

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed  
Jan 31 2012 08:22 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

STEVEN C. JACOBS,

Appellant,

v.

LAS VEGAS SANDS CORP., a  
Nevada corporation, SANDS  
CHINA LTD., a Cayman Islands  
corporation; SHELDON G.  
ADELSON, in his individual and  
representative capacity,

Respondents.

) SUPREME CASE NO: 58740

) DISTRICT COURT CASE  
) NO: A-10-627691-B

Appeal from Judgment of The Eighth Judicial District Court

---

**RESPONDENT SHELDON ADELSON'S ANSWERING BRIEF**

---

MORRIS PETERSON  
Steve Morris, Bar No. 1543  
Ryan M. Lower, Bar No. 9108  
900 Bank of America Plaza  
300 South Fourth Street  
Las Vegas, Nevada 89101

Attorneys for Respondent  
Sheldon G. Adelson

## TABLE OF CONTENTS

COUNTER-STATEMENT OF THE PRIVILEGE ISSUE PRESENTED BY THIS APPEAL .....	1
I. The Context in Which The Issue is Presented.....	1
II. The Privilege Issue Presented.....	2
STATEMENT OF THE CASE .....	2
I. The Nature of the Case, the Course of Proceedings, and the Disposition Below. ....	2
STATEMENT OF FACTS .....	3
I. The Parties.....	3
II. Jacobs Files Suit after He Is Fired for Cause.....	4
III. Jacobs Sues Adelson for Defamation After He Made a Single Statement About the Litigation Following the Hearing in District Court.....	6
STANDARD OF REVIEW .....	7
SUMMARY OF ARGUMENT .....	7
ARGUMENT .....	8
I. The District Court Properly Dismissed Jacobs's Defamation Claim Under Directly Applicable Nevada Precedent. ....	8
A. Adelson's Statement Is Absolutely Privileged.....	8
B. The Court Should Decline Jacobs's Invitation to Limit the Scope Of Nevada's Absolute Privilege. ....	10
C. Adelson's Statement to <i>The Wall Street Journal</i> Following the March 15 Hearing About the Claims and Defenses in this Case Does Not Amount to "Excessive Publication." .....	13
II. Alternatively, the Court Should Affirm the District Court's Decision Because Adelson Has a Privileged Right to Reply to Jacobs's Defamatory Allegations. ....	16
A. Adelson Has the Privileged Right to Reply to Jacobs's Own Privileged Libels Against Him.....	17
B. Adelson's Opinion of Jacobs's Claims is Not Actionable.....	20

CONCLUSION .....	22
CERTIFICATE OF COMPLIANCE.....	23

## TABLE OF AUTHORITIES

CASES	PAGE NO.:
<i>Asay v. Hallmark Cards, Inc.</i> , 594 F.2d 692 (8th Cir. 1979) .....	11, 14, 16
<i>Bower v. Harrah’s Laughlin, Inc.</i> , 125 Nev. 470, 215 P.3d 709 (2009) .....	16
<i>Bradley v. Hartford Accident &amp; Indem. Co.</i> , 106 Cal. Rptr. 718 (Cal. Ct. app. 1973) .....	11, 15
<i>Buckley v. Fitzsimmons</i> , 509 U.S. 259 (1993) .....	14, 16
<i>Buzz Stew, LLC v. City of N. Las Vegas</i> , 124 Nev. 224, 181 P.3d 670 (2008) .....	7
<i>Circus Circus Hotels, Inc. v. Witherspoon</i> , 99 Nev. 56, 657 P.2d 101 (1983) .....	passim
<i>Clark Cnty. Sch. Dist. v. Virtual Educ. Software, Inc.</i> , 125 Nev. 374, 213 P.3d 496 (2009) .....	2
<i>Dallas Indep. Sch. Dist. v. Finlan</i> , 27 S.W.3d 220 (Tex. Ct. App. 2000) .....	11, 12
<i>Fink v. Oshins</i> , 118 Nev. 428, 49 P.3d 640 (2002) .....	9, 12, 14
<i>Foretich v. Capital Cities/ABC, Inc.</i> , 37 F.3d 1541 (4th Cir. 1994) .....	19, 20
<i>Green Acres Trust v. London</i> , 688 P.2d 617 (Ariz. 1984) .....	11, 14, 16
<i>Green Acres Trust v. London</i> , 688 P.2d 658 (Ariz. App. 1983) .....	18
<i>Hall v. Smith</i> , 152 P.3d 1192 (Ariz. Ct. App. 2007) .....	13
<i>Hill v. Herald-Post Publ’g Co.</i> , 877 S.W.2d 774 (Tex. Ct. App. 1994) .....	12
<i>Hoover v. Van Stone</i> , 540 F. Supp. 1118 (D. Del. 1982) .....	15
<i>Hotel Riviera, Inc. v. Torres</i> , 97 Nev. 399, 632 P.2d 1155 (1981) .....	16

<i>Kennedy v. Cannon</i> , 182 A.2d 54 (Md. 1962) .....	15
<i>Kirchstein v. Haynes</i> , 788 P.2d 941 (Okla. 1990).....	15
<i>Kleier Adver., Inc. v. Premier Pontiac, Inc.</i> , 921 F.2d 1036 (10th Cir. 1990) .....	14, 16
<i>Knox v. Dick</i> , 99 Nev. 514, 665 P.2d 267 (1983).....	13
<i>Krouse v. Bower</i> , 20 P.3d 895 (Utah 2001).....	15
<i>Lewis v. Benson</i> , 101 Nev. 300, 701 P.2d 751 (1985).....	12
<i>Lubin v. Kunin</i> , 117 Nev. 107, 17 P.3d 422 (2001).....	20
<i>Mast v. Overson</i> , 971 P.2d 928 (Utah Ct. App. 1998) .....	21
<i>Pease v. Int’l Union of Operating Engineers Local 150</i> , 567 N.E.2d 614 (Ill. Ct. App. 1991) .....	21
<i>Pratt v. Nelson</i> , 164 P.3d 366 (Utah 2007).....	10, 15, 16
<i>Sahara Gaming Corp. v. Culinary Workers Union Local 226</i> , 115 Nev. 212, 984 P.2d 164 (1999).....	12
<i>Sanchez v. Wal-Mart Stores, Inc.</i> , 125 Nev. Adv. Op. 60, 221 P.3d 1276 (2009) .....	7
<i>Smithart v. State</i> , 86 Nev. 925, 478 P.2d 576 (1970).....	7
<i>State of Nev. v. Eighth Jud. Dist. Ct. (“Anzalone”)</i> , 118 Nev. 140, 42 P.3d 233 (2002).....	passim
<i>Williams v. Springfield School Dist.</i> , 447 S.W.2d 256 (Mo. 1969).....	18
<i>Wynn v. Smith</i> , 117 Nev. 6, 16 P.3d 424 (2001).....	21
<b>STATUTES</b>	
42 U.S.C. § 1983.....	14
Nev. R. Civ. P. 12(b)(5) .....	7

Nev. R. Civ. P. 54(b) .....	3
Nev. R. Civ. P. 8(a) .....	4, 15

## OTHER AUTHORITIES

Restatement of Torts (Second) § 583, (Absolute Privileges: Consent) (1977) .....	18
Restatement of Torts (Second) § 586 (1977) .....	19

## COUNTER-STATEMENT OF THE PRIVILEGE ISSUE PRESENTED BY THIS APPEAL

### I. The Context in Which The Issue is Presented.

Steven Jacobs is suing the corporate defendants in this case because he alleges he was wrongfully fired as the CEO of defendant Sands China Ltd. at the instance of Sheldon Adelson because he would not accede to Mr. Adelson's "outrageous demands" that he (Jacobs) engage in unlawful and criminal conduct.<sup>1</sup> He refers to Mr. Adelson in his publicly-filed complaints as "notoriously bellicose,"<sup>2</sup> "mercurial,"<sup>3</sup> and "rude and obstreperous"<sup>4</sup> in the course of characterizing Adelson as a criminal.<sup>5</sup> These sensational personal libels against Mr. Adelson were extensively published worldwide by the media. JA0146. They were recycled in motion practice and in the hearing on motions to dismiss on March 15, 2011, which was attended by the press and televised nationally, which Mr. Jacobs supported over the objection of the defendants.<sup>6</sup>

In response to the worldwide reporting again of Mr. Jacobs's sensational (and baseless) allegations, following the March 15 hearing, of

---

<sup>1</sup> JA0144–45.

<sup>2</sup> JA0004:5, JA0020:11–12.

<sup>3</sup> JA0004:24–25, JA0021:3–4.

<sup>4</sup> JA0007:10–11, JA0023:15.

<sup>5</sup> As in the district court, Mr. Jacobs continues his ad hominem assaults on Mr. Adelson by employing epithets to describe Mr. Adelson's state of mind on March 15, 2011, which is not part of the record and, in point of fact, is nothing more than wishful advocacy springing from the author's imagination. *See, e.g.*, Opening Brief 1:24–25 ("Following this hearing, Adelson *had a fit*, and *lashed out* against Jacobs by defaming him in the press") (emphasis added).

<sup>6</sup> JA0146–47; JA0361–75.

"illegal demands from his boss, Las Vegas Sands Chief Executive Sheldon Adelson," that Mr. Jacobs says resulted in his termination, JA0190; *see also* JA0192–96, JA0199, and JA0358, Mr. Adelson said this to *Wall Street Journal* reporter Alexandra Berzon, who attended and reported on the March 15 hearing in the district court:

'While I have largely stayed silent on the matter to this point, the allegations must be addressed,' he said. '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.'

JA0032 at ¶ 62, JA0377.

It is this statement of opinion replying to Mr. Jacobs's continuing libels against him that resulted in Mr. Jacobs's defamation claim that is the subject of this appeal, which the district court dismissed on June 20, 2011, because "the statement was and is absolutely privileged and is not actionable" under *Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 657 P.2d 101 (1983), and *Clark Cnty. Sch. Dist. v. Virtual Educ. Software, Inc.* ("VESI"), 125 Nev. 374, 213 P.3d 496 (2009). JA0358–59.

## **II. The Privilege Issue Presented.**

Should Nevada's broad rule of absolute privilege be narrowed or abrogated so that statements made in reply to allegations of criminal misconduct in a judicial proceeding become actionable as "defamation"?

### **STATEMENT OF THE CASE**

#### **I. The Nature of the Case, the Course of Proceedings, and the Disposition Below.**

Steven Jacobs ("Jacobs") filed a complaint against Las Vegas Sands Corp. ("LVSC") and Sands China Ltd. ("Sands China") for wrongful

termination, seeking to recover damages for breach of contract, breach of the implied covenant of good faith and fair dealing, and tortious discharge in violation of public policy. JA0001–16. LVSC and Sands China moved to dismiss the complaint for failure to join an indispensable party and lack of personal jurisdiction. JA0055–124.

The district court heard argument and denied both motions on March 15, 2011. JA0031–32 at ¶¶ 60–61. The 90-minute hearing on the motions to dismiss was televised nationally and attended by members of the press, including Ms. Alexandra Berzon, a Pulitzer Prize winning a journalist for the *Wall Street Journal*, "one of the most respected and widely read publications in the world." JA0031–32 at ¶¶ 60–61; JA0146–147. Ms. Berzon reported on the hearing, recycling Mr. Jacob's accusations of criminal misconduct against Mr. Adelson along with the statement of Mr. Adelson, set out above. JA0032 at ¶ 62; JA0147, JA0377.

The following day, Mr. Jacobs amended his complaint and asserted a claim for defamation against Mr. Adelson, LVSC, and Sands China based on Mr. Adelson's email to Ms. Berzon. JA0017–37 at ¶¶ 60–66. Mr. Adelson and his co-defendants moved to dismiss the defamation claim, JA0143–223, JA0039–142, and the district court granted those motions, JA0359, and certified her order as a final judgment under Nev. R. Civ. P. 54(b). JA0357–360.

## STATEMENT OF FACTS

### I. The Parties.

Appellant Steven Jacobs is a citizen of the State of Florida who also maintains a home in Georgia. JA0017 at ¶ 1. Mr. Jacobs alleges that he served as President and CEO of Sands China for almost a year under a

"Term Sheet." JA0022 at ¶ 22. Mr. Jacobs also alleges that he was the President and CEO of LVSC's Macau operations. JA0024 at ¶ 26.

Respondent Sheldon Adelson is a Nevada citizen. JA0018 at ¶ 4. He is the Chairman of the Board and CEO of LVSC. *Id.* He is also Chairman of the Board of Sands China. *Id.*

Defendant LVSC is a Nevada corporation with its principal place of business in Clark County, Nevada. JA0017 at ¶ 2. Defendant Sands China is a Cayman Islands corporation. JA0018 at ¶ 3. It is an indirect subsidiary of LVSC. JA0041.

## **II. Jacobs Files Suit after He Is Fired for Cause.**

Mr. Jacobs filed this lawsuit against LVSC and Sands China to recover damages for breach of contract and wrongful termination. JA0001–34. He alleged he was terminated on July 23, 2010, without "cause," "in an effort to deprive him of contractual benefits to which he [says he] is otherwise entitled." JA0026 at ¶ 31; JA0028 at ¶ 42. He alleged that he was wrongfully fired for his "conflicts" with Sands China's Chairman of the Board, Sheldon Adelson, who Mr. Jacobs says demanded that he engage in criminal activities as he (Jacobs) pursued "saving the Titanic" as the CEO of Sands China. JA0023 at ¶ 22; JA0024 at ¶ 26; JA0024–25 at ¶¶ 27–28. LVSC and Sands China maintain that Mr. Jacobs was fired for cause. JA0029 at ¶ 47.

In pleading his case Mr. Jacobs went well beyond making "a short and plain statement of . . . [his claims] showing that . . . [he] is entitled to relief." Nev. R. Civ. P. 8(a). Relying on the litigation privilege to shield him from liability for defamation, Mr. Jacobs alleged his claims with sensational libelous statements about Mr. Adelson that he knew would

attract the interest of the media and regulatory authorities and antagonize Adelson, whom he described in his complaint as "notoriously bellicose",<sup>7</sup> "mercurial",<sup>8</sup> and "rude and obstreperous."<sup>9</sup> Thus, in pleading the "facts" of his garden-variety claim for breach of contract against his corporate employer, Mr. Jacobs accused Mr. Adelson of making "outrageous demands" on him to engage in unlawful and criminal conduct, such as:

- employing "improper 'leverage' " against senior government officials of Macau;
- threatening to withhold business from Chinese banks unless the banks exercised influence with senior government officials to achieve favorable government treatment of Sands China;
- conduct "secret investigations" of Macau government officials to gather "negative information" to use as leverage to obtain exemptions from government regulations for Sands China;
- use the services of a Macau attorney that Jacobs says he was concerned would be an offense under the Foreign Corrupt Practices Act;
- withhold material information from the board of Sands China so that the board could not disclose the information to the Hong Kong Stock Exchange, as the company was required to do.

JA0024–25 at ¶ 27. When and after Mr. Jacobs alleges he "objected to and/or refused to carry out Adelson's illegal demands," he was fired.

JA0025 at ¶ 28; JA0026 at ¶ 31.

Notwithstanding the sensational personal direct libels against him in the complaint, Mr. Adelson said nothing in response. JA00146:5–6. The media, however, picked up these sensational and wholly unnecessary,

---

<sup>7</sup> JA0004:5, JA0020:11–12.

<sup>8</sup> JA0004:24–25, JA0021:3–4.

<sup>9</sup> JA0007:10–11, JA0023:15.

defamatory allegations made by Mr. Jacobs and published and republished them extensively, worldwide. JA00146:6–20; JA0155–201.

**III. Jacobs Sues Adelson for Defamation After He Made a Single Statement About the Litigation Following the Hearing in District Court.**

As the case progressed through initial motion practice, Mr. Adelson did not reply to the defamatory allegations made against him. JA0146:21–22. He did not attend the hearing on LVSC and Sands China's motions to dismiss on March 15, 2011. JA00146:22–23. The hearing, however, was televised nationally and attended by members of the press, including a reporter from the *Wall Street Journal*, Alexandra Berzon. JA0031–32 at ¶¶ 60–61; JA0146–147. Immediately following the televised hearing, the press, including Ms. Berzon reporting online for the *Wall Street Journal*, began publishing the court's decision denying the defendants' motions to dismiss and repeating Mr. Jacobs's characterization of Mr. Adelson as a criminal, JA0147:2–4, just as he knew and intended the press to do. JA0147:4–7, JA0186–201, JA0361–75.

In *this context* of worldwide media dissemination of Mr. Jacobs's defamatory statements occasioned by the hearing before the district court, Mr. Adelson responded to the press reports and replied to Mr. Jacobs's criminal accusations the same day. JA00147:10–13. He sent an email to reporter Alexandra Berzon that evening:

'While I have largely stayed silent on the matter to this point, the recycling of his allegations must be addressed,' he said. '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.'

JA0032 at ¶ 62, JA0377. Even though Mr. Adelson's single statement of opinion was made during the course of judicial proceedings and was related directly to that litigation, it became the basis for the fifth claim (defamation) in Mr. Jacobs's First Amended Complaint, filed the next day. JA0031–33 at ¶¶ 60–66.<sup>10</sup>

### STANDARD OF REVIEW

An order granting a motion to dismiss the complaint under Nev. R. Civ. P. 12(b)(5) "is subject to a rigorous standard of review on appeal." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). Although the Court accepts petitioner's allegations as true on appeal, those allegations "must be legally sufficient to constitute the elements of the claim asserted." *Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. Adv. Op. 60, 4, 221 P.3d 1276, (2009). The Court reviews the district court's legal conclusions on a motion to dismiss de novo. *Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672.

### SUMMARY OF ARGUMENT

The district court properly dismissed Mr. Jacobs's defamation claim and entered judgment for Mr. Adelson because his statement of opinion is absolutely privileged under Nevada law: It was made in the course of a judicial proceeding and was directly related to the litigation Mr. Jacobs had started.

---

<sup>10</sup> The Court should disregard Mr. Jacobs's improper citations to the macaubusiness.com articles, Opening Brief 11:25–27 n. 1, because they are not part of the record. *Smithart v. State*, 86 Nev. 925, 930, 478 P.2d 576, 580 (1970) ("On appeal this court will not consider anything outside the trial record.").

The Court should decline Mr. Jacobs's invitation to limit the scope of the absolute privilege because the law elsewhere and the cases Mr. Jacobs relies on are not congruent with Nevada's broad application of the absolute privilege. The Court should also reject Mr. Jacobs's argument that Mr. Adelson lost the benefit of the privilege through "excessive publication" by the media *Mr. Jacobs was courting*.

Finally, the Court should affirm the district court's decision because Mr. Adelson has a legal right to reply to Mr. Jacobs's defamatory allegations against him. Mr. Adelson's statement of opinion about Mr. Jacobs's reasons for defaming him is not actionable.

## ARGUMENT

### **I. The District Court Properly Dismissed Jacobs's Defamation Claim Under Directly Applicable Nevada Precedent.**

#### **A. Adelson's Statement Is Absolutely Privileged.**

Nevada law unequivocally declares that "[C]ommunications uttered or published in the course of judicial proceedings are absolutely privileged so long as they are in some way pertinent to the subject of controversy." *Circus Circus*, 99 Nev. at 60, 657 P.2d at 104 (reversing and remanding for new trial where district failed to apply absolute privilege) (emphasis added); *VESI*, 125 Nev. at 383, 213 P.3d at 503 ("for the [absolute] privilege to apply (1) a judicial proceeding must be contemplated in good faith and under serious consideration, and (2) the communication must be related to the litigation"). The protection of the absolute privilege extends to instances where a non-lawyer, like Mr. Adelson in this case, "asserts an allegedly defamatory communication . . . during a judicial proceeding." *VESI*, 125 Nev. at 383, 213 P.3d at 503 (holding that district court

improperly denied summary judgment on plaintiff's defamation claim where the non-lawyer defendant's letter was absolutely privileged).

The policy underlying absolute privilege fosters "the public interest in having people speak freely [which] outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements." *Circus Circus*, 99 Nev. at 61, 657 P.2d at 104. Thus, the absolute privilege applies "even where the defamatory statements are published with knowledge of their falsity and personal ill will toward the plaintiff." *Id.*, 99 Nev. at 60, 657 P.2d at 104.

The test for relevancy to invoke the absolute privilege is very broad. *Id.*, 99 Nev. at 61, 657 P.2d at 104 ("The defamatory material need not be relevant in the traditional evidentiary sense, but need have only 'some relation' to the proceeding; so long as the material has some bearing on the subject matter of the proceeding, it is absolutely privileged."); *Fink v. Oshins*, 118 Nev. 428, 433, 49 P.3d 640, 644 (2002) ("The 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.'"); *VESI*, 125 Nev. at 382, 213 P.3d at 502 ("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").

Here, the district court properly found that Mr. Adelson's statement was absolutely privileged. JA0357–360. Mr. Jacobs admits that Mr. Adelson made the allegedly defamatory statement during the course of *this* judicial proceeding that Mr. Jacobs initiated. JA0032 at ¶¶ 61–62. The First Amended Complaint ("FAC") specifically states that Mr. Adelson made the statement following the 90-minute hearing on the defendants'

motions to dismiss this lawsuit, which "received widespread attention by members of the media, and particularly by journalists who report on affairs in the business community" including "Ms. Alexandra Berzon, a Pulitzer Prize winning journalist who attended the hearing on behalf of her employer, the Wall Street Journal® . . . one of the most respected and widely read publications in the world." JA0032 at ¶ 61. Mr. Adelson's statement to Ms. Berzon was directly related to the subject of this lawsuit—plaintiff's claim for wrongful termination: "*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.*" JA0032 at ¶ 62 (emphasis in original).

Mr. Adelson's statement of opinion under the facts and law of this case is absolutely privileged. The Court should declare it so and affirm the judgment below. *VESI*, 125 Nev. at 383, 213 P.3d at 503.

**B. The Court Should Decline Jacobs's Invitation to Limit the Scope Of Nevada's Absolute Privilege.**

Relying on several decisions from *other* jurisdictions, Mr. Jacobs contends it is "black letter law" that the absolute privilege does not apply to statements made to third parties unconnected with the litigation, like members of the media and press. Opening Brief at 7:20–10:15. Mr. Jacobs's reliance on cases from other jurisdictions is misplaced and does not reflect "black letter law" on the absolute privilege in Nevada because many of the cases require the presence of additional elements that Nevada does not. *Compare, e.g., Pratt v. Nelson*, 164 P.3d 366, 376 (Utah 2007) (for the absolute privilege to apply under Utah law "the 'statements must be (1) made during or in the course of a judicial proceeding; (2) have some reference to

the subject matter of the proceeding; and (3) be made by someone acting in the capacity of judge, juror, witness, litigant, or counsel.""); *Bradley v. Hartford Accident & Indem. Co.*, 106 Cal. Rptr. 718, 722 (Cal. Ct. app. 1973) (under California law the absolute privilege applies "only if the following conditions have been met: the publication (1) was made in a judicial proceeding; (2) had some connection or logical relation to the action; (3) was made to achieve the objects of the litigation; and (4) involved litigants or other participants authorized by law"); *with VESI*, 125 Nev. at 383, 213 P.3d at 503("for the [absolute] privilege to apply (1) a judicial proceeding must be contemplated in good faith and under serious consideration, and (2) the communication must be related to the litigation"); *Circus Circus*, 99 Nev. at 60, 657 P.2d at 104 (same). The comparison of these foreign authorities to *Circus Circus* and *VESI* demonstrates that Mr. Adelson's statement in the course of *this* Nevada judicial proceeding is absolutely privileged under Nevada law.

Moreover, Mr. Jacobs's own cases demonstrate that his letter-law is not as "black" as he represents. *See, e.g., Asay v. Hallmark Cards, Inc.*, 594 F.2d 692, 697 (8th Cir. 1979) ("[p]ublication to the news media is not *ordinarily* sufficiently related to a judicial proceeding to constitute a privileged occasion") (emphasis added); *Green Acres Trust v. London*, 688 P.2d 617, 622 (Ariz. 1984) ("[p]ublication to the news media is not *ordinarily* sufficiently related to a judicial proceeding to constitute a privileged occasion") (emphasis added). Thus, statements to the press, *if related to specific litigation*, may be absolutely privileged. *See, e.g., Dallas Indep. Sch. Dist. v. Finlan*, 27 S.W.3d 220, 239–40 (Tex. Ct. App. 2000) (statements to the press which related to the allegations in the plaintiff's

complaint were absolutely privileged);<sup>11</sup> *Hill v. Herald-Post Publ'g Co.*, 877 S.W.2d 774, 783–84 (Tex. Ct. App. 1994) (absolute privilege applied where lawyer's statements to press "in response to [reporter's] inquiry about [pending] motions . . . bore a substantial relationship to the criminal proceedings" because the lawyer was "merely affirming the allegations in his motion and brief and his belief that he could prove them").

Finally and most important, the decisions cited by Mr. Jacobs in his attempt to limit the scope of the absolute privilege do not line up with Nevada's broader interpretation of the privilege. *VESI*, 125 Nev. at 383, 213 P.3d at 503 (extending the absolute privilege to cover non-lawyers who make defamatory statements when a judicial proceeding is under "serious consideration"); *Fink*, 118 Nev. at 433, 49 P.3d at 644 ("The scope of the absolute privilege is quite broad"); *Sahara Gaming Corp. v. Culinary Workers Union Local 226*, 115 Nev. 212, 215–19, 984 P.2d 164, 166–68 (1999) (recognizing Nevada's long-standing policy of protecting the news media and general public's ability to report newsworthy in events in judicial proceedings and holding that the union's republication of false and malicious statements made during a judicial proceeding was absolutely privileged); *Lewis v. Benson*, 101 Nev. 300, 301, 701 P.2d 751, 752 (1985) (holding a citizen's complaint filed against metro officers with metro's internal affairs bureau was protected by the absolute privilege); *Circus Circus*, 99 Nev. at 60–62, 657 P.2d at 104–105 (finding an employer's letter

---

<sup>11</sup> Just as this case, the issues raised in the *Finlan* lawsuit "played a prominent role in the local news media." 27 S.W.3d at 239. The *Finlan* court also found that "advising the media that a lawsuit has been filed, including the basic description of the allegations, has no practical effect different from providing the pleadings to the media." *Id.*

sent to Nevada Employment Security Department requesting an appeal of former employee's grant of unemployment benefits was absolutely privileged); *Knox v. Dick*, 99 Nev. 514, 517–18, 665 P.2d 267, 270–71 (1983) (holding that a witness's testimony before Clark County Personnel Grievance Board was absolutely privileged).

Thus, Nevada does not have a bright-line rule that limits who may be the recipient of a statement protected by the absolute privilege, as Mr. Jacobs contends. And there is a good reason for this: The application of the absolute privilege is a "case-specific" and "fact-intensive inquiry" that is "determined [by the Court] on case-by-case basis, with a focus on the underlying principle that the privilege should be applied to 'promote candid and honest communication between the parties and their counsel in order to resolve disputes.'" *Hall v. Smith*, 152 P.3d 1192, 1196–99 (Ariz. Ct. App. 2007) (finding absolute privilege applied to statement given to non-party where it had a close and direct relationship to the litigation). The Court should decline Mr. Jacobs's invitation to limit the scope of the absolute privilege under Nevada law, as the district court did.

**C. Adelson's Statement to *The Wall Street Journal* Following the March 15 Hearing About the Claims and Defenses in this Case Does Not Amount to "Excessive Publication."**

Based on "black letter law" elsewhere, as reviewed above, Mr. Jacobs posits that Mr. Adelson lost the absolute immunity afforded by the privilege by publishing the statement to Ms. Berzon—a person, who according to Mr. Jacobs, "lacks any legal interest in the outcome of this case [and] has no connection to Jacobs's claims or Adelson's defenses." Opening Brief 9:3–10:15. While it is true that a statement may lose immunity

through excessive publication,<sup>12</sup> Nevada law does *not* hold that witness's statement (like Mr. Adelson's in this case, which was made during the course of a judicial proceeding and was directly related to the subject of the lawsuit and allegations against him by Mr. Jacobs) loses immunity if it is published to the press in response to a plaintiff's own defamatory allegations about the witness that are repeatedly disseminated worldwide by the same press. *VESI*, 125 Nev. 374, 213 P.3d 496; *Fink*, 118 Nev. 428, 49 P.3d 640; *Anzalone*, 118 Nev. 140, 42 P.3d 233; *Circus Circus*, 99 Nev. 56, 657 P.2d 101.

The operative facts in the cases cited by Mr. Jacobs to support his argument that Mr. Adelson's statement lost the protection of the absolute privilege through "excessive publication" are not analogous to the facts in this case. *See, e.g., Buckley v. Fitzsimmons*, 509 U.S. 259, 262 (1993) (holding that a prosecutor, who "made false statements about [a criminal defendant] in a press conference announcing his arrest and indictment 12 days before primary election," did not have absolute immunity from claims asserted under 42 U.S.C. § 1983); *Asay*, 594 F.2d at 697 (plaintiff sent his complaint to media and letters and witness interrogatories to *several* of defendants' current and former employees to investigate the propriety of a class action against the defendant); *Kleier Adver., Inc. v. Premier Pontiac, Inc.*, 921 F.2d 1036, 1043–44 (10th Cir. 1990) (finding under Oklahoma law that the subject statement was unrelated to judicial process); *Green Acres Trust*, 688 P.2d at 622 (plaintiffs and their lawyers discussed proposed action with reporter and distributed draft complaint to reporter, who published a story

---

<sup>12</sup> *State of Nev. v. Eighth Jud. Dist. Ct. ("Anzalone")*, 118 Nev. 140, 149, 42 P.3d 233, 239 (2002).

on the allegations *before* the complaint was filed); *Pratt*, 164 P.3d at 377 (plaintiffs "organized a press conference to discuss publicly their lawsuit", "made *several* statements to reporters concerning . . . their lawsuit", and distributed the complaint and a prepared statement to *several* reporters) (emphasis added); *Kennedy v. Cannon*, 182 A.2d 54, 55–56 (Md. 1962) (criminal defense attorney for black man accused of raping white married woman made statement to newspaper that "the woman submitted to his advances willingly"); *Bradley*, 106 Cal. Rptr at 724 (no privilege where non-parties and non-witnesses made statements outside of court and not during any legal proceeding).<sup>13</sup>

Unlike the facts and law in these substantively distinguishable cases relied on by Mr. Jacobs, Mr. Adelson made a single statement to the press during the course of this judicial proceeding, which was directly related to the litigation, *but only after* Mr. Jacobs went well beyond Rule 8(a)'s requirement "a short and plain statement of . . . [his claims for breach of contract] showing that . . . [he] is entitled to relief," and the media had reported on and disseminated Mr. Jacob's defamatory allegations against Mr. Adelson. None of Mr. Jacobs's principal cases indicate that the media

---

<sup>13</sup> Mr. Jacobs's other cases actually *support* Mr. Adelson's position. *Krouse v. Bower*, 20 P.3d 895, 900 (Utah 2001) (finding lawyer's demand letter to HOA, which was also distributed to members of the HOA, was protected by the absolute privilege and was not excessively published); *Hoover v. Van Stone*, 540 F. Supp. 1118, 1123 (D. Del. 1982) (holding that plaintiff, who sent 220 form letters to defendants' customers sent during the course of litigation concerning the customers transactions with defendant, was protected by the absolute privilege); *Kirchstein v. Haynes*, 788 P.2d 941, 951 (Okla. 1990) (finding statement concerning parentage submitted under vital statistics rules was relevant to judicial proceeding and was not excessively published).

was already reporting on the underlying litigation when the subject statement was made, as it was here. *See, e.g., Buckley v. Fitzsimmons*, 509 U.S. 259, 262 (1993); *Asay*, 594 F.2d at 697; *Kleier*, 921 F.2d at 1043–44; *Green Acres*, 688 P.2d at 622; *Pratt*, 164 P.3d at 377. This substantively distinguishing fact renders these authorities interesting but irrelevant.

**II. Alternatively, the Court Should Affirm the District Court's Decision Because Adelson Has a Privileged Right to Reply to Jacobs's Defamatory Allegations.**

Although the district court found that Mr. Adelson's statement was absolutely privileged and is not actionable under *Circus Circus* and *VESI*, JA00358–59, this Court can affirm the decision based on any legal ground apparent in the record. *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 479, 215 P.3d 709, 716 (2009) ("this court can affirm the district court's decision on alternate grounds"); *Hotel Riviera, Inc. v. Torres*, 97 Nev. 399, 403, 632 P.2d 1155, 1158 (1981) ("If a decision below is correct, it will not be disturbed on appeal even though the lower court relied upon wrong reasons.").

The Court should affirm the district court's decision because, as briefed and argued before the district court,<sup>14</sup> (1) Mr. Adelson's statement is protected by the conditional privilege of reply; and (2) his statement of opinion is not actionable.

---

<sup>14</sup> The district court also heard argument and considered briefing on the conditional right of reply and whether statements of opinion are actionable. JA0143–152; JA0267–278; JA0291–355.

**A. Adelson Has the Privileged Right to Reply to Jacobs's Own Privileged Libels Against Him.**

Nevada's privilege of reply gives those who are attacked with defamatory statements a right to answer those statements. *Anzalone*, 118 Nev. at 149, 42 P.3d at 239. Although the privilege of reply may be lost if the allegedly defamatory 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", *none* of these exceptions is invoked by Mr. Adelson's statement on the facts of this case.

Here, Mr. Adelson made a single statement that was directly responsive and relevant to Mr. Jacobs's own defamatory statements made against Mr. Adelson in Mr. Jacobs's privileged complaints. JA0032 at ¶¶ 61–62. Mr. Adelson's statement that "We have a substantial list of reasons why Steve Jacobs was fired for cause"<sup>15</sup> is no different from Mr. Jacobs's own allegations regarding the circumstances of his termination:

- He received a letter which "identified 12 pretextual items that allegedly support a 'for cause' termination of his employment" JA0027 at ¶ 33;
- "LVSC has breached the Term Sheet agreement by purportedly terminating Jacobs for 'cause'" JA0028 at ¶ 40;
- "Jacobs was terminated for 'cause'" JA0028 at ¶ 41;
- "LVSC has wrongfully characterized Jacobs' termination as one for 'cause'" JA0028–29 at ¶ 42;
- "LVSC and Sands China . . . characteriz[ed] Jacobs' termination as being for 'cause'" JA0029 at ¶ 47;
- "LVSC and Sands China have wrongfully characterized Jacobs' termination as being for 'cause'" JA0030 at ¶ 48; and

---

<sup>15</sup> JA0032 at ¶ 62.

- "the wrongful characterization of Jacobs' termination as being for 'cause'" JA0030 at ¶ 51.

These allegations demonstrate that Mr. Adelson's statement did not include "substantial defamatory matter that is irrelevant or non-responsive to the initial statement," nor was it "disproportionate to the initial statement." *Anzalone*, 118 Nev. at 150, 52 P.3d at 240. Mr. Jacobs may not care for Mr. Adelson's opinion of the claims Jacobs makes against him and the corporate defendants in this case but, to put it candidly, he asked for it. He, in legal effect, invited and consented to Mr. Adelson's reply, and by doing so he clothed Mr. Adelson's response in privilege.

Consent is an absolute bar to an action for defamation. *See* Restatement of Torts (Second) § 583 (Absolute Privileges: Consent) cmt. c (1977) ("conduct that gives apparent consent is sufficient to bar recovery" for the alleged defamation); cmt. f ("the privilege conferred by the consent of the person about whom the defamatory matter is published is absolute"); *see Williams v. Springfield School Dist.*, 447 S.W.2d 256, 269 (Mo. 1969) ("one who has invited or *instigated* the publication of defamatory words cannot be heard to complain of the resulting damage to his reputation"). 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. App. 1983) (overruled on other grounds *Green Acres Trust v. London*, 688 P.2d 617 (Ariz. 1984) because a complaint had not been filed before counsel made defamatory statement to the press), 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.

*Accord*, Restatement of Torts (Second) § 586 (1977) (an attorney [and in Nevada, a party or a witness] is absolutely privileged to publish defamatory matter concerning another during the course of a judicial proceeding).

Mr. Adelson's statement was not excessively publicized; it was made to the same media that was reporting Mr. Jacobs's characterization of Mr. Adelson as a crook. JA0032 at ¶¶ 61–62, JA0155–56, JA0190–91, JA0377–78. This conclusion is confirmed by examining *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1559–60 (4th Cir. 1994), which is the case this Court relied on in adopting the conditional privilege of reply. *Anzalone*, 118 Nev. at 149, 52 P.3d at 239. In *Foretich*, 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." 37 F.3d 1541, 1559–60. Here, Mr. Jacobs's own defamatory statements made against Mr. Adelson in the complaint were published worldwide over and over and over. JA00146:6–20; JA0155–201. Thus, Mr. Adelson's single statement to a *Wall Street Journal* reporter, who attended and reported on the March 15th hearing,<sup>16</sup> after Mr. Jacobs himself spoke to the press,<sup>17</sup> was "not excessively publicized." *Anzalone*, 118 Nev. at 150, 42 P.3d at 240 (finding a letter from the then-Attorney General that 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 was not excessively published).

---

<sup>16</sup> JA0032 at ¶ 61.

<sup>17</sup> JA0377–78.

Finally, Mr. Adelson's statement of opinion was neither gratuitous nor malicious. It does not exhibit "malice in the sense of actual spite or ill will" that would take it out of the conditional privilege of reply. In *Anzalone*, this Court 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. 118 Nev. at 150, 42 P.3d at 239. Similarly, the Fourth Circuit in *Foretich* 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 invoking the exception for malice*. 37 F.3d at 1562 (emphasis added).

None of the exceptions to applying the conditional right of reply applies to Mr. Adelson's statement of opinion. It remains privileged as a reply to Mr. Jacobs's own defamatory allegations about Mr. Adelson that he foolishly and unnecessarily put in his complaints for the public and the press to consider, thereby inviting Mr. Adelson's public response in the same forum.

**B. Adelson's Opinion of Jacobs's Claims is Not Actionable.**

"As a general rule, only assertions of fact, not of opinion can sustain a defamation claim." *Anzalone*, 118 Nev. at 150–51, 42 P.3d at 240 (finding that a statement, which "reflected negatively on [plaintiff's character], professional integrity, and honesty," was a statement of opinion and not actionable); *Lubin v. Kunin*, 117 Nev. 107, 112, 17 P.3d 422, 426 (2001) ("Statements of opinion are protected speech under the First

Amendment of the United States Constitution and are not actionable at law") (citation omitted); *see also Mast v. Overson*, 971 P.2d 928, 931–34 (Utah Ct. App. 1998) (finding statement that his opponent was telling "bare-faced lies," which was made in response to public attacks during a heated public debate, was one of opinion and not actionable).

"The test for whether a statement constitutes fact or opinion is: 'whether a reasonable person would be likely to understand the remark as an expression of the source's opinion or as a statement of fact.'" *Anzalone*, 118 Nev. at 151, 42 P.3d at 240 (holding statement was one of opinion); *Mast*, 971 P.2d at 932 ("In deciding whether a statement is capable of sustaining a defamatory meaning, 'the guiding principle is the statement's tendency to injure in the eyes of its audience' *when viewed in the context in which it was made*") (emphasis added). Where the statement is unambiguous the "fact-versus-opinion issue is a question of law for the court." *Wynn v. Smith*, 117 Nev. 6, 18, 16 P.3d 424, 431 (2001).

Here, any reasonable person can easily see that Mr. Adelson's statement that Mr. Jacobs has "attempted to explain his termination by using outright lies and fabrications which seem to have their origins in delusion" is Mr. Adelson's unambiguous opinion—not a statement of fact. JA0032 at ¶ 62. At most, his statement could be viewed "rhetorical hyperbole" that was "employed only in a loose, figurative sense," and therefore, it is not actionable. *Pease v. Int'l Union of Operating Engineers Local 150*, 567 N.E.2d 614, 619 (Ill. Ct. App. 1991) (finding statements, "He's dealing with half a deck" and "I think he's crazy," were not actionable).

## CONCLUSION

Based on the foregoing, Sheldon Adelson submits that the district court properly dismissed Mr. Jacobs's defamation claim against him and respectfully requests that the Court affirm the dismissal.

MORRIS PETERSON

By: 

Steve Morris, Bar No. 1543  
Ryan M. Lower, Bar No. 9108  
900 Bank of America Plaza  
300 South Fourth Street  
Las Vegas, Nevada 89101

Attorneys for Respondent  
Sheldon G. Adelson

## CERTIFICATE OF COMPLIANCE

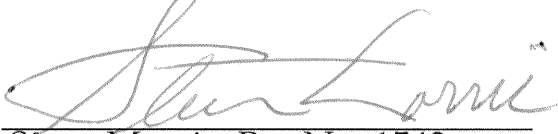
1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14 point Palatino font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

MORRIS PETERSON

By:



Steve Morris, Bar No. 1543  
Ryan M. Lower, Bar No. 9108  
900 Bank of America Plaza  
300 South Fourth Street  
Las Vegas, Nevada 89101

Attorneys for Respondent  
Sheldon G. Adelson

## CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. P. 25(b) and NEFR 9(f), I hereby certify that I am an employee of Morris Peterson; that on this date I electronically filed the foregoing **RESPONDENT SHELDON ADELSON'S ANSWERING BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (Eflex). Participants in the case who are registered with Eflex as users will be served by the Eflex system as follows:

Todd L. Bice  
Debra L. Spinelli  
Jarrod L. Rickard  
PISANELLI BICE PLLC  
3883 Howard Hughes Parkway  
Suite 800  
Las Vegas, Nevada 89169  
JJP@pisanellibice.com  
DLS@pisanellibice.com

*Attorneys for Appellants  
Steven C. Jacobs*

J. Stephen Peek  
HOLLAND & HART LLP  
9555 Hillwood Drive, 2nd Floor  
Las Vegas, Nevada 89134  
speek@hollandhart.com  
jcjones@hollandhart.com

*Attorneys for Defendant  
Las Vegas Sands Corp.*

I further certify that the foregoing are not registered with the Eflex system and will be served by depositing **RESPONDENT SHELDON ADELSON'S ANSWER BRIEF** with the U.S. Postal Service at Las Vegas, Nevada, in a sealed envelope, with first class postage prepaid, on the date and to the addressee(s) shown below

Patricia Glaser  
Andrew D. Sedlock  
GLASER WEIL FINK JACOBS HOWARD  
AVCHEN & SHAPIRO LLP  
3763 Howard Hughes Pkwy, Suite 300  
Las Vegas, Nevada 89161  
asedlock@glaserweil.com  
pglaser@glaserweil.com

*Attorneys for Defendant  
Sands China Ltd.*

Dated this 30th day of January, 2012.

By: 