

1 of potential falls at the store, Plaintiff seeks to reopen discovery and compel production of the
2 requested slip and fall incidents for the five years prior in all of store #2884.

3 Defendant claims that there is no evidence supporting that Defendant had notice of the
4 temporary hazard – sugar – involved in the subject incident. It further underscores that the
5 substance was a temporary hazard and Nevada law permits prior incidents to be discovered if
6 there was a continuing hazard. Defendant notes that it filed a prior motion for protective order on
7 this request for prior incidents, which the Court found moot when Plaintiff withdrew it. Further,
8 Defendant highlights that it provided a compromise response of prior incidents from three years
9 prior to the subject incident that occurred within the subject incident area. Defendant also claims
10 there was not a good faith meet and confer prior to Plaintiff’s filing the instant motion.

11 Plaintiff replies that she satisfied the meet and confer requirement prior to bringing this
12 motion. She also contends that the prior incidents were always the subject of her discovery
13 attempts, including through the depositions that resulted in the filing of this motion. Plaintiff also
14 contends that Defendant purposefully concealed the total number of prior incidents because they
15 want to prove their theory that this was an isolated incident. She claims that the deposition
16 testimony of hundreds of falls suggest this is a systematic problem and Plaintiff is entitled to a
17 response to prior written discovery to determine if there was a continuous and dangerous
18 condition.

19 **II. DISCUSSION**

20 Fed.R.Civ.P. 33 requires the responding party to serve its answers or any objections
21 within 30 days after being served with written interrogatories. The “failure to object to discovery
22 requests within the time required constitutes a waiver of any objection.” *Richmark Corp. v.*
23 *Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir. 1992); *see also Haddad v. Interstate*
24 *Management Co., LLC*, 2012 WL 398764, * 1 (D. Nev. 2012) (same).

25 Further, Fed.R.Civ.P. 26(b)(1) provides for broad and liberal discovery. “Parties may
26 obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or
27 defense.” *Id.* However, a court may limit discovery via Rule 26(c), which permits the court to
28 issue a protective order to protect a party or person from annoyance, embarrassment, oppression,

1 or undue burden or expense when the party establishes good cause. For good cause to exist, the
2 party seeking protection bears the burden of showing specific prejudice or harm will result if no
3 protective order is granted. *See Beckman Indus., Inc., v. Int'l. Ins. Co.*, 966 F.2d 470, 476 (9th
4 Cir. 1992).

5 Rule 26(c) requires more than “broad allegations of harm, unsubstantiated by specific
6 examples or articulated reasoning.” *Id*; *see also Foltz v. State Farm*, 331 F.3d 1122, 1130 (9th
7 Cir. 2003) (*citing San Jose Mercury News, Inc., v. District Court*, 187 F.3d 1096, 1102 (9th Cir.
8 1999) (holding that the party must make a particularized showing of good cause)). The Supreme
9 Court has interpreted the language of Rule 26(c) as conferring “broad discretion on the trial court
10 to decide when a protective order is appropriate and what degree of protection is required.”
11 *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984). Additionally, the Supreme Court has
12 acknowledged that the “trial court is in the best position to weigh fairly the competing needs and
13 interests of the parties affected by discovery. The unique character of the discovery process
14 requires that the trial court have substantial latitude to fashion protective orders.” *Id*.

15 However, since the 2015 amendment, Rule 26’s relevancy analysis explores whether the
16 information sought has a bearing on the claims and defenses of the parties. Particular attention to
17 detail is needed when conducting the relevancy analysis when the claim is negligence and
18 specifically, notice is the issue. Like in *Caballero v. Bodega Latina Corp.*, 2017 WL 3174931 at
19 *2 (D. Nev. July 25, 2017), the linchpin here is that the alleged dangerous condition – sugar –
20 was temporary and changeable in nature. In general, prior incidents of a temporary dangerous
21 condition may help establish that a defendant had actual or constructive notice of its probable
22 recurrence. However, the Nevada Supreme Court made it clear in *Eldorado Club, Inc. v. Graff*,
23 78 Nev. 507, 511, 377 P.2d 174, 176 (1962) that notice evidence is not admissible for a slip and
24 fall that was caused by the temporary presence of debris or foreign substance.

25 Significantly, we are only talking about discoverability rather than admissibility at this
26 stage in the case. As in *Shakespear v. Wal-Mart Stores, Inc.*, 2012 WL 13055159, at *6 (D. Nev.
27 Nov. 5, 2012), Plaintiff is entitled to discover evidence of prior incidents because they are
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1 probative of whether her fall was caused by a temporary condition as Defendant claims or a
2 recurring problem that Defendant had a duty to address.

3 Discovery closed in this matter on March 8, 2021. Ms. Watanabe's deposition was on
4 March 4, 2021 and Mr. Hope's deposition was on March 5, 2021. The Court finds that Plaintiff
5 acted diligently to file this Motion in a timely manner; Plaintiff is not precluded from bringing the
6 Motion simply because Defendant's prior motion for protective order was found moot. The Court
7 hoped that the issue was resolved with finality, but since it is apparent that a new dispute has
8 arisen, the Court will consider Plaintiff's request. Further, although the Court finds it warranted
9 to compel a supplemental response as discussed below, it will not reopen discovery. The parties
10 may complete this final matter outside the close of discovery and the Court will extend the
11 dispositive motions deadline by 60 days so that there is sufficient time to review the response. As
12 no other discovery is requested subsequent to the supplemental response, the Court finds it
13 unnecessary to reopen discovery and will simply consider the response timely submitted.

14 As for the relevance and proportionality of the prior incident requests, the Court promotes
15 resolution of this case on the merits. With discovery just closing and the new information from
16 the depositions becoming known, the Court finds that no prejudice results to Defendant by
17 compelling supplemental responses at this state of the litigation. Indeed, no trial date has been set
18 and no dispositive motions have been ruled upon. Plaintiff contends that the prior incidents are
19 relevant to establishing that the hazard was a continuous hazard rather than a single, isolated
20 incident as Defendant claims. Under these circumstances, with Plaintiff asserting a negligence
21 claim along with negligent training and supervision, the Court will compel a supplemental
22 response because it finds the information to be relevant and proportional to the needs of this case.
23 This is a very specific case-by-case inquiry. After giving it careful consideration for this case, the
24 Court finds that Plaintiff has carried her burden of establishing relevance.

25 For the proportionality analysis, the Court considered the importance of the issues at
26 stake, the amount in controversy, the parties' relative access to information, the parties' resources,
27 the importance of the discovery in resolving the issues, and whether the burden or expense of the
28 proposed discovery outweighs its likely benefit. Fed.R.Civ.P. 26(b)(1); *see also Caballero*, 2017

1 WL 3174931 at *2. The Court will narrow Plaintiff's request for prior incidents as follows: Only
2 incidents for three years prior to the subject incident, that occurred in store #2884, and that
3 involved sugar or other granular substance. This does not expand the time scope since Defendant
4 already provided one incident for the prior three years. Three years is not burdensome here given
5 that there was only one incident in the prior three years in the subject area; as such, it is not
6 comparable to other cases that applied an 18 month limitation nor does this set a precedent that
7 finding three years is always appropriate. Further, it only slightly expands the location scope
8 from just the subject incident location to all locations in the store with the important limitation
9 that prior incidents must similarly involve sugar or other granular substance. Again, the Court is
10 not discussing admissibility of this evidence, but rather, only appropriate discovery for Plaintiff's
11 theory that the sugar may have been a continuous hazard. With this narrow tailoring, the Court
12 finds the requests to be proportional to the needs of this case. Defendant will have 30 days to
13 provide the supplemental response to Plaintiff. To the extent there are privacy concerns regarding
14 third party or medical information, Defendant may redact information or submit it to Plaintiff
15 under a protective order governing the exchange of discovery materials.

16 **III. CONCLUSION**

17 **IT IS THEREFORE ORDERED** that Plaintiff's Motion to Compel and Extend/Reopen
18 Discovery (ECF No. 23) is **granted in part and denied in part**.

19 **IT IS FURTHER ORDERED** that Defendant shall provide a supplemental response to
20 Interrogatory No. 20 and Request for Production No. 4 within 30 days with the limitations
21 established by the Court.

22 **IT IS FURTHER ORDERED** that the dispositive motions deadline shall be extended by
23 60 days to June 4, 2021.

24 DATED: April 27, 2021



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26 DANIEL J. ALBRECHTS
27 UNITED STATES MAGISTRATE JUDGE
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