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Tracie K. Lindeman
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16 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

17 SANDS CHINA LTD.,

18 Petitioner,

19 vs.

20 THE EIGHTH JUDICIAL DISTRICT
21 COURT OF THE STATE OF
22 NEVADA, IN AND FOR THE
23 COUNTY OF CLARK; AND THE
24 HONORABLE ELIZABETH GOFF
25 GONZALEZ, DISTRICT COURT,

26 Respondent,

27 and

28 STEVEN C. JACOBS.

Real Party in Interest

Sup. Ct. Case No. 58294

District Court Case No.
A-10-627691

**REAL PARTY IN INTEREST,
STEVEN C. JACOBS' RESPONSE
TO MOTION TO RECALL
MANDATE AND
COUNTERMOTION
REGARDING SAME**

1 **I. INTRODUCTION**

2 Providing no legal standard as the movant, Petitioner Sands China Ltd.
3 ("Sands China") seeks to recall a writ of mandamus issued over two years ago,
4 asserting that a change in law has rendered evidence as to its actual contacts with
5 Nevada irrelevant. If that were true, which it is not, of course, Sands China would
6 presumably so move the district court, where its position could be vetted in the
7 context of the full record. Its refusal to do so is telling indeed.

8 Beyond improperly seeking to evade the district court and the evidence,
9 Sands China also exaggerates the case to which it clings – *Daimler AG v. Bauman*,
10 134 S. Ct. 746 (2014) – continuing its long-rejected attempts at fact avoidance.
11 Jacobs' personal jurisdiction position does not turn on Sands China's false premise
12 that he predicates jurisdiction based solely on the contacts of a corporate affiliate,
13 the issue *Bauman* addresses. Rather, Sands China is subject to Nevada jurisdiction
14 because of its contacts and the contacts of its agents, acting on its behalf, within
15 Nevada.

16 The only legitimate basis for recalling the writ of mandamus is to unravel the
17 false premise upon which Sands China and its parent co-defendant, Las Vegas
18 Sands Corp. ("LVSC"), obtained the resulting stay. The executives controlling
19 Sands China are doing so from Las Vegas, and the entire improper termination of
20 Jacobs was conceived and orchestrated in Las Vegas by these same executives
21 acting as agents of Sands China in Nevada. Sands China and LVSC sought to
22 conceal these facts, which the district court refused to let them get away with. Of
23 course, they both knew the truth when they obtained the stay nearly three years ago.
24 The resulting delays and prejudice to Jacobs are unprecedented. This case is now
25 over three and a half years old. No trial date is set; no date for resolving Sands
26 China's bogus personal jurisdiction defense is set. The testimony and recollection
27 of witnesses is constantly fading, and important witnesses are disappearing and/or
28 being terminated by the Defendants.

1 The basis for this Court to take action is not to disregard the district court's
2 knowledge of the evidence (as Sands China recognizes as its only chance), but it is
3 to cease the prejudice to Jacobs by dispensing with an illegitimate stay and allowing
4 him to conduct discovery so as to stem the continuing loss of merits evidence.

5 **II. LEGAL STANDARD**

6 As the moving party, Sands China declines to cite any legal standard
7 governing its motion. Jacobs does not dispute that this Court has the ability to
8 recall a remittitur and/or mandate under appropriate circumstances. This Court
9 previously had an express rule for doing so. *Wood v. State*, 60 Nev. 139, 104 P.2d
10 187 (1940).

11 And, while not doubting this Court's inherent authority to do so today, Jacobs
12 certainly disputes that Sands China's avoid-the-evidence-at-all-costs approach is a
13 qualifying basis. Rather, under the analogous federal rules: While "[a]ppellate
14 courts have inherent power to recall a mandate upon a showing of 'good cause,' []
15 that power should be exercised sparingly." *Fireison v. Pearson*, 520 A.2d 1046,
16 1054 (D.C. App. 1987) (citing *American Iron & Steel Institute v. EPA*, 560 F.2d
17 589, 592-95 (3d Cir. 1977)); *Greater Boston Television Corp. v. FCC*, 463 F.2d
18 268, 277 (D.C. App. 1971). "Recall of the mandate must be necessary to avoid
19 injustice and it is proper only in the presence of 'exceptional circumstances.'" *Id.*
20 And, while it may be that "[a] supervening change in governing law that calls into
21 serious question the correctness of the court's judgment," could be "[o]ne
22 circumstance that that may justify recall of a mandate" (*Sargent v. Columbia Forest*
23 *Products, Inc.*, 75 F.3d 86, 90 (2d Cir. 1996)), that is not remotely the case here.

24 Rather, the only basis to recall the writ of mandamus is the lack of forthright
25 disclosure by Sands China as to its actual Nevada contacts when it sought the writ
26 in the first instance. It knew the truth and it knew what honest compliance with
27 jurisdictional discovery would reveal, which is why it and LVSC chose to walk the
28 contrary path. The proper relief now should not be that which rewards and

1 perpetuates the impropriety. It should be to end the insufferable and long-abused
2 stay so that Jacobs can at long last attempt to preserve what evidence remains.¹

3 **III. BACKGROUND**

4 **A. This Court Directs a Stay Pending an Evidentiary Hearing.**

5 To understand the failures in Sands China's latest proposal for fact avoidance,
6 this Court should briefly recall how we got here. Jacobs commenced this action on
7 October 20, 2010, claiming breach of contract and tortious termination for
8 attempting to silence him from reporting corporate improprieties of senior
9 executives with LVSC and Sands China, including those entities' common
10 chairman, Sheldon Adelson ("Adelson"). LVSC answered and filed a counterclaim,
11 representing to the court that Jacobs had no contract with LVSC and was instead
12 simply an employee of Sands China. (APP.000099-100.) That false tale would
13 soon unravel.

14 For its part, Sands China disputed personal jurisdiction. The district court
15 disagreed, finding general jurisdiction from "pervasive" Nevada contacts.
16 (APP.000114.) Given the district court's ruling as to general jurisdiction, it did not
17 address or even take up the other applicable grounds, including specific jurisdiction.

18 Sands China thereafter petitioned for the writ of mandamus. Through its
19 August 26, 2011 decision, this Court labeled the district court's findings to be of
20 "summary nature" and incomplete for review. *Id.* At the same time, Sands China
21 protested as to how it faced extreme burdens in complying with discovery that
22 would, it was represented, be a waste in the face of its lacking Nevada contacts.²

23
24 ¹ On May 31, 2013, Jacobs submitted a "Motion for Immediate Lift of Stay"
25 for filing with this Court. The Clerk would not allow Jacobs to file that motion,
asserting that this case was closed and any relief must be sought in the district court.

26 ² As discovery would later show, Sands China's lack of candor to this Court
27 was equally startling. While it sought to pretend that its discoverable documents
28 were all located in Macau, it knew the truth was otherwise. Just like it knew – and
its executives would later have to admit – that Sands China's controlling executives
were based in Las Vegas and from there had planned, orchestrated and undertook
the tortious termination of Jacobs.

1 As such, this Court accommodated Sands China's request for a stay and
2 "instruct[ed] the district court to hold an evidentiary hearing on personal
3 jurisdiction, to issue findings of fact and conclusions of law stating the basis for its
4 decision following that hearing, and to stay the action as set forth in this order until
5 after entry of the district court's personal jurisdiction decision." (APP.000115.)
6 Again, although LVSC was not a party to that writ petition and had no basis for
7 delaying the case, the entire merits of Jacobs' case, even as to LVSC, was stayed
8 and has been ever since.

9 **B. Sands China Opposes Jurisdictional Discovery.**

10 Given this Court's directive, Jacobs sought jurisdictional discovery to present
11 the evidentiary record establishing:

- 12 [1] general jurisdiction based upon what Sands China does here,
13 [2] general jurisdiction based upon the agency role of Las Vegas
14 Sands and what it performs here on behalf of Sands China,
15 [3] specific jurisdiction of what Sands China did here in relation to the
16 causes of action that was presented to [the Court], and, of course,
17 [4] transient jurisdiction of Sands China.

18 (APP.000120.) In a move that would foretell their future maneuvers, Sands China
19 and LVSC objected, claiming that this Court's decision had somehow limited
20 Jacobs to pursuing only general jurisdiction and that "no amount of discovery could
21 or would" establish jurisdiction over Sands China, the same position it regurgitates
22 to this Court today. (APP.000122.) The district court rejected their attempts of
23 depriving Jacobs of his rights to develop the evidentiary record that Sands China
24 claimed was missing as to all potential bases for personal jurisdiction, including
25 general, specific and/or transient.

26 The reasons Sands China and LVSC so vehemently opposed jurisdictional
27 discovery were soon manifest. Their central thesis to the district court proved false.
28 Indeed, LVSC's initial representation – that Jacobs had no contract with LVSC and
instead his only agreement was with Sands China – was a doozy. Apparently,
LVSC had forgotten its representations to the United States Securities and

1 Exchange Commission, as well as to its own shareholders, how Jacobs' employment
2 contract with LVSC stemmed from the negotiated term sheet dated August 3, 2009
3 (the "Term Sheet"). (APP.000001; APP.000087; APP.000090-91.) Indeed,
4 LVSC's COO, Michael Leven ("Leven") was forced to admit that he negotiated and
5 signed Jacobs' Term Sheet on behalf of LVSC after it was approved by Adelson.
6 (APP.000150.) But that was just the tip of the iceberg.

7 Equally egregious was Sands China's lack of candor to both the district court
8 and this Court concerning its Nevada contacts at the time it petitioned for and
9 obtained the stay. After having to fight tooth and nail to pry the facts out of
10 Sands China, jurisdictional discovery revealed how Adelson and Leven were
11 operating Sands China from their executive offices here in Las Vegas. In just one
12 candid email to Sands China's executives in Macau, Leven decreed that although he
13 is always willing to listen to their input, "all final [] decisions are made by sga
14 [Adelson] and las vegas." (APP.000092.)

15 Unremarkably, this included the decision and orchestration of Jacobs'
16 wrongful termination as Sands China's CEO. The evidence and testimony exposed
17 that the very scheme to terminate Jacobs – hastily arranged before a scheduled
18 Board meeting where Jacobs planned to report on the misconduct – was hatched
19 and carried out from Las Vegas by executives claiming to be acting for
20 Sands China. In fact, despite his best word-smithing, Leven had to acknowledge:
21 "The plan – the – the arrangements for carrying out the termination of Steve Jacobs
22 was developed here [in Las Vegas] and executed there [in Macau].").
23 (APP.000151.)

24 In actuality, discovery confirmed that what actually occurred in Macau was
25 minimal, consisting of little more than Leven and other high-ranking executives
26 flying from Las Vegas, landing in Macau and telling Jacobs of what had been
27 preordained in Las Vegas. The substantive events occurred in Las Vegas, including
28 the preparation of the initial termination letter. Indeed, lacking a copy of actual

1 "Sands China" letterhead in Las Vegas, these executives (Adelson and Leven)
2 resorted to manufacturing temporary letterhead in Las Vegas so as to prepare the
3 termination letter. (*See* APP.000134-36.) The press releases – including those
4 making false statements – were drafted in and issued from Las Vegas by executives
5 purportedly acting for Sands China. (APP.000152.) The lawyers overseeing the
6 plan did so from Las Vegas and, again, as agents for Sands China. (APP.000153.)
7 Even the subsequent so-called justification letter – providing the twelve fabricated
8 reasons for Jacobs' termination – was prepared in Las Vegas, albeit after they
9 apparently obtained actual copies of Sands China's letterhead upon which to print it.
10 (*Id.*)

11 Sands China's lack of forthrightness was not limited to what the district court
12 found in the concealment of jurisdictional evidence, it chose that path when it first
13 petitioned this Court for the writ of mandamus. Because the actual events
14 surrounding Jacobs' termination have been unearthed, Sands China resorts to
15 coyness, asserting (in a footnote of all places) that this truth can be ignored because
16 Jacobs somehow waived any specific jurisdiction over Sands China. How he did so
17 prior to jurisdictional discovery or even the district court addressing that issue
18 (since it had relied upon general jurisdiction) is, tellingly, never explained, which is
19 likely why it is relegated to a footnote. Whatever the rationale, Sands China's need-
20 to-avoid-the-evidence approach only serves to highlight the fatal flaw of its motion.

21 **C. Sands China Obstructs the Very Evidentiary Hearing it Sought.**

22 The events that have brought this case to a standstill are detailed in Jacobs'
23 Answering Briefs to the second, third and fourth writ petitions filed by LVSC and
24 Sands China, Case Nos. 62489, 62944, and 63444. There is no need to recite again
25 their underhandedness. Those briefs and the record before the district court expose
26 what they were doing.

27 The district court's inability to conduct an honest evidentiary hearing is the
28 product of that misconduct, not the after-the-fact attempts to divert attention from

1 their misdeeds. Jacobs' entire case, including against LVSC, has been stayed all the
2 while memories fade, witnesses disappear, evidence is lost, and LVSC and
3 Sands China benefit from their lack of disclosure.³

4 It is beyond fair debate that the stay contemplated by this Court is being
5 abused and is a product of illegitimacy. It needs to end. The legal basis for
6 recalling the writ of mandamus is not to avoid the facts as Sands China desires, but
7 to undo the abused stay. If Sands China wants to continue to debate personal
8 jurisdiction, it should do so in the usual course like every other litigant. There is no
9 justification to continue the unparalleled prejudice to Jacobs' rights.

10 **IV. ARGUMENT**

11 **A. *Bauman* Does Not Change the Law of Minimum Contacts.**

12 Having been unable to stop the evidence of its Nevada contacts from coming
13 to light, Sands China now proposes a theory where all the facts should be ignored.
14 According to Sands China, the United States Supreme Court has accommodated
15 this unique approach through its recent decision, *Daimler AG v. Bauman*, 134 S. Ct.
16 746 (2014). Hardly. The *Bauman* Court did not dispense with the longstanding
17 precedent that a corporation is subject to jurisdiction in those forums in which their
18 agents act. In fact, the *Bauman* Court said that it "need not pass judgment on
19 invocation of an agency theory in the context of general jurisdiction[.]" *Id.* at 759.

20 In *Bauman*, a group of plaintiffs sued DaimlerChrysler ("Daimler") in the
21 State of California based upon the alleged collaboration between its subsidiary,
22 Mercedes-Benz Argentina ("MB Argentina") and various Argentina terrorist
23 groups. The car sales of one of Daimler's subsidiaries, Mercedes-Benz USA, LLC
24 ("MBUSA"), was the lone connection between Daimler and California. Thus, in

25
26 ³ Indeed, the district court has taken the view that Jacobs cannot even amend
27 his complaint to outline additional claims against both LVSC and Sands China -
28 including those that will reinforce jurisdiction over Sands China – until after the
evidentiary hearing is held. LVSC has filed an answer and counterclaim, and even
it is being protected by a stay despite the fact that it does not dispute that it is
subject to jurisdiction.

1 the face of that fact, the plaintiffs, citing *Doe v. Unocal*, 248 F.3d 915 (9th Cir.
2 2001), urged personal jurisdiction given that selling cars in California is
3 "sufficiently important" to Daimler such that it would have stepped in to perform
4 the tasks for MBUSA were it necessary. *Id.* at 759.

5 The Supreme Court disagreed, and found that a parent corporation's
6 "hypothetical readiness" to perform services on behalf of the subsidiary in the
7 forum state does not, in and of itself, establish general jurisdiction over the parent.
8 *Bauman*, 134 S. Ct. at 759-60. The Court reasoned, "[a]nything a corporation does
9 through an independent contractor, subsidiary, or distributor is presumably
10 something that the corporation would do 'by other means' if the independent
11 contractor, subsidiary, or distributor did not exist." *Id.* at 759. As a result, the
12 Court found that the Ninth Circuit's "hypothetical readiness" test unfairly "subjects
13 foreign corporations to general jurisdiction whenever they have an in-state
14 subsidiary or affiliate" *Id.* at 759-60.

15 The Court explained that for general jurisdiction over a foreign corporation to
16 exist, it "must be fairly regarded as at home" in the forum state. *Id.* at 761. The
17 Court affirmed its prior decisions on this point. The question is, as it has always
18 been, whether the corporation's "affiliations with the State are 'so continuous and
19 systematic' as to render it essentially at home in the form State." *Id.* (quoting *Int'l*
20 *Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Goodyear Dunlop Tires Ops., S.A. v.*
21 *Brown*, 131 S.Ct. 2846 (2011)).

22 Despite that Sands China wishes the law were otherwise, a corporation has
23 always been subject to jurisdiction based upon the acts of its agents in the forum
24 state. As this Court explained long ago: "The contacts of an agent are attributable to
25 the principal in determining whether personal jurisdiction exists." *Trump v. Eighth*
26 *Jud. Dist. Ct. of State of Nev. In & For Cnty. of Clark*, 109 Nev. 687, 694, 857 P.2d
27 740, 745 (1993).

1 Here, Sands China's attempts of fact-avoidance before the district court is as
2 misguided as it is transparent. This is not a case of a foreign parent corporation's
3 "hypothetical readiness" to stand in for its local subsidiary. The evidence exposes
4 how Sands China is *actually* being operated and run by and through its agents in
5 Nevada. Indeed, depositions of both Adelson and Leven demonstrate how they
6 direct the activities and operations of Sands China from Las Vegas, and they
7 claimed to be acting as Sands China's agents whenever they did so.

8 These Nevada activities included everything from approving compensation
9 for Sands China executives to making design decisions for Sands China's casinos.
10 In Leven's words to Sands China's executives in Macau: "input from anyone is
11 expected and listen to [*sic*] but final [] decisions are made by sga [Adelson] and
12 las vegas." (APP.000092.) The examples literally go on and on. Thus, if
13 Sands China wants to continue to debate whether it can be deemed to be "at home"
14 in Las Vegas for purposes of general jurisdiction, on top of the other jurisdictional
15 bases discovery has uncovered, that is a matter for the district court.

16 **B. Jacobs Should be Allowed to Preserve Evidence through Merits**
17 **Discovery.**

18 While Sands China provides no basis to recall the writ of mandamus, there is
19 a basis for this Court's immediate attention, whether by recalling the writ of
20 mandamus for a limited purpose or simply directing the district court: Dispense
21 with the illegitimately-obtained stay that has precipitated unwarranted prejudice and
22 delay. Even if Sands China wants to continue to pretend that it lacks Nevada
23 contacts, there is no need for a stay to do so.⁴ This Court has long recognized that
24 there are two ways to address personal jurisdiction. *Trump v. Eighth Jud. Dist. Ct.*,
25 109 Nev. 687, 857 P.2d 740, 743 (1993). The "more frequently utilized process"
26 allows "a plaintiff [to] make a *prima facie* showing of personal jurisdiction prior to

27 ⁴ Indeed, Jacobs asked LVSC to stipulate to allow merits discovery to proceed,
28 since LVSC does not dispute that it is subject to jurisdiction. Tellingly, it refused,
wanting to continue what was supposed to be a temporary stay.

1 trial and then prove jurisdiction by a preponderance of the evidence at trial."
2 *Id.* at 692, 857 P.2d at 743.

3 Even in the face of the documented obstruction seeking to skew the fact-
4 finding process, enough facts have emerged of a *prima facie* case for personal
5 jurisdiction. If Sands China wants to continue the jurisdiction debate, it can do so
6 at trial, or at a subsequent evidentiary hearing. But Jacobs should be allowed to
7 proceed and preserve evidence. What this Court contemplated as a temporary stay
8 (which has now lasted nearly three years) only serves to perpetuate an injustice.
9 *See Wood*, 60 Nev. at 104, 100 P.2d at 188 (under prior rule, recall of remittitur
10 proper for incomplete knowledge of the circumstances.).

11 **V. CONCLUSION**

12 Sands China's motion is an untenable attempt at avoiding the facts and is
13 legally flawed. The only legal basis for recalling this Court's writ of mandamus is
14 to put an end to the misuse of what was supposed to be a temporary stay. And,
15 accordingly, Jacobs countermoves and asks this Court to do so now.

16 DATED this 6th day of February, 2014.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Pisanelli Bice PLLC, and pursuant to Nev. R. App. P. 25(b) and NEFR 9(d), that on this date I electronically filed the foregoing **REAL PARTY IN INTEREST, STEVEN C. JACOBS' RESPONSE TO MOTION TO RECALL MANDATE AND COUNTERMOTION REGARDING SAME** with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Courts E-Filing system (Eflex), Participants in the case who are registered with Eflex as users will be served by the Eflex system as follows:

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SERVED VIA HAND-DELIVERY ON FEBRUARY 7, 2014

The Honorable Elizabeth Gonzalez
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DATED this 6th day of February, 2014.

/s/ Kimberly Peets
An employee of Pisanelli Bice, PLLC