

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 69802

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LAS VEGAS SANDS CORP., A NEVADA CORPORATION;
CHINA LTD., A CAYMAN ISLANDS CORPORATION;
ADELSON, IN HIS INDIVIDUAL AND REPRESENTATIVE CAPACITY;
AND VENETIAN MACAU LTD., A MACAU COPORATION

Petitioners,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE
HONORABLE DAVID B. BARKER, DISTRICT JUDGE

Respondents,

and

STEVEN C. JACOBS,

Real Party in Interest.

**ANSWER TO PETITION FOR WRIT OF PROHIBITION OR
MANDAMUS RE ORDERS DENYING MOTION TO DISQUALIFY
JUDGE ELIZABETH GONZALEZ WITHOUT A HEARING**

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) that must be disclosed. These representations are made in order that Justices of this Court may evaluate possible disqualification or recusal.

PISANELLI BICE PLLC and CAMPBELL & WILLIAMS are the only law firms whose partners or associates have or are expected to appear for Real Party in Interest Steven C. Jacobs.

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ISSUE PRESENTED

Can a party with well-documented intent of forum shopping attack a judge in the media and then use its own conduct as grounds to claim bias?

1 **I. INTRODUCTION**

2 Faced with this Court's rejection of prior attempts at case reassignment, Las
3 Vegas Sands Corp. ("LVSC")¹ sought to generate adverse media coverage of District
4 Court Judge Elizabeth Gonzalez. When the fingerprints of its Chairman, Sheldon
5 Adelson ("Adelson"), on that campaign came to light, LVSC then claimed that the
6 self-generated media coverage now served as a basis for accomplishing what this
7 Court had on three prior occasions rejected: replacement of a judge that has presided
8 over a case for over five years, that has entered multiple orders over litigation
9 misconduct and thereby delay a trial date that Petitioners are desperate to avoid.

10 These tactics are neither novel nor legitimate. It is hardly unique that an
11 intransigent litigant with a history of non-compliance wants a do-over in front of an
12 uninformed decision maker. LVSC's smear is not just upon one the presiding judge;
13 it is an assault upon the entire judicial process. If it works here, this Court will have
14 condoned a clear playbook for future judge-shopping by ill-tempered litigants. No
15 reasonable observer could call the District Court's partiality into question, particularly
16 considering the actual record in this case and the established practices of Adelson and
17 the companies he controls. The latest request to disqualify Judge Gonzalez should
18 be denied.

19 **II. FACTS CONFIRMING WHY THE PETITION SHOULD BE DENIED.**

20 **A. The District Court Properly Addresses Reprehensible Discovery
21 Tactics.**

22 As Judge Barker lacked familiarity with the true impetus of the Motion to
23 Disqualify – adverse rulings necessitated by the Defendants' long-standing discovery
24 misconduct – Jacobs briefly recounted some of that history to place LVSC's Motion
25 for Reconsideration into proper context. (PA2638S-2651S.) To put it simply, the

26 ¹ Jacobs disputes the standing of Sands China Ltd., Sheldon G. Adelson, and
27 Venetian Macau Ltd. to be Petitioners. They were not moving parties in the Motion
28 to Disqualify. (PA1975-2094; PA2319-64.) Thus, they have not raised a challenge
to Judge Gonzalez's impartiality and cannot do so for the first time before this Court.

1 claims of "bias" are nothing more than the cries of unprincipled litigants who had to
2 account for unethical tactics. Jacobs will not chronicle again for this Court the near
3 two-years of deception in discovery by the Defendants, and principally around their
4 misrepresentations as to the location of evidence and the applicability of a foreign
5 blocking statute known as the Macau Personal Data Privacy Act ("MPDPA"). When
6 the truth finally came to light, the District Court ordered an evidentiary hearing.
7 And, after hearing multiple days of testimony, the District Court entered an order
8 (the "September 2012 Order"), finding that the "lack of disclosure appears to the
9 Court to be an attempt by Defendants to stall the discovery, and in particular, the
10 jurisdictional discovery in these proceedings." (SA007.)

11 The District Court continued, "given the number of occasions the [MPDPA]
12 and the production of ESI by Defendants was discussed there can be no other
13 conclusions than that the conduct was *repetitive and abusive*." (*Id.* (emphasis
14 added).) The District Court expressly found that the Defendants changed corporate
15 policy regarding access to information "during the course of this ongoing litigation"
16 to "prevent the disclosure of the transferred data as well as other data." (SA006.)
17 Because of the false representations over many months, the District Court found that
18 LVSC, SCL and their respective agents acted with the "*intention to deceive the*
19 *Court*." (SA0008 (emphasis added).)

20 Because the MPDPA served as the tool for this deception, the District Court's
21 principal sanction precluded them from "raising the [MPDPA] as an objection or as
22 a defense to admission, disclosure or production of any documents" for purposes of
23 jurisdictional discovery or the yet-to-be-held jurisdictional hearing. (*Id.*) Notably
24 neither LVSC nor Sands China raised any challenge to that sanctions order.

25 **B. This Court Upholds Additional Sanctions.**

26 Unfortunately, the first sanctions did not prove adequate to dissuade further
27 concealment. As the District Court learned at yet another evidentiary hearing, LVSC
28

1 and Sands China continued their lack of compliance. The District Court
2 subsequently found that their use of the MPDPA was even more contradictory and
3 inconsistent than previously known.

4 Following a second evidentiary hearing, the District Court imposed additional
5 sanctions, precluding Sands China from calling witnesses or introducing evidence at
6 the jurisdictional hearing. (SA0570.) It also imposed a rebuttable adverse inference
7 that all of the improper MPDPA redactions supported Jacobs' assertion of personal
8 jurisdiction. It ordered Sands China to pay \$250,000 to various legal charities and
9 Jacobs' attorneys' fees and costs. (*Id.*)

10 Sands China sought *another* writ petition to review these sanctions and to stay
11 the jurisdictional hearing. (Supreme Court Case No. 67576.) As part of its writ
12 petition, Sands China asked this Court to reassign the case, claiming that "[t]he
13 district court's punitive and grossly unjust sanctions order is the most recent in a long
14 history of rulings, comments, and findings that create an objectively reasonable basis
15 for questioning the court's impartiality, and its ability to effectively manage this
16 litigation." (SA0626.) Then, as now, Petitioners pointed to the number of writ
17 petitions as a basis to reassign the case. (*Id.*) They complained about supposedly
18 "unreasonable" and "burdensome" orders and asserted that the Court had
19 "pre-judged every major issue against SCL, including, of course, the March 6, 2015
20 sanctions decision." (SA0627-28.)

21 On review, this Court only stayed the monetary sanctions and allowed the
22 jurisdictional hearing to proceed, upholding the evidentiary sanctions the District
23 Court imposed. (SA0634-36.) This Court did not even dignify the improper recusal
24 request with a response.

25 **C. This Court Affirms Specific Jurisdiction and Denies Case**
26 **Reassignment Yet Again.**

27 Finally, after five years of Defendants' stalling, the jurisdictional hearing
28 proceeded in April and May 2015. The District Court found Sands China subject to

1 general, specific, and transient personal jurisdiction. (SA0637-75.) Sands China
2 took yet another writ challenging the District Court's jurisdictional findings. Once
3 more, Sands China asked that the case be reassigned. (SA0732-34.) LVSC and
4 Adelson made the same claim in their related writ proceeding regarding the trial
5 date. (SA0760.)

6 Ultimately, this Court upheld the District Court's assertion of specific
7 jurisdiction over Sands China and affirmed all of the evidentiary sanctions with the
8 exception of the recipients of the monetary sanctions. (SA0785-93.) The Court
9 upheld the amount of the sanction (\$250,000) but ruled that the District Court could
10 not order that amount to be given to a particular nonprofit organization. (SA0789-
11 90.)

12 And yet again, this Court denied the request to force recusal of the
13 District Court. It held "[b]ecause the district court's rulings and the district court's
14 comment that Sands China has identified do not suggest bias, we deny the request."
15 (SA0791-92.) Additionally, it noted that the claim of bias had also been waived
16 because no timely affidavit or motion had been filed even raising the issue. (*Id.*)
17 (citing *Minor v. State*, 86 Nev. 691, 694, 476 P.2d 11, 13 (1970)).

18 **D. Petitioners Create Adverse Media Coverage.**

19 But, this Court's ruling did not stop the forum shopping attempts. Contrary to
20 the current spin by Petitioners, it is not Jacobs that sought to gin up media coverage
21 about this case. That has been the province of the Petitioners, including the smear
22 campaign that they undertook against Jacobs back in 2011 which gives rise to his
23 claims for defamation. And, because that long-standing campaign has continued,
24 the Defendants' contacts with the media in perpetuating their defamation against
25 Jacobs has long been the subject of court-approved discovery. Indeed, Petitioners
26 themselves have been entitled to inquire into Jacobs' contacts with the media up to
27 the date of Adelson's defamatory statement in the Wall Street Journal on March 16,
28 2011 as part of their purported "invited defamation" defense. (*See* SA0781.)

1 Thus, it would come as no surprise that Jacobs would inquire of various
2 defense witnesses as to contacts they have had with media sources concerning Jacobs
3 or this case. It is in that context that Jacobs uncovered the fingerprints of LVSC's
4 general counsel and Adelson's son-in-law, Patrick Dumont, on a sham news article
5 that appeared in the New Britain Herald drafted to attack the District Court's fairness.
6 *See* Erik Wemple, *Report for Connecticut's Bristol Press Resigns, and Why that*
7 *Matters*, Dec. 24, 2015 available at [https://www.washingtonpost.com/blogs/erik-](https://www.washingtonpost.com/blogs/erik-wemple/wp/2015/12/24/reporter-for-connecticuts-bristol-press-resigns-and-why-that-matters)
8 [wemple/wp/2015/12/24/reporter-for-connecticuts-bristol-press-resigns-and-why-](https://www.washingtonpost.com/blogs/erik-wemple/wp/2015/12/24/reporter-for-connecticuts-bristol-press-resigns-and-why-that-matters)
9 [that-matters](https://www.washingtonpost.com/blogs/erik-wemple/wp/2015/12/24/reporter-for-connecticuts-bristol-press-resigns-and-why-that-matters); (*See* PA2127-28.) Media reported that "while Adelson was reportedly
10 in negotiations to buy the *Review-Journal*, several of the paper's journalists were
11 ordered to monitor Gonzalez and two other Clark County judges." (PA2121.)

12 The article, partly fabricated and partly plagiarized, was written by Michael
13 Schroeder under the fake name "Edward Clarkin." Adelson's relationship with
14 Schroeder goes back more than a decade. (PA2644S.) According to Adelson's
15 longtime confidant, attorney, and LVSC Board Member, Charles Forman
16 ("Forman"), Schroeder served as one of Adelson's consultant in the creation of
17 Adelson's newspaper in Israel. (*Id.*) Dumont admits meeting Schroeder in person
18 at LVSC's offices in December 2015. (*Id.*)

19 It is the attempt to conceal the involvement of Dumont and LVSC's general
20 counsel in continuing the media smear against Jacobs that led to a discovery dispute.
21 Dumont's counsel continually instructed the witness not to answer questions about
22 Dumont's communications with the media. (*See* PA1944-47.) Of course, those
23 instructions were improper as there were no claim of privilege or pre-existing order.
24 To the contrary, the Court had previously ruled that the Defendants' contacts with
25 media sources were discoverable in light of Jacobs' claims of defamation and
26 damage.

27 At a scheduled hearing the next morning, Jacobs brought these improper
28 instructions to the attention of the District Court, as Dumont's deposition was

1 scheduled to continue that morning. As the District Court recognized after
2 reviewing the deposition transcript, "[t]he question was about communications about
3 Jacobs, not communications about [the District Court]." (PA1946.) Jacobs' inquiries
4 were not limited solely to Dumont's discussions with the media. Nonetheless,
5 Dumont's counsel instructed Dumont not to answer the questions based upon
6 relevancy objections. (*See* PA1944-47.)

7 Thinking that they had found a new way to attack the District Court, LVSC
8 as well as Dumont now asserted that the District Court should recuse itself from
9 ruling on whether Dumont should have to answer questions about his
10 communications with the media. (PA1946.) The District Court stated that any
11 motion to recuse would have to be made in writing and the District Court would not
12 entertain an oral motion. (*Id.*) (PA1948.)²

13 Unremarkably, the District Court noted the impropriety of issuing instructions
14 not to answer questions, particularly on matters – the Defendants' attempts to smear
15 Jacobs in the media – that were long-recognized as relevant. The District Court again
16 noted that Dumont's statements about Jacobs are plainly relevant and discoverable,
17 even those statements about the litigation to the extent those discussions were about
18 Jacobs himself. (PA1951; PA1958 ("[T]o the extent that the question is one that
19 seeks communications your client Mr. Dumont, who is an employee of Las Vegas
20 Sands, had with the media or any other third party about Mr. Jacobs I do not see an
21 issue related to that with me, and I do not have any uncertainty in my ability to fairly
22 resolve that.").)

23 In an abundance of caution, the District Court established a procedure
24 whereby any objections to questions "that relate to the litigation, as opposed to Mr.
25 Jacobs, those disputes . . . will be directed to Discovery Commissioner Bulla, and
26 any appeals. . . .will go to Judge Togliatti." (PA1947-48.) The District Court noted

27 ² Dumont never filed a motion to recuse. Instead, he filed a "Motion to Transfer
28 Issue." (PA2095-2204.)

1 the clear distinction between questions about communications discussing Jacobs and
2 communications discussing this litigation generally. (PA1948; PA1962 ("I have
3 given you a two-pronged way of addressing issues that come up on Mr. Dumont's
4 communication to third parties, depending upon whether it is a question framed
5 related to Mr. Jacobs or if it is a question that is framed related to the litigation.").)

6 But unremarkably, the District Court's protocol proved unnecessary once the
7 improper instructions to not answer were halted. Dumont answered the questions
8 surrounding his involvement in generating adverse media coverage, including
9 acknowledging his receipt of a draft of the article at issue. It is notable how the
10 discovery process works when the law is simply followed.

11 **E. LVSC Moves to Disqualify the District Court and is Rejected — Twice**

12 Even though additional disputes related to Dumont's media contacts did not
13 occur, and the District Court has made hundreds of pretrial rulings in this matter,
14 LVSC filed a Motion to Disqualify the District Court with the accompanying
15 affidavit under NRS 1.235. (PA1975-2094.) Jacobs moved to strike LVSC's affidavit
16 for cause as untimely, pointing out that motions based upon NRS 1.235 are improper
17 if a district court has ruled upon any pretrial motions. (PA2255-60.) Judge Gonzalez
18 submitted a Declaration in response to LVSC's Motion to Disqualify under NRS
19 1.235(5)(b). (PA2212-32.)

20 The Honorable Chief Judge David Barker of Department 18 denied LVSC's
21 Motion. (PA2291-96.) Judge Barker determined that Judge Gonzalez's references to
22 the media coverage of the case "does not demonstrate an 'interest' for purposes of an
23 implied bias analysis." (PA2292.) Judge Barker also ruled that Judge Gonzalez's
24 statements to *Time* and conversations with members of the media in her courtroom
25 do not adversely reflect on Judge Gonzalez's appearance of impartiality. (PA2293-
26 94.) Judge Barker highlighted that Judge Gonzalez did not make any case specific
27 comments — specifically declining to do so — and there is no Nevada authority that
28 prohibits judges from talking to the media about non-case matters. (PA2293-94.)

1 Judge Barker specifically upheld the established procedure utilizing
2 Discovery Commissioner Bulla and Judge Togliatti to resolve disputes involving
3 Dumont's communications with third parties (including the media) about the
4 litigation while Judge Gonzalez would continue to preside over disputes about
5 communications with third parties about Jacobs (and other witnesses). (PA2295.)
6 Judge Barker concluded that "Defendant's argument that there are reasonable
7 concerns about Judge Gonzalez's impartiality is unpersuasive . . . This Court finds
8 that a reasonable person knowing all the facts would not harbor reasonable doubts
9 about Judge Gonzalez's impartiality with respect to any issues raised in Defendant's
10 motion." (PA2295-96.)

11 True to form, LVSC then attacked *Judge Barker*. LVSC accused him of
12 depriving it of a "statutory right to a hearing" and robbing it of the chance to file a
13 reply brief setting forth the District Court's "disparate treatment," "outright
14 hostility," and "campaign to justify it earlier [sanction] ruling . . ." (PA2319-20.)
15 But, he LVSC did not actually seek reconsideration. Its motion now asserted a host
16 of completely different grounds, unrelated to the media coverage, in seeking Judge
17 Gonzalez's disqualification.³

18 Judge Barker correctly ruled that LVSC was not seeking reconsideration, it
19 was raising entirely new arguments which also lacked legal merit. (PA2676-81.)
20 First, Judge Barker noted that LVSC had indeed received a "hearing" on its motion
21 as he had considered all submissions. Furthermore, LVSC's complaints about filing
22 a reply brief rang hollow because the issues it wanted to raise – perceived "history
23

24 ³ Jacobs opposed the Motion for Reconsideration, and Judge Gonzalez filed
25 another Declaration in response. (PA2390-2632; PA2638S-2651S.) For the first time
26 in its reply brief seeking reconsideration, LVSC submitted a "Declaration of Leslie
27 Abramson," a purported "expert" on legal ethics from Kentucky. (PA2652-63.)
28 Highlighting lack of serious substance, the Declaration confirmed that purported
expert had no actual knowledge of the long history of this case and did not even
consider any of Jacobs' submissions in the District Court. (PA2654.)

1 of uneven treatment" – was not part of its original motion and it was improper to do
2 so in the context of a motion to reconsider. (PA2678.) Judge Barker also noted that
3 this Court had rejected Petitioners' other attempts to obtain a case reassignment, on
4 these very same issues. (PA2679.)

5 **III. REASONS WHY THE WRIT SHOULD NOT ISSUE.**

6 **A. Applicable Standard.**

7 Writ relief is an extraordinary remedy and the decision to entertain a writ
8 petition lies within this Court's discretion. *Haley v. Dist. Ct.*, 128 Nev. Adv. Op. 16,
9 273 P.3d 855, 858 (2012). In such extraordinary cases, mandamus is the appropriate
10 method to seek review of a decision denying a motion to disqualify a judge. *Ivey v.*
11 *Dist. Ct.*, 129 Nev. Adv. Op. 16, 299 P.3d 354, 357 (2013). "A writ of mandamus
12 is available to compel the performance of an act that the law requires as a duty
13 resulting from an office, trust, or station or to control an arbitrary or capricious
14 exercise of discretion." *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 124 Nev.
15 193, 197, 179 P.3d 556, 558 (2008) (footnotes omitted).

16 This Court generally will not hear writ proceedings related to the
17 performance of a discretionary act. *Bd. of Cty. Comm'rs of Clark Cty. v. Las Vegas*
18 *Disc. Golf & Tennis, Inc.*, 110 Nev. 567, 570 n.5, 875 P.2d 1045, 1047 n.5 (1994).
19 And a chief judge's decision to deny a motion to disqualify another district court
20 judge is reviewed for abuse of discretion. *Rivero v. Rivero*, 125 Nev. 410, 438, 216
21 P.3d 213, 233 (2009).

22 **B. Judge Barker Did Not Abuse His Discretion Denying the Motions to**
23 **Disqualify**

24 ***1. The Nevada Code of Judicial Conduct Does Not Support***
25 ***Disqualification***

26 Nevada Code of Judicial Conduct Rule 1.2 requires a judge to "act at all times
27 in a manner that promotes public confidence in the independence, integrity, and
28 impartiality of the judiciary and shall avoid impropriety and the appearance of

1 impropriety." Comments 5 to Rule 1.2 explains that "[t]he test for appearance of
2 impropriety is whether the conduct would create in reasonable minds a perception
3 that the judge violated this Code or engaged in other conduct that reflects adversely
4 on the judge's honesty, impartiality, temperament, or fitness to serve as a judge."
5 NCJC 1.2 cmt. 5. Similarly, a judge should only be disqualified when her
6 "impartiality might reasonably be questioned. . . ." NCJC 2.11(A).

7 But, "[a] judge is presumed to be impartial, and the party asserting the
8 challenge carries the burden of establishing sufficient factual grounds warranting
9 disqualification." *Rippo v. State*, 113 Nev. 1239, 1248, 946 P.2d 1017, 1023 (1997).
10 Requests to disqualify must be based upon actual facts, not rank speculation. *Id.*
11 The reason for this requirement is obvious: "recusal on demand would put too large
12 a club in the hands of litigants and lawyers, enabling them to veto the assignment
13 of judges for no good reason." *In re United States*, 158 F.3d 26, 30 (1st Cir. 1998).

14 The dangers associated with party-driven recusal are heightened with
15 disqualification requests based upon media coverage. "[I]t is well settled that prior
16 written attacks upon a judge are legally insufficient to support a charge of bias or
17 prejudice on the part of the judge toward the author of such a statement." *United*
18 *States v. Bray*, 546 F.2d 851, 858 (10th Cir. 1976). "[A] judge considering whether
19 to disqualify [her]self must ignore rumors, innuendos, and erroneous information
20 published as fact in the newspapers To find otherwise would allow an
21 irresponsible, vindictive or self-interested press information and/or an irresponsible,
22 misinformed or careless reporter to control the choice of judge." *United States v.*
23 *Greenough*, 782 F.2d 1556, 1558 (11th Cir. 1986) (quotation omitted). Parties with
24 access to, or ownership of, media outlets should not be able to manufacture
25 arguments of bias in order to "judge-shop." *See In re Aguinda*, 241 F.3d 194, 206
26 (2d Cir. 2001). Otherwise, "parties who are sophisticated in their dealings with the
27 press might then be able to engineer a judge's recusal for their own strategic reasons."
28 *United States v. Bayless*, 201 F.3d 116, 129 (2d Cir. 2000).

1 It is entirely consistent with the Nevada Code of Judicial Conduct for a judge
2 to "initiate and participate in community outreach activities" — including non-case
3 specific comments to the media — "for the purpose of promoting public
4 understanding of and confidence in the administration of justice." *See* NCJC 1.2 cmt.
5 6; *Ex parte Monsanto Co.*, 862 So. 2d 595, 631 (Ala. 2003) (stating that judges
6 should encourage media to inquire of them because "there is no one other than the
7 judge who is in a position to give a detailed and impartial explanation of the case to
8 the news media.") (quotations omitted). Court's routinely hold that public remarks
9 by a trial judge concerning the factual or procedural aspects of a case that are based
10 on what the judge had observed in the courtroom during the course of the litigation,
11 provide no basis for recusal or disqualification. *See Ex Parte Monsanto Co.*, 862
12 So. 2d. at 631-32 (collecting cases from both federal and state appellate courts)

13 Here, Judge Barker correctly applied the Nevada Code of Judicial Conduct
14 and recognized that Judge Gonzalez's generic comments to the media could not
15 create an appearance of impropriety or call her impartiality into question. (PA2292-
16 94.) Judge Gonzalez's comments to *Time Magazine* did not discuss this litigation or
17 any parties to this case. On the contrary, Judge Gonzalez specifically refused and
18 declined to comment on anything about this case. The *Time* article states, "Gonzalez
19 says she can't discuss Adelson or the sale of the *Review-Journal* because of the
20 ongoing case." (PA2122.) Judge Gonzalez even refused to answer whether Adelson
21 ate the M&Ms that she keeps on the witness stand to put witnesses at ease. (*Id.*)

22 Another article is unequivocal, "[w]hen contacted for comment Thursday,
23 Gonzalez said only that she didn't mind reporters or anyone else sitting in her
24 courtroom, which is open to the public, *but declined to comment further because the*
25 *issue involve pending cases.*" (PA2129 (emphasis added).) The articles'
26 representations were corroborated by Judge Gonzalez's Declarations. She averred
27 that she told reporters that she should not discuss any litigant or case. (PA2212.)
28 Judge Barker considered the media articles and the information provided by Judge

1 Gonzalez's Declarations. (PA2292-94.) Judge Barker did not, as Petitioners now
2 falsely smear him, rest his conclusions solely upon "the challenged judge's
3 subjective belief(s)." (Pet. at 15.) After all, remarks "reflecting even strong views
4 about a defendant will not call for a judge's recusal so long as those views are based
5 on [o]wn observations during the performance of his [or her] judicial duties." *United*
6 *States v. Barry*, 961 F.2d 260, 263 (D.C. Cir. 1992).

7 Judge Barker did not err by finding that Judge Gonzalez does not have an
8 "interest" in the media coverage and Petitioners' failed to meet their burden of
9 establishing that her comments give rise to the appearance of impropriety. (PA2292-
10 94.) Indeed, Petitioners did not invoke NCJC 2.10 before Judge Barker or this Court.
11 NCJC 2.10(A) prohibits judges from making "any public statement that might
12 reasonably be expected to affect the outcome or impair the fairness of a matter
13 pending or impending in any court, or make any nonpublic statement that might
14 substantially interfere with a fair trial or hearing." Judge Barker correctly noted that
15 "Defendant's omission of any reference to disqualification under NCJC 2.10 serves
16 as its acknowledgment that Judge Gonzalez's media comments are not judicial
17 statement on this pending case." (PA2293.)

18 ***2. Judge Gonzalez's Rulings Do not Demonstrate Bias or Prejudice***

19
20 Re-deploying to its prior tactics, LVSC returns to claiming that every adverse
21 ruling a District Court makes is evidence of bias, as opposed to being a well-
22 considered outcome that it simply dislikes. For good reason, the law recognizes
23 that "rulings and actions of a judge during the course of official judicial proceedings
24 do not establish legally cognizable grounds for disqualification." *Matter of*
25 *Dunleavy*, 104 Nev. 784, 789, 769 P.2d 1271, 1275 (1988). Bias sufficient to
26 warrant disqualification "must 'stem from an extrajudicial source and result in an
27 opinion on the merits on some basis other than what the judge learned from his
28 participation in the case.'" *Id.* at 790, 769 P.2d at 1275 (quoting *United States v.*

1 *Beneke*, 449 F.2d 1259, 1260–61 (8th Cir. 1971)).

2 As the United States Supreme Court has held, "opinions formed by the judge
3 on the basis of facts introduced or events occurring in the course of the current
4 proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality
5 motion unless they display a *deep-seated favoritism or antagonism that would*
6 *make fair judgment impossible.*" *Liteky v. United States*, 510 U.S. 540, 555 (1994)
7 (emphasis added). "[N]either bias nor prejudice refer[s] to the attitude that a judge
8 may hold about the subject matter of a lawsuit." *Cameron v. State*, 114 Nev. 1281,
9 1283, 968 P.2d 1169, 1170 (1998)).

10 *First*, while criticizing the deposition procedure implemented to address
11 Dumont's communications about this litigation, LVSC complains about alleged
12 "inconsistent" rulings on deposition objections between this case and the *Okada*
13 case with regard to relevancy objections made by counsel. (Pet. at 19-20.) Of
14 course, LVSC does not present the actual deposition transcript from the *Okada* case.
15 Instead, it cites to portions of a hearing transcript and counsel's self-serving
16 characterizations of the *Okada* deposition. (Pet. at 20 (citing PA2361:11-13;
17 PA2363:10-16).)

18 Even those out of context statements support the District Court. At the *Okada*
19 hearing, Judge Gonzalez explained that "Mr. Campbell allowed the witness to
20 answer on a question-by-question basis, rather than asserting an entire block to your
21 request." (PA2363.) At Dumont's deposition, out-of-state counsel improperly
22 blocked every media related question with blanket relevancy objections. In any
23 event, perceived inconsistent rulings are not indicative of judicial bias and should
24 not result in disqualification. *Creech v. Hardison*, No. CV 99-0224-S-BLW, 2010
25 WL 1338126, at *23 (D. Idaho Mar. 31, 2010).

26 *Second*, LVSC protests that the District Court did not hold Jacobs in
27 contempt when he sought reconsideration of an oral ruling related to his private
28 medical records once a written order was entered. (Pet. at 20-21.) LVSC claims it

1 was unfair not to hold Jacobs in contempt of an oral ruling – which the District
2 Court later correctly reconsidered – when it sanctioned Sands China for failing to
3 produce documents that should have been produced years earlier pursuant to a 2012
4 oral directive. (Pet. at 20-23.)

5 LVSC fails to grasp the difference between a discovery sanction and
6 contempt. *See Div. of Child & Family Servs., Dep't of Human Res., State of Nevada*
7 *v. Eighth Jud. Dist. Ct.*, 120 Nev. 445, 455, 92 P.3d 1239, 1246 (2004) ("We further
8 conclude that the district court's oral release order was ineffective, and
9 consequently, it could not serve as a basis for the subsequent contempt order.").
10 "An order on which a judgment of contempt is based must be clear and
11 unambiguous, and must spell out the details of compliance in clear, specific and
12 unambiguous terms so that the person will readily know exactly what duties or
13 obligations are imposed on him." *Id.* at 454-55, 92 P.3d at 1245 (quotations
14 omitted). In contrast, an oral admonition regarding discovery is sufficient to impose
15 discovery sanctions. *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787
16 P.2d 777, 779 (1990).

17 Thus, Sands China was properly sanctioned for failing to produce documents
18 in unredacted form in compliance with the District Court's December 18, 2012 oral
19 order. Indeed, this Court upheld that sanction. Conversely, Jacobs could not be in
20 contempt of a non-existent order. And once an order was actually entered, Jacobs
21 successfully sought reconsideration based upon the Defendants' improper
22 overreaching. (PA1657-66 ("Sometimes when you overreach, it causes things to go
23 the other way.")) In light of the actual law, the District Court's rulings in both
24 matters were entirely accurate.

25 *Third*, LVSC faults the District Court for rejecting Sands China's attempt to
26 force Jacobs to sign an MPDPA consent for the release of documents in Macau
27 where his name appears. (Pet. at 24.) However, this Court has already determined
28 that "the mere existence of an applicable foreign international privacy statute does

1 not itself preclude Nevada district courts from ordering foreign parties to comply
2 with Nevada discovery rules. Thus, civil litigants may not utilize foreign
3 international privacy statutes as a shield to excuse their compliance with discovery
4 obligations in Nevada courts." *Las Vegas Sands v. Eighth Jud. Dist. Ct.*, 130 Nev.
5 Adv. Op. 61, 331 P.3d 876, 877 (2014). A foreign privacy statute "is *only* relevant
6 to the imposition of sanctions for a party's disobedience, and not in evaluating
7 whether to issue the discovery order." *Id.* at 879 (adopting the test of the Tenth
8 Circuit Court of Appeals).

9 Therefore, Sands China has the obligation to produce all discoverable
10 documents from Macau. Moreover, the form of consent proposed by Sands China
11 made Jacobs subject to Macanese law. (PA2244.) LVSC fails to disclose to this
12 Court — and initially omitted from the District Court — that Sands China has taken
13 active steps trying to get Jacobs criminally prosecuted in Macau simply for filing
14 this lawsuit and challenging Adelson. (PA2313S-14S; PA2318S-d-18S-ww.)

15 The District Court rightly refused to require Jacobs to sign a consent under
16 Macau law, but nonetheless ruled that it would enter an order finding that Jacobs
17 waived the ability to object to any release of his personal information by bringing
18 this suit. (PA2707.) The District Court held that Jacobs placed those documents in
19 issue by bringing the suit. (*Id.*)

20 *Fourth*, LVSC claims that the District Court is biased because it ordered
21 Adelson to submit to depositions during merits discovery for seven days of seven
22 hours. (Pet. at 26-27.) To trump up this claim, LVSC counts the number of hours
23 that Adelson testified during jurisdictional discovery, at the evidentiary hearing on
24 jurisdiction, and *during a Florida proceeding that Adelson filed against Jacobs.*
25 (Pet. at 26.)

26 In another telling omission, Petitioners fail to disclose how they successfully
27 argued that discovery limitations started fresh during merits discovery. After the
28 jurisdictional hearing, Jacobs objected to the excessive number of interrogatories

1 served by Sands China. He argued that interrogatories served during jurisdictional
2 discovery counted toward the 40 allowed under NRCP 33. (SA0794-829.) At the
3 Defendants' urging, the District Court overruled Jacobs, and ruled that "[t]he
4 number of interrogatories started anew when merits discovery opened." (SA0843.)
5 The District Court ruled consistently with respect to Adelson's deposition.
6 Defendants had the opportunity to depose Jacobs during jurisdictional discovery but
7 made the strategic decision not to do so to avoid creating an official record of all of
8 their improprieties.⁴

9 Most egregiously, Petitioners do not inform this Court that the District Court
10 also required Jacobs to sit for an equal amount of time for his deposition. Petitioners
11 moved for additional time to conduct Jacobs' deposition and they were first granted
12 seven days of seven hours of testimony from Jacobs, after claiming that they
13 deserved 10 days. (SA0930-31.) Petitioners completed those seven days of Jacobs
14 deposition and did not decry that it was "arbitrary in the extreme," "irrational,"
15 "punitive," or "wholly disproportionate." (Pet. 26-30.) Like Defendants, Jacobs
16 properly filed a motion for additional time under NRCP 30 to conduct Adelson's
17 deposition and he was awarded the same amount of time. (PA2714.) Only in the
18 Adelson bubble is being treated "equally" evidence of bias.

19 *Fifth*, the District Court's comments do not demonstrate partiality. The
20 District Court's frustration with Petitioners' continued misconduct and stalling over
21 the last *five and half years* is understandable. And while excited utterances in the
22 midst of contentious cases should be avoided by the District Court (and counsel),
23 the record does not support that the District Court has a "deep seated favoritism or
24 antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555;

25 ⁴ Adelson cannot legitimately claim prejudice due to his Florida deposition
26 because he instituted that action against Jacobs. Jacobs was also deposed
27 extensively in that action before the Florida district court dismissed Adelson's
28 frivolous claims at summary judgment and before the Florida Court of Appeals
affirmed the dismissal.

1 *see also control People v. Mattison*, No. 283212, 2009 WL 1441548, at *7 (Mich.
2 Ct. App. May 21, 2009) (denying disqualification of judge despite allegations of
3 inappropriate comments, yelling foul language, violent behavior, and a bad temper).

4 **IV. CONCLUSION**

5 Petitioners' desperation – attacking any judicial officer who rules against them
6 – is just sad. But it is predictable. The writ petition should be denied and this long-
7 stalled case should be allowed to proceed to trial.

8
9 DATED this 3rd day of March, 2016.

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1 **CERTIFICATE OF COMPLIANCE**

2 I hereby certify that this brief complies with the formatting requirements of
3 NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style
4 requirements of NRAP 32(a)(6) because this brief has been prepared in a
5 proportionally spaced typeface using Office Word 2013 in size 14 font in
6 double-spaced Times New Roman. I further certify that I have read this brief and that
7 it complies with NRAP 21(d).

8 Finally, I hereby certify that to the best of my knowledge, information and
9 belief, it is not frivolous or interposed for any improper purpose. I further certify that
10 this brief complies with all applicable Nevada Rules of Appellate Procedure, in
11 particular NRAP 28(e)(1), which requires that every assertion in this brief regarding
12 matters in the record to be supported by appropriate references to the record on
13 appeal. I understand that I may be subject to sanctions in the event that the
14 accompanying brief is not in conformity with the requirements of the Nevada Rules
15 of Appellate Procedure.

16 DATED this 3rd day of March, 2016.

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1 **CERTIFICATE OF SERVICE**

2 I HEREBY CERTIFY that I am an employee of Pisanelli Bice, and that on this
3 3rd day of March, 2016, I electronically filed and served a true and correct copy of
4 the above and foregoing **ANSWER TO PETITION FOR WRIT OF**
5 **PROHIBITION OR MANDAMUS RE ORDERS DENYING MOTION TO**
6 **DISQUALIFY JUDGE ELIZABETH GONZALEZ WITHOUT A HEARING**
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