8 document and any attachments thereto do not contain personal information including,
9 without limitation, home address/phone number, social security number, driver's license
10 number or identification card number, account number, PIN numbers, credit card number or
11 debit card number, in combination with any required security code, access code, or password
12 that would permit access to the person's financial account.

13 Dated this 21 day of August, 2019.

14 CLIFF W. MARCEK, P.C.



15
16 Cliff W. Marcek, Esq.
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Las Vegas, NV 89104
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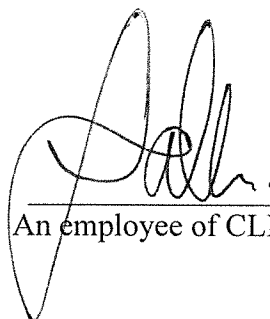
17
18
19
20 Attorney for Plaintiff
SHAY TOTH

CERTIFICATE OF SERVICE

Pursuant to Nev.R.Civ.P 5(b), I certify that I am an employee of CLIFF W. MARCEK, P.C., and that on this 21 day of August, 2019, I caused the above and foregoing document, **REQUEST FOR EXEMPTION FROM ARBITRATION**, to be served via E-service on Wiznet pursuant to mandatory NEFCR 4(b) to the following parties at their last known address:

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Sean P. Connell, Esq.
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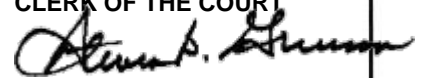
Attorney for Defendant
KEOLIS TRANSIT SERVICES, LLC



An employee of CLIFF W. MARCEK, P.C.

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TAB 4



1 SCHTO

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 SHAY TOTH,

7 Plaintiff(s),

8 vs.

9 KEOLIS TRANSIT SERVICES, et al.,

10 Defendant(s).

Case No.: A-19-797214-C
Dept. No.: II

**SCHEDULING ORDER and ORDER
SETTING CIVIL JURY TRIAL, PRE-
TRIAL CONFERENCE and
CALENDAR CALL**

11
12
13 **SCHEDULING ORDER**

14 NATURE OF ACTION: **Negligence - Auto**

15 TIME REQUIRED FOR TRIAL: **2 Weeks**

16 TRIAL READY DATE: **January 11, 2021**

17 DATES FOR SETTLEMENT CONFERENCE: N/A

18 Counsel representing all parties and after consideration by the Judge,

19 **IT IS HEREBY ORDERED:**

20 1. all parties shall complete discovery on or before **October 2, 2020.**

21 2. all parties shall file motions to amend pleadings or add parties on or before

22 **July 2, 2020.**

23 3. all parties shall make initial expert disclosures pursuant to N.R.C.P. 16.1(a)(2) on
24 or before **July 2, 2020.**

25 4. all parties shall make rebuttal expert disclosures pursuant to N.R.C.P. 16.1(a)(2)
26 on or before **August 3, 2020.**

27 5. all parties shall file dispositive motions on or before **November 2, 2020.**

28 . . .

Richard F. Scotti
District Judge

Department Two
Las Vegas, NV 89155

1 Unless otherwise directed by the court, all pretrial disclosures pursuant to N.R.C.P.
2 16.1(a)(3) must be made at least 30 days before trial.

3 Discovery disputes that do not affect the Trial setting will be handled by the Discovery
4 Commissioner.

5 A request for an extension of the discovery deadline, if needed, must be submitted to
6 this department in compliance with EDCR 2.35. Stipulations to continue trial will be allowed
7 only for cases that are less than two (2) years old. All cases two years or older must file a
8 motion and have it set for hearing before the Court.

9
10 **ORDER SETTING CIVIL JURY TRIAL,**

11 **PRE-TRIAL CONFERENCE AND CALENDAR CALL**

12 **IT IS HEREBY FURTHER ORDERED THAT:**

13 A. The above entitled case is set to be tried to a jury on a **Five week stack**, to begin,
14 **January 11, 2021 at 10:00 a.m.**

15 B. Pursuant to EDCR 2.68, a Pre-Trial Conference with the designated trial attorney
16 and/or parties in proper person will be held on **December 21, 2020 at 8:45 a.m.**

17 C. **Prior to the 9:00 a.m. law and motion calendar, the calendar call will be held**
18 **on January 4, 2021 at 8:45 a.m. You must be punctual or sanctions may be imposed**
19 **including the loss of your slot on the stack, loss of the trial date, and/or any other**
20 **appropriate sanction as set forth below.** The Parties must bring to calendar call all items
21 listed in EDCR 2.69. At the time of the calendar call, counsel will set an appointment with the
22 Court Clerk. The appointment must be at least two days before the first day of trial.

23 D. Parties are to appear on **October 12, 2020 at 9:00a.m.**, for a Status Check re Trial
24 Readiness.

25 E. The Pre-Trial Memorandum must be filed no later than **January 4, 2021**, with a
26 courtesy copy delivered to Department II. All parties, (Attorneys and parties in proper
27 person) **MUST** comply with **All REQUIREMENTS** of E.D.C.R. 2.67, 2.68 and 2.69.
28 Counsel should include the Memorandum an identification of orders on all motions in limine

1 or motions for partial summary judgment previously made, a summary of any anticipated legal
2 issues remaining, a brief summary of the opinions to be offered by any witness to be called to
3 offer opinion testimony as well as any objections to the opinion testimony.

4 F. All motions in limine to exclude or admit evidence must be in writing and filed no
5 later than **November 2, 2020. Orders shortening time will not be signed except in extreme**
6 **emergencies**.

7 G. All original depositions anticipated to be used in any manner during the trial must
8 be delivered to the clerk prior to the final Pre-Trial Conference. If deposition testimony is
9 anticipated to be used in lieu of live testimony, a designation (by page/line citation) of the
10 portions of the testimony to be offered must be filed and served by email or hand, three (3)
11 judicial days prior to the final Calendar Call. Any objections or counterdesignations (by
12 page/line citation) of testimony must be filed and served by facsimile or hand, two (2) judicial
13 days prior to the commencement of Calendar Call. Counsel shall advise the clerk prior to
14 publication.

15 H. In accordance with EDCR 2.67, counsel shall meet, review, and discuss exhibits.
16 All exhibits must comply with EDCR 2.27. Three (3) sets must be three-hole punched placed
17 in three ring binders, exhibit tabs, and an exhibit list. The sets must be delivered to the clerk
18 prior to the Calendar Call. Any demonstrative exhibits including exemplars anticipated to be
19 used must be disclosed prior to the calendar call. Pursuant to EDCR 2.68, at the final Pre-
20 Trial Conference, counsel shall be prepared to stipulate or make specific objections to
21 individual proposed exhibits. Unless otherwise agreed to by the parties, demonstrative
22 exhibits are marked for identification but not admitted into evidence.

23 I. In accordance with EDCR 2.67, counsel shall meet, review, and discuss items to
24 be included in the Jury Notebook. Pursuant to EDCR 2.68, counsel shall be prepared to
25 stipulate or make specific objections to items to be included in the Jury Notebook.

26 J. In accordance with EDCR 2.67, counsel shall meet and discuss pre-instructions to
27 the jury, jury instructions, special interrogatories, if requested, and verdict forms. Each side
28 shall provide the Court, two (2) judicial days prior to the firm trial date given at Calendar Call,

1 an agreed set of jury instructions and proposed form of verdict along with any additional
2 proposed jury instructions with an electronic copy in Word format.

3 K. Counsel shall email to dept02lc@clarkcountycourts.us, in accordance with
4 EDCR 7.70, two (2) judicial days prior to the firm trial date given at Calendar Call, voir dire
5 proposed to be conducted pursuant to conducted pursuant to EDCR 2.68.

6 **Failure of the designated trial attorney or any party appearing in proper person**
7 **to appear for any court appearances or to comply with this Order shall result in any of**
8 **the following: (1) dismissal of the action (2) default judgment; (3) monetary sanctions;**
9 **(4) vacation of trial date; and/or any other appropriate remedy or sanction.**

10 Counsel is required to advise the Court immediately when the case settles or is
11 otherwise resolved prior to trial. A stipulation which terminates a case by dismissal shall also
12 indicate whether a Scheduling Order has been filed and, if a trial date has been set, the date of
13 that trial. A copy should be given to Chambers.

14 IT IS SO ORDERED.

15 Dated this 8th day of November, 2020.

16
17 
18 RICHARD F. SCOTTI
19 DISTRICT COURT JUDGE

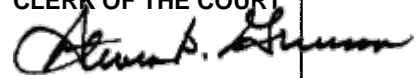
20 **CERTIFICATE OF SERVICE**

21 I hereby certify that on or about the date signed, a copy of this Order was electronically
22 served in accordance with Administrative Order 14.2, to all interested parties, through the
23 Court's Odyssey EFileNV system.

24
25 /s/ Melody Howard

26 Melody Howard
27 Judicial Executive Assistant
28

TAB 5



1 **MCOM**

2 CLIFF W. MARCEK, ESQ.

3 Nevada Bar No. 5061

4 CLIFF W. MARCEK, P.C.

5 536 E. St. Louis Ave.

6 Las Vegas, NV 89104

7 Telephone: (702) 366-7076

8 Facsimile: (702) 366-7078

9 Email: cwmarcek@marceklaw.com

10 BOYD B. MOSS III, ESQ.

11 Nevada Bar No. 8856

12 MOSS BERG INJURY LAWYERS

13 4101 Meadows Lane, Suite 110

14 Las Vegas, Nevada 89107

15 Telephone: (702) 222-4555

16 Facsimile: (702) 222-4556

17 Email: boyd@mossberglv.com

18 *Attorneys for Plaintiff*

19 **DISTRICT COURT**

20 **CLARK COUNTY, NEVADA**

21 SHAY TOTH, an Individual,

CASE NO. A-19-797214-C

DEPT. NO. 2

22 Plaintiff,

23 v.

(Discovery Commissioner)

24 ANDRE RAMON PETWAY, an Individual;
25 KEOLIS TRANSIT SERVICES, a Delaware
26 Limited-Liability Company; DOES I through
27 X; and ROE CORPORATIONS XI through
28 XX, inclusive,

Hearing Requested

Defendants.

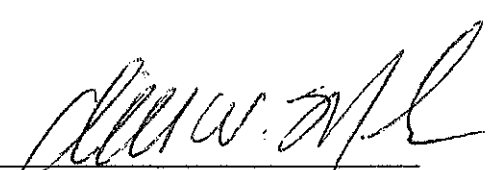
PLAINTIFF'S MOTION TO COMPEL DEFENDANTS' DISCOVERY RESPONSES

Plaintiff, SHAY TOTH, by and through her attorneys of record, CLIFF W. MARCEK, ESQ., and BOYD B. MOSS III, ESQ., hereby files the following Motion to Compel Defendants' Responses to Plaintiff's First Set Requests for Production of Documents.

1 This Motion is made and based on the pleadings and papers on file herein, the following
2 Memorandum of Points and Authorities, and upon any oral argument the Court may entertain at
3 the time of the hearing in this matter.

4 DATED this 23 day of March, 2020.

5
6
7
8 By:


CLIFF W. MARCEK, ESQ.
Nevada Bar No. 5061
CLIFF W. MARCEK, P.C.
536 E. St. Louis Ave.
Las Vegas, NV 89104
Telephone: (702) 366-7076
Facsimile: (702) 366-7078
Email: cwmarcek@marceklaw.com

14 BOYD B. MOSS III, ESQ.
15 Nevada Bar No. 8856
16 MOSS BERG INJURY LAWYERS
17 4101 Meadows Lane, Suite 110
18 Las Vegas, Nevada 89107
19 Telephone: (702) 222-4555
20 Facsimile: (702) 222-4556
21 Email: boyd@mossberglv.com
22 *Attorneys for Plaintiff*
23
24
25
26
27
28

1 **NOTICE OF MOTION**

2 **TO: ALL INTERESTED PARTIES AND THEIR ATTORNEYS OF RECORD:**

3 PLEASE TAKE NOTICE that the undersigned counsel shall bring the foregoing
4 **PLAINTIFF'S MOTION TO COMPEL DEFENDANTS' DISCOVERY RESPONSES** for
5 hearing before the Discovery Commissioner of the above-entitled Court on the _____ day
6 of _____, 2020, at the hour of _____ a.m. / p.m., or as soon thereafter as
7 counsel may be heard.
8

9 DATED this 23 day of March, 2020.

10 CLIFF W. MARCEK, P.C.

11
12
13 By:


CLIFF W. MARCEK, ESQ.

Nevada Bar No. 5061

CLIFF W. MARCEK, P.C.

536 E. St. Louis Ave.

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18
19 BOYD B. MOSS III, ESQ.

Nevada Bar No. 8856

MOSS BERG INJURY LAWYERS

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Telephone: (702) 222-4555

Facsimile: (702) 222-4556

Email: boyd@mossberglv.com

Attorneys for Plaintiff

1 **AFFIDAVIT OF COUNSEL IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL**
2 **DEFENDANTS' DISCOVERY RESPONSES**

3 STATE OF NEVADA)
) ss:
4 COUNTY OF CLARK)

5
6 I, CLIFF W. MARCEK, ESQ., being first duly sworn, depose and say under penalty of
7 perjury under the laws of the State of Nevada that the following assertions are true:

8 1. That I am an attorney duly licensed to practice law in all courts in the state of
9 Nevada and I am a partner at the law firm of CLIFF W. MARCEK, P.C. co-counsel for Plaintiff,
10 SHAY TOTH. By virtue of the same, I have personal knowledge of the facts and circumstances
11 set forth herein;

12
13 2. On October 18, 2019, my office served Plaintiff's First Set of Interrogatories and
14 Requests for Production of Documents to Defendant, KEOLIS TRANSIT SERVICES. The types
15 of documents and data requested for production included, among other items, any (a) documents
16 obtained about the Plaintiff from any source, including, social media, private investigators and/or
17 insurance companies, (b) video surveillance, and/or imaging, of the Plaintiff obtained through
18 private investigators, witnesses, and/or social media, (c) Defendant KEOLIS' claims file;

19
20 3. On November 25, 2019, Defendant KEOLIS served its Responses to Plaintiff's
21 First Requests for Production;

22 4. Defendant KEOLIS' Responses to Plaintiff's First Requests for Production
23 insufficiently alleged various privileges as its basis of objecting to the production of three
24 surveillance videos, two reports on said surveillance videos and the ISO claims search of Plaintiff;

25 5. Further, Defendant KEOLIS initially failed to provide its privilege log to Plaintiff;

26 6. On December 27, 2019 I emailed Defendant KEOLIS' attorney of record,
27 ANDREW R. MUEHLBAUER, in regards to Defendant KEOLIS' objections to the production
28

1 of the three surveillance videos, two reports on said surveillance videos and the ISO report of
2 Plaintiff on the basis of its alleged privilege;

3 7. On January 10, 2020, Defendant KEOLIS served its Amended Response to
4 Plaintiff's First Requests for Production along with an inadequate Privilege Log that revealed the
5 three surveillance videos to be Defendant KEOLIS' bates stamped KEO01311-1313, the two
6 reports on said surveillance videos to be Defendant KEOLIS' KEO01314-1326 and KEO01327-
7 KEO01339 and the ISO report of Plaintiff to be KEO01340-1343;

8
9 8. Defendant's January 10, 2020, Amended Responses and inadequate Privilege Log
10 maintained, and expanded, the alleged privileges it maintained as its basis of objecting to the
11 production the aforementioned videos and reports;

12
13 9. On January 10, 2020, Defendant KEOLIS' attorney of record, ANDREW R.
14 MUEHLBAUER, responded to my December 27, 2019 email, asserting that Defendant KEOLIS
15 need not produce the aforementioned videos and reports in her First Requests for Production as
16 Defendant KEOLIS' asserted that the deficiencies in its allegations of privilege in its objections
17 had been remedied by way of its production of its Amended Responses, inadequate Privilege log
18 and Supplemental Disclosure;

19
20 10. Within his email, ANDREW R. MUEHLBAUER explained that Defendant
21 KEOLIS would most likely instruct him to maintain its objections to the production of the
22 aforementioned videos and reports on the basis of its alleged privilege and that the matter may
23 ultimately need to be argued in front of the Judge;

24
25 11. Defendant KEOLIS' Amended Responses, inadequate Privilege Log and
26 Supplemental Disclosure are not sufficient to remedy the deficiencies in Defendant KEOLIS'
27 allegations of privilege in its objections to the production of the aforementioned videos and
28 reports;

1 12. Defendant KEOLIS' inadequate Privilege Log is insufficient in providing a
2 detailed privilege log in regard to the documents withheld as privileged as required by law;

3 13. On January 16, 2020, I responded to ANDREW R. MUEHLBAUER'S January
4 10, 2020 email and advised him that Plaintiff would most likely need to file a subsequent motion
5 in order to compel the production of the aforementioned videos and reports;

6 14. On March 18, 2020, at 10:00 a.m., I had a EDCR 2.34 telephonic conference with
7 ANDREW R. MUEHLBAUER in an attempt to resolve these discovery disputes. (This was
8 actually a second call. I had a previous call with Mr. Muehlbauer in January 2020, but I can not
9 remember the exact date.) I stated that if Plaintiff and Defendant KEOLIS could not reach a
10 compromise on the production of, or at the very least the disclosure of the nature of, the
11 aforementioned videos and reports, then Plaintiff would file a motion to compel the production.
12 ANDREW R. MUEHLBAUER advised me to move forward with the motion to compel, as
13 KEOLIS would not disclose the nature and dates of, let alone produce a true or even redacted
14 copy of, the aforementioned videos and reports without a court order.

15 15. As it appears a dispute remains as to Defendant's discovery responses, Plaintiff
16 files the following Motion to Compel.

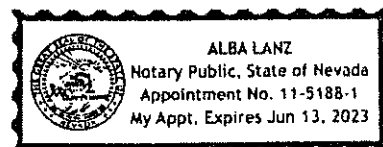
17 DATED this 23 day of March, 2020.

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28

CLIFF W. MARCEK, ESQ., Affiant

SUBSCRIBED and SWORN to before
me this 23 day of March, 2020.


NOTARY PUBLIC in and for
said COUNTY and STATE



1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 INTRODUCTION

4 **A. Statement of Facts:**

5 This is an action for personal injuries and damages as a result of a motor vehicle collision
6 occurring on July 1, 2017, at approximately 6:47 p.m. Defendant ANDRE RAMON PETWAY,
7 while in the scope of his employment with Defendant KEOLIS, was driving a 2013 Dodge Grand
8 Caravan, owned by Defendant KEOLIS, and was traveling northbound on Boulder Highway.
9 Thereafter, Defendant PETWAY negligently, carelessly, and recklessly controlled Defendant
10 KEOLIS' vehicle by following too closely and not paying attention to the road ahead. As a result,
11 Defendant PETWAY drove into the back of a 2015 Toyota Corolla that was waiting to make a left
12 turn onto Sahara Avenue. Plaintiff, SHAY TOTH, was operating the Corolla, and was severely
13 injured in the crash.

14 **B. Procedural Posture:**

15 Plaintiff filed her Complaint on June 21, 2019, alleging a claim of negligence against
16 Defendant ANDRE RAMON PETWAY, an Individual; and Defendant KEOLIS TRANSIT
17 SERVICES, a Delaware Limited Liability Company. Thereafter, on or about August 6, 2019,
18 Defendant KEOLIS filed its answer to Plaintiff's Complaint. On or about September 20, 2019,
19 Plaintiff filed its affidavit of Due Diligence for the service of Defendant PETWAY. Plaintiff and
20 Defendant KEOLIS met and conferred at an early case conference and a Joint Case Conference
21 Report was filed on or about October 16, 2019. On or about October 17, 2019, Plaintiff filed its
22 motion for Extension of Time of Service for Defendant PETWAY, which was subsequently
23 granted. On or about October 31, 2019, Plaintiff filed its proof of service for Defendant
24 PETWAY. On or about November 21, 2019, Defendant PETWAY filed his answer to Plaintiff's
25

1 Complaint. Shortly thereafter, scheduling and trial orders were issued in this. The case deadlines
2 are as follows:

3	Amend Pleadings/Add Parties:	July 2, 2020
4	Initial Expert Disclosures:	July 2, 2020
5	Rebuttal Expert Disclosures:	August 3, 2020
6	Close of Discovery:	October 2, 2020
	Deadline to File Dispositive Motions:	November 2, 2020

7 The trial in this matter is currently set to commence on a five-week stack beginning on
8 January 11, 2021. This is the first trial setting in this matter.

9 **C. Facts Relevant to Plaintiff's Motion to Compel:**

10 On October 18, 2019, Plaintiff electronically served Defendant KEOLIS with her First Set
11 of Requests for Production of Documents.¹ On November 25, 2019, Defendant KEOLIS served
12 its Responses to Plaintiff's First Requests for Production of Documents. Defendant KEOLIS'
13 Responses to Plaintiff's First Requests for Production insufficiently alleged various privileges as
14 its basis of objecting to the production of documents and data requested by Plaintiff. Further,
15 Defendant KEOLIS initially failed to provide an associated privilege log to Plaintiff.
16

17 On December 27, 2019 CLIFF W. MARCEK emailed Defendant in regards to its
18 objections to the production of documents and data requested by Plaintiff on the basis of its
19 alleged privilege.² On January 10, 2020, Defendant KEOLIS served its Amended Response to
20 Plaintiff's First Requests for Production along with an inadequate Privilege Log.^{3 4} Defendant's
21 January 10, 2020, Amended Responses maintained, and expanded, its alleged privileges as its
22 basis of objecting to the production of three surveillance videos to be Defendant KEOLIS' bate
23 stamped KEO01311-1313, the two reports on said surveillance videos to be Defendant KEOLIS'
24
25

26 ¹ See Plaintiff's First Set of Requests for Production of Documents (attached as Exhibit 1)

27 ² See Email correspondence of CLIFF W. MARCEK and ANDREW R. MUEHLBAUER (attached as Exhibit 2)

28 ³ See Defendant KEOLIS' Amended Responses to Plaintiff's First Set of Requests for Production of Documents (attached as Exhibit 3)

⁴ See Defendant KEOLIS' Privilege Log (attached as Exhibit 4)

1 KEO01314-1326 and KEO01327-KEO01339 and the ISO report of Plaintiff to be KEO01340-
2 1343.⁵ Specifically, Defendant refused to produce the aforementioned videos and reports
3 requested by Plaintiff in her discovery requests numbered 10, 11 and 23 for (a) documents
4 obtained about the Plaintiff from any source, including, social media, private investigators and/or
5 insurance companies, (b) video surveillance, and/or imaging, of the Plaintiff obtained through
6 private investigators, witnesses, and/or social media, (c) Defendant KEOLIS' claims file,
7 respectively.^{6 7 8}

9 On January 10, 2020, Defendant KEOLIS' attorney of record, ANDREW R.
10 MUEHLBAUER, responded to CLIFF W. MARCEK's December 27, 2019 email, asserting that
11 Defendant KEOLIS need not produce the aforementioned videos and reports that Plaintiff
12 requested in her First Requests for Production as Defendant KEOLIS maintained that the
13 deficiencies in its allegations of privilege maintained in its objections had been remedied by way
14 of its production of its Amended Responses, Privilege log and Supplemental Disclosure.⁹ Within
15 his email, ANDREW R. MUEHLBAUER explained that Defendant KEOLIS would most likely
16 instruct him to maintain its objections to the production of the aforementioned videos and reports
17 on the basis of its alleged privilege and that the matter may ultimately need to be argued in front
18 of the Judge.¹⁰

19 On March 20, 2020, at 10:00 a.m., CLIFF W. MARCEK had a EDCR 2.34 telephonic
20 conference with ANDREW R. MUEHLBAUER in an attempt to resolve these discovery disputes
21 wherein ANDREW R. MUEHLBAUER confirmed he would not produce the aforementioned
22
23
24
25

26 ⁵ See *Supra* 3

27 ⁶ See *Supra* 2

28 ⁷ See *Supra* 3

⁸ See *Supra* 4

⁹ See *Supra* 2

¹⁰ See *Supra*

1 videos and reports without a court order.¹¹

2 Since Defendant KEOLIS' first response to Plaintiff's Request for Production, Plaintiff's
3 counsel has made multiple good faith attempts to resolve this discovery dispute and obtain
4 Defendant's complete discovery responses. However, Defendant KEOLIS has maintained its
5 refusal of the production of the aforementioned videos and reports on the basis of its alleged
6 privilege and has refused to provide any further documents or data in regard to Plaintiff's request
7 absent a Court order.¹²

9 II.

10 LEGAL ARGUMENT

11 **A. The Videos and Reports Requested by Plaintiff Must Be Disclosed Pursuant to** 12 **NRCP 16.1**

13 The 2019 amendments to the Nevada Rules of Civil Procedure are comprehensive and
14 modeled in part after the Federal Rules of Civil Procedure.¹³ The 2019 amendments to NRCP
15 16.1 has brought NRCP 16.1 in line with the relevant FRCP produced in relevant part in footnote
16 below.¹⁴ As laid out in the redline provisions of the 2019 NRCP amendments, against the previous
17
18
19

20 ¹¹ See Affidavit of CLIFF W. MARCEK, Esq. in Support of Plaintiff's Motion to Compel Defendant KEOLIS.

21 ¹² See *Supra*

22 ¹³ See ADKT 522 Redline of Proposed NRCP Amendments Against Existing NRCP at pg 1 Advisory Committee
23 Note 2019 Amendment; Reproduced in Pertinent part: The 2019 amendments to the Nevada Rules of Civil
24 Procedure are comprehensive. Modeled in part on the 2018 version of the Federal Rules of Civil Procedure, the
25 2019 amendments restyle the rules and modernize their text to make them more easily understood. Although
26 modeled on the FRCP, the amendments retain and add certain Nevada-specific provisions. The stylistic changes are
27 not intended to affect the substance of the former rules.

28 ¹⁴ See *Supra* at 77-78 Advisory Committee Note 2019 Amendment; Reproduced in Pertinent part:
Rule 16.1(a)(1)(A)(ii) incorporates language from the federal rule requiring that a party disclose materials that it may
use to support its claims or defenses. However, the disclosure requirement also includes any record, report, or
witness statement in any form, including audio or audiovisual form, concerning the incident that gives rise to
the lawsuit. The 78 initial disclosure requirement of a "record" or "report" under Rule 16.1(a)(1)(A)(ii) includes but
is not limited to: incident reports, records, logs and summaries, maintenance records, former repair and inspection
records and receipts, sweep logs, and any written summaries of such documents. Documents identified or produced
under Rule 16.1(a)(1)(A)(ii) should include those that are prepared or exist at or near the time of the subject
incident. The reasonable time required for production of such documents will depend on the facts and circumstances
of each case. A party who seeks to avoid disclosure based on privilege must provide a privilege log. (emphasis added)

1 NRCP, the mandatory disclosure of data, including video, pursuant to NRCP 16.1(a)(1)(A)(ii) is
2 as follows:

3 ~~(B) A(ii) a copy of, or a description by category and location —~~
4 ~~of, all documents, data—compilations electronically stored~~
5 ~~information, and tangible things that are the disclosing party has in~~
6 ~~the its possession, custody, or control of and may use to support its~~
7 ~~claims or defenses, including for **impeachment or rebuttal,**~~
8 ~~and, unless privileged or protected from disclosure, any record,~~
9 ~~report, or witness statement, in any form, concerning the party and~~
10 ~~which are discoverable under Rule 26(b); incident that gives rise to~~
11 ~~the lawsuit.¹⁵ (emphasis added)~~

12 As such, and in accordance with the statutory intent of the drafters of the 2019
13 amendments to NRCP 16.1, Defendant must have disclosed any record, report, or witness
14 statement in any form, including audio or audiovisual form, concerning the incident that gives
15 rise to the lawsuit, including incident reports, records, logs and summaries, maintenance records,
16 former repair and inspection records and receipts, sweep logs, and any written summaries of such
17 documents.¹⁶ So long as those Documents are prepared or exist at or near the time of the subject
18 incident.¹⁷ As noted in this case, Defendant KEOLIS failed to provide any dates within its
19 privilege log, preventing Plaintiff the opportunity of discovering whether the documents were
20 prepared, or existed, at or near the time of the subject incident, which would sufficiently entail
21 the disclosure of the documents as privilege would most likely not manifest at that time as entailed
22 below.¹⁸

23 **B. Defendant Must Be Compelled to Fully Respond to Plaintiff's Discovery Responses:**

24 The purpose of discovery is to promote the truth and the ultimate disposition of the lawsuit
25 in accordance therewith. Discovery fulfills this purpose by assuring the mutual knowledge of all
26

27 ¹⁵ See Supra at 71

28 ¹⁶ See Supra 14

¹⁷ See Supra

¹⁸ See Supra 4

1 relevant facts gathered by both parties which are essential to proper litigation.¹⁹

2 NRCP 34(b) provides, in part, "The party upon whom the request is served shall serve a
3 written response within 30 days after the service of the request..."

4 Further, NRCP 37(a)(2)(B) provides in part, "If...a party fails to answer an interrogatory
5 submitted under Rule 33, or if a party, in response to a request for inspection submitted under
6 Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection
7 as requested, the discovering party may move for an order compelling an answer, or a designation,
8 or an order compelling inspection in accordance with the request."²⁰

9
10 Plaintiff properly and timely served Defendant with written discovery requests on
11 November 25, 2019. Rules 33 and 34 of the Nevada Rules of Civil Procedure allow a party (30)
12 thirty days to respond to such written discovery requests. Here, it doesn't appear that the materials
13 are privileged, proprietary or non-discoverable but actual evidence that defendant intends to use
14 either directly, or for impeachment or rebuttal. However, because Defendant has not provided an
15 adequate privilege log, it is impossible to ascertain the basis of its alleged to know whether said
16 materials should properly be protected under attorney/client privilege.^{21 22 23}

17
18 Plaintiff has attempted on multiple occasions, to obtain Defendant KEOLIS' complete
19 discovery responses. Most recently, on March 18, 2020 Plaintiff's co-counsel, CLIFF W.
20 MARCEK, held a telephonic conference with Defendant KEOLIS' attorney of record, ANDREW
21 R. MUEHLBAUER in an attempt to resolve these discovery disputes in accordance with EDCR
22 2.34.²⁴ However, genuine discovery disputes remain requiring this Court's intervention as defense
23
24

25 ¹⁹ *In re: Bergeson*, 112 F.R.D. 692, 696 (D. Mont. 1986).

26 ²⁰ NRCP 37(a)(3) goes on to state that, "For purposes of this subdivision an evasive or incomplete disclosure, answer
or response is to be treated as a failure to disclose, answer or respond.

27 ²¹ *See Supra* 2

28 ²² *See Supra* 3

²³ *See Supra* 4

²⁴ *See Supra* 11

1 counsel indicates that Defendant KEOLIS does not intend to disclose the nature and dates of, let
2 alone produce a true or even redacted copy of, the requested evidence without a court order.²⁵

3 Defendant KEOLIS failure to provide complete and verified responses to Plaintiff's
4 written discovery prejudices Plaintiff's ability to adequately prepare for trial. Plaintiff urges the
5 Court to grant her motion and compel Defendant to provide the requested evidence.
6

7 **C. Defendant KEOLIS' Purported Privileges and Objections Do Not Justify Their**
8 **Refusal**

9 The attorney-client privilege protects communications "by the client to the attorney, [and]
10 advice rendered by the attorney to the client, at least to the extent that such advice may reflect
11 confidential information conveyed by the client."²⁶ If documents are withheld on the basis of this
12 privilege, the withholding entity must provide a detailed privilege log.²⁷ Moreover, after a
13 privilege log is produced, the withholding party "has the burden of making a prima facie showing
14 that the information being withheld is indeed privileged."²⁸
15

16 With respect to Defendant KEOLIS' assertion of the attorney-client and/or work product
17 doctrine (pursuant to NRCP 26(b)(3)) and/or the litigation privilege, it has not properly asserted
18 the privilege. In its January 10, 2020, Amended Response to Plaintiff's First Requests for
19 Production along with its Privilege Log, where Defendant KEOLIS objected to Request No. 10,
20 No. 11 and No. 23, based on the attorney-client and/or work product doctrine (pursuant to NRCP
21 26(b)(3)) and/or the litigation privilege, it did not provide Plaintiff with an adequate privilege
22 log.²⁹
23
24

25 ²⁵ See *Supra*

26 ²⁶ *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 442 (S.D.N.Y. 1995).

27 ²⁷ See *Germaine Music v. Universal Songs of Polygram*, No. 2:03CV00047-PMP-LRL, 2006 WL 3780131, at *2 (D.
28 Nev. Dec. 20, 2006) (If documents are withheld "on the basis of [attorney-client privilege or work product], [the
withholding party] shall provide a detailed privilege log").

28 ²⁸ *Id.*

29 ²⁹ See *Supra* 4

1 Without an adequate privilege log, Plaintiff has no means of discerning what documents,
2 and data, Defendant KEOLIS is actually withholding; and, more importantly, Plaintiff has no
3 mechanism for challenging unilateral - and unwarranted - attempts to clothe relevant,
4 discoverable documents, and data, in the attorney-client privilege. Without an adequate privilege
5 log, Defendant KEOLIS unquestionably fails to make prima facie showing that responsive
6 documents and data are in fact privileged. Here, it appears the information the Defendant is
7 withholding is not pertaining to attorney-client conversations or proprietary information.

9 Further, Defendant's assertion regarding the propriety of withholding the video from
10 plaintiff or defendant's employees is not justified. Indeed, preventing access to the video runs
11 counter to the paramount goals of transparency, collaboration, and efficiency in the discovery
12 process.³⁰ Courts generally have ordered parties to produce materials to promote such goals,
13 particularly the goal of transparency.^{31 32} Given this preference for transparent and collaborative
14 discovery, the video must be produced prior to plaintiff's deposition.

16 The Defendant is withholding information that it will likely try to use as evidence whether
17 directly, for impeachment or rebuttal. It is improper to assert privilege to hold back relevant
18 evidence only to later attempt to use that evidence to advantage of the withholding party.

20 III.

21 CONCLUSION

23 ³⁰ See *Apple, Inc. v. Samsung Electronics Co.*, No. 12-CV-0630-LHK PSG, 2013 U.S. Dist. LEXIS 67085, 2013 WL
24 1942163, at *3 (N.D. Cal. May 9, 2013) ("[T]ransparency and collaboration [are] essential to meaningful, cost-
effective discovery"); The Sedona Conference, *The Sedona Conference Cooperation Proclamation* (2008)
(http://www.thesedonaconference.org/content/tsc_cooperation_proclamation) (promoting "open and forthright
25 information sharing... to facilitate cooperative, collaborative, transparent discovery.").

26 ³¹ See e.g., *Whitney v. City of Milan, Tenn.*, No. 09-1127, 2010 U.S. Dist. LEXIS 54393, 2010 WL 2011663, at *3
(W.D. Tenn. May 20, 2010) (Court denies plaintiff's request to withhold recordings for impeachment purposes until
27 after depositions are complete, holding, among others, that gamesmanship with information is discouraged by the
federal rules).

28 ³² *Rofail v. United States of America*, 227 F.R.D. 53, 58 (E.D.N.Y. 2005) (Court held that plaintiff
must produce recording because "[o]pen discovery is the norm. Gamesmanship with information is discouraged and
surprises are abhorred.").

1 CONCLUSION

2 For the above and foregoing reasons, Plaintiff respectfully requests that the Court compel
3 Defendant to fully respond to Plaintiff's First Set Requests for Production of Documents.
4

5 DATED this 23 day of March, 2020.
6

7 CLIFF W. MARCEK, P.C.

8
9 By: 

10 CLIFF W. MARCEK, ESQ.

11 Nevada Bar No. 5061

12 CLIFF W. MARCEK, P.C.

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26 *Attorneys for Plaintiff*
27
28

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Andrew R. Muehlbauer, Esq.
Sean P. Connell, Esq.
MUEHLBAUER LAW OFFICE, LTD.
7915 West Sahara Ave., Suite 104
Las Vegas, Nevada 89117
Attorneys for Defendants

035

EXHIBIT 1

EXHIBIT 1

1 Cliff W. Marcek, Esq.
Nevada Bar No. 5061
2 CLIFF W. MARCEK, P.C.
536 E. St. Louis Ave.
3 Las Vegas, NV 89104
Telephone : (702) 366-7076
4 Facsimile : (702) 366-7078
Email : cwmarcek@marceklaw.com

5 Attorney for Plaintiff
SHAY TOTH
6

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**
9

10 SHAY TOTH, an Individual,

11 Plaintiff,

12 v.

13 ANDRE RAMON PETWAY, an Individual;
KEOLIS TRANSIT SERVICES, a Delaware
14 Limited Liability Company; DOES I through
X; and ROE CORPORATIONS XI through
15 XX, Inclusive;

16 Defendants.

Case No. : A-19-797214-C

Dept. No. : 2

**PLAINTIFF'S FIRST REQUEST
FOR PRODUCTION OF
DOCUMENTS TO DEFENDANT
KEOLIS TRANSIT SERVICES**

17 Plaintiff, Shay Toth, by and through her attorney Cliff W. Marcek, Esq., hereby
18 propounds the following Requests for Production of Documents to Defendant, Keolis Transit
19 Services, pursuant to Nev.R.Civ.P. 34:

20 **INSTRUCTIONS AND DEFINITIONS**

21 The following Instructions and Definitions are to be considered applicable to all
22 demands for production of documents and tangible things contained herein:

23 If any of these documents cannot be produced in full, produce to the extent possible,
24 specifying your reasons for your inability to produce the remainder and stating whatever
25 information, knowledge or belief you do have concerning the unproduced portion.

26 If any of the requested documents or other things at one time existed, but no longer
27 are in existence, please so state and specify for each document or thing, (a) the document
28 type or thing, (b) the type of information contained therein, (c) the date upon which it ceased

1 to exist, (d) the circumstances under which it ceased to exist, (e) the identity of any person
2 having knowledge of said circumstances, (f) the identity of any person having knowledge of
3 the contents thereof, and (g) the identity of any person or business which might have a copy
4 thereof.

5 This request is a continuing one. If you should later obtain or become aware of any
6 further documents responsive to this request, you are required to produce such additional
7 documents.

8 1. The terms "DOCUMENT" and "DOCUMENTS" are intended in their
9 broadest sense, and include, without limitation, any original, matrix, reproduction or copy of
10 any kind, typed, recorded, graphic, printed, photostatic, written or documentary matter,
11 including, without limitation, articles, correspondence, memoranda, interoffice
12 communications, electronic mail, text messages, notes, diaries, contracts, agreements,
13 drawings, plan, photographs, movies, negatives, specifications, estimates, vouchers, permits,
14 written ordinances, minutes of meetings, invoices, billings, checks, reports, studies,
15 telegrams, facsimiles, telexes, notes of telephonic conversations, intra-corporate
16 communications, computer programs and data including all matter stored on magnetic or
17 other disc, tape or film, or in computer storage, including all indices and keys that would
18 assist in retrieving or interpreting the matter, and/or reproductions of any and all
19 communications by all means of recording any tangible thing, including letters, words,
20 pictures, sounds or symbols or combinations thereof, and all written, printed, typed, recorded
21 or graphic matter of any kind or character, now or formerly in your actual or constructive
22 possession, custody or control, however produced, recorded, stored or reproduced for access.
23 With respect to a document covered by an Interrogatory, if a document was prepared in more
24 than one copy, or if additional copies were subsequently made, and if any copies were not
25 identical or are no longer identical by reason of subsequent notation or modification of any
26 kind, including without limitation, notations on the front or back of any of the pages of the
27 document, then each non-identical copy is a separate document and shall be identified.

2. When used with respect to a document, the terms "IDENTIFY" and "IDENTITY" mean to state the date of the document; the type of document (e.g., letter, memorandum, telegram, chart, photograph, sound recording, videotape, computer printout, computer program, microfilm, catalog, etc.); the identity of the author(s); the identity of the addressee(s); the identity of each recipient of the document or a copy of the document; the present location and the identity of the custodian of the original and each copy of the document; and a description of the contents of the document.

3. Any term used in singular form in these Requests for Production is to be interpreted in the plural form as well. Any term used in the plural form in these Requests for Production is to be interpreted in the singular form as well.

4. When used herein, the term "AND" shall mean to include "AND/OR." When used herein, the term "OR" shall mean to include "AND/OR."

5. The terms "YOU" and "YOUR" mean Defendant, **Keolis Transit Services**, and all officers, directors, partners, trustees, employees, agents, representatives, investigators, accountants, lawyers, bankers, financial analysts, advisers or other persons or parties acting on your behalf, including all individuals and entities who are no longer but were in one of these positions, capacities, statuses or relationships during the relevant time.

6. The term "CRASH" refers to the motor vehicle crash that is the subject of the Complaint for Money Damages, filed in this case on June 21, 2019.

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1:

Please produce a copy of any and all audiotapes, recordings, videotapes, or DVDs of any persons involved in the CRASH.

REQUEST FOR PRODUCTION NO. 2:

Please produce any and all written, recorded, or transcribed statements of any persons who witnessed the CRASH or with knowledge of the CRASH.

REQUEST FOR PRODUCTION NO. 3:

Please produce any and all post CRASH investigation reports and DOCUMENTS of the CRASH.

REQUEST FOR PRODUCTION NO. 4:

Please produce all DOCUMENTS and things relating to any expert retained to testify, including, but not limited to: the expert's resume/curriculum vitae; the expert's fee chart; all 1099s from your attorney's firm with respect to the expert; all 1099s from your insurance company with respect to the expert; a list of all cases worked on by the expert on behalf of your attorney's firm; a list of all cases in which the expert has rendered testimony; and the expert's entire working file, including, but not limited to, correspondence, notes, calculations, tests, analyses, scientific studies, journals, reports, articles, charts, and audio, video, or computer storage disks, including all cassettes or tapes.

REQUEST FOR PRODUCTION NO. 5:

Please produce any and all DOCUMENTS you intend to use at arbitration or trial, including impeachment or rebuttal documents.

REQUEST FOR PRODUCTION NO. 6:

Please produce good quality laser prints of any and all photographs of any vehicles involved in the CRASH.

REQUEST FOR PRODUCTION NO. 7:

Please produce any and all estimates for damage to any vehicles in the CRASH.

REQUEST FOR PRODUCTION NO. 8:

Please produce any and all Department of Transportation and State inspections of the vehicle involved in the subject CRASH for one year prior to the CRASH.

REQUEST FOR PRODUCTION NO. 9:

Please produce any and all information concerning the vehicle driven by Andre Petway, involved in the subject CRASH, including the make and model of the vehicle, the weight of the vehicle, the load and towing capacity of the vehicle, any repair and maintenance logs for the vehicle, and any information regarding prior crashes in which the vehicle has been involved.

REQUEST FOR PRODUCTION NO. 10:

Please produce any and all DOCUMENTS YOU have obtained about the Plaintiff from any source, including social media, any private investigators, and/or insurance index bureaus.

REQUEST FOR PRODUCTION NO. 11:

Please produce any video surveillance or imaging of Plaintiff, including but not limited to video surveillance or imaging obtained through private investigators, witnesses, and/or social media.

REQUEST FOR PRODUCTION NO. 12:

Please produce any and all training manuals, and instructional manuals, videotapes, CDs or DVDs created by YOU or for YOU, related to driver safety training or safety courses.

REQUEST FOR PRODUCTION NO. 13:

Please produce the employee handbook issued to Andre Petway.

REQUEST FOR PRODUCTION NO. 14:

Please produce all personnel and employee records for Andre Petway with regard to his employment with YOU, including, but not limited to, pre-hiring and post-hiring motor vehicle records checks, his Driver Qualification File, criminal records checks, employment background checks, disciplinary action(s) taken against Andre Petway, employment reviews of Andre Petway's job performance, and all employee orientation and training materials provided to Andre Petway.

REQUEST FOR PRODUCTION NO. 15:

Please produce all documentation relating to Andre Petway's driving safety record.

REQUEST FOR PRODUCTION NO. 16:

Please produce any and all safety training logs for Andre Petway.

REQUEST FOR PRODUCTION NO. 17:

Please produce all DOCUMENTS regarding your policies, procedures, and guidelines for hiring drivers, including documents regarding policies for investigating drivers' employment histories.

CLIFF W. MARCEK, ESQ.
536 E. ST. LOUIS AVE., LAS VEGAS, NEVADA 89104
Phone (702) 366-7076 • Facsimile (702) 366-7078

1 **REQUEST FOR PRODUCTION NO. 18:**

2 Please produce copies of your policies and procedures relating to alcohol and drug
3 testing of drivers.

4 **REQUEST FOR PRODUCTION NO. 19:**

5 Please produce a copy of the results of any and all post-accident alcohol testing Andre
6 Petway underwent in the 72 hours following the subject CRASH. If no post-accident alcohol
7 test was conducted, please provide any and all DOCUMENTS evidencing why no such testing
8 was performed.

9 **REQUEST FOR PRODUCTION NO. 20:**

10 Please produce a copy of the results of any and all post-accident drug and controlled
11 substance testing Andre Petway underwent within the 72 hours following the subject CRASH.
12 If no such test was conducted, please provide any and all DOCUMENTS evidencing why no
13 such testing was performed.

14 **REQUEST FOR PRODUCTION NO. 21:**

15 Please produce any and all documentation in your care, custody, and/or control that
16 mention, discuss, describe, summarize, reflect, constitute, identify, evidence, memorialize, or
17 otherwise refer to any and all on-the-job motor vehicle crashes involving your employee Andre
18 Petway.

19 **REQUEST FOR PRODUCTION NO. 22:**

20 Please produce all applicable insurance policy information.

21 **REQUEST FOR PRODUCTION NO. 23:**

22 Please produce the entire claims file.

23
24 ///

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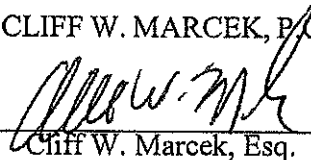
CLIFF W. MARCEK, ESQ.
536 E. ST. LOUIS AVE., LAS VEGAS, NEVADA 89104
Phone (702) 366-7076 ♦ Facsimile (702) 366-7078

1 **REQUEST FOR PRODUCTION NO. 24:**

2 Please produce all DOCUMENTS identified in YOUR Answers to Plaintiff's
3 Interrogatories.

4 Dated this 17 day of October, 2019.

5 CLIFF W. MARCEK, P.C.

6 

7 Cliff W. Marcek, Esq.
8 Nevada Bar No. 5061
9 536 E. St. Louis Ave.
10 Las Vegas, NV 89104
11 Telephone : (702) 366-7076
12 Facsimile : (702) 366-7078
13 Email : cwmarcek@marceklaw.com

14 Attorney for Plaintiff
15 SHAY TOTH
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CLIFF W. MARCEK, ESQ.
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CERTIFICATE OF SERVICE

Pursuant to Nev.R.Civ.P 5(b), I certify that I am an employee of CLIFF W. MARCEK, P.C., and that on this 18 day of October, 2019, I caused the above and foregoing document, **PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANT KEOLIS TRANSIT SERVICES**, to be served via E-service on Wiznet pursuant to mandatory NEFCR 4(b) to the following parties at their last known address:

Andrew R. Muehlbauer, Esq.
Sean P. Connell, Esq.
MUEHLBAUER LAW OFFICE, LTD.
7915 West Sahara Ave., Suite 104
Las Vegas, Nevada 89117
Phone: (702) 330-4505
Fax: (702) 825-0141

Attorney for Defendant
KEOLIS TRANSIT SERVICES, LLC



An employee of CLIFF W. MARCEK, P.C.

EXHIBIT 2

EXHIBIT 2

Marilyn Abel

From: Cliff Marcek <cwmarcek@marceklaw.com>
Sent: Friday, December 27, 2019 10:39 AM
To: Andrew Muehlbauer
Cc: Sean Connell; Briget Cortez
Subject: RE: Toth

Andrew,

This is what I was calling about. It boils down to responses to RPD, numbers 6,7,10 and 11.

RPD number 6 asks for photographs of the vehicles. I see several photos of my client's car but none of yours. Please produce them.

RPD number 7 asks for property damage estimates. I see the property damage estimates for my car but none for yours. There are several parts invoices as best I can tell, but they appear to be for my client's car. I want legible copies of any property damage estimates for your client's vehicle in the crash.

RPD number 10 and 11: This request asks for any video tape, surveillance, social media and/or information from any Insurance Index Bureau. You object primarily on work-product. This is not an absolute privilege, and I believe I am entitled to this information.

Last, you attach many photographs of my client's vehicle to your NRCP 16.1 disclosures and incorporate those documents when asked to produce them in response to my RPD. Please provide clear, color copies. I will pay for any reproduction expenses.

Take a look and get back to me.

From: Andrew Muehlbauer <Andrew@mlollegal.com>
Sent: Thursday, December 26, 2019 8:36 AM
To: Cliff Marcek <cwmarcek@marceklaw.com>
Cc: Sean Connell <sean@mlollegal.com>
Subject: Toth

Hey Cliff. I got your voicemail. I am out of town this week. Sean is in the office, though, if you want to discuss anything. Otherwise you could e-mail me or I'll call you when I get back in the office in January.

Thanks,

- Andy

Andrew R. Muehlbauer, Esq.
Muehlbauer Law Office, Ltd.
7915 West Sahara Ave., Suite 104
Las Vegas, NV 89117
Tel: 702.330.4505 | Fax: 702.825.0141
Licensed in Nevada, Arizona, and Illinois

EXHIBIT 3

EXHIBIT 3

MUEHLBAUER
LAW OFFICE, LTD.

RSPN
ANDREW R. MUEHLBAUER, ESQ.
Nevada Bar No. 10161
SEAN P. CONNELL, ESQ.
Nevada Bar No. 7311
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Attorneys for Defendant
Keolis Transit Services, LLC

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

SHAY TOTH, an Individual,

Plaintiff,

v.

ANDRE RAMON PETWAY, an Individual;
KEOLIS TRANSIT SERVICES, a Delaware
Limited Liability Company; DOES I through X; and
ROE CORPORATIONS XI through XX, Inclusive;

Defendants.

CASE NO.: A-19-797214-C

DEPT. NO.: 2

**DEFENDANT KEOLIS TRANSIT
SERVICES, LLC'S AMENDED
RESPONSES TO FIRST SET OF
REQUESTS FOR PRODUCTION OF
DOCUMENTS FROM PLAINTIFF
SHAY TOTH**

**DEFENDANT KEOLIS TRANSIT SERVICES, LLC'S AMENDED RESPONSES TO FIRST
SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS FROM PLAINTIFF SHAY
TOTH**

PRELIMINARY STATEMENT

Defendant KEOLIS TRANSIT SERVICES, LLC's ("Defendant") answers to the following requests for production of documents are based on information currently known to Defendant and are provided without prejudice to Defendant's right to submit evidence of any subsequently discovered

1 facts, information, or documents, should such become known. These responses are made in a good
2 faith effort to supplement such information as presently known to Defendant after reasonable
3 investigation. Defendant reserves its right to further supplement or alter any answer set forth herein
4 and to use such additional information at trial.

5 Further, because some of these responses may have been ascertained by Defendant's attorneys,
6 investigators, and/or through discovery in this litigation, Defendant may not have personal knowledge
7 of the information from which these responses are derived.

8 **Any changes from the original responses are noted in *italicized* typeface below.**

9
10 **REQUEST FOR PRODUCTION NO. 1:** Please produce a copy of any and all audiotapes,
11 recordings, videotapes, or DVDs of any persons involved in the CRASH.

12 **RESPONSE TO REQUEST FOR PRODUCTION NO. 1:**

13 None exist to the knowledge of Defendant.
14

15 **REQUEST FOR PRODUCTION NO. 2:** Please produce any and all written, recorded, or
16 transcribed statements of any persons who witnessed the CRASH or with knowledge of the CRASH.

17 **RESPONSE TO REQUEST FOR PRODUCTION NO. 2:**

18 The only such statements known to Defendant are those contained in the Keolis Incident Report,
19 previously disclosed.
20

21 **REQUEST FOR PRODUCTION NO. 3:** Please produce any and all post CRASH
22 investigation reports and DOCUMENTS of the CRASH.

23 **RESPONSE TO REQUEST FOR PRODUCTION NO. 3:**

24 See the Keolis Incident Report, previously disclosed as document bearing bates stamp KEO00001 –
25 KEO00005.
26

27 **REQUEST FOR PRODUCTION NO. 4:** Please produce all DOCUMENTS and things
28 relating to any expert retained to testify, including, but not limited to: the expert's resume/curriculum

vitae; the expert's fee chart; all 1099s from your attorney's firm with respect to the expert; all 1099s from your insurance company with respect to the expert; a list of all cases worked on by the expert on behalf of your attorney's firm; a list of all cases in which the expert has rendered testimony; and the expert's entire working file, including, but not limited to, correspondence, notes, calculations, tests, analyses, scientific studies, journals, reports, articles, charts, and audio, video, or computer storage disks, including all cassettes or tapes.

RESPONSE TO REQUEST FOR PRODUCTION NO. 4:

OBJECTION, this Request seeks to impermissibly replace and override the Court's Scheduling Order and NRCP 16.1's rules regarding expert disclosures. This is an improper use of a Request for Production. Without waiving said Objection, Defendant responds as follows: All such materials will be disclosed as directed by the Court, not by Plaintiff. Defendant will comply with NRCP 16.1 and the Court's scheduling order.

REQUEST FOR PRODUCTION NO. 5: Please produce any and all DOCUMENTS you intend to use at arbitration or trial, including impeachment or rebuttal documents.

RESPONSE TO REQUEST FOR PRODUCTION NO. 5:

All such documents are already the subject of NRCP 16.1's automatic disclosure rules. This Request is duplicative and useless. Defendant will comply with the NRCP's rules on disclosure of every document intended to be used at trial without the need for this discovery request.

REQUEST FOR PRODUCTION NO. 6: Please produce good quality laser prints of any and all photographs of any vehicles involved in the CRASH.

RESPONSE TO REQUEST FOR PRODUCTION NO. 6:

After a diligent search, Defendants were unable to locate any good quality copies of said documents. The black and white copies were received from Plaintiff's own insurance company in the form provided and no better versions are in the care, custody, or control of Defendants. Defendants would recommend that Plaintiff request the better quality copies from her property damage insurer.

REQUEST FOR PRODUCTION NO. 7:

Please produce any and all estimates for damage

to any vehicles in the CRASH.

RESPONSE TO REQUEST FOR PRODUCTION NO. 7:

Please see documents previously disclosed and identified as bates number KEO00006 – KEO00082.

REQUEST FOR PRODUCTION NO. 8:

Please produce any and all Department of

Transportation and State inspections of the vehicle involved in the subject CRASH for one year prior to the CRASH.

RESPONSE TO REQUEST FOR PRODUCTION NO. 8:

Defendant has no idea what Plaintiff is talking about with this Request. This was not a bus accident. This was a passenger vehicle owned by Defendant colliding with a passenger vehicle driven by Plaintiff. The only documents that would qualify under this description would be smog checks, which are entirely irrelevant to this case. Defendant does keep maintenance records for its vehicles, however, and the records for this vehicle have been previously disclosed as documents bearing bates stamps KEO00272 – KEO00274.

REQUEST FOR PRODUCTION NO. 9:

Please produce any and all information

concerning the vehicle driven by Andre Petway, involved in the subject CRASH, including the make and model of the vehicle, the weight of the vehicle, the load and towing capacity of the vehicle, any repair and maintenance logs for the vehicle, and any information regarding prior crashes in which the vehicle has been involved.

RESPONSE TO REQUEST FOR PRODUCTION NO. 9:

OBJECTION, this Request is too vague and ambiguous to identify what Plaintiff is seeking. If Plaintiff wants to know the make and model of the vehicle, an Interrogatory would be the proper method for such. Without waiving said Objection, Defendant responds as follows: please see the vehicle maintenance records and the Incident Report, disclosed previously with bates number KEO00001 – KEO0005 and KEO00272 – KEO00274.

REQUEST FOR PRODUCTION NO. 10:

Please produce any and all DOCUMENTS YOU

have obtained about the Plaintiff from any source, including social media, any private investigators, and/or insurance index bureaus.

RESPONSE TO REQUEST FOR PRODUCTION NO. 10:

*OBJECTION, this Request seeks information that is protected from disclosure by the attorney-client privilege, the attorney work product privilege, and NRCP 26(b)(3). These materials are protected and privileged under NRCP 26(b)(3) regardless of whether an attorney directed the investigation. See Mega Mfg. v. Eighth Judicial Dist. Court, No. 62396, 2014 Nev. Unpub. LEXIS 844, at *3 (May 30, 2014) ("Whether an attorney is involved or directs an investigation is not dispositive for deciding whether the fruit of that investigation is work product. See Wardleigh v. Second Judicial Dist. Court, 111 Nev. 345, 357-58, 891 P.2d 1180, 1188 (1995)") The materials at issue were generated solely based on the expectation of litigation, and not in the ordinary course of the insurer's duties. Without waiving these objections, however, Defendant responds as follows: There are no responsive documents that are not subject to the referenced privileges. Please see the attached Privilege Log for additional details on the privileges being asserted. If any such documents exist and if Defendants choose to use said documents in their defense of claims in this case, Defendants will appropriately disclose said documents and waive the privilege in accordance with the Nevada Rules of Civil Procedure.*

REQUEST FOR PRODUCTION NO. 11:

Please produce any video surveillance or

imaging of Plaintiff, including but not limited to video surveillance or imaging obtained through private investigators, witnesses, and/or social media.

RESPONSE TO REQUEST FOR PRODUCTION NO. 11:

*OBJECTION, this Request seeks information that is protected from disclosure by the attorney-client privilege, the attorney work product privilege, and NRCP 26(b)(3). These materials are protected and privileged under NRCP 26(b)(3) regardless of whether an attorney directed the investigation. See Mega Mfg. v. Eighth Judicial Dist. Court, No. 62396, 2014 Nev. Unpub. LEXIS 844, at *3 (May 30, 2014) ("Whether an attorney is involved or directs an investigation is not dispositive for deciding*

whether the fruit of that investigation is work product. See *Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 357-58, 891 P.2d 1180, 1188 (1995)”) The materials at issue were generated solely based on the expectation of litigation, and not in the ordinary course of the insurer’s duties. Without waiving these objections, however, Defendant responds as follows: There are no responsive documents that are not subject to the referenced privileges. Please see the attached Privilege Log for additional details on the privileges being asserted. If any such documents exist and if Defendants choose to use said documents in their defense of claims in this case, Defendants will appropriately disclose said documents and waive the privilege in accordance with the Nevada Rules of Civil Procedure.

REQUEST FOR PRODUCTION NO. 12: Please produce any and all training manuals, and instructional manuals, videotapes, CDs or DVDs created by YOU or for YOU, related to driver safety training or safety courses.

RESPONSE TO REQUEST FOR PRODUCTION NO. 12:

See documents previously disclosed bearing bates numbers KEO00096 – KEO00183, KEO00184 – KEO00241, and KEO00242 – KEO00271.

REQUEST FOR PRODUCTION NO. 13: Please produce the employee handbook issued to Andre Petway.

RESPONSE TO REQUEST FOR PRODUCTION NO. 13:

Please see document previously disclosed bearing bates number KEO00184 – KEO00241.

REQUEST FOR PRODUCTION NO. 14: Please produce all personnel and employee records for Andre Petway with regard to his employment with YOU, including, but not limited to, pre-hiring and post-hiring motor vehicle records checks, his Driver Qualification File, criminal records checks, employment background checks, disciplinary action(s) taken against Andre Petway, employment reviews of Andre Petway’s job performance, and all employee orientation and training materials provided to Andre Petway.

RESPONSE TO REQUEST FOR PRODUCTION NO. 14:

Please see documents previously disclosed as KEO00273 – KEO00365 and KEO00096 – KEO00183.

REQUEST FOR PRODUCTION NO. 15: Please produce all documentation relating to Andre Petway's driving safety record.

RESPONSE TO REQUEST FOR PRODUCTION NO. 15:

All such documents in Defendant's care, custody, or control are contained in documents previously disclosed and bearing bates numbers KEO00273 – KEO00365 and KEO00096 – KEO00183.

REQUEST FOR PRODUCTION NO. 16: Please produce any and all safety training logs for Andre Petway.

RESPONSE TO REQUEST FOR PRODUCTION NO. 16:

All such documents in Defendant's care, custody, or control are contained in documents previously disclosed and bearing bates numbers KEO00273 – KEO00365 and KEO00096 – KEO00183.

REQUEST FOR PRODUCTION NO. 17: Please produce all DOCUMENTS regarding your policies, procedures, and guidelines for hiring drivers, including documents regarding policies for investigating drivers' employment histories.

RESPONSE TO REQUEST FOR PRODUCTION NO. 17:

All such documents in Defendant's care, custody, or control are contained in documents previously disclosed and bearing bates numbers KEO00273 – KEO00365 and KEO00096 – KEO00183.

REQUEST FOR PRODUCTION NO. 18: Please produce copies of your policies and procedures relating to alcohol and drug testing of drivers.

RESPONSE TO REQUEST FOR PRODUCTION NO. 18:

Please see documents previously disclosed and bearing bates number KEO00242 – KEO00271.

REQUEST FOR PRODUCTION NO. 19: Please produce a copy of the results of any and

all post-accident alcohol testing Andre Petway underwent in the 72 hours following the subject CRASH. If no post-accident alcohol test was conducted, please provide any and all DOCUMENTS evidencing why no such testing was performed.

RESPONSE TO REQUEST FOR PRODUCTION NO. 19:

See documents produced previously bearing bates numbers KEO00366 – KEO00369.

REQUEST FOR PRODUCTION NO. 20: Please produce a copy of the results of any and all post-accident drug and controlled substance testing Andre Petway underwent within the 72 hours following the subject CRASH. If no such test was conducted, please provide any and all DOCUMENTS evidencing why no such testing was performed.

RESPONSE TO REQUEST FOR PRODUCTION NO. 20:

See documents produced previously bearing bates numbers KEO00366 – KEO00369.

REQUEST FOR PRODUCTION NO. 21: Please produce any and all documentation in your care, custody, and/or control that mention, discuss, describe, summarize, reflect, constitute, identify, evidence, memorialize, or otherwise refer to any and all on-the-job motor vehicle crashes involving your employee Andre Petway.

RESPONSE TO REQUEST FOR PRODUCTION NO. 21:

All such documents in Defendant's care, custody, or control are contained in documents previously disclosed and bearing bates numbers KEO00001 – KEO00005.

REQUEST FOR PRODUCTION NO. 22: Please produce all applicable insurance policy information.

RESPONSE TO REQUEST FOR PRODUCTION NO. 22:

Defendant has already disclosed the declaration pages showing coverage limits that would be relevant to Plaintiff's case. The remaining insurance policy is not to be disseminated, as it contains trade secrets for the insurer and copying is not permitted. If Plaintiff or her counsel would like to review the policy, a copy can be made available for viewing at the offices of Defendant's counsel.

REQUEST FOR PRODUCTION NO. 23:

Please produce the entire claims file.

RESPONSE TO REQUEST FOR PRODUCTION NO. 23:

OBJECTION, this Request seeks information that is protected from disclosure by the attorney-client privilege, the attorney work product privilege, and NRCP 26(b)(3). These materials are protected and privileged under NRCP 26(b)(3) regardless of whether an attorney directed the investigation. *See Mega Mfg. v. Eighth Judicial Dist. Court, No. 62396, 2014 Nev. Unpub. LEXIS 844, at *3 (May 30, 2014)* (“Whether an attorney is involved or directs an investigation is not dispositive for deciding whether the fruit of that investigation is work product. *See Wardleigh v. Second Judicial Dist. Court, 111 Nev. 345, 357-58, 891 P.2d 1180, 1188 (1995)*”) The claim file at issue was generated solely based on the expectation of litigation, and therefore no argument can be made that the claim file was generated in the normal course of the insurer’s duties. Without waiving these objections, however, Defendant responds as follows: There are no documents in the claim file that are not subject to the privileges referenced in the Objection or were not previously disclosed. The only documents contained in the claim file that were not generated in anticipation of litigation are the Keolis Incident Report, previously disclosed. That report was generated for Keolis’ own purposes regardless of litigation.

REQUEST FOR PRODUCTION NO. 24:

Please produce all DOCUMENTS identified in

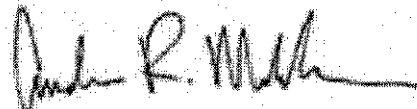
YOUR Answers to Plaintiff’s Interrogatories.

RESPONSE TO REQUEST FOR PRODUCTION NO. 24:

All such documents have been previously disclosed, as identified in the Answers to Interrogatories.

Dated: January 10, 2020

MUEHLBAUER LAW OFFICE, LTD.



By: _____

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EXHIBIT 4

EXHIBIT 4

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Attorneys for Defendant Century Theatres, Inc.

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

SHAY TOTH, an Individual,

Plaintiff,

v.

ANDRE RAMON PETWAY, an Individual;
KEOLIS TRANSIT SERVICES, a Delaware
Limited Liability Company; DOES I through X; and
ROE CORPORATIONS XI through XX, Inclusive;

Defendants.

CASE NO.: A-19-797214-C

DEPT. NO.: 2

**DEFENDANT KEOLIS TRANSIT
SERVICES, LLC'S PRIVILEGE LOG**

DEFENDANT KEOLIS TRANSIT SERVICES, LLC'S PRIVILEGE LOG

COMES NOW, Defendant KEOLIS TRANSIT SERVICES, LLC (hereinafter referred to as "Keolis"), by and through its attorneys of record, the law firm of Muehlbauer Law Office, Ltd., and hereby discloses the following log of privileged documents pursuant to NRCP 26(b)(5):

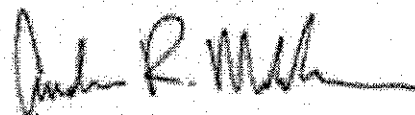
Date	Document(s)	Bates	Privilege Asserted
[PRIVILEGED] ¹	Surveillance Video 1	KEO01311	Litigation Privilege

¹ While a date is typically included in a privilege log, Defendants' position is that disclosing the precise date(s) upon

			NRCP 26(b)(3)
[PRIVILEGED]	Surveillance Video 2	KEO01312	Litigation Privilege NRCP 26(b)(3)
[PRIVILEGED]	Surveillance Video 3	KEO01313	Litigation Privilege NRCP 26(b)(3) Attorney-client privilege Attorney work product
[PRIVILEGED]	Surveillance Report 1	KEO01314 – KEO01326	Litigation Privilege NRCP 26(b)(3)
[PRIVILEGED]	Surveillance Report 2	KEO01327 – KEO01339	Litigation Privilege NRCP 26(b)(3) Attorney-client privilege Attorney work product
7/17/2017	ISO Report	KEO01340 – KEO01343	Litigation Privilege NRCP 26(b)(3)

Dated this 10th day of January, 2020.

MUEHLBAUER LAW OFFICE, LTD.



By: _____

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_____ which surveillance was conducted would defeat the purpose of asserting the privilege.

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sean@mlollegal.com

Attorneys for Defendant Century Theatres, Inc.

TAB 6



OMCM
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

SHAY TOTH, an Individual,

Plaintiff,

v.

ANDRE RAMON PETWAY, an Individual;
KEOLIS TRANSIT SERVICES, a Delaware
Limited Liability Company; DOES I through X; and
ROE CORPORATIONS XI through XX, Inclusive;

Defendants.

CASE NO.: A-19-797214-C

DEPT. NO.: 2

**DEFENDANT KEOLIS TRANSIT
SERVICES, LLC'S OPPOSITION TO
PLAINTIFF'S MOTION TO COMPEL**

(DISCOVERY COMMISSIONER)

DEFENDANT KEOLIS TRANSIT SERVICES, LLC'S OPPOSITION TO
PLAINTIFF'S MOTION TO COMPEL

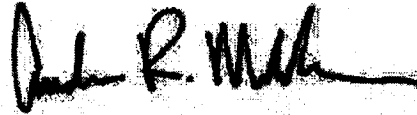
COMES NOW Defendant KEOLIS TRANSIT SERVICES, LLC, by and through its counsel
of record, ANDREW R. MUEHLBAUER, ESQ. of the law firm MUEHLBAUER LAW OFFICE,
and hereby submits its Opposition to Plaintiff's Motion to Compel.

This Opposition is made and based upon the pleadings and papers on file herein, the attached

1 Memorandum of Points and Authorities, and any oral argument that may be permitted at the time of
2 hearing.

3 Dated: April 6, 2020

MUEHLBAUER LAW OFFICE, LTD.

5
6 

7 By:

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14 *Attorneys for Defendants Keolis Transit
Services, LLC and Andre Petway*

15
16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 **I. INTRODUCTION AND FACTUAL BACKGROUND**

18 This case arises out of a car accident on July 1, 2017 between a vehicle driven by Plaintiff
19 SHAY TOTH and a vehicle driven by Defendant ANDRE PETWAY that was owned by his employer
20 at the time, KEOLIS TRANSIT SERVICES, LLC ("Defendant" or "Keolis"). Mr. Petway was a route
21 supervisor for Keolis, which meant that he drove a company vehicle around the Las Vegas
22 metropolitan area to investigate complaints, accidents, or other issues encountered by drivers for
23 Keolis. Mr. Petway was in the course and scope of his employment at the time of the accident.

24 At the time of the accident, Mr. Petway was driving a 2013 Dodge Caravan and was waiting
25 behind Plaintiff to turn left. After the light turned green, Plaintiff and Mr. Petway both began to
26 accelerate through the intersection. Plaintiff did not proceed through the intersection, however; she
27 stopped her vehicle during the turn and Mr. Petway's vehicle impacted her vehicle from behind.
28 Plaintiff estimates she was going less than 5 mph when she was hit by Mr. Petway and Mr. Petway

1 believes he was going between 3-5 mph when the impact occurred.

2 Despite the extremely low speed of impact, Plaintiff has claimed severe and debilitating
3 injuries arising out of this accident, including migraines, memory loss, blurred vision, confusion, neck
4 pain, ear ringing, left arm pain, tingling in her left arm, numbness, shooting pain, lower back pain, left
5 leg pain, numbness and tingling/shooting pain down her leg, among other complaints. Before even
6 filing suit, Plaintiff amassed an astonishing \$274,199.33 in medical billings that she claims are directly
7 attributed to this accident. (*See* Request for Exemption from Arbitration, filed on August 22, 2019.)

8 Within five days following the accident, Plaintiff had retained an attorney and her attorney had
9 contacted Keolis to inform it of the claims of injury. Thus, Keolis was on notice that a lawsuit was
10 coming almost immediately after the accident occurred. As information kept coming in to Keolis from
11 Plaintiff's counsel, it became more and more clear that Plaintiff would be seeking substantial
12 compensation from Keolis for her alleged injuries.

13 In light of these claims of severe injury from an extremely low speed collision, and the massive
14 damages being claimed, Keolis undertook investigation of Plaintiff's history and physical condition.
15 This included running an Insurance Services Office ("ISO") report to see what other claims Plaintiff
16 had made previously, as well conducting a limited amount of surveillance to observe Plaintiff's
17 condition.

18 Plaintiff, apparently concerned about what Defendants have learned through the ISO search
19 and surveillance, has now demanded that Keolis turn over the ISO report, surveillance videos,
20 surveillance reports, and *the entire claim file* in this case. To support this claim, Plaintiff does not even
21 attempt to argue that she has substantial need or any compelling purpose to violate Defendant's
22 privilege. Plaintiff is simply curious to see what Defendant's investigation yielded, presumably so she
23 can figure out how to explain away whatever impeachment evidence the investigation yielded. As will
24 be demonstrated herein, general curiosity is insufficient to meet Nevada's standards for invoking an
25 exception to privilege, and Plaintiff's Motion must fail as a matter of law.

26 27 II. PROCEDURAL HISTORY

28 Plaintiff's Motion presents a generally accurate procedural history of the discovery requests

1 and responses here, but omits several additional elements the Court should consider.

- 2 • On October 18, 2019, Plaintiff served 24 different Requests for Production of
- 3 Documents to Defendant, not including the extensive subparts.
- 4 • In response to these far-reaching Requests, on November 22, 2019, Defendant
- 5 produced or identified more than a hundred pages of additional documents and only
- 6 claimed privilege in response to three of the 24 Requests:
 - 7 ○ No. 10, asking for “all documents obtained about Plaintiff from any source,
 - 8 including social media, any private investigators, and/or insurance index
 - 9 bureaus.”
 - 10 ○ No. 11, asking for “any video surveillance or imaging of Plaintiff, including but
 - 11 not limited to video surveillance or imaging obtained through private
 - 12 investigators, witnesses, and/or social media.”
 - 13 ○ No. 23, asking for “the entire claims file.”
- 14 • Plaintiff is correct that Defendant did not initially produce a privilege log in November
- 15 of 2019. To be completely transparent with the Court, Defendant’s counsel’s routine
- 16 practice for the past 12 years is to assert the privilege for obviously privileged
- 17 documents without preparing a privilege log initially. In virtually all cases in counsel’s
- 18 recollection, this usually suffices for obviously privileged materials and opposing
- 19 counsel never follows up to demand a privilege log once the privilege is raised.
- 20 Defendant’s counsel typically only prepares a privilege log when there are privileged
- 21 documents interspersed with non-privileged documents, as opposed to an entire
- 22 category of documents being obviously privileged, as we have here. Still, Plaintiff’s
- 23 counsel is correct that Defendant failed to supply the required privilege log in
- 24 November and this was a failing by Defendant’s counsel, which was eventually
- 25 remedied. On April 3, 2020, Defendant issued a First Amended Privilege Log that
- 26 contained substantial additional data, as discussed herein.
- 27 • In light of the above, Plaintiff’s counsel e-mailed Defendant’s counsel on or about
- 28 December 27, 2019 and challenged Defendant’s claims of privilege as to Requests 10

1 and 11, but never addressed Request No. 23. Based on this, Defendant did not even
2 believe Plaintiff was still seeking production of the entire claims file in this case.
3 Plaintiff also repeated her demand for photos and other documents that Defendant
4 simply does not have.

- 5 • In response, and after Plaintiff's counsel graciously granted Defendant's counsel more
6 time to address the issue due to counsel's vacation plans, Defendant produced
7 Amended Responses to the Requests for Admission as well as a Privilege Log on
8 January 10, 2020.
- 9 • The original privilege log identified each of the documents withheld and the privilege
10 asserted. Defendant only identified the date of the ISO report, however, and did not list
11 the dates for the surveillance materials. Defendant identified the basis for this in the
12 log, namely that identification of the date the surveillance was conducted would defeat
13 the purpose of the log in the first place. Identifying the date of the surveillance would
14 expose a key element of the investigation and would potentially allow Plaintiff to plan
15 her explanation for her activities before even being deposed. Subsequently, however,
16 Defendant's counsel served the First Amended Privilege Log on April 3, 2020
17 identifying the month and year of every privileged document. This was done after
18 contemplating the arguments of Plaintiff and the need to establish a better chronology
19 for privileged materials in relation to Plaintiff's counsel's Letter of Representation, as
20 discussed further below.
- 21 • On the same date, January 10, 2020, Defendant's counsel e-mailed Plaintiff's counsel
22 explaining that the law only requires production of these privileged materials if
23 Defendant plans to use them in its case. Defendant's counsel expressly stated that to
24 the extent any such materials would ever be used in his client's defense, such materials
25 would be disclosed in a timely manner to allow Plaintiff's counsel a full and fair
26 opportunity to review them in advance.
- 27 • Plaintiff's counsel came back to this issue via a March 17, 2020 e-mail wherein he
28 asked for another copy of the privilege log because he could not find the log that was

1 served and requested that we have another meet and confer regarding the claims of
2 privilege to ensure we complied with the Rules.

- 3 • Plaintiff's counsel and Defendant's counsel did conduct an additional meet and confer
4 over the privilege issue for the ISO report and surveillance documents on March 18,
5 2020. On that call, the parties could not reach an agreement and Plaintiff's counsel
6 informed Defendant's counsel that a motion would be forthcoming.

7 8 III. LEGAL STANDARDS

9 A. NRC 26(b)(3) Privilege

10 Although hardly mentioned in Plaintiff's entire Motion, the primary privilege asserted in this
11 case is the litigation privilege, or the trial preparation materials privilege, depending on your choice
12 of terminology. While at common law, this privilege generally only applied to work created by an
13 attorney, the Nevada Rules (and the Federal Rules upon which they are modeled) have revised this
14 privilege to apply far more broadly. This Rule provides,

15 (3) Trial Preparation: Materials.

16 (A) *Documents and Tangible Things*. Ordinarily, a party may not discover
17 documents and tangible things that are prepared in anticipation of litigation or for trial
18 by or for another party or its representative (including the other party's attorney,
19 consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26 (b)(4), those
20 materials may be discovered if:

- 21 (i) they are otherwise discoverable under Rule 26 (b)(1); and
22 (ii) the party shows that it has **substantial need** for the materials to prepare its
23 case and cannot, without **undue hardship**, obtain their substantial equivalent by other
24 means.

25 (B) *Protection Against Disclosure*. If the court orders discovery of those
26 materials, it must protect against disclosure of the mental impressions, conclusions,
27 opinions, or legal theories of a party's attorney or other representative concerning the
28 litigation.

29 N.R.C.P. 26 (emphasis added). What we can glean here is an essential framework as follows:

- 30 • The presumption is that any materials prepared in anticipation of litigation or for trial are not
31 discoverable, so long as they are prepared by a party, for a party, or for a party's representative.
32 • This presumption has exceptions where the party seeking disclosure of said materials can

1 show that the materials are otherwise discoverable under NRCP 26(b)(1), the seeking party
2 shows a substantial need for the materials, AND that said party cannot obtain the materials by
3 other means without undue hardship.

- 4 • However, even *if* the seeking party proves up the exception to the court's satisfaction, the
5 court *still* must protect from disclosure the mental impressions, conclusions, opinions, or legal
6 theories of a party's attorney or other representative.

7 As the Court knows, many of these protections used to only apply to attorneys themselves. Now,
8 however, it encompasses even documents prepared by a part, its attorney, or "other representatives"
9 of a party to litigation.

10 The NRCP tracks identically to the Federal Rules of Civil Procedure ("FRCP") on this
11 provision contained in FRCP 26(b)(3). The advisory committee notes for this section explain the
12 change from the historical protection of attorney work product to the current, broader rule:
13 "Subdivision (b)(3) reflects the trend of the cases by requiring a special showing, not merely as to
14 materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or
15 preparation for trial by or for a party or any representative acting on his behalf."

16 As with all rules, however, there is some level of ambiguity remaining as to the term "prepared
17 in anticipation of litigation." After all, an insurance company conducts routine processing of claims
18 as part of its general duties in adjusting, regardless of whether litigation is expected to follow or not.
19 Would a routine claim investigation, without a threat of litigation, be covered by this expansive
20 privilege?

21 Thankfully, the Nevada Supreme Court recently examined this issue in *Wynn Resorts, Ltd. v.*
22 *Eighth Judicial Dist. Court of Nev.*, 399 P.3d 334 (2017). In *Wynn Resorts*, the Nevada Supreme
23 Court evaluated whether an investigative report prepared by outside counsel was protected by the
24 work product privilege. The report in that case was publicly disclosed, thereby waiving any attorney-
25 client privilege for the underlying documents supporting the report. The disclosing party argued,
26 however, that the work product doctrine contained in NRCP 26(b)(3) still protected the underlying
27 documents.

28 In evaluating these claims, the *Wynn Resorts* court adopted the "because of" test to determine

1 the applicability of the privilege. See *Wynn Resorts, Ltd.*, 399 P.3d at 347. This *Wynn Resorts* court
2 explained the "because of" test as follows:

3 Under the "because of" test, documents are prepared in anticipation of litigation when
4 "in light of the nature of the document and the factual situation in the particular case, the
5 document can fairly be said to have been prepared or obtained *because of the* prospect of
6 litigation."

6 *Id* (internal citations omitted). The court went on to expand the application even further,

7 The anticipation of litigation must be the *sine qua non* for the creation of the document—
8 "but for the prospect of that litigation," the document would not exist. However, "a
9 document. . . does not lose protection under this formulation merely because it is created
10 in order to assist with a business decision." "Conversely . . . [this rule] withholds
11 protection from documents that are prepared in the ordinary course of business or that
12 would have been created in essentially similar form irrespective of the litigation." *Id*.

13 In determining whether the "because of test is met, we join other jurisdictions in adopting
14 a "totality of the circumstances" standard. In *Torf*, the Ninth Circuit Court of Appeals
15 stated that [t]he "because of standard does not consider whether litigation was a primary
16 or secondary motive behind the creation of a document. Rather, it considers the totality
17 of the circumstances and affords protection when it can fairly be said that the "document
18 was created because of anticipated litigation, and would not have been created in
19 substantially similar form but for the prospect of that litigation[.]"

20 *Wynn Resorts, Ltd.*, 399 P.3d at 348 (internal citations omitted, emphases added). The *Wynn Resorts*
21 case was evaluating work product generated by an attorney, and its subsequent discussion in the case
22 references that fact, but the rule itself does not require the work product to have been prepared by an
23 attorney. As the *Wynn Resorts* court held, NRCP 26(b)(3) protects documents so long as they have
24 "two characteristics: (1) they must be prepared in anticipation of litigation or for trial, and (2) they
25 must be prepared by or for another party or by or for that party's representative." *Wynn Resorts*, 399
26 P.3d at 347.

27 Thus, in summary, so long as the documents meet the "because of" test when considering "the
28 totality of the circumstances" and they were prepared by or for a party or its representative, NRCP
26(b)(3)'s privilege applies. Unless the party seeking disclosure can demonstrate the "substantial
27 need" and "no other means without undue burden" tests identified above, the documents cannot be
28 obtained.

28 B. Attorney-client Privilege

1 The attorney-client privilege in Nevada is set forth in NRS 40.095, which states:

2 **NRS 49.095 General rule of privilege.** A client has a privilege to refuse to disclose,
3 and to prevent any other person from disclosing, confidential communications:

- 4 1. Between the client or the client's representative and the client's lawyer or the
5 representative of the client's lawyer.
6 2. Between the client's lawyer and the lawyer's representative.
7 3. Made for the purpose of facilitating the rendition of professional legal services
8 to the client, by the client or the client's lawyer to a lawyer representing another in a
9 matter of common interest.

10 NRS 49.055 defines the term confidential, stating, "[a] communication is 'confidential' if it is not
11 intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the
12 rendition of legal services to the client or those reasonably necessary for the transmission of the
13 communication."

14 **C. NRCP 16.1(a)**

15 For reasons unknown, Plaintiff's Motion focuses on NRCP 16.1(a)'s automatic disclosure
16 rules. The records at issue here were actually requested as part of an NRCP 34 Request for Production
17 of Documents. Still, since Plaintiff relies on NRCP 16.1(a)'s automatic disclosure provisions,
18 Defendant will address that legal authority.

19 As correctly cited in the Motion, NRCP 16.(a)(1)(A)(ii) states that a party must automatically
20 disclose,

- 21 (ii) a copy — or a description by category and location — of all documents,
22 electronically stored information, and tangible things that the disclosing party has in its
23 possession, custody, or control and may use to support its claims or defenses, including
24 for impeachment or rebuttal, and, unless privileged or protected from disclosure, any
25 record, report, or witness statement, in any form, concerning the incident that gives rise
26 to the lawsuit;

27 (emphasis added). This Rule contains two separate categories of documents: everything before the
28 "and" and everything after the "and." Although Plaintiff's Motion tries to blur these two provisions
together, they are intentionally separated by the drafters so we will address each section separately.

29 **1. All Documents That a Party May Use to Support its Claims or Defenses**

30 To the extent NRCP 16.1(a) has anything to say on the issue at hand at all, the first section of
the Rule would be the most applicable. Plaintiff goes on at length to focus on the fact that, as part of

1 this Rule, the drafters state that all impeachment or rebuttal evidence must be disclosed. (See Mot. at
2 11.) Plaintiff pays no mind whatsoever to the emphasized portion of the Rule above, however: “and
3 may use to support its claims or defenses...” This is axiomatic in litigation – if a party plans to use
4 any document to support its claims or defenses, even including impeachment evidence, it must disclose
5 said information to all parties. This is to avoid the classic “trial by ambush” by forcing opposing parties
6 to show their hand during discovery instead of allowing them to surprise their opponent. See *Land*
7 *Baron Invs., Inc. v. Bonnie Springs Family Ltd. P’ship*, 356 P.3d 511, 522 n.14 (Nev. 2015)

8 Impeachment evidence is, therefore, only subject to this automatic disclosure rule if it may be
9 used at trial to support a claim or defense. The construction of this Rule as set forth by Plaintiff’s
10 Motion would be impossible to enforce. It would require opposing parties to disclose every possible
11 document that could possibly be negative for the Plaintiff, regardless of whether the party intends to
12 use the document or not. Investigation of claims like Plaintiff’s involve countless hours of
13 investigation and research to determine the credibility of Plaintiff’s claims. To torture the Rules to
14 make every single document unearthed that could arguably contain impeachment evidence would
15 create an unlimited universe of documents subject to automatic disclosures. This surely is not what
16 the drafters intended.

17 Rather, the only rational construction of the NRCP 16.1(a)(1)(A)(ii) is to rely on the plain
18 language of the Rule: if a party intends to use the impeachment evidence in any way at trial, it must
19 be disclosed without awaiting a specific request under NRCP 34. This effectively narrows the universe
20 of disclosures to only the documents that could ever be used by the opposing party as opposed to
21 forcing automatic disclosure of every possible document that anyone could ever construe as being
22 impeachment evidence against Plaintiff.

23 This “plain language” construction of the Rule also is the only construction that makes sense
24 because the Rule does not explicitly provide for privilege claims related to these documents. The only
25 way this makes sense is to view the automatic disclosures as only applying to documents a party may
26 use to support its claims or defenses at trial. The assumption built into this structure is that a party who
27 uses a document to supports its claim or defense at trial has waived any privilege applicable to said
28 document. That is why the rule does not have a specific carve out for privileged documents like other

1 sections of NRCP 16.1(a) do; if you are planning to use the documents at trial, you must disclose the
2 document and waive any privileges associated with the documents.

3 **2. Any Record, Report, or Incident Statement Prepared at or Near the Time of the**
4 **Incident**

5 In reviewing the second section of the cited Rule, it should become immediately clear that it
6 has nothing to do with the issue at hand. This section is directed at incident reports, sweep sheets,
7 repair records, etc. generated at or near the time of the incident as a part of ordinary business
8 operations. How do we know this? Plaintiff's own Motion cites to the Advisory Committee Notes
9 saying exactly that:

10
11 The 78 [sic] initial disclosure requirement of a "record" or "report" under Rule
12 16.1(a)(1)(A)(ii) includes but is not limited to: incident reports, logs and summaries,
13 maintenance records, former repair and inspection records and receipts, sweep logs, and
14 any written summaries of such documents. Documents identified or produced under Rule
15 16.1(a)(1)(A)(ii) should include those that are prepared or exist at or near the time of the
16 subject incident. The reasonable time required for production of such documents will
17 depend on the facts and circumstances of each case. **A party who seeks to avoid**
18 **disclosure based on privilege must provide a privilege log.**

19
20 ADKT 522 Redline of Proposed NRCP Amendments Against Existing NRCP, at 77-78 (emphasis
21 added). What this should demonstrate is that this section of the rule is directed exclusively at
22 contemporaneous or near-contemporaneous incident reports and business records regarding the
23 incident. Although obvious by the text itself, this would also be required using the canon of
24 construction *ejusdem generis*, as this Court knows well. While discussed in depth more below,
25 Defendant has already disclosed every incident report, repair records, and other similar documents in
26 its care, custody, or control.

27 The second fact that should be clear is that *even if* Plaintiff could somehow twist the language
28 here to include her requested materials, the Rule specifically includes an acknowledgment that
privileges may attach to said documents. Plaintiff omits this sentence when she goes on to argue the
application of the Rule on page 11 of her Motion.

 Although more germane to the prior section's analysis, it is worth noting that, once again,

1 Plaintiff ignores the fact that the materials referenced are only to be disclosed if they are intended to
2 be used by the party. The Committee's own statements reinforce this fact, "Rule 16.1(a)(1)(A)(ii)
3 incorporates language from the federal rule requiring that a party disclose materials **that it may use**
4 **to supports it claims or defense...**" *Id* (emphasis added).

5 What we are left with, then, is simply a statement that all incident reports or similar materials
6 must be automatically disclosed unless they are subject to a privilege. Defendant has never denied
7 such a contention, so it is unclear why this Rule would appear to be a primary basis of Plaintiff's
8 Motion.

9 10 IV. LEGAL ARGUMENT

11 A. Every Document Sought But Not Disclosed Was Prepared in Anticipation of 12 Litigation or Trial Under The Nevada Supreme Court Standard Set Forth in 13 *Wynn Resorts*

14 While Plaintiff appears to argue that it is impossible to determine whether NRCP 26(b)(3)'s
15 privilege applies to the documents sought because the privilege log does not identify dates for all but
16 the ISO report, this is the proverbial red herring in its truest form. Why? Because Plaintiff's counsel,
17 the same person who drafted the Motion, knows that he sent a Letter of Representation to Defendant
18 on July 5, 2017 – four short days after the accident. That letter is attached hereto as Exhibit "A."
19 Plaintiff, via counsel, knew that every single document she is seeking in this case was generated *after*
20 Plaintiff's counsel sent a Letter of Representation regarding her claims. If a letter from an attorney
21 directing all communications to go through his office is not a sufficient basis to be "anticipating"
22 litigation, then it would be hard to imagine anything that would.

23 For the Court's reference, the first document in the claim file is the Incident Report dated July
24 3, 2017, which has already been disclosed as document bearing bates-stamp number KEO00001 –
25 KEO00005. That report was disclosed as the first document in this case by Defendant as part of its
26 automatic disclosure under NRCP 16.1(a). **No privilege claim was made as to this document**
27 **because it falls under NRCP 16.1(a)(1)(A)(ii)'s automatic disclosure provisions as discussed at**
28 **length above.** The next document in the claim file is the Letter of Representation, which was placed

1 in the claim file on the very same date as the Incident Report following the July 4th holiday in 2017.
2 Thus, there are no documents generated in the claim file that were not already produced that would
3 not have been prepared in the shadow of this Letter of Representation and directed at evaluating and
4 defending a potential lawsuit.

5 In applying *Wynn Resorts* and its construction of NRCP 26(b)(3), this Court has to simply
6 determine whether the documents sought by Plaintiff were generated "because of" litigation. Although
7 the answer is clear, Defendant will address each of the three categories of documents sought by
8 Plaintiff out of an abundance of caution.

9 **1. Surveillance Videos/Reports**

10 As identified in the Privilege Log, there are three separate surveillance videos and two separate
11 Surveillance Reports that are identified by Defendant. This Court is charged with evaluating the
12 totality of the circumstances in order to assess whether these surveillance videos and reports were
13 generated because of the anticipation of litigation. *See Wynn Resorts*, 399 P.3d at 347. The surveillance
14 materials satisfy this test without question. Surveillance is only conducted on plaintiffs or potential
15 plaintiffs in litigation who are claiming damages substantial enough to justify the expense of verifying
16 their claims through surveillance. The need for surveillance was solely based on the fact that an
17 attorney had contacted Defendant's representatives on July 5, 2017 and then subsequently informed
18 Defendant that massive damages would be claimed related to this case. As Plaintiff's counsel knows
19 very well, he told Defendant's representatives in March of 2018 that Plaintiff had roughly \$45,000.00
20 in medical bills already incurred and would potentially be seeking surgery on her lower back at a cost
21 of approximately \$250,000.00. Plaintiff's counsel also informed Defendant's representative at that
22 time that Plaintiff was claiming a traumatic brain injury.

23 As this Court surely understands, those types of claims send up red flags for any Defendant
24 and its insurer. Plaintiff's counsel knows very well why surveillance was initiated; his own office's
25 statements triggered the need for Defendant's representatives to evaluate the veracity of such serious
26 claims of injury. **Every single surveillance document requested by Plaintiff in her Motion was**
27 **generated after Plaintiff's counsel made these serious injury allegations in March of 2018.**
28 Defendant recognizes that this is new information to Plaintiff, since the dates were not listed on the

1 Privilege Log. However, Plaintiff's counsel cannot possibly claim this is as a surprise, given that his
2 own office was the one making these statements in the first place. To act like Plaintiff is somehow in
3 the dark on this is when the statements came her own counsel's office is not credible.

4 Applying *Wynn Resorts*, this Court must determine "in light of the nature of the document and
5 the factual situation in particular case, the document can fairly be said to have been prepared or
6 obtained *because of* the prospect of litigation." *Id* at 348 (internal quotation marks omitted). The nature
7 of the document is that it is solely used to impeach claims of serious injury raised by Plaintiff, and the
8 factual situation is that Plaintiff's counsel had alleged damages in excess of \$300,000.00 prior to the
9 initiation of the surveillance. If this does not satisfy the "because of" test, then no document would.
10 There is, therefore, no doubt that all surveillance materials were made in anticipation of litigation to
11 support Defendant's defenses at trial.

12 2. ISO Report

13 Plaintiff demands production of the ISO Report as well as other "documents obtained about
14 the Plaintiff from any source, including, social media, private investigators and/or insurance
15 companies." Any such reports would be contained in the Claim File and will be addressed in Section
16 3 below. This section addresses only the ISO Report to try and keep things as straightforward as
17 possible.

18 The ISO Report was commissioned on July 17, 2017. This was 12 days after Defendant's
19 representatives received Plaintiff's counsel's Letter of Representation. ISO Reports are routinely
20 sought, but particularly obtained when litigation is contemplated. Plaintiff's counsel directed all
21 communications to flow through his office on July 5, 2017. This was an immediate signal to Defendant
22 that claims of injury would be raised by Plaintiff and litigation was on the horizon. After all, property
23 damage claims are never litigated, only personal injury claims are. By retaining a lawyer and alleging
24 personal injury claims on July 5, 2017, Plaintiff placed Defendant on notice of potential litigation.

25 ISO Reports are far more routinely requested than surveillance, because they are far cheaper
26 and easier to request than surveillance. It would be highly unusual for an ISO Report to be requested
27 in a case where a lawyer has not been retained and where litigation is not being anticipated. The ISO
28 Report serves as potential impeachment evidence to negotiate down a claim value and, if necessary,

1 use for impeachment at trial. An ISO Report rarely would be ordered if a claimant is not represented
2 by counsel and if no threat of litigation is anticipated because there would be no need for impeachment
3 in that circumstance.

4 In terms of the *Wynn Resorts* analysis, the “nature of the document” is a report solely generated
5 to impeach the credibility of the Plaintiff. It looks to see how many other claims have been filed by a
6 claimant to determine veracity and to challenge causation. This is a document used to support defenses
7 in eventual litigation. The “factual situation” is that it was obtained shortly after the Letter of
8 Representation was received where a lawyer had indicated all communications regarding the injury
9 claim must go through his office. While not as eminently clear as the surveillance documents, since
10 ISO Reports are occasionally generated as a matter of course for some companies, the circumstances
11 here still support a finding of privilege under NRCP 26(b)(3) and *Wynn Resorts*.

12 **3. Claim File**

13 The type of documents that requires the most analysis by this Court would be the claim file. It
14 is worth noting, once again, that Plaintiff’s meet and confer e-mail and telephone call never referenced
15 a demand for the claim file. Thus, this matter is arguably not even before the Court. Still, Defendant
16 will address these documents in the same manner as the others. Note for the record that the Claims
17 File was not included in the original Privilege Log because Defendant was unaware that Plaintiff was
18 alleging that the Motion involved production of the claim file. An updated Privilege Log has been
19 served on Plaintiff that includes the claim file date range from July 3, 2017 through July 25, 2019.
20 Note that July 3, 2017 was the date the Incident Report was authored, but it was not placed in the claim
21 file until the file was created on July 5, 2017.

22 The question on the claim file is more sophisticated because a claim file is generated upon any
23 incident that is reported by the insured to its insurance carrier regardless of the expectation of litigation
24 or size of the claim. We also know that if a claim file investigation is directed by any attorney, it is
25 privileged. See *California State Auto Ass’n Inter-Insurance Bureau v. Eighth Judicial Dist. Ct.*, 106
26 Nev 197, 199 (1990); *Ballard v. Eighth Judicial Dist. Ct.*, 106 Nev. 83 (1990). Unfortunately, we do
27 not have a holding directly on point as to claim file privilege for documents generated by a non-
28 attorney because the petitioner in *California State Auto Ass’n Inter-Insurance Bureau* never raised the

1 NRCP 26(b)(3) privilege at the district court level. Thus, the Nevada Supreme Court did not issue a
2 holding on that question. Thankfully, we do still have the guiding principles of *Wynn Resorts* to apply
3 in this case, and that analysis supports a claim of privilege here.

4 There is no good argument that simply being named a "claim file" either imbues privilege or
5 denies any claim of privilege. A claim file is a collection of documents that varies from claim to claim
6 and the contents are drastically different depending on the type of claim being made, the context of
7 the claim, and the damages being claimed.

8 The best way to look at a claim file is how you would look at any other basic type of document:
9 was it generated in the ordinary course of business or was it generated in anticipation of litigation?
10 The most compelling argument, considering the totality of the circumstance as mandated by *Wynn*
11 *Resorts*, is that a claim file changes character once the generating party is on notice that litigation is
12 on the horizon. A claim file would automatically be generated for every claim, but claims in litigation
13 contain very different materials than claim files for non-litigation claims. We see that exact distinction
14 in this case.

15 Without even disclosing every detail of the claims file, we can see that this is most certainly a
16 claim file generated in anticipation of litigation. It contains surveillance videos, surveillance reports,
17 investigative reports, an ISO Report, and communications with opposing counsel about the value of
18 the claim. This leads us to the most rational application of *Wynn Resorts* – if materials inside the claim
19 file are clearly generated in anticipation of litigation, those materials support a similar finding of
20 privilege as to the claim file itself *once the insurer has reason to suspect litigation is on the horizon*.

21 To put it differently, a claim file can certainly be generated and not be privileged in many
22 circumstances. At some point, however, the claim file would change from being a routine file
23 generated for loss adjustment into a claim file generated in anticipation of litigation. The most logical
24 point at which this change would occur, under the *Wynn Resorts* "factual situation" prong, would be
25 when an attorney contacts the defendant's representative and confirms representation.

26 Applying that rationale to this case, the claims file was opened on July 5, 2017 – just days prior
27 to Plaintiff's attorney sending the Letter of Representation to Defendant's representative. The earliest
28 dated document in the claim file is the Incident Report that was generated on July 3, 2017 but not

1 placed into the claim file until July 5, 2017, the same day as the Letter of Representation. Plaintiff
2 would have a far better argument that the claim file contents were generated as part of the ordinary
3 course of business if his Letter of Representation had not been placed in the claim file on the same day
4 it was opened.

5 Plaintiff may argue that letters of representation are sent all the time in cases that do not end
6 up in litigation. This would miss the point of both the Rule and the concept of privilege, however.
7 First, it is not a question of whether the claim actually ends up going to litigation or not, but rather
8 whether litigation is reasonably anticipated. Second, privilege claims need to be as clear and
9 predictable as possible to allow consistency and reliance. A bright line is the best line when addressing
10 privilege claims. Having to evaluate how serious a letter of representation is in terms of placing a party
11 on notice of upcoming litigation would create a vague and unworkable standard. A party facing
12 liability and needing to consult knowledgeable third parties for assistance in preparing a defense
13 should be able to know with certainty that those efforts will not be later exploited by their political
14 adversaries. The best way to ensure that confidence is a bright line rule that a letter of representation
15 is a per se indication that litigation should be anticipated.

16 **B. No Showing of Substantial Need Has Even Been Attempted by Plaintiff**

17 To this point, the focus of this Opposition has been on proving that the documents sought are
18 privileged. Plaintiff's Motion barely even challenged that contention, and instead inexplicably relied
19 on NRCP 16.1(a)(1)(A)(ii)'s automatic disclosure provisions instead of arguing why an exception to
20 NRCP 26(b)(3) exists. Despite failing to argue "substantial need" for the documents and showing that
21 Plaintiff cannot obtain the documents, or a substantial similar equivalent without "undue burden" to
22 Plaintiff, Defendant will still briefly address these requirements out of an abundance of caution.

23 **1. Surveillance Documents**

24 Even the most cursory review of these requested documents would demonstrate, perhaps, why
25 Plaintiff did not even bother arguing this necessary prong of substantial need: Plaintiff has no actual
26 need of these documents for her case, she just wants to know what Defendant has learned about her
27 daily life. Presumably, Plaintiff wants to begin preparing an explanation of why she is claiming
28 massive, debilitating injuries but is still doing whatever the surveillance shows. Without knowing

1 precisely which date and what activity was captured, Plaintiff is left guessing at which activity she
2 needs to explain away. This paranoia is understandable, given the circumstances of this case, but
3 paranoia and curiosity do not even come close to demonstrating a "substantial need."

4 The classic example used in law school of "substantial need" would be a witness statement
5 obtained by the defendant from a person who cannot be located by plaintiff. The theory there is that
6 the defendant has learned something about the claim that the plaintiff has no ability to learn by herself.
7 Under that circumstance, the law school textbooks suggest that as long as the thoughts and mental
8 impressions of the person taking the statement are protected, the plaintiff can demonstrate that she has
9 a substantial need and cannot possibly obtain the statement from any other source.

10 Here, Plaintiff never argues anything close to this because it would be an absurdity. There is
11 no "substantial need" for surveillance videos of the Plaintiff's every day activities. Plaintiff does not
12 care about the contents of the video – she knows what public activity she has undertaken over the past
13 several years – she only cares to learn what *Defendant* knows. The contents of the videos are only
14 important to her to the extent they demonstrate what Defendant has learned in preparation of its
15 defense, not what the videos actually show – Plaintiff knows generally what they show because she
16 was living it.

17 To find this as a "substantial need" would make a mockery of the NRCP 26(b)(3) privilege
18 and the Nevada Supreme Court's holding *Wynn Resorts*.

19 2. ISO Report

20 Similar to the surveillance materials, an ISO Report's contents are meaningless to Plaintiff. An
21 ISO Report simply identifies publicly available knowledge about prior claims and other activity by
22 Plaintiff. Plaintiff does not care about the contents of the Report, she only cares to learn what
23 Defendant has gleaned from the Report. Presumably Plaintiff knows what claims she had made in the
24 past against others, unless she is suffering from some form of amnesia. Plaintiff knows what claims
25 she has made.

26 Additionally, Plaintiff has not demonstrated she could not order her own ISO Report. While
27 Defendant is not entirely certain what the process would be, as Defendant is not an insurer, it seems
28 reasonable that a person should be able to order an ISO Report on herself for a fee. Plaintiff did not

1 state in her Motion that she attempted to order an ISO Report and was refused; rather, she just wants
2 to piggyback off of the investigation done by Defendant, at the cost of Defendant. This cannot possibly
3 be what the drafters envisioned when they created the terms "substantial need" and "undue burden."

4 3. Claim File

5 The claim file is a conglomeration of various documents from numerous sources, such as
6 adjusters, insurance carriers, insureds, investigators, experts, and more. Defendant freely
7 acknowledges that the prong of "undue burden" would be automatically met as to a claim file because
8 no two claim files are alike, as discussed herein. Plaintiff cannot obtain Defendant's insurer's claim
9 file from any source but Defendant's insurer, without question.

10 Just as the claim file easily meets the "undue burden" prong of NRCP 26(b)(3), however, it
11 immediately fails the "substantial need" test. What possible substantial need does Plaintiff have to see
12 the thoughts and impressions of the adjusters and insurers regarding her claim? Other than curiosity,
13 or a desire to learn what the perceived value of her claim is to the insurance adjusters, what could a
14 claim file possibly offer to Plaintiff to help her prove her case?

15 We will never know the answer to this question because Plaintiff never even argues it in her
16 Motion. She just says she wants the claim file and we should give it to her. All the work of Defendant
17 and its representatives to defend their interests and investigate Plaintiff should be laid bare for the
18 curious Plaintiff so that she can figure out how to best maximize the value of her case and so she can
19 learn how much money has been set aside to settle her claim.

20 Defendant has disclosed thousands of pages of documents, and Defendant's counsel is
21 intimately aware of the rules of privilege. If there were any documents in the claim file that would
22 contain information not ascertainable to Plaintiff through her own investigation, such information
23 would have been identified – such as witness statements, photographs, videos, or any other type of
24 document that is objective in nature and cannot be easily obtained by Plaintiff. Plaintiff knows this.

25 Plaintiff and her counsel are simply trying to violate the privileged and confidential nature of
26 Defendant's claim file in order to take advantage of all of the work done by Defendant instead of
27 generating their own documents to support her claims. This is an impermissible use of discovery,
28 would violate the privilege set forth in NRCP 26(b)(3), and would violate the holding in *Wynn Resorts*

1 to create an unfair system heavily favoring plaintiffs and discouraging frank and open discussion
2 between and among insurers, insureds, and their representatives.

3 C. **All Documents Prepared At or Near the Time of the Accident Have Already Been**
4 **Disclosed in Accordance with NRCP 16.1(a)(1)(A)(ii).**

5 As referenced above, the second part of NRCP 16.1(a)(1)(A)(ii) requires that all reports that
6 were prepared at or near the time of the incident must be disclosed. Defendant has disclosed every
7 such document that arguably matches this description as follows:

- 8 • Keolis Incident Report – KEO0001 – KEO0005, the first document in the claim file
9 received prior to the Letter of Representation, disclosed as part of Defendant's Initial
10 NRCP 16.1 Disclosures on or about September 29, 2019;
- 11 • Repair Estimates and Photos – KEO00006 – KEO00082, disclosed as part of
12 Defendant's Initial NRCP 16.1 Disclosures on or about September 29, 2019;
- 13 • Police Report – KEO00083 – KEO00086, disclosed as part of Defendant's Initial
14 NRCP 16.1 Disclosures on or about September 29, 2019;
- 15 • Maintenance Records – KEO00272 – KEO-00274, disclosed as part of Defendant's
16 First Supplemental NRCP 16.1 Disclosures on or about November 8, 2019;
- 17 • Andre Petway Human Resources File – KEO00273 – KEO00365, disclosed as part of
18 Defendant's First Supplemental NRCP 16.1 Disclosures on or about November 8,
19 2019;
- 20 • Drug Test Results for Andre Petway – KEO00366 – KEO00369, disclosed as part of
21 Defendant's Second Supplemental NRCP 16.1 Disclosures on or about November 14,
22 2019;
- 23 • Repair Estimate – KEO01602, disclosed as part of Defendant's Sixth Supplemental
24 NRCP 16.1 Disclosures on or about January 16, 2020; and
- 25 • Vehicle Data Recorder Information – KEO01603 – DEF01648, disclosed as part of
26 Defendant's Seventh Supplemental NRCP 16.1 Disclosures on or about February 7,
27 2020.

28 In short, Defendant has been continuously disclosing every non-privileged document related

1 to this incident. In only a few short months of discovery, Defendant has already made nine separate
2 disclosures of documents in this case. Defendant is not trying to hide anything discoverable and not
3 privileged from Plaintiff. Defendant only seeks to protect the privileged and confidential materials
4 prepared by or on behalf of itself for purposes of defending itself at trial.

5 This is not a case where a defendant has been trying to actively cover up anything or limit the
6 plaintiff's ability to prosecute her case. Defendant has been actively providing information throughout
7 this litigation with and without requests by Plaintiff in line with its ethical and legal obligations.

8 **D. Public Policy Demands that Trial Preparation Materials Must be Protected from**
9 **Disclosure**

10 The final consideration for this Court would be whether public policy favors the protection of
11 the documents in question. This is an important question and the answer is firmly in favor of
12 Defendant's position. The work product rule "shields from disclosure materials prepared 'in
13 anticipation of litigation' by a party, or the party's representative, absent a showing of
14 substantial need." *United States v. Adlman*, 68 F.3d 1495, 1501 (2d Cir. 1995) (citing Fed. R. Civ. P.
15 26(b)(3)). **"The purpose of the doctrine is to establish a zone of privacy for strategic litigation**
16 **planning and to prevent one party from piggy-backing on the adversary's preparation."** *Id. New*
17 *York v. Solvent Chem. Co.*, 166 F.R.D. 284, 288 (W.D.N.Y. 1996). It would be impossible to find a
18 more on-point analysis for this case than the above citation evaluating the equivalent federal rule.

19 Plaintiffs already start out at a distinct advantage as compared to defendants in litigation in that
20 the plaintiff knows well before the defendant whether a lawsuit will be coming and what that lawsuit
21 will allege. A defendant is left at the mercy of a plaintiff for months, or even years, while a plaintiff
22 generates documents, talks to experts, and obtains professional opinions in support of his or her claim.
23 A defendant only learns of the claim when the plaintiff chooses to inform the defendant, and a
24 defendant will never have access to everything done by a plaintiff in preparation for that claim because
25 of the attorney-client and work product privilege. No one disputes that.

26 To compensate for this disadvantage, the drafts of the Rules and the courts have created a
27 complementary system of protection for defendants facing litigation contained in NRCP 26(b)(3).
28 Once the plaintiff alerts the defendant that litigation is on the horizon, a defendant begins to plan a

1 strategic defense to protect itself. This defense entails countless conversations, e-mails, notes, and
2 reports generated by a defendant in every effort to learn more about what is coming, who is bringing
3 the claim, and what the risk is. This is an essential function of both a defendant and the adjusters and
4 insurers who are charged with initial responsibilities for a claim.

5 The idea that every piece of investigation, discussion, and strategy discussed by and among
6 the parties during this time could be exposed to their adversaries is offensive to our adversarial legal
7 system. A plaintiff cannot simply make a threat of a lawsuit and then sit back and let his or her
8 adversary do all the work of investigation and evaluation and then walk up and demand a copy of the
9 fruits of the defendant's labor.

10 The results of a holding allowing such "piggy-backing" off of an adversary's work would be
11 incalculably damaging to defendants all across Nevada. No frank discussions could be had with
12 anyone but an attorney, and no meaningful investigation could be conducted without fear that
13 everything learned would be subject to disclosure to the enemy at a later date. It would create an
14 astonishing chilling effect on all communications and would force defendants to operate in the dark
15 unless and until they hire an attorney to "direct" every action they take. While this may result in a
16 massive financial windfall for attorneys, it would violate the express directive of the drafters and the
17 Nevada Supreme Court in expanding the work product privilege in NRCP 26(b)(3) to cover *all*
18 documents generated in anticipation of litigation.

19 20 V. CONCLUSION

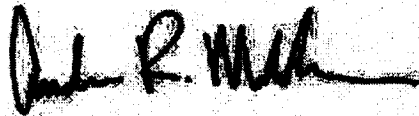
21 Defendant has already disclosed thousands of pages of documents here that are relevant and
22 not privileged. Defendant has not overreached in its claims of privilege; it disclosed the first document
23 of the claim file without any request being made. Defendant fully acknowledges that its counsel, based
24 on the strict letter of the law, should have produced a privilege log immediately after claiming the
25 privilege and that practice will be incorporated into counsel's future practices. But that error has been
26 remedied twice over at this point, and it has not changed the substance of the argument: the documents
27 sought by Plaintiff are privileged and Plaintiff has no substantial need for any of the documents sought.

28 Based on the clear wording of NRCP 26(b)(3), the controlling law contained in *Wynn Resorts*,

1 and the public policy supporting the privilege, Defendant respectfully requests that Plaintiff's Motion
2 be denied in its entirety. To the extent that any documents sought by Plaintiff are ever going to be used
3 to support Defendant's defenses, Defendant will waive the privilege by disclosing them to Plaintiff
4 and giving Plaintiff an adequate and fair opportunity to evaluate the documents before they are used
5 against her. This is how the system was designed, and this is how the system functions best to the
6 fairness of all.

7
8 Dated: April 6, 2020

MUEHLBAUER LAW OFFICE, LTD.

9
10
11 

12 By:

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25
26
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28

EXHIBIT A



CLIFF W. MARCEK
BOARD CERTIFIED PERSONAL INJURY SPECIALIST
A PROFESSIONAL CORPORATION
ATTORNEY AT LAW

July 5, 2017

SEND VIA FACSIMILE TO 859-550-2732

Broad Spire
Mr. Gaspar Vigil
PO BOX 14351
Lexington, KY 40512

Re: **My Client: Shay Frances Toth**
Your Insured : Andre Ramon Petway
Claim No. : 188532830
Date of Loss : July 1, 2017

Dear Mr. Vigil:

Please be advised that this office represents the above-named client in a claim for damages for personal injuries arising from a motor vehicle accident on July 1, 2017 involving your insured's vehicle being driven by Andre Ramon Petway.

Please provide to me written confirmation of your insurance coverage as well as the policy limits. Kindly direct all future communications to this office.

Thank you for your cooperation and prompt attention to this matter.

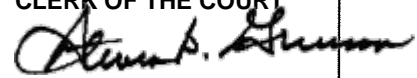
Very truly yours,

Cliff W. Marcek / kd

Cliff W. Marcek, Esq.

CWM/kd

TAB 7



RPLY

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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

SHAY TOTH, an Individual,

Plaintiff,

v.

ANDRE RAMON PETWAY, an Individual;
KEOLIS TRANSIT SERVICES, a Delaware
Limited-Liability Company; DOES I through
X; and ROE CORPORATIONS XI through
XX, inclusive,

Defendants.

**CASE NO. A-19-797214-C
DEPT. NO. 2**

(Discovery Commissioner)

**Hearing Date: April 23, 2020
Hearing Time: 9:00 a.m.
Place: RJC Level 5 Hearing Room**

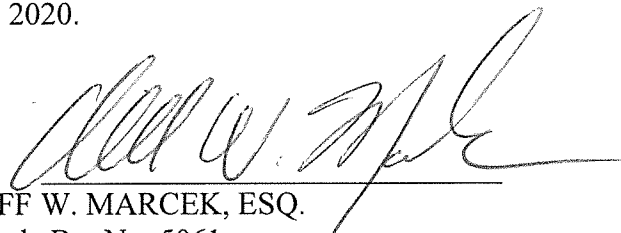
**REPLY IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL DEFENDANTS'
DISCOVERY RESPONSES**

Plaintiff, SHAY TOTH, by and through her attorneys of record, CLIFF W. MARCEK,
ESQ., and BOYD B. MOSS III, ESQ., hereby files the following Reply in Support of Plaintiff's

1 Motion to Compel Defendants' Responses to Plaintiff's First Set Requests for Production of
2 Documents.

3
4 This Reply is made and based on the pleadings and papers on file herein, the following
5 Memorandum of Points and Authorities, and upon any oral argument the Court may entertain at
6 the time of the hearing in this matter.

7 DATED this 16 day of April, 2020.

8
9 By: 
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25 Email: boyd@mossberglv.com
26 *Attorneys for Plaintiff*
27
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**
3 **LEGAL ARGUMENT**

4 **A. Defendant's New Privilege Log Reveals that the Data and Documents Requested Do Not**
5 **Fall Under NRCP 26(b)(3)'s Privilege as they were Not "generated" by Defendant or its**
6 **Agent in Anticipation of Litigation but Rather were Obtained in its Ordinary Scope of**
7 **Business as a Self-Insured Company**

8 In its application of the Wynn court's decision to adopt the "because of" test, Defendant
9 fatally assumes (1) that the Defendant only obtained such documents and data in anticipation of
10 litigation and that said documents would not otherwise be prepared in the ordinary course of
11 business, (2) that the Defendant, or its agent, actually prepared or "generated" the documents and
12 data requested by Plaintiff and (3) that the discovery sought by Plaintiff falls under the umbrella
13 of materials prepared for litigation.¹

14 **(1) Plaintiff's Letter of Representation Does Not Absolve Defendant, as a Self-Insured**
15 **Company, of its Duties to Fairly and Promptly Evaluate Her Claim Pursuant to NRS**
16 **686A.310**

17 Defendant takes the stance that because Plaintiff's attorney sent a Letter of Representation
18 four days after the subject crash that Defendant, a self-insured company, only prepared or
19 "generated" material in anticipation of litigation.² Further, Defendant maintains that if not
20 established by the Letter of Representation, Plaintiff's claimed damages of over \$300,000 in
21 March of 2018 caused Defendant, as a self-insured company, to prepare or "generate" material in
22 anticipation of litigation.³ Surely it is not the Defendant's position that before attempting to settle
23 the claim in good faith, as required by law, Defendant instead chose to prepare for litigation
24 simply because Plaintiff was severely injured or represented in this matter by an attorney.⁴

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27 ¹ See Defendant's Opposition to Plaintiff's Motion to Compel

28 ² See *Supra*

³ See *Supra*

⁴ See NRS 686A.310

1 It is the preexisting business obligations of Defendant, as a self-insured company, that in
2 essence differentiates its actions to that of the parties of the *Wynn* court. Defendant, as a self-
3 insured company, had to fairly evaluate Plaintiff's claim in its ordinary scope of business pursuant
4 to NRS 686A.310.⁵ To do so Defendant, as a self-insured company, (1) obtained an ISO report
5 from Verisk roughly two weeks after the crash, (2) conducted surveillance on Plaintiff roughly a
6 year after the crash, which resulted in the creation of video evidence, and (3) obtained a report
7 based upon the surveillance all the while adjusting Plaintiff's claim.
8

9 On its face Defendant's actions imply that it was trying to fairly evaluate Plaintiff's claim
10 in its ordinary scope of business as an insurance company, especially as Plaintiff represented over
11 \$300,000 in damages in March of 2018.⁶ As such, the materials obtained and produced by
12 Defendant were done so at its discretion as a self-insured company in its ordinary scope of its
13 business.

14 **(2) There is No Litigation Privilege in the ISO Report as Defendant Did Not Prepare or**
15 **Generate the ISO Report but Rather Bought a Copy from Verisk**

16 No privilege may be maintained in the ISO Report on Plaintiff as it is public information
17 compiled by non-party Insurance Services Office, Inc., subsidiary of non-party Verisk Analytics,
18 Inc., and merely purchased by Defendant KEOLIS.⁷ As such Defendant KEOLIS, and its agents,
19 never "generated" the ISO report. Further, although the ISO Report is publicly available to several
20 agencies, including Defendant as a self-insured company, only limited information is released to
21 each agency based upon its level of access to the information.⁸ Further, the information provided
22 within the ISO claims search frequently contains incomplete or incorrect information.

23 Here, Plaintiff may only obtain a limited portion of her own ISO report by registering and
24 paying a fee with Verisk as a third party.⁹ However, as a third party, Plaintiff is not allowed to
25

26 ⁵ See NRS 686A.310

27 ⁶ See Defendant's first amended privilege log

28 ⁷ See https://claimsearch-cdn.iso.com/cs_onlinerequestportal/ (accessed March 9,2020)

⁸ See *Supra*

⁹ See *Supra*

1 purchase the same report as Defendant.¹⁰ The Defendant argues Plaintiff should know what's on
2 the report because it's only reporting things she's done. By refusing to disclose the report, Plaintiff
3 has no opportunity to know whether it is accurate or refute any inaccuracies.
4

5 Clearly, Defendant cannot claim a privilege in the ISO Report that neither it nor its agents
6 prepared. This information should have disclosed it in its initial disclosures pursuant to NRCP
7 16.1 or at a minimum provided it to Plaintiff's discovery requests pursuant to NRCP 34(b).^{11 12}

8 **B. Plaintiff Need Not Show Substantial Need Does Not Apply to the Mandatory 16.1**
9 **Disclosures as There are No NRCP 26(b)(3) Privileges**

10 As discussed above the materials requested by Plaintiff do not trigger the NRCP 26(b)(3)
11 litigation privilege and, thus, no substantial need must be shown to obtain the materials requested
12 as the materials are otherwise discoverable.¹³ Defendant's reliance in *Wynn* is yet again misguided
13 as the materials requested from Defendant in this case were been obtained or "generated" in
14 Defendant's ordinary scope of business as a self-insured company.

15 **C. Public Policy Demands Disclosure to Prevent Trial by Ambush and Waste of the**
16 **Judicial Economy**

17 The Courts in Nevada have made it clear that a party should not withhold discoverable
18 information and then later present it at trial by ambush.¹⁴ Defendant's stance, that it must hide
19 relevant evidence as a means of preventing Plaintiff from "explaining away" the content of the
20 evidence, is thinly veiled attempt to confuse this Court into accepting Defendant's slippery slope
21 argument.

22 Defendant presents a slippery slope argument that if this Court binds itself to the current
23 discovery rules that it would be "incalculably damaging to defendants all across Nevada" as "no
24 meaningful investigation can be conducted" by defendants which would then "create an
25 astonishing chilling effect on all communications" and "would force defendants to operate in the

26 ¹⁰ See *Supra*

27 ¹¹ See NRCP 16.1

28 ¹² See NRCP 34

¹³ See NRCP 26(b)(3)

¹⁴ *Land Baron Invs., Inc. v. Bonnie Springs Family Ltd. P'ship*, 356 P.3d 511 (Nev. 2015).

1 dark.” Defendant attempts to justify its logical fallacies by claiming that the current NRCP would
2 somehow violate the directives of the drafters, who are very much alive and wrote their actual
3 directives in the redline NRCP provided, and the Supreme Court, which is bound to the new
4 NRCP. However, as explained in Plaintiff’s original motion, the intention of the drafters of the
5 2019 NRCP made it clear in the redline provisions that the Court is to move to mandatory
6 disclosure of impeachment evidence pursuant to NRCP 16.1 and for production pursuant to NRCP
7 34, absent the relevant privileges.^{15 16}

9 Here, the materials Plaintiff requested are not privileged as discussed. If Defendant
10 maintains that the materials requested by Plaintiff are privileged under NRCP 26(b)(3) it
11 effectively admits its engagement in Bad Faith practices in violation of NRS 686A.310 for failure
12 to fairly evaluate Plaintiff’s claim as a self-insured company.¹⁷ Understandably Defendant is
13 resorting to public policy arguments as a means to escape the position its own actions have placed
14 it in. The reality is the transparency required by NRCP 16.1 is a means for parties in litigation to
15 lay there cards on the table and potentially resolve matters without going to trial.
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27 ¹⁵ See NRCP 16.1

28 ¹⁶ See NRCP 34

¹⁷ See NRCP 686A.310

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II.
CONCLUSION

For the above and foregoing reasons, Plaintiff respectfully requests that the Court compel Defendant to fully respond to Plaintiff's First Set Requests for Production of Documents.

DATED this 16 day of April, 2020.

CLIFF W. MARCEK, P.C.

By: 

CLIFF W. MARCEK, ESQ.

Nevada Bar No. 5061

CLIFF W. MARCEK, P.C.

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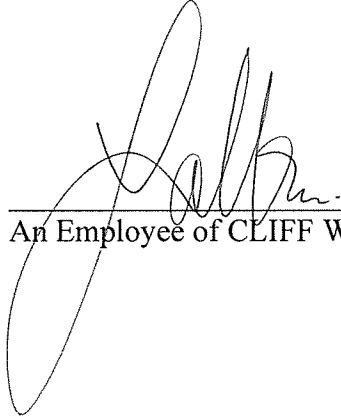
Email: boyd@mossberglv.com

Attorneys for Plaintiff

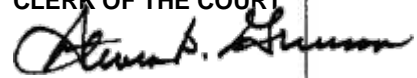
1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of CLIFF W. MARCEK,
3 P.C. and that on the 14 day of April, 2020, I served the above and foregoing **REPLY IN**
4 **SUPPORT OF PLAINTIFF'S MOTION TO COMPEL DEFENDANT'S DISCOVERY**
5 **RESPONSES** by placing a true and accurate copy of the same into a sealed envelope and into
6 the regular United States mail, first-class postage prepaid thereon, addressed as follows:
7

8 Andrew R. Muehlbauer, Esq.
9 Sean P. Connell, Esq.
10 MUEHLBAUER LAW OFFICE, LTD.
11 7915 West Sahara Ave., Suite 104
12 Las Vegas, Nevada 89117
13 *Attorneys for Defendants*

14 
An Employee of CLIFF W. MARCEK, P.C.
15
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25
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27
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TAB 8



1 **DCRR**

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Attorneys for Plaintiff

13 **DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

15 SHAY TOTH, an Individual,

16
17 Plaintiff,

18 v.

19 ANDRE RAMON PETWAY, an Individual;
20 KEOLIS TRANSIT SERVICES, a Delaware
21 Limited-Liability Company; DOES I through
22 X; and ROE CORPORATIONS XI through
XX, inclusive,

23 Defendants.

CASE NO. A-19-797214-C
DEPT. NO. 2

24 **DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS**

25 HEARING DATE: April 23, 2020

26 HEARING TIME: 9:00 a.m.
27
28

1 APPEARANCES:

2 Plaintiff Shay Toth: Cliff Marcek, Esq. and Boyd B. Moss, Esq.

3 Defendants Andre Ramon Petway and Keolis Transit Services, LLC: Andrew R.
4 Muehlbauer, Esq.

5 I.

6 **FINDINGS**

7 On March 23, 2020, Plaintiff filed her motion to Compel Defendants' Discovery
8 Responses seeking Defendant cure its ^{alleged} insufficient discovery responses pursuant to NRCP 16.1
9 and which requires disclosures of all documents including impeachment or rebuttal evidence. In
10 particular, Plaintiff requested Defendant produce any documents obtained about the Plaintiff from
11 any source, including, social media, private investigators and/or insurance companies, video
12 surveillance, and/or imaging of the Plaintiff obtained through private investigators, witnesses
13 and/or social media, and Keolis' claims file. Specifically, Plaintiff requested three surveillance
14 videos of Plaintiff, two reports associated with those surveillance videos and an ISO claim search
15 of Plaintiff.¹

16
17
18 Keolis filed its opposition on April 6, 2020 arguing that it had provided adequate privilege
19 logs to the Plaintiff asserting certain privileges in support of its position to not disclose the
20 requested tangible things, that the requested tangible things were generated in anticipation of
21 litigation under NRCP 26(b)(3), and that Plaintiff had failed to argue "substantial need" for the
22 requested documents. Plaintiff filed her reply on April 16, 2020.

23
24 Based on the representations of KEOLIS' counsel, two of the surveillance videos of
25 Plaintiff were done at the direction of claims adjuster² and one of the surveillance videos was

26
27 ¹ Two surveillance videos were taken August 2018 and the other surveillance
28 video was taken September 2019. There was one surveillance report in August
2018 and one surveillance report in September 2019.

² The surveillance videos taken August 2018.

1 done at the direction of counsel³. Further, the ISO Claims Report was requested by the claims'
2 adjuster prior to the retention of counsel.

3 The Honorable Discovery Commissioner, after reviewing the facts of this case, the
4 briefing on this matter and the argument of counsel finds good cause exists to deny Plaintiff's
5 Motion in part and to grant Plaintiff's Motion in part.
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28 ³ The surveillance video of September 2019.

II.

RECOMMENDATIONS

IT IS HEREBY RECOMMENDED that Plaintiff, Shay Toth's, Motion is GRANTED IN PART and DENIED IN PART as follows:

1. The surveillance videos and reports are protected at this time. However, the surveillance video must be disclosed within thirty (30) days of Plaintiff's deposition if Defendant Keolis intends to use the surveillance video ^{or reports} at Trial. *(initials)*

2. The ISO Report was done in the normal course of business and it is not protected. Therefore, the ISO Report is to be disclosed to the Plaintiff.

DATED this 26th day of May, 2020.

Andrew R. Muehlbauer
DISCOVERY COMMISSIONER

DATED this 20 day of May, 2020

MOSS BERG INJURY LAWYERS

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Approved as to form and content:

MUEHLBAUER LAW OFFICE, LTD.

/s/ Andrew R. Muehlbauer
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Attorneys for Defendants

NOTICE

Pursuant to NRC 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 June 11th, 2020.

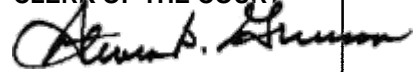
A copy of the foregoing Discovery Commissioner's Report was:

Mailed to Plaintiff/Defendants, on the _____ day of _____, 2020.

✓ Electronically filed and served on counsel on May 28th, 2020,
pursuant to N.E.F.C.R. Rule 9.

By: Nataniel Simonetti
Commissioner's Designee

TAB 9



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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

SHAY TOTH, an Individual,

Plaintiff,

v.

ANDRE RAMON PETWAY, an Individual;
KEOLIS TRANSIT SERVICES, a Delaware
Limited-Liability Company; DOES I through
X; and ROE CORPORATIONS XI through
XX, inclusive,

Defendants.

**CASE NO. A-19-797214-C
DEPT. NO. 2**

**OBJECTION TO THE DISCOVERY
COMMISSIONER'S REPORT AND
RECOMMENDATIONS**

(Oral Argument Requested)

Plaintiff, SHAY TOTH, by and through her attorneys of record, CLIFF W. MARCEK,
ESQ., and BOYD B. MOSS III, ESQ., hereby files her objection to the Discovery Commissioner's
Report and Recommendations filed May 28, 2020.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **SUMMARY OF ISSUES**

4
5 The issues before the Discovery Commissioner were (1) whether the defendants have to
6 turn over three difference surveillance videos of the plaintiff, Shay Toth. Two of the recordings
7 were August 2018 (a little more than a year after the motor vehicle crash and almost one year
8 before the Complaint was filed)¹ and a third recording was in September 2019²; and (2) Whether
9 the defendants have to turn over the surveillance reports from those above reference recordings.³

10 The plaintiff's position is that these surveillance videos and reports are discoverable and
11 should have been turned over pursuant to NRCP 16.1 or pursuant to the NRCP 34 request in that
12 NRCP 16.1 states "...a party must ...provide to the other parties. ...all documents. ... used to
13 support its claims or defenses, including impeachment or rebuttal. ..." documents.

14 The Discovery Commissioner ruled the defendants did not have to turn over these records
15 until 30 days after the plaintiff's deposition. This ruling is inconsistent with the rule change and
16 policy behind NRCP 16.1, promotes gamesmanship, and has no basis in law.

17 **A. Statement of Facts:**

18
19 This is an action for personal injuries and damages as a result of a motor vehicle collision
20 that occurred July 1, 2017. Defendant ANDRE RAMON PETWAY, while in the scope of his
21 employment with Defendant KEOLIS, was driving a 2013 Dodge Grand Caravan, owned by
22 Defendant KEOLIS, and was traveling northbound on Boulder Highway. Thereafter, Defendant
23 PETWAY carelessly and recklessly drove into the back of a 2015 Toyota Corolla that was waiting
24 to make a left turn onto Sahara Avenue. Plaintiff, SHAY TOTH, was operating the Corolla, and
25

26 ¹ These two recordings were requested by the insurance claims adjuster

27 ² This was requested by counsel

28 ³ There was a third issue before the Discovery Commissioner regarding a "ISO"
report. However, since the court granted the plaintiff's request, this is
not before the court here.

1 was severely injured in the crash.

2 **B. Procedural Posture:**

3 Plaintiff filed her Complaint on June 21, 2019, alleging a claim of negligence against
4 Defendant ANDRE RAMON PETWAY, an Individual; and Defendant KEOLIS TRANSIT
5 SERVICES, a Delaware Limited Liability Company. Thereafter, on or about August 6, 2019,
6 Defendant KEOLIS filed its answer to Plaintiff's Complaint. Plaintiff and Defendant KEOLIS
7 met and conferred at an early case conference and a Joint Case Conference Report was filed on
8 October 16, 2019. On November 21, 2019, Defendant PETWAY filed his answer to Plaintiff's
9 Complaint. Shortly thereafter, scheduling and trial orders were issued in this. The case deadlines
10 are as follows:
11

12	Amend Pleadings/Add Parties:	July 2, 2020
13	Initial Expert Disclosures:	July 2, 2020
14	Rebuttal Expert Disclosures:	August 3, 2020
15	Close of Discovery:	October 2, 2020
16	Deadline to File Dispositive Motions:	November 2, 2020

17
18 The trial in this matter is currently set to commence on a five-week stack beginning on
19 January 11, 2021. This is the first trial setting in this matter.

20 **C. Facts Relevant to Plaintiff's Motion to Compel:**

21 On October 18, 2019, Plaintiff electronically served Defendant KEOLIS with her First Set
22 of Requests for Production of Documents.⁴ On November 25, 2019, Defendant KEOLIS served
23 its Responses to Plaintiff's First Requests for Production of Documents. Defendant KEOLIS'
24 Responses to Plaintiff's First Requests for Production insufficiently alleged various privileges as
25 its basis of objecting to the production of documents and data requested by Plaintiff.⁵ Further,
26 Defendant KEOLIS initially failed to provide an associated privilege log to Plaintiff.
27

28 ⁴ See Plaintiff's First Set of Requests for Production of Documents (attached as **Exhibit 1**)

⁵ See defendants' response marked as Exhibit 2)

1 On December 27, 2019 CLIFF W. MARCEK emailed Defendant in regard to its
2 objections to the production of documents and data requested by Plaintiff on the basis of its
3 alleged privilege. On January 10, 2020, Defendant KEOLIS served its Amended Response to
4 Plaintiff's First Requests for Production along with an inadequate Privilege Log.⁶ ⁷Defendant's
5 January 10, 2020, Amended Responses maintained, and expanded, its alleged privileges as its
6 basis of objecting to the production of three surveillance videos to be Defendant KEOLIS' bated
7 stamped KEO01311-1313, the two reports on said surveillance videos to be Defendant KEOLIS'
8 KEO01314-1326 and KEO01327-KEO01339 and the ISO report of Plaintiff to be KEO01340-
9 1343.⁸ Specifically, Defendant refused to produce the aforementioned videos and reports
10 requested by Plaintiff in her discovery requests numbered 10, 11 and 23 for (a) documents
11 obtained about the Plaintiff from any source, including, social media, private investigators and/or
12 insurance companies, (b) video surveillance, and/or imaging, of the Plaintiff obtained through
13 private investigators, witnesses, and/or social media, (c) Defendant KEOLIS' claims file,
14 respectively.

15
16 After a meet and confer March 20, 2020 pursuant to EDCR 2.34, Plaintiff filed a motion
17 to compel. The main point of the motion is that the changes to NRCP 16.1 in 2019 compel
18 disclosure of these documents.
19

20 II.

21 LEGAL ARGUMENT

22 **A. The Videos and Reports Requested by Plaintiff Must Be Disclosed Pursuant to** 23 **NRCP 16.1**

24 The 2019 amendments to the Nevada Rules of Civil Procedure are comprehensive and
25

26
27 ⁶ See Defendant KEOLIS' Amended Responses to Plaintiff's First Set of Requests for Production of Documents
(attached as **Exhibit 3**)

28 ⁷ Keolis submitted a privilege log January 10, 2020. (See Exhibit 4)

⁸ Keolis then submitted a First Amended Privilege Log April 13, 2020. (Exhibit 5)

modeled in part after the Federal Rules of Civil Procedure.⁹ The 2019 amendments to NRCP 16.1 has brought NRCP 16.1 in line with the relevant FRCP produced in relevant part in footnote below.¹⁰ As laid out in the redline provisions of the 2019 NRCP amendments, against the previous NRCP, the mandatory disclosure of data, including video, pursuant to NRCP 16.1(a)(1)(A)(ii) is as follows:

(B) A (ii) a copy of, ~~or a description by category and location of,~~ all documents, ~~data—compilations~~ electronically stored information, and tangible things that ~~are~~ the disclosing party has in the its possession, custody, or control of and may use to support its claims or defenses, including for **impeachment or rebuttal**, and, unless privileged or protected from disclosure, any record, report, or witness statement, in any form, concerning the party and which are discoverable under Rule 26(b); incident that gives rise to the lawsuit;¹¹ **(emphasis added)**

As such, and in accordance with the statutory intent of the drafters of the 2019 amendments to NRCP 16.1, Defendant must have disclosed any record, report, or witness statement in any form, including audio or audiovisual form, concerning the incident that gives rise to the lawsuit, including incident reports, records, logs and summaries, maintenance records, former repair and inspection records and receipts, sweep logs, and any written summaries of such documents¹² so long as those Documents are prepared or exist at or near the time of the subject

⁹ See ADKT 522 Redline of Proposed NRCP Amendments Against Existing NRCP at pg 1 Advisory Committee Note 2019 Amendment; Reproduced in Pertinent part: The 2019 amendments to the Nevada Rules of Civil Procedure are comprehensive. Modeled in part on the 2018 version of the Federal Rules of Civil Procedure, the 2019 amendments restyle the rules and modernize their text to make them more easily understood. Although modeled on the FRCP, the amendments retain and add certain Nevada-specific provisions. The stylistic changes are not intended to affect the substance of the former rules.

¹⁰ See *Supra* at 77-78 Advisory Committee Note 2019 Amendment; Reproduced in Pertinent part: Rule 16.1(a)(1)(A)(ii) incorporates language from the federal rule requiring that a party disclose materials that it may use to support its claims or defenses. However, **the disclosure requirement also includes any record, report, or witness statement in any form, including audio or audiovisual form, concerning the incident that gives rise to the lawsuit.** The 78 initial disclosure requirement of a “record” or “report” under Rule 16.1(a)(1)(A)(ii) includes but is not limited to: incident reports, records, logs and summaries, maintenance records, former repair and inspection records and receipts, sweep logs, and any written summaries of such documents. Documents identified or produced under Rule 16.1(a)(1)(A)(ii) should include those **that are prepared or exist at or near the time of the subject incident.** The reasonable time required for production of such documents will depend on the facts and circumstances of each case. A party who seeks to avoid disclosure based on privilege must provide a privilege log. **(emphasis added)**

¹¹ See *Supra* at 71

¹² See *Supra* 14

incident.¹³

B. Defendant KEOLIS' Purported Privileges and Objections Do Not Justify Their Refusal

The defendants assert that they do not have to turn over the surveillance videos and reports based on the litigation privilege in NRCP 26(b)(3). That section states in part: *Trial Preparation: Materials.*

(A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26 (b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26 (b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

As the court can see, the videos and the reports, especially the two videos and the one report from August 2018 was not done at counsel's behest and Rule 26(b)(1) states these are discoverable. This litigation privilege is actually a version of the work product privilege and is not absolute. Further, Defendant's assertion regarding the propriety of withholding the video from plaintiff or defendant's employees is not justified. Indeed, preventing access to the video runs counter to the paramount goals of transparency, collaboration, and efficiency in the discovery process.¹⁴ Courts generally have ordered parties to produce materials to promote such goals, particularly the goal of transparency.¹⁵ ¹⁶ Given this preference for transparent and collaborative discovery, the videos must be produced prior to plaintiff's deposition. If defendants are allowed to lie in wait, secretly video tape plaintiffs and withhold this information, the rule of disclosure

¹³ See *Supra*

¹⁴ See *Apple, Inc. v. Samsung Electronics Co.*, No. 12-CV-0630-LHK PSG, 2013 U.S. Dist. LEXIS 67085, 2013 WL 1942163, at *3 (N.D. Cal. May 9, 2013) ("[T]ransparency and collaboration [are] essential to meaningful, cost-effective discovery"); The Sedona Conference, *The Sedona Conference Cooperation Proclamation* (2008) (http://www.thesedonaconference.org/content/tsc_cooperation_proclamation) (promoting "open and forthright information sharing... to facilitate cooperative, collaborative, transparent discovery.").

¹⁵ See e.g., *Whitney v. City of Milan, Tenn.*, No. 09-1127, 2010 U.S. Dist. LEXIS 54393, 2010 WL 2011663, at *3 (W.D. Tenn. May 20, 2010) (Court denies plaintiff's request to withhold recordings for impeachment purposes until after depositions are complete, holding, among others, that gamesmanship with information is discouraged by the federal rules

¹⁶ *Rofail v. United States of America*, 227 F.R.D. 53, 58 (E.D.N.Y. 2005) (Court held that plaintiff must produce recording because "[o]pen discovery is the norm. Gamesmanship with information is discouraged and surprises are abhorred.").

1 is rendered null and void and promotes gamesmanship discouraged by the plain meaning of the
2 rule and discussed in *Whitney v. City of Milan, TN, supra*, and in *Rofail v. USA, supra*.

3 The defendants rely on *Wynn Resorts, Ltd v. Eighth Judicial Dist. Ct.*, 399 P. 3d 334
4 (2017) as authority to withhold the surveillance recordings and the reports. The *Wynn* case did
5 not involve surveillance videotapes and is distinguishable from this case in many particulars.
6 First, it was decided before the rule change to NRCP 16.1. Though the rule change by itself does
7 not compel a different ruling than the discovery commissioner made, the policy and rational
8 behind the rule is instructive. Second, the issues in *Wynn* were whether documents and
9 communications made directly from lawyers and law firms to a party to litigation were privileged
10 from disclosure by the attorney client and attorney work product privileges and whether there was
11 a waiver of the privileges. What the court held, *inter alia*, was that documents prepared “. . .in
12 the ordinary course of business or that would have been created in essentially similar form
13 irrespective of litigation . . .” are not privileged. *Id.* at p. 348.

14
15 The defendants will argue that all work on a claim even by an adjuster is privileged
16 because it is work done in “anticipation of litigation.” To accept this construction of the rules and
17 case law would be contrary to the express language of NRCP 16.1 and would not require them to
18 exchange documents that support claims or defenses and not require them to turn over
19 impeachment and rebuttal evidence. However, insurance companies are required to investigate
20 claims under law. NRS 686A.310 states that it is an unfair claims practice to “not implement
21 reasonable standards for the prompt investigation and processing of claims arising under
22 insurance policies.” The law requires them to investigate and many, many claims never make it
23 to court.
24

25 The privilege the defendants are invoking here is the work product privilege. The work
26 product privilege is not absolute. NRCP 26(b)(3) states the records and recording should be
27 disclosed if “they are discoverable under NRCP 26(b)(3) and there is a substantial need by the
28

1 other party. These recordings were done by the defendant, presumably, to obtain information on
2 the plaintiff that would be inconsistent with the injuries she is complaining about. Almost by
3 virtue of getting these recordings, they would likely lead to the discovery of admissible evidence
4 or are admissible evidence already. In particular, they are likely to support either the plaintiff's
5 claims or Keolis' defenses. There is a substantial need for the plaintiff to get these because she
6 has no other way to get them. The Defendants are withholding information that it will likely try
7 to use as evidence whether directly, for impeachment or rebuttal. It is improper to assert privilege
8 to hold back relevant evidence only to later attempt to use that evidence to advantage of the
9 withholding party by disclosing it after her deposition. There is no basis in law for the Discovery
10 Commissioner to make such a decision. Such tactics promote gamesmanship and result in trial
11 by ambush or discovery by ambush, both of which are discouraged by law.
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III.

CONCLUSION

For the above and foregoing reasons, Plaintiff respectfully requests that the Court compel Defendant to fully respond to Plaintiff's First Set Requests for Production of Documents.

DATED this 3 day of June 2020.

CLIFF W. MARCEK, P.C.

By: 

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EXHIBIT “1”

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Attorney for Plaintiff
SHAY TOTH

DISTRICT COURT
CLARK COUNTY, NEVADA

SHAY TOTH, an Individual,

Plaintiff,

v.

ANDRE RAMON PETWAY, an Individual;
KEOLIS TRANSIT SERVICES, a Delaware
Limited Liability Company; DOES I through
X; and ROE CORPORATIONS XI through
XX, Inclusive;

Defendants.

Case No. : A-19-797214-C

Dept. No. : 2

**PLAINTIFF'S FIRST REQUEST
FOR PRODUCTION OF
DOCUMENTS TO DEFENDANT
KEOLIS TRANSIT SERVICES**

Plaintiff, Shay Toth, by and through her attorney Cliff W. Marcek, Esq., hereby
propounds the following Requests for Production of Documents to Defendant, Keolis Transit
Services, pursuant to Nev.R.Civ.P. 34:

INSTRUCTIONS AND DEFINITIONS

The following Instructions and Definitions are to be considered applicable to all
demands for production of documents and tangible things contained herein:

If any of these documents cannot be produced in full, produce to the extent possible,
specifying your reasons for your inability to produce the remainder and stating whatever
information, knowledge or belief you do have concerning the unproduced portion.

If any of the requested documents or other things at one time existed, but no longer
are in existence, please so state and specify for each document or thing, (a) the document
type or thing, (b) the type of information contained therein, (c) the date upon which it ceased

1 to exist, (d) the circumstances under which it ceased to exist, (e) the identity of any person
2 having knowledge of said circumstances, (f) the identity of any person having knowledge of
3 the contents thereof, and (g) the identity of any person or business which might have a copy
4 thereof.

5 This request is a continuing one. If you should later obtain or become aware of any
6 further documents responsive to this request, you are required to produce such additional
7 documents.

8 1. The terms "DOCUMENT" and "DOCUMENTS" are intended in their
9 broadest sense, and include, without limitation, any original, matrix, reproduction or copy of
10 any kind, typed, recorded, graphic, printed, photostatic, written or documentary matter,
11 including, without limitation, articles, correspondence, memoranda, interoffice
12 communications, electronic mail, text messages, notes, diaries, contracts, agreements,
13 drawings, plan, photographs, movies, negatives, specifications, estimates, vouchers, permits,
14 written ordinances, minutes of meetings, invoices, billings, checks, reports, studies,
15 telegrams, facsimiles, telexes, notes of telephonic conversations, intra-corporate
16 communications, computer programs and data including all matter stored on magnetic or
17 other disc, tape or film, or in computer storage, including all indices and keys that would
18 assist in retrieving or interpreting the matter, and/or reproductions of any and all
19 communications by all means of recording any tangible thing, including letters, words,
20 pictures, sounds or symbols or combinations thereof, and all written, printed, typed, recorded
21 or graphic matter of any kind or character, now or formerly in your actual or constructive
22 possession, custody or control, however produced, recorded, stored or reproduced for access.
23 With respect to a document covered by an Interrogatory, if a document was prepared in more
24 than one copy, or if additional copies were subsequently made, and if any copies were not
25 identical or are no longer identical by reason of subsequent notation or modification of any
26 kind, including without limitation, notations on the front or back of any of the pages of the
27 document, then each non-identical copy is a separate document and shall be identified.

2. When used with respect to a document, the terms "IDENTIFY" and "IDENTITY" mean to state the date of the document; the type of document (e.g., letter, memorandum, telegram, chart, photograph, sound recording, videotape, computer printout, computer program, microfilm, catalog, etc.); the identity of the author(s); the identity of the addressee(s); the identity of each recipient of the document or a copy of the document; the present location and the identity of the custodian of the original and each copy of the document; and a description of the contents of the document.

3. Any term used in singular form in these Requests for Production is to be interpreted in the plural form as well. Any term used in the plural form in these Requests for Production is to be interpreted in the singular form as well.

4. When used herein, the term "AND" shall mean to include "AND/OR." When used herein, the term "OR" shall mean to include "AND/OR."

5. The terms "YOU" and "YOUR" mean Defendant, **Keolis Transit Services**, and all officers, directors, partners, trustees, employees, agents, representatives, investigators, accountants, lawyers, bankers, financial analysts, advisers or other persons or parties acting on your behalf, including all individuals and entities who are no longer but were in one of these positions, capacities, statuses or relationships during the relevant time.

6. The term "CRASH" refers to the motor vehicle crash that is the subject of the Complaint for Money Damages, filed in this case on June 21, 2019.

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1:

Please produce a copy of any and all audiotapes, recordings, videotapes, or DVDs of any persons involved in the CRASH.

REQUEST FOR PRODUCTION NO. 2:

Please produce any and all written, recorded, or transcribed statements of any persons who witnessed the CRASH or with knowledge of the CRASH.

REQUEST FOR PRODUCTION NO. 3:

Please produce any and all post CRASH investigation reports and DOCUMENTS of the CRASH.

REQUEST FOR PRODUCTION NO. 4:

Please produce all DOCUMENTS and things relating to any expert retained to testify, including, but not limited to: the expert's resume/curriculum vitae; the expert's fee chart; all 1099s from your attorney's firm with respect to the expert; all 1099s from your insurance company with respect to the expert; a list of all cases worked on by the expert on behalf of your attorney's firm; a list of all cases in which the expert has rendered testimony; and the expert's entire working file, including, but not limited to, correspondence, notes, calculations, tests, analyses, scientific studies, journals, reports, articles, charts, and audio, video, or computer storage disks, including all cassettes or tapes.

REQUEST FOR PRODUCTION NO. 5:

Please produce any and all DOCUMENTS you intend to use at arbitration or trial, including impeachment or rebuttal documents.

REQUEST FOR PRODUCTION NO. 6:

Please produce good quality laser prints of any and all photographs of any vehicles involved in the CRASH.

REQUEST FOR PRODUCTION NO. 7:

Please produce any and all estimates for damage to any vehicles in the CRASH.

REQUEST FOR PRODUCTION NO. 8:

Please produce any and all Department of Transportation and State inspections of the vehicle involved in the subject CRASH for one year prior to the CRASH.

REQUEST FOR PRODUCTION NO. 9:

Please produce any and all information concerning the vehicle driven by Andre Petway, involved in the subject CRASH, including the make and model of the vehicle, the weight of the vehicle, the load and towing capacity of the vehicle, any repair and maintenance logs for the vehicle, and any information regarding prior crashes in which the vehicle has been involved.

REQUEST FOR PRODUCTION NO. 10:

Please produce any and all DOCUMENTS YOU have obtained about the Plaintiff from any source, including social media, any private investigators, and/or insurance index bureaus.

REQUEST FOR PRODUCTION NO. 11:

Please produce any video surveillance or imaging of Plaintiff, including but not limited to video surveillance or imaging obtained through private investigators, witnesses, and/or social media.

REQUEST FOR PRODUCTION NO. 12:

Please produce any and all training manuals, and instructional manuals, videotapes, CDs or DVDs created by YOU or for YOU, related to driver safety training or safety courses.

REQUEST FOR PRODUCTION NO. 13:

Please produce the employee handbook issued to Andre Petway.

REQUEST FOR PRODUCTION NO. 14:

Please produce all personnel and employee records for Andre Petway with regard to his employment with YOU, including, but not limited to, pre-hiring and post-hiring motor vehicle records checks, his Driver Qualification File, criminal records checks, employment background checks, disciplinary action(s) taken against Andre Petway, employment reviews of Andre Petway's job performance, and all employee orientation and training materials provided to Andre Petway.

REQUEST FOR PRODUCTION NO. 15:

Please produce all documentation relating to Andre Petway's driving safety record.

REQUEST FOR PRODUCTION NO. 16:

Please produce any and all safety training logs for Andre Petway.

REQUEST FOR PRODUCTION NO. 17:

Please produce all DOCUMENTS regarding your policies, procedures, and guidelines for hiring drivers, including documents regarding policies for investigating drivers' employment histories.

CLIFF W. MARCEK, ESQ.
536 E. ST. LOUIS AVE., LAS VEGAS, NEVADA 89104
Phone (702) 366-7076 ♦ Facsimile (702) 366-7078

1 **REQUEST FOR PRODUCTION NO. 18:**

2 Please produce copies of your policies and procedures relating to alcohol and drug
3 testing of drivers.

4 **REQUEST FOR PRODUCTION NO. 19:**

5 Please produce a copy of the results of any and all post-accident alcohol testing Andre
6 Petway underwent in the 72 hours following the subject CRASH. If no post-accident alcohol
7 test was conducted, please provide any and all DOCUMENTS evidencing why no such testing
8 was performed.

9 **REQUEST FOR PRODUCTION NO. 20:**

10 Please produce a copy of the results of any and all post-accident drug and controlled
11 substance testing Andre Petway underwent within the 72 hours following the subject CRASH.
12 If no such test was conducted, please provide any and all DOCUMENTS evidencing why no
13 such testing was performed.

14 **REQUEST FOR PRODUCTION NO. 21:**

15 Please produce any and all documentation in your care, custody, and/or control that
16 mention, discuss, describe, summarize, reflect, constitute, identify, evidence, memorialize, or
17 otherwise refer to any and all on-the-job motor vehicle crashes involving your employee Andre
18 Petway.

19 **REQUEST FOR PRODUCTION NO. 22:**

20 Please produce all applicable insurance policy information.

21 **REQUEST FOR PRODUCTION NO. 23:**

22 Please produce the entire claims file.

23
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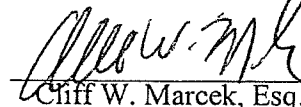
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1 **REQUEST FOR PRODUCTION NO. 24:**

2 Please produce all DOCUMENTS identified in YOUR Answers to Plaintiff's
3 Interrogatories.

4 Dated this 17 day of October, 2019.

5 CLIFF W. MARCEK, P.C.

6 

7 Cliff W. Marcek, Esq.

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15 SHAY TOTH

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CERTIFICATE OF SERVICE

Pursuant to Nev.R.Civ.P 5(b), I certify that I am an employee of CLIFF W. MARCEK, P.C., and that on this 18 day of October, 2019, I caused the above and foregoing document, **PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANT KEOLIS TRANSIT SERVICES**, to be served via E-service on Wiznet pursuant to mandatory NEFCR 4(b) to the following parties at their last known address:

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Sean P. Connell, Esq.
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Attorney for Defendant
KEOLIS TRANSIT SERVICES, LLC

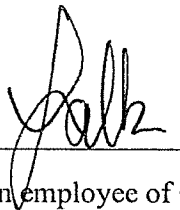

An employee of CLIFF W. MARCEK, P.C.

EXHIBIT “2”

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

SHAY TOTH, an Individual,

Plaintiff,

v.

ANDRE RAMON PETWAY, an Individual;
KEOLIS TRANSIT SERVICES, a Delaware
Limited Liability Company; DOES I through X; and
ROE CORPORATIONS XI through XX, Inclusive;

Defendants.

CASE NO.: A-19-797214-C

DEPT. NO.: 2

**DEFENDANT KEOLIS TRANSIT
SERVICES, LLC'S RESPONSES TO
FIRST SET OF REQUESTS FOR
PRODUCTION OF DOCUMENTS
FROM PLAINTIFF SHAY TOTH**

**DEFENDANT KEOLIS TRANSIT SERVICES, LLC'S RESPONSES TO FIRST SET OF
REQUESTS FOR PRODUCTION OF DOCUMENTS FROM PLAINTIFF SHAY TOTH**

PRELIMINARY STATEMENT

Defendant KEOLIS TRANSIT SERVICES, LLC's ("Defendant") answers to the following requests for production of documents are based on information currently known to Defendant and are provided without prejudice to Defendant's right to submit evidence of any subsequently discovered facts, information, or documents, should such become known. These responses are made in a good

1 faith effort to supplement such information as presently known to Defendant after reasonable
2 investigation. Defendant reserves its right to further supplement or alter any answer set forth herein
3 and to use such additional information at trial.

4 Further, because some of these responses may have been ascertained by Defendant's attorneys,
5 investigators, and/or through discovery in this litigation, Defendant may not have personal knowledge
6 of the information from which these responses are derived.

7
8 **REQUEST FOR PRODUCTION NO. 1:** Please produce a copy of any and all audiotapes,
9 recordings, videotapes, or DVDs of any persons involved in the CRASH.

10 **RESPONSE TO REQUEST FOR PRODUCTION NO. 1:**

11 None exist to the knowledge of Defendant.

12
13 **REQUEST FOR PRODUCTION NO. 2:** Please produce any and all written, recorded, or
14 transcribed statements of any persons who witnessed the CRASH or with knowledge of the CRASH.

15 **RESPONSE TO REQUEST FOR PRODUCTION NO. 2:**

16 The only such statements known to Defendant are those contained in the Keolis Incident Report,
17 previously disclosed.

18
19 **REQUEST FOR PRODUCTION NO. 3:** Please produce any and all post CRASH
20 investigation reports and DOCUMENTS of the CRASH.

21 **RESPONSE TO REQUEST FOR PRODUCTION NO. 3:**

22 See the Keolis Incident Report, previously disclosed as document bearing bates stamp KEO00001 –
23 KEO00005.

24
25 **REQUEST FOR PRODUCTION NO. 4:** Please produce all DOCUMENTS and things
26 relating to any expert retained to testify, including, but not limited to: the expert's resume/curriculum
27 vitae; the expert's fee chart; all 1099s from your attorney's firm with respect to the expert; all 1099s
28 from your insurance company with respect to the expert; a list of all cases worked on by the expert on

1 behalf of your attorney's firm; a list of all cases in which the expert has rendered testimony; and the
2 expert's entire working file, including, but not limited to, correspondence, notes, calculations, tests,
3 analyses, scientific studies, journals, reports, articles, charts, and audio, video, or computer storage
4 disks, including all cassettes or tapes.

5 **RESPONSE TO REQUEST FOR PRODUCTION NO. 4:**

6 OBJECTION, this Request seeks to impermissibly replace and override the Court's Scheduling Order
7 and NRCP 16.1's rules regarding expert disclosures. This is an improper use of a Request for
8 Production. Without waiving said Objection, Defendant responds as follows: All such materials will
9 disclosed as directed by the Court, not by Plaintiff. Defendant will comply with NRCP 16.1 and the
10 Court's scheduling order.

11
12 **REQUEST FOR PRODUCTION NO. 5:** Please produce any and all DOCUMENTS you
13 intend to use at arbitration or trial, including impeachment or rebuttal documents.

14 **RESPONSE TO REQUEST FOR PRODUCTION NO. 5:**

15 All such documents are already the subject of NRCP 16.1's automatic disclosure rules. This Request
16 is duplicative and useless. Defendant will comply with the NRCP's rules on disclosure of every
17 document intended to be used at trial without the need for this discovery request.

18
19 **REQUEST FOR PRODUCTION NO. 6:** Please produce good quality laser prints of any
20 and all photographs of any vehicles involved in the CRASH.

21 **RESPONSE TO REQUEST FOR PRODUCTION NO. 6:**

22 Please see documents previously disclosed and identified as bates number KEO00006 – KEO00082.

23
24 **REQUEST FOR PRODUCTION NO. 7:** Please produce any and all estimates for damage
25 to any vehicles in the CRASH.

26 **RESPONSE TO REQUEST FOR PRODUCTION NO. 7:**

27 Please see documents previously disclosed and identified as bates number KEO00006 – KEO00082.

REQUEST FOR PRODUCTION NO. 8:

Please produce any and all Department of Transportation and State inspections of the vehicle involved in the subject CRASH for one year prior to the CRASH.

RESPONSE TO REQUEST FOR PRODUCTION NO. 8:

Defendant has no idea what Plaintiff is talking about with this Request. This was not a bus accident. This was a passenger vehicle owned by Defendant colliding with a passenger vehicle driven by Plaintiff. The only documents that would qualify under this description would be smog checks, which are entirely irrelevant to this case. Defendant does keep maintenance records for its vehicles, however, and the records for this vehicle have been previously disclosed as documents bearing bates stamps KEO00272 – KEO00274.

REQUEST FOR PRODUCTION NO. 9:

Please produce any and all information concerning the vehicle driven by Andre Petway, involved in the subject CRASH, including the make and model of the vehicle, the weight of the vehicle, the load and towing capacity of the vehicle, any repair and maintenance logs for the vehicle, and any information regarding prior crashes in which the vehicle has been involved.

RESPONSE TO REQUEST FOR PRODUCTION NO. 9:

OBJECTION, this Request is too vague and ambiguous to identify what Plaintiff is seeking. If Plaintiff wants to know the make and model of the vehicle, an Interrogatory would be the proper method for such. Without waiving said Objection, Defendant responds as follows: please see the vehicle maintenance records and the Incident Report, disclosed previously with bates number KEO00001 – KEO0005 and KEO00272 – KEO00274.

REQUEST FOR PRODUCTION NO. 10:

Please produce any and all DOCUMENTS YOU have obtained about the Plaintiff from any source, including social media, any private investigators, and/or insurance index bureaus.

RESPONSE TO REQUEST FOR PRODUCTION NO. 10:

OBJECTION, this Request seeks information protected by the attorney-client and attorney work

1 product privilege. If such materials exist and if Defendant chooses to utilize those materials or
2 testimony in this case, Defendant will properly disclose such materials under NRCP 16.1. Until that
3 time, however, such documents would be privileged and non-discoverable.

4
5 **REQUEST FOR PRODUCTION NO. 11:** Please produce any video surveillance or
6 imaging of Plaintiff, including but not limited to video surveillance or imaging obtained through
7 private investigators, witnesses, and/or social media.

8 **RESPONSE TO REQUEST FOR PRODUCTION NO. 11:**

9 OBJECTION, this Request seeks information protected by the attorney-client and attorney work
10 product privilege. If such materials exist and if Defendant chooses to utilize those materials or
11 testimony in this case, Defendant will properly disclose such materials under NRCP 16.1. Until that
12 time, however, such documents would be privileged and non-discoverable.

13
14 **REQUEST FOR PRODUCTION NO. 12:** Please produce any and all training manuals, and
15 instructional manuals, videotapes, CDs or DVDs created by YOU or for YOU, related to driver safety
16 training or safety courses.

17 **RESPONSE TO REQUEST FOR PRODUCTION NO. 12:**

18 See documents previously disclosed bearing bates numbers KEO00096 – KEO00183, KEO00184 –
19 KEO00241, and KEO00242 – KEO00271.

20
21 **REQUEST FOR PRODUCTION NO. 13:** Please produce the employee handbook issued to
22 Andre Petway.

23 **RESPONSE TO REQUEST FOR PRODUCTION NO. 13:**

24 Please see document previously disclosed bearing bates number KEO00184 – KEO00241.

25
26 **REQUEST FOR PRODUCTION NO. 14:** Please produce all personnel and employee
27 records for Andre Petway with regard to his employment with YOU, including, but not limited to, pre-
28 hiring and post-hiring motor vehicle records checks, his Driver Qualification File, criminal records

1 checks, employment background checks, disciplinary action(s) taken against Andre Petway,
2 employment reviews of Andre Petway's job performance, and all employee orientation and training
3 materials provided to Andre Petway.

4 **RESPONSE TO REQUEST FOR PRODUCTION NO. 14:**

5 Please see documents previously disclosed as KEO00273 – KEO00365 and KEO00096 – KEO00183.
6

7 **REQUEST FOR PRODUCTION NO. 15:** Please produce all documentation relating to
8 Andre Petway's driving safety record.

9 **RESPONSE TO REQUEST FOR PRODUCTION NO. 15:**

10 All such documents in Defendant's care, custody, or control are contained in documents previously
11 disclosed and bearing bates numbers KEO00273 –KEO00365 and KEO00096 – KEO00183.
12

13 **REQUEST FOR PRODUCTION NO. 16:** Please produce any and all safety training logs
14 for Andre Petway.

15 **RESPONSE TO REQUEST FOR PRODUCTION NO. 16:**

16 All such documents in Defendant's care, custody, or control are contained in documents previously
17 disclosed and bearing bates numbers KEO00273 –KEO00365 and KEO00096 – KEO00183.
18

19 **REQUEST FOR PRODUCTION NO. 17:** Please produce all DOCUMENTS regarding
20 your policies, procedures, and guidelines for hiring drivers, including documents regarding policies
21 for investigating drivers' employment histories.

22 **RESPONSE TO REQUEST FOR PRODUCTION NO. 17:**

23 All such documents in Defendant's care, custody, or control are contained in documents previously
24 disclosed and bearing bates numbers KEO00273 –KEO00365 and KEO00096 – KEO00183.
25

26 **REQUEST FOR PRODUCTION NO. 18:** Please produce copies of your policies and
27 procedures relating to alcohol and drug testing of drivers.

28 **RESPONSE TO REQUEST FOR PRODUCTION NO. 18:**

Please see documents previously disclosed and bearing bates number KEO00242 – KEO00271.

REQUEST FOR PRODUCTION NO. 19: Please produce a copy of the results of any and all post-accident alcohol testing Andre Petway underwent in the 72 hours following the subject CRASH. If no post-accident alcohol test was conducted, please provide any and all DOCUMENTS evidencing why no such testing was performed.

RESPONSE TO REQUEST FOR PRODUCTION NO. 19:

See documents produced previously bearing bates numbers KEO00366 – KEO00369.

REQUEST FOR PRODUCTION NO. 20: Please produce a copy of the results of any and all post-accident drug and controlled substance testing Andre Petway underwent within the 72 hours following the subject CRASH. If no such test was conducted, please provide any and all DOCUMENTS evidencing why no such testing was performed.

RESPONSE TO REQUEST FOR PRODUCTION NO. 20:

See documents produced previously bearing bates numbers KEO00366 – KEO00369.

REQUEST FOR PRODUCTION NO. 21: Please produce any and all documentation in your care, custody, and/or control that mention, discuss, describe, summarize, reflect, constitute, identify, evidence, memorialize, or otherwise refer to any and all on-the-job motor vehicle crashes involving your employee Andre Petway.

RESPONSE TO REQUEST FOR PRODUCTION NO. 21:

All such documents in Defendant's care, custody, or control are contained in documents previously disclosed and bearing bates numbers KEO00001 – KEO00005.

REQUEST FOR PRODUCTION NO. 22: Please produce all applicable insurance policy information.

RESPONSE TO REQUEST FOR PRODUCTION NO. 22:

Defendant has already disclosed the declaration pages showing coverage limits that would be relevant

to Plaintiff's case. The remaining insurance policy is not to be disseminated, as it contains trade secrets for the insurer and copying is not permitted. If Plaintiff or her counsel would like to review the policy, a copy can be made available for viewing at the offices of Defendant's counsel.

REQUEST FOR PRODUCTION NO. 23: Please produce the entire claims file.

RESPONSE TO REQUEST FOR PRODUCTION NO. 23:

OBJECTION, this Request seeks information that is protected from disclosure by the attorney-client privilege, the attorney work product privilege, and NRCP 26(b)(3). These materials are protected and privileged under NRCP 26(b)(3) regardless of whether an attorney directed the investigation. *See Mega Mfg. v. Eighth Judicial Dist. Court, No. 62396, 2014 Nev. Unpub. LEXIS 844, at *3 (May 30, 2014)* ("Whether an attorney is involved or directs an investigation is not dispositive for deciding whether the fruit of that investigation is work product. *See Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 357-58, 891 P.2d 1180, 1188 (1995)") The claim file at issue was generated solely based on the expectation of litigation, and therefore no argument can be made that the claim file was generated in the normal course of the insurer's duties. Without waiving these objections, however, Defendant responds as follows: There are no documents in the claim file that are not subject to the privileges referenced in the Objection or were not previously disclosed. The only documents contained in the claim file that were not generated in anticipation of litigation are the Keolis Incident Report, previously disclosed. That report was generated for Keolis' own purposes regardless of litigation.

REQUEST FOR PRODUCTION NO. 24: Please produce all DOCUMENTS identified in YOUR Answers to Plaintiff's Interrogatories.

RESPONSE TO REQUEST FOR PRODUCTION NO. 24:

All such documents have been previously disclosed, as identified in the Answers to Interrogatories.

Dated: November 22, 2019

MUEHLBAUER LAW OFFICE, LTD.



By: _____

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*Attorneys for Defendant Keolis Transit
Services, LLC*

EXHIBIT “3”

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LAW OFFICE, LTD.

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Attorneys for Defendant
Keolis Transit Services, LLC

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

SHAY TOTH, an Individual,

Plaintiff,

CASE NO.: A-19-797214-C

DEPT. NO.: 2

v.

ANDRE RAMON PETWAY, an Individual;
KEOLIS TRANSIT SERVICES, a Delaware
Limited Liability Company; DOES I through X; and
ROE CORPORATIONS XI through XX, Inclusive;

**DEFENDANT KEOLIS TRANSIT
SERVICES, LLC'S AMENDED
RESPONSES TO FIRST SET OF
REQUESTS FOR PRODUCTION OF
DOCUMENTS FROM PLAINTIFF
SHAY TOTH**

Defendants.

**DEFENDANT KEOLIS TRANSIT SERVICES, LLC'S AMENDED RESPONSES TO FIRST
SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS FROM PLAINTIFF SHAY
TOTH**

PRELIMINARY STATEMENT

Defendant KEOLIS TRANSIT SERVICES, LLC's ("Defendant") answers to the following requests for production of documents are based on information currently known to Defendant and are provided without prejudice to Defendant's right to submit evidence of any subsequently discovered

1 facts, information, or documents, should such become known. These responses are made in a good
2 faith effort to supplement such information as presently known to Defendant after reasonable
3 investigation. Defendant reserves its right to further supplement or alter any answer set forth herein
4 and to use such additional information at trial.

5 Further, because some of these responses may have been ascertained by Defendant's attorneys,
6 investigators, and/or through discovery in this litigation, Defendant may not have personal knowledge
7 of the information from which these responses are derived.

8 Any changes from the original responses are noted in *italicized* typeface below.

9
10 **REQUEST FOR PRODUCTION NO. 1:** Please produce a copy of any and all audiotapes,
11 recordings, videotapes, or DVDs of any persons involved in the CRASH.

12 **RESPONSE TO REQUEST FOR PRODUCTION NO. 1:**

13 None exist to the knowledge of Defendant.

14
15 **REQUEST FOR PRODUCTION NO. 2:** Please produce any and all written, recorded, or
16 transcribed statements of any persons who witnessed the CRASH or with knowledge of the CRASH.

17 **RESPONSE TO REQUEST FOR PRODUCTION NO. 2:**

18 The only such statements known to Defendant are those contained in the Keolis Incident Report,
19 previously disclosed.

20
21 **REQUEST FOR PRODUCTION NO. 3:** Please produce any and all post CRASH
22 investigation reports and DOCUMENTS of the CRASH.

23 **RESPONSE TO REQUEST FOR PRODUCTION NO. 3:**

24 See the Keolis Incident Report, previously disclosed as document bearing bates stamp KEO00001 –
25 KEO00005.

26
27 **REQUEST FOR PRODUCTION NO. 4:** Please produce all DOCUMENTS and things
28 relating to any expert retained to testify, including, but not limited to: the expert's resume/curriculum

1 vitae; the expert's fee chart; all 1099s from your attorney's firm with respect to the expert; all 1099s
2 from your insurance company with respect to the expert; a list of all cases worked on by the expert on
3 behalf of your attorney's firm; a list of all cases in which the expert has rendered testimony; and the
4 expert's entire working file, including, but not limited to, correspondence, notes, calculations, tests,
5 analyses, scientific studies, journals, reports, articles, charts, and audio, video, or computer storage
6 disks, including all cassettes or tapes.

7 **RESPONSE TO REQUEST FOR PRODUCTION NO. 4:**

8 OBJECTION, this Request seeks to impermissibly replace and override the Court's Scheduling Order
9 and NRCP 16.1's rules regarding expert disclosures. This is an improper use of a Request for
10 Production. Without waiving said Objection, Defendant responds as follows: All such materials will
11 disclosed as directed by the Court, not by Plaintiff. Defendant will comply with NRCP 16.1 and the
12 Court's scheduling order.

13
14 **REQUEST FOR PRODUCTION NO. 5:** Please produce any and all DOCUMENTS you
15 intend to use at arbitration or trial, including impeachment or rebuttal documents.

16 **RESPONSE TO REQUEST FOR PRODUCTION NO. 5:**

17 All such documents are already the subject of NRCP 16.1's automatic disclosure rules. This Request
18 is duplicative and useless. Defendant will comply with the NRCP's rules on disclosure of every
19 document intended to be used at trial without the need for this discovery request.

20
21 **REQUEST FOR PRODUCTION NO. 6:** Please produce good quality laser prints of any
22 and all photographs of any vehicles involved in the CRASH.

23 **RESPONSE TO REQUEST FOR PRODUCTION NO. 6:**

24 *After a diligent search, Defendants were unable to locate any good quality copies of said documents.*
25 *The black and white copies were received from Plaintiff's own insurance company in the form*
26 *provided and no better versions are in the care, custody, or control of Defendants. Defendants would*
27 *recommend that Plaintiff request the better quality copies from her property damage insurer.*
28

REQUEST FOR PRODUCTION NO. 7: Please produce any and all estimates for damage to any vehicles in the CRASH.

RESPONSE TO REQUEST FOR PRODUCTION NO. 7:

Please see documents previously disclosed and identified as bates number KEO00006 – KEO00082.

REQUEST FOR PRODUCTION NO. 8: Please produce any and all Department of Transportation and State inspections of the vehicle involved in the subject CRASH for one year prior to the CRASH.

RESPONSE TO REQUEST FOR PRODUCTION NO. 8:

Defendant has no idea what Plaintiff is talking about with this Request. This was not a bus accident. This was a passenger vehicle owned by Defendant colliding with a passenger vehicle driven by Plaintiff. The only documents that would qualify under this description would be smog checks, which are entirely irrelevant to this case. Defendant does keep maintenance records for its vehicles, however, and the records for this vehicle have been previously disclosed as documents bearing bates stamps KEO00272 – KEO00274.

REQUEST FOR PRODUCTION NO. 9: Please produce any and all information concerning the vehicle driven by Andre Petway, involved in the subject CRASH, including the make and model of the vehicle, the weight of the vehicle, the load and towing capacity of the vehicle, any repair and maintenance logs for the vehicle, and any information regarding prior crashes in which the vehicle has been involved.

RESPONSE TO REQUEST FOR PRODUCTION NO. 9:

OBJECTION, this Request is too vague and ambiguous to identify what Plaintiff is seeking. If Plaintiff wants to know the make and model of the vehicle, an Interrogatory would be the proper method for such. Without waiving said Objection, Defendant responds as follows: please see the vehicle maintenance records and the Incident Report, disclosed previously with bates number KEO00001 – KEO0005 and KEO00272 – KEO00274.

REQUEST FOR PRODUCTION NO. 10: Please produce any and all DOCUMENTS YOU have obtained about the Plaintiff from any source, including social media, any private investigators, and/or insurance index bureaus.

RESPONSE TO REQUEST FOR PRODUCTION NO. 10:

*OBJECTION, this Request seeks information that is protected from disclosure by the attorney-client privilege, the attorney work product privilege, and NRCP 26(b)(3). These materials are protected and privileged under NRCP 26(b)(3) regardless of whether an attorney directed the investigation. See Mega Mfg. v. Eighth Judicial Dist. Court, No. 62396, 2014 Nev. Unpub. LEXIS 844, at *3 (May 30, 2014) (“Whether an attorney is involved or directs an investigation is not dispositive for deciding whether the fruit of that investigation is work product. See Wardleigh v. Second Judicial Dist. Court, 111 Nev. 345, 357-58, 891 P.2d 1180, 1188 (1995)”) The materials at issue were generated solely based on the expectation of litigation, and not in the ordinary course of the insurer’s duties. Without waiving these objections, however, Defendant responds as follows: There are no responsive documents that are not subject to the referenced privileges. Please see the attached Privilege Log for additional details on the privileges being asserted. If any such documents exist and if Defendants choose to use said documents in their defense of claims in this case, Defendants will appropriately disclose said documents and waive the privilege in accordance with the Nevada Rules of Civil Procedure.*

REQUEST FOR PRODUCTION NO. 11: Please produce any video surveillance or imaging of Plaintiff, including but not limited to video surveillance or imaging obtained through private investigators, witnesses, and/or social media.

RESPONSE TO REQUEST FOR PRODUCTION NO. 11:

*OBJECTION, this Request seeks information that is protected from disclosure by the attorney-client privilege, the attorney work product privilege, and NRCP 26(b)(3). These materials are protected and privileged under NRCP 26(b)(3) regardless of whether an attorney directed the investigation. See Mega Mfg. v. Eighth Judicial Dist. Court, No. 62396, 2014 Nev. Unpub. LEXIS 844, at *3 (May 30, 2014) (“Whether an attorney is involved or directs an investigation is not dispositive for deciding*

whether the fruit of that investigation is work product. See *Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 357-58, 891 P.2d 1180, 1188 (1995)”) The materials at issue were generated solely based on the expectation of litigation, and not in the ordinary course of the insurer’s duties. Without waiving these objections, however, Defendant responds as follows: There are no responsive documents that are not subject to the referenced privileges. Please see the attached Privilege Log for additional details on the privileges being asserted. If any such documents exist and if Defendants choose to use said documents in their defense of claims in this case, Defendants will appropriately disclose said documents and waive the privilege in accordance with the Nevada Rules of Civil Procedure.

REQUEST FOR PRODUCTION NO. 12: Please produce any and all training manuals, and instructional manuals, videotapes, CDs or DVDs created by YOU or for YOU, related to driver safety training or safety courses.

RESPONSE TO REQUEST FOR PRODUCTION NO. 12:

See documents previously disclosed bearing bates numbers KEO00096 – KEO00183, KEO00184 – KEO00241, and KEO00242 – KEO00271.

REQUEST FOR PRODUCTION NO. 13: Please produce the employee handbook issued to Andre Petway.

RESPONSE TO REQUEST FOR PRODUCTION NO. 13:

Please see document previously disclosed bearing bates number KEO00184 – KEO00241.

REQUEST FOR PRODUCTION NO. 14: Please produce all personnel and employee records for Andre Petway with regard to his employment with YOU, including, but not limited to, pre-hiring and post-hiring motor vehicle records checks, his Driver Qualification File, criminal records checks, employment background checks, disciplinary action(s) taken against Andre Petway, employment reviews of Andre Petway’s job performance, and all employee orientation and training materials provided to Andre Petway.

RESPONSE TO REQUEST FOR PRODUCTION NO. 14:

Please see documents previously disclosed as KEO00273 – KEO00365 and KEO00096 – KEO00183.

REQUEST FOR PRODUCTION NO. 15:

Please produce all documentation relating to

Andre Petway's driving safety record.

RESPONSE TO REQUEST FOR PRODUCTION NO. 15:

All such documents in Defendant's care, custody, or control are contained in documents previously disclosed and bearing bates numbers KEO00273 – KEO00365 and KEO00096 – KEO00183.

REQUEST FOR PRODUCTION NO. 16:

Please produce any and all safety training logs

for Andre Petway.

RESPONSE TO REQUEST FOR PRODUCTION NO. 16:

All such documents in Defendant's care, custody, or control are contained in documents previously disclosed and bearing bates numbers KEO00273 – KEO00365 and KEO00096 – KEO00183.

REQUEST FOR PRODUCTION NO. 17:

Please produce all DOCUMENTS regarding

your policies, procedures, and guidelines for hiring drivers, including documents regarding policies for investigating drivers' employment histories.

RESPONSE TO REQUEST FOR PRODUCTION NO. 17:

All such documents in Defendant's care, custody, or control are contained in documents previously disclosed and bearing bates numbers KEO00273 – KEO00365 and KEO00096 – KEO00183.

REQUEST FOR PRODUCTION NO. 18:

Please produce copies of your policies and

procedures relating to alcohol and drug testing of drivers.

RESPONSE TO REQUEST FOR PRODUCTION NO. 18:

Please see documents previously disclosed and bearing bates number KEO00242 – KEO00271.

REQUEST FOR PRODUCTION NO. 19:

Please produce a copy of the results of any and

1 all post-accident alcohol testing Andre Petway underwent in the 72 hours following the subject
2 CRASH. If no post-accident alcohol test was conducted, please provide any and all DOCUMENTS
3 evidencing why no such testing was performed.

4 **RESPONSE TO REQUEST FOR PRODUCTION NO. 19:**

5 See documents produced previously bearing bates numbers KEO00366 – KEO00369.
6

7 **REQUEST FOR PRODUCTION NO. 20:** Please produce a copy of the results of any and
8 all post-accident drug and controlled substance testing Andre Petway underwent within the 72 hours
9 following the subject CRASH. If no such test was conducted, please provide any and all
10 DOCUMENTS evidencing why no such testing was performed.

11 **RESPONSE TO REQUEST FOR PRODUCTION NO. 20:**

12 See documents produced previously bearing bates numbers KEO00366 – KEO00369.
13

14 **REQUEST FOR PRODUCTION NO. 21:** Please produce any and all documentation in
15 your care, custody, and/or control that mention, discuss, describe, summarize, reflect, constitute,
16 identify, evidence, memorialize, or otherwise refer to any and all on-the-job motor vehicle crashes
17 involving your employee Andre Petway.

18 **RESPONSE TO REQUEST FOR PRODUCTION NO. 21:**

19 All such documents in Defendant's care, custody, or control are contained in documents previously
20 disclosed and bearing bates numbers KEO00001 – KEO00005.
21

22 **REQUEST FOR PRODUCTION NO. 22:** Please produce all applicable insurance policy
23 information.

24 **RESPONSE TO REQUEST FOR PRODUCTION NO. 22:**

25 Defendant has already disclosed the declaration pages showing coverage limits that would be relevant
26 to Plaintiff's case. The remaining insurance policy is not to be disseminated, as it contains trade secrets
27 for the insurer and copying is not permitted. If Plaintiff or her counsel would like to review the policy,
28 a copy can be made available for viewing at the offices of Defendant's counsel.

REQUEST FOR PRODUCTION NO. 23: Please produce the entire claims file.

RESPONSE TO REQUEST FOR PRODUCTION NO. 23:

OBJECTION, this Request seeks information that is protected from disclosure by the attorney-client privilege, the attorney work product privilege, and NRCP 26(b)(3). These materials are protected and privileged under NRCP 26(b)(3) regardless of whether an attorney directed the investigation. *See Mega Mfg. v. Eighth Judicial Dist. Court, No. 62396, 2014 Nev. Unpub. LEXIS 844, at *3 (May 30, 2014)* (“Whether an attorney is involved or directs an investigation is not dispositive for deciding whether the fruit of that investigation is work product. *See Wardleigh v. Second Judicial Dist. Court, 111 Nev. 345, 357-58, 891 P.2d 1180, 1188 (1995)*”) The claim file at issue was generated solely based on the expectation of litigation, and therefore no argument can be made that the claim file was generated in the normal course of the insurer’s duties. Without waiving these objections, however, Defendant responds as follows: There are no documents in the claim file that are not subject to the privileges referenced in the Objection or were not previously disclosed. The only documents contained in the claim file that were not generated in anticipation of litigation are the Keolis Incident Report, previously disclosed. That report was generated for Keolis’ own purposes regardless of litigation.

REQUEST FOR PRODUCTION NO. 24: Please produce all DOCUMENTS identified in YOUR Answers to Plaintiff’s Interrogatories.

RESPONSE TO REQUEST FOR PRODUCTION NO. 24:

All such documents have been previously disclosed, as identified in the Answers to Interrogatories.

Dated: January 10, 2020

MUEHLBAUER LAW OFFICE, LTD.



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Attorneys for Defendant Keolis Transit
Services, LLC

EXHIBIT “4”

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Attorneys for Defendant Century Theatres, Inc.

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

SHAY TOTH, an Individual,

Plaintiff,

v.

ANDRE RAMON PETWAY, an Individual;
KEOLIS TRANSIT SERVICES, a Delaware
Limited Liability Company; DOES I through X; and
ROE CORPORATIONS XI through XX, Inclusive;

Defendants.

CASE NO.: A-19-797214-C

DEPT. NO.: 2

**DEFENDANT KEOLIS TRANSIT
SERVICES, LLC'S PRIVILEGE LOG**

DEFENDANT KEOLIS TRANSIT SERVICES, LLC'S PRIVILEGE LOG

COMES NOW, Defendant KEOLIS TRANSIT SERVICES, LLC (hereinafter referred to as "Keolis"), by and through its attorneys of record, the law firm of Muehlbauer Law Office, Ltd., and hereby discloses the following log of privileged documents pursuant to NRCP 26(b)(5):

Date	Document(s)	Bates	Privilege Asserted
[PRIVILEGED] ¹	Surveillance Video 1	KEO01311	Litigation Privilege

¹ While a date is typically included in a privilege log, Defendants' position is that disclosing the precise date(s) upon

			NRCP 26(b)(3)
[PRIVILEGED]	Surveillance Video 2	KEO01312	Litigation Privilege NRCP 26(b)(3)
[PRIVILEGED]	Surveillance Video 3	KEO01313	Litigation Privilege NRCP 26(b)(3) Attorney-client privilege Attorney work product
[PRIVILEGED]	Surveillance Report 1	KEO01314 – KEO01326	Litigation Privilege NRCP 26(b)(3)
[PRIVILEGED]	Surveillance Report 2	KEO01327 – KEO01339	Litigation Privilege NRCP 26(b)(3) Attorney-client privilege Attorney work product
7/17/2017	ISO Report	KEO01340 – KEO01343	Litigation Privilege NRCP 26(b)(3)

Dated this 10th day of January, 2020.

MUEHLBAUER LAW OFFICE, LTD.



By: _____

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_____ which surveillance was conducted would defeat the purpose of asserting the privilege.

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Attorneys for Defendant Century Theatres, Inc.

EXHIBIT “5”

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*Attorneys for Defendants Keolis Transit Services, LLC
and Andre Ramon Petway*

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

SHAY TOTH, an Individual,

Plaintiff,

v.

ANDRE RAMON PETWAY, an Individual;
KEOLIS TRANSIT SERVICES, a Delaware
Limited Liability Company; DOES I through X; and
ROE CORPORATIONS XI through XX, Inclusive;

Defendants.

CASE NO.: A-19-797214-C

DEPT. NO.: 2

**DEFENDANT KEOLIS TRANSIT
SERVICES, LLC'S FIRST AMENDED
PRIVILEGE LOG**

DEFENDANT KEOLIS TRANSIT SERVICES, LLC'S PRIVILEGE LOG

COMES NOW, Defendant KEOLIS TRANSIT SERVICES, LLC (hereinafter referred to as "Keolis"), by and through its attorneys of record, the law firm of Muehlbauer Law Office, Ltd., and hereby discloses the following log of privileged documents pursuant to NRCP 26(b)(5) (changes noted in **bold-faced** type):

Date	Document(s)	Bates	Privilege Asserted
August 2018	Surveillance Video 1	KEO01311	Litigation Privilege

			NRCP 26(b)(3)
August 2018	Surveillance Video 2	KEO01312	Litigation Privilege NRCP 26(b)(3)
September 2019	Surveillance Video 3	KEO01313	Litigation Privilege NRCP 26(b)(3) Attorney-client privilege Attorney work product
August 2018	Surveillance Report 1	KEO01314 – KEO01326	Litigation Privilege NRCP 26(b)(3)
September 2019	Surveillance Report 2	KEO01327 – KEO01339	Litigation Privilege NRCP 26(b)(3) Attorney-client privilege Attorney work product
7/17/2017	ISO Report	KEO01340 – KEO01343	Litigation Privilege NRCP 26(b)(3)
7/3/2017 – 7/25/2019	Claims File Received from Broadspire	KEO01689 – KEO02338	Litigation Privilege NRCP 26(b)(3) Attorney-client privilege Attorney work product

Dated this 3rd day of April, 2020.

MUEHLBAUER LAW OFFICE, LTD.

By: _____

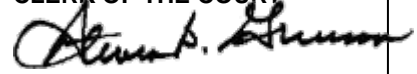
ANDREW R. MUEHLBAUER, ESQ.
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Attorneys for Defendants Keolis Transit Services,
LLC and Andre Ramon Petway

TAB 10



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*Attorneys for Defendants Keolis Transit Services, LLC
and Andre Petway*

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

SHAY TOTH, an Individual,

Plaintiff,

v.

ANDRE RAMON PETWAY, an Individual;
KEOLIS TRANSIT SERVICES, a Delaware
Limited Liability Company; DOES I through X; and
ROE CORPORATIONS XI through XX, Inclusive;

Defendants.

CASE NO.: A-19-797214-C

DEPT. NO.: 2

**DEFENDANT KEOLIS TRANSIT
SERVICES, LLC'S OPPOSITION TO
PLAINTIFF'S OBJECTION TO
DISCOVERY COMMISSIONER'S
REPORT AND RECOMMENDATIONS**

DEFENDANT KEOLIS TRANSIT SERVICES, LLC'S OPPOSITION TO
PLAINTIFF'S MOTION TO COMPEL

COMES NOW Defendant KEOLIS TRANSIT SERVICES, LLC, by and through its counsel
of record, ANDREW R. MUEHLBAUER, ESQ. of the law firm MUEHLBAUER LAW OFFICE,
and hereby submits its Opposition to Plaintiff's Motion to Compel.

This Opposition is made and based upon the pleadings and papers on file herein, the attached

Memorandum of Points and Authorities, and any oral argument that may be permitted at the time of hearing.

Dated: June 16, 2020

MUEHLBAUER LAW OFFICE, LTD.



By: _____
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*Attorneys for Defendants Keolis Transit
Services, LLC and Andre Petway*

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is an Objection to the Discovery Commissioner's decision regarding protection of confidential materials prepared in anticipation of litigation by Defendant KEOLIS TRANSIT SERVICES, LLC. ("Defendant" or "Keolis"). The Discovery Commissioner correctly applied the law set forth in NRCP 26(b)(3) and *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court of Nev.*, 399 P.3d 334 (2017). The Discovery Commissioner ruled that the ISO Report was prepared in the ordinary course and was not privileged, but that the remaining documents were protected under the above-cited authority. The Discovery Commissioner further ruled that if Defendant chose to use the video surveillance, it must be disclosed within 30 days of Plaintiff's deposition.

The Discovery Commissioner correctly applied the law, but Plaintiff here continues her misguided reliance on the 2019 amendments to NRCP 16.1 to somehow argue that the litigation privilege does not apply. Further, she never even attempted to demonstrate that she has a "substantial

1 need” as required under the law. The Discovery Commissioner’s decision should not be reversed by
2 this Court because the documents protected were properly the subject of privilege under the plain
3 language of NRCP 26(b)(3) and the *Wynn Resorts* case.

4 **II. FACTUAL BACKGROUND**

5 To give the Court some context here, this case arises out of a car accident on July 1, 2017
6 between a vehicle driven by Plaintiff SHAY TOTH and a vehicle driven by Defendant ANDRE
7 PETWAY that was owned by his employer at the time, KEOLIS TRANSIT SERVICES, LLC
8 (“Defendant” or “Keolis”). Mr. Petway was a route supervisor for Keolis, which meant that he drove
9 a company vehicle around the Las Vegas metropolitan area to investigate complaints, accidents, or
10 other issues encountered by drivers for Keolis. Mr. Petway was in the course and scope of his
11 employment at the time of the accident.

12 At the time of the accident, Mr. Petway was driving a 2013 Dodge Caravan and was waiting
13 behind Plaintiff to turn left. After the light turned green, Plaintiff and Mr. Petway both began to
14 accelerate through the intersection. Plaintiff did not proceed through the intersection, however; she
15 stopped her vehicle during the turn and Mr. Petway’s vehicle impacted her vehicle from behind.
16 Plaintiff estimates she was going less than 5 mph when she was hit by Mr. Petway and Mr. Petway
17 believes he was going between 3-5 mph when the impact occurred.

18 Despite the extremely low speed of impact, Plaintiff has claimed severe and debilitating
19 injuries arising out of this accident, including migraines, memory loss, blurred vision, confusion, neck
20 pain, ear ringing, left arm pain, tingling in her left arm, numbness, shooting pain, lower back pain, left
21 leg pain, numbness and tingling/shooting pain down her leg, among other complaints. Before even
22 filing suit, Plaintiff amassed an astonishing \$274,199.33 in medical billings that she claims are directly
23 attributed to this accident. (*See* Request for Exemption from Arbitration, filed on August 22, 2019.)

24 Within five days following the accident, Plaintiff had retained an attorney and her attorney had
25 contacted Keolis to inform it of the claims of injury. Thus, Keolis was on notice that a lawsuit was
26 coming almost immediately after the accident occurred. As information kept coming in to Keolis from
27 Plaintiff’s counsel, it became more and more clear that Plaintiff would be seeking substantial
28 compensation from Keolis for her alleged injuries.

1 In light of these claims of severe injury from an extremely low speed collision, and the massive
2 damages being claimed, Keolis undertook investigation of Plaintiff's history and physical condition.
3 This included running an Insurance Services Office ("ISO") report to see what other claims Plaintiff
4 had made previously, as well conducting a limited amount of surveillance to observe Plaintiff's
5 condition.

6 Plaintiff, apparently concerned about what Defendants have learned through the ISO search
7 and surveillance, demanded that Keolis turn over the ISO report, surveillance videos, surveillance
8 reports, and *the entire claim file* in this case. To support this claim, Plaintiff does not even attempt to
9 argue that she has substantial need or any compelling purpose to violate Defendant's privilege.
10 Plaintiff is simply curious to see what Defendant's investigation yielded, presumably so she can figure
11 out how to explain away whatever impeachment evidence the investigation yielded. As was
12 demonstrated before the Discovery Commissioner, and will be demonstrated herein, general curiosity
13 is insufficient to meet Nevada's standards for invoking an exception to privilege, and Plaintiff's
14 Motion must fail as a matter of law.

15 III. LEGAL STANDARDS

16 A. NRCP 26(b)(3) Privilege

17 Although hardly mentioned in Plaintiff's entire Motion or the Objection, the primary privilege
18 asserted in this case is the litigation privilege, or the trial preparation materials privilege, depending
19 on your choice of terminology. While at common law, this privilege generally only applied to work
20 created by an attorney, the Nevada Rules (and the Federal Rules upon which they are modeled) have
21 revised this privilege to apply far more broadly. This Rule provides,

22 (3) *Trial Preparation: Materials.*

23 (A) ***Documents and Tangible Things.*** Ordinarily, a party may not discover
24 documents and tangible things that are prepared in anticipation of litigation or for trial
25 by or for another party or its representative (including the other party's attorney,
consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26 (b)(4), those
materials may be discovered if:

26 (i) they are otherwise discoverable under Rule 26 (b)(1); and

27 (ii) the party shows that it has **substantial need** for the materials to prepare its
case and cannot, without **undue hardship**, obtain their substantial equivalent by other
28 means.

(B) ***Protection Against Disclosure.*** If the court orders discovery of those

materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

N.R.C.P. 26 (emphasis added). What we can glean here is an essential framework as follows:

- The presumption is that any materials prepared in anticipation of litigation or for trial are not discoverable, so long as they are prepared by a party, for a party, or for a party's representative.
- This presumption has exceptions where the party seeking disclosure of said materials can show that the materials are otherwise discoverable under NRCP 26(b)(1), the seeking party shows a substantial need for the materials, AND that said party cannot obtain the materials by other means without undue hardship.
- However, even *if* the seeking party proves up the exception to the court's satisfaction, the court *still* must protect from disclosure the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative.

As the Court knows, many of these protections used to only apply to attorneys themselves. Now, however, it encompasses even documents prepared by a part, its attorney, or "other representatives" of a party to litigation.

The NRCP tracks identically to the Federal Rules of Civil Procedure ("FRCP") on this provision contained in FRCP 26(b)(3). The advisory committee notes for this section explain the change from the historical protection of attorney work product to the current, broader rule: "Subdivision (b)(3) reflects the trend of the cases by requiring a special showing, not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf."

As with all rules, however, there is some level of ambiguity remaining as to the term "prepared in anticipation of litigation." After all, an insurance company conducts routine processing of claims as part of its general duties in adjusting, regardless of whether litigation is expected to follow or not. Would a routine claim investigation, without a threat of litigation, be covered by this expansive privilege?

Thankfully, the Nevada Supreme Court recently examined this issue in *Wynn Resorts, Ltd. v.*

Eighth Judicial Dist. Court of Nev., 399 P.3d 334 (2017). In *Wynn Resorts*, the Nevada Supreme Court evaluated whether an investigative report prepared by outside counsel was protected by the work product privilege. The report in that case was publicly disclosed, thereby waiving any attorney-client privilege for the underlying documents supporting the report. The disclosing party argued, however, that the work product doctrine contained in NRCP 26(b)(3) still protected the underlying documents.

In evaluating these claims, the *Wynn Resorts* court adopted the “because of” test to determine the applicability of the privilege. *See Wynn Resorts, Ltd.*, 399 P.3d at 347. This *Wynn Resorts* court explained the “because of” test as follows:

Under the “because of” test, documents are prepared in anticipation of litigation when “in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of the* prospect of litigation.”

Id (internal citations omitted). The court went on to expand the application even further,

The anticipation of litigation must be the *sine qua non* for the creation of the document—“but for the prospect of that litigation,” the document would not exist. However, “a document. . . does not lose protection under this formulation merely because it is created in order to assist with a business decision.” “Conversely . . . [this rule] withholds protection from documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation.” *Id*.

In determining whether the “because of test is met, we join other jurisdictions in adopting a “totality of the circumstances” standard. In *Torf*, the Ninth Circuit Court of Appeals stated that [t]he “because of standard does not consider whether litigation was a primary or secondary motive behind the creation of a document. Rather, it considers the totality of the circumstances and affords protection when it can fairly be said that the **“document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of that litigation[.]”**

Wynn Resorts, Ltd., 399 P.3d at 348 (internal citations omitted, emphases added). The *Wynn Resorts* case was evaluating work product generated by an attorney, and its subsequent discussion in the case references that fact, but the rule itself does not require the work product to have been prepared by an attorney. As the *Wynn Resorts* court held, NRCP 26(b)(3) protects documents so long as they have “two characteristics: (1) they must be prepared in anticipation of litigation or for trial, and (2) they must be prepared by or for another party or by or for that party’s representative.” *Wynn Resorts*, 399

P.3d at 347.

Thus, in summary, so long as the documents meet the “because of” test when considering “the totality of the circumstances” and they were prepared by or for a party or its representative, NRCP 26(b)(3)’s privilege applies. Unless the party seeking disclosure can demonstrate the “substantial need” and “no other means without undue burden” tests identified above, the documents cannot be obtained.

B. Attorney-client Privilege

The attorney-client privilege in Nevada is set forth in NRS 40.095, which states:

NRS 49.095 General rule of privilege. A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications:

1. Between the client or the client’s representative and the client’s lawyer or the representative of the client’s lawyer.
2. Between the client’s lawyer and the lawyer’s representative.
3. Made for the purpose of facilitating the rendition of professional legal services to the client, by the client or the client’s lawyer to a lawyer representing another in a matter of common interest.

NRS 49.055 defines the term confidential, stating, “[a] communication is ‘confidential’ if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of legal services to the client or those reasonably necessary for the transmission of the communication.”

C. NRCP 16.1(a)

For reasons unknown, Plaintiff’s Motion and Objection focuses on NRCP 16.1(a)’s automatic disclosure rules. The records at issue here were actually requested as part of an NRCP 34 Request for Production of Documents. Still, since Plaintiff relies on NRCP 16.1(a)’s automatic disclosure provisions, Defendant will address that legal authority.

As correctly cited in the Motion, NRCP 16.(a)(1)(A)(ii) states that a party must automatically disclose,

- (ii) a copy — or a description by category and location — of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control **and may use to support its claims or defenses**, including for impeachment or rebuttal, and, unless privileged or protected from disclosure, any record, report, or witness statement, in any form, concerning the incident that gives rise

1 to the lawsuit;
2 (emphasis added). This Rule contains two separate categories of documents: everything before the
3 “and” and everything after the “and.” Although Plaintiff’s Motion tries to blur these two provisions
4 together, they are intentionally separated by the drafters so we will address each section separately.

5 **1. All Documents That a Party May Use to Support its Claims or Defenses**

6 To the extent NRCP 16.1(a) has anything to say on the issue at hand at all, the first section of
7 the Rule would be the most applicable. Plaintiff goes on at length to focus on the fact that, as part of
8 this Rule, the drafters state that all impeachment or rebuttal evidence must be disclosed. (*See* Mot. at
9 11.) Plaintiff pays no mind whatsoever to the emphasized portion of the Rule above, however: “and
10 may use to support its claims or defenses...” This is axiomatic in litigation – if a party plans to use
11 any document to support its claims or defenses, even including impeachment evidence, it must disclose
12 said information to all parties. This is to avoid the classic “trial by ambush” by forcing opposing parties
13 to show their hand during discovery instead of allowing them to surprise their opponent. *See Land*
14 *Baron Invs., Inc. v. Bonnie Springs Family Ltd. P’ship*, 356 P.3d 511, 522 n.14 (Nev. 2015)

15 Impeachment evidence is only subject to this automatic disclosure rule if it may be used at trial
16 to support a claim or defense. The construction of this Rule as set forth by Plaintiff’s Motion would
17 be impossible to enforce. It would require opposing parties to disclose every possible document that
18 could possibly be negative for the Plaintiff, regardless of whether the party intends to use the document
19 or not. Investigation of claims like Plaintiff’s involve countless hours of investigation and research to
20 determine the credibility of Plaintiff’s claims. To torture the Rules to make every single document
21 unearthed that could arguably contain impeachment evidence would create an unlimited universe of
22 documents subject to automatic disclosures. This surely is not what the drafters intended.

23 Rather, the only rational construction of the NRCP 16.1(a)(1)(A)(ii) is to rely on the plain
24 language of the Rule: if a party intends to use the impeachment evidence in any way at trial, it must
25 be disclosed without awaiting a specific request under NRCP 34. This effectively narrows the universe
26 of disclosures to only the documents that could ever be used by the opposing party as opposed to
27 forcing automatic disclosure of every possible document that anyone could ever construe as being
28

1 impeachment evidence against Plaintiff.

2 This “plain language” construction of the Rule also is the only construction that makes sense
3 because the Rule does not explicitly provide for privilege claims related to these documents. The only
4 way this makes sense is to view the automatic disclosures as only applying to documents a party may
5 use to support its claims or defenses at trial. The assumption built into this structure is that a party who
6 uses a document to supports its claim or defense at trial has waived any privilege applicable to said
7 document. That is why the rule does not have a specific carve out for privileged documents like other
8 sections of NRCP 16.1(a) do; if you are planning to use the documents at trial, you must disclose the
9 document and waive any privileges associated with the documents.

10 This is another reason why the Discovery Commissioner’s decisions was perfectly in line with
11 the law; the Discovery Commissioner made it clear that Defendant could not wait until the last second
12 to disclose the video surveillance. If Defendant plans to used the surveillance, the Discovery
13 Commissioner ordered that it must be disclosed within 30 days of the deposition of Plaintiff. This is
14 directly in line with the applicable law, and gives Plaintiff an appropriate ability to respond during the
15 discovery period to any findings in the surveillance.

16
17 **2. Any Record, Report, or Incident Statement Prepared at or Near the Time of the**
18 **Incident**

19 In reviewing the second section of the cited Rule, it should become immediately clear that it
20 has nothing to do with the issue at hand. This section is directed at incident reports, sweep sheets,
21 repair records, etc. generated at or near the time of the incident as a part of ordinary business
22 operations. How do we know this? Plaintiff’s own Motion cites to the Advisory Committee Notes
23 saying exactly that:

24
25 The 78 [sic] initial disclosure requirement of a “record” or “report” under Rule
26 16.1(a)(1)(A)(ii) includes but is not limited to: incident reports, logs and summaries,
27 maintenance records, former repair and inspection records and receipts, sweep logs, and
28 any written summaries of such documents. Documents identified or produced under Rule
16.1(a)(1)(A)(ii) should include those that are prepared or exist at or near the time of the
subject incident. The reasonable time required for production of such documents will
depend on the facts and circumstances of each case. **A party who seeks to avoid**

ADKT 522 Redline of Proposed NRCP Amendments Against Existing NRCP, at 77-78 (emphasis added). What this should demonstrate is that this section of the rule is directed exclusively at contemporaneous or near-contemporaneous incident reports and business records regarding the incident. Although obvious by the text itself, this would also be required using the canon of construction *ejusdem generis*, as this Court knows well. While discussed in depth more below, Defendant has already disclosed every incident report, repair records, and other similar documents in its care, custody, or control.

Although more germane to the prior section’s analysis, it is worth noting that, once again, Plaintiff ignores the fact that the materials referenced are only to be disclosed if they are intended to be used by the party. The Committee’s own statements reinforce this fact, “Rule 16.1(a)(1)(A)(ii) incorporates language from the federal rule requiring that a party disclose materials **that it may use to support its claims or defense...**” *Id* (emphasis added).

What we are left with, then, is simply a statement that all incident reports or similar materials must be automatically disclosed unless they are subject to a privilege. Defendant has never denied such a contention, so it is unclear why this Rule would appear to be a primary basis of Plaintiff's Motion.

A. Every Document Sought But Not Disclosed Was Prepared in Anticipation of Litigation or Trial Under The Nevada Supreme Court Standard Set Forth in *Wynn Resorts*

10

1 whether NRCP 26(b)(3)'s privilege applies to the documents sought because the privilege log does
2 not identify dates for all but the ISO report, this is the proverbial red herring in its truest form. Why?
3 Because Plaintiff's counsel, the same person who drafted the Motion, knows that he sent a Letter of
4 Representation to Defendant on July 5, 2017 – four short days after the accident. That letter is attached
5 hereto as Exhibit "A." Plaintiff, via counsel, knew that every single document she is seeking in this
6 case was generated *after* Plaintiff's counsel sent a Letter of Representation regarding her claims. If a
7 letter from an attorney directing all communications to go through his office is not a sufficient basis
8 to be "anticipating" litigation, then it would be hard to imagine anything that would.

9 For the Court's reference, the first document in the claim file is the Incident Report dated July
10 3, 2017, which has already been disclosed as document bearing bates-stamp number KEO00001 –
11 KEO00005. That report was disclosed as the first document in this case by Defendant as part of its
12 automatic disclosure under NRCP 16.1(a). **No privilege claim was made as to this document**
13 **because it falls under NRCP 16.1(a)(1)(A)(ii)'s automatic disclosure provisions as discussed at**
14 **length above.** The next document in the claim file is the Letter of Representation, which was placed
15 in the claim file on the very same date as the Incident Report following the July 4th holiday in 2017.
16 Thus, there are no documents generated in the claim file that were not already produced that would
17 not have been prepared in the shadow of this Letter of Representation and directed at evaluating and
18 defending a potential lawsuit.

19 In applying *Wynn Resorts* and its construction of NRCP 26(b)(3), the Discovery Commissioner
20 simply had to determine whether the documents sought by Plaintiff were generated "because of"
21 litigation. Although the Discovery Commissioner already evaluated these arguments and found that
22 all but the ISO report met the test, Defendant will address each of the three categories of documents
23 sought by Plaintiff for this Court out of an abundance of caution.

24 **1. Surveillance Videos/Reports**

25 As identified in the Privilege Log, there are three separate surveillance videos and two separate
26 Surveillance Reports that are identified by Defendant. This Discovery Commissioner was charged
27 with evaluating the totality of the circumstances in order to assess whether these surveillance videos
28 and reports were generated because of the anticipation of litigation. *See Wynn Resorts*, 399 P.3d at

347. The surveillance materials satisfy this test without question, as the Discovery Commissioner determined. Surveillance is only conducted on plaintiffs or potential plaintiffs in litigation who are claiming damages substantial enough to justify the expense of verifying their claims through surveillance. The need for surveillance was solely based on the fact that an attorney had contacted Defendant's representatives on July 5, 2017 and then subsequently informed Defendant that massive damages would be claimed related to this case. As Plaintiff's counsel knows very well, he told Defendant's representatives in March of 2018 that Plaintiff had roughly \$45,000.00 in medical bills already incurred and would potentially be seeking surgery on her lower back at a cost of approximately \$250,000.00. Plaintiff's counsel also informed Defendant's representative at that time that Plaintiff was claiming a traumatic brain injury.

As this Court surely understands, those types of claims send up red flags for any Defendant and its insurer. Plaintiff's counsel knows very well why surveillance was initiated; his own office's statements triggered the need for Defendant's representatives to evaluate the veracity of such serious claims of injury. **Every single surveillance document requested by Plaintiff in her Motion was generated after Plaintiff's counsel made these serious injury allegations in March of 2018.** Defendant recognizes that this is new information to Plaintiff, since the dates were not listed on the Privilege Log. However, Plaintiff's counsel cannot possibly claim this is as a surprise, given that his own office was the one making these statements in the first place. To act like Plaintiff is somehow in the dark on this is when the statements came her own counsel's office is not credible.

Applying *Wynn Resorts*, this Court must determine "in light of the nature of the document and the factual situation in particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation." *Id* at 348 (internal quotation marks omitted). The nature of the document is that it is solely used to impeach claims of serious injury raised by Plaintiff, and the factual situation is that Plaintiff's counsel had alleged damages in excess of \$300,000.00 prior to the initiation of the surveillance. If this does not satisfy the "because of" test, then no document would. There is, therefore, no doubt that all surveillance materials were made in anticipation of litigation to support Defendant's defenses at trial.

2. ISO Report

1 While Defendant believes the ISO Report could have qualified for privilege, the Defendant
2 does not take issue with the Discovery Commissioner's conclusion that ISO Reports are prepared as a
3 matter of course and are not generally privileged. Defendant did not object to this ruling by the
4 Discovery Commissioner and stands ready to disclose the ISO report once this Objection is resolved.

5 **3. Claim File**

6 The claim file was not considered for disclosure by the Discovery Commissioner, so it will not
7 be addressed here. For arguments on the confidentiality of the claim file, though, please see the original
8 Opposition to Motion to Compel.

9 **B. No Showing of Substantial Need Has Even Been Attempted by Plaintiff**

10 To this point, the focus of this Opposition has been on proving that the documents sought are
11 privileged. Plaintiff's Motion and Objection barely even challenged that contention, and instead
12 inexplicably relied on NRCP 16.1(a)(1)(A)(ii)'s automatic disclosure provisions instead of arguing
13 why an exception to NRCP 26(b)(3) exists. Despite failing to argue "substantial need" for the
14 documents and showing that Plaintiff cannot obtain the documents, or a substantial similar equivalent
15 without "undue burden" to Plaintiff, Defendant will still address these requirements out of an
16 abundance of caution, since the Discovery Commissioner did appear to rely on the failing to prove
17 substantial need as a basis for her ruling.

18 **1. Surveillance Documents**

19 Even the most cursory review of these requested documents would demonstrate, perhaps, why
20 Plaintiff did not even bother arguing this necessary prong of substantial need to the Discovery
21 Commissioner: Plaintiff has no actual need of these documents for her case, she just wants to know
22 what Defendant has learned about her daily life. Presumably, Plaintiff wants to begin preparing an
23 explanation of why she is claiming massive, debilitating injuries but is still doing whatever the
24 surveillance shows. Without knowing precisely which date and what activity was captured, Plaintiff
25 is left guessing at which activity she needs to explain away. This paranoia is understandable, given the
26 circumstances of this case, but paranoia and curiosity do not even come close to demonstrating a
27 "substantial need."

28 The classic example used in law school of "substantial need" would be a witness statement

obtained by the defendant from a person who cannot be located by plaintiff. The theory there is that the defendant has learned something about the claim that the plaintiff has no ability to learn by herself. Under that circumstance, the law school textbooks suggest that as long as the thoughts and mental impressions of the person taking the statement are protected, the plaintiff can demonstrate that she has a substantial need and cannot possibly obtain the statement from any other source.

Here, Plaintiff never argued anything close to this because it would be an absurdity. There is no “substantial need” for surveillance videos of the Plaintiff’s every day activities. Plaintiff does not care about the contents of the video – she knows what public activity she has undertaken over the past several years – she only cares to learn what *Defendant* knows. The contents of the videos are only important to her to the extent they demonstrate what Defendant has learned in preparation of its defense, not what the videos actually show – Plaintiff knows generally what they show because she was living it.

To find this as a “substantial need” would make a mockery of the NRCP 26(b)(3) privilege and the Nevada Supreme Court’s holding *Wynn Resorts*. The Discovery Commissioner rightly relied on the language of NRCP 26(b)(3) and the *Wynn Resorts* case instead of Plaintiff’s flawed reading of NRCP 16.1.

2. ISO Report

As stated above, Defendant is not challenging the ruling as it pertains to the ISO Report at this time.

3. Claim File

The claim file was not considered by the Discovery Commissioner, so it will not be addressed here. For arguments on the claim file, please see Defendant’s underling Opposition to the Motion to Compel.

C. All Documents Prepared At or Near the Time of the Accident Have Already Been Disclosed in Accordance with NRCP 16.1(a)(1)(A)(ii).

As referenced above, the second part of NRCP 16.1(a)(1)(A)(ii) requires that all reports that were prepared at or near the time of the incident must be disclosed. Defendant has disclosed every

such document that arguably matches this description as follows:

- Keolis Incident Report – KEO0001 – KEO0005, the first document in the claim file received prior to the Letter of Representation, disclosed as part of Defendant’s Initial NRCP 16.1 Disclosures on or about September 29, 2019;
- Repair Estimates and Photos – KEO00006 – KEO00082, disclosed as part of Defendant’s Initial NRCP 16.1 Disclosures on or about September 29, 2019;
- Police Report – KEO00083 – KEO00086, disclosed as part of Defendant’s Initial NRCP 16.1 Disclosures on or about September 29, 2019;
- Maintenance Records – KEO00272 – KEO-00274, disclosed as part of Defendant’s First Supplemental NRCP 16.1 Disclosures on or about November 8, 2019;
- Andre Petway Human Resources File – KEO00273 – KEO00365, disclosed as part of Defendant’s First Supplemental NRCP 16.1 Disclosures on or about November 8, 2019;
- Drug Test Results for Andre Petway – KEO00366 – KEO00369, disclosed as part of Defendant’s Second Supplemental NRCP 16.1 Disclosures on or about November 14, 2019;
- Repair Estimate – KEO01602, disclosed as part of Defendant’s Sixth Supplemental NRCP 16.1 Disclosures on or about January 16, 2020; and
- Vehicle Data Recorder Information – KEO01603 – DEF01648, disclosed as part of Defendant’s Seventh Supplemental NRCP 16.1 Disclosures on or about February 7, 2020.

In short, Defendant has been continuously disclosing every non-privileged document related to this incident. In only a few short months of discovery, Defendant has already made nine separate disclosures of documents in this case. Defendant is not trying to hide anything discoverable and not privileged from Plaintiff. Defendant only seeks to protect the privileged and confidential materials prepared by or on behalf of itself for purposes of defending itself at trial.

This is not a case where a defendant has been trying to actively cover up anything or limit the plaintiff’s ability to prosecute her case. Defendant has been actively providing information throughout

1 this litigation with and without requests by Plaintiff in line with its ethical and legal obligations.

2 **D. Public Policy Demands that Trial Preparation Materials Must be Protected from**
3 **Disclosure**

4 The final consideration for this Court in evaluating the Discovery Commissioner's ruling
5 would be whether public policy favors the protection of the documents in question. This is an
6 important question and the answer is firmly in favor of Defendant's position. The work product rule
7 "shields from disclosure materials prepared 'in anticipation of litigation' by a party, or the party's
8 representative, absent a showing of substantial need." *United States v. Adlman*, 68 F.3d 1495, 1501
9 (2d Cir. 1995) (citing Fed. R. Civ. P. 26(b)(3)). **"The purpose of the doctrine is to establish a zone**
10 **of privacy for strategic litigation planning and to prevent one party from piggy-backing on the**
11 **adversary's preparation."** *Id. New York v. Solvent Chem. Co.*, 166 F.R.D. 284, 288 (W.D.N.Y.
12 1996). It would be impossible to find a more on-point analysis for this case than the above citation
13 evaluating the equivalent federal rule.

14 Plaintiffs already start out at a distinct advantage as compared to defendants in litigation in that
15 the plaintiff knows well before the defendant whether a lawsuit will be coming and what that lawsuit
16 will allege. A defendant is left at the mercy of a plaintiff for months, or even years, while a plaintiff
17 generates documents, talks to experts, and obtains professional opinions in support of his or her claim.
18 A defendant only learns of the claim when the plaintiff chooses to inform the defendant, and a
19 defendant will never have access to everything done by a plaintiff in preparation for that claim because
20 of the attorney-client and work product privilege. No one disputes that.

21 To compensate for this disadvantage, the drafts of the Rules and the courts have created a
22 complementary system of protection for defendants facing litigation contained in NRCP 26(b)(3).
23 Once the plaintiff alerts the defendant that litigation is on the horizon, a defendant begins to plan a
24 strategic defense to protect itself. This defense entails countless conversations, e-mails, notes, and
25 reports generated by a defendant in every effort to learn more about what is coming, who is bringing
26 the claim, and what the risk is. This is an essential function of both a defendant and the adjusters and
27 insurers who are charged with initial responsibilities for a claim.

28 The idea that every piece of investigation, discussion, and strategy discussed by and among

the parties during this time could be exposed to their adversaries is offensive to our adversarial legal system. A plaintiff cannot simply make a threat of a lawsuit and then sit back and let his or her adversary do all the work of investigation and evaluation and then walk up and demand a copy of the fruits of the defendant's labor.

The results of a holding allowing such "piggy-backing" off of an adversary's work would be incalculably damaging to defendants all across Nevada. No frank discussions could be had with anyone but an attorney, and no meaningful investigation could be conducted without fear that everything learned would be subject to disclosure to the enemy at a later date. It would create an astonishing chilling effect on all communications and would force defendants to operate in the dark unless and until they hire an attorney to "direct" every action they take. While this may result in a massive financial windfall for attorneys, it would violate the express directive of the drafters and the Nevada Supreme Court in expanding the work product privilege in NRCP 26(b)(3) to cover *all* documents generated in anticipation of litigation.

V. CONCLUSION

Defendant has already disclosed thousands of pages of documents here that are relevant and not privileged. Defendant has not overreached in its claims of privilege; it disclosed the first document of the claim file without any request being made. Defendant fully acknowledges that its counsel, based on the strict letter of the law, should have produced a privilege log immediately after claiming the privilege and that practice will be incorporated into counsel's future practices. But that error has been remedied twice over at this point, and it has not changed the substance of the argument: the documents sought by Plaintiff are privileged and Plaintiff has no substantial need for any of the documents sought.

Based on the clear wording of NRCP 26(b)(3), the controlling law contained in *Wynn Resorts*, and the public policy supporting the privilege, Defendant respectfully requests that Plaintiff's Objection be denied in its entirety. As properly ruled by the Discovery Commissioner, to the extent that any documents sought by Plaintiff are ever going to be used to support Defendant's defenses, Defendant will waive the privilege by disclosing them to Plaintiff and giving Plaintiff an adequate and fair opportunity to evaluate the documents before they are used against her. This is how the system

1 was designed, and this is how the system functions best to the fairness of all.

2 The Discovery Commissioner correctly applied the law. Plaintiff's reliance on NRCP 16.1 to
3 somehow argue that the litigation privilege does not apply is misguided. Automatic disclosures do not
4 void the privilege. Further, NRCP 16.1 only governs documents intended to be used by a party as the
5 plain language of the Rule states. Finally, they never even attempt to demonstrate that they have
6 "substantial need" as required under the law. The Discovery Commissioner's decision should not be
7 reversed by this Court because the documents protected were properly the subject of privilege under
8 the plain language of NRCP 26(b)(3) and the *Wynn Resorts* case.

9
10 Dated: June 16 2020

MUEHLBAUER LAW OFFICE, LTD.

11
12 

13
14 By: _____

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ATTORNEY AT LAW

July 5, 2017

SEND VIA FACSIMILE TO 859-550-2732

Broad Spire
Mr. Gaspar Vigil
PO BOX 14351
Lexington, KY 40512

Re: **My Client: Shay Frances Toth**
Your Insured : Andre Ramon Petway
Claim No. : 188532830
Date of Loss : July 1, 2017

Dear Mr. Vigil:

Please be advised that this office represents the above-named client in a claim for damages for personal injuries arising from a motor vehicle accident on July 1, 2017 involving your insured's vehicle being driven by Andre Ramon Petway.

Please provide to me written confirmation of your insurance coverage as well as the policy limits. Kindly direct all future communications to this office.

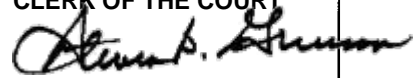
Thank you for your cooperation and prompt attention to this matter.

Very truly yours,

Cliff W. Marcek, Esq.

CWM/kd

TAB 11



RPLY

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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

SHAY TOTH, an Individual,

Plaintiff,

v.

ANDRE RAMON PETWAY, an Individual;
KEOLIS TRANSIT SERVICES, a Delaware
Limited-Liability Company; DOES I through
X; and ROE CORPORATIONS XI through
XX, inclusive,

Defendants.

**CASE NO. A-19-797214-C
DEPT. NO. 2**

**PLAINTIFF'S REPLY TO
DEFENDANTS OPPOSITION TO
PLAINTIFF'S OBJECTION TO THE
DISCOVERY COMMISSIONER'S
REPORT AND RECOMMENDATION**

Defendant states repeatedly in its opposition that "...[t]he Discovery Commissioner's decision was perfectly in line with the law..." (Opp., p. 9, ls.10-11). Where in the law does it state that a defendant (because these surveillance recordings are only used by defendants in personal

1 injury cases) can record the plaintiff, hold onto the recordings on the basis of privilege, take the
2 plaintiff's deposition and then disclose it within 30 days of the deposition. This is a rhetorical
3 question, but the answer is obvious, there is no such rule or law.
4

5 Defendant then tries to reduce Plaintiff's position to the absurd in particular, Defendant
6 states:

7 Impeachment evidence is only subject to automatic disclosure oath
8 it may be used at trial to support a claim or defense.¹ The
9 construction of this rule set forth in plaintiff's motion would be
10 impossible to enforce. It would require opposing parties to disclose
11 every possible document that could possibly be negative to plaintiff,
12 regardless of whether the party intends to use a document or not.
13 Investigation of claims like plaintiffs involve countless hours of
14 investigation and research to determine the credibility of plaintiffs
15 came to torture the rules to make every single document on earth
16 that could arguably contain impeachment evidence to create an
17 unlimited universe of documents subject to our automatic
18 disclosure. This surely is not what the drafters intended. (See
19 Opposition, p. 8, ls. 15-22).

20 The plaintiff is not suggesting such a broad construction to include "the unlimited universe" of
21 documents. Rather, the plaintiff is making the point that defendant makes in the first sentence of
22 the quotation and that it makes in very next paragraph of its opposition that states:

23 If a party intends to use the impeachment evidence in any way at
24 trial, it must be disclosed without awaiting specific request under
25 NRCP 34. This effectively narrows the universe of disclosures to
26 only those documents that could ever be used by the opposing party,
27 as opposed to forcing automatic disclosure of every possible
28 document that anyone could ever construe as being impeachment
evidence against plaintiff. (See defendant's opposition, p. 8. ls 24-
25).

29 Plaintiff agrees with that statement made by defendant. The defendant is withholding
30 surveillance video recordings used for one purpose and one purpose only, to catch the plaintiff in
31 an inconsistent statement that could be construed as a lie at her deposition and, therefore,

32 ¹ Plaintiff agrees with this correct statement of the law.

1 undermine her credibility. This is not what the rules require and is definitely not the intent of the
2 rules.

3
4 The plaintiff wants the court to remember that there are three videos and surveillance
5 reports at issue here. Two were in August of 2018 requested by the claim's adjuster, one year
6 before litigation, and the third was a recording in September 2019 requested by counsel after
7 litigation.

8 Defendant's arguments run counter to the clear purpose and intent of the rules and law
9 which are to promote transparency, have an efficient discovery process and to deter
10 gamesmanship. These are all stated purposes in case law and in the rules themselves. If defendants
11 position is accepted, it does nothing more than continue parties "hiding the ball" and withholding
12 information that is relevant to a claim or defense which increases the expense of litigation, makes
13 settlement less likely, and makes cases, generally, more contentious and difficult for parties. This
14 cannot be the intent of the rules or even common sense.

15 DATED this 26 day of June, 2020.

16
17 By: 

18 CLIFF W. MARCEK, ESQ.

19 Nevada Bar No. 5061

20 CLIFF W. MARCEK, P.C.

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Attorneys for Plaintiff

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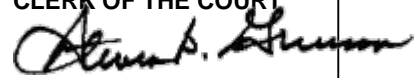
CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of CLIFF W. MARCEK, P.C. and that on the 26 day of June, 2020, I served the above and foregoing **PLAINTIFF'S REPLY TO DEFENDANTS OPPOSITION TO PLAINTIFF'S OBJECTION TO THE DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATION** by placing a true and accurate copy of the same into a sealed envelope and into the regular United States mail, first-class postage prepaid thereon, addressed as follows:

Andrew R. Muehlbauer, Esq.
Sean P. Connell, Esq.
MUEHLBAUER LAW OFFICE, LTD.
7915 West Sahara Ave., Suite 104
Las Vegas, Nevada 89117
Attorneys for Defendants


An Employee of CLIFF W. MARCEK, P.C.

TAB 12



1 **NEOJ**

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17 Email: boyd@mossberglv.com

18 *Attorneys for Plaintiff*

19 **DISTRICT COURT**

20 **CLARK COUNTY, NEVADA**

21 SHAY TOTH, an Individual,

22 Plaintiff,

23 v.

24 ANDRE RAMON PETWAY, an Individual;
25 KEOLIS TRANSIT SERVICES, a Delaware
26 Limited-Liability Company; DOES I through
27 X; and ROE CORPORATIONS XI through
28 XX, inclusive,

Defendants.

CASE NO. A-19-797214-C
DEPT. NO. 2

NOTICE OF ENTRY OF ORDER

TO: ALL INTERESTED PARTIES, and THEIR COUNSEL OF RECORD.

PLEASE TAKE NOTICE that the attached and foregoing ORDER regarding the
DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS was entered on
the 24th day of June, 2020 and filed in the above captioned case on the 13th day of July, 2020. A

1 copy of the Order is attached hereto.

2 DATED this 31 day of July, 2020

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MOSS BERG INJURY LAWYERS




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I hereby certify that I am an employee of MOSS BERG INJURY LAWYERS and that on the 31st day of July, 2020, I served the above and foregoing **NOTICE OF ENTRY OF ORDER** on the following parties in compliance with the Nevada Electronic Filing and Conversion Rules:

Marilyn A. Abel
An Employee of Moss Berg Injury Lawyers



ORDR

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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

SHAY TOTH, an Individual,

Plaintiff,

v.

ANDRE RAMON PETWAY, an Individual;
KEOLIS TRANSIT SERVICES, a Delaware
Limited-Liability Company; DOES I through
X; and ROE CORPORATIONS XI through
XX, inclusive,

Defendants.

CASE NO. A-19-797214-C
DEPT. NO. 2

Date of Hearing: April 23, 2020
Time of Hearing: 9:00 a.m.

ORDER

ORDER

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

 No timely objection having been filed,

☒ 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) FN-1


 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 _____, 2020, at _____ a.m.

DATED this 24 day of June, 2020.


DISTRICT COURT JUDGE

FN-1
Defendant is ordered to immediately respond
to Plaintiff's first set of Requests for Production
of Documents, including the subject surveillance videos
and reports.

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