# IN THE SUPREME COURT OF THE STATE OF NEVADA

LAS VEGAS SANDS CORP., a Nevada corporation, and SANDS CHINA LTD., a Cayman Islands corporation

Petitioners,

vs.

CLARK COUNTY DISTRICT COURT, THE HONORABLE ELIZABETH GONZALEZ, DISTRICT JUDGE, DEPT. 11,

Respondents,

and

STEVEN C. JACOBS,

Real Party in Interest.

Case Number:



District Court Case Number A627691-B

**EMERGENCY PETITION FOR WRIT OF PROHIBITION OR MANDAMUS TO PROTECT PRIVILEGED DOCUMENTS**

**RELIEF IS REQUESTED ON OR BEFORE FEBRUARY 4, 2013**

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## Rule 26.1 Disclosure

The undersigned counsel of record certifies that the following are persons and entities as described in Nev. R. App. P. 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Petitioner Las Vegas Sands Corp. ("LVSC") is a publicly-traded Nevada corporation. LVSC owns a majority of the stock in Petitioner Sands China Ltd. ("SCL"), which is a Cayman Islands corporation whose stock is publicly traded on the Stock Exchange of Hong Kong Limited ("HKEx").

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# I. INTRODUCTION

## A. The Discovery Order That Gives Rise to this Petition for Extraordinary Relief.

On January 18, 2013, the district court entered a Discovery Order compelling defendants to produce documents that are indisputably privileged and/or protected by the work product doctrine. The court held that the privileged documents must be produced because a former lawyer for one of the defendants had previously looked at the documents to refresh his memory about the dates of past events when the court compelled him to testify at a hearing in September 2012.

The court based its order on Nev. Rev. Stat. 50.125, which provides that documents used by a testifying witness to refresh his recollection in advance of the hearing can be produced "at the hearing" to test the witness's credibility through cross examination. Yet the court ordered the privileged documents to be produced not "at the hearing" and not for cross-examination, but as part of discovery long after the witness had testified, the hearing had concluded and a final ruling had issued—*i.e.*, at a time when the Rule could not possibly serve its intended purpose. Furthermore, in so doing, the court departed from the decisions of federal courts holding that the federal analog of Nev. Rev. Stat. 50.125 is not an absolute rule of discovery, but a rule of evidence requiring a careful balancing of competing interests.

The district court ordered the privileged documents to be produced within 10 days (by February 4, 2013). Hence, this Emergency Petition.[1]

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[1] Defendants filed a motion for a stay pending the outcome of this Petition in the district court. The court has set January 29 as the hearing date on that motion.

### B. This Court's Precedents Addressing Improper Discovery Orders Support Writ Review of the District Court's Discovery Order.

A writ of prohibition is the proper "remedy for the prevention of improper discovery," *Wardleigh v. Dist. Ct.*, 111 Nev. 345, 350, 891 P.2d 1180 (1995), as is mandamus to vacate a discovery order that compels the disclosure of privileged information. *Valley Health Sys. v. Dist. Ct.*, 127 Nev.___, 252 P.3d 676, 678–79 (2011). There is no doubt that the discovery of defendants' privileged information the district court ordered is improper. There is also no doubt that the defendants do not have an adequate remedy at law to deal with this aberrant order other than to seek extraordinary relief from this Court. If defendants are compelled to produce the indisputably privileged documents the district court has ordered them to relinquish by February 4, the documents "would irretrievably lose [their] confidential and privileged quality and petitioners would have no effective remedy, even by a later appeal." *Wardleigh*, 111 Nev. at 350–51. Once privileged information has been disclosed, "there would be no adequate remedy at law that could restore the privileged nature of the information, because once such information is disclosed, it is irretrievable." *Valley Health Sys.*, 252 P.3d at 679.

### C. The Discovery Order Is an Unprecedented Application of a Rule of Evidence for Testimonial Purposes to Compel Post-hearing General Discovery of Privileged Information.

This Petition also presents important questions of first impression concerning the proper application of Nev. Rev. Stat. 50.125. Nev. Rev. Stat. 50.125 is a rule of evidence, limited by its language to live testimony at a hearing. It is not a rule of general discovery. Nev. Rev. Stat. 50.125 says that "[i]f a witness uses a writing to refresh his or her memory, either before or while testifying, an adverse party is entitled" to have the

writing "produced at the hearing," to "inspect it," "to cross-examine the witness thereon" and to "introduce in evidence those portions which relate to the testimony of the witness for the purpose of affecting the witness's credibility."

In this case, the witness was Justin Jones, a prominent lawyer for one of the defendants, who appeared at the district court's direction as a witness at a sanctions hearing that occurred and concluded months ago. Jones, who had not worked on the case for a year and was in the middle of a heated political campaign, testified that he had reviewed certain internal privileged documents before the hearing to refresh his recollection concerning the dates of certain events in the preceding year. Although plaintiff's counsel cross-examined and asked him to identify the documents he had used to refresh his memory, counsel did not challenge Jones's credibility on the dates of events he testified to, nor did plaintiff's counsel ask the court "before or while" [Jones was] testifying," to have any writing he used "to refresh his memory" produced at the hearing. Instead, plaintiff waited until two months later, after the sanctions hearing was over and the district court had ruled, to demand production of the privileged documents in discovery—claiming that he was entitled to them under Nev. Rev. Stat. 50.125, even though the witness's credibility was no longer even arguably at issue.

### D. This Petition Presents Issues That Are Important to the Bench and Bar and to the Fair and Efficient Administration of Justice in Nevada.

The first issue is whether, as plaintiff contended and the district court held, Nev. Rev. Stat. 50.125 creates a no-exceptions rule of discovery for any document that a witness may review before testifying, regardless of whether a time-honored evidentiary privilege otherwise protects the

document from disclosure. Rule 612 of the Federal Rules of Evidence, which served as the model for Nev. Rev. Stat. 50.125, has not been interpreted in such an absolute fashion: federal courts have consistently applied a balancing test to decide whether an adverse party is entitled to examine privileged documents that a witness used to refresh his or her recollection before testifying. That same balancing test should have been applied here and, if it had been, the plaintiff's motion to compel would have been denied and the defendants' privileges and attorney work product preserved.

The second issue is whether Nev. Rev. Stat. 50.125 can be used to compel the production of documents post-hearing—after the witness has completed testifying and his credibility has been assessed. By its plain terms, Nev. Rev. Stat. 50.125 is a rule of evidence, not a rule of discovery. Its purpose is to assist the finder of fact at the hearing to assess witness credibility. Accordingly, the rule only empowers the court to make orders for disclosure at the hearing. Here, however, the January 18 Discovery Order compels the disclosure of privileged information long after the hearing's conclusion and the district court's ruling. Thus, the documents, if produced on February 4, would not assist the district court in assessing witness Jones's credibility last September; the hearing is history. Disclosure now would give the plaintiff discovery on highly sensitive, privileged materials and attorney work product—mental impressions, for example--that go to the merits of the case. Thus, the district court has torn Nev. Rev. Stat. 50.125 from its moorings in the law of evidence, transforming it into a free-ranging vessel for fishing expeditions in discovery, which this Court should interdict before disclosure of this protected information becomes prejudicially "irretrievable." *Valley Health Sys., supra*, 256 P.3d at 679.

Third, the district court's January 18 Discovery Order raises serious issues concerning the enforcement of this Court's limited remand Order of August 26, 2011, which stayed all proceedings until the district court decides the threshold question of whether it has personal jurisdiction over one of the defendants, Sands China, Ltd. ("SCL"), a foreign corporation. Following remand, the district court allowed plaintiff to engage in massive "jurisdictional" discovery. Even if that discovery were deemed to be within the scope of this Court's August 26, 2011 Order, the district court's January 18 Discovery Order is not because it compels the defendants to produce privileged documents without any finding that the documents are relevant to jurisdiction over SCL. That the January 18 Discovery Order disregards both the letter and the spirit of this Court's August 2011 Order is enough, in and of itself, to warrant the extraordinary relief sought herein.

## II. ISSUES PRESENTED BY THIS WRIT PETITION

(1) Whether Nev. Rev. Stat. 50.125 is an absolute rule that mandates the forfeiture of all privileges in all cases in which a witness uses any part of a privileged document to refresh his or her memory before testifying, or whether the courts must balance the adverse party's interests in challenging the witness' credibility under Nev. Rev. Stat. 50.125 against the public and private interests served by the privilege based on the facts of the particular case;

(2) Whether Nev. Rev. Stat. 50.125, which governs the testimony of witnesses at a hearing and limits the types of orders a court may enter to those affecting that testimony, may be used as a tool for obtaining discovery after the relevant hearing has been concluded; and

(3) Whether the district court acted beyond the scope of the authority afforded to it by this Court's August 26, 2011 Order when it compelled production of documents without any finding that those documents were necessary or even relevant to the issue of whether the court had personal jurisdiction over SCL.

## III. STATEMENT OF FACTS SUPPORTING EXTRAORDINARY RELIEF

Plaintiff and Real Party in Interest Steven C. Jacobs was formerly the Chief Executive Officer of SCL, which does business exclusively in the Macau Special Administrative Region of the People's Republic of China ("Macau") and in Hong Kong. In July 2010, Jacobs was terminated as SCL's CEO. Shortly thereafter, he filed this lawsuit against LVSC and SCL, alleging that he had been wrongfully terminated and that SCL had breached contractual obligations it purportedly owed him by refusing to honor his claimed right to exercise certain stock options. LVSC/SCL Appendix at LVSC/SCL0001-18.

SCL moved to dismiss Jacobs' breach of contract claim against it for (among other things) lack of personal jurisdiction. Jacobs argued in response that SCL's "de facto executive headquarters" was and is in Las Vegas, where its majority shareholder (LVSC) is headquartered, and that SCL is therefore subject to the general jurisdiction of the Nevada courts. *See, e.g.*, LVSC/SCL0087.[2] The district court denied SCL's motion to dismiss, holding that plaintiff had met his burden of showing general jurisdiction. LVSC/SCL0021-22. SCL then sought an extraordinary writ in this Court, arguing that the district court had improperly predicated

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[2] Jacobs also argued that the court had jurisdiction over SCL because he served the summons and complaint on SCL's then-acting CEO, Michael Leven, when Mr. Leven happened to be in Las Vegas. LVSC/SCL0080.

jurisdiction over SCL on LVSC's contacts with the forum. LVSC/SCL0023, 31.

On August 26, 2011, this Court issued an Order Granting Petition for Writ of Mandamus, in which it "direct[ed] the district court to revisit the issue of personal jurisdiction" over SCL "by holding an evidentiary hearing and issuing findings regarding general jurisdiction." LVSC/SCL0128. The Court further directed the district court to "stay the underlying action, except for matters relating to a determination of personal jurisdiction, until a decision on that issue has been entered." *Id.*

After this Court issued its August 26 Order, the district court set a hearing date, but then vacated that date when Jacobs sought what he described as "narrowly confine[d]" discovery on the issue of jurisdiction. LVSC/SCL0149; LVSC/SCL0184. Over defendants' objection, the court granted plaintiff's request to take depositions of four senior LVSC executives and ordered defendants to produce eleven categories of documents (LVSC/SCL0170-76); the court also allowed plaintiff to pursue a number of new jurisdictional arguments, including the never-before-raised argument that the court had specific jurisdiction over his breach of contract claim against SCL.[3] LVSC/SCL0185-86. The "narrowly confined" discovery the court allowed continues to lurch along so that the hearing

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[3] Plaintiff offered a new general jurisdiction theory as well, claiming that LVSC acted as SCL's agent, both in Nevada and elsewhere — a theory that would require plaintiff to prove that the subsidiary somehow directed and controlled the parent company. LVSC/SCL0186-88. The district court has so far refused even to attempt to sort out plaintiff's often conflicting theories, while at the same time ordering more and more discovery that is irrelevant to any viable theory of jurisdiction.

this Court ordered the district court to hold more than a year ago has not been scheduled.[4]

In September 2012, the district court *sua sponte* convened what turned into a three-day hearing to determine whether defendants should be sanctioned for not disclosing to the court, prior to June 2012, that electronically stored information ("ESI") for which Jacobs was the custodian had been transferred from SCL in Macau to LVSC in Las Vegas in 2010, shortly after Jacobs was terminated. At various points in the litigation, counsel for SCL had advised the district court that its ability to produce documents that were located in Macau was significantly constrained by its obligation to comply with Macau's strict data privacy laws. The district court took the view that, when making these statements, defendants should have specifically disclosed the fact that Jacobs' ESI had already been transferred to the United States and would therefore not be subject to Macau's Personal Data Protection Act ("MPDPA").[5] LVSC/SCL0361-64.

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[4] By the beginning of December, Defendants had produced approximately 168,000 pages of documents in response to plaintiff's jurisdictional requests at a cost of more than $2.3 million. LVSC/SCL0407. SCL produced over 27,000 pages of documents, after a December 18, 2012 hearing at which the court ordered SCL to search for and produce documents by January 4, 2013. LVSC/SCL0510. Defendants have produced all four witnesses plaintiff designated (including the Chairman of SCL and Chairman/CEO of LVSC, Sheldon Adelson) for depositions, but the court recently ordered those witnesses to sit for additional deposition days, notwithstanding defendants' objection that plaintiff was using the depositions to inquire into the merits, rather than into the limited question of jurisdiction. LVSC/SCL0458-60.

[5] Defendants argued that they had no obligation to disclose prior to June 2012, when they did so voluntarily in light of advice SCL received on May 28, 2012 from the Macau Office for Personal Data Protection ("OPDP") that ESI that had already been transferred to the United States could be produced without complying with the MPDPA. LVSC/SCL0267-75.

The district court directed certain defense counsel to appear and to testify as witnesses at the sanctions hearing, which was held on September 10-12, 2012. LVSC/SCL0357. Justin Jones, a partner in the law firm of Holland & Hart, was one of the witnesses called by the court. LVSC/SCL0280-353. Mr. Jones testified that he had been involved in the case for about a year, from October or November 2010 until the end of September 2011. LVSC/SCL0285-86. During that time, Holland & Hart had represented only LVSC. LVSC/SCL0286.

Mr. Jones was first questioned by the district court itself. The court asked about statements Mr. Jones had made at a court hearing in July 2011 to the effect that he was prohibited by the MPDPA from reviewing SCL documents in Macau because he did not represent either SCL or its operating subsidiary, Venetian Macau Limited ("VML").[6] LVSC/SCL0282-83. The court also questioned Mr. Jones about the fact that in May 2011 he had reviewed some of the Jacobs ESI that had been transferred to the United States in LVSC's offices in Las Vegas. LVSC/SCL0281-82. During the court's own examination, counsel for defendants raised a number of objections based on attorney-client privilege and work product, which the court sustained. *Id.*

After the district court completed its questioning, it permitted plaintiff's counsel to cross-examine Mr. Jones. LVSC/SCL0285-352. Plaintiff's counsel asked a series of questions about Mr. Jones' review of Jacobs' ESI in Las Vegas, many of which drew objections on privilege or

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[6] This statement was made ***before*** this Court's August 26, 2011 Order and did not concern the issue of personal jurisdiction. As defendants noted in a Statement filed before the sanctions hearing, this Court's Order precluded the district court from imposing sanctions "for conduct that does not directly relate to jurisdiction." LVSC/SCL0253 at n.2.

work product grounds, which the court sustained. LVSC/SCL0285-301. Plaintiff's counsel then took a new tack, noting that Mr. Jones had been "pretty precise on the date" that he had reviewed that ESI and asking whether he had reviewed billing records before testifying. LVSC/SCL0301-02. Mr. Jones, who had not worked on the case for a year and was at that point engaged in a hotly-contested race for the state Senate, testified that he had reviewed certain billing records to refresh his recollection about the timing of events in the case. He was then asked whether he had reviewed anything else before testifying. Mr. Jones said that he had reviewed some emails "that refreshed my recollection as to the timing of events in this case." LVSC/SCL0303.

In response to questions from plaintiff's counsel, Mr. Jones testified that he had reviewed 10-15 emails in preparation for his testimony. LVSC/SCL0304. When plaintiff's counsel asked him to identify the emails, SCL's counsel objected on the assumption that plaintiff would next be asking Mr. Jones to produce the documents. He argued that the ordinary rules relating to documents used to refresh a witness' recollection should not apply where opposing counsel was being allowed to cross-examine a lawyer for one of the parties and the documents in question were protected by privilege or work product. LVSC/SCL0305-06. The court overruled the objection, on the ground that all plaintiff's counsel was asking for at that point was an identification of the documents in question. LVSC/SCL0306. The court then told Mr. Jones to identify the emails by author and approximate date, in order to avoid any privilege waiver. LVSC/SCL0307-09.

Mr. Jones testified that all of the emails were between himself and other counsel, either in-house or outside, for the defendants.

LVSC/SCL0310-13. He also testified that he could not provide any more information about the emails without risking a waiver of privilege or work product protection. LVSC/SCL0313-14. Plaintiff's counsel then asked the court to order the documents Mr. Jones had reviewed to be segregated; the court declined to do so. LVSC/SCL0314-15. Plaintiff's counsel did not, however, ask for the documents to be produced so he could use them to cross-examine Mr. Jones, nor did he suggest at any point that Mr. Jones had inaccurately recalled the time-line of relevant events, such as when he reviewed the Jacobs ESI in Las Vegas.

On September 14, 2012, the district court issued a Decision and Order imposing certain sanctions on the defendants for failing to disclose at an earlier point in time the fact that Jacobs ESI had been transferred to the United States. LVSC/SCL0357-65.[7] The Decision and Order did not mention Mr. Jones' testimony.

Two months after the district court ruled, plaintiff asked defendants to produce the documents Mr. Jones had used to refresh his recollection before the September 2012 hearing. When defendants refused to do so, plaintiff filed a motion to compel. LVSC/SCL0366. Plaintiff did not deny that the documents he sought would ordinarily be protected from discovery by the work product doctrine or attorney-client privilege. Nor did he attempt to show that he had any need for the documents in question

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[7] The court held that, for purposes of jurisdictional discovery and the evidentiary hearing on jurisdiction, defendants could not invoke the MPDPA as a defense to the admission, disclosure or production of any document and could not argue that ESI that Jacobs had taken when he left Macau was not rightfully in his possession. The court also imposed monetary sanctions in the form of a legal aid contribution (which defendants have paid) and an award of attorneys' fees plaintiff had expended on MPDPA issues (which plaintiff has yet to seek). LVSC/SCL0364-65.

or that they were likely to be relevant to jurisdiction. Instead, plaintiff based his motion to compel solely on the theory that Nev. Rev. Stat. 50.125 gave him an absolute right to production of any documents any witness may have used to refresh his recollection on any matter, however relevant (or immaterial) the witness's recollection may be. LVSC/SCL0375-77.

Defendants filed an opposition to plaintiff's motion on December 6. LVSC/SCL0431. In their opposition, defendants demonstrated (i) that plaintiff's automatic-forfeiture theory was contrary to law; (ii) that under the circumstances of the case the undisputed protections of the attorney-client privilege and work-product doctrine outweighed any interest plaintiff may have had in testing Mr. Jones' recollection; and (iii) that Nev. Rev. Stat. 50.125 did not give plaintiff the right to take discovery after the relevant hearing had concluded and after the sanctions order had been issued. LVSC/SCL0433-42.

The district court did not hear argument on plaintiff's motion to compel. On January 17, 2013, the district court entered an Order adopting verbatim a proposed order submitted by plaintiff (referred to herein as the "Discovery Order"). LVSC/SCL0569-71. The Discovery Order commands defendants to "produce all documents Justin Jones reviewed in preparation for testifying at the evidentiary hearing" within 10 days of notice of entry of the Order or by February 4, 2013. LVSC/SCL0571-72. The Discovery Order is not limited to the documents or portions of documents that actually refreshed Mr. Jones' recollection. Nor does it allow Petitioners to redact any portions of the documents that were not related to Mr. Jones' testimony. The documents defendants were ordered to produce "include, but are not limited to, Jones' billing entries for the third week in May and end of August or early September 2011, and approximately ten to fifteen

emails dated May, August, or September of 2011." LVSC/SCL0570, ¶ 3. Those emails are described as including "an email from J. Stephen Peek [defendants' lead trial counsel] to Jones in May 2011" and "emails from Jones to Peek, counsel from Glaser Weil [prior counsel for SCL], and in-house counsel." *Id.*

## IV. STATEMENT OF REASONS THE WRIT SHOULD ISSUE

### A. The District Court's Order Presents Important Questions of First Impression That Require Urgent Clarification.

Writ relief is available where the petitioner has no "plain, speedy and adequate remedy in the ordinary course of law." Nev. Rev. Stat. § 34.330. Prohibition is the proper "remedy for the prevention of improper discovery," *Wardleigh*, 111 Nev. at 350, 891 P.2d at 1183, because discovery orders are not immediately appealable and therefore the affected party does not have a plain, speedy, or adequate remedy at law to prevent disclosure. "Because mandamus is an extraordinary remedy, a writ will not issue if the petitioner has a plain, speedy and adequate remedy at law." *Valley Health Sys.*, 252 P.3d at 678 (quoting *Millen v. Dist. Ct.*, 122 Nev. 1245, 1250–51, 148 P.3d 694, 698 (2006)). That principle applies with special force in cases where, as here, a district court order "requires disclosure of privileged information." *Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Ct.*, 128 Nev. ___, 276 P.3d 246, 249 (2012). "If improper discovery were allowed" in such a case, "the assertedly privileged information would irretrievably lose its confidential and privileged quality and petitioners would have no effective remedy, even by a later appeal." *Id.* (quoting *Wardleigh*, 111 Nev. at 350-51, 891 P.2d at 1183-84). That is certainly true here, where appeal in the normal course "would not remedy" the

"improper disclosure of" information that is privileged and protected by the work product doctrine.

It is also true that, "the consideration of an extraordinary writ is often justified 'where an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction.'" *Sonia F. v. Eighth Judicial Dist. Ct.*, 125 Nev. 495, 498, 215 P.3d 705, 707 (2009) (citation omitted). This Petition concerns important issues of law this Court has never decided — and a district court order based on an extreme theory that this Court has never adopted.

This Court has never considered the relationship between Nev. Rev. Stat. 50.125 and the attorney-client privilege (codified at Nev. Rev. Stat. 49.095). In *Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004), the Court did consider the interplay between Nev. Rev. Stat. 50.125 and the work-product doctrine, but in very different circumstances than those here. First, in *Means*, the party seeking the production of an attorney's notes made a request for the notes while the attorney was still testifying as a witness at a hearing. *Id.* at 1006, 103 P.3d at 29. In these circumstances, the request was properly made under Nev. Rev. Stat. 50.125, which applies to documents relevant to witness credibility at hearings. By contrast, plaintiff here did not request the privileged documents until months after the witness had completed his testimony, when Nev. Rev. Stat. 50.125 was no longer relevant.

In *Means*, any work product protection was at best weakened and was perhaps inapplicable because the party seeking production of the documents was the lawyer-witness' former client. This case, by contrast, presents what is likely to be the much more common scenario where there is a discovery dispute among adverse parties in civil litigation. The Court

expressly stated that this common scenario was not "at hand" in *Means*, but it is squarely presented here. 120 Nev. at 1010, 103 P.3d at 31. This case is one in which "[t]he work-product doctrine is most commonly and appropriately invoked," *id.*, and the Court's guidance is sorely needed.

The need for guidance from this Court is particularly acute because the district court's Discovery Order rests on an extreme automatic-forfeiture theory that this Court has never endorsed. The ramifications of the Discovery Order are far-reaching and drastic: it adopts an all-encompassing, absolute rule that would require the forfeiture of all privileges in any proceeding in which any witness reviews any part of a privileged communication to refresh his or her memory. The district court's theory would preclude consideration or balancing of the public and private interests that would be lost if the privilege is destroyed, and it would operate without regard to the circumstances of the testimony or the case.

The policy interests undermined by the district court's Discovery Order are worth preserving: "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Goyak v. Private Consulting Grp.*, No. A558299, 2011 WL 4427745 (Nev. Dist. Ct. Aug. 16, 2011) (quoting *Tahoe Regional Planning Agency v. McKay*, 769 F.2d 534,540 (9th Cir. 1985) (citations omitted). The privilege shields confidential communications "to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.' " *Premiere Digital Access, Inc. v. Cent. Tel. Co.*, 360 F. Supp. 2d 1168, 1172 (D. Nev. 2005) (*citing Upjohn Co. v. United States*, 449 U.S. 383, 388 (1981)).

Likewise, the work-product doctrine of Nev. R. Civ. P. 26(b)(3) serves the interests of parties and the broader interests of impartial justice. It gives attorneys the "free[dom] from unnecessary intrusion by opposing parties and their counsel" they need to adequately "protect their clients' interests." *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). The doctrine confers absolute protection "against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Nev. R. Civ. P. 26(b)(3); *see Wardleigh*, 111 Nev. at 359, 891 P.2d at 1189 (holding that "opinion" work product is "not discoverable under any circumstances"). Even non-opinion "ordinary" work product may be disclosed "only upon a showing that the party seeking discovery has substantial need of the materials . . . and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Nev. R. Civ. P. 26(b)(3).

This case also implicates the conduct of proceedings in which a party's outside counsel has been *required* to testify. This Court has justifiably stated that it is "wholeheartedly concerned with this vehicle of discovery." *Club Vista*, 276 P.3d at 250. In those "remarkable" circumstances in which a party is allowed to depose the opposing party's counsel, the Court has instructed district courts "to ensure that the parties avoid improper disclosure of protected information." *Id.* The Discovery Order ***compels***, rather than avoids, the "improper disclosure of protected information," providing further reason for this Court's review.

All of the important public and private interests described above are at risk if the Discovery Order is allowed to stand. Worse still, the district court's theory would reach beyond the attorney-client privilege and

the work-product doctrine, as it extends to ***all*** privileges in all proceedings. This Court's immediate intervention will thus provide necessary "clarification" on "important issue[s] of law" and serve critical "public policy" interests. *Sonia F.*, 125 Nev. at 498, 215 P.3d at 707.

### B. The District Court's Order Fashions an Extreme Automatic-Forfeiture Theory That is Contrary to Law.

#### 1. The District Court Ignored the Statutory Protections for Attorney-Client Communications and Work Product.

The Discovery Order's extreme and expansive theory rests on a single sentence: the district court's observation that "neither the attorney-client privilege nor the work-product doctrine" appears as an express exception in Nev. Rev. Stat. 50.125. LVSC/SCL0570, ¶ 8. That sentence improperly looks at Nev. Rev. Stat. 50.125 in a vacuum, without regard to its statutory context.

There was no need for the legislature to expressly reiterate and preserve all of the many evidentiary privileges in Nev. Rev. Stat. 50.125. Chapter 49 of the Code already codifies the various privileges, and Nev. Rev. Stat. 49.095 in particular enshrines the attorney-client privilege. Nev. Rev. Stat. 47.020 expressly states that those privileges apply "at all stages of all proceedings" except in special proceedings (like extradition hearings) where the normal rules of civil procedure do not apply. Nev. Rev. Stat. § 47.020. Further, Nev. R. Civ. P. 26(b)(3) expressly exempts work product from the discovery process, and confers absolute protection on opinion work product.

The proper question, then, is not whether Nev. Rev. Stat. 50.125 expressly ***preserves*** privileges but instead whether the legislature intended Nev. Rev. Stat. 50.125 to ***abrogate*** all the established privileges that are expressly preserved by Nev. Rev. Stat. 47.020 and Nev. R. Civ. P. 26(b)(3).

The fact that Nev. Rev. Stat. 50.125 says nothing one way or the other about privilege cuts ***against*** the district court's extreme theory, not for it. After all, one could just as easily say that the attorney-client privilege statute (Nev. Rev. Stat. 49.095) does not list Nev. Rev. Stat. 50.125 as an exception to the rule of privilege, and that Nev. R. Civ. P. 26(b)(3) does not recognize any exceptions to its absolute protection of opinion work product. From that perspective, one would conclude that privileged materials should ***never*** be disclosed. The governing statutes must be read together, not in isolation.

The proper approach for reconciling the various statutes and resolving the apparent conflict between them is to balance the competing interests they serve on a case-by-case basis. That is exactly the course taken by the federal courts, which have already confronted the question presented here. This Court has recognized that "federal decisions involving the Federal Rules of Civil Procedure provide persuasive authority when this court examines its rules." *Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2006). In particular, the legislature modeled Nev. Rev. Stat. 50.125 on FRE 612. Nev. Rev. Stat. § 50.125 Sub-committee cmt.[8] Thus, plaintiff correctly admitted below that "[c]ase law discussing Federal

[8] There is a slight difference in text, but it does not affect the outcome. FRE 612 contains a clause stating that its provisions apply "if the court decides that justice requires the [adverse] party to have those options" when a witness reviews a writing before testifying. Nev. Rev. Stat. 50.125 does not contain that clause, because it was based on a draft of FRE 612 rather than the final version. But that clause says nothing about any privilege; rather, it addresses the separate issue of how to deal with materials reviewed before a hearing, as opposed to materials reviewed while the witness is on the stand. More fundamentally, it would be untenable to contend that the Nevada legislature, when it adopted the then-current draft of a federal Rule, somehow intended a massive deviation from federal law.

Rule of Evidence 612 is instructive" on the issues presented by his motion. LVSC/SCL0376.

Yet those federal authorities have not endorsed the extreme automatic-forfeiture rule adopted by the district court here. To the contrary, the House Judiciary Committee's Notes to FRE 612 plainly state Congress' intent "***that nothing in the Rule be construed as barring the assertion of a privilege with respect to writings used by a witness to refresh his memory***." (Emphasis added). Likewise, the case law applying FRE 612 does not adopt the district court's automatic-forfeiture theory; rather, federal courts have recognized that they have discretion on a case-by-case basis to balance the adverse party's need for the testimony against the important public interests in protecting privileged documents. As one treatise puts it, "Rule 612 sometimes conflicts with privilege law but does not describe how that conflict should be resolved," so "it is appropriate for the courts to resolve the conflict by balancing the competing principles underlying both Rule 612 and privilege law." Wright & Gold, *Federal Practice and Procedure* § 6188.

To illustrate, consider a recent decision of the federal district court here in Nevada: *Server Tech., Inc. v. American Power Conversion Corp.*, No. 3:06-CV-698-LRH, 2011 WL 1447620 (D. Nev. April 14, 2011). The court in that case acknowledged the "potential conflict" between FRE 612 and the protections afforded to privileged documents. *Id.* at *7. Like the district court here, it recognized that FRE 612 (like its Nevada analog Nev. Rev. Stat. 50.125) "does not expressly exempt privileged matter from disclosure." *Id.* at *6 (quotations omitted). But, far from taking the extreme automatic-forfeiture approach taken by the district court here, the court in *Server Tech* reached the exact opposite conclusion, holding that "FRE 612

does ***not*** mandate the disclosure of documents used to refresh a witness's recollection prior to . . . testimony." *Id.* at *11 (emphasis added).

As the court explained, Rule 612 gives courts discretion to balance the interest in disclosure against the need to protect confidentiality. *Id.* While observing that the federal courts have differed on the precise factors to balance, the *Server Tech* court concluded "that production of the [disputed document] is not required" regardless of which federal test was employed. *Id.*; *see also Ehrlich v. Howe*, 848 F. Supp. 482, 493 (S.D.N.Y. 1994) ("The potential for conflict [that] exists between Rule 612 . . . and the work-product privilege is resolved by the courts ***on a case-by-case basis*** by balancing the competing interests in the need for full disclosure and the need to protect the integrity of the adversary system protected by the work-product rule." *Id.* at 493 (emphasis added and internal quotations omitted). Here, the district court erred by failing even to attempt the same case-by-case balancing between competing statutes that the federal courts have applied, and by instead adopting the extreme view that Nev. Rev. Stat. 50.125 trumps all privileges in all cases without regard to the circumstances.

### 2. The Discovery Order Fails the Balancing Test the Law Requires.

In this case, balancing the competing interests for and against disclosure has only one possible outcome: as a matter of law, any balance would favor the privilege.

At issue here are obviously protected communications by and between trial counsel, including core "opinion" work product and attorney-client communications. For all of the reasons outlined above, these protections are critical to the functioning of our adversary system and

cannot be abrogated absent a compelling need to do so. But here there is ***no*** need, let alone a ***compelling*** need, for production of the documents.

Nev. Rev. Stat. 50.125 was designed to ensure that the adverse party has a full and fair opportunity to test the witness' credibility when the witness' testimony is based on recollection that was refreshed by examining particular writings. But by the time the district court entered its Discovery Order, there was no longer any need — or indeed any opportunity — to test Mr. Jones' credibility. The hearing was already over and the district court had already ruled there is no reason to believe that Mr. Jones will ever be called to testify again about the timing issues on which his recollection was refreshed.

Indeed, even ***during*** the hearing, no purpose would have been served by requiring production of the documents, because there was no question concerning the accuracy of Mr. Jones' recollection of the time-line of events and therefore no need for plaintiffs' counsel to review the documents in order to challenge his credibility. Under similar circumstances, federal courts have refused to require production of documents under FRE 612. *See, e.g., Hiskett v. Wal-Mart Stores, Inc.*, 180 F.R.D. 403, 408 (D. Kan. 1998) (rejecting motion to compel discovery where the witness used the documents to refresh her recollection "as to when two employees left" the defendant's employ, and thus "had minimal impact upon her testimony"). Indeed, in *Laborers Local 17 Health Benefit Fund v. Philip Morris, Inc.*, No. 97CIV.4550 (SAS)(MHD), 1998 WL 414933, at *4-5 (S.D.N.Y. July 23, 1998), the court rejected as "meritless" and "plainly inadequate" the argument that a party had waived privilege and work-product protection when a witness reviewed a protected document before

a deposition, because the document had merely been used to refresh the witness' recollection about the "particular time frame" of a meeting.

### C. The District Court's Automatic-Forfeiture Theory is Not Supported by This Court's Decision in *Means v. State.*

This Court considered Nev. Rev. Stat. 50.125 in *Means*, but limited its conclusions to the unique circumstances of that case. In the district court in this case, plaintiff tried to extend *Means* beyond its express limits, citing a snippet of the opinion — where the Court stated that "the work-product doctrine is not an exception to the inspection rights conferred in NRS 50.125" — for the proposition that Nev. Rev. Stat. 50.125 mandates an automatic-forfeiture rule for all cases. LVSC/SCL0570, ¶¶ 7, 8. That argument does not reflect this Court's ruling in *Means*.

In the same sentence that plaintiff here relies on, the Court in *Means* made clear that its holding was limited to the specific facts before it, explaining that the work-product doctrine "does not shield an attorney from having to disclose his notes ***to his former client*** when the attorney, in giving testimony, has refreshed his memory with the notes." 120 Nev. at 1010, 103 P.3d at 31 (emphasis added). That the party seeking production of the documents under Nev. Rev. Stat. 50.125 was the witness' former client is a critical distinction, *and* he sought production of his attorney's notes at the next hearing, not months later, as plaintiff is doing in this case. There was no attorney-client privilege at issue in *Means* because the client was seeking disclosure. Here, by contrast, plaintiff is an adverse party who is attempting to compel disclosure of attorney-client communications despite the fact that the client did nothing to waive the privilege, which the legislature has mandated shall apply at "all stages of all proceedings." After all, it was not LVSC's idea to put its former attorney on the stand; the

court directed him to appear and answer the court's (and plaintiff's) questions.

While the party opposing disclosure in *Means* did assert a work product objection, that objection was weakened in the unusual attorney-client dispute scenario that was before the court. The work-product doctrine is intended to protect against the disclosure of work product to an adversary. As the U.S. Supreme Court has explained, in our system of justice "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion ***by opposing parties and their counsel***" so they can "protect their clients' interests." *Hickman*, 329 U.S. at 510-11 (emphasis added). Similarly, the codification of the work-product doctrine in Nev. R. Civ. P. 26(b)(3) prevents one "party" from obtaining materials "prepared in anticipation of litigation or for trial by or for ***another party***." (Emphasis added.) The client in *Means* argued that his former attorney "could not invoke the work product privilege" at all because, as the client, he "[wa]s not and cannot be an opposing party within the meaning of the rule." 120 Nev. at 1007, 103 P.3d at 29. Further, the work-product doctrine is intended to help attorneys "protect their clients' interests," *Hickman*, 329 U.S. at 511, and in *Means*, the client's interests favored disclosure, unlike this case.

In light of those special circumstances, the Court expressly distinguished the attorney-client dispute in *Means* from the situation presented here (a dispute between opposing parties). As the Court explained, "[m]ost federal authority addresses attorney files and the work-product doctrine in the context of opposing a demand for disclosure made by counsel representing a party adverse to the client, rather than the former client." 120 Nev. at 1009, 103 P.3d at 30. Indeed, the Court recognized that

"[t]he work-product doctrine is most commonly and appropriately invoked" in disputes between opposing parties and made a point of explaining that such a dispute was not "at hand" in *Means*. *Id.* at 1010, 103 P.3d at 31.

The present case involves a classic dispute between opposing parties that was absent in *Means*. The defendants and their attorneys are united: they seek to protect against "intrusion by opposing parties and their counsel." *Hickman*, 329 U.S. at 510. Defense counsel's responsibility to "protect their clients' interests" (*id.* at 511) cuts squarely ***against*** disclosure, not ***for*** disclosure, as was the case in *Means*. The situation here is precisely the one in which "[t]he work-product doctrine is most commonly and appropriately invoked" (*id.*) and it is the one that was not "at hand" in *Means*. *Means*, 120 Nev. at 1009, 103 P.3d at 31.[9]

The district court's theory would render most of the carefully crafted opinion in *Means* completely superfluous. The Court laid out at length the unusual fact setting before it, carefully distinguished that situation from the more common litigation scenario presented here, and clearly limited its holding (that "Means was entitled under the statute . . . to see the notes") to the specific "circumstance" before it. 120 Nev. at 1010, 103 P.3d at 31. The district court's absolute rule is antithetical to this Court's carefully limited, case-specific approach.

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[9] As a further distinction, the party seeking disclosure in *Means* moved promptly at the hearing "to inspect" the documents his former lawyer was reviewing while testifying "and to have them introduced as evidence." *Id.* at 1006, 103 P.3d at 29. The Court ordered disclosure for use in the limited context of re-trying the denial of post-conviction relief. Here, by contrast, the district court erroneously ordered disclosure two months after the hearing and after it had issued its order regarding sanctions. *See* Section D below.

### D. The District Court's Order Improperly Transforms Nev. Rev. Stat. 50.125 From a Limited Rule of Evidence Into an Open-Ended "Fishing License" for Discovery.

In addition to erroneously turning Nev. Rev. Stat. 50.125 into a sweeping abrogation of privileges, the district court compounded its error by drastically expanding the statute beyond its express limitations. Nev. Rev. Stat. 50.125 limits the relief that "an adverse party" like plaintiff is "entitled" to request "[i]f a witness uses a writing to refresh his or her memory, either before or while testifying." Nev. Rev. Stat. § 50.125(1). First, the adverse party may have the writing "produced at the hearing." *Id.* § 50.125(1)(a). Second, the adverse party can ask to "inspect" the writing and "cross-examine the witness thereon." *Id.* § 50.125(1)(b)-(c). Finally, the adverse party may "introduce in evidence those portions which relate to the testimony of the witness for the purpose of affecting the witness's credibility." *Id.* § 50.125(1)(d).

As the statutory language makes clear, Nev. Rev. Stat. 50.125 is a rule of evidence, not a rule of discovery. At a given hearing, a witness is free to testify if he or she has refreshed his or her memory with a writing, but the adverse party may be allowed to use the same writing in cross-examination and in evidence at the hearing, so the fact finder at that hearing can assess the witness's credibility.

The remaining provisions of Nev. Rev. Stat. 50.125 confirm its limited scope, geared narrowly to specific testimony at a specific hearing. If the party adverse to the witness seeks to obtain or use the writing at the hearing, subsection (2) allows the other side to respond "that the writing contains matters not related to the subject matter of the testimony." Nev. Rev. Stat. § 50.125(2). The judge must then "examine the writing in chambers" and "excise any portions not so related." *Id.* Thus, disclosure is

limited to the "portions" of the document that actually affect the hearing testimony. Subsection (3) gives the judge discretion to make other orders related to the hearing (such as striking the testimony or declaring a mistrial) but only "[i]f a writing is not produced or delivered pursuant to order under this section": that is, an order under subsections (1) and (2).

The district court's Discovery Order purports to rely on Nev. Rev. Stat. 50.125, but is contrary to the express terms of the statute. It did not order that the documents in question be produced "at the hearing" under Nev. Rev. Stat. 50.125(1)(a). It did not allow plaintiff to "inspect" the documents or "cross-examine the witness" on them at the hearing under Nev. Rev. Stat. 50.125(1)(b) or (c). And it did not permit plaintiff to "introduce" any portions of any document "in evidence" under Nev. Rev. Stat. 50.125(1)(d). Indeed, none of the orders permitted by Nev. Rev. Stat. 50.125 was possible: the witness had long since been excused, the hearing had long since ended, and the district court had already ruled.

Instead of entering an order governing the presentation of evidence and cross-examination ***at the hearing***, the district court simply ordered defendants to hand the privileged materials to plaintiff without limitation, for use outside of the hearing. The Discovery Order compels the production of "all documents Justin Jones ***reviewed*** in preparation for testifying at the evidentiary hearing" — not just the documents that refreshed Mr. Jones' recollection for the hearing. LVSC/SCL0570, ¶ 2 (emphasis added). Nor is it limited to the "portions" of documents that were actually related to the hearing testimony, as Nev. Rev. Stat. 50.125(1)(d) and (2) require.

As a result, the district court's Discovery Order undertakes a radical transformation of the statute. It turns Nev. Rev. Stat. 50.125 into an

unlimited license for litigants to compel discovery and launch open-ended fishing expeditions that can go far outside the limited hearing context that Nev. Rev. Stat. 50.125 addresses. As the district court put it, "once a document is used by a witness to refresh his recollection, then that document is subject to discovery" without limitation. LVSC/SCL0570, ¶¶ 7, 8.

That is not what Nev. Rev. Stat. 50.125 is. Section 50.125 is a rule of evidence that governs the conduct of hearings. It appears in title 4 of the Revised Statutes, titled "Witnesses and Evidence"; within that title, it is part of chapter 50 ("Witnesses") and falls under the heading "Examination of Witnesses." Nev. Rev. Stat. 50.125 does not appear in the Rules of Civil Procedure, and it is not one of the discovery tools set forth there. Further, the statute does not make any document "subject to discovery" as the district court wrongly decided. Rather, it limits the adverse party's rights to having the relevant portions of the document "produced ***at the hearing***" for inspection, cross-examination, and introduction into evidence, solely "for the purpose of affecting the witness's credibility." (Emphasis added).

As with the choice between an automatic-forfeiture rule and a balance of competing interests, "[c]ase law discussing Federal Rule of Evidence 612 is instructive" on the scope of Nev. Rev. Stat. 50.125. And on this issue as well, that federal case law refutes the district court's theory. FRE 612 (like its Nevada counterpart Nev. Rev. Stat. 50.125) "is a rule of evidence, not a rule of discovery." *Aguinaga v. John Morrell & Co.*, 112 F.R.D. 671, 683 (D. Kan. 1986). Thus, "Rule 612 is not a vehicle for a plenary search for contradictory or rebutting evidence that may be in a file but

rather is a means to reawaken recollection of the witness." *United States v. Sheffield*, 55 F.3d 341, 343 (8th Cir. 1995).

### E. The Discovery Order Violates this Court's Order Staying the Action Except for Matters Relating to Personal Jurisdiction.

Yet another reason for granting extraordinary relief is that the district court's Discovery Order violates the plain terms of the stay this Court imposed in its August 26, 2011 Order. That Order stayed the underlying action "except for matters relating to a determination of personal jurisdiction." LVSC/SCL0128. Even assuming that it was permissible for the district court to hold a hearing on sanctions (which defendants do not concede), the court's decision to compel production of the documents Mr. Jones used to refresh his recollection was clearly outside the scope of the district court's authority on remand.

Plaintiff did not assert, nor did the court find, that Mr. Jones' testimony (and more specifically, his refreshed memory regarding certain dates) has any bearing on the question of personal jurisdiction. Nor is there any claim that the documents in question have any relevance to personal jurisdiction. On the contrary, Mr. Jones' testimony, including his refreshed memory, was simply a tangent that had no impact on the sanctions hearing, which was itself a tangent to the jurisdictional inquiry. Enough is enough. Given the limitations this Court imposed on the district court in August 2011, there was no even conceivable basis for the district court to grant plaintiffs' motion to compel.

## V. CONCLUSION

Petitioners respectfully request that this Court grant the Petition and (1) clarify that a witness's use of documents to refresh his or her memory does not result in an automatic forfeiture of all privileges; (2)

declare that Nev. Rev. Stat. 50.125 does not give courts authority to order production of documents after the relevant hearing has been concluded, and (3) direct the district court to set aside its erroneous Order.

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## NRAP 27(E) CERTIFICATE OF NEED FOR EMERGENCY RELIEF

I, Steve Morris, declare as follows:

1. I am a lawyer with Morris Law Group, counsel for Petitioners Las Vegas Sands Corp. ("LVSC") and Sands China Ltd. ("SCL").

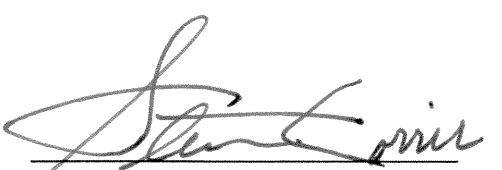
2. I certify that the relief requested in this Petition is needed on an emergency basis. Unless the district court's order is reversed, Petitioners will suffer immediate and irreparable harm and their privileges will be impaired.

3. As explained in this Petition, urgency of immediate review is present because the district court's order requires Petitioners to produce privileged documents by February 4, 2013. Defendants have filed a motion for a stay of that order in the district court, which is scheduled to be heard on January 29, 2013.

4. The contact information (including telephone number) for the other attorneys in this case is James J. Pisanelli, Todd L. Bice, Debra Spinelli, Pisanelli Bice, 3883 Howard Hughes Parkway, Suite 800, Las Vegas, Nevada 89169, Telephone No.: (702) 214-2100, attorneys for Steven C. Jacobs, Real Party in Interest. Opposing counsel were notified that Petitioners would be challenging the district court's order by writ, and have been e-served with a copy of this Petition concurrently with its submission to this Court.

5. I declare the foregoing under penalty of perjury under the laws of the State of Nevada.

Signed this 23rd day of January, 2013.



Steve Morris

## CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this **EMERGENCY PETITION FOR EXTRAORDINARY WRIT RELIEF UNDER NRAP 21(a)(6),** 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 Nev. R. App. P. 28(e), which requires every section of the brief regarding matters in the record to be supported by a reference to the page 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.

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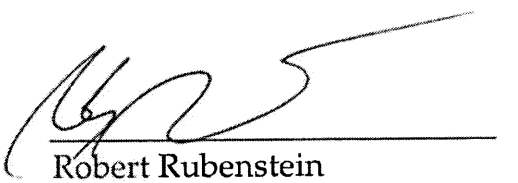
## VERIFICATION

1. I, Robert Rubenstein, declare:
2. I am the Vice President Legal Affairs at Las Vegas Sands Corp., one of the Petitioners herein;
3. I verify that I have read the foregoing **EMERGENCY PETITION FOR WRIT OF PROHIBITION OR MANDAMUS TO PROTECT PRIVILEGED DOCUMENTS**; that the same is true of my own knowledge, except for those matters therein stated on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury of the laws of Nevada, that the foregoing is true and correct.



Robert Rubenstein

## CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. P. 25, I certify that I am an employee of MORRIS LAW GROUP; that, in accordance therewith, I caused a copy of the **EMERGENCY PETITION FOR WRIT OF PROHIBITION OR MANDAMUS TO PROTECT PRIVILEGED DOCUMENTS** to be served as indicated below, on the date and to the addressee(s) shown below:

**VIA HAND DELIVERY ON 1/24/13**
Judge Elizabeth Gonzalez
Eighth Judicial District Court of
Clark County, Nevada
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155

**Respondent**

**VIA ELECTRONIC AND U.S. MAIL**
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**Attorneys for Steven C. Jacobs, Real Party in Interest**

DATED this 23rd day of January, 2013.

By: /s/ PATRICIA FERRUGIA