impossible. They come back and they tell you because the fonts are different. The fonts are different. That's why they couldn't get this all up on the system. I don't understand what that means. I'm digressing. I apologize, Your Honor.

THE COURT: There are certain matters with .tif. I mean, it's our rules. If you're going to practice here, you've got to follow the rules.

MR. ZACHER: I know. You're right. I agree. I agree.

THE COURT: I've practiced all around the world and I followed the rules wherever I was before I took the bench.

MR. ZACHER: I know. Anyway, I'm a little troubled by the Court being troubled because I think I've tried to show deposition testimony. In fact, in our -- we've also -- defense counsel came up with undisputed facts. We also came up with undisputed facts. And I think the Court should pay attention to our undisputed facts that we also describe.

THE COURT: I looked at all -- The standard for punitive damages here in Nevada -- I mean, the question really becomes whether -- I haven't let you finish. Please, go ahead.

MR. ZACHER: The defendant points out two cases, *Vellucci* and the *Range* case. And they say because there's no standard required to test for Legionella, that those two cases basically kicked out summary judgment on a summary judgment motion. In fact, they kicked out the whole case. Well, those two cases are distinguishable because, Your Honor, those two cases factually did not have in place a water management plan. Aria did. Aria had a water management plan, which they did not properly implement; number one. And number two, they at no time changed when they saw it was not being implemented. Mr. Carballosa said

in his deposition, well that's not my job. I'm more involved in just implementing the plan; I don't care about what's going on with the public. And he said that right in his deposition. He's a vice-president of facilities. He should have that as a concern of his.

Defense counsel talks about public policy; this is the wrong message that we want to send to the public. I would respectfully argue or say that the message we want to send to the public is when you know you have Legionella throughout your hotel for ten months and you don't tell the public, that's the wrong message. That's the wrong message and they should have told the public. They should have either done that or they should have done all the things they did in remediation before the outbreak. They only send people in to do changes when there's a -- when there's the outbreak, when there's -- when they know they've got -- there's seven cases involved. There's seven confirmed cases associated with this hotel. That's when they make all these changes. And they already knew that they had Legionella in their hotel. They already knew they had it in at least thirty-seven different locations. So my point is that's -- you know, defense counsel said we were raising a red herring by showing these thirty-seven different locations. That's a red flag, not a red herring.

One thing I think that the Court should also be aware of is that the *Nittinger* case, as mentioned by defense counsel, is not on point because in *Nittinger* there was no plan. There was no plan. Here they had a plan; in Aria they had a plan. And they didn't implement their own plan properly and they never changed it.

I think that's it. That's all I have, Your Honor.

THE COURT: Thank you. Brief reply?

MR. SMITH: Yes. Thank you, Your Honor.

First, in addressing the quotations that counsel recited from Mr. McBeath's transcript, while he was doing that I was reviewing his opposition. None of those citations are in his opposition. Instead, he submitted the entire transcript and would like Your Honor to review it. But we're limited to the pleadings and what he's cited to as evidence. Also, counsel referred to an Exhibit 13. If Your Honor will recall in our reply brief we objected to that document because it's simply a spreadsheet that counsel prepared, and now he's arguing off of that as if that's evidence of some conduct. Counsel's work product, much less counsel's argument, is never evidence, certainly not on a motion for summary judgment standard when we're dealing with the rule of clear and convincing evidence.

The last point I want to make is counsel's argument was, well, because Aria implemented this chlorination system and something after the fact, that shows we weren't doing something properly before the fact, which is the hallmark of subsequent remedial measures. It's totally inadmissible, improper to argue subsequent remedial measures to establish liability during an underlying fact pattern.

I'll submit on that, Your Honor. Thank you.

THE COURT: Okay. You all have told me I need to go back and re-read Mr. McBeath's deposition again and Mr. Carballosa's deposition again, although Mr. Carballosa you all have cited to me before, when he was here and when he wasn't here and what he could and could and could not be responsible to. I've got concerns, and so I do want to go back and re-read it, which shouldn't be a surprise

to anyone from the nature of the questions I have. I mean, we've got a high standard. I appreciate excellent argument and I appreciate what goes on for trial argument, but I do have to look at the actual evidentiary support.

And even referencing Mr. McBeath's deposition on page 47, one of the citations that you mentioned for the ratification issue, I mean, you can read it a couple of different ways. "Did Mr. Carballosa have the authority to draw up the plan, yes or no?" Well, the response was: "To draw up the plan or to work on the plan?" And then when the question gets rephrased: "To work on it, draw it up, involved in it; any way you want to do it," he says, "Yeah." I mean, I don't have a follow-up question, I don't have a question from defense counsel to clarify that point. I mean, each of you like it for its sound bite vagueness, but it's kind of a key aspect in what you all are asking me to rule on.

So I want to read it -- re-read it all in context, in light of your elucidation of the different ways I should be reading it, as brought out in oral arguments that may not have been in the pleadings. And when I say that, it doesn't mean I'm considering things outside the pleadings. I'm just saying you've highlighted different things here than may have been fully highlighted in the pleadings, so I have to go back and re-reference those.

And I didn't have an explanation beforehand about the delay in filing the amended complaint, and the Court has to take that into consideration under a different standard. And technically I'm only taking it into consideration as a procedural bar. I'm not in any way advance ruling on the motion to strike, unless you all are telling me you wish today's argument to be your motion to strike argument. I didn't hear anybody telling me that, so I wasn't going to do it. I just was going to

take it whether or not there's a procedural bar that I should deal with or whether or not it's best left for the date of the hearing that it's currently scheduled for, and whether or not I should just be focusing on the merits of the summary judgment.

MR. ZACHER: Well, we've agreed to take out that one sentence that the defense objected to, so I don't understand the reason why there would be anything left to argue.

THE COURT: Okay. Do you agree? Is it a non-issue?

MR. SMITH: I don't agree it's a non-issue, Your Honor.

THE COURT: Okay. So then I hear it on the 27th.

MR. ZACHER: May I ask counsel what is left to argue? I mean, you granted us the order allowing us to file the Third Amended Complaint. We're now taking out that one sentence that's objectionable. The Court has not changed the original order. What's going to be left to argue?

MR. SMITH: If you'd like to have the argument now, we can. My argument is you failed to comply with the order, the rules, and it's improper to file it late unilaterally.

THE COURT: Okay. So it's teed up for a different day.

MR. ZACHER: So the only argument that's left is the temporality issue, that we failed to argue it on a timely basis? I just want to make sure I know.

THE COURT: I will hear your arguments on the 27th. If you all wish to --

MR. ZACHER: Well, it means coming out again to argue something that we should have argued right now, Your Honor. That's the problem.

THE COURT: I'm more than glad to hear the argument. I'm here if you all want to do it right now.

MR. SMITH: Your Honor --

THE COURT: I'm not asking anybody to waive your opportunity to file briefs which down the road you may wish to utilize for whatever you may to wish to utilize. I'm here. I'm glad to listen to it. If you all wish to be back on the 27th, defense counsel filed a motion. They have a right to have it heard on the 27th because this isn't -- there's no reason for me to preclude you all from having your full opportunity to hear a motion that was appropriately and regularly noticed. If it's a moot issue, I can vacate it. One side says it's moot, one side says it's not. The moving party on the motion says it's not. You have an opportunity to have your motion heard.

MR. SMITH: I certainly do not want to waste any judicial resources or anyone's time. Not my plan at all. If the representation by plaintiff's counsel is the allegation of corporate ratification or authorization is stipulated to be stricken from the pending complaint before Your Honor, I'll take that stipulation. And if the second issue is do we argue the issue of the motion to strike in terms of filing it late, does that bar the complaint, I'm more than happy to argue it right now. It's a very straight-forward issue from my perspective. If Your Honor wants to hear five minutes of argument from me, I'll be glad to do it. It makes sense to me. I know counsel is coming from out of state; so am I. I have no problem with arguing it this morning.

THE COURT: My short answer from the Court's perspective, I'll make myself available now if you want it. If you don't want it, fine. I don't have any viewpoint one way or another. If it makes your lives easier, I'm here. If you want your time to put written papers because it has certain other ramifications, I'll see you on the 27th. If you don't want the 27th and you want a different day and you can agree upon it,

I'll see you on a different day.

MR. NETTLES: Your Honor, to respond to both the Court and to Mr. Smith, we are willing to strike the one additional sentence that was in the complaint.

(Speaking to Mr. Smith) I think you might have phrased it a little bit differently. Unless -- is your interpretation any different than that there was one additional sentence in one of the -- in paragraph -- I believe it was 30.

MR. SMITH: My thought is for clarification purposes, why don't I read that sentence into the record, that it will be stricken, and that way there's no confusion.

MR. NETTLES: Sure. Yeah, that would be great. And I believe in the beginning of this oral argument, Your Honor, we've already -- both sides have already argued the issue. We'd be happy to have you rule based on that.

THE COURT: Let's do the two part. Let's do the easy stipulation first --

MR. NETTLES: Okay.

THE COURT: -- and then I've got to see if you all want to come back or if you don't want to come back.

MR. ZACHER: Sure.

MR. SMITH: Your Honor, I have in front of me --

THE COURT: Sure.

MR. SMITH: -- a document titled, Third Amended Complaint, filed by plaintiffs, electronically filed April 7, 2014 at 1:36 p.m. The paragraph in question is paragraph 128, and within paragraph 128 the sentence in question is on page 17, lines 8 through 9, and reads as follows: "This conduct is the result of decisions taken by management of the defendant." That's my understanding of the sentence plaintiffs' counsels are agreeing to strike from the recently filed complaint.

MR. ZACHER: I agree with that, Your Honor.

THE COURT: Okay. Now the part two aspect of the 27th motion, as I understood from what defense counsel said was -- you phrased it as the temporality, the timing of the filing. If you all wish to stand on what you've argued today and are not requesting any briefs -- Let's put it this way. This is not a court order or a court determination or a court pleasure or judicial efficiency. I'm just -- you all said you came from out of town; can we do it now? I'm fine with it, okay, without the hand gestures that I'm making. If -- hand gestures -- just so we're clear on the record, since it doesn't show my hand gestures, my hand was just opening like either which way, I don't care, okay.

So if you want it, great. If you feel you've sufficiently covered it, great. If you feel you want to be back on the 27th, great. If you wish to be here on a different date because the 27th being -- right after the Memorial Day holiday is not probably somebody's favorite time to be here, we'll reset it. So -- okay, and that is in no way advance ruling on anything that was presented before the Court today. Just tell me what you each want. If you don't agree, it's staying on the 27th because it was your motion and that's when you filed it.

MR. SMITH: Sure, Your Honor. My preferred course of action this morning, let's hear the argument, take it -- no reason to come back out on May 27th. I would like to have a two minute short statement of my position and then let Your Honor rule on it.

THE COURT: Okay.

MR. ZACHER: Works for me, Your Honor.

THE COURT: Okay. And so you're waiving any right to file a brief?

MR. ZACHER: I am waiving any rights to file a brief.

THE COURT: Okie-dokie. Do you want a moment to prepare, or do you want to do it right now?

MR. SMITH: I think I'm ready, Your Honor.

THE COURT: Go ahead.

MR. SMITH: The motion to strike is targeted at the Third Amended Complaint that I just referred to, filed April 7, 2014 by plaintiffs. Your Honor granted plaintiffs leave to amend to file a Third Amended Complaint. In August of 2013, this Court granted plaintiffs leave to amend, and per this Court's scheduling order we had a cut-off for filing amended complaints, amended pleadings, November 22nd, 2013. It's undisputed that plaintiffs did not file the Third Amended Complaint on or before November 22nd, 2013. In fact, the first time the Third Amended Complaint was filed was April 7, 2014, in response to Defendant Aria's motion for summary judgment, a little over four months late beyond the deadline to amend pleadings and some six or seven months after Your Honor granted the order permitting plaintiffs to file an amended complaint.

Based on the fact that plaintiffs failed to amend the pleadings by the court-ordered scheduling deadline, from Defendant Aria's perspective the Third Amended Complaint filed April 7th is untimely, improper and should be stricken.

THE COURT: Okay.

MR. NETTLES: Your Honor, just to repeat what I said earlier, defendants were well aware of this Third Amended Complaint from the moment that the motion was filed and this Court ordered the same. The fact that it wasn't then filed thereafter was simply due to mistake or inadvertence on my part and the part of

my firm. I cannot see any way that the defendant has been prejudiced or harmed by the amended complaint not actually being filed, as they've had it. They've had the same complaint since you ordered that it could be filed. We'd ask that you allow us leave now to file the Third Amended Complaint, based on the mistake or inadvertence of myself and my office.

Thank you.

THE COURT: Thank you.

MR. SMITH: To me it made sense to have the motions heard together because they dovetail. The motion for summary judgment is framed by the pleadings. So now we have the pleadings framed. And now that the pleadings are framed, we have the complaint that has no allegation of management authority or ratification, which would additionally back up the arguments we made earlier on the motion for summary judgment.

THE COURT: Just on a point of clarification. Is your motion for summary judgment premised on the Second Amended Complaint or premised on the Third Amended Complaint? That's part one of the question. And did I understand what you just said -- let me ask, do you know where I'm going?

MR. SMITH: I do.

THE COURT: Are you asking me for a new motion for summary judgment, that I have to rule on this first part on the Third Amended Complaint and then you want me to evaluate it, or is there something not in your brief? And I appreciate you're all excellent lawyers and so you're teeing things up however you need it teed up, but I'm just trying to be clear. Am I looking at the Third Amended Complaint for purposes of your motion for summary judgment, or was I looking at the Second,

and does it matter from -- matter is probably not the best choice of words -- is there a legal distinction that the Court needs to take into consideration that I need to rule on this first and then for some reason have to have you re-argue your motion for summary judgment and let you re-file it based on whatever ruling I may make with regards to the first?

MR. SMITH: Sure.

THE COURT: I just need to tee up what I'm looking at.

MR. SMITH: No, I appreciate that. To address your question head on, the motion for summary judgment was addressed primarily at the Second Amended Complaint because that was from defense perspective the only operative complaint at the time. However, we addressed the merits of plaintiffs' punitive damages arguments as they are alleged in the Third Amended Complaint that they filed on April 7th, less the sentence that was just stricken from that complaint.

So I would not be requesting from Your Honor additional briefing, additional oral argument. I believe Your Honor can look at -- To the extent the Court is inclined to deny Defendant Aria's motion to strike, if that is your inclination, then I believe you could rule on the motion for summary judgment based upon the allegations that are in the April 7th Third Amended Complaint, taking into consideration that one sentence that was stricken out of it. If Your Honor is inclined to grant the motion to strike, and I hope you are, if you grant the motion to strike, there are no punitive damages before Your Honor, because we go back to the Second Amended Complaint.

Does that answer your question, Your Honor?

THE COURT: Yes, it does. Thank you so very much.

MR. SMITH: Okay.

THE COURT: Okay. That should be last and final word. Is there any difference of position from plaintiff, in light of what defendant has said as to what the Court should or should not be taking into account?

MR. NETTLES: No, Your Honor.

THE COURT: Or do I wish you all a very nice rest of your afternoon and long day?

MR. NETTLES: Thank you.

THE COURT: Nothing further? Okay. If there being nothing further, I wish you all a nice rest of your day. I've got to put it on the 16th. I can't do it by this Friday. I'm just too bonked.

MR. ZACHER: Just for clarification, the hearing in May is off then, right?

THE COURT: Two seconds.

MR. ZACHER: I'm sorry.

THE COURT: Let me just, for my clerk's sake, who has been writing very diligently, so May 16th I'm going to put it on chambers. I'm going to put this decision for May 16th on chambers. I'm putting both, based on the agreements of the parties, waiving briefing and requesting that I vacate the May 27th hearing, that the order on May 16th -- hopefully May 16th -- address both the motion to strike, so that will be advanced to chambers on May 16th for a decision, and vacating the hearing on the 27th, as well as the motion for partial summary judgment decision on May 16th chambers. Obviously no appearance is necessary.

I think that answers your question. I think that takes care of both pending issues. Counsel, is there something missed?

MR. SMITH: Just -- I think just a clarification.

THE COURT: Sure.

MR. SMITH: When you say in chambers, that means you'll rule on it in your chambers and we'll get notice of that, right?

THE COURT: Bingo. Yes.

MR. SMITH: Okay, thank you.

THE COURT: More politely, yes, that is chambers are the decisions, and then simple things like motions to withdraw and stuff like that that I just handle, no appearances are necessary. My goal is to have these all written and a hundred percent done by the date I tell you. Reality doesn't always happen that way, depending on how many OST's, TRO's and lovely other things that pop up between now and then. So my goal is to try and get it by that date. So I try and give you a date. If I can't get it by that date, usually either the day before or that morning of, it says it has to be continued a week.

MR. SMITH: Okay.

THE COURT: Okay?

MR. SMITH: Thank you.

MR. ZACHER: One quick question if I may, Your Honor.

THE COURT: Sure.

MR. ZACHER: For edification purposes, so we have a firm date for trial in September.

THE COURT: Yes.

MR. ZACHER: And we've got eighteen plaintiffs in this case.

THE COURT: Okay.

MR. ZACHER: And the question in my mind is -- I think three of them are actually in federal court, so I think we only have fifteen left in state court. To get to the point, would it be possible to seek some clarification from the Court in terms of how to logistically handle them? I mean, my point being maybe you want to bring in three at a time and try those three, and the next three and the next three. It's a mass tort case, basically.

THE COURT: Well --

MR. ZACHER: I don't know if you handle those, you know. I'll abide by whatever the Court decides.

THE COURT: I think first it has to be a request by the parties how they want to do it, is really where it first comes. You all need to meet and come up with a proposal of what you're suggesting, okay? If you come to an agreement, we will try and find a way to accommodate it. If for some reason this courtroom is too small, okay, we handle up to eighty-four, there's a couple of the courtrooms, the "D" courtrooms throughout the courthouse that have bigger capacity. Your co-counsel is familiar with Judge Johnson, Judge Williams, I mean, right down the hall. Sometimes we might have to do a courtroom switch, if I can get one of my colleagues, you know what I mean, so that we can handle it if it's a size matter.

If it's a you are requesting that these be handled separately with separate juries, that's a very different question, okay. So if you all are thinking that you all want to speak among yourselves and then need to set up either a telephonic so I can accommodate people, you know, not have to travel in, on kind of that scheduling, we can set aside some time to do that as well.

So does that kind of -- I mean, do you have an agreement on what

you're thinking is a game plan, or is this news to you, defense counsel? It looked like it might be somewhat news to you.

MR. SMITH: News to me.

THE COURT: Okay.

MR. NETTLES: Yeah, and that's the clarification I think we were looking for, so we'll discuss it with defense counsel, Your Honor.

THE COURT: Yeah. I mean, you know, we'll make it work.

MR. NETTLES: Sure.

THE COURT: The question is, what do you want to make work, or do you need a definitive ruling from the Court if you have a difference of opinion on what you all are teeing up for trial? Currently this is one case; all parties. It's not -- there's no bifurcation as to plaintiffs, there's no consolidation for discovery but not for trial purposes or anything. I mean, please correct me if I'm wrong, but I don't believe I am.

MR. NETTLES: You're correct.

THE COURT: So in that normal situation they just flow all the way through, each person going through, okay, however you wish to have teed it up, okay. If you're asking for something different, if defense counsel is in agreement, like I said, we'll make it work. If you all need to try one or two or three, you know what I mean, to do it, you've got to let me know. Okay?

MR. ZACHER: Well, the reason -- I mean, obviously picking a jury, the numbers, the whole -- you know, that depends on --

THE COURT: Well, I think your co-counsel can explain. We have handled very, very large cases throughout this courthouse and we make it work, like I said,

even if we need to borrow a courtroom to do some jury selection and then come back in here for trial purposes. You all have not requested a jury questionnaire, but sometimes that -- well, let's put it this way. I will tell you any time I grant a jury questionnaire I limit the amount of in court questioning because by definition the whole reason for a jury questionnaire is to minimize the voir dire process, okay. At least that's the argument people always give me when they want a questionnaire.

So if you're doing that method to reduce jury -- it depends on if your issue is trial of the number of individuals or if it's jury selection. Each of those can be accommodated, and if you have a game plan we can try and make it work. If you have other issues that I haven't kind of mentioned, talk among yourselves first, and then like I said, if it's easier to do a telephonic, you want a telephonic, and if you want a telephonic sooner rather than later because that's how you're doing this, fine. Just give us some heads-up notice. Please don't just call. I mean, but if you give me some heads-up notice, everyone -- we always get a telephonic taken care of.

MR. NETTLES: Will do Your Honor.

THE COURT: Okay?

MR. ZACHER: Thank you.

THE COURT: Does that give you a general --

MR. NETTLES: That's perfect.

THE COURT: Okay, great. Have a nice rest of the day and a nice weekend.

MS. ROSE: Thank you, Your Honor.

THE COURT: Thank you.

/ / / / /

(PROCEEDINGS CONCLUDED AT 11:25 A.M.)

* * * * * *

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

Liz Garcia

Liz Garcia, Transcriber
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CLERK OF THE COURT

ORDR

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

SAVANNAH ANDERSON, et al.,

Plaintiff,

vs.

TUTOR PERINI CORP., et al.,

Defendants.

Case No. A-11-652922-C
Dep't No. XXXI

DECISION AND ORDER

This matter came before the Court on May 1, 2014, on Defendant Aria Resort & Casino, LLC's ("Aria") Motion for Partial Summary Judgment as to Punitive Damages. On that date, the parties also agreed to advance the oral argument on Defendant Aria's Motion to Strike Plaintiffs' Third Amended Complaint. Present at the hearing were Brian Nettles, Esq., and Jules Zacher, Esq., counsel for the Plaintiffs; and Amy Rose, Esq., and Keith Smith, Esq., counsel for Defendants. Both motions were deferred to Department XXXI's Chambers Calendar for further consideration of the briefing and argument. After a full review of the papers, pleadings, oral arguments of counsel and all applicable statutes and case law, the Court finds as follows:

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JOANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

Facts

Aria is a 4000-room hotel owned by MGM Resorts in the heart of the City Center project at the center of the Las Vegas Strip. The hotel opened in December 2009. Plaintiffs were guests at the hotel from April 2011 through June 2011, who assert that they, or their spouses, were exposed to *Legionella* or other bacteria. Plaintiffs allege causes of action for Negligence, Breach of Contract, and Loss of Consortium.

In May 2010, Aria obtained a *Legionella* Water Management Plan through a third-party consultant, TRC, in an effort to minimize potential *Legionella* growth at the hotel. TRC issued a revised plan on September 28, 2010. Prior to any Plaintiffs' stay at Aria, the hotel implemented the revised *Legionella* Water Management Plan. The plan included voluntary testing for *Legionella* and commencement of remediation through a "heat and flush" method.

In June 2010, The Southern Nevada Health District ("SNHD") performed an environmental assessment of Aria's water system, which included an inspection, water sampling, and discussion between SNHD and Aria personnel. William Ham, the Vice President of Facility Operations at the time, testified in his deposition that SNHD had no concerns about Aria's water delivery system at that time.

At various times, at specific locations, from September 2010 through the time that Plaintiffs stayed at Aria, *Legionella* test results exceeded 10 CFU/ml. Defendant asserts that it commenced with remediation that consisted of superheating the domestic water supply for the zone that fed the subject location

JOANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

where there was a positive result to a temperature that would kill *Legionella* bacteria. The superheating and flushing continued until the result was less than 10 CFU/ml. Plaintiffs contend that the efforts of Defendant were insufficient and caused harm to them.

In June 2011, SNHD testing detected *Legionella* bacteria, which resulted in an investigation by SNHD. Aria then commenced a remediation protocol, including sending out notice to over 18,000 guests, installing a chlorination system, replacing fixtures, and developing a new and more comprehensive water management plan. SNHD approved of the remediation efforts.

Procedural History

Plaintiffs filed their initial Complaint on December 8, 2011, seeking damages, including punitive damages. The Court dismissed Plaintiffs' claim for punitive damages on March 21, 2012, for failure to state a claim upon which relief can be granted as there were no allegations to support the punitive damages request. The Plaintiffs, thereafter, filed an Amended Complaint, and Second Amended Complaint, neither of which included claims for punitive damages. On August 5, 2013, after a full hearing and briefing, the Court granted Plaintiffs leave to file their Third Amended Complaint reasserting punitive damages based on the record in the case. That Third Amended Complaint was filed on April 7, 2014.

Discussion

A. Defendant Aria's Motion to Strike Plaintiff's Third Amended Complaint

Defendants have moved to Strike Plaintiffs' Third Amended Complaint in its entirety based on the fact that it was not timely filed, and also have moved to strike specific language in the Third Amended Complaint based on the fact that the language does not conform with the Court's Order granting leave to amend.

NEV. R. CIV. P. 15(a) provides in pertinent part: "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave to amend shall be freely given when justice so requires." However, leave should not be freely given in circumstances of bad faith, undue delay, or dilatory motive on the part of the movant. *Stephens v. Southern Nev. Music Co.*, 89 Nev. 104, 507 P.2d 138 (1973). Under local rules, a copy of a proposed amended pleading must be attached to any motion to amend said pleading. EDCR 2.30(a). Once leave to amend has been granted, the amended pleading "must be re-typed or re-printed and filed..." *Id.* Further, "[n]o pleading will be deemed to be amended until there has been compliance with this rule." *Id.*

If a party or a party's attorney fails to obey a scheduling order, "the judge, upon motion or the court's own initiative, may make such orders with regard thereto as are just, including any of the orders provided in Rule 37(b)(2)(B),(C),(D)." NEV. R. CIV P. 16(f). Rule 37(b)(2)(C) provides that when a party violates a discovery order, the court may issue "[a]n order striking out pleadings or parts thereof..."

JOANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

The scheduling Order filed October 5, 2012, indicates that the deadline for motions to amend pleadings was November 22, 2013. Leave to amend was granted on August 5, 2013. The Third Amended Complaint was filed on April 7, 2014. Defendant argues that the Third Amended Complaint is, therefore, untimely and should be stricken. However, Plaintiff argues that there is no prejudice to Defendant in the delay because the Third Amended Complaint was attached to the Motion for Leave to Amend, and they were, therefore, on notice of it well before any applicable deadline. Further, at the hearing on May 1, 2014, Plaintiff represented that the failure to properly file the Third Amended Complaint was due to mistake, inadvertence, or excusable neglect.

The Court finds that there was no prejudice to Defendants, as they were on notice of the Third Amended Complaint and the claims contained therein. Furthermore, Defendant Aria even filed a Motion for Partial Summary Judgment as to Punitive Damages, addressing claims found in the Third Amended Complaint. Therefore, with respect to striking the Third Amended Complaint in its entirety based on timeliness, that portion of the Motion is DENIED.

Defendant Aria also moved to strike portions of the Third Amended Complaint wherein the Plaintiffs alleged there was corporate ratification. The basis of the Motion was that the Plaintiffs included language outside of what was the subject of the original Motion to Amend. At the hearing on May 1, 2014, Plaintiffs agreed to strike the sentence at issue. The parties agreed to delete the following sentence: "This conduct is the result of decisions taken by management of Defendant." The sentence was found at ¶128, p 17, l. 8-9 of Plaintiffs' Third

Amended Complaint. Given the parties agreed to delete the sentence, that portion of the motion was unopposed. To the extent there are any other portions of the Third Amended Complaint that were not subject to the Court's Order granting leave to amend, that portion of the Motion is GRANTED pursuant to EDCR 2.20. Given the above, the Motion to Strike is GRANTED in part, and DENIED in part, as set forth in detail above.

B. Defendant Aria's Motion for Partial Summary Judgment as to Punitive Damages

Within Nevada, summary judgment is guided by Nevada Rule of Civil Procedure Rule 56. Specifically, summary judgment shall only be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." NEV. R. CIV. P. 56(c). The Nevada Supreme Court has held that it is "[t]he substantive law [that] controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant. A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026 (2005) (internal citations omitted). Additionally, "[w]hile the pleadings and other proof must be construed in a light most favorable to the nonmoving party, that party bears the burden to 'do more than simply show that there is some metaphysical doubt' as to the operative facts in order to avoid summary judgment being entered in the moving party's favor... The nonmoving

party 'is not entitled to build a case on the gossamer threads of whimsy, speculation and conjecture.'" *Id.* at 732.

NEV. REV. STAT. § 42.005(1) provides, in part: "Except as otherwise provided in NRS 42.007...where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied, the plaintiff...may recover damages for the sake of example and by way of punishing the defendant." NEV. REV. STAT. § 42.007 provides:

> 1. Except as otherwise provided in subsection 2, in an action for the breach of an obligation in which exemplary or punitive damages are sought pursuant to subsection 1 of NRS 42.005 from an employer for the wrongful act of his or her employee, the employer is not liable for the exemplary or punitive damages unless:
>
> (a) The employer had advance knowledge that the employee was unfit for the purposes of the employment and employed the employee with a conscious disregard of the rights or safety of others;
>
> (b) The employer expressly authorized or ratified the wrongful act of the employee for which the damages are awarded; or
>
> (c) The employer is personally guilty of oppression, fraud or malice, express or implied.
>
> If the employer is a corporation, the employer is not liable for exemplary or punitive damages unless the elements of paragraph (a), (b) or (c) are met by an officer, director or managing agent of the corporation who was expressly authorized to direct or ratify the employee's conduct on behalf of the corporation.

NEV. REV. STAT. § 42.001(1) defines "conscious disregard" as "the knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences." NEV. REV. STAT. § 42.001(3) defines "malice, express or implied," as "conduct which is intended to

JOANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

injure a person or despicable conduct which is engage in with a conscious disregard of the rights or safety of others."

Defendant contends that there is no basis for an imposition of punitive damages as Aria sought and implemented a water management plan even though they were not required by any law to do so. Plaintiffs allege, however, that once the plan is undertaken, the requirements of the plan must be followed, and that the failure to follow the requirements here creates a question of fact with respect to the element of conscious disregard that would preclude summary judgment. Specifically, the plan required maintaining water temperature records, yet no such records were kept. The plan required a risk assessment to be performed for the water system, yet no such risk assessment was performed. The plan required awareness training of hotel personnel, yet no such training occurred. The plan also required an inventory of the water system that was never taken. The plan required formal written procedures to be maintained, yet no such formal procedure was ever written down. Plaintiffs also call into question Aria's efforts at remediation. Plaintiff alleges that Aria's attempts at remediation were ineffective because they would only remediate specific locations rather than deal with the problem on a systemic basis.

The Court finds that in light of evidence presented to the Court, there are material issues of fact in dispute, and thus, summary judgment at this juncture would not be proper. Accordingly, Defendant Aria's Motion for Partial Summary Judgment as to Punitive Damages is DENIED without prejudice.

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DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

CONCLUSION

It is hereby ORDERED, ADJUDGED, and DECREED that Defendant Aria's Motion to Strike Plaintiff's Third Amended Complaint is GRANTED in part and DENIED in part as set forth herein. Defendant Aria's Motion for Partial Summary Judgment as to Punitive Damages is DENIED without prejudice.

Dated this 9th day of June, 2014.

JOANNA S. KISHNER
DISTRICT COURT JUDGE

JOANNA S. KISHNER
DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

CERTIFICATE OF SERVICE

I hereby certify that on or about the date filed, a copy of this Order was provided to all counsel, and/or parties listed below via one, or more, of the following manners: via email, via facsimile, via US mail, via Electronic Service if the Attorney/Party has signed up for Electronic Service, and/or a copy of this Order was placed in the attorney's file located at the Regional Justice Center:

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EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

SAVANNA ANDERSON; DUJUAN ALLEN; MARK BARRY; EVALYN BELL; EUGENE BROWN; VALREE BROWN; MARILYN CARNAHAN; TERRY CARNAHAN; NANCY CHUN; CATALINA CORTEZ; TERRY DAVIS; KARIN DUGAN; PATRICK DUGAN; STEPHEN DURLER; JOHN ELIAS; DONOVAN GARCIA; JENNIFER GROSSMAN; TERRY HAILE; WILLIAM HART; PAMELA JACKSON; CATHRIN JOSEPH; AUBREY KAUFMAN; DORIS KEMPA; ALI MAFI; VALERIE MORTENSEN; EDWARD PRADO; KATHLEEN REDLE; DAVID SCHROEDER; LINDA SCHROEDER; I. LANE SOTO; TINA WILCOX; DEAN URIBE; MARY URIBE; and NYIKA WILLIAMS;

Plaintiffs,

vs.

ARIA RESORT & CASINO, LLC; PERINI BUILDING COMPANY; and TUTOR PERINI CORPORATION;

Defendants.

Case No.: A-11-652922-C
Dept. No.: XXXI

MOTION FOR RECONSIDERATION OF THE COURT'S RULING ON DEFENDANT ARIA RESORT & CASINO, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Hearing Date:

Hearing Time:

MOTION FOR RECONSIDERATION OF THE COURT'S RULING ON DEFENDANT ARIA RESORT & CASINO, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT

COMES NOW, Defendant ARIA RESORT & CASINO, LLC ("Defendant" or "Aria"), by and through its attorneys of record with the law firms KRAVITZ, SCHNITZER & JOHNSON, CHTD., and WOOD, SMITH, HENNING & BERMAN, LLP, and hereby submits this Motion For Reconsideration of the Court's Ruling on Defendant's Motion for Partial Summary Judgment because this Honorable Court's holding is incorrect under *NRS* § 42.007 which requires corporate officer ratification in order to impose punitive damages claims. Further, the failure to adequately implement a voluntary water management plan, even if true, cannot constitute conscious disregard. As such, Defendant Aria respectfully requests this Honorable Court GRANT its Motion for Reconsideration.

This Motion is based on the pleadings and papers on file, the Memorandum of Points and Authorities contained herein, the exhibits attached thereto, and any argument permitted by this Honorable Court at the time set for hearing.

Dated this 24th day of June, 2014.

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NOTICE OF MOTION

PLEASE TAKE NOTICE that MOTION FOR RECONSIDERATION OF THE COURT'S RULING ON DEFENDANT ARIA RESORT & CASINO, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT will be heard before the Honorable Joanna S. Kishner, Judge, in Department XXXI of the above-entitled Court on the 29 day of JULY, 2014, at the hour of 9:30A a.m./p.m., or as soon thereafter as can be heard.

DATED this 24th day of June, 2014.

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MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

At its most basic level, Plaintiffs' claim against Aria Resort & Casino, LLC ("Aria") is that Aria inadequately implemented a voluntary water management plan. This claim, even if true, is wholly inadequate to maintain a claim for punitive damages. Plaintiffs have not and cannot produce any evidence to satisfy the "conscious disregard" element of a punitive damages claim. Further and more importantly with respect to the instant Motion, the Honorable court failed to address the necessary element of "corporate ratification" in its Decision and Order ("Order") denying Defendant Aria's motion for partial summary judgment. Not only did

Plaintiffs fail to present any evidence of corporate ratification, but Plaintiffs voluntarily agreed to dismiss the only allegation of corporate ratification in the operative complaint.

Therefore, Defendant Aria brings this Motion for Reconsideration because this Honorable Court's holding is incorrect under *NRS* § 42.007 which requires corporate officer ratification in order to impose punitive damages upon a corporate defendant. Further, failure to adequately implement a voluntary water management plan, even if true, cannot constitute conscious disregard. As such, Defendant Aria respectfully requests this Honorable Court GRANT its Motion for Reconsideration.

II. LEGAL STANDARD

The legal standard for a motion to reconsider is *E.D.C.R.* 2.24. In pertinent part, the Rule states that a district court must first grant leave to allow the moving party to renew the motion. *Id.* Further, the Rule provides the following:

> Rule 2.24 Rehearing of motions.
>
> *(b) A party seeking reconsideration of a ruling of the court, other than any order which may be addressed by motion pursuant to N.R.C.P. 50(b), 52(b), 59 or 60, must file a motion for such relief within 10 days after service of written notice of an order of judgment unless the time is shortened or enlarged by order. A motion for rehearing or reconsideration must be served, noticed, filed and heard as in any other motion. A motion for reconsideration does not toll the 30 day period for filing a notice of appeal from final order or judgment.*
>
> *(c) A party seeking reconsideration of a ruling of the court, other than any order which may be addressed by motion pursuant to NRCP 50(b), 52(b), 59 or 60, must file a motion for such relief within 10 days after service of written notice of the order of judgment unless the time is shortened or enlarged by order. A motion for rehearing or reconsideration must be served, noticed, filed and heard as in any other motion. A motion for reconsideration does not toll the 30 day period for filing a notice of appeal from final order or judgment.*

The district court may reconsider previously decided issues when the decision is clearly erroneous. See, *Masonry and Tile Contractors Ass'n of Southern Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997).

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III. PROCEDURAL & FACTUAL BACKGROUND

A. Moving Papers.

On or about March 28, 2014, Defendant Aria brought a Motion for Partial Summary Judgment as to Punitive Damages ("Motion"). In the Motion, Defendant Aria argued Plaintiff is lacking any evidence to support its claim that (1) Defendant Aria acted with a "conscious disregard" for the health and safety of tis patrons and that (2) an officer, director or managing agent of Defendant Aria ratified any such conduct as required under *NRS* § 42.007. The following is a non-exhaustive list of facts the parties stipulated to in the underlying motion papers:

1. Undisputed Material Fact ("UMF") No. 1: Defendant Aria obtained a Legionella Water Management Plan through a third party consultant, TRC, which sought to minimize Legionella growth at the hotel. (*See*, Plaintiffs' Opposition to MPSJ at pp 11-12; Defendants Reply In Support of MPSJ at 3:3 - 4:23.)

2. UMF No. 8: William McBeath, the former President and Chief Operating Officer of the Aria Resort & Casino, had not seen the Water Management Plan before his deposition in October 2013 and had no role in its drafting or preparation. (*Id.*)

3. UMF No. 9: Prior to any of the Plaintiffs' stay at the Aria Resort & Casino, Defendant Aria had implemented the revised Legionella Water Management Plan. (*Id.*)

4. UMF No. 10: Part of the implementation of the water management plan included Defendant Aria's voluntary testing for Legionella, which was conducted on October 4, 2010, November 12, 2010, November 30, 2010, January 19, 2011, January 20, 2011, and February 23, 2011, prior to any Plaintiffs' stay. (*Id.*)

5. UMF No. 12: Defendant Aria voluntarily implemented these preventative measures despite the fact there is no mandatory duty in any code, statute or law in Nevada or any

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state within the United States that requires a building owner to implement a Legionella water management plan or to test for Legionella. (*Id.*)

6. UMF No. 14: Mr. McBeath, the President and COO, had no knowledge of the 2010 environmental assessment by the SNHD and no knowledge of any cases of Legionnaires' disease associated with the Aria Resort & Casino in 2010. (*Id.*)

7. UMF No. 15: At the conclusion of the environmental assessment, the lead investigator for the SNHD, Mark Bergtholdt, sent a report to the CDC outlining the findings from his inspection and assessment of the water system. (*Id.*)

8. UMF No. 16: In an e-mail correspondence responding to Mr. Bergtholdt, Laurel Garrison from the CDC, stated as follows:

> *"Dear Mark,*
> *Thank you for sharing the results of your investigation. It looks like you've done a very thorough assessment and* ***have not found anything out of order or any red flags****. I will file this information in case we receive any additional reports associated with a stay at this hotel."*

(Id.)

9. UMF No. 23: With respect to publications discussing Legionella prevention, Mr. Ham, the Vice President of Facility Operations (through early January 2011), had no knowledge of these publications prior to Plaintiffs' stay, including those publications relied upon by Plaintiffs' experts in this case, such as ASHRAE Guideline 12-2000, OSHA Technical Manual and the Southern Nevada Health District, Public Accommodations Facilities Regulations. (*Id.*)

10. UMF No. 24: Mr. Ham had no knowledge of instances of patrons becoming ill at the Aria prior to Plaintiffs' stay. (*Id.*)

11. UMF No. 25: Mr. Carballosa, who became the Vice President of Facilities in January 2011 at the Aria, had no knowledge of instances of patrons becoming ill at the Aria prior to Plaintiffs' stay. (*Id.*)

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B. Oral Argument.

On May 1, 2014, oral argument on Defendant Aria's Motion was heard. At this time, Plaintiffs' counsel argued Plaintiffs are entitled to submit the issue of punitive damages to a jury because "there [was] systemic infestation here in the property; that [Aria] didn't even implement their own plan properly." (*See*, May 1, 2014 Hearing Transcript at 21:21-22, attached hereto as **Exhibit "A".**) Plaintiffs' counsel further argued Aria "never cleaned up everything; that they continued to do the same thing." (*Id.* at 23:19.) In response to Plaintiffs' counsel's arguments, this Court noted Plaintiff was making "trial arguments" but the Court "is really trying to look at the evidence." (*Id.* at 24:4-5.) This Court reiterated that sentiment by stating "I appreciate what goes on for trial argument, but I do have to look at the actual evidentiary support." (*Id.* at 27:2-3.)

Additionally, Plaintiffs' counsel agreed to strike from the Third Amended Complaint the allegation that "This conduct is the result of decisions taken by management of the Defendant." (*Id.* at 30:19-31:1.) Accordingly, Plaintiffs stipulated to strike the only allegations of corporate ratification from the operative complaint. (*Id.*)

C. Decision And Order.

On or about June 11, 2014, this Court issued a "Decision and Order" regarding Defendant's Motion for Partial Summary Judgment as to Punitive Damages. This Court identified the following allegations as potential acts of conscious disregard: (1) Defendant failed to maintain water temperature record; (2) Defendant failed to perform a water system risk assessment; (3) Defendant did not conduct awareness training; (4) Defendant did not conduct a water system inventory; (5) Defendant did not write down formal procedures; and (6) Defendant's remediation efforts were ineffective. (Decision and Order Dated June 11, 2014.) However, the Order failed to identify any specific fact that created a genuine issue of material

fact and failed to identify any actual evidence submitted by Plaintiffs that would support a determination there is a genuine issue of material fact. (*Id.*)

More importantly, as to the very crucial element of corporate ratification, the Order is notably silent. The Order fails to address this necessary element of punitive damages against a corporate defendant in ay meaningful way. However, the Order does note that the sole allegation of corporate ratification in the operative complaint *was voluntarily stricken* by Plaintiffs, thus leaving the operative complaint devoid of any allegation of corporate ratification. In addition to lacking any allegation of corporate ratification, no evidence was provided by Plaintiffs to demonstrate a genuine issue of material fact. Given the lack of any allegation of corporate ratification and the lack of any evidence of corporate ratification, Defendant Aria was and is entitled to summary judgment as a matter of law. As a result of this Honorable Court's failure to address this crucial element in the Order, Reconsideration is respectfully in order.

With great humility, Defendant Aria brings this Motion for Reconsideration which establishes this Honorable Court's determination is clearly erroneous as a matter of plain, direct and binding Nevada law.

IV. ARGUMENT

This Honorable Court should GRANT Defendant Aria's Motion for Reconsideration because this Honorable Court's decision to deny Defendant Aria's Motion for Partial Summary Judgment is incorrect as a matter of binding Nevada law. Specifically, reconsideration is proper for the following reasons: (1) no allegations exist in the operative complaint and the evidence presented does not establish corporate ratification in order to find punitive damages against corporate defendant and (2) the undisputed facts do not demonstrate any basis from which a jury could find that Defendant Aria's conduct exceeded mere recklessness or gross negligence, in order to satisfy the element of conscious disregard. As such, Defendant Aria respectfully

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requests this Honorable Court GRANT is Motion for Reconsideration.

A. Defendant Hereby Requests Leave to Hear Motion for Reconsideration.

As required by local Rule 2.24, Defendant Aria respectfully requests this Honorable Court grant leave to Defendant, allowing Defendant to renew its Motion for Summary Judgment. Defendant Aria requests the rehearing because the Court's holding is incorrect under binding Nevada authority. Below, Defendant will establish, as a matter of Nevada law, that Aria cannot be held liable for punitive damages. As such, it would constitute a significant injustice to deny Defendant's request for rehearing of this matter. Thankfully, binding Nevada law requires this Honorable Court to reverse its previous holding and enter the required, equitable ruling in Defendant's favor.

B. This Honorable Court's Decision is Incorrect as a Matter of Nevada Law.

1. Plaintiffs Did Not Establish Any Genuine Issue Of Material Fact Regarding Whether Corporate Ratification Occurred.

This Honorable Court's Decision and Order, which denied Defendant Aria's Motion, makes no mention of the issue of corporate ratification. As corporate ratification is necessary element of a claim of punitive damages against a corporate defendant, and Plaintiffs provided no evidence to establish a genuine issue regarding corporate ratification, the failure to address this issue constitutes a clear error of law and entitles Defendant Aria to a rehearing. Moreover, based on the fact that the operative complaint fails to contain a single allegation of corporate ratification, Defendant Aria is entitled to judgment as a matter of law. As such, the denial of Defendant Aria's Motion, despite the lack of corporate ratification allegations further constitutes a clear error of law. Further and substantively, a review of binding Nevada law and the evidence in this matter shows Plaintiffs' punitive damages claim must fail as a matter of law.

In order to establish a right to recovery against a corporate defendant, such as Defendant Aria, Plaintiffs must meet the requirements of *NRS* § 42.007. Therefore, even if Plaintiffs could

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somehow create a genuine issue of material fact with respect to whether the conduct of an employee exceeded mere recklessness or gross negligence under *Thitchner*, which Plaintiffs cannot do, Plaintiffs must then also demonstrate a genuine issue of material fact with respect to whether there was ratification or authorization of an employee's conduct by an officer, director or managing agent. *See, Nittinger v. Holman*, 119 Nev. 192, 197, 69 P.3d 688, 691 (2003).

In order to establish corporate culpability under *NRS* § 42.007, Plaintiffs must show one or more of the following:

> *(1) Defendant Aria had advance knowledge that the employee was unfit for the purposes of employment and employed the person with a conscious disregard of the rights and safety of others;*
>
> *(2) Defendant Aria expressly authorized or ratified the wrongful act of the employee for which the damages are awarded; or*
>
> *(3) The employer is personally guilty of oppression, fraud or malice.*

Plaintiffs' Opposition contends that the actions of Defendant Aria's employees establish liability against Defendant Aria for punitive damages. *(See, Plaintiffs'* Opposition to MPSJ at p. 16.) Therefore, in order to succeed on this theory under *NRS* § 42.007, Plaintiffs must show that Defendant Aria ratified the alleged wrongful act of the employee. Notably, Plaintiffs' counsel, during the summary judgment hearing, stipulated to omit any allegation of corporate ratification from the Third Amended Complaint. (*See,* Third Amended Complaint and Ex. "A" at 30:19 – 31:1.) The lack of any corporate ratification allegation alone warrants the motion for summary judgment being granted. *Fox v. Good Samaritan, L.P.*, 801 F.Supp. 2d 883, 887 (N.D. Cal. 2010)(holding that "[w]hile a summary judgment motion goes beyond the pleadings in the sense that it tests the sufficiency of the evidence *to support the allegations of the complaint*, those allegations still serve to frame—and limit—the issues." Emphasis in original.) In short, based upon Plaintiffs' own complaint, corporate ratification is not an issue Plaintiff has placed before this Court.

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If Plaintiffs had made corporate ratification an issue, which they have not, Plaintiffs would still need to provide actual evidence that an employee's alleged misconduct was ratified or authorized by an officer, director or managing agent. *See*, *NRS* § 42.007(b). In this case, the Court noted the following allegations as potential grounds of Defendant's misconduct: (1) Defendant failed to maintain water temperature record; (2) Defendant failed to perform a water system risk assessment; (3) Defendant did not conduct awareness training; (4) Defendant did not conduct a water system inventory; (5) Defendant did not write down formal procedures; and (6) Defendant's remediation efforts were ineffective.

However, this Court did not address whether any evidence exists to establish a genuine issue of fact as to whether any of the above alleged failures were ratified by a corporate officer. The reason this Honorable Court could not cite any evidence to establish a genuine issue is because Plaintiffs failed to provide any such evidence in their Opposition. To survive summary judgment, Plaintiffs must provide evidence that the conduct of Mr. Ham and Mr. Carballosa was ratified or authorized by an officer, director or managing agent of Defendant Aria. By way of the Opposition, Plaintiffs attempt to characterize Mr. Ham and Mr. Carballosa as "top level management." (*See*, Plaintiffs' Opposition to MPSJ at pp. 6-7.) Tellingly, Plaintiffs' Opposition contains no analysis or argument to support the bare conclusory assertion that Mr. Ham and Mr. Carballosa have the authority to set corporate policy. Lest there be any confusion, Mr. Ham and Mr. Carballosa cannot set corporate policy as required under *Nittinger*. Mr. Ham and Mr. Carballosa "would not have been able to implement any water plan without sharing it and getting approval from [Mr. McBeath], . . . Bobby Baldwin, risk management and legal counsel and all the appropriate parties to ensure appropriate oversight." (*See*, Defendant Aria's MPSJ at Ex. "C" at p. 108, lines 12-24 and p. 111, lines 5-8.) Additionally, Bill McBeath testified unambiguously that Mr. Carballosa would not be able to "set policy in any way, shape or form." (*See*, Defendant

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Aria's MPSJ at Ex. "C" at pp. 107-108, lines 11-2 and pp. 112-113, lines 12-1). Plaintiffs never attempt to assert that Bill McBeath ratified or authorized the conduct of his subordinates, Mr. Ham and Mr. Carballosa. (*See*, Opposition to MPSJ at pp. 17-18.)

Plaintiffs' articulated theory has been that the plan was not properly implemented and that Aria did not respond properly to positive test results. This theory fails because Mr. McBeath, the only officer who could have ratified the conduct of Mr. Ham and Mr. Carballosa, was never made aware of the *Legionella* testing results. (UMF Nos. 14.) For this reason, Plaintiffs' conclusory statements that "hotel management knew it had a systemic *Legionella* infestation" must be disregarded entirely – no evidence supports this assertion. (*See*, Opposition to MPSJ at p. 7.)

It goes without saying that in order for Mr. McBeath to have authorized or ratified the conduct of Mr. Ham or Mr. Carballosa, he would have had to have knowledge of such conduct. As the undisputed facts demonstrate, he had no such knowledge. Therefore, Plaintiffs cannot establish a genuine issue regarding corporate liability against Defendant Aria for punitive damages, as a matter of law. *See*, *NRS* § 42.007; *Nittinger*, 119 Nev. at 197, 69 P.3d at 691.

Based on the above, reconsideration is necessary and proper on the issue of corporate ratification.

2. Failure to Correctly Implement a Voluntary Water Management Plan Cannot Meet The "Conscious Disregard" Standard.

In addition to the fact that reconsideration is necessary based upon the element of corporate ratification, reconsideration is also necessary based upon the Honorable Court's Order pertaining to the element of conscious disregard. In response to Defendant Aria's Motion, Plaintiffs had the burden to produce evidence that Defendant Aria acted with a "'conscious disregard' [which] means the knowledge of the probable harmful consequences of a wrongful act

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and a **willful** and **deliberate** failure to act to avoid those consequences." Nev. Rev. Stat. § 42.001(1)(emphasis added). The undisputed facts show Defendant Aria did not act with a culpable state of mind to establish a right to recovery of punitive damages. *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 743, 192 P.3d 243, 255 (2008). *Thitchener* requires that Plaintiffs establish conduct which exceeded mere recklessness or gross negligence. *Id.* The Nevada Supreme Court has held gross negligence is "equivalent to the **failure to exercise even a slight degree of care**. . . . It is very great negligence, or the absence of slight diligence, or the want of even scant care." *Bearden v. Boulder City*, 89 Nev. 106, 109 (1973)(emphasis added). In sum, if any degree of care is exercised or any effort put forth, a defendant's conduct does not even rise to the level of gross negligence. *Id.*

Here, this Honorable Court identified in its "Decision and Order" the following allegations as potential acts showing a conscious disregard: (1) Defendant failed to maintain water temperature record; (2) Defendant failed to perform a water system risk assessment; (3) Defendant did not conduct awareness training; (4) Defendant did not conduct a water system inventory; (5) Defendant did not write down formal procedures; and (6) Defendant's remediation efforts were ineffective. However, none of these acts, even if true, tend to prove that Aria acted willfully and deliberately to harm Plaintiffs and without slight diligence. The facts of this case show the exact opposite: Aria was trying to protect its patrons. The facts show that Defendant Aria obtained a water management plan with a goal of reducing the presence of Legionella bacteria—an undisputed fact that shows more than "slight diligence." (See, UMF No. 1.) An inadequate attempt to meet the requirements of such plan cannot under any set of facts constitute

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a conscious disregard as a matter of law and Plaintiffs presented no legal authority to support such a position. Moreover, the Honorable Court's Order failed to identify any legal authority for such a proposition. Even if Aria's efforts to protect were lacking, Plaintiffs would not have a claim for punitive damages, but instead, a claim for negligence.

The above alleged failures to comply with the water management plan can only expose Defendant Aria to punitive damages, if Defendant Aria did something worse than failing to exercise even the slightest care. *Thitchener*, 124 Nev. at 743; *Bearden v. Boulder City*, 89 Nev. at 109. To maintain a punitive damages claim, Plaintiff must produce evidence of intent to injure, not merely allege acts of negligence. As demonstrated below, it is an undisputed fact that Defendant Aria attempted to protect its patrons from Legionella bacteria and, at worst, negligently failed to do so.

As noted above, it is undisputed that Defendant Aria voluntarily implemented a Legionella water management plan despite there being no mandatory duty in any code, statute or law in Nevada or any state within the United States that requires a building owner to implement a Legionella water management plan or to test for Legionella. (UMF No. 12.) Defendant Aria **voluntary** tested for Legionella on October 4, 2010, November 12, 2010, November 30, 2010, January 19, 2011, January 20, 2011, and February 23, 2011, prior to any Plaintiffs' stay. (UMF No. 10.) On any occasion where a Legionella test result exceeded 10 CFU/mL from September 2010 through the time Plaintiffs stayed at the Aria Resort & Casino, Defendant Aria attempted to remediate the issue. (*See*, Defendant Aria's MPSJ, Ex. "A" at 119:9-25, 160:9-161:15 and 162:6-24; Ex. "B" at 56:6-24.)

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In light of the efforts undertaken, Plaintiffs cannot create a genuine issue of material fact that Defendant Aria willfully and deliberately exposed Plaintiffs to harm. At worst, Defendant Aria voluntarily attempted to protect its patrons, but did so negligently. Since Plaintiffs have not produced any evidence to create a genuine issue regarding conscious disregard, Defendant Aria requests reconsideration of this matter as the Honorable Court's Order is erroneous as a matter of law

IV. CONCLUSION

Based upon the above, Defendant Aria respectfully requests this Honorable Court GRANT the present Motion for Reconsideration and hold that Defendant Aria cannot be liable for punitive damages for the following reasons: (1) Plaintiffs have provided no evidence to establish a genuine issue of material fact regarding corporate ratification and (2) a failure to properly implement a voluntary water management plan cannot, as a matter of law, constitute conscious disregard for the health and safety of hotel patrons.

Dated this 24th day of June, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June, 2014, I served a true and correct copy of the foregoing MOTION FOR RECONSIDERATION OF THE COURT'S RULING ON DEFENDANT ARIA RESORT & CASINO, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT as follows:

X Electronically pursuant to Rule 9 of the N.E.F.C.R.:

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EXHIBIT "A'