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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

\* \* \*

Marina District Development Company,  
LLC,

Plaintiff,

v.

AC Ocean Walk, LLC, et al.,

Defendants.

Case No. 2:20-cv-01592-GMN-BNW

**ORDER**

This matter is before the court on Plaintiff’s emergency motion for sanctions (ECF Nos. 48 and 49). Plaintiff seeks sanctions for defense counsel contacting Plaintiff’s employee, Mr. Lyons, without counsel’s consent, allegedly in violation of Rule 4.2 of the Nevada Rules of Professional Conduct. See *id.* Defendants opposed the motion. ECF No. 57. The Court did not permit a reply (ECF No. 50) and held a hearing on September 21, 2020, to expedite resolution of the motion. ECF No. 64. After the hearing, the Court took the motions under submission and ordered supplemental briefing on one issue. *Id.*; ECF No. 66. Specifically, the Court ordered supplemental briefing on “what provision of state law [Plaintiff] believes vests Mr. Lyons with the ability to bind plaintiff in a legal evidentiary sense.” ECF No. 66. Plaintiff and Defendants filed supplemental briefs at ECF Nos. 71, 73.

1 Defendants then moved to strike portions of Plaintiff's supplemental brief and  
2 accompanying exhibits. ECF No. 72.

3 As discussed below, the Court will deny Plaintiff's motions (ECF Nos. 48, 49) and deny  
4 Defendants' motion (ECF No. 72) as moot.

5 **I. Background**

6 **A. Plaintiff's Complaint and Motion for Preliminary Injunction**

7 This is a case about two competing casinos. See ECF No. 1. Plaintiff, Marina District  
8 Development Company, LLC d/b/a Borgata Hotel Casino & Spa (Borgata), alleges that  
9 Defendant AC Ocean Walk, LLC d/b/a Ocean Casino Resort (Ocean) is "in the process of raiding  
10 Borgata's casino marketing department" and unfairly competing against Borgata. *Id.* at 2. Borgata  
11 alleges that Ocean hired five of Borgata's executives, including Borgata's Executive Director of  
12 Marketing (Kelly Burke) and Vice President of Relationship Marketing (William Callahan). *Id.*  
13 Borgata further alleges that these employees have a duty to protect Borgata's trade secrets. *Id.*  
14 However, Ms. Burke's and Mr. Callahan's employment at Ocean will allegedly require them to  
15 use their knowledge of Borgata's trade secrets and other confidential information to perform their  
16 new jobs. See *id.* Borgata argues that Ocean intends to misappropriate Borgata's proprietary  
17 information and cripple Borgata's casino operations. *Id.* at 2-3.

18 Borgata also makes specific allegations in its complaint regarding Mr. Callahan's  
19 Borgata-issued cell phone. Specifically, Borgata alleges that it issued Mr. Callahan a cell phone  
20 that contains trade secrets and other confidential information, which he now refuses to return. *Id.*  
21 at 3, 6.

22 Based on this conduct, Borgata sued Ocean, Mr. Callahan, and Ms. Burke. ECF No. 1.  
23 Borgata seeks injunctive relief, a declaratory judgment, and monetary damages for breach of  
24 contract, tortious interference, unfair competition, and violations of the Defend Trade Secrets Act,  
25 New Jersey Trade Secrets Act, and Racketeer Influenced and Corrupt Organizations Act (RICO).  
26 *Id.*

27 Shortly after filing its complaint, Borgata filed a motion for a preliminary injunction. ECF  
28 No. 9. Borgata sought several forms of temporary injunctive relief, including that Mr. Callahan

1 return his Borgata-issued cell phone. ECF No. 9-8. Defendants opposed Borgata's motion for a  
2 preliminary injunction. ECF No. 40. Critically, in support of their opposition, Defendants  
3 attached a declaration stating that Borgata's president said that Mr. Callahan could keep his  
4 phone. ECF No. 40-2. The declaration was signed by a Borgata employee. See *id.* at 2. More  
5 specifically, it was signed by Borgata's Vice President of Relationship Marketing, Mr. Lyons. *Id.*  
6 at 2.

7 **B. Borgata's Emergency Motion**

8 Borgata alleges that Defendants violated the Nevada Rules of Professional Conduct by  
9 obtaining Mr. Lyons's declaration. ECF Nos. 48, 49.<sup>1</sup> Specifically, Borgata alleges that defense  
10 counsel violated Rule 4.2, which generally provides that a lawyer may not communicate with  
11 another represented party about the subject of the representation, unless authorized to do so by the  
12 other lawyer, law, or court order. Nev. R. Prof. Cond. 4.2.

13 While the parties dispute whether Rule 4.2 prohibits what occurred in this case,  
14 they generally do not disagree that the following occurred: On the evening of September  
15 15, 2020, Mr. Lyons received a phone call from defense counsel. ECF No. 48 at 4; ECF  
16 No. 57 at 19. He did not answer. ECF No. 48 at 4; ECF No. 57 at 19. Shortly thereafter, he  
17 received a text message from the same number. ECF No. 48 at 4; ECF No. 57 at 19. The  
18 text message identified the sender as Mr. Callahan's counsel and asked Mr. Lyons to call  
19 her. ECF No. 48 at 4; ECF No. 57 at 19. Mr. Lyons then called defense counsel. ECF No.  
20 48 at 4; ECF No. 57 at 19.

21 At some point during the conversation, defense counsel asked Mr. Lyons if he was  
22 represented by counsel, and he said no.<sup>2</sup> ECF No. 48 at 4; ECF No. 57 at 20. Mr. Lyons  
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25 <sup>1</sup> At the hearing on September 21, 2020, Borgata's counsel raised a separate series of events that  
26 Borgata alleges also violated the Nevada Rules of Professional Conduct. Borgata also addressed these  
27 events in its supplemental brief. ECF No. 71-1. However, the Court will not address this alleged conduct  
in the absence of complete briefing on the matter. If Borgata wishes to file another motion related to this  
alleged conduct, it may do so.

28 <sup>2</sup> Mr. Lyons subsequently stated that he thought defense counsel was asking whether he personally  
had a lawyer. ECF No. 48 at 4.

1 asked whether he should retain counsel, and defense counsel did not advise Mr. Lyons that  
2 he should contact Borgata’s in-house or outside counsel. ECF No. 48 at 4; see ECF No. 57  
3 at 20. Defense counsel states that she told Mr. Lyons that it might be smart to retain counsel.  
4 ECF No. 57 at 20.

5 In all events, Mr. Lyons and defense counsel continued speaking. Defense counsel  
6 asked Mr. Lyons to sign a declaration about a statement Borgata’s president allegedly made  
7 regarding whether Mr. Callahan could keep his company phone. ECF No. 48 at 4; see ECF  
8 No. 57 at 20-21. Ultimately, Mr. Lyons agreed to sign a declaration regarding this  
9 statement and did so. ECF No. 40-2; ECF No. 48 at 4; ECF No. 57 at 21-22.

10 **II. Analysis**

11 Plaintiff argues that defense counsel’s contact with Mr. Lyons violated Rule 4.2 of  
12 the Nevada Rules of Professional Conduct and Federal Rule of Civil Procedure 26. ECF  
13 Nos. 48, 49. Defendants disagree and moves to strike certain portions of Plaintiff’s  
14 supplemental brief. ECF No. 72.

15 **A. Whether Defense Counsel Violated Rule 4.2**

16 Nevada Rule of Professional Conduct 4.2 provides,

17 In representing a client, a lawyer shall not communicate about the subject of the  
18 representation with a person the lawyer knows to be represented by another  
19 lawyer in the matter, unless the lawyer has the consent of the other lawyer or is  
authorized to do so by law or a court order.

20 Nev. R. Prof. Cond. 4.2. Borgata, as the moving party, “bears the burden of establishing an  
21 ethical violation.” See *Rebel Comms., LLC v. Virgin Valley Water Dist.*, No. 2:10-cv-  
22 00513-LRH-GWF, 2011 WL 677308, at \*5 (D. Nev. Feb. 15, 2011).

23 Here, the parties’ dispute revolves around whether Mr. Lyons was a “person . . .  
24 represented by another lawyer.” See Nev. R. Prof. Cond. 4.2. Put another way, the parties  
25 disagree about whether Mr. Lyons was a “represented party” such that defense counsel  
26 could not contact him under Rule 4.2.

27 In 2002, the Nevada Supreme Court took up the issue of who, in a corporation, is a  
28 represented person such that Rule 4.2 prohibits lawyers from contacting them. See *Palmer*

1 v. Pioneer Inn Assocs., Ltd., 118 Nev. 943 (2002). Ultimately, the court adopted the  
2 “managing-speaking-agent test.” Id. at 960. Under the version of the managing-speaking-  
3 agent test adopted by the Nevada Supreme Court, “employees should be considered  
4 ‘parties’ for the purposes of the disciplinary rule if, under applicable [state] law, they have  
5 managing authority sufficient to give them the right to speak for, and bind, the  
6 corporation.” Id. at 961. The court clarified that “an employee does not ‘speak for’ the  
7 organization simply because his or her statement may be admissible as a party-opponent  
8 admission. Rather, the inquiry is whether the employee can bind the organization with his  
9 or her statement.” Id. The court further explained that “[w]hich employees have ‘speaking’  
10 authority is determined on a case-by-case basis according to the particular employee’s  
11 position and duties and the jurisdiction’s agency and evidence law.” Id. at 955.

12 Here, Borgata failed to establish that Mr. Lyons is a managing-speaking-agent.  
13 Borgata did not explain in either its opening brief or its supplemental brief how, under  
14 applicable state agency or evidence law, Mr. Lyons can speak for and bind Borgata. While  
15 Borgata provides facts regarding Mr. Lyons’ high-ranking position, managerial duties, and  
16 broad discretion, it does not explain how, under applicable state agency or evidence law,  
17 Mr. Lyons can bind the company. See id. (“Which employees have ‘speaking’ authority is  
18 determined on a case-by-case basis according to the particular employee’s position and  
19 duties and *the jurisdiction’s agency and evidence law.*”) (emphasis added). In other words,  
20 an explanation of Mr. Lyons’s position and duties is a necessary but not sufficient condition  
21 for establishing a Rule 4.2 violation. To carry its burden, Palmer requires Borgata to  
22 provide **both** Lyons’s “position and duties” **and** an analysis of applicable “agency and  
23 evidence law.” See id.

24 The Court cannot manufacturer arguments for parties. *Indep. Towers of Washington*  
25 *v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003). And without an explanation of applicable  
26 state agency or evidence law, the Court cannot properly apply the managing-speaking-  
27 agent test to Mr. Lyons. See id. at 956 (“[T]he test relies on a particular jurisdiction’s  
28 agency and evidence law.”). As such, the Court cannot find that Mr. Lyons is a managing-

1 speaking-agent of Borgata or that defense counsel violated Rule 4.2 when she contacted  
2 him.

3 To be clear, however, the Court is not finding that Mr. Lyons is not a managing-speaking-  
4 agent or that it was proper for defense counsel to contact him.<sup>3</sup> Indeed, the Court is troubled by  
5 defense counsel contacting Mr. Lyons. He is an executive of an opposing party, and a purely  
6 factual analysis of the issue suggests this contact was impermissible. However, the Court is  
7 required to not just look at the facts, but also to apply Nevada law. Nevada law requires the Court  
8 to analyze whether the employee in question can bind the company under state agency or  
9 evidence law. Borgata has not explained how Mr. Lyons can speak for and bind it under state  
10 agency or evidence law. Rather, Borgata provided facts demonstrating that Mr. Lyons can  
11 obligate the company in certain ways. However, providing facts without an analysis of how the  
12 law works is insufficient to carry Borgata's burden. Accordingly, the Court finds that Borgata has  
13 not met its burden to explain how, under applicable state agency or evidence law, Mr. Lyons can  
14 speak for and bind the company.

15 **B. Whether Defendants Violated Federal Rule of Civil Procedure 26**

16 Borgata also argues that contacting Mr. Lyons violated Federal Rule of Civil  
17 Procedure 26 because, by doing so, Defendants engaged in discovery before the parties'  
18 Rule 26(f) conference. ECF No. 48 at 10. As a remedy, Borgata asks the Court to deny  
19 Defendants' emergency motions (ECF Nos. 32-35). Id. at 11.

20 Defendants disagree with Borgata's analysis. ECF No. 57. Defendants argue that  
21 they did not engage in formal discovery by contacting Mr. Lyons. Id. at 11. Rather,  
22 Defendants argue that the discussion with Mr. Lyons was a witness interview and therefore  
23 a form of informal investigation not prohibited by Rule 26. Id.

24 Rule 26(d)(1) provides, "A party may not seek discovery from any source before  
25 the parties have conferred as required by Rule 26(f), except in a proceeding exempted from  
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27 <sup>3</sup> Upon further analysis, this Court agrees with Plaintiff that it was previously reading Palmer too  
28 narrowly.

1 initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation,  
2 or by court order.” The comments to Rule 26(d) provide, “This subdivision is revised to  
3 provide that formal discovery—as distinguished from interviews of potential witnesses and  
4 other informal discovery—not commence until the parties have met and conferred as  
5 required by subdivision (f).”

6 Here, Plaintiff has not established that Defendants violated Rule 26. Plaintiff  
7 generally cites to Rule 26 for the proposition that Defendants cannot engage in discovery  
8 before the Rule 26(f) conference. ECF No. 48 at 10. However, Plaintiff does not analyze  
9 the comment to the Rule, which explicitly seems to permit interviewing potential witnesses  
10 before the Rule 26(f) conference. See *id.* Plaintiff also does not cite any case law or other  
11 authority for the proposition that Defendants violated Rule 26. See *id.* On this record, and  
12 considering the comment to Rule 26, the Court finds that Plaintiff has not established that  
13 Defendants violated Rule 26 by interviewing Mr. Lyons.

14 **C. Whether Plaintiff’s Supplemental Brief Should be Stricken**

15 Defendants move to strike certain portions of Plaintiff’s supplemental brief and  
16 certain exhibits attached thereto. ECF No. 72. Defendants argue that the Court asked for  
17 supplemental briefing on one narrow issue, and Plaintiff’s supplemental brief included  
18 arguments and declarations that were outside the scope of the what the Court requested.  
19 See *id.* Defendants argue that portions of Plaintiff’s supplemental brief and new  
20 declarations were an attempt to “sandbag” Defendants, and the Court should not consider  
21 these new arguments or evidence. See *id.* at 4. Alternatively, Defendants argue that if the  
22 Court is inclined to consider Plaintiff’s new arguments and evidence, the Court should give  
23 Defendants additional time to properly respond. See *id.* at 4-5.

24 Given that the Court is denying Plaintiff’s motions for sanctions, the Court will  
25 deny Defendants’ motion to strike as moot.

26 **III. Conclusion**

27 IT IS THEREFORE ORDERED that Plaintiff’s emergency motions (ECF Nos. 48, 49) are  
28 DENIED.

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IT IS FURTHER ORDERED that Defendants' motion to strike (ECF No. 72) is DENIED  
as moot.

DATED: September 30, 2020



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Brenda Weksler  
UNITED STATES MAGISTRATE JUDGE