IN THE SUPREME COURT OF THE STATE OF NEVADA

****

LAS VEGAS SANDS CORP.,

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK: AND THE HONORABLE ELIZABETH GOFF GONZALES, DISTRICT JUDGE,

Respondent,

and

STEVEN C. JACOBS

Real Party In Interest.

Sup. Ct. Case No. 58740

District Court Case No. A-10-627691

JOINT APPENDIX

VOL. 2

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DISTRICT COURT

CLARK COUNTY, NEVADA

STEVEN C. JACOBS, Plaintiff, vs. LAS VEGAS SANDS CORP., a Nevada corporation; SANDS CHINA LTD., a Cayman Islands corporation; SHELDON G. ADELSON, in his individual and representative capacity; DOES I through X; and ROE CORPORATIONS I through X, Defendants.	CASE NO. A-10-627691-C DEPT. NO. XI Date of Hearing: June 9, 2011 Time of Hearing: 9:00 a.m.

PLAINTIFF'S OMNIBUS RESPONSE IN OPPOSITION TO THE DEFENDANTS' RESPECTIVE MOTIONS TO DISMISS THE FIFTH CAUSE OF ACTION ALLEGING DEFAMATION PER SE

COMES NOW the Plaintiff, Steven C. Jacobs, by and through his attorneys of record, and hereby files his Omnibus Response in Opposition to the Defendants' Respective Motions to Dismiss the Fifth Cause of Action Alleging Defamation Per Se.

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INTRODUCTION

The Defendants, Sheldon Adelson ("Adelson"), Las Vegas Sands Corp. ("LVS") and Sands China, Ltd. ("SCL") have each filed a motion seeking the dismissal of Plaintiff's Fifth Cause of Action, which claims defamation per se. Although Adelson proffers an aside in a footnote to the effect that his remarks "could be viewed as an expression of opinion," the bulwark of the Defendants' common motions relies upon their collective claim that Adelson's remarks were privileged. This claim is, in a word, meritless.

FACTS

The facts which give rise to this trio of motions seeking dismissal of Jacobs' Fifth Cause of Action are not in dispute. A hearing was held before Her Honor on March 15, 2011, during which Ms. Glaser repeatedly branded Jacobs a liar:

> And it's sort of funny, but it's sort of not, because this man, ***Mr. Jacobs, lied to the Court and said money was couriered into this country. He lied to the Court*** and ***he's not telling the truth*** in a lot of other respects as well.
> Trans. 57:11-15 (emphasis supplied)[1]

Later that day, Mr. Adelson, apparently emboldened by Ms. Glaser's in-court attack on Jacobs, decided that he would pile on by issuing a press release to *The Wall Street Journal,* stating in part:

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[1] Mr. Jacobs did not lie to the Court. Attached to his Opposition to SCL's earlier Motion to Dismiss is Exhibit 13, an e-mail from SCL's Collection Manager, David Law, to Christine Hu dated May 12, 2010. It bears the subject line "***USD 4.8million company check to be couriered over to US.***" The text of the e-mail is as follows: "*Christine, We spoke today. After discussion with Jeffrey and also Kerwin today, we had decided that it would be better for this signed company check of* ***USD4.8million to be couriered*** *over using FEDEX courier company to Freddie Kwok, Kerwin's brother in Venetian Las Vegas to assist us to deposit this check into the BOA Las Vegas USD account* ***instead of myself flying over to Vegas to hand over the check to Freddie as I need to declare the reasons I am in US which would be more risky.*** *I will be couriering the check and the complete documentation to Freddie later today and will be sending an email to the bank officer at BOA Las Vegas informing her on this matter. Thanks, Regards, David Law*"

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> While I have largely stayed silent on the matter to this point, the recycling of his allegations must be addressed. We have a substantial list of reasons why Steve Jacobs was fired for cause and interestingly he has not refuted a single one of them. Instead, he has attempted to explain his termination by using outright lies and fabrications which seem to have their origin in delusion.
> First Amended Complaint, ¶62

Following world-wide publication of Adelson's defamatory comments, Jacobs filed his First Amended Complaint adding a Fifth Cause of Action claiming defamation per se.

POINTS AND AUTHORITIES

Adelson's statements are not absolutely privileged

The principal argument advanced by the Defendants is that Adelson's statements to *The Wall Street Journal* were absolutely privileged as a matter of law:

> Because Jacobs instigated and invited Adelson's statement to the *Wall Street Journal,* he cannot now hold Adelson or his co-defendants liable for the email to Alexandra Berzon that he (Jacobs) prompted on March 15, as the court in *Green Acres Trust v. London*, 688 P.2d 658, 671 (Ariz. Ct. App. 1983), teaches:
>
> > "We hold that defamatory communications concerning impending litigation are absolutely privileged, whether made to the news media or to a prospective participant in the litigation, provided it has some relation to the proceeding."
>
> Adelson Mtn., 8:23 – 9:07

This may indeed have been the lesson taught by the Arizona Court of Appeals, but it was one that was flatly rejected by the Arizona Supreme Court when it reversed the decision the following year.

In *Green Acres Trust v. London,* 688 P.2d 617, 620 (Ariz. 1984), the Arizona Supreme Court unanimously held that a party's attorney did not enjoy an "absolute privilege" to make extrajudicial statements to the press to the effect that defendants had violated criminal laws by having "'bilked' up to 5,000 people." Acknowledging that it was a case of first impression, Arizona's highest court nevertheless had little difficulty deciding the issue.

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> While we have not addressed the application of the absolute privilege to this kind of extra-judicial communication, other authorities have considered the "press conference" context and decided against the application of the privilege to communications made in that setting. These authorities generally conclude that since publication to the news media lacks a sufficient relationship to judicial proceedings, it should not be protected by an absolute privilege.
> *Id.* at 622 (multiple citations omitted).

Inexplicably, SCL has likewise cited a case which stands for the proposition that the privilege does *not* extend to extrajudicial statements made to the press. At page 13, lines 10-15 of its motion, SCL advances the following novel notion:

> The absolute privilege has been recognized in other jurisdiction as well, which protect a litigant's statements to the news media as communications to a "public journal" of a "judicial proceeding . . . or anything said in the course thereof" as privileged, unless they violate a court order. *See* Cal. Civil Code § 47(d). This privilege extends to all matters in the court record and repeated in the courtroom, as long as they are made "in the course" of the lawsuit, meaning after the litigation has commenced. *See Rothman v. Jackson*, 49 Cal.App.4th 1134, 1143 (1996).

But that was clearly *not* the holding in *Rothman*. Indeed, the holding was just the opposite.

In *Rothman,* the plaintiff, an attorney for a minor alleged to have been sexually molested by the entertainer Michael Jackson, sued Jackson along with his lawyer, Bert Fields, after Fields issued statements to the press to the same effect as those recently made by Adelson.[2]

> [T]he defendants not only denied the charges against Jackson, but made countercharges that Rothman and his clients had knowingly and intentionally made false accusations against Jackson in order to extort money from him. Extortion is, of course, a crime, and the charge was inevitably damaging to Rothman's professional reputation.
> 49 Cal.App.4th at 1139 (citations omitted).

[2] Not content with defaming Jacobs in a press release to *The Wall Street Journal,* Adelson escalated the attack when, on March 28, 2011, he attended the J.P. Morgan 2011 Gaming Forum. There, before a packed audience of Wall Street analysts, Adelson launched into an ad hominem attack of Jacobs. Once again he declared Jacobs' case to be founded upon "lies and fabrications" which entailed "blackmail and extortion." Jacobs looks forward to exploring these and other comments with Mr. Adelson during the course of his upcoming deposition.

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Presented with the same claim of "absolute privilege" as advanced by the Defendants here, the California Court of Appeals found that Fields' statements were not immunized as they were neither made to achieve the objects of the litigation nor did they have any connection or logical relation to the case. *Id.* at 1145. Indeed, Fields' statements were not intended for a court of law, but rather for the court of public opinion and therefore illegible for protection. *Id.* Such statements were simply not an interest which the litigation privilege was created to protect:

> The litigation privilege exists so that persons who have been harmed or have other grievances calling for redress through the judicial process can and will use the courts, rather than self-help, to obtain relief. The privilege thus affords its extraordinary protection to the uninhibited airing, discussion and resolution of disputes ***in, and only in, judicial or quasi-judicial arenas***. Public mudslinging, while a less physically destructive form of self-help than a public brawl, is nevertheless one of the kinds of unregulated and harmful feuding that courts and their processes exist to prevent.
> *Id.* at 1146 (emphasis in original)

Nor did the *Rothman* court warm to the entreaty that the privilege should somehow be broadened to cover press releases:

> In sum, we hold that the litigation privilege should not be extended to "litigating in the press." Such an extension would not serve the purposes of the privilege; indeed, it would serve no purpose but to provide immunity to those who would inflict upon our system of justice the damage which litigating in the press generally causes: poisoning of jury pools and bringing disrepute upon both the judiciary and the bar.
> *Id.*

Thus, it is clear that Adelson's defamatory remarks were not made "in and only in the judicial or quasi-judicial arena" and were not "absolutely privileged." *Id.*

Similarly, there is nothing which shelters the Defendants from liability in those remaining cases they have cited in support of their claim of absolute privilege. For example, in *Libco Corp. v. Adams*, 426 N.E.2d 1130, 1132 (Ill.Ct.App. 1981), the issue was whether letters exchanged between attorneys were absolutely privileged where they clearly pertained to proposed or

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pending litigation. Unsurprisingly, the answer was, yes. This was also the unremarkable holding in *Digerati Holdings, LLC v. Young Money Entertainment*, -- Cal.Rptr.3d --, 194 Cal.App.4th 873 (Cal.Ct.App. 2011). To similar effect in Nevada, is *Fink v. Oshins*, 118 Nev. 428, 49 P.3d 640 (2002), where our Supreme Court held an attorney's statements to his client were absolutely privileged as a "communication preliminary to a proposed judicial proceeding . . ." 49 P.2d at 644.

As for the citation to *Clark County School District v. Virtual Education Software, Inc.*, 213 P.3d 496 (Nev. 2009), our Supreme Court merely extended the privilege for the responsive exchange of letters in anticipation of litigation to the parties themselves where that same exchange would have been protected had their staff counsel authored the letters in anticipation of pending litigation:

> Dr. Rice's letter to VESI was in response to VESI's threat to initiate legal action against CCSD. The letter would be absolutely privileged had it been drafted by CCSD's legal counsel; therefore, we conclude that the protections afforded by the absolute privilege should be extended to Dr. Rice, who was a party involved in this dispute where judicial proceedings were under serious consideration.
> 213 P.3d at 503

This privilege has also been specifically extended by statute to quasi-judicial and administrative bodies and officials. Thus, written communications to and from the Nevada State Employment Security Department were held to be absolutely privileged under NRS 622.265(7) in *Circus Circus Hotels, Inc. v. Witherspoon,* 99 Nev. 56, 657 P. 101 (1983).

So, the question naturally arises: What do any of these cases have to do with the present controversy where Adelson's comments were not made in a pre-litigation letter to an adversary or counsel, nor were made in a quasi-judicial setting but, rather, were made to the press as part of a public relations campaign? The answer, of course, is nothing.

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Adelson's defamatory statements were not conditionally privileged as a "reply"

The Defendants also contend that Adelson's defamatory remarks were further subject to a qualified or conditional privilege[3] of "reply" having been "invited" by Jacobs upon the filing of his Complaint.

While it is true that a speaker has a conditional privilege to reply to defamatory comments in order to protect his own interests or those interests which he has in common with a third party, he may do so only so long as the interest sought to be protected is sufficiently important and that communication is delivered to a proper recipient. See Restatement (Second) of Torts, §594 cmt. h (interest affected), cmt. i (recipient). Applying this standard to the statements of Adelson, it becomes clear his comments do not qualify for any conditional privilege.

First of all, the Defendants' interest in replying to Jacobs' Complaint is not properly accomplished by Adelson's issuance of a press release to *The Wall Street Journal*. Rather, that interest is to be addressed by the filing of a formal answer and counterclaim. It is this Court that is the "proper recipient of the communication," not *The Wall Street Journal.*

Second, the decision in *State v. Eighth Judicial District*, 118 Nev. 140, 42 P.3d 233 (2002) has *not* expressly endorsed Adelson's venomous comments to *The Wall Street Journal.* To the contrary, the Court conferred the cloak of conditional immunity on a public official in a highly detailed factual setting which bears, at best, only a superficial similarity to the facts at issue here.

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[3] The term "qualified privilege" and "conditional privilege" are legal terms for an identical legal principal. *See, e.g., Blue Cross & Blue Shield of Ala.,* 773 So. 2d 475, 477 (Ala. 2000): ([T]he two terms have been used interchangeably; multiple citations omitted).

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There, a former investigator for the Office of the Attorney General gave a wide ranging sit-down interview to the *Las Vegas Sun* in which, among other things, he accused the attorney general of engaging in gross misconduct while in office. Following publication of the article, then-Attorney General Frankie Sue Del Papa wrote the *Las Vegas Sun* a responsive letter in which she denied the allegations and explained the factual background regarding the investigator's separation from the office. After acknowledging the general rule that an individual who is attacked in the paper has a right to rebut the charges, the Nevada Supreme Court noted the Attorney General's reply was addressed only to the allegations that had been raised by the former investigator and was in all respects carefully measured in its response.[4] Particularly noteworthy in this regard was the Court's warning to others that the conditional privilege would not be conferred upon those who ventured beyond the limits of the privilege:

> The privilege may be lost, however, if the reply: (1) includes substantial defamatory matter but is irrelevant or non-responsive to the initial statement; (2) includes substantial defamatory material that is disproportionate to the initial statement; (3) is excessively publicized; or (4) is made with malice in the sense of actual spite or ill will.
> 118 Nev. at 149-50, 42 P.3d at 239

On this point, the Defendants should make no mistake; this is precisely the legal terrain they now find themselves upon. Paragraph 63 of the First Amended Complaint clearly details that it is Jacobs' position that Adelson's publication to *The Wall Street Journal* was malicious and was purposefully intended to harm Jacobs' reputation and good name. Thus, as a matter of law, Adelson's liability will be left for the jury to decide. *See e.g., Weldy v. Pietmont Airlines, Inc.*, 985 F.2d 57 (2d Cir. 1993) (the loss of a conditional privilege in a defamation case is to be

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[4] "Del Papa's response rebutted these charges and explained the inaccuracies that were found within the March 26, 1997 article." 42 P.3d at 239. For Adelson to compare his actions to those of Attorney General Del Papa is to invite the comparison that undertaking a drive-by shooting with an AK-47 is no different than a boxer who delivers a counterpunch following an opponent's jab.

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determined by the jury where it is claimed that the factual context of the statements constituted defamation per se and were published with a malicious intent to harm the target.)[5]

Jacobs' claim for defamation has been properly pled

SCL has also alleged that Jacobs' Fifth Cause of Action is fatally defective as a matter of law. Citing *Lubin v. Kunin*, 117 Nev. 107, 111, 17 P.3d 422, 425 (2001), SCL argues:

> Although Jacobs alleges that Adelson's statements regarding Jacobs' termination "for cause" and Jacobs' "outright lies and fabrications" in this litigation were false and defamatory, **Jacobs fails to allege that these statements were unprivileged**, a necessary element to establish a *prima facie* claim for defamation. Jacobs' FAC therefore is deficient on its face. Defendant SCL's Mtn. to Dismiss for Failure to State a Claim, 12:1-4 (emphasis supplied)

Really? Perhaps SCL should read Paragraph 65 of Jacobs' Fifth Cause of Action:

> 65. That all the comments and statements by Adelson as detailed in Paragraph 62, *supra*, were made **without justification or legal excuse**, and were otherwise **not privileged** because they did not function as a necessary or useful step in the litigation process and did not otherwise serve its purpose.
> (emphasis supplied)

Adelson's statements were not "opinion"

Equally specious is Adelson's claim that his comments to *The Wall Street Journal* were merely expressions of "opinion." See Motion, pg. 5, fn 3. In support of that claim, Adelson cites *Mast v. Overson*, 971 P.2d 928 (Utah 1998). But Adelson's statements were most certainly not made during a "heated public debate" concerning a matter of community-wide interest. Nor were his comments the type to be "taken with a grain of salt" because they were obviously

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[5] Adelson's other "conditional privilege" cases are equally inapplicable to the case at bar. In *Litman v. Mass. Mutual Life Ins. Comp.*, 739 F.2d 1549, 1552 (11th Cir. 1984), the court found that where the employee expressly solicited his former employer to share information with a prospective employer, any publication was conditionally privileged as having been invited. Similarly, in *Williams v. School District of Springfield*, 447 S.W.2d 256 (Mo. 1969), a school teacher who had been terminated demanded the superintendent of schools to explain, during the course of a school board meeting, the reasons why she had been terminated. The court, obviously and quite correctly, held that the explanation had been invited and thus conditionally privileged.

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"exaggerated and polemicized." *Id.* at 933-934. Instead, Adelson's comments were specifically delivered to the leading publisher of business news to the world . . . *The Wall Street Journal.*

Clearly then, Adelson's comments were designed to inflict the maximum amount of reputational damage possible.

The fired "for cause" allegation

Adelson's salvo alleged that Jacobs had not only been fired "for cause" but, moreover, had not proffered any defense to his termination. In the business and investment community, it is well understood that an officer or director of a publicly traded gaming company who has been fired "for cause" had, at best, engaged in gross misconduct; and at worst, had committed a crime.

Casting aspersions on someone's integrity and ability to perform his job is defamatory per se. *Posadas v. City of Reno,* 109 Nev. 448, 453, 851 P.2d 438, 442 (1993). That is the gist of Adelson's statement that Jacobs was terminated "for cause." In reviewing an allegedly defamatory statement, "[t]he words must be reviewed in their entirety and in context to determine whether they are susceptible of a defamatory meaning." *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 484, 851 P.2d 459, 463 (1993).[6] Thus, "where a statement is susceptible of different constructions, one of which is defamatory, resolution of the ambiguity is a question of fact for the jury." *Lubin v. Kunin, supra,* 117 Nev. at 111, 17 P.3d at 425-426 (internal quotation marks and citations omitted); *see also, Posada v. City of Reno, supra,* 109 Nev. at 453, 851 P.2d at 442 (summary judgment dismissing defamation claim was error because the statement "is capable of a defamatory construction"). Such is the case with regard to the thinly-disguised euphemism "for cause."

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[6] *See also, Las Vegas Sun, Inc. v. Franklin,* 74 Nev. 282, 287, 329 P.2d 867, 869 (1958) (allegedly defamatory statements "are to be taken in their plain and natural import according to the ideas they convey to those to whom they are addressed; reference being had not only to the words themselves but also to the circumstances under which they were used") (quoting *Talbot v. Mack*, 41 Nev. 245, 262, 169 P. 25, 29 (1917)).

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In *Carney v. Memorial Hosp. & Nursing Home of Greene County*, 485 N.Y.S.2d 984, 475 N.E.2d 451 (1985), for example, a hospital pathologist had been discharged after reports from the state health agency disclosed deficiencies in the hospital's laboratory. The hospital stated to a local newspaper that the plaintiff had been terminated "for cause," whereupon she filed suit for defamation. The hospital made the same argument now advanced by Adelson, and convinced the trial judge to dismiss the defamation claim. On appeal, however, that ruling was reversed for reasons which apply with equal force here:

> [T]o the extent that defendants argue that the statement is not defamatory because it means only that the hospital administrators had a "reason," which may or may not be valid, for dismissing plaintiffs, their argument must be tested against the understanding of the average reader ...
>
> . . . [T]he statement that plaintiff was terminated "for cause" is not clearly susceptible to only one interpretation. The rule is that if the words taken in their natural and ordinary meaning are susceptible to a defamatory connotation, then it is for the jury to decide how it would be understood by the average reader . . . It cannot be said as a matter of law that the average reader of the statement that plaintiff was discharged "for cause" would not interpret it as meaning that plaintiff had actually been derelict in this professional duties. Accordingly, plaintiff is entitled to a jury determination of the issue[.]
>
> 475 N.E.2d at 453 (citations omitted).

For similar reasons, the court in *Vanover v. Kansas City Life Ins. Co.*, 438 N.W.2d 524 (N.D. 1989), reversed summary judgment dismissing a libel action based on letters stating that the plaintiff had been terminated "for cause." The court explained that "summary judgment is not warranted if the letter is capable of two meanings – one defamatory and the other innocent." *Id.* at 527 (internal quotation marks omitted).[7]

[7] On remand, the jury found for the plaintiff and awarded punitive damages. The award was affirmed in *Vanover v. Kansas City Life Ins. Co.*, 553 N.W.2d 192 (N.D. 1996), holding that "[w]hat [the defendant] meant when it used the phrase 'for cause,' what the recipients of the letters thought 'for cause' meant, and whether [the defendant] acted with malice, were all questions of fact for the jury." *Id.* at 199.

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The plaintiff in *Linkage Corp. v. Trustees of Boston University*, 425 Mass. 1, 679 N.E.2d 191, *cert. denied*, 522 U.S. 1015, 118 S. Ct. 599, 139 L. Ed. 2d 488 (1997), had a contract with Boston University to manage educational programs at a facility owned by the university. After an internal audit, university officials canceled the agreement, entered the facility, gathered the plaintiffs' employees into a room and announced that the contract had been terminated "for cause." The context in which this statement was made, held the court, supported the jury's finding that it was defamatory: "the jury would have been warranted in finding that Westling's statements to Linkage employees on the day of the termination, that the termination was 'for cause,' were defamatory when considered in the context of the hostile and forcible takeover of Linkage's offices, because the statements conveyed a message to those employees that Linkage had been involved in serious wrongdoing." 679 N.E.2d at 206 n.30. This is precisely the message conveyed by Adelson's statement to *The Wall Street Journal; i.e.,* that Jacobs had been involved in very serious wrongdoing.

The contention that Jacobs is a liar

Adelson is not the first celebrity/billionaire to have publicly branded an adversary as a liar for merely having the temerity to seek legal redress.

In *Cook v. Winfrey*, 141 F.3d 322 (7th Cir. 1998), Oprah Winfrey was sued for having interfered with a former paramour's contractual relations with a publisher. After the complaint against her had been filed, Winfrey told the *National Enquirer* that Cook was "a liar" and characterized his lawsuit as "all a pack of lies."

Reversing the lower court's dismissal of Cook's defamation claim, the Seventh Circuit Court of Appeals found that Winfrey's allegations could certainly be found by a jury to have been a factual assertion masquerading as opinion and, therefore, were actionable under law:

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> [W]hether or not Winfrey's alleged statements were, in all the circumstances, opinions or assertions of fact requires an inquiry that goes beyond the allegations of the complaint into a consideration of the context in which the statements were uttered. It was therefore error for the district court to grant Winfrey's motion to dismiss with regard to Count IV, (defamation) and we reverse.
> 141 F.3d 330 (parenthetical provided)

Consider as well, the recent case involving the celebrated (and recently indicted) baseball player, Roger Clemens, who threw the same sort of spitballs at his former trainer, Brian McNamee, and was promptly sued in United States District Court for defamation in *McNamee v. Clemens,* 2011 WL 323267 (E.D.N.Y. Feb. 3, 2011).

The background of the case is both interesting and instructive. McNamee had been interviewed by former United States Senator George Mitchell after Mitchell had been hired by Major League Baseball ("MLB") to conduct a special investigation into the use of performance enhancing drugs by current and former MLB players. *Id.* at *2. After Mitchell completed his investigation, he issued a Special Report in which he memorialized McNamee's allegation that Clemens had repeatedly used steroids and a human growth hormone. *Id.* In the months that followed, both Clemens and his attorney issued press releases in which they alleged McNamee was "a liar." *Id.* at **3-4. Fed up with these brush back pitches to his integrity, McNamee sued, claiming he had been defamed. When Clemens moved to dismiss, the judge found Clemens' claims that McNamee had been lying had gone well beyond a general denial. Having found that McNamee's integrity had been impugned, the court refused to dismiss the complaint. *Id.* at *12.

As for the issue of privilege, because the statements were made out of court, they required greater factual development. Accordingly, the court found that granting a motion to dismiss would be inappropriate. *Id.* at *20.

The above two cases are hardly unique. *See, e.g., Vinson v. Linn-Mar Community School District*, 360 N.W.2d 108 (Iowa 1984) ("no meaningful distinction between being called a liar

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and being accused of falsifying information"); *Pease v. Int'l Union of Operating Engineers Local 150*, 567 N.E.2d 614, 619 (Ill.App.Ct. 1991) (statements "he simply lied" and "lied to us and lied to you" were not reasonably susceptible to an innocent construction and were therefore libelous per se); *Clarage v. Kuzma*, 795 N.E.2d 348, 356 (Ill.App.Ct. 2003) (allegations in letter that plaintiff "needs to stop lying" impugned plaintiff's business ethics and was defamatory per se); *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113, 121 (2d Cir. 1977) (no allegation could be better calculated to ruin academic reputations than to call university professors "paid liars").

CONCLUSION

Sheldon Adelson's statement to *The Wall Street Journal* on March 15, 2011, was not in any way invited by Jacobs. Rather, Adelson's defamatory comments were the likely product of frustration at having failed to achieve the dismissal he so desperately wanted. And while Adelson was certainly emboldened to characterize Jacobs as a liar – given that earlier in the day Ms. Glaser repeatedly and unjustifiably labeled Jacobs as such before Her Honor – his comments were neither absolutely, nor conditionally, privileged under the law.

In short, by publicly defaming Mr. Jacobs to a worldwide investment community, Adelson ran headlong into a legal minefield where his explosive defamatory remarks have exposed him and the companies he heads to further substantial liability.

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Accordingly, the Defendants' respective motions to dismiss should be denied in their entirety.

DATED this 23rd day of May, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of May, 2011, I served via e-mail and U.S. Mail, first class postage pre-paid, a true and correct copy of the foregoing Plaintiff's Omnibus Response in Opposition to the Defendants' Respective Motions to Dismiss the Fifth Cause of Action Alleging Defamation Per Se to the following counsel of record:

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DISTRICT COURT

CLARK COUNTY, NEVADA

STEVEN C. JACOBS,

Plaintiff,

v.

LAS VEGAS SANDS CORP., a Nevada corporation; SANDS CHINA LTD., a Cayman Islands corporation; SHELDON G. ADELSON, in his individual and representative capacity; DOES I-X; and ROE CORPORATIONS I-X,

Defendants.

CASE NO.: A627691-B
DEPT NO.: XI

Date: June 9, 2011
Time: 9:00 a.m.

REPLY IN SUPPORT OF LAS VEGAS SANDS CORP.'S MOTION TO DISMISS PURSUANT TO NRCP 12(B)(5)

Defendant Las Vegas Sands Corp. ("LVSC"), by and through its undersigned counsel, the law firm of Holland & Hart LLP, hereby submits this Reply in support of its Motion to dismiss Plaintiff Steven C. Jacobs' ("Jacobs") Fifth Cause of Action for Defamation Per Se pursuant to NRCP 12(b)(5). LVSC also joins in the Reply briefs submitted by Defendant Sheldon Adelson ("Mr. Adelson").

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This Reply is based on the following Memorandum of Points and Authorities and any oral argument the Court may allow.

DATED June 3, 2011.

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REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PURSUANT TO NRCP 12(B)(5)

I.

INTRODUCTION

Apparently recognizing that the Nevada authorities cited in LVSC's Motion compel dismissal of his defamation claim, Jacobs' Opposition brief seeks to muddy the waters by attempting to distinguish those cases and relying upon inapposite case law of other jurisdictions. But this Court need not countenance Jacobs' meritless arguments and LVSC's Motion must be granted.

First, Jacobs has failed to refute that Mr. Adelson's statement is protected under the absolute litigation privilege. The absolute privilege broadly protects communications, even knowingly false statements, made during the course of judicial proceedings provided they are in some way relevant or pertinent to the subject of controversy. Mr. Adelson's statements were made during the course of the instant litigation following the March 15, 2011 hearing in response to a reporter who attended the hearing. There is similarly no dispute that his statements were directly related to Jacobs' claims for wrongful termination. Jacobs' attempt to improperly narrow the scope of the absolute privilege to exclude an email statement to a news reporter contradicts the Nevada Supreme Court's mandate that every doubt should be resolved in favor of applying the absolute privilege, and must be rejected. Accordingly, the absolute privilege

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protects Mr. Adelson's statements as a matter of law.

Mr. Adelson's statements are also absolutely privileged as a republication of statements made during the course of this lawsuit. Mr. Adelson's statement to the effect that Jacobs was terminated for cause simply republishes what is alleged in this action and was discussed earlier that day at the motion hearing. Likewise, Mr. Adelson's statement that Jacobs had resorted to "outright lies and fabrications" merely republished what was stated by counsel for Sands China, Ltd. ("SCL") before this Court at the hearing. Accordingly, Mr. Adelson's statements are also absolutely privileged as a republication of judicial proceedings, and Jacobs' claim must be dismissed.

Second, Mr. Adelson's statements are privileged under the conditional privilege of reply. Despite being forced to recognize that the conditional privilege of reply protects a party's ability to respond to attacks of another party, Jacobs urges that Mr. Adelson's sole remedy would be to file an Answer and Counterclaim in the Court. Jacobs conveniently ignores the fact that Mr. Adelson's statements were in response to attacks Jacobs had repeatedly lodged against him in the litigation to the effect that he was terminated for objecting to and/or failing to carry out "outrageous" and "illegal" demands allegedly made by Mr. Adelson. Accordingly, Mr. Adelson's statement in reply to Jacobs' allegations was protected as a matter of law. Jacobs likewise fails in his attempt to establish any exception to the conditional privilege and to distinguish the controlling case of *State v. Eighth Judicial Dist. Ct.* Accordingly, Jacobs' defamation claim is barred under the conditional privilege of reply, and the Court should grant LVSC's Motion.

As discussed in the Motion, and further below, Mr. Adelson's statements are subject to the absolute litigation privilege and, independently, the conditional privilege of reply. Therefore, Jacobs' Fifth Cause of Action for defamation per se against LVSC is deficient as a matter of law, and must be dismissed with prejudice.

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II.

LEGAL ANALYSIS

A. Jacobs' Defamation Claim Fails as a Matter of Law Because Mr. Adelson's Statements Are Protected by the Absolute Litigation Privilege.

As stated in LVSC's Motion, "communications uttered or published in the course of judicial proceedings [even if known to be false] are absolutely privileged so long as they are in some way pertinent to the subject of controversy." ***See Circus Circus Hotels v. Witherspoon***, 99 Nev. 56, 60 (1983). It is beyond dispute that the absolute privilege protects communications by attorneys as well as parties (and potential parties) provided their statements relate to a judicial proceeding. ***Clark County School Dist. v. Virtual Educ. Software, Inc.***, 213 P.3d 496, 503 (Nev. 2009) ("[W]e extend the protections of the absolute privilege to instances where a nonlawyer asserts an alleged defamatory communication in response to threatened litigation ***or during a judicial proceeding***"). Moreover, "[t]he defamatory communication 'need not be strictly relevant to any issue involved' in 'the proposed or pending litigation,' it only need be 'in some way pertinent to the subject of controversy.'" ***Fink v. Oshins***, 118 Nev. 428, 433, 49 P.3d 640, 644 (2002) (citation omitted).

Whether the absolute privilege applies is a question of law that is properly resolved by the court on a motion to dismiss. ***Circus Circus Hotels***, 99 Nev. at 62 ("Absolute privilege and relevance are questions of law for the court to decide."). Because any doubts must be resolved in favor of applying the absolute privilege, this Court must rule that the absolute privilege protects Mr. Adelson's statements. ***Fink***, 118 Nev. at 433, 49 P.3d at 644 ("In reaching its decision, the district court simply resolved any doubt in favor of a broad application of the absolute privilege, just as it should have"); ***Virtual Educ. Software***, 213 P.3d at 502 (holding that "because the scope of the absolute privilege is broad, a court determining whether the privilege applies should resolve any doubt in favor of a broad application").

In Opposition to LVSC's Motion, Jacobs does not argue that Mr. Adelson is undeserving of the protections of the privilege nor that his statements were not pertinent to the subject of controversy avoid the application of the absolute privilege. Indeed, the allegations of the First

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Amended Complaint specifically confirm that Mr. Adelson made the statement the same day as the hearing on the Defendants' motions to dismiss, which "received widespread attention by members of the media, and particularly by journalists who report on affairs in the business community." FAC, ¶ 61. Mr. Adelson's statement was also directly related to Jacobs' claims for wrongful termination. FAC, ¶ 62 ("We have a substantial list of reasons why Steve Jacobs was fired for cause and interestingly he has not refuted a single one of them. Instead, he has attempted to explain his termination by using outright lies and fabrications which seem to have their origins in delusion.").

Because the Nevada authorities unequivocally compel dismissal of his claims, Jacobs is left attempting to distinguish the holdings of the Nevada authorities. But Jacobs' attempt to narrow the scope of the absolute privilege is contrary to well-settled Nevada law and the public policy behind this privilege. ***Circus Circus Hotels***, 99 Nev. at 61, 657 P.2d at 104 ("[T]he public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements" and applies "even where the defamatory statements are published with knowledge of their falsity and personal ill will toward the plaintiff."). Indeed, the broad rules of absolute privilege pronounced by the Nevada Supreme Court have never precluded a party from responding to an inquiry from a member of the press, and Jacobs has identified no Nevada authority which has expressed any concern about statements to the press regarding litigation. California law specifically *protects* litigants' statements to the news media as communications to a "public journal" of "a judicial proceeding . . . or anything said in the course thereof," unless they violate a court order, the Rules of Professional Conduct or other confidentiality requirements imposed by law. CAL. CIVIL CODE § 47(d); ***see also Designing Health, Inc. v. Erasmus***, 2001 WL 36239748 (C.D. Cal. Apr. 24, 2001) (finding that a letter and press release discussing the claims in a lawsuit fell "within the absolute privilege afforded to communications regarding judicial proceedings"). Therefore, Jacobs' attempt to distinguish the cases cited in the other Defendants' motion to dismiss merely confirms the broad range of cases in which the absolute privilege applies.[1] Therefore, the Court should reject

[1] For example, the Arizona Supreme Court did not reverse the holding of the court of appeals that a statement made

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Jacobs' attempt to unduly narrow the scope of the broad absolute privilege, and the defamation per se claim should be dismissed.

B. Mr. Adelson's Statements Are Absolutely Privileged Because They Simply Republished Counsel's Statements at the Court Hearing.

Mr. Adelson's statements are also protected by the absolute litigation privilege because they simply republished the statements made by counsel for SCL at the court hearing earlier in the day on March 15, 2011. The absolute privilege for republication is not limited to those specifically engaged in reporting news to the public, but extends to any person who makes a republication of a judicial proceeding or material that is available to the general public. ***Sahara Gaming Corp. v. Culinary Workers Union Local 226***, 115 Nev. 212, 218, 984 P.2d 164 (1999). Tellingly, Jacobs does not dispute in his Opposition brief that Mr. Adelson's statement was simply a republication of the Court proceeding, and, in fact, Jacobs failed to address this argument entirely.

Mr. Adelson's statement to the *Wall Street Journal* reporter simply repeated the position advanced by counsel for SCL at the March 15, 2011 hearing (which was attended by the press) that Jacobs had been terminated for cause and that Jacobs had lied to the Court and in his allegations against the Defendants. *See* Mot., Ex. A at 57: 11-16. Therefore, Mr. Adelson's statements merely republished what previously had been stated before this Court at the March 15, 2011 hearing. Accordingly, Jacobs' claim for defamation fails as a matter of law and should be dismissed because the alleged statements on which it is based are subject to the absolute litigation privilege as a republication of a judicial proceeding. ***Sahara Gaming Corp.***, 115 Nev. at 218, 984 P.2d at 168.

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(continued)
to the news media may be covered by the privilege provided it has some relation to the proceeding. ***Green Acres Trust v. London***, 688 P.2d 617 (Ariz. 1984). Moreover, its holding relative to refusing to apply the absolute litigation privilege before litigation commenced is inapposite because Nevada law specifically protects defamatory statements made "in anticipation of judicial proceedings." ***See Virtual Educ. Software***, 213 P.3d at 499.

C. Mr. Adelson's Statements Are Independently Protected by the Conditional Privilege of Reply.

Mr. Adelson's response to the *Wall Street Journal* reporter is further protected by the conditional "privilege of reply." In the Complaint, Jacobs repeatedly alleged that LVSC and SCL had wrongfully taken the position that he had been terminated for cause, and further alleged that he was terminated because he "objected to and/or refused to carry out" allegedly "outrageous" and "illegal" demands allegedly made upon him by Mr. Adelson. ***E.g.***, Compl., ¶¶ 41, 46, 47 and 50. But as Jacobs was forced to admit in his Opposition, the common law privilege of reply grants those which are attacked with defamatory statements a limited right to respond to such statements. ***See State v. Eighth Judicial Dist. Ct. ("Anzalone")***, 118 Nev. 140, 149, 42 P.3d 233, 239 (2002). Jacobs does not argue that Mr. Adelson was not attacked by the allegations in the Complaint, but simply argues that the Defendants lost the privilege when he responded to the *Wall Street Journal* reporter. ***See*** Opp., at pp. 7-8.

As discussed in the Motion, the conditional privilege of reply may be lost only if the reply (1) includes substantial defamatory matter that is irrelevant or non-responsive to the initial statement, (2) includes substantial defamatory material that is disproportionate to the initial statement, (3) is excessively publicized, or (4) is made with malice in the sense of actual spite or ill will. ***Id.*** at 150, 52 P.3d at 240.[2] Here, there is simply no basis for Jacobs to argue that the privilege was lost.

1. Mr. Adelson's Reply Was Not Excessively Published.

Jacobs first argues that Mr. Adelson's statement was excessively published by being reported to the *Wall Street Journal*, arguing that Mr. Adelson's sole permitted response was limited to filing an Answer and Counterclaim in the Court. This argument is silly and meritless. Not surprisingly, Jacobs cites no authority that actually holds that a party's conditional privilege of reply must be limited to the identical forum in which the statements were made. Of course,

[2] Jacobs does not argue in his Opposition (nor could he) that Mr. Adelson's response to the *Wall Street Journal* reporter included substantial defamatory matter that is irrelevant or non-responsive to Jacobs' allegations. This is because, as discussed in the Motion, Mr. Adelson's response squarely addressed the allegations contained in Jacobs' Complaint. Therefore, there is no question that the first exception to the conditional privilege is not implicated here.

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Jacobs' argument is not reflective of the test for determining whether the reply was excessively published. In ***Foretich v. Capital Cities/ABC, Inc.***, 37 F.3d 1541, 1559-60 (4th Cir. 1994), which was relied upon by the Nevada Supreme Court in adopting the conditional privilege of reply, the Fourth Circuit recognized that while the reply generally should "reasonably focus on the audience which heard the attack . . . ***where the original attack was widespread, the response can be widely disseminated as well.***" ***Id.*** (emphasis added). Jacobs apparently would like the Court to believe that the defamatory allegations he levied in the Complaint do not receive any attention outside of the courthouse such that a response must only be presented to the Court. But it is plain that this lawsuit and Jacobs' allegations were public attacks on Mr. Adelson and the Defendants that have received widespread media attention[3] (including Jacobs' own decision to speak with the press). It was no coincidence that Jacobs' counsel argued in favor of permitting cameras and reporters in the courtroom for the March 15, 2011 hearing or that Jacobs' counsel directed much of his presentation to the cameras at the hearing. Under such high profile, high stakes circumstances, Mr. Adelson was certainly permitted by law to reply to the defamatory allegations levied against him that were about to be published in the *Wall Street Journal*.

In the ***Anzalone*** case, the letter from the then-Attorney General that was alleged to be defamatory was sent not only to the *Las Vegas Sun*, which was the forum that addressed the allegations, but also to the Nevada Gaming Control Board, the Governor, and the Nevada Gaming Commission. ***Id.*** at 150, 42 P.3d at 240. Yet the Supreme Court had no trouble concluding that these additional publications were "not excessive publication." ***Id.*** Further, the ***Foretich*** court analyzed whether a party's public statements to media outlets were excessively published:

> [T]he Foretiches' public statements were made only to reporters from media outlets that had already aired, ***or were planning soon to air, Dr. Morgan's accusations against them*** and their son. The Foretich grandparents ***did not reach out to additional media outlets***, and thereby to new audiences, in an effort to expand the circle of persons familiar with the controversy. Rather, they ***targeted their message toward those persons***

[3] While Jacobs acknowledges the widespread dissemination of his defamatory allegations in his First Amended Complaint and does not dispute in his Opposition brief that he, himself, addressed members of the press following the March 15, 2011 hearing. ***See*** FAC, ¶ 61 ("The hearing received widespread attention by members of the media, and particularly by journalists who report on affairs in the business community").

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> ***in whose eyes their reputations already had been (or soon would be) sullied***. Thus, their replies were not excessive.

Id. (emphasis added). Here, Mr. Adelson's statements were made in a single email in response to a *Wall Street Journal* reporter who was publishing an article discussing the instant lawsuit and the defamatory allegations levied against Mr. Adelson, LVSC, and SCL. Indeed, Jacobs' own allegations confirm that Mr. Adelson did not issue a "press release" (as Jacobs now attempts to recharacterize it), but simply sent a single responsive email to an inquiring reporter for the *Wall Street Journal*.[4] ***See*** FAC, ¶ 62. Jacobs does not allege, nor is there any evidence, that Mr. Adelson reached out to a large number of media outlets or sent the same or similar emails to a large number of publications to respond to the allegations. Mr. Adelson was certainly entitled to reply to and dispute the assertions made by Jacobs in the litigation, and did so in response to a reporter's question. Accordingly, as held by the ***Anzalone*** and ***Foretich*** courts, Mr. Adelson's single email response to one publication cannot be deemed excessive publication as a matter of law.

2. Mr. Adelson's Reply Was Not "So Intemperate or Violent," "Truly Outrageous," or "Altogether Disproportionate" to Jacobs' Allegations.

Jacobs' allegations that Defendants acted with malice does not render the claim inappropriate for dismissal as a matter of law. Of course, if such were the case, no defamation claim would ever be dismissed under the conditional reply privilege since a plaintiff would merely need to allege that a defendant acted with malice. Unfortunately for Jacobs, the standard set forth in the relevant case authorities is much higher. This high standard requires "malice in the sense of ***actual spite or ill will***." ***Anzalone***, 118 Nev. 140, 150, 42 P.3d at 239. The ***Foretich*** court found that for the privilege to be lost, the language must be "***so intemperate or violent*** as to be of itself evidence of [spite]." ***Id.*** at 1562 (citation omitted).

Mr. Adelson's response was not disproportionate to Jacobs' allegations and is not so intemperate or violent to constitute malice or actual spite. A "reply would have to be ***truly***

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[4] Mr. Adelson's email to the *Wall Street Journal* reporter more closely resembles the Attorney General's letter than an official press release from himself, LVSC, or SCL that would be widely disseminated to the press.

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outrageous before we would deem it '***altogether disproportionate*** to the occasion.'" ***Id.*** The ***Foretich*** court explained, "[o]ur reading of the extensive case law on abuse of the privilege of reply . . . demonstrates, however, that a public response to a public attack may be 'uninhibited, robust, and wide-open,' without stepping over the line into abuse." ***Id.*** (citing ***New York Times v. Sullivan***, 376 U.S. 254, 270 (1964)). Indeed, that court further stated: "we observe that a person under attack ***may properly allege***, in Dean Prosser's words, 'that his accuser is an ***unmitigated liar*** and the truth is not in him.'" ***Id.*** at 1562 (emphasis added). The ***Foretich*** court recognized that "a reply that labeled an accusation 'a ***contemptible, cowardly, malicious lie***' and referred to its source as a 'scoundrel' who 'could not [be] recognized . . . in the way a gentleman should be recognized'" did not fall outside of the protection of the conditional privilege. ***Id.*** (citation omitted) (emphasis added).

In ***Anzalone,*** the Nevada Supreme Court easily found that the statements in the Attorney General's letter that the attacker was an "obviously ***disgruntled*** former employee" who "has ***not been completely candid***," and who "has chosen to ***distort the facts***" fell well within the conditional privilege of reply. ***Id.*** The Attorney General's letter also levied allegations against Anzalone that "he had removed documents from a file and failed to turn over evidence after being requested to do so," and that he was "disciplined for misuse of state property." ***Id.*** Nonetheless, the Nevada Supreme Court found that the publication of this letter was protected under the conditional privilege of reply as a matter of law. Similarly, in applying the legal standard to the facts of that case, the ***Foretich*** court specifically found that statements that the attacking party was "'mentally ill,' 'sick,' and 'not in her right mind,' [and] label[ing] her allegations as '***heinous lie[s]***,' 'downright filth,' and 'filthy dirt'-'like from the bottom of a cesspool'" ***did not come "even close"*** to offending the exception. ***Id.*** at 1562 (emphasis added).

When viewing the statements in the foregoing authorities in comparison to the alleged statements in the instant case, Mr. Adelson's statements that Jacobs was terminated "for cause" and that he "attempted to explain his termination by using outright lies and fabrications which seem to have their origins in delusion" (FAC, ¶ 62) were not only directly proportionate to the defamatory allegations levied against him, but fall immeasurably short of the high standard of

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"so intemperate or violate" or "truly outrageous" to be deemed malicious or disproportionate to fall outside of the conditional privilege of reply. As discussed above, Jacobs repeatedly alleged in the Complaint that LVSC and SCL had wrongfully taken the position that he had been terminated for cause and further alleged that Jacobs was terminated because he "objected to and/or refused to carry out" allegedly "outrageous" and "illegal" demands allegedly made upon him by Mr. Adelson. Compl., ¶¶ 41, 46, 47 & 50. Indeed, the foregoing authorities confirm that Mr. Adelson is permitted to respond that "his accuser is an unmitigated liar" without abusing the conditional privilege of reply, and the Court should find that Mr. Adelson's statements are conditionally privileged as a matter of law.

3. The Conditional Privilege of Reply Applies as a Matter of Law.

This Court should rule on the application of the conditional privilege as a matter of law. In ***Anzalone***, the Supreme Court specifically ruled that "[a]pplying this [conditional] privilege [of reply] is a question of law" for the Court to resolve. ***Anzalone***, 118 Nev. at 149, 42 P.3d at 239 (citation omitted). This holding is confirmed by the Nevada Supreme Court's findings that the district court should have granted the motion to dismiss the defamation claim under the conditional privilege, as well as by the Supreme Court's express finding as a matter of law that ***none of the exceptions to the privilege applied to the facts of that case***. ***Id.*** at 150, 42 P.3d at 240. Similarly, the rulings by the Court in ***Foretich*** with respect to each of the exceptions to the conditional privilege of reply were made by way of a pretrial motion as a matter of law.[5] 37 F.3d at 1562. Accordingly, consistent with the Nevada Supreme Court's issuance of a writ of mandamus directing the district court to dismiss the defamation claim based upon the conditional privilege of reply, this Court must likewise dismiss Jacobs' defamation claim against Defendants under the conditional privilege of reply.

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[5] Jacobs' reliance upon the case of *Weldy v. Pietmont Airlines, Inc.*, 985 F.2d 57 (2d Cir. 1993) that discusses New York law to suggest that the Court must allow a jury to resolve the conditional privilege is misplaced, as that court applied a legal standard for "malice" contrary to that adopted by the Nevada Supreme Court, and also because the court found substantial evidence in that case that could warrant application of the exception, which is similarly absent here.

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IV.

CONCLUSION

Because both the absolute litigation privilege and the conditional privilege of reply protect Mr. Adelson's statements in his email to the *Wall Street Journal*, LVSC respectfully requests that the Court grant its Motion to Dismiss Jacobs' Fifth Cause of Action for Defamation Per Se.

DATED June 3, 2011.

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that on June 3, 2011, I served a true and correct copy of the foregoing **REPLY IN SUPPORT OF LAS VEGAS SANDS CORP.'S MOTION TO DISMISS PURSUANT TO NRCP 12(B)(5)** via e-mail and by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

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DISTRICT COURT

CLARK COUNTY, NEVADA

STEVEN C. JACOBS,

Plaintiff,

v.

LAS VEGAS SANDS CORP., a Nevada corporation; SANDS CHINA LTD., a Cayman Islands corporation; SHELDON G. ADELSON, in his individual and representative capacity; DOES I through X; and ROE CORPORATIONS I through X,

Defendants.

Case No.: A-10-627691-C

Dept. No.: XI

REPLY BRIEF IN SUPPORT OF DEFENDANT SANDS CHINA LTD.'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

DATE OF HEARING: 06/09/11
TIME OF HEARING: 9:00 A.M.

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I

INTRODUCTION

Defendant Sands China Ltd. ("SCL") demonstrated in its "Motion To Dismiss For Failure To State A Claim" (the "Motion") that the two claims Jacobs asserts against SCL, one for breach of contract and one for defamation, both are deficient as a matter of law. Rather than submit to the Court a third reply brief regarding the defamation claim, SCL instead refers to and adopts the arguments made in the reply briefs filed by Sheldon Adelson ("Adelson") and Las Vegas Sands Corp. ("LVSC"). This brief therefore serves to reply only with respect to Jacobs' opposition to the Motion (the "Opposition") as directed to Jacobs' claim against SCL for breach of contract.

As demonstrated in the Motion, and as acknowledged in Jacobs' Opposition, Jacobs alleges that SCL is a party to only one contract with Jacobs, namely, the Stock Option Grant Letter.[1]

SCL has demonstrated in its Motion that Jacobs' breach of contract claim against SCL fails for two independent reasons. First, the plain and unambiguous language of the Stock Option Grant Letter provides that the right Jacobs seeks to enforce by his breach of contract claim, namely, the right to exercise an option to purchase SCL stock after Jacobs' employment with SCL was terminated, was extinguished upon the termination of his employment with SCL. Simply put, by the plain and unambiguous terms of the Stock Option Grant Letter that Jacobs seeks to enforce as an alleged contract, the grant was extinguished, along with the rights to the options thereunder, when he was terminated. Second, Jacobs has not alleged in the FAC that he took the actions that the Stock Option Grant Letter specifies must be taken by him in order to accept the offer it conveyed and to create a contract. In other words, Jacobs does not allege that he signed and returned the Stock Option Grant Letter.

In response, Jacobs' Opposition engages in an exercise at misdirection. First, in response to the Stock Option Grant Letter being extinguished upon termination, Jacobs argues that an alleged agreement between him and LVSC, namely, the Term Sheet, governs the rights and obligations of SCL under the Stock Option Grant Letter. Second, in response to his failure to allege that he

[1] All defined terms (e.g., "Stock Option Grant Letter" and "FAC") have the same meaning as was ascribed to them in the Motion.

accepted the offer communicated by the Stock Option Grant Letter, Jacobs argues that he "performed all of his obligations...except where excused." Finally, Jacobs argues that he can in effect revive the extinguished option to purchase SCL stock because he alleges that he was wrongfully terminated in derogation of the alleged LVSC Term Sheet. Each of Jacobs' arguments fails.

With respect to Jacobs' effort to avoid the plain and unambiguous language of the Stock Option Grant Letter, Jacobs' reliance on the Term Sheet is unavailing. First, as Jacobs admits, SCL is not a party to the Term Sheet. Jacobs presumably admits that SCL is not a party to the Term Sheet because SCL did not exist at the time the Term Sheet allegedly was executed. Second, Jacobs identifies no language in the Stock Option Grant Letter that adopts or incorporates any provisions from the Term Sheet. Third, the legal authority on which Jacobs relies for his tortured argument that the terms of the Term Sheet, not the terms of the Stock Option Grant Letter, govern his rights under the Stock Option Grant Letter, is inapplicable and does not support his position. It is inapplicable because the Stock Option Grant Letter is governed by Hong Kong law. Jacobs cites no Hong Kong law and does not argue that the cases on which he relies apply Hong Kong law, which they do not. The (inapplicable) cases he cites also do not support his position, even if they were applicable to the Stock Option Grant Letter, which they are not. For these reasons, among others, Jacobs' effort to alter the plain and unambiguous terms of the Stock Option Grant Letter by relying on the Term Sheet and law which does not apply to the Stock Option Grant Letter is unavailing, at best.

Second, with respect to the argument that the FAC fails to allege that Jacobs accepted the offer conveyed by the Stock Option Grant Letter by signing and returning the Stock Option Letter and that the FAC therefore fails to allege that a contract came into existence, Jacobs' citation to his allegation that he performed all contractual obligations confuses two different rudimentary legal concepts, namely, acceptance and performance. Jacobs' allegation that he performed all of his contractual obligations is legally and logically irrelevant to the question of whether he accepted an offer and created a contract. On that basis, as well, Jacobs' purported contract claim against SCL is deficient as a matter of law. There simply is no contract.

Finally, Jacobs' last argument, that he is entitled to seek damages arising from his inability to exercise the option to purchase SCL stock because he was "wrongfully discharged" or "wrongfully terminated" is a "hail Mary" argument that is mistaken as a matter of fact and law, including as demonstrated by Jacobs' own FAC. First, Jacobs' FAC includes claims for breach of the implied covenant of good faith and fair dealing and for tortious discharge in violation of public policy, but only against LVSC, not against SCL. Second, Jacobs does not allege (and does not have) an employment contract with SCL. Third, each of the cases Jacobs cites for the proposition that damages for the loss of stock options can be pursued where an employee was wrongfully terminated are cases in which the employee had an employment contract, a factual and legal predicate to a claim for wrongful discharge or wrongful termination under the cases Jacobs' cites. Thus, those cases do not support Jacobs' position. Finally, Hong Kong law is not applied in those cases and those cases therefore do not apply to the Stock Option Grant Letter, which is governed by Hong Kong law.

Accordingly, SCL respectfully submits that Jacobs' second and fifth causes of action both are deficient as a matter of law, and that this action therefore should be dismissed as against SCL, with prejudice.

II

ARGUMENT

A. The Plain and Unambiguous Language of the Only Contract Alleged Between Jacobs and SCL, The Stock Option Grant Letter, Extinguishes the Contractual "Right" He Sues to Enforce

SCL demonstrated in its Motion that the plain and unambiguous language of the only alleged contract between Jacobs and SCL, the Stock Option Grant Letter, not only does not provide Jacobs the right to exercise an option to purchase SCL stock after Jacobs' employment with SCL terminated, it extinguishes any such right upon termination. It is undisputed that, pursuant to the plain and unambiguous terms Stock Option Grant Letter, if Jacobs was terminated, the option terminates unless the option had previously vested. It is undisputed that, pursuant to the plain unambiguous terms of the Stock Option Grant Letter, Jacobs' option had not vested when he was

terminated in July 2010. (FAC, ¶44) Pursuant to the Stock Option Grant Letter, Jacobs therefore does not have the very right he sues to enforce.

Jacobs does not dispute that the Stock Option Grant Letter provides that the option to purchase SCL shares terminated upon the termination of his employment with SCL. Instead, Jacobs argues that the rights and obligations of Jacobs and SCL under the Stock Option Grant Letter are governed by the Term Sheet, his alleged employment agreement with LVSC. Based on this tortured *ipse dixit*, he concludes that a provision in the Term Sheet that certain options vest upon termination in effect replaces the plain and unambiguous language of the Stock Option Grant Letter that unvested options terminate when employment terminates.

Jacobs makes this argument notwithstanding the fact that SCL is not a party to the Term Sheet and notwithstanding the fact that SCL did not exist at the time the Term Sheet was executed. He likewise ignores the fact that nowhere in the Stock Option Grant Letter is there any indication that the Term Sheet, much less the inconsistent vesting term on which Jacobs relies, is incorporated into or intended to modify the Stock Option Grant Letter. Equally mistaken is Jacobs' reliance on a series of cases from different jurisdictions in the United States, none of which apply Hong Kong law, which governs the Stock Option Grant Letter (and the Equity Award Plan on which it is based). (As discussed below, even if those cases applied to the Stock Option Grant Letter, which they do not, they do not support Jacobs' position.)

In an effort to (incorrectly) suggest that the Stock Option Grant Letter somehow references the Term Sheet, Jacobs begins his argument with an incomplete quotation of Section 8.1 of the "Option Terms And Conditions" appended to and incorporated in the Stock Option Grant Letter and concludes as follows:

> "In other words, the Stock Option Grant cannot be used by a grantee to claim he has an employment contract with the company when one does not otherwise exist. Where, however, the grantee does have an employment agreement, its terms and obligation will not be affected by the Stock Option Grant."

(Opposition at 5:22-24.)

By the foregoing, Jacobs' mischaracterizes the plain language of the Stock Option Grant Letter and implies that the Stock Option Grant Letter references his alleged "employment agreement" with LVSC, the Term Sheet.

Section 8 of Option Terms And Conditions appended to and incorporated in the Stock Option Grant Letter provides in its entirety as follows:

> 8.1 No Rights to Employment: The grant of Options and these Terms and Conditions shall not form part of any contract of employment between the Company or any subsidiary and any employee and the rights and obligations of any employee under the terms of his office or employment shall not be affected thereby. No grantee shall have any additional rights to compensation or damages in consequence of the termination of such office or employment for any reason as a result of the grant of an Option to him.
>
> 8.2 No Legal or Equitable Rights: These Terms and Conditions shall not confer on any person any legal or equitable rights (other than those constituting the Options themselves) against the Company directly or indirectly or give rise to any cause of action at law or in equity against the Company.
>
> 8.3 Governing Law: These Terms and Conditions and Options granted hereunder shall be governed by and construed in accordance with Hong Kong law.

The first sentence of 8.1 provides that the Stock Option Grant Letter will not affect the terms of any contract of employment "between the Company or any subsidiary and any employee." "Company" is defined in the "Notice of Exercise" portion of the Stock Option Grant Letter as SCL. Thus, by its terms, Section 8.1 refers only to employment contracts with SCL and subsidiaries of SCL. LVSC is not a subsidiary of SCL. Thus, and contrary to what Jacobs suggests, the Term Sheet between Jacobs and LVSC is not referenced in Section 8.1 of the Stock Option Grant Letter.

The FAC alleges only one contract between Jacobs and SCL, namely, the Stock Option Grant Letter. Jacobs' FAC alleges that SCL breached the Stock Option Grant Letter by rejecting Jacobs' September 24, 2010 demand to exercise an option pursuant to the Stock Option Grant Letter. (FAC, ¶47). By the FAC, Jacobs sues SCL only for breach of contract, not for breach of the implied covenant of fair dealing or for tortious discharge in violation of public policy, although Jacobs makes those claims against LVSC based on the Term Sheet (which Jacobs contends constitutes an

employment agreement). The FAC does not allege any other contract, including any employment contract, between Jacobs and SCL.

Jacobs' FAC alleges that the Term Sheet is a contract with LVSC, not SCL. (See FAC, ¶36, 40 and 41.) Any doubt that Jacobs contends the Term Sheet was with LVSC alone was put to rest by his counsel who, in opposing LVSC's motion to dismiss for failure to name an indispensible party, stated as follows:

> "**This terms sheet,** which was agreed and signed on August the 3rd of '09, Your Honor, makes no mention whatsoever of VML. You will see, likewise, that the signature on it is not of an officer or director of VML. You don't see Antonio Ferraria's signature on it on behalf of VML. For good reason, Your Honor. Because this is not with Venetian Macau Limited, this is not like the consulting agreement with VML or the--or any of the other agreements. That's why Ferraria is not signing it. This **is with Las Vegas Sands.**"

(March 15, 2011 transcript at 26:25-27:8.)

Moreover, Section 8.2 provides that the Stock Option Grant Letter "shall not confer on any person any legal or equitable rights...against the Company directly or indirectly or give rise to any cause of action at law or in equity against the Company," This provision also bars Jacobs' claim for breach of the Stock Option Grant Letter (and presumably would be argued by Jacobs to apply only to SCL, and not to LVSC).

In sum, Jacobs makes the implausible argument that it is the terms of the Term Sheet, to which SCL is admittedly not a party and which indisputably was executed at a time when SCL did not exist, that govern the rights and obligations of SCL and Jacobs under the Stock Option Grant Letter. He does so notwithstanding the fact that he does not allege (and cannot allege) that the Stock Option Grant Letter adopts or incorporates the terms in the Term Sheet. This reflects the fact that the Stock Option Grant Letter is based on a form document used in connection with SCL's Equity Award Plan (referenced and incorporated in the Stock Option Grant Letter), which is a stock option plan available to others, not simply a stock option plan created specifically for Jacobs. This also reflects the fact that Jacobs did not seek and/or secure inclusion in the Stock Option Grant Letter of any provision that references or incorporates the (irrelevant) Term Sheet.

Finally, the cases on which Jacobs relies do not support his position and do not warrant denial of the Motion. First, none of those cases apply Hong Kong law, which Jacobs does not

address at all. Pursuant to Hong Kong law, when a single transaction allegedly is evidenced by multiple writings, Hong Kong courts generally will interpret those documents consistently unless this would result in a breach of the terms of the documents. *See UBS AG v HSH Nordbank AG* (2008) I.L.Pr. 46; *UBS AG v HSH Nordbank AG* (2009) 1 C.L.C. 934[2].

Here, whether Jacobs was terminated for cause makes a difference under the provision in the Term Sheet regarding what happens to unvested options, but whether Jacobs was terminated for cause makes no difference to what happens to unvested options pursuant to the Stock Option Grant Letter. The Stock Option Grant Letter and Term Sheet therefore cannot be interpreted consistently, and Jacobs' Opposition effectively asks this Court to rewrite the plain and unambiguous language of the Stock Option Grant Letter and replace its term regarding what happens to unvested options upon termination of employment with a different term from the Term Sheet. After this veiled exercise at offering parole argument, Jacobs shamelessly suggests that the Court cannot rule on the Motion. Were such an argument well-taken, which it is not, every contract case would survive to trial because one party argues that the Court cannot interpret the plain and unambiguous language of the (alleged) contract. Of course, that is not the law. *See NGA #2 LLC v. Rains*, 113 Nev. 1151, 1158 (1997) (holding that interpretation and construction of contractual terms is a "question of law" that can be determined in a 12(b)(5) motion to dismiss); *see also Anvui, LLC v. G.L. Dragon, LLC*, 123 Nev. 213, 215 (1997).

Because none of the cases cited by Jacobs apply Hong Kong law, each of them is irrelevant to the Motion. However, they do serve to highlight Jacobs' inability to demonstrate any legal basis for his breach of contract claim against SCL, because they do not support denial of the Motion.

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[2] Hong Kong contract law is based principally on the English common laws of contract. Before the 1997 handover of Hong Kong from the United Kingdom to the People's Republic of China, Hong Kong courts were bound by the decisions of the Judicial Committee of the Privy Council to the sovereign of England, and were effectively (though not strictly) bound by applicable decisions of the United Kingdom House of Lords. *See Solicitor (24/07) v Law Society of Hong Kong* (2008) 11 HKCFAR 117. Pursuant to Basic Law of the Hong Kong Special Administration Region of the People's Republic of China, the common law in force prior to 1997 continued to have effect but Hong Kong courts are no longer bound by decisions of the Privy Council and the House of Lords (whose judicial powers have been transferred to a newly constituted Supreme Court of England and Wales. As a matter of practice, however, the decisions of these bodies, and the English courts generally, are of persuasive authority in Hong Kong. *See Solicitor (24/07) v Law Society of Hong Kong* (2008) 11 HKCFAR 117.

To begin, the cases Jacobs cites all concern single transactions. That is not the situation in this case. The Term Sheet is, according to Jacobs, an employment contract with LVSC. The Stock Option Grant Letter, by its own terms, is an offer of an option pursuant to SCL's Equity Award Plan. Jacobs dutifully ignores this distinction, which distinguishes the cases he cites from this case.

Case in point – Jacobs' reliance on the *Knox v. Microsoft Corp.*, 962 P.2d 839 (Wash. Ct. App. 1998) case for the proposition that somehow SCL is liable for LVSC's alleged breach of the Term Sheet. The *Knox* case, as with all of the cases cited by Jacobs' in his Opposition, concerned a suit between a terminated employee and the employer over damages flowing from the breach of an employment agreement. *Id.* at 840. The court in *Knox* framed the issue as "the measure of damages Knox was entitled to seek [against his employer] in his wrongful termination case. General contract principles apply, as Knox's wrongful termination action was based on a breach of employment contract theory." *Id.*

The court in *Knox* predicated its finding of liability on the employer's initial breach of an employment agreement, a crucial fact that cannot be found in any of Jacobs' allegations against SCL. Without an allegation that SCL breached the Term Sheet (which Jacobs has not made, and cannot make), Jacobs cannot pursue a breach of contract claim against SCL or seek damages from SCL based on the Term Sheet.

An instructive example of the principle ignored by Jacobs in *Knox* also is shown in the case of *Morschbach v. Household Int'l Inc. and Beneficial Corp.*, 2002 U.S. Dist. LEXIS 1874; 27 Employee Benefits Cas. (BNA) 2140. In *Morschbach*, the plaintiff served as the CEO of defendant Household Int'l Inc.'s subsidiary (through merger) pursuant to an employment contract with the parent, and he argued that he was entitled to exercise options to purchase the subsidiary's stock after the merger allegedly caused his employment to be "wrongfully" terminated. *Id.* at *7-*8.

The *Morschbach* court noted that the ability to purchase stock options in the subsidiary was governed by the subsidiary's stock option agreements and the non-qualified stock option plan, which contained an express clause that terminated plaintiff's right to purchase stock once his employment ceased. *Id.* Similar to the case at bar, the option agreements also made clear that they do not give rise to an employment relationship, nor do they interfere with the right of plaintiff's

employer [the parent corporation] to terminate his employment. *Id.* at *11-*12 (finding that due to these limitations that "the [stock option agreements] are stand-alone grants, which do not tie into any other agreement or contract.").

The *Morschbach* court found the same to be true with plaintiff's employment contract with the parent company, which it recognized as a contract between plaintiff and his employer, not the subsidiary, and therefore could not be enforced against the subsidiary. *Id.* The plaintiff in *Morschbach* could not recover damages from the subsidiary, either due to its alleged breach of the stock option agreements (because the plaintiff could not show that the subsidiary had failed to comply with its terms) or due to any terms in the employment agreement with the parent (because the subsidiary was not a party and could not be bound by its terms).

The similarities between the *Morschbach* case and the current case underscore the distinctions that can be drawn between Jacobs' argument and the actual holdings in the *Knox* case and the remaining cases cited by Jacobs in his Opposition. In short, none of them stand for the proposition that a third-party can be held liable for an employer's alleged breach of an employment contract, and no creative citations on Jacobs' part can overcome the basic tenets of contract law. Thus, the inapplicable cases to which Jacobs cites do not apply to the Stock Option Grant Letter but, if they did, would not provide a basis for denying the Motion.

In short, Jacobs' "have it both ways" effort to rely on the Term Sheet to modify the plain language of the Stock Option Grant Letter is unavailing. The plain language of the Stock Option Grant Letter bars the very claim Jacobs makes pursuant to that document. The breach of contract claim against SCL therefore fails as a matter of law.

B. Jacobs' Failure to Allege that He Signed and Returned the Stock Option Grant Letter is Fatal to his Claim for Breach of the Contract.

SCL demonstrated in its Motion that Jacobs' claim for breach of contract against SCL is deficient as a matter of law because Jacobs has not alleged that he took the actions that the Stock Option Grant Letter specifies must be taken by him in order to accept the offer it conveys and create an agreement. In this regard, the Stock Option Grant Letter provides as follows:

5. Acceptance Of The Option

"If you wish to accept this offer of Option, please sign a duplicate copy of this notice and return it (together with remittance of HK $1.00) to Joey Cheong...within 28 days of the date of this letter. If Joey Cheong does not receive the letter and amount (in accordance with this paragraph) within 28 days, you shall be deemed to have declined the grant of the Option."

Neither in the second cause of action nor elsewhere in the FAC does Jacobs allege that he signed and returned the Stock Option Grant Letter. Indeed, Jacobs does not even allege generally that he took any action to accept the offer communicated by the Stock Option Grant Letter. For this reason, as well, the second cause of action is deficient as a matter of law.

In response, Jacobs argues that SCL's analysis is "nonsensical" because "Jacobs has alleged that he performed all contractual obligations except where excused, and the court is bound to accept those allegations as true." (Opposition at 7:27-8:2.) Jacobs further argues that his failure to allege that he signed and returned the Stock Option Grant Letter is not fatal to his contract claim because he was terminated twelve days before the acceptance period expired, and that "[i]t is axiomatic that 'any affirmative tender of performance is excused when performance has in effect been prevented by the other party to the contract' [citation omitted]." (Opposition at 8:7-9.) Each of these arguments is a misdirected exercise at obfuscation, because each confuses the legal concept of acceptance necessary to create a contract with a different legal concept, performance, which is irrelevant to whether a contract has been created.

The Stock Option Grant Letter states in its "Terms, Option and Conditions" that it "shall be governed by and construed in accordance with Hong Kong law." While Jacobs includes no discussion of Hong Kong law in his Opposition, that law will nonetheless control his claim for breach of contract against SCL. An enforceable contract must include a valid offer and acceptance. *See Chitty on Contracts – Thirtieth Ed. (Vol. 1, Gen. Principles)*, 2008, Thomas Reuters trading as Sweet & Maxwell, 2-001. In other words, an offer without acceptance is not a contract; and as a rule the acceptance, to be binding, must be in accord with the terms of the offer and not in some other form or less efficacious manner. *See Yates Building Co., Ltd. v. Pulleyn & Sons (York) Ltd.* (1976) 1 EGLR 157.

Here, the Stock Option Grant Letter by its express terms required that the recipient, in this instance Jacobs, execute and return it within 28 days of the date of the Stock Option Grant Letter in order to accept the offer it conveyed and create an option contract. This provision is consistent with the fundamental legal precept that acceptance is required to create an option agreement.

Nowhere in the FAC are there allegations that Jacobs (i) executed the Stock Option Grant Letter and (ii) returned it (iii) within the time specified.

Jacobs' citation to the allegations in the FAC (¶ 46) that he "has performed all of his obligations under the contract except where excused" is a desperate effort at misdirection. Performance cannot happen in the absence of contract and a contract does not exist without acceptance of an offer. The FAC does not allege acceptance and Jacobs' allegation of performance is irrelevant to the analysis.

The same is true with respect to the cases Jacobs cites for the proposition that performance is excused when it is precluded. Even were those cases based on Hong Kong law, which they are not, they are inapposite, because the issue here is acceptance, not performance. Moreover, Hong Kong law also states that, in general, an offer, including one that sets a time period for acceptance, may be terminated at any time (even if the offeror has promised that the offer will be open for a specified period of time, for such a promise will generally lack consideration). *See Payne v. Cave* (1789) 3 T.R. 653; *see also Dickenson v. Dodds* (1876) 2 Ch. D 463.

Because Jacobs does not (and cannot) allege acceptance, he does not (and cannot) properly plead the existence of an option contract. Therefore, the second cause of action for breach of contract as against SCL is deficient as a matter of law and should be dismissed.

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III

CONCLUSION

For the foregoing reasons, SCL respectfully requests that this Court grant its Motion and dismiss this case against SCL, with prejudice.

DATED this 3 day of June, 2011.

GLASER WEIL FINK JACOBS
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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that on the 3RD day of June, 2011, I served a true and correct copy of the foregoing **REPLY BRIEF IN SUPPORT OF DEFENDANT SANDS CHINA LTD.'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM** via e-mail and by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

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