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The Signature Condominiums, LLC, and
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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, Plaintiff, vs. HARRAH'S LAS VEGAS, LLC; THE SIGNATURE CONDOMINIUMS, LLC; BELLAGIO, LLC, Defendants.	Case No.: 2:20-cv-01221-RFB-NJK **DEFENDANTS THE SIGNATURE CONDOMINIUMS, LLC AND BELLAGIO, LLC'S MOTION TO DISMISS OR, ALTERNATIVELY, MOTION FOR JUDGMENT ON THE PLEADINGS** **Oral Argument Requested**

Defendants The Signature Condominiums, LLC ("Signature") and Bellagio, LLC ("Bellagio") (collectively, "Defendants"), by and through their attorneys, Jackson Lewis P.C., hereby submit the instant Motion to Dismiss Plaintiff's claims pursuant to Rules 12(b)(1), 12(b)(6), and/or 12(c)[1] and of the Federal Rules of Civil Procedure. This Motion is based on the

[1] Should the Court determine that Defendants' prior Motion to Dismiss or in the Alternative to Sever, which requested that the Court sever the claims against Bellagio and Signature from those against

following Memorandum of Points and Authorities, all pleadings and documents on file with the Court, and any oral argument the Court deems proper.

I. INTRODUCTION

Bellagio and Signature, respectively, have had collective bargaining relationships with Plaintiff, the Local Joint Executive Board of Las Vegas ("Union" or "Plaintiff"), for more than a decade. There is constant, if not daily, communication, and that communication has continued throughout the COVID-19 crisis. Since the pandemic's onset in March 2020, Signature and Bellagio have been enmeshed in negotiations with the Union over the various issues the companies have been forced to confront as a result of their unexpected closure. The Union never contended or proposed that Defendants adopt specific health and safety standards during those discussions. It focused on economic demands like recall rights, continued wages, and health and welfare benefits.

In preparation for reopening, Defendants retained national experts to guide them in developing comprehensive health and safety plans, taking advantage of the best available science and epidemiological studies. Defendants provided its industry leading Seven Point Safety Plan, as well as other procedures and employee training information to the Union on May 12, 2020 – more than three weeks before the June 4, 2020 reopening. The Union did not comment – let alone object or criticize – Defendants' plans. It certainly never contended that Defendants' plans were insufficient to safeguard employees and guests. Indeed, when Defendants met with the Union for negotiations about the above-referenced economic issues on May 28, 2020, the Union asserted that it would not discuss or negotiate over specific health and safety standards on a bilateral basis because it desired uniform industry standards promulgated by the government, at least in part because such uniformity would simplify the Union's administration of the labor agreements.

After Defendants reopened in June, the Union did not change its position. Although it now appears that the Union spent most of June preparing a lawsuit, it shared no information and

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Harrah's Las Vegas, LLC (ECF No. 5) exhausted Defendants' ability to seek relief under Rule 12(b)(6), Defendants can pursue the same motion, on the same grounds pursuant to Rule 12(c).

raised no concerns with Defendants. Indeed, although one would expect the Union to act with alacrity and alert Defendants to health and safety deficiencies, it has done no such thing. In negotiation meetings, the Union continued to focus on economic issues. The Union raised concerns about scheduling, seniority and recall, but its leadership never picked up the phone about the COVID-19 issues set forth in the Complaint.

Startlingly, given the importance of worker and guest safety to both Defendants and the Las Vegas economy at large, Defendants first learned of the Union's concerns in a press release which confirmed that this lawsuit, rather than informal resolution through the grievance and arbitration procedure, was preordained. Indeed, it is both inconceivable and inexcusable that the Union spent days, if not more than a week, collecting allegations, drafting a thirty page lawsuit, issuing a press release, and then conducting a press conference instead of contacting Defendants to share information and collaborate to keep workers and guests safe. There is no allegation, let alone evidence, that Defendants ignored safety issues or refused to engage the Union.

Nor could there be. Until filing its grievances on June 25, 2020, the Union never asked Defendants to meet to discuss alleged deficiencies in those policies. Although Defendants met and/or communicated with Union leadership more than sixty times during and after the closure period, the Union never proposed its own or otherwise proposed modification or alteration of Defendants' health and safety policies. And, most critically, before filing the Grievances, the Union never contended that it believed the Defendants' policies were insufficient in any way, let alone insufficient to protect workers and guests. Taken together, the Union's efforts to raise its concerns, and by extension, its efforts to address the alleged problems quickly, and without a lawsuit, have been totally inadequate. Their absence calls the purpose of the lawsuit into question.

And it does not end there. Plaintiff made no effort to contact Defendants even after the lawsuit was filed. It did not file an application for injunctive relief. It did not approach Defendants and seek stipulated relief as contemplated by Fed. R. Civ. P. and Local Rule 65. It is Defendants who initiated discussions, requesting to meet with the Union, as required by the collective bargaining agreements, on June 30, July 2, and July 3, 2020. The Union accepted

Defendants' invitation to arbitrate the grievances immediately but did not otherwise respond. Defendants requested that the Union provide them with information about their allegations on July 2, and July 3. Again, the Union did not respond.[2] Indeed, the Union did not agree to any meeting until July 6, 2020, after it was ordered to do so by the mutually selected arbitrator. It did not agree to furnish any information until, as discussed below, after Defendants were forced to file unfair labor practice charges with the National Labor Relations Board and the Union was ordered by the arbitrator to comply with its contractual obligations.

The Court's authority in this case is narrow and limited. It has no jurisdiction to consider the substance of Defendants' health and safety policies. The Norris-LaGuardia Act, 29 U.S.C. § 143 ("NLA"), prohibits the Court from doing anything other than issuing, if appropriate, what is referred to as a reverse *Boys Markets* status quo injunction. *See Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235 (1970); *See N.Y. State Nurses Ass'n v. Montefiore Med. Ctr.*, 2020 U.S. Dist. LEXIS 77659, *6-8 (S.D.N.Y. May 1, 2020) (denying injunction in union's attack on hospital health and safety policies). The Union's Complaint, however, seeks far more than a status quo injunction. It would have the Court step into the fray, consider the merits of Defendants' health and safety policies, and issue an order mandating potentially massive changes. It is nothing less than an invitation for the Court to serve as the arbitrator and, as set forth in paragraph 88 of the Complaint, it appears that the Union would have the Court potentially order both Bellagio and Signature's shut down, if the Union's demands for affirmative relief are not met. The Southern District of New York recently considered an almost identical case. In *N.Y. State Nurses Ass'n v. Montefiore Med. Ctr.*, 2020 U.S. Dist. LEXIS 77659, *6-8 (S.D.N.Y. May 1, 2020), the Union asked the court to enter an injunction enacting additional PPE requirements, contact tracing, and other safety procedures, just as the Union has done here. As the Southern District of New York explained, whether the union was right or wrong was irrelevant. It could

[2] On Thursday, July 2, 2020, **after** Defendants filed their Motion to Dismiss or in the Alternative Sever, the Union provided Defendants with a new proposal containing health and safety provisions which had never before been advanced. Submitting such a proposal **after** filing a lawsuit and being served with a Motion to Dismiss does not cure Plaintiff's failure to participate in the grievance process in good faith.

not grant the requested relief. Doing so would "turn the purpose of a reverse *Boys Markets* injunction — to protect the integrity of the arbitral process — on its head." *Id.*

Even if the Court had the authority to issue the injunctive relief requested by the Union, it still would not be able to do so. Section 8 of the NLA also "denies injunctive relief to any party who has not attempted to settle the dispute by negotiation or resort to available governmental machinery for mediation or voluntary arbitration . . . ." THE DEVELOPING LABOR LAW § 1.III.D, at 23 (citing *Bhd. of R.R. Trainmen, Enter. Lodge, No. 27 v. Toledo, Peoria & W.R.R.*, 321 U.S. 50, 58 (1944)). Its text provides that "[n]o restraining order or injunctive relief shall be granted to any complainant who . . . has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration." 29 U.S.C. § 108; *see also Camping Constr. Co.*, 915 F.2d at 1345 (citing *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457-59, 1 L. Ed. 2d 972, 77 S. Ct. 912 (1957) and noting Section 8 of the NLA denies injunctive relief to any person who has failed to make "every reasonable effort" to settle the dispute)). As set forth below, in failing to engage in any pre-dispute informal attempts to negotiate, in failing to respond to Defendants' requests for Boards of Adjustment, and in failing to provide information required by both the collective bargaining agreements and the NLRA, the Union has not – and at this point cannot – meet its burden.

II. FACTUAL BACKGROUND

Defendant Signature is an all-suite resort consisting of three towers containing approximately 1,700 rental units located at 145 East Harmon Avenue in Las Vegas, Nevada. ECF No. 1, ¶ 29. Defendant Bellagio is a hotel-casino property with 3,950 rooms located at 3600 South Las Vegas Boulevard in Las Vegas, Nevada. *Id.* at ¶ 68. Both Defendants have a collective bargaining relationship with Plaintiff. *See* **Exhibit 1,** Signature Collective Bargaining Agreement; **Exhibit 2**, Bellagio Collective Bargaining Agreement. Signature and Bellagio are subsidiaries of MGM Resorts International ("MGMRI").[3]

[3] The currently collective bargaining agreements between the Union and Bellagio and Signature, were negotiated in 2018 and 2019, respectively, and they expire in 2023. They were not attached to the Complaint but may be properly considered by this Court. *See Van Buskirk v. CNN*, 284 F.3d 977, 980 (9th Cir. 2002) ("Under the 'incorporation by reference" rule of this Circuit, a court may look beyond

In early March of this year, Bellagio, Signature and all other MGMRI subsidiaries approached the leadership of the Joint Executive Local Board of Las Vegas ("Plaintiff" or "Union"), prior to Nevada Governor Steve Sisolak's mandated closures, to begin discussing COVID-19 and the various steps that MGMRI, including Signature and Bellagio, and the Union would need to take to protect employees and customers. **Exhibit 3**, Declaration of Wendy L. Nutt ("Nutt Decl.") at ¶ 3. MGMRI's Senior Vice President of Labor Strategy, Wendy L. Nutt, met and/or communicated with Union leadership more than twenty times in March alone. *Id.* at ¶ 4.

Those meetings and communications continued into the months of April, May, and June. *Id.* at ¶5. The parties met additional times to discuss and negotiate various issues, including health insurance benefits, recall rights, and similar issues. *Id.* At no time during those discussions did the Union seek to engage Defendants in detailed discussions over health and safety protocols, even after Defendants provided the Union with its Seven Point Plan, Training Manual, and Safety Fact Sheets on May 12, 2020. *Id.* at ¶6. In fact, the Union never made any such detailed proposals; rather, the Union proposed, and the parties negotiated only regarding daily room cleaning and Defendants' general authority to implement general safety and health protocols and related training. *Id.* at ¶7. During a meeting on May 28, 2020, the Union stated that that it was proposing to remove even the general safety, health and training language from memorandum of agreement being negotiated. *Id.* The Union asserted instead that all health and safety standards should be universal for the Las Vegas casino operations and set by the state government. *Id.* The Union stated that they intended to seek such universal standards through direct approach to state governmental officials. *Id.*

The first time that the Union formally notified Defendants of an objection or concern regarding the content or application of the Defendants' health and safety policies and protocols

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the pleadings without converting the Rule 12(b)(6) motion into one for summary judgment.") Those agreements, however, have not been completely reduced to writing. The prior agreements are therefore attached. For purposes of this Motion, the prior agreements establish that each entity has its own collective bargaining relationship with the Union and the collection of tentative agreements which comprise current agreements is not necessary. Those tentative agreements may prove necessary for subsequent motion practice and they will be introduced at that time. With respect to Exhibits 1 and 2, because the collective bargaining agreements are over 100 pages long, the attached exhibits include only the first eight pages and the recognition clauses.

was June 25, 2020, when it filed the grievances. *Id.* at ¶8; **Exhibit 4**, Signature Grievance; **Exhibit 5**, Bellagio Grievance. Although the allegations in the grievances are serious, the Union did not take any of its normal steps to make Defendants aware of its concerns. **Ex. 3**, Nutt Decl. at ¶8. It did not contact me or any other labor relations executive to discuss the issues or to propose modifications to the policies/protocols. *Id.* The Union delivered the grievances to a general email address. *Id.* In fact, Defendants first became aware of the Union's concerns when the Union issued a press release on June 26, 2020. *Id.* Defendants first became aware of the grievances themselves on Monday, June 29, 2020. *Id.*

On June 30, 2020, Ms. Nutt contacted the Union and asked to meet for a Board of Adjustment:

> Geo and Terry,
>
> I recently was made aware that you filed two general grievances, one at Bellagio and one at Signature, alleging a violation of Side Letter #11 relating to the Union's concerns regarding COVID-19. Unlike your usual practice with issues of importance, you did not send these to my attention, and instead, these were forwarded to the general grievance inbox without copy to me or Rudy, so I did not see them until yesterday. The health and safety of our employees is our top priority, and given our extensive discussions and relationship, we would expect that you would immediately bring safety concerns to our attention in real time, so that they can be addressed. We have provided you with a copies of, or information regarding, our safety plans and protocols, including our incident response protocols, and we were not made aware of the concerns set forth in the grievances until we discovered those grievances on Monday.
>
> The Company takes these concerns very seriously, and I would like to schedule a Board of Adjustment with you immediately to discuss these concerns in more detail, as you suggest in your grievance. I will make myself available any time today, so please let me know what time works best for you to discuss.
>
> Wendy

Ex. 3, Nutt Decl. at ¶9; **Exhibit 6**.

Defense counsel followed up by letter the same day and offered to meet and if necessary, arbitrate, the grievances on July 21-24, 2020. **Exhibit 7**. Union counsel responded the following day, July 1, 2020. **Exhibit 8**. Union counsel agreed to the arbitration dates, but neither the Union nor its counsel agreed to schedule the mandatory Boards of Adjustment. *Id.*

Ms. Nutt followed up by email on Thursday, July 2, 2020, asking to meet again and for information about the Union's allegations:

> Dear Ms. Kline and Mr. Greenwald:
>
> Please provide the following information regarding the grievance filed by the Local Joint Executive Board of Las Vegas, against Signature, dated June 24, 2020, asserting a violation of safety provisions of the collective bargaining agreement between the Local Joint Executive Board and [Defendant]:
>
> All documents, evidence, health and safety standards, health and safety analysis, all reports, claims or other documents provided to any governmental agency, and all other information on which the grievance is based, including but not limited to all statements completed by employees, including any Culinary Clean Workplace Safety Reports ("Reports") or similar questionnaires. Given your demand for an expedited Board of Adjustment and arbitration, it is critical that we receive this information immediately and we ask that you provide us with all such information or Reports in your possession by 5:00 p.m. tomorrow, July 3, 2020. Additionally, this is an ongoing, continuous request, and we ask that you provide us with all future information or Reports within 24 hours of the time you receive it. Failure to provide the documents promptly interferes with our ability to investigate and, if appropriate, take precautions to protect the health and safety of employees and guests. Based on observation, your representatives are obtaining Reports at the properties.
>
> With regard to your demand for an expedited Board of Adjustment, I contacted you on Tuesday, June 30, 2020, indicating our availability to meet immediately on this this matter, but at this point, have not received a response to that email.
>
> Please direct all responses to this request for information to me at wnutt@mgmresorts.com.
>
> Wendy Nutt

Ex. 3, Nutt Decl. at ¶10; **Exhibit 9** (Signature); **Exhibit 10** (Bellagio).

The Union did not initially respond to Ms. Nutt's emails. **Ex. 3**, Nutt Decl. at ¶11. Defendants followed up through counsel on July 3, 2020. **Exhibit 11**. The Union still had not responded when Defendants filed unfair labor practice charges on July 5, 2020. **Exhibits 12, 13**. On July 6, 2020, the Union's legal counsel contacted Ms. Nutt to schedule a Board of Adjustment meeting. **Ex. 3**, Nutt Decl. at ¶11.

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III. LEGAL ARGUMENT

A. Legal Standards

1. *Motion to Dismiss.*

Under Federal Rule of Civil Procedure 12(b)(6), dismissal is proper when a complaint fails to state a claim upon which relief can be granted. "Dismissal may be based on the lack of a cognizable legal theory or on the absence of sufficient facts alleged under a cognizable legal theory." *Id.* (citing *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001); *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988)). In order for the plaintiffs to survive a 12(b)(6) motion, they must "provide the grounds for [] entitlement to relief [which] requires more than labels and conclusions. *Id.* (citing *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 547 (2007)).

To survive a motion to dismiss, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 545. A claim has "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). "[A] pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action" does not satisfy this standard. *Id.* at 1950. "Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement." *Id.* (quotation omitted). In short, if Plaintiff's allegations fail to "raise a right to relief above the speculative level," this Motion should be granted. *Twombly*, 550 U.S. at 570.

2. *Requirements for Injunctive Relief in a Labor Dispute.*

Plaintiff's Complaint fails to state a claim for injunctive relief because it utterly fails to meet the heavy burden required for any potential award of such relief. "A preliminary injunction is an ***extraordinary*** remedy never awarded as of right." *Winter v. Natural Res. Council, Inc.*, 555 U.S. 7, 24, 129 S. Ct. 365 (2008) (emphasis added). Therefore, to qualify, "the movant's right to relief must be ***clear and unequivocal***." *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Horne*, 698 F.3d 1295, 1301 (10th Cir. 2012) (emphasis added). A court may grant a preliminary injunction only if the movant establishes: (1) it will suffer irreparable harm; (2) that there is a substantial likelihood that it will succeed on the merits; (3) that an injunction, if issued,

would not be adverse to public policy; and (4) that the threatened injury outweighs the damage the proposed injunction may cause the opposing party. *Fernandez v. State of Nevada*, 2011 U.S. Dist. LEXIS 6103 at *2-3 (D. Nev Jan. 15, 2011) (citing Fed. R. Civ. P. 65; *Winter*, 55 U.S. at 24).

A party's traditional path to injunctive relief is further narrowed in cases "involving or growing out of any labor dispute" because the NLA constrains the federal courts' jurisdiction to issue injunctive relief. 29 U.S.C. §§ 101 & 104. Indeed, the Norris-LaGuardia Act is "an anti-injunction statute," *San Antonio Cmty. Hosp. v. S. California Dist. Council of Carpenters*, 125 F.3d 1230, 1234 (9th Cir. 1997), which prevents district courts from issuing "any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with [its] provisions," 29 U.S.C. § 101 (alteration added). Indeed, the Norris-LaGuardia Act "prohibits any federal court from issuing an injunction in **almost any labor dispute**." *Reuter v. Skipper*, 4 F.3d 716, 718 (9th Cir. 1993) (emphasis added) (citing *Camping Constr. Co. v. District Council of Iron Workers*, 915 F.2d 1333, 1343-49 (9th Cir. 1990)). Plaintiff concedes that this is a labor dispute and therefore the NLA and its jurisdictional prohibition on injunctions applies.

B. <u>The Court Lacks Subject Matter Jurisdiction Because Plaintiff's Request for an Injunction is Barred by the Norris-LaGuardia Act</u>

1. *Plaintiff is Not Entitled to Injunctive Relief Because It Has Failed to Comply With the Section 8 of the Norris-LaGuardia Act.*

To further ensure that an injunction is an employer's "last line of defense" in the effort to resolve a labor dispute, *Bhd. of R.R. Trainmen, Enter. Lodge, No. 27 v. Toledo, Peoria & W.R.R.*, 321 U.S. 50, 58 (1944), the NLA's § 8 "denies injunctive relief to any party who has not attempted to settle the dispute by negotiation or resort to available governmental machinery for mediation or voluntary arbitration . . . ." THE DEVELOPING LABOR LAW § 1.III.D, at 23. No "restraining order or injunctive relief shall be granted to any complainant who . . . has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration." 29 U.S.C. § 108; *see also Camping Constr. Co.*, 915 F.2d at 1345 (citing *Textile Workers Union v. Lincoln Mills*, 353

U.S. 448, 457-59, 1 L. Ed. 2d 972, 77 S. Ct. 912 (1957) and noting Section 8 of the NLA denies injunctive relief absent "every reasonable effort" to settle the dispute).

Here, Plaintiff seeks injunctive relief from the Court as a first resort, rather than a last. On May 28, 2020, Plaintiff abruptly, and without prior notice, stopped engaging in negotiations with Defendants' representatives over health and safety proposals and asserted that all hotel-casinos should be subject to universal standards promulgated by state government. It has ignored Defendants' efforts to engage in the dispute resolution procedures mandated by the collective bargaining agreements. Now, Plaintiff claims that the standards promulgated by the state government are "inadequate." ECF No. 1 at 28:17-28. Until the grievances, Plaintiff did not contend that the Defendants' health and safety policies violated the agreements.

Indeed, although the Union now contends that the issues presented in the grievances require immediate attention, the Union sent those grievances to a general MGM Resorts International email inbox, and did not attempt to expedite the process by contacting any of the labor relations executives with whom it deals with on a daily basis. Two days after Plaintiff filed its grievances, it announced in a press release its intention to file a complaint against "major Las Vegas Strip casino companies" on June 29, 2020, the next business day following the announcement. In other words, the alleged exigent circumstances Plaintiff relies on as a basis for injunctive relief are manufactured. They are neither the result of bad faith nor delays in contractual dispute resolution process. Plaintiff's attempt to substitute the judicial process for the timely, good faith use of the contractual dispute resolution is contrary to the "clean hands" provision of the NLA and should not be countenanced by the Court.

2. *Plaintiff's Request for an Affirmative Injunction Exceeds the Scope of the Limited Injunctive Relief Permissible Under the Norris-LaGuardia Act.*

Plaintiff's Compliant seeks to enjoin "Defendants from promulgating and following unreasonable rules and procedures." ECF No. 1 at 29:3-6. On its face, Plaintiff's broad, vague request asks the Court to micro-manage Defendants' operations and nullify the (unidentified) protective rules and procedures already in place solely because the Union deems these rules and procedures to be "unreasonable." Plaintiff then seeks to impose affirmative obligations which it

deems "reasonable" on Defendants such as training "contact people and Joint Board members" in the "scientifically accurate[4] protocols for reporting," and to even force Defendants to close pending contact tracing, further conditioned upon the immediate, mandatory disclosure of employees' protected health information to Union representatives. *See* ECF No. 1 at 26:13-26. Accordingly, even though Plaintiff's request for injunctive relief is couched as a bar against action, in reality Plaintiff seeks the Court's endorsement of new, affirmative obligations on Defendants, or otherwise require Defendants to cease operating. This type of mandatory, affirmative relief is expressly prohibited by the NLA:

> every restraining order or injunction granted in a case involving or growing out of a labor dispute **shall include only a prohibition of such specific act or acts as may be expressly complained of** in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided in this chapter.

29 U.S.C. § 107 (emphasis added). Simply put, even if this Court had jurisdiction over Plaintiff's claims, it would still be unable to award the affirmative relief Plaintiff aims for. To be clear, the Court does not have jurisdiction because Plaintiff's claims do not fit within the limited exceptions to the NLA's outright ban on issuance of injunctions in labor disputes, which include compelling the parties to honor agreements to arbitrate, enjoining strikes when a union refuses to honor its contractual commitment to arbitrate, and enforcing a union's positive duties under federal statutes such as the Railway Labor Act. Indeed, in *Camping Constr. Co.*, the Ninth Circuit noted "every such [exception to the NLA] we have discovered accommodates the Act either to a duty specifically imposed by another statute, or to the strong federal policy favoring labor arbitration." *Camping Constr. Co.*, 915 F.2d at 1345; *see also Reuter*, 4 F.3d at 720. No such circumstances exist here. On the contrary, Plaintiff's request for injunctive relief undermines the strong federal policy favoring labor arbitration.

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[4] This request exemplifies the impropriety of Plaintiff's request that the Court intervene it its labor dispute with Defendants, as it would require the Court to determine what protocols are "scientifically accurate" where even the scientific community's understanding of such protocols has been subject to change throughout the course of the pandemic.

C. A "Reverse" *Boys Markets* Injunction Cannot Serve as the Basis for Subject Matter Jurisdiction Because the Union Cannot Meet the Requirements for This Limited Exception to the NLA

In *Boys Markets*, 398 U.S. at 252-53, the Supreme Court carved out a limited exception to the NLA's prohibition against injunctions in labor disputes. Under *Boys Markets*, a court has jurisdiction to issue injunctive relief where a union strikes over a dispute that both parties are contractually bound to arbitrate. *Id*. at 254. Injunctive relief is only available when: (1) the collective bargaining agreement contains a mandatory arbitration provision; (2) the underlying dispute is arbitrable; (3) the party seeking arbitration is prepared to arbitrate; and (4) issuance of an injunction would be warranted under ordinary principles of equity - whether breaches are occurring and will continue, or have been threatened and will be committed; whether the breaches have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance. *Id.*; *see also Newspaper & Periodical Drivers' & Helpers' Union, Local 921 v. San Francisco Newspaper Agency*, 89 F.3d 629, 632 (9th Cir. 1996).

Since the decision in *Boys Markets*, there have been cases where reverse situations have arisen. *Id.* In a "reverse *Boys Markets*" case, an employer makes changes in areas which are subject to the grievance-arbitration procedure, and the union seeks to enjoin the employer from making the changes until the grievance is resolved through arbitration. *Id.*; *see also Niagra Hooker Emps. Union v. Occidental Chem Corp.*, 935 F.2d 1370, 1377 (2d Cir. 1991) (discussing a "reverse *Boys Markets*" injunction as an injunction against an employer to maintain the status quo in aid of arbitration by prohibit the employer from acting during the pendency of an arbitration). A union's ability to enjoin an employer from acting during the pendency of an arbitration is not absolute. Rather, a union may obtain a reverse *Boys Markets* injunction only when the circumstances are so extreme as to require the injunction in order to avoid rendering the arbitration process "meaningless." The Ninth Circuit further explained the "frustration of arbitration" standard in *Newspaper & Periodical Drivers'*:

> The arbitration process is rendered meaningless only if any arbitral award in favor of the union would substantially fail to undo the harm occasioned by the lack of a status quo injunction. . . . The arbitral process is not rendered "meaningless,"

> however, by the inability of an arbitrator to completely restore the status quo ante or by the existence of some interim damage that is irremediable.
>
> The "frustration of arbitration" standard preserves the effectiveness of the arbitral process which the parties have agreed upon. By requiring more than a minimal showing of injury for the issuance of an injunction, the standard also guards against undue judicial interference with the employer's ability to make business decisions.

89 F.3d at 634 (*citing Niagara Hooker*, 935 F.2d at 1378). The law in this Circuit is clear: courts may issue a reverse *Boys Markets* injunction only on those rare occasions when such an injunction is necessary to "preserve[] the effectiveness of the arbitral process." *Id.* As explained below, Plaintiff can satisfy neither the specialized burden required to obtain a reverse *Boys Markets* injunction, nor the traditional equitable requirements for injunctive relief.

1. *The Union's Request for Injunctive Relief is Improper Because It Seeks to Change the "Status Quo" Rather Than Preserve it.*

Regardless of how the allegations are characterized, the Union's Complaint seeks nothing more than a determination that Bellagio and Signature's health and safety policies are "unreasonable" because they do not satisfy the Union's demands and are therefore inconsistent with the applicable collective bargaining agreements. Conspicuously absent from the Union's Complaint are allegations that Bellagio and Signature have failed to comply with any law[5] or regulation promulgated by any federal, state, or local agency.[6] Instead, the Union gripes that the Southern Nevada Health District is too slow and OSHA has shirked responsibility for inspections and enforcement in non-medical workplaces. ECF No. 1 at 28:17-28. The Union asks that this Court step in and assume responsibility, in the midst of a pandemic, for the areas in which federal and state agencies are supposedly lacking. Once the Court has assumed the responsibilities for promulgating and enforcing health and safety standards, the Union would have the Court order Bellagio and Signature to comply with these standards, which would require Bellagio and

[5] The Union makes indirect allegations regarding an alleged failure to comply with CDC guidance regarding closure of areas used for prolonged periods of time by a sick person, ECF No. 1 at 6:26-7:2, however, the Union entirely misinterprets and misapplies the CDC's guidance.

[6] Even if the Union had made such an allegation, compliance with OSHA or other agency guidelines and regulations falls squarely within those agencies' jurisdiction, rather than the Court's, pursuant to the doctrine of primary jurisdiction. *See, e.g., United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956)).

Signature to go above and beyond what the public health experts have currently determined is appropriate for the hospitality industry. This would constitute a radical change in the "status quo" pending arbitration.[7]

The U.S. District Court for the Southern District of New York recently considered claims similar to the Union's claims here. There, the New York State Nurses Association filed an action much like the Complaint and demanded that a hospital take affirmative health and safety steps while the Nurses Association's grievance was pending. *See N.Y. State Nurses Ass'n v. Montefiore Med. Ctr.*, 2020 U.S. Dist. LEXIS 77659, *6-8 (S.D.N.Y. May 1, 2020). The Court dismissed the association's complaint pursuant to the NLA. As it explained:

> …it lacks subject-matter jurisdiction to grant NYSNA the injunction it seeks. Put simply, [the] … **NYSNA does not seek to preserve the status quo. Instead, it "seeks to create a new status quo that gives the Union everything (and more) it requests in the grievance." Indeed, "Montefiore (not NYSNA) would need to pursue the arbitration to reverse the changes the Court had ordered**." *Id.* Such relief would not be "would not be in 'aid' of arbitration but . . . would be in lieu of it." **Accordingly, granting it would turn the purpose of a reverse *Boys Markets* injunction — to protect the integrity of the arbitral process — on its head**. And it would "unduly interfere" with the hospital's "ability to make business decisions" at a time when the judicial interference could be particularly problematic. The tragic fact that, between now and the conclusion of the arbitration proceedings, nurses at Montefiore may well (indeed, are likely to) contract COVID-19 does not alter that conclusion. First, as the *Niagara Court* held, the arbitral process "is not rendered meaningless by the inability of an arbitrator to completely restore the status quo ante or by the existence of some interim damage that is irremediable." Second, on the existing record — that is, given the measures that Montefiore has been taking, under extraordinary circumstances, to protect its staff and provide patient care — the Court cannot say that the likelihood of infection (let alone death) in the absence of an injunction is so great as to render the arbitral process meaningless. That is not to say that Montefiore cannot or should not do more to protect its nurses than it is; it is merely to say that, under the parties' collective bargaining agreement, that is an issue for the arbitrator, not this Court, to decide.

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[7] Even if this Court were to accept the Union's tortuous reasoning that the Defendants' implementation of health and safety protocols is an "unreasonable" alteration of the "status quo" (which would require the assumption that the "status quo" was a workplace with no such protocols in place), the Ninth Circuit explained that an employer's alteration of the status quo typically does not rise to the level to warrant an exception to the anti-injunctive prohibition of the NLA*:* "[A] strike pending arbitration generally will frustrate and interfere with the arbitral process while the employer's altering the status quo generally will not." *Newspaper & Periodical Drivers'*, 89 F.3d at 634 (citing *Amalgamated Transit Union v. Greyhound Lines, Inc.*, 550 F.2d 1237, 1238-39 (9th Cir. 1977) ("*Greyhound II*")).

Id. (emphasis added and citations omitted). Even under the most compelling circumstances, involving front line health care workers in one of the largest COVID-19 epicenters nationally, an affirmative, status-quo altering injunction cannot be imposed.

2. *The Union's Request for Injunctive Relief Improperly Circumvents the Arbitral Process in Order to Seek Ultimate Relief from the Court.*

The Union's request for injunctive relief is nothing more than a transparent attempt to usurp the role of the arbitrator. The parties have agreed to arbitrate the underlying grievances on July 21-24, 2020, less than a month after the Union filed its Complaint.[8] The issues in the grievances overlap entirely with those presented in the Union's Complaint. *Compare* Ex. 4-5 *with* ECF No. 1. The Union's continued maintenance of its claim for injunctive relief is contrary to the express purpose underlying the reverse *Boys Markets* doctrine. *N.Y. State Nurses Ass'n*, 2020 U.S. Dist. LEXIS 77659 at *6-8. The Union's request for injunctive relief seeks to bypass the arbitrator entirely for an award of the ultimate relief requested from the Court. This is clearly illustrated by the possibility that the arbitrator and the Court could issue inconsistent decisions, both of which would be binding on the parties. This nonsensical result emphasizes the dissimilarities between the Union's request here and the type of requests where pre-arbitral intervention is warranted; for instance, to prevent a potentially unlawful labor strike or enjoin the sale of a business.

Under the undisputed terms of the applicable collective bargaining agreements, the arbitrator has the exclusive responsibility for determining whether a violation of those agreements occurred, and, if such a violation occurred, what the remedy should be. The Union now attempts to have the Court step into the shoes of the arbitrator and jump straight to the award of a remedy. This result would clearly stand "the integrity of the arbitral process [] on its head." *Id.*

[8] Notably, the Union did not file an application for a temporary restraining order in conjunction with its Complaint or soon thereafter despite the allegations of exigent circumstances therein. Accordingly, the parties will have arbitrated this matter before the Court is fully briefed and able to rule on Defendants' pending motions, and months before the Court would decide the matter on the merits (should the Complaint survive dismissal). This further illustrates the frivolity and impropriety of the Union's attempt to involve the Court in a labor dispute as a first resort.

3. *An Injunction is Not Required to Prevent the Arbitration From Devolving Into a Hollow Formality. Indeed, Granting Injunctive Relief to The Union Would Convert the Arbitration Into a Hollow Formality Because the Court's Order Would Completely Resolve the Dispute.*

In the Complaint, the Union alleges that it would suffer injury in advance of arbitration because, if the arbitrator later agrees with the Union's position, "the arbitrator will not be able to fashion a remedy that provides any relief to [Union] members have been unnecessarily exposed to a life-threatening virus in the workplace." ECF No. 1 at 27:3-6. However, under the "empty victory" standard articulated in *Newspaper & Periodical Drivers'*, injunctive relief is only appropriate where the injury sustained would be so irreparable so that "any arbitral award in favor of the union would substantially fail to undo the harm occasioned" by the lack of equitable relief. *Newspaper & Periodical Drivers'*, 89 F.3d at 634. Although there may be some measure of difficulty in devising appropriate compensatory relief, merely because an arbitrator may not be able completely to restore the status quo ante, does not render the arbitral process a hollow formality. *See id*; *see also Columbia Local Am. Postal Workers Union v. Bolger*, 621 F.2d 615, 618 (4th Cir. 1980); *IBEW, Local 1269 v. YP Adver. & Publ'g, LLC*, 2016 U.S. Dist. LEXIS 22036, *5 (N.D. Cal. 2016).

In the context of a global pandemic, this Court must consider the threat after "accounting for the protective measures" Defendants have already implemented. *Valentine v. Collier*, 956 F.3d 797, 801 (5th Cir. Apr. 22, 2020). As detailed above, the health and safety protocol implemented by Defendants is in accordance with all federal, state, and local requirements, was approved by the Nevada Gaming Commission, and continues to be reviewed by OSHA, Clark County, and the Nevada Gaming Control Board. Taking these precautions into account, Plaintiff's alleged injury, the potential exposure to and contraction of COVID-19, is far too speculative to serve as the basis for the extraordinary relief requested. *See Rural Cmty. Workers Alliance v. Smithfield Foods*, 2020 U.S. Dist. LEXIS 78793, *28 (W.D. Mo. May 5, 2020) (concluding that the risk of contracting COVID-19 in the workplace is too speculative to support a finding of irreparable harm); *YP Adver. & Publ'g, LLC*, 2016 U.S. Dist. LEXIS 22036 at *5 (Denying

union's request for injunction against company where the injuries alleged to be irremediable were speculative and unsupported by evidence).

Plaintiff must demonstrate that it will suffer an actual, imminent harm if the injunction is denied. "This is not the same as analyzing whether employees risk exposure if they continue to work, and, unfortunately, no one can guarantee health for workers—or even the general public—in the middle of this global pandemic." *Smithfield Foods*, 2020 U.S. Dist. LEXIS 78793, at *28. But given the significant measures Defendants are taking to protect their workers from COVID-19, Plaintiff can do nothing more than speculate that the spread of COVID-19 at Defendants' properties is inevitable or that Defendants will be unable to contain it if it occurs. *Id.* Thus, Plaintiff has not established an immediate threat of irreparable harm.

D. The Union Cannot State a Claim for Injunctive Relief Because It, As a Matter of Law, Cannot Establish a Likelihood of Success on the Merits

In order to state a valid claim for injunctive relief, Plaintiff must show that it is *likely* to suffer irreparable harm if an injunction does not issue. *Wells Fargo & Co. v. ABD Ins. & Fin. Servs., Inc.*, 758 F.3d 1069, 1071 (9th Cir. 2014) (citing *Winter*, 555 U.S. at 20). As Plaintiff points out, employees and guests are required to wear masks when working or otherwise patronizing Defendants' businesses. As a result, the risk of exposure to and transmission of COVID-19 is substantially reduced. Indeed, a recent study backed by the World Health Organization found that the use of face masks reduced the chance of infection or transmission to just 3% compared with 17% without a mask, a reduction of more than 80%. CHU, D., ET AL., *Physical distancing, face masks, and eye protection to prevent person-to-person transmission of SARS-CoV-2 and COVID-19: a systematic review and meta-analysis*, THE LANCET, Vol. 395, Iss. 10242, pp. 1973-1987 (June 1, 2020) (accessible at https://doi.org/10.1016/S0140-6736(20)31142-9); *see* Rettner, Rachael, *Face masks may reduce COVID-19 spread by 85%, WHO-backed study suggests*, LIVE SCIENCE, June 1, 2020 (accessible at https://www.livescience.com/face-masks-eye-protection-covid-19-prevention.html). In addition, even where masks are not worn, when people maintained at least 3 feet of social distance the chances of infection or transmission is about 3%, compared with 13% when people kept a

distance of less than that. *Id.* The study also found that the risk of infection or transmission was reduced by half for every extra 3 feet of distance (up to 10 feet). *Id.*

Next, Plaintiff alleges that coronavirus can live on various surfaces sometimes for days. However, there is no scientific consensus that infection is possible merely because the virus is present on a surface. As Frank Espers, M.D., an infectious disease expert with the Cleveland Clinic, stated "just because the virus is detectable on a surface doesn't necessarily mean that there's enough there to make someone sick. Scientists are still working to figure out what the infectious dose requirement is to actually cause an infection." *How Long Will Coronavirus Survive on Surfaces?*, Cleveland Clinic, April 24, 2020 (accessible at https://health.clevelandclinic.org/how-long-will-coronavirus-survive-on-surfaces/). Similarly, Peter Chin-Hong, M.D., an infectious disease expert with the University of California, San Francisco, School of Medicine recently stated that "[t]here's little evidence that fomites (contaminated surfaces) are a major source of transmission, whereas there is a lot of evidence of transmission through inhaled droplets." Bai, Nina, *Still Confused About Masks? Here's the Science Behind How Face Masks Prevent Coronavirus*, UCSF, June 26, 2020 (accessible at https://www.ucsf.edu/news/2020/06/417906/still-confused-about-masks-heres-science-behind-how-face-masks-prevent).

Here, Plaintiff has shown, at best, a *possibility* that they will experience irreparable harm. The Supreme Court has stated that the mere "possibility" of harm is insufficient to warrant issuing an injunction. *Winter*, 555 U.S. at 20 (rejecting the Ninth Circuit's earlier rule that the mere "possibility" of irreparable harm, as opposed to its likelihood, was sufficient, in some circumstances, to justify a preliminary injunction). While Defendants recognize the uncertainty and fear that surrounds the COVID-19 pandemic, Defendants' current protocols (including mandatory masks for employees and guests), have evolved as scientists and experts have learned more about the novel virus and given guidance based on the best available evidence to reduce risk of transmission and infection to employees and the public. Plaintiff "must do more than allege imminent harm sufficient to establish standing"; indeed, Plaintiff must "demonstrate *immediate*

threatened injury as a prerequisite to preliminary injunctive relief." *Caribbean Marine Servs. Co.*, 844 F.2d at 674.

E. The Union Cannot State a Claim for Injunctive Relief Because the Balance of Equities and Public Interest Weighs in Bellagio's and Signature's Favor

Plaintiff must show that the balance of the equities tips heavily in its direction. *Prof'l Beauty Fed'n. of Cal. v. Newsom*, No. 2:20-cv-04275-RGK-AS, 2020 U.S. Dist. LEXIS 102019, at *24-25 (C.D. Cal. June 8, 2020). Plaintiff's Complaint does not satisfy this standard. Governor Sisolak has issued appropriate orders to preserve the public health in response to the COVID-19 pandemic including allowing businesses to reopen under certain conditions. Enjoining Defendants from operating in compliance with the Governor's orders undermines those efforts and would disrupt the balance of powers established by our federal system. *See S. Bay United Pentecostal Church v. Newsom*, No. 19A1044, 2020 U.S. LEXIS 3041, 2020 WL 2813056 (May 29, 2020) (Roberts, C.J., concurring) (state officials' decisions in response to this public health crisis "should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people."). On this record, Plaintiff has not met its burden to show that the hardships it suffers *definitively* outweigh the risk of interfering in the State's process for reopening. *Slidewaters LLC v. Wash. Dep't of Labor & Indus.*, No. 2:20-CV-0210-TOR, 2020 U.S. Dist. LEXIS 103350, at *16 (E.D. Wash. June 12, 2020).

F. Plaintiff's Complaint Fails to State a Claim of Nuisance Under Nevada Law

At the outset, Plaintiff's Complaint fails to state a claim for nuisance under NRS 40.140. NRS 40.140(l)(a) defines "nuisance" as "[a]nything which is injurious to health, or indecent and offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." The Nevada Supreme Court has made it clear that viable claims for private nuisance are limited "to substantial interferences with the use and enjoyment ***of real property***." *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330, 130 P.3d 1280, 1288 (2006) (emphasis added); *see Coughlin v. Tailhook Ass'n*, 818 F. Supp. 1366, 1372 (D. Nev. 1993) (NRS 40.140 is a civil cause of action for private nuisance "concerning real property.").

Here, Plaintiff does not claim a substantial interference with its real property. Rather, Plaintiff alleges that Defendants' conduct has increased the risk to Defendants' employees of being exposed to COVID-19 and as such, has "wrongfully and unduly interfered with Plaintiffs' (sic) comfortable enjoyment of their lives." ECF No. 1, ¶ 94. Even if these allegations were true (which they are not), they do not support a cognizable claim for private nuisance because Plaintiff has not alleged that it or its members have property rights or other legally protected interests in Defendants' respective real property upon which Plaintiff's members are employed. *See* RESTAT 2D OF TORTS, § 821E (stating that "liability for private nuisance exists only for the protection of persons having "property rights and privileges," [and] does not comprehend [] rights of a purely contractual nature that are only effective against particular persons."); *Roeder v. Atl. Richfield Co.*, No. 3:11-cv-00105-RCJ-RAM, 2011 U.S. Dist. LEXIS 101870, at *16 (D. Nev. Aug. 30, 2011) (noting the Restatement (Second) is approved by the Nevada Supreme Court).

Further, to the extent Plaintiff is attempting to set forth a public nuisance claim, Plaintiff cannot prevail. "In Nevada, 'there is no private right of action for a public nuisance.'" *Prescott v. Slide Fire Sols., LP*, 410 F. Supp. 3d 1123, 1144 (D. Nev. 2019); *Diamond X Ranch LLC v. Atlantic Richfield Co.*, No. 3:13-cv-00570-MMD-WGC, 2017 U.S. Dist. LEXIS 160845, 2017 WL 4349223, at *11 (D. Nev. Sept. 29, 2017); *Coughlin v. Tailhook Ass'n, Inc.*, 818 F. Supp. 1366, 1371-72 (D. Nev. 1993), *aff'd by Coughlin v. Tailhook Ass'n*, 112 F.3d 1052 (9th Cir. 1997). Accordingly, Plaintiff's Complaint fails to state a claim for nuisance under Nevada law.

G. Bellagio and Signature Should be Awarded Their Attorney's Fees and Costs

This lawsuit is a transparent attempt to circumvent the arbitration process, generate publicity, and create an appearance that Defendants have been cavalier. There is no reason to reiterate the facts set forth above. The Union's allegations simply are not true, and with respect to the merits of the lawsuit, it is not supported by the law. It clearly would require the Court to violate the NLA. There is not a colorable explanation that would allow the Court to sustain the Union's demands without circumventing the limitations imposed by the NLA. The relief sought would render arbitration meaningless. The Union has refused Defendants' repeated attempts to engage it in the formal and informal dispute resolution procedures set forth in the collective

bargaining agreement. And perhaps most startlingly, the Union has not made any meaningful settlement efforts required by the NLA, pre or post Complaint. Indeed, as noted above, the Defendants learned of the Union's concern via a press release.

To summarize, the Union made no effort to serve Defendants nor did it seek expedited relief as indicated in the Complaint. It has violated its evidence disclosure obligations under the CBAs and the NLRA. And it ignored repeated attempts to scheduled Boards of Adjustment. Had Plaintiff acted in good faith by complying with the terms of the collective bargaining agreement, or at least expressing a plausible legal basis for its refusal, Defendants would not have to incur the needless time and expense related to this Motion to Dismiss.

When a party acts in bad faith or in a vexatious, wanton or oppressive manner, this Court has the authority to assess attorney's fees pursuant to 28 U.S.C. § 1927 and through its own inherent power. *See Schutts v. Bentley Nevada Corp.*, 966 F. Supp. 1549, 1558-61 (D. Nev. 1997) (internal citation omitted); *Hubbard v. Yardage Town, Inc.*, 2005 WL 3388146, at *10 (S.D. Cal. Dec. 2, 2005). A frivolous or bad faith attempt to circumvent arbitration – which is exactly what has occurred here – is considered sanctionable conduct. *See United Food & Commercial Workers Union, Locals 197 v. Alpha Beta Co.*, 736 F.2d 1371, 1381 (9th Cir. 1984) ("[T]he award of fees is appropriate when a party frivolously or in bad faith refuses to submit a dispute to arbitration or appeals from an order compelling arbitration."); *Road Sprinkler Fitters Local Union No. 669 v. Cosco Fire Protection, Inc.*, 363 F.Supp.2d 1220, 1226 (C.D. Cal. 2005) (deciding attorney's fees are warranted when a party frivolously or in bad faith refused to submit a dispute to arbitration).[9]

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[9] Defendants will submit all necessary bills and fee related information as required by FCRP 54 and L.R. 54-14 when briefing on this Motion is complete.

IV. CONCLUSION

For each and all of the reasons stated above, Bellagio and Signature respectfully request that the Court grant their Motion to Dismiss and award Bellagio and Signature their reasonable attorneys' fees and costs incurred in connection with the same.

DATED this 7th day of July, 2020.

JACKSON LEWIS P.C.

/s/ *Paul T. Trimmer*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Jackson Lewis P.C., and that on this 7th day of July, 2020, I caused to be served via the Court's CM/ECF Filing, a true and correct copy of the foregoing **DEFENDANTS THE SIGNATURE CONDOMINIUMS, LLC AND BELLAGIO, LLC'S MOTION TO DISMISS OR, ALTERNATIVELY, MOTION FOR JUDGMENT ON THE PLEADINGS** properly addressed to the following:

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