would have made some difference on the sanctions issue if plaintiff had made a timely motion at the hearing. More fundamentally, plaintiff has made no showing that the documents would be important to the only issue now before the Court – whether this Court has personal jurisdiction over Sands China Limited. Plaintiff's counsel failed to ask Mr. Jones about any of the subjects covered by the documents he referenced, limiting the cross-examination to housekeeping matters like who created the documents and when. Mr. Jones testified that he used the documents simply to refresh his recollection about the timing and sequence of events, which were not disputed. See Pl. Motion Ex. 1, at 30-31. Thus, even if plaintiff had asked for the documents at the appropriate time, during the hearing, he would not have been able to show that his need for the documents outweighed the established interests in protecting obviously privileged communications. See *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"); *Laborers Local 17 Health Benefit Fund v. Philip Morris, Inc.*, Nos. 97 CIV.4550(SAS)(MHD) *et al.*, 1998 WL 414933, at *4-*5 (S.D.N.Y. July 23, 1998) (rejecting as "meritless" and "plainly inadequate" the argument that party waived privilege and work-product protection when witness reviewed document before deposition, because document reminded the witness about the "particular time frame" of meeting).

CONCLUSION

For the reasons set forth above, defendants respectfully request that the Court deny the motion to compel filed by plaintiff.

DATED December 7, 2012.

J. Stephen Peek, Esq.
Robert J. Cassity, Esq,
Holland & Hart LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

Attorneys for Las Vegas Sands Corp. and Sands China Ltd.

Holland & Hart LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that on December 7, 2012, I served a true and correct copy of the foregoing **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS USED BY WITNESS TO REFRESH RECOLLECTION** via e-mail and by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

James J. Pisanelli, Esq.
Debra L. Spinelli, Esq.
Todd L. Bice, Esq.
Pisanelli & Bice
3883 Howard Hughes Parkway, Suite 800
Las Vegas, Nevada 89169
214-2100
214-2101 – fax
jjp@pisanellibice.com
dls@pisanellibice.com
tlb@pisanellibice.com
kap@pisanellibice.com – staff
see@pisanellibice.com – staff

Attorney for Plaintiff

An Employee of Holland & Hart LLP

Holland & Hart LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

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all of a sudden this stay has great impact upon the Florida proceedings.

The reason that I think -- and the reason that we sought coordination to have this in front of you is in no small part because I think it is important that the Nevada court does address whether or not its stay order impacts or has any extension into that Florida proceeding. We've cited the caselaw to you. It does not. And we don't believe that it's appropriate for a litigant --

Let's also remember something. You know, Mr. Adelson is out of the Nevada action. He obtained 54(b) certification. He's not even a party in terms of his personal capacity to that stay. So where he gets off trying to now invoke it to insulate his employees from questions about a lawsuit he brought I think is a bit much.

Our point here, Your Honor, is a party has asserted defamation in another court. They have asserted in that defamation claim as the malice and the motive that Mr. Jacobs brought this lawsuit, the Nevada action, and filed the affidavit in the Nevada action as supposed retaliation in order to earn an unearned windfall because he was terminated for cause. That's their explanation to the Florida court about what the lawsuit is about. All right. Mr. Jacobs is entitled to disprove that supposed motive. He is entitled to conduct discovery to challenge that supposed malice. And that

includes the facts and circumstances surrounding his termination, the facts and circumstances surrounding the declaration that he filed in this action, and why he has brought this action, as opposed to the story that Mr. Adelson and company now wants to tell -- or wants to claim in the Florida lawsuit, that somehow Mr. Jacobs brought this litigation solely as a means of trying to earn an unearned windfall, as opposed to a legitimate attempt by Mr. Jacobs to recover what he believes he's rightfully owed for being wrongfully terminated by someone who was insistent upon taking a course of unethical and illegal business activities. And that, of course, is all fair game when someone opens up and files a defamation lawsuit and says, no, none of that was true and you were just trying to extort me for money. Having elected to file that cause of action, Mr. Adelson has opened the door for that discovery, properly so, and Mr. Jacobs is entitled to defend himself.

And, Your Honor, we have pointed out in this proceeding -- and when I say this proceeding, the proceeding in which you are the judge, you know, I don't need to go back into the whole history of what was going on relative to document production and the withholding of evidence and the attempt to prejudice Mr. Jacobs through that maneuver. This is simply -- this present motion is simply an extension of that same strategy, and that is let's obstruct whenever we can

as much as we can.

And I'm asking this Court -- that happened already in the proceeding in front of you by Mr. Adelson's companies. I'm asking that it not be allowed to extend elsewhere. And so therefore this motion should be denied in its entirety, Your Honor.

The story about Mr. Reese not knowing anything, well, perhaps they didn't bother to look at Mr. Adelson's deposition when he says he specifically discussed this issue with Mr. Reese and in fact Mr. Reese is the one who went and issued the press release about it. And Mr. Reese is the one who has tremendous knowledge about all the other issues that are impacting Mr. Adelson's reputation, the ongoing criminal investigation by the Department of Justice and the Securities and Exchange Commission, as well as the U.S. Attorney's Office out of Los Angeles, which is conducting a money laundering investigation, and there are newspaper articles with Mr. Adelson's picture painted all over headlines about a money laundering investigation.

This individual's reputation is being impacted not because of an affidavit that references prostitution in Macau casinos, of which there are also newspaper articles where the Macau Government raided one of his casinos after Mr. Jacobs was gone and arrested 120 prostitutes and pimps on the casino floor while Mr. Adelson was present at the property. So to

sit there and say, well, his reputation is being harmed by this prostitution issue, we're entitled to demonstrate and to conduct discovery to show, no, no, no, no, your reputation is being harmed by all of the other investigations that the government and all of the other nefarious activities that were going on and that you were supervising and directing. And that is all an appropriate subject matter for a defamation lawsuit on an individual who claims that his reputation has been harmed, especially considering -- and this is where we had attached the New York pleadings -- when he claims that his reputation in Nevada law governs and it primarily all occurred in Nevada. And that's why we are entitled to that discovery, and the motion should be denied.

With respect to the documents, Your Honor, we've cited you the caselaw. These are high-ranking corporate executives. Mr. Leven is the president and COO of Las Vegas Sands. By definition he has control over those documents, and the courts -- the Federal Courts -- and, again, we have the parallel rules in Nevada, the Nevada Supreme Court hasn't addressed it, but the Federal Courts have addressed it, and they say high-ranking executives have control over the documents and you can subpoena them -- the documents from them directly, you do not have to issue a separate subpoena to the company itself.

THE COURT: So why haven't you issued a separate

subpoena to the company itself?

MR. BICE: We haven't issued because, Your Honor, we have -- we have difficulty, unremarkably, getting subpoenas, getting cooperation out of Mr. Adelson's Florida counsel about getting these depositions set. So we issued a subpoena for the individuals, to take their depositions and issued with that subpoena a request for the documents, which we are entitled to do. Could we -- could we go through the same rigmarole and get a whole separate subpoena and issue it and bring it back here? Well, that'd take a bunch of time. And are they going to, of course, obstruct us in the Florida proceedings to do that? Of course they are.

So the question is -- and I appreciate your question, Your Honor, but I would pose the point to the Court why should I have to do that when the law doesn't say that we have to do that.

THE COURT: Okay. Thank you.

MR. BICE: Thank you, Your Honor.

THE COURT: The stay order that has been issued by the Nevada Supreme Court in their Case Number 58294 does not apply to this administrative action. However, I disagree with Mr. Bice with respect to the scope of the document requests that are attached to the subpoenas and believe that it would be more appropriate for the subpoena for almost all of the documents requests to be directed to the Las Vegas Sands, as

opposed to the individuals. However, with certain exceptions, which are those documents, for instance, Number 25 and 26 -- 24, 25, and 26 with respect to Mr. Leven's document requests, those clearly relate to documents that are personally in his possession or information that is personally maintained by him, and those are fair subject of this --

MR. PEEK: 24 through 26 of the subpoena.

THE COURT: Well, as examples. As examples.

MR. PEEK: Well --

THE COURT: All the others appear to me to be items that are corporate in nature.

MR. PEEK: Okay.

THE COURT: However, if Mr. Leven has his own personal file that he keeps at home, then that's fair game.

MR. PEEK: And, Your Honor, I agree with that. I have not disputed that.

THE COURT: So -- but with respect to those documents which are being sought in his position as the president of the Las Vegas Sands it would be more appropriate to direct the subpoena to the Las Vegas Sands.

I am not going to limit the scope of any examination of these gentlemen. That determination, if one is going to be made, needs to be made by the judge in Florida. But my stay that I'm subject to does not apply to these. But if the Florida judge decides it does, that's his problem or her

problem.

MR. PEEK: That's sort of a point of clarification. There's going to be a hearing in Florida on the 13th. It's going to address this very same issue. So I don't know whether you're saying, I'm ordering them to go forward, or you're saying, I'm going to defer and be bound by the ruling in Florida of the Florida judge.

THE COURT: I am ordering them to go forward unless a judge in Florida makes a different decision.

MR. PEEK: So you're taking -- because, you know --

THE COURT: I'm not ruling on the scope. I don't know what the scope of the Florida litigation is going to be, because that's the Florida judge's job. If the Florida judge makes a determination like I did in my March 8, 2012, order the limit the scope of discovery, that would clearly apply to these depositions, because they're being taken in that case. I don't know that that's going to happen. But if it does happen, I'm going to defer to that.

MR. PEEK: That's really what I was asking you, is to defer now, Your Honor, to that --

THE COURT: I'm not going to defer now, because I have no idea when or ever -- I've deferred to judges and I got stuck waiting for six months for somebody in South Carolina. And so I'm not doing it again.

MR. PEEK: And I've been in here when you've had

that issue, Your Honor. But what Mr. Bice says to you is, I should be allowed to do all of these things about defamation and the scope of the defamation action should allow me to do all of these things. That's -- Florida law is different than Nevada law. And I didn't want to brief that, because I thought it was more appropriate that a Florida judge make those decisions, as opposed to a Nevada judge make those decisions.

THE COURT: And I don't disagree. But in the absence of a Florida judge having made that decision I am permitting the depositions to forward, but limiting the document responses as I said.

MR. PEEK: Thank you, Your Honor.

THE COURT: All right. Anything else?

Let's go to the request for additional discovery related to your sanctions motion that is currently pending for December 27th and whether you really want to have any additional stuff or you just want to talk to me about attorneys' fees based on the findings I've already made.

MR. BICE: No, I do want to talk to you about additional stuff, Your Honor. You have made findings. But, as you will recall from the -- both the discovery that you permitted preceding the evidentiary hearing on your sanctions motion -- or not your -- yeah, it was really the Court's sanctions motion.

THE COURT: It was.

MR. BICE: It was.

THE COURT: It was sua sponte.

MR. BICE: It was sua sponte.

As you will recall, there were a lot of issues that had come up in that discovery, both in the discovery and at the evidentiary hearing itself, relative to the scope of questions and our ability to determine the involvement of executives at Las Vegas Sands and at Sands China in the involvement in the concealing of evidence from us and from the Court. And the Court had indicated to us that it wasn't -- that was beyond the scope of its particular hearing and therefore would address that at a subsequent point in time relative to a Rule 37 motion to be brought by us, which is what we have brought, in part not just because of the past conduct, but because we believe that that conduct has continued even past the evidentiary hearing that you have directed, and that's what's on the -- that's what's part of our motion that is set at the end of the month.

THE COURT: So let me ask you a question, Mr. Bice --

MR. BICE: Yeah.

THE COURT: -- because I am clearly confused.

MR. BICE: All right.

THE COURT: My brief review -- because, understand

I'm in a different trial, so I'm looking at stuff, but I may not be paying as much attention to things that are on the end of December as I would usually.

It looks like what you're asking in that motion is largely duplicative of the substantive issues that I've already made determinations on.

MR. BICE: Part is true. Not completely.

THE COURT: Okay. What part are you trying to carve out that's different than what I've already had a hearing on?

MR. BICE: Relative to -- well, there's two parts, I would say. Part of that motion that is going to be heard at the end of the month is the ongoing -- what we believe is the ongoing noncompliance with your directive and instructions to them to review the documents in Macau, which we do not believe -- again, we were here a month ago, and we seem to be getting very conflicting stories about what has transpired. After Mr. Weissman was here, as you will recall, from Munger Tolles, we had a hearing in front of you where Mr. Weissman had indicated they wanted to do the sequencing, and you shut that down immediately. We were led to believe then that the review was going on in Macau and we were going to either get a log of some sort that told us what it is that they claimed to have there relevant to the jurisdictional discovery or not.

We were here about a month ago, and Mr. Peek and Mr. Jones were here and told you they were going to be going to

Macau to review documents. After that hearing Ms. Spinelli and I were a little bit confused, because it didn't sound like anybody had been there, and we wanted to confirm that process had been underway.

Well, then we get a response that we believe just indicated that they had done nothing. And now we get a motion that was -- I guess it's on today, another motion that was -- there's an OST signed for it, yes, that --

THE COURT: Max is handing it to me.

MR. BICE: -- which was given to us the day before yesterday at about 4:30. Which is really an attempt to preempt that issue. And we find that motion to be fascinating, Your Honor, in many respects, because now there are documents that are from back in August that they refused to give to us, but now they're giving them to the Court.

THE COURT: -- the OST. Did I?

MR. PEEK: You did, Your Honor. We were actually surprised that you did.

MR. BICE: Not as surprised as I was.

MR. PEEK: I was -- I was -- Your Honor, I have to say I was surprised that you signed it for today, because we did submit it to you at about 4:30 in the afternoon.

THE COURT: Okay. Keep going, Mr. Bice.

MR. BICE: Well, I haven't had a chance to address that motion. Obviously --

THE COURT: We're going to move it, because I didn't take this one home last night.

MR. BICE: Understood, Your Honor. So the point being here we've got a lot going on relative to documents in Macau and whether they reviewed those documents and whether they have been reviewing them since I believe it was sometime in May when they led -- when you told them the sequencing story wasn't going -- or attempt wasn't going to work. They never came back to you, they never sought any form of relief from you on that.

Then we get an email from Mr. Jones, who was new to the case, which gave us a firm belief that nothing has transpired in terms of review. And then we get this motion which we have only preliminarily reviewed, Your Honor, and it seems to confirm that story, because now they're basically asking you for a protective order that says that they don't have to --

THE COURT: Okay.

MR. BICE: -- some six months later.

THE COURT: So let's talk for just a second about that motion for protective order related to the search of the ESI that's in Macau. When will you all be ready to talk to me, understanding for some reason I didn't take this one home last night?

MR. PEEK: I'll let the Jones brothers handle that,

Your Honor, even though it's my motion. Mark's the one that's been to Macau.

MR. BICE: And we are obviously, Your Honor, going to want to respond to it.

THE COURT: I know.

MR. BICE: It's very extensive.

THE COURT: I'm trying to find a time for us to talk about it.

MR. BICE: Understood.

THE COURT: Scheduling.

MR. MARK JONES: Your Honor, we have been the process throughout this, and since [inaudible] and before that the short version is that we believe that if everything goes according to plan [inaudible] the documents should make their way out of Macau to the Court and to counsel, and we're still confirming that we captured all of the Jacobs ESI, and we don't know the volume as of yet, and that's the only --

THE COURT: So my question is do you want the December 13th or December 18th is really my question.

MR. MARK JONES: I'm sorry, Your Honor?

THE COURT: December 13th or 18th for the hearing?

MR. PEEK: 18th would be better for me.

MR. BICE: Can we move it to the 27th, which we're going to be here anyway, or theoretically we're going to be here anyway.

THE COURT: Because somebody's going to tell me they're having Christmas with their kids. I don't know which one of the people in the room's going to say that. Okay. I had a volunteer to say it.

MR. PEEK: I'm going to be with my two teenage daughters in Reno, Your Honor. And one of my -- we'll just be home that week.

THE COURT: Well, let's -- I'm going to talk about scheduling in a minute. But do you want to move the motion for protective order on whether you have to search the information in Macau to the 13th or the 18th?

MR. MARK JONES: The 18th, Your Honor.

THE COURT: Okay. So we're going to start with that on the 18th.

Now let's go back to your motion that you want to do -- it sounds like this is really a motion to compel, Mr. Bice, because I've had representations made to me in court that certain discovery obligations were going to be done --

MR. BICE: Yes.

THE COURT: -- and maybe we haven't met that schedule.

MR. BICE: Well, it is -- it is in addition to that. And I don't disagree with you that --

THE COURT: Well, what's the in addition? I'm trying to get to what's really the subject of the Rule 37

motion so I can determine if there's anything I should let you do discovery on, because I'm not inclined to do so.

MR. BICE: Okay. Well, you shouldn't give me that warning, because now I'm going to try and persuade you otherwise. But I'm going to do so briefly.

THE COURT: I know. That's why I gave you the hint.

MR. BICE: Your Honor, as you will recall, you had indicated at the hearing and both during the discovery process -- they were refusing to provide information because the testimony was principally coming from lawyers, and so they were refusing to provide a whole host of information about what executives were involved, when they were involved, who reviewed the documents, where they sent them to, et cetera, all of --

THE COURT: I had the IT guy tell me it was a decision made by management. That's the guy who sat on the stand, and he told me management made that decision.

MR. BICE: And we tried to get into more detail with him in his deposition on that, and they claimed either privilege or he hadn't been prepared on those subject matters. That's why we had -- and as you'll recall, at the evidentiary hearing itself we asked the lawyers these specific questions, did Mr. Leven -- was Mr. Leven involved in that decision, was Mr. Adelson involved.

THE COURT: We got attorney-client. That's why I

had Sam Lionel here.

MR. BICE: Privilege, privilege, privilege, privilege. And you had indicated to us at that point in time it was because we were asking the lawyers.

THE COURT: That's right.

MR. BICE: So what we're entitled to do is we're entitled to find out what executives were involved in this process of concealing the evidence from us. And I know that they don't want to do that, but we're entitled to know that as part of our Rule 37 sanctions --

THE COURT: Okay.

MR. BICE: -- both on the past activity, as well as that going forward. Because you'll also recall they wouldn't provide to us -- and this is what we find fascinating about this latest motion -- they wouldn't provide to us their contacts with the Macau Government. Well, now they want to release some of them, the ones that they think are helpful to them. And again it's this garbling of the truth, as the Nevada Supreme Court says, when you try and selectively waive information that you think is helpful to yourself but then you invoke privilege on any questions or followup.

THE COURT: It's called the sword and shield doctrine.

MR. BICE: Yes.

THE COURT: So basically what you're trying to tell

me is that, since I wouldn't let you take the depositions of certain executives during the discovery before my Rule 37 sanctions, you want me to now let you take those executives' depositions understanding you may be faced with all the privilege issues again.

MR. BICE: We may be. But we think that we can certainly have a better shot at --

THE COURT: So what is the purpose, since I've already granted you all the fees related to the work that would have been accomplished related to those decisions by executives?

MR. BICE: We are seeking additional forms of sanctions, Your Honor, in addition to fees under Rule 37.

THE COURT: Okay. We're not going to do any more discovery, then.

MR. BICE: What's that?

THE COURT: We're not going to do any more discovery. You can ask me for the additional sanctions, but I had testimony from the IT, the head of IT for the whole company --

MR. BICE: I understand that.

THE COURT: -- and I understood what he told me. It was a decision made by the company, not a decision made by the lawyers. He told me that. I heard him. What was his name?

MR. BICE: Mr. Singh.

MR. PEEK: Manjit Singh, Your Honor.

THE COURT: Mr. Singh.

MR. BICE: But the problem with that, Your Honor, is at the same time we asked questions about the involvement of personnel, and there were claims of privilege, and you had indicated to us we would get into that relative to our motion, as opposed to the Court's motion, because that was directed at representations to the Court.

THE COURT: I was surprised I heard that testimony in my evidentiary hearing. And as a result of hearing that testimony in my evidentiary hearing I believe I covered the issue related to misconduct of management in making the decision to mislead the Court, what I believed was a decision to mislead the Court.

MR. BICE: So our --

THE COURT: I know the Sands still disagrees and says it wasn't wilful, because I read your footnote.

MR. BICE: I understand that that is what they claim. But, Your Honor, again, they invoke privilege selectively, and they have done it yet again in this current motion.

THE COURT: I'm not saying you won't be able to get there some other day. I'm on jurisdictional discovery. I did the sanctions hearing related to jurisdictional discovery. You may well be able to get into some of those other issues

later, because it will certainly go to the credibility that witnesses may have. But in getting ready for my jurisdictional hearing I am not going to go there now.

MR. BICE: I will want to readdress this very point with you when we address that motion, because --

THE COURT: Yes. I'm not precluding you.

MR. BICE: Yeah. It seems to be a very selective disclosure of information, Your Honor.the

THE COURT: I'm not saying they weren't selective. I saw what they did. I was here.

MR. BICE: Thank you.

THE COURT: I watched Sam Lionel and Charlie McCrea do their job.

MR. BICE: Yes. I'm not criticizing them for doing their jobs. My point is I just don't think you can cut off some questions and allow others to be answered. That's been our only point.

THE COURT: I understand.

December 27th is when the issue related to their Rule 37 motion is scheduled. Do you want to move it up to December 18th, since you're all going to be here?

MR. BICE: We would ask that you do so.

MR. RANDALL JONES: The only concern I have, Your Honor, is that I know -- I think --

THE COURT: When are you going to be done with trial

with Judge Johnson?

MR. RANDALL JONES: Not till mid January.

THE COURT: Yeah. I'm not going to be done till mid January, either. And I don't want to wait till mid January to do this.

MR. PEEK: What you're talking about, you're just talking about an oral argument on their motion?

THE COURT: All I'm having is an oral argument.

MR. RANDALL JONES: If we set it at 8:30, Your Honor -- the 18th is what day of the week?

MR. PEEK: It's a Tuesday, Your Honor.

THE COURT: It's a Tuesday.

MR. RANDALL JONES: That's typically a very late day for Judge Johnson. So if we set this early, I can --

THE COURT: You want to come at 8:20 on the 18th and move the motion that's currently on the 27th to that day.

MR. BICE: We have Mr. Kaye's deposition that day, Your Honor.

THE COURT: Can you start him a little later since I've said you're not limited to a day?

MR. PEEK: He's noticed for 10:00 o'clock anyway, Your Honor, I believe, because that's when they notice all their depositions is for 10:00 o'clock.

THE COURT: Well, but sometimes it takes them a little longer to argue motions.

MR. PEEK: I hadn't noticed that, Your Honor.

THE COURT: You're part of the problem.

MR. PEEK: I'm trying to be part of the solution, Your Honor.

THE COURT: In fact, when I look at my calendar and I'm in trial and I see your name on there, I move the trial start time back.

MR. PEEK: Oh, my gosh. I'm crushed, Your Honor.

THE COURT: Yeah, I know you are. Anything else?

MR. BICE: No, Your Honor. Thank you.

MR. RANDALL JONES: Your Honor, just to be clear, I was going to respond to that. But I take it that the Court has denied that motion without prejudice.

THE COURT: The discovery motion?

MR. RANDALL JONES: Yes, Your Honor.

THE COURT: During this period of time where I am in jurisdictional discovery only, yes.

MR. RANDALL JONES: Denied their motion, just for the record, for all purposes at this time without prejudice?

THE COURT: Correct. On discovery.

MR. PEEK: And I'm assuming, Your Honor, you're also denying their motion for an evidentiary hearing, as well.

THE COURT: I may change my mind --

MR. PEEK: That comes -- that comes after the 18th

THE COURT: -- during the 18th hearing that an

evidentiary hearing would be appropriate. Certainly if I make a determination that evidentiary sanctions are appropriate, Mr. Jones, I will make the offer, as I always do under Nevada Power-Fluor, to the person who may be facing sanctions to have an evidentiary hearing.

MR. BICE: Thank you, Your Honor.

MR. RANDALL JONES: Your Honor, again, the only concern I have -- we didn't argue it, and I don't want to belabor it. I know you've had a lot of people waiting a long time. But there are -- there are issues that we want to make sure we address at that hearing on the 18th that we did not address today so that --

THE COURT: So are you going to file a brief?

MR. RANDALL JONES: Well, we did file an opposition to this motion, and we also will file --

THE COURT: No. Are you going to file a brief in response to the Rule 37 motion?

MR. RANDALL JONES: We will. Absolutely, Your Honor.

THE COURT: Okay. That's really what I will need, Mr. Jones.

MR. RANDALL JONES: Okay. Very good.

MR. PEEK: Your Honor, may we have -- and I -- maybe I could just ask counsel here, because we've been dealing with quite a few other motions so far, and I think that our

response date is due today on that motion, or maybe Monday on that motion. You don't know, Ms. Spinelli?

MS. SPINELLI: I don't know your deadlines. I just know mine.

MR. PEEK: Your Honor, we'd just like a little additional time until like the --

MR. RANDALL JONES: Monday?

MR. PEEK: No. I think it's due on Monday. I can look at my calendar, as well, Your Honor.

MR. BICE: I'm trying to check mine, Steve. I apologize.

THE COURT: Mr. Bice has all this technology at his fingertips. It's really odd when you're in a settlement conference and people are quoting from stuff and all they have is that little piece of plastic in front of them.

MR. BICE: I don't know what day it is due, but I will -- Mr. Peek and I and Mr. Jones will chat, and we will agree upon a time frame --

MR. PEEK: The deposition is due on the 10th, Your Honor.

THE COURT: Agree on a reasonable schedule, and I will need the reply brief by noon on the 17th.

MR. BICE: Understood, Your Honor. Thank you.

MR. PEEK: Our opposition's due the 10th, so we probably want until the 13th.

MR. MARK JONES: The motion to seal, do you want to deal with the motion to seal?

THE COURT: The motions to seal we handle on the chambers calendar.

MR. PEEK: Sort of administratively.

MR. RANDALL JONES: Thank you, Your Honor.

MR. PEEK: May I just consult with counsel for a moment, Your Honor, before you dismiss you?

THE COURT: Yes.

The motion to seal that's on calendar today, does anybody have an objection to sealing or redacting Exhibits D and F to the motion for protective order?

MR. BICE: Your Honor, I don't have -- for purposes of right now I don't, because Mr. Goldstein's deposition, the 30 days is not --

THE COURT: So I'll grant it, and then if you need to change it, you'll let me know.

MR. BICE: In respect to Mr. Adelson's deposition we haven't had our meet and confer over those designations yet, so we may -- we're not going to oppose it for right -- for purposes of right now, but we may in the future.

MR. PEEK: Yeah. I understood that, Your Honor.

THE COURT: Okay.

MR. PEEK: They have an objection to some of the designations that we've made, and we'll address those with

them.

THE COURT: Billie Jo, the motion that was on the 27th is now on the 18th.

'Bye. 8:00 a.m.

THE PROCEEDINGS CONCLUDED AT 9:41 A.M.

* * * * *

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
Las Vegas, Nevada 89146

Florence M. Hoyt

FLORENCE HOYT, TRANSCRIBER

12/10/12

DATE

OPPI
J. Stephen Peek, Esq.
Nevada Bar No. 1759
Robert J. Cassity, Esq.
Nevada Bar No. 9779
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
(702) 669-4600
(702) 669-4650 – fax
speek@hollandhart.com
bcassity@hollandhart.com

Attorneys for Las Vegas Sands Corp. and Sands China, LTD.

J. Randall Jones, Esq.
Nevada Bar No. 1927
Mark M. Jones, Esq.
Nevada Bar No. 000267
Kemp Jones & Coulthard, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
(702) 385-6000
(702) 385-6001 – fax
m.jones@kempjones.com

Attorneys for Sands China, LTD.

DISTRICT COURT

CLARK COUNTY, NEVADA

STEVEN C. JACOBS,

Plaintiff,

v.

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

Defendants.

_____/

AND ALL RELATED MATTERS.

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

Date: n/a
Time: n/a

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS USED BY WITNESS TO REFRESH RECOLLECTION

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INTRODUCTION

Plaintiff's motion to compel fails for two independent reasons. First, although the motion seeks relief under Nev. Rev. Stat. § 50.125, plaintiff ignores the plain language and limitations of that statute. NRS 50.125 gives an adverse party certain rights if a witness uses a writing to refresh his or her memory before or while testifying: the adverse party may ask to have the document "produced at the hearing" and to "inspect it" and "cross-examine the witness thereon"; he may also be able to "introduce in evidence" portions of the document "for the purpose of affecting the witness's credibility." Nev. Rev. Stat. § 50.125(1). But those rights must be exercised *at the hearing.* In this case, the hearing in question ended two months ago, and the Court has long ago issued its ruling. It is far too late for plaintiff to invoke NRS 50.125 to seek discovery now.

Second, plaintiff does not even discuss the critical issue – the undisputed fact that the documents he seeks are protected by the attorney-client privilege and work-product doctrine – until page 11 of his brief. Then plaintiff tries to dismiss those protections by asserting that NRS 50.125 (and its model, Federal Rule of Evidence 612) automatically trumps them. Contrary to plaintiff's view, the House Judiciary Committee's Notes to FRE 612 plainly state that "nothing in the Rule . . . bar[s] the assertion of a privilege with respect to writings used by a witness to refresh his memory." Likewise, the case law applying FRE 612 does not adopt plaintiff's automatic-forfeiture theory; rather, courts have discretion to balance the adverse party's need for the testimony and the important public interests in protecting privileged documents.

Here, plaintiff does not even attempt to satisfy the balancing test required by the cases he himself cites. Any balance would inevitably weigh against plaintiff. The witness (Mr. Jones) is an attorney, and the documents in question (attorney time sheets, and e-mails between inside and outside counsel about pending litigation) are textbook examples of communications protected by the attorney-client privilege and attorney work product doctrine. Plaintiff does not claim and cannot show that cross-examining Mr. Jones or testing his credibility with privileged documents would have been in any way important to the limited question of sanctions that the Court addressed at the hearing, let alone that they would have any bearing on the issue of personal

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jurisdiction – which is the only issue that is now before the Court. Indeed, plaintiff does not identify a single relevant piece of information that he expects to obtain. Nor can he: Mr. Jones used the documents solely to refresh his recollection about the timing of certain events, a subject that the parties did not dispute. Moreover, the Court has already ruled on the sanctions issue, making plaintiff's motion moot.

RELEVANT FACTUAL BACKGROUND

At the September 2012 sanctions hearing, Justin Jones (formerly outside counsel for defendants) testified. Mr. Jones stated that before the hearing, he had refreshed his recollection regarding the dates and sequence of events by referring to his time entries and approximately 10-15 emails between in-house and outside counsel. Counsel for plaintiff examined Mr. Jones at length about these documents in general (what they were, who wrote them, and when they were created), but did not ask Mr. Jones to identify any specifics, like the particular subjects that were discussed. Plaintiff's counsel did not ask the Court to compel Mr. Jones to produce the documents at the hearing, nor did he argue that the documents were necessary in order to test Mr. Jones' credibility. On September 14, 2012, the Court issued its ruling on the sanctions issue.

Two months later, plaintiff filed the instant motion to compel. Plaintiff seeks to compel production of the documents referenced by Mr. Jones, without regard to their relevance to the only issue that is now before the Court — whether the Court has personal jurisdiction over Sands China Limited. The motion is based solely on plaintiff's theory that NRS 50.125 gives him an absolute right to production of any documents any witness used to refresh his recollection. For the reasons outlined below, plaintiff's theory fails as a matter of law.

ARGUMENT

I. The Plain Language Of NRS 50.125 Refutes Plaintiff's Attempt To Compel Production, Which Was Not Made Until After The Relevant Hearing And After The Court's Ruling.

Plaintiff seeks production under NRS 50.125. But the plain language of the statute requires his motion to be denied as untimely.

Section 50.125 limits the relief that "an adverse party" like plaintiff is "entitled" to request

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"[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).

NRS 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 factfinder at that hearing can assess the witness's credibility.

The remaining provisions of NRS 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.* 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).

If plaintiff had asked to have the documents referenced by Mr. Jones "produced *at the hearing*,"[1] as NRS 50.125(1)(a) allows, defendants could have made the applicable privilege objections. The Court could have then heard arguments and balanced plaintiff's desire to test Mr. Jones' credibility against defendants' interest in protecting privileged materials. See Section II below.

The problem with plaintiff's motion is that plaintiff did not do what NRS 50.125 allowed him to do at the hearing. Instead, plaintiff waited until two months *after* "the hearing" to file his motion, and two months after the Court issued its ruling. Plaintiff did not ask to have the documents in question produced "at the hearing" under NRS 50.125(1)(a). Plaintiff did not seek

[1] All emphases in quoted material have been added unless otherwise stated.

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9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

to "inspect" the documents or "cross-examine the witness" on them at the hearing under NRS 50.125(1)(b) or (c). Plaintiff did not seek to "introduce" any portions of any document "in evidence" under NRS 50.125(1)(d). Plaintiff did ask the Court if the documents could be segregated for possible later use, but the Court denied that request and plaintiff did not pursue the matter any further. See Pl. Motion Ex. 1, at 42-43. And although plaintiff suggested they would be filing a motion to compel production after the hearing, they did not file the instant motion until two months after the hearing and the Court's ruling. Under these circumstances, any rights plaintiff might have had to assert NRS 50.125 have long since been waived. See *Gay v. P.K. Lindsay Co.*, 666 F.2d 710, 714 (1st Cir. 1981) (rejecting argument based on federal analog to NRS 50.125, because "plaintiffs . . . waived their objection on this ground by failing to make it below" and "[t]he district court was thus deprived of the opportunity to exercise its discretion under the rule"). See also *Hooks v. State*, 416 A.2d 189, 200-01 (Del. 1980) (applying Uniform Rule analog to NRS 50.125 and holding that party could not "claim that the notes should have been produced because of their use to refresh recollection since that evidentiary claim was not fairly presented to the Trial Judge for the exercise of his discretion").

While plaintiff's failure to comply with the plain terms of NRS 50.125 is dispositive, plaintiff's motion also reflects a fundamental misreading of the statute. Plaintiff assumes that NRS 50.125 is a free-floating license to compel discovery and launch fishing expeditions. It is not. 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." NRS 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 legislature modeled the statute on Federal Rule of Evidence 612, and plaintiff himself admits (Motion, p. 11) that "[c]ase law discussing Federal Rule of Evidence 612 is instructive." Yet plaintiff ignores that FRE 612 (like its Nevada counterpart NRS 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."

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United States v. Sheffield, 55 F.3d 341, 343 (8th Cir. 1995). Plaintiff's late-blooming motion founders on the very statute that it invokes, and on the same federal case law he admits is "instructive."

II. Plaintiff Fails To Overcome The Attorney-Client Privilege And Work Product Doctrine.

Over and above plaintiff's improper attempt to ignore the limitations of NRS 50.125, plaintiff's motion fails for the independent reason that it fails to overcome the barriers posed by the attorney-client privilege and work product doctrine. There is and can be no dispute that the documents sought by plaintiff are protected. The witness (Mr. Jones) is an attorney who represented defendants in this lawsuit, and he was testifying about events during the course of discovery. The documents he reviewed (correspondence between in-house and outside attorneys about the lawsuit, and attorney time entries prepared during that lawsuit) are obviously privileged communications and attorney work product.

Unable to dispute that both protections apply, plaintiff resorts to the extreme view that NRS 50.125 automatically trumps all privileges and leaves the courts no discretion but to compel production of privileged materials. Quite apart from plaintiff's failure to comply with NRS 50.125 (discussed in Section I) neither the case law nor the statute supports plaintiff's extreme automatic-forfeiture theory.

A. Plaintiff's Own Citations To Federal Case Law Refute His Automatic-Forfeiture Theory.

Plaintiff is correct to admit that "[c]ase law discussing Federal Rule of Evidence 612 is instructive because Nevada's Rules of Civil Procedure are modeled after the Federal Rules." Motion, p. 11; see also *Nelson v. Heer*, 121 Nev. 832, 834 (2006) ("[F]ederal decisions involving the Federal Rules of Civil Procedure provide persuasive authority when this court examines its rules."). In particular, the legislature modeled NRS 50.125 on FRE 612. Nev. Rev. Stat. § 50.125 Sub-committee cmt.[2] But plaintiff is dead wrong in contending that the federal cases support his

[2] 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. This language codifies prior case law giving courts more discretion to deny disclosure for materials reviewed before a hearing (as opposed to materials

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Las Vegas, Nevada 89134

automatic-forfeiture theory. In reality, the case law – including the very cases cited by plaintiff's own motion – refutes plaintiff's theory.

Consider first plaintiff's lead case, *Server Tech., Inc. v. American Power Conversion Corp.*, No. 3:06-CV-00698-LRH, 2011 WL 1447620 (D. Nev. April 14, 2011) (cited at Pl. Motion, pp. 11-12). Far from supporting plaintiff's automatic-forfeiture theory, 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. Rather, the Rule 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 found "that production of the [disputed document] is not required" regardless of which federal test was employed. *Id.*

Likewise, plaintiff's backup citation to *Ehrlich v. Howe*, 848 F. Supp. 482 (S.D.N.Y. 1994), does not support automatic forfeitures. To the contrary, the court's opinion plainly states that "[t]he 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 (internal quotations omitted).[3]

Plaintiff's inability to muster support from the federal case law is not surprising. The House Judiciary Committee's Notes to FRE 612 state the 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." Thus, although plaintiff's motion refers the Court to federal law, its automatic-forfeiture theory is in reality contrary to federal law.

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(continued)

reviewed while the witness is on the stand). The House Judiciary Committee's notes make clear this is a clarification, not a change in law. While NRS 50.125 does not contain that clause (because it was based on a draft of FRE 612, not the final version), plaintiff does not contend that Nevada law deviates from the federal Rule. To the contrary, plaintiff admits that federal law is "instructive."

[3] Plaintiffs' other citations (including one citation to a New York case that comes without any explanation why New York state law is relevant) are simple string citations offered without any analysis. The decisions themselves find waiver on the specific facts before them, but they do not say that waiver is mandatory in all cases and they do not contain any real analysis of Rule 612.

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B. Plaintiff's Motion Misreads *Means v. State*, Which Is Plainly Inapposite.

Finding no support for his extreme view in federal law, plaintiff overreaches again in his citation to *Means v. State*, 120 Nev. 1001 (2004). There are several critical distinctions between this case and *Means*. First, the party seeking disclosure in *Means* (a criminal defendant seeking post-conviction relief) moved promptly at the hearing "to inspect" the disputed documents "and to have them introduced as evidence" when a witness reviewed the documents during his testimony. *Id.* at 1006. The criminal defendant then argued the issue as part of his appeal from the order denying him post-conviction relief. Here, by contrast, plaintiff did not move to obtain or inspect the documents at issue until two months after the hearing. See Section I above.

Second, there was no question of attorney-client privilege in *Means* because that case involved an attempt by an attorney's former client to obtain notes that the attorney used to refresh his memory when he testified in a post-conviction proceeding. In *Means*, the party seeking disclosure was the client, who held the privilege and was therefore free to see the documents (particularly in disputes involving the attorney-client relationship). By contrast, the present dispute is obviously not between attorney and client, but between opposing parties. The applicable clients (defendants) and their attorneys are aligned, and the clients (and their attorneys) have asserted the privilege and objected to the disclosure sought by their opponent.

Third, while the party opposing disclosure in *Means* did assert a work product objection, that objection was weakened by the attorney-client dispute scenario that was before the court in *Means*. The work product doctrine is intended to protect against the disclosure of work product to an adversary. As the U.S. Supreme Court 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 v. Taylor*, 329 U.S. 495, 510-11 (1947). Similarly, the codification of the work product doctrine in NRCP 26(b)(3) prevents one "party" from obtaining materials "prepared in anticipation of litigation or for trial by or for *another party*." Thus, the party seeking disclosure in *Means* argued that his former attorneys "could not invoke the work product privilege" at all because, as their client, he "[wa]s not and cannot be an opposing party within the meaning of the rule." 120 Nev. at 1007. Further,

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at its bottom line 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.

In light of those special circumstances, the *Means* court expressly distinguished the attorney-client dispute before it 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. Indeed, the court recognized that "[t]he work product doctrine is most commonly and appropriately invoked" in disputes between opposing parties, like the one presented here, and made a point of explaining that such a dispute was not "at hand" in *Means*. *Id.* at 1010.

In sharp contrast, the present case involves a classic dispute between opposing parties. 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*. Defendants are "opposing a demand for disclosure made by counsel representing a party adverse to the client." *Means*, 120 Nev. at 1009. The situation here is precisely the one in which "[t]he work product doctrine is most commonly and appropriately invoked." *Id.* It is wrong for plaintiff to portray *Means* as controlling authority in a dispute between adversaries, when the court expressly said that such a situation was not before it. *Id.*

As a fourth distinction between this case in *Means*, the attorney in *Means* used his notes to refresh his recollection *during the hearing*, not before the hearing as Mr. Jones did here. The court in *Means* took pains to draw this distinction several times. See 120 Nev. at 1006 ("*During* the evidentiary hearing, one of Means's former attorneys . . . referred to those notes *while being questioned*"); *id.* at 1007 ("Means claims that" the trial court's refusal to turn over the documents "was error since [the witness] used the notes to refresh his recollection *at the hearing*."); *id.* at 1010 ("*At the hearing*, former counsel, acting as a witness, refreshed his memory with the notes."); *id.* (holding that work product doctrine does not shield notes "when the attorney, *in giving testimony*, has refreshed his memory with the notes"). *Means* was quite correct to

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highlight the distinction between materials used at the hearing versus materials reviewed beforehand. Federal case law before the adoption of Rule 612 held that the trial court retained more discretion to rule against disclosure of materials reviewed before a hearing (as occurred here) as opposed to materials reviewed during testimony (the situation addressed by *Means*). The House Judiciary Committee's Notes confirm that Rule 612 carries forward the same distinction.

Plaintiff's motion portrays *Means* as an abstract, unlimited ruling that requires forfeiture of all privileges in all cases. But the *Means* court 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. And immediately after the sentence fragment that plaintiff's motion selectively carves from the court's opinion (Motion, p. 11: "the work product doctrine is not an exception to the inspection rights conferred in NRS 50.125") the *Means* court again reiterated that its holding was limited to the specific facts before it. In the very same sentence, the court continued by elaborating 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. Plaintiff's motion blithely replaces this second half of the court's sentence with an ellipsis, and pretends that "there is nothing" in *Means* that "limit[s] the statute's application" to the specific circumstances that were before the court in *Means*. Motion, p. 11. This Court cannot put on plaintiff's blinders or ignore the Supreme Court's opinion.

C. Plaintiff Erroneously Reads NRS 50.125 Out of Context.

Next, plaintiff asserts that NRS 50.125 does not expressly preserve privileges and leaps to the conclusion that the statute automatically abrogates all privileges, leaving the courts no discretion to protect them. But there was no need for the legislature to expressly reiterate and preserve all of the many evidentiary privileges in NRS 50.125. Chapter 49 of the Code already codifies the various privileges, and NRS 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.

Plaintiff is improperly trying to read NRS 50.125 in a vacuum, without regard to its statutory context. The question before the Court is not the false question posed by plaintiff's

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motion – whether NRS 50.125 *preserves* privileges – but instead, whether the legislature intended NRS 50.125 to *abrogate* all the established privileges that are expressly preserved by NRS 47.020. The fact that NRS 50.125 says nothing one way or the other about privilege cuts *against* plaintiff's theory, not for it. After all, federal Rule 612 "does not expressly exempt privileged matter from disclosure" (*Server Tech.*, 2011 Wl 1447620, at *6; quotations omitted), but as shown above the House Judiciary Committee's notes and the case law make clear that FRE 612 does not abrogate privileges.

D. Plaintiff's Motion Fails To Articulate, Much Less Satisfy, An Appropriate Balancing Test.

As the preceding sections demonstrate, plaintiff's own citations destroy his notion that NRS 50.125 mandates the automatic forfeiture of all privileges. Instead, those authorities hold that the courts have discretion to balance the asserted interest in disclosure against the important public interests in protecting privilege. As a result, plaintiff's motion fails on multiple grounds.

First, the need for a balancing test confirms the point demonstrated in Section I above: that plaintiff's failure to seek disclosure at the sanctions hearing is fatal to his motion. The time to weigh the plaintiff's desire to test the recollection and credibility of Mr. Jones, and to decide whether plaintiff's asserted interest was sufficient to overcome the long-established protections afforded by the attorney-client privilege and work product doctrine, was at the hearing. Then, the record was open and the sanctions issue before the Court was at the forefront. But now, after the Court has already ruled, the time for assessing Mr. Jones' credibility and weighing the competing interests for and against disclosure has passed.

Second, plaintiff's motion makes no attempt to satisfy the balancing test required by the very same federal authorities that it invokes. It would fail any reasonable test. Plaintiff does not and cannot show that Mr. Jones' recollection or credibility were material to the sanctions issue before the Court. The Court ordered sanctions against defendants, and there is no indication from the transcript or its ruling that Mr. Jones' testimony played any part in the Court's decision.

In addition, plaintiff does not even try to show what new information (if any) the privileged documents might reveal. Plaintiff makes no showing that the privileged documents

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Macau because Plaintiff's counsel refused to discuss that issue with SCL's new counsel. Accordingly, it is extremely difficult to estimate how much it would cost to conduct a broader search in Macau than the search SCL has agreed to undertake (ESI for which Jacobs was the custodian). But it is a good guess that conducting a broad search of even a few additional custodians' ESI in Macau would be extremely costly. In deciding whether SCL should be required to bear that expense, in addition to the more than $2.3 million Defendants estimate they have already spent on jurisdictional discovery, the Court should consider what, if any, benefit the additional discovery would yield in terms of improving Plaintiff's ability to present his case on jurisdiction.[13] The answer to that question is "none."

Plaintiff's theory is that SCL was doing business in Nevada at the time he brought this lawsuit and thus could be sued by any plaintiff based on events that occurred anywhere in the world. As explained in Defendants' Motion for a Protective Order filed on November 26, 2012, the standard for general jurisdiction is high: a company is not deemed to be "present" in a State unless it has a high level of systematic and continuous contacts with the forum. As Wright & Miller notes, "the defendant must be engaged in longstanding business in the forum state, such as marketing or shipping products, or performing services or maintaining one or more offices there; activities that are less extensive than that will not qualify for general in personam jurisdiction." 4 *Federal Practice and Procedure* § 1067.5, at 507. Given this standard, whatever non-duplicative emails are in Macau could not possibly make any difference to the jurisdictional analysis. After all, it is activity ***in Nevada*** that counts toward the jurisdictional analysis — ***not*** what SCL was doing in Macau. And Plaintiff already has all of the evidence he needs concerning SCL's contacts with Nevada.

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[13] *See Chen-Oster v. Goldman Sachs*, No. 10 Civ. 6950 (LBS) (JCF), 2012 WL 3964742, at *14 (S.D.N.Y. Sept. 10, 2012) (holding that defendant was not required to search an older database because "the burden of extracting the requested information from the older PeopleSoft database at this time outweighs the benefit"); *Daugherty*, 2012 WL 4877720, at *7 (granting motion for a protective order and holding that additional discovery was not warranted after weighing the "heavy time and expense to create" the sought-after information against "the benefits of that discovery and its importance to the issues to be resolved" in the case); *U.S. ex rel McBride v. Halliburton Co.*, 272 F.R.D. 235,241 (D.D.C. 2011) (denying plaintiff's motion to compel further discovery because the utility of further discovery was outweighed by its cost).

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9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

That is particularly true since the U.S. Supreme Court has held that purchases from the forum of goods and services to be used elsewhere do not provide a basis for general jurisdiction. In *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 415 (1984), the plaintiff tried to sue a helicopter company in Texas for an accident that occurred in South America on the ground that the defendant purchased 80% of its helicopters in Texas and had sent its employees there for training and thus should be deemed to have been "doing business" in Texas. The Supreme Court rejected that argument, holding that "mere purchases [made in the forum state], even if occurring at regular intervals, are not enough to warrant a State's assertion of [general] jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions." *Id.* at 418. So too, in this case, no matter how many goods and services SCL may have been purchasing from LVSC or other Nevada-based entities for use in Macau, those activities would not provide a basis for a finding general jurisdiction over SCL in Nevada.

Plaintiff does not complain in his Motion for Sanctions that he lacks the evidence necessary to support his jurisdictional theories. That in and of itself demonstrates that the additional expense SCL would be forced to incur if it were required to search the ESI of additional custodians would yield no benefit. So too does the way in which Plaintiff has conducted the depositions he has taken so far. The Court may recall that in May 2012 Plaintiff complained that he should not be forced to take those depositions because he did not yet have all of the ESI for each witness. By the time Plaintiff took Mr. Adelson's deposition on September 6, 2012, he had all of Mr. Adelson's ESI. Yet he showed Mr. Adelson only ***two*** documents — the shared services agreement between SCL and LVSC and the letter Mr. Adelson signed terminating Jacobs as SCL's CEO. Similarly, when Mr. Goldstein was deposed on November 6, 2012, Plaintiff's counsel used only nineteen of the documents that had been produced. In each case, Plaintiff's counsel seemed far more eager to explore the merits of Jacob's claims with the witnesses than his jurisdictional theories.

Basic principles of proportionality dictate that discovery should come to an end once it is clear that the cost of conducting more searches far outweighs any conceivable benefit those searches might create. *See U.S. ex rel McBride*, 272 F.R.D. at 240-41 (denying further discovery

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9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

after "consider[ing] whether (1) the discovery sought is unreasonably cumulative or duplicative…; (2) the party seeking the discovery has had ample opportunity to obtain the sought information by earlier discovery; or (3) the burden of the discovery outweighs its utility."). We are long past that point in this case.

IV.

CONCLUSION

For the foregoing reasons, SCL urges the Court to enter an order providing that SCL has no obligation to search the ESI in Macau of custodians other than Jacobs or to use any more expansive search terms on the Jacobs ESI in Macau than was used to search the Jacobs ESI that was transferred to the United States in 2010.

DATED December 4, 2012.

J. Stephen Peek, Esq.
Robert J. Cassity, Esq,
Holland & Hart LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

Attorneys for Las Vegas Sands Corp. and Sands China Ltd.

and

J. Randall Jones, Esq.
Nevada Bar No. 1927
Mark M. Jones, Esq.
Nevada Bar No. 000267
Kemp Jones & Coulthard, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169

Attorneys for Sands China, Ltd.

RECEIPT OF COPY

Receipt of **APPENDIX OF EXHIBITS TO DEFENDANT SANDS CHINA LTD.'S MOTION FOR A PROTECTIVE ORDER** is hereby acknowledged this 4th day of December, 2012:

James J. Pisanelli, Esq.
Debra L. Spinelli, Esq.
Todd L. Bice, Esq.
Pisanelli & Bice
3883 Howard Hughes Parkway, Suite 800
Las Vegas, Nevada 89169
214-2100
214-2101 – fax
jjp@pisanellibice.com
dls@pisanellibice.com
tlb@pisanellibice.com
kap@pisanellibice.com – staff
see@pisanellibice.com – staff

Attorney for Plaintiff

An Employee of Holland & Hart LLP

Holland & Hart LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

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CLARK COUNTY, NEVADA
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STEVEN JACOBS Plaintiff vs. LAS VEGAS SANDS CORP., et al. Defendants	CASE NO. A-627691 DEPT. NO. XI **Transcript of Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON MOTION FOR PROTECTIVE ORDER

THURSDAY, DECEMBER 6, 2012

APPEARANCES:

FOR THE PLAINTIFF: TODD BICE, ESQ.
DEBRA SPINELLI, ESQ.

FOR THE DEFENDANTS: J. STEPHEN PEEK, ESQ.
JON RANDALL JONES, ESQ.
MARK JONES, ESQ.

COURT RECORDER: TRANSCRIPTION BY:

JILL HAWKINS
District Court

FLORENCE HOYT
Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

LAS VEGAS, NEVADA, THURSDAY, DECEMBER 6, 2012, 8:32 A.M.

(Court was called to order)

THE COURT: Now if I could go to Sands-Jacobs, who for some reason some of you thought you were coming at 8:20.

MR. PEEK: Your Honor, I think you did, actually, when we just had the one singular motion say 8:20 for just that one singular motion. I think that's where the confusion arose. But everything else got set at 8:30.

THE COURT: And I'm happy to have you at 8:20, but that means you all have to come at 8:20.

MR. PEEK: Everything else got set at 8:30, so I --

THE COURT: I know it did. That's what I thought until I was told that Sands-Jacobs thought they were going now, they were all sitting at the front tables. And then I came in.

Mr. Jones. Both Mr. Joneses.

MR. MARK JONES: Your Honor, good morning.

MR. RANDALL JONES: Since we had the first motion, I was wondering if we would be -- if it would be appropriate if we addressed the Court first.

THE COURT: If you'd like.

MR. RANDALL JONES: I would like if the Court would like.

THE COURT: Okay.

MR. RANDALL JONES: Thank you. Your Honor, as you

know, I have not been before you on this case as of yet. And while I'm a protracted -- and I think the Court can relate to this -- what seemed to be an interminable trial in front of Judge Johnson --

THE COURT: Yeah, but I'm worse.

MR. RANDALL JONES: I will defer to the Court.

-- I thought it was important that I appear today and talk about this. I think there are some important issues. Well, I guess I want to say a couple of things first to the Court, since this is my first appearance in this case.

THE COURT: You know there's been a history.

MR. RANDALL JONES: I do. And that's actually what I want to address. I want to assure this Court -- and this is an important point that I really want to make -- our clients, respective clients, the two defendants, heard the Court, and I want to make sure the Court is aware that we have -- we believe we have taken very decisive action to make sure that we are addressing the Court's concerns that were raised in September and even before, and that we are doing what we believe we can to make sure that we accomplish what I understand to be your goal, to make sure we get this evidentiary hearing done, the jurisdictional hearing done as soon as possible. And we are, as I said, taking a number of different actions to do that. And since it's been my understanding that the Court hasn't been made aware of some of

these things, I want to just briefly describe a few of the things that have happened since -- well, actually even a bit before we got involved. But the clients have now, since June, produced over 148,000 pages of documents at a cost of about $2.3 million. That's through the present time. Within weeks of that September hearing new counsel was retained to address these concerns, the Court's concerns, not just my firm and my brother Mark's firm, but also Mayor Brown, within weeks of that happening -- and I would have gone, as well, but I was tied up in my trial -- Mike Lackey of Mayor Brown and Mark Jones flew to Macau to meet with the government officials and try to make sure we addressed their concerns so we could get moving on that document production or make sure that we could even get that document production.

And also the other I think piece of that puzzle as I understand it was make sure that the depositions that the Court had allowed, the four depositions, to take place. And I know there's some issues related to that that are going to be heard this morning, the scope of those depositions, but three of those four depositions have occurred, and the last one is scheduled for the 18th of this month.

And so I just want to make that comment up front that we -- our firm is committed, as I know is Mr. Peek and Mayor Brown, to getting this case in a place that you want it to be so we can get this done.

THE COURT: Well, I've got an order from the Nevada Supreme Court dated August 26, 2011, where they told me to do something. I'm trying really hard to do it.

MR. RANDALL JONES: And I know this Court has a lot of other things on its plate, and so we're committed, and I just want to tell you that here, that we are committed to trying to make sure that we do what you want us to do.

The concern that I have -- and I want to just mention this briefly, and then I'm going to turn this over to Mr. Peek, because he's going to argue the details of the first motion for protective order. But there have been problems. It's not all one sided, and I want the Court to be aware of that.

THE COURT: Well, I know. Because I got two phone calls earlier in the week.

MR. RANDALL JONES: Well, and had to put things on on shortened time. And that's --

THE COURT: That's okay, though. That's what I'm supposed to do. I'm supposed to help.

MR. RANDALL JONES: Sure. And that's what I want to make sure you know. We want your help, and we need your help. We believe that essentially what's happening here is that the plaintiff is essentially trying to pile on from the hearing in September, and now they're asking to relitigate issues or reconsider improperly issues that have been decided by this

Court instead of moving this forward, that they are not following the proper discovery procedures. So in a sense they're trying to distract this Court from their own discovery lapses, if you will, by trying to focus on something -- on past history. And the Court's addressed that. And we need your help, and we're here today as part of that process to ask your help to make sure this process is balanced, that it's fair to both sides, that both sides are afforded procedural due process so that when we have the jurisdictional hearing that it's fair to both sides.

And so we need your help in doing that, but I just want to reiterate we are committed to making sure that we get this process done. But in the meantime we need this Court to stop what we believe to be the overly broad and essentially harassing discovery that the plaintiff is trying to accomplish here, and make sure that, as I said, it's fair to both sides.

So with that I will turn this over to Mr. Peek. And I appreciate you allowing me to address the Court, since this is my first opportunity to do that.

THE COURT: Sure.

MR. RANDALL JONES: Thank you.

THE COURT: Mr. --

MR. BICE: Your Honor --

THE COURT: Yes, Mr. Bice.

MR. BICE: Is this an argument on the motion, or --

because I'm going to respond to these assertions when people just get up and address the Court. So I --

THE COURT: You can go after me Peek.

MR. BICE: Okay. That's fine. Thank you.

THE COURT: And you can respond to both of them at the same time.

MR. BICE: I will. Thank you.

THE COURT: Okay. Mr. Peek.

MR. PEEK: Thank you, Your Honor.

MS. SPINELLI: Can you let us know which motion. Sorry.

THE COURT: I'm on the motion for protective order related to the four witnesses that I said could go. And then later I'm going to do the motion on the administrative proceeding, and then I'm going to do your motion, which is can we do some more discovery on the sanctions issue and set an evidentiary hearing on December 27th.

MS. SPINELLI: Thank you, Your Honor.

THE COURT: How's that for a plan?

MR. BICE: Thank you.

MR. PEEK: I didn't know we were actually going to set an evidentiary hearing on the 27th, but --

THE COURT: No. That's what they asked. That's the motion.

MR. PEEK: Your Honor, this is Las Vegas Sands and

Sands China Limited's motion for protective order with respect to the scope of the discovery. And I'm not trying to relitigate, as plaintiff suggests, issues related to general or transient jurisdiction. I'm here more to talk about the perception of the plaintiffs of the scope of jurisdictional discovery that the Court allowed and the defendants' perception of the scope of the discovery that has been allowed.

THE COURT: And, for the record, we're talking about the four witnesses that I specifically identified in my March 8th, 2012, where I gave what I believed was fairly clear instructions on what the breadth of those depositions were given the stay that is in place on the jurisdictional --

MR. PEEK: And I agree, Your Honor. We certainly have had --

THE COURT: That's where we are.

MR. PEEK: That's what -- that's what we're here to discuss.

THE COURT: So let's turn to page 2 of that order and talk about what it really means.

MR. PEEK: Okay.

THE COURT: Or you could give me your argument, Mr. Peek.

MR. PEEK: I'd like to make my argument, Your Honor. And I'm happy to turn to page 2, if you'd like.

THE COURT: It's okay.

MR. PEEK: You've told us on a number of occasions that the scope of discovery should be narrowly confined to jurisdiction and shouldn't go into the merits, and you've reiterated what the Supreme Court order has said. The issue that we have here is where do we draw that line. And we had some discussions on Tuesday as to where do we draw that line. We know that the plaintiff has --

THE COURT: And I drew it short of the substance of why he was terminated.

MR. PEEK: That is correct. Your Honor. But there are other issues related to not just short of why he was terminated, but also all of the things he did during the course of his employment that don't go to the who, the where, and the what.

The plaintiff has three theories, as we know. We know he had transient jurisdiction, we know he has specific jurisdiction, and we know he has general jurisdiction. Transient jurisdiction, I don't think we need discovery on that, because that's just an issue of the services of the summons and complaint upon Mr. Leven when he was here in the United States and what role he was. And they've taken Mr. Leven's deposition.

Certainly you know we've argued about specific jurisdiction, we argued again earlier this week. I get the

message from the Court that the Court is going to say is that they're going to be allowed to ask questions about the who, the where, and the what, in other words, where were you when you did an act, what act did you undertake, and who undertook that act and what role he took that at.

We haven't -- you know, we had a disagreement in Mr. Adelson's deposition. We resolved that. We had a disagreement in Mr. Leven's deposition -- we had two disagreements in Mr. Leven's deposition. As you said, I was not really surprised, because I thought I was right when I made my objection, but you did sustain one of those objections, and you overruled one of my objections. And that was an objection the first time of the when, when was it in Singapore did Mr. Adelson and Mr. Leven discuss termination.

But I want to look really at the deposition of Mr. Adelson. And we know and I've cited to the pages and the lines within the deposition where we have seen disagreements and where I had instructed him not to answer under 30(b) and then the 30(b)(3) to come back to this Court.

Mr. Adelson testified that Leven had the power to negotiate a resolution with Jacobs when he was terminated. But instructed him not to answer more questions to explore the extent of his settlement authority. Mr. Adelson testified that he had a conversation with Mr. Leven about his dissatisfaction with Jacobs at the road show in London. I

instructed him not to answer questions about what precisely his concerns were, because that goes to the merits.

So that's certainly -- the who, the where, and the what was part of that examination, but the substance of the why was not to be part of that. It's not relevant as to substance of the why he was terminated, what the basis and what the grounds were.

Your Honor, as Mr. Jones has said, we've produced over -- since June, of course -- a hundred and some-odd thousand, but over 200,000 documents have been produced by plaintiffs for this theory of both general jurisdiction and specific jurisdiction. And we understand now that the plaintiffs are pursuing an agency theory. They're pursuing an agency theory of Las Vegas Sands Corporation, when it undertook acts, was being directed by its subsidiary, it's 71-percent-owned subsidiary, to take those -- take on those acts on behalf of Sands China Limited. They gave up, Your Honor, the alter ego claim. Maybe they are going to revive it. I don't know. But that seems to be from the -- their own presentation to the Court in September and even from their papers now as to what they're going to be undertaking. They cite, of course, to the Doe versus Unical case, which is the agency issue.

Moving on to Mr. Goldstein, again I instructed Mr. Goldstein not to answer when they were getting into the

merits. They seemed to think that Mr. Goldstein was being directed by somebody in Macau -- I guess that would have been Mr. Jacobs, because Mr. Jacobs was the CEO and the president of Sands China Limited, that he was directing Mr. Goldstein to undertake certain actions so therefore the agency theory is that there is a presence in Nevada of Sands China Limited by Mr. Jacobs directing Mr. Goldstein to take acts or by directing Mr. Adelson to take acts. I don't think, Your Honor, that that theory -- well, if they want to pursue that theory, that's their theory.

But the point is, Your Honor, they argue that -- in their opposition -- that we seem to be focused and have a disagreement on specific jurisdiction. That is not where the disagreement lies. The disagreement lies on them getting into the merits. And I -- you know, and I've also asked that Mr. Adelson, Mr. Leven -- now Mr. Leven, who was deposed on Tuesday, and Mr. Goldstein, who have all been deposed for a day, not be required to come back. Because, if you look at the transcript of both the Goldstein and the Adelson deposition you will see that they wasted an awful lot of time in areas that really don't go to their one single theory now of agency. And we need to move on, as Mr. Jones said, get this case set for an evidentiary hearing, as we're directed by the Court, and not fuss around now that they have 200,000 pages, three depositions, and one to go. Thank you, Your

Honor.

THE COURT: Thank you.

Mr. Mark Jones, is there something you want to add before I hear from Mr. Bice?

MR. MARK JONES: Just one point, Your Honor.

THE COURT: Okay.

MR. MARK JONES: The only thing I would like to add to this issue, Your Honor, is some context and remind the Court that the only claim for relief against Sands China Limited in this case is a claim for an alleged breach of a stock options agreement. And we would submit that there is no relations between plaintiff's questions regarding the details and the whys of his termination and his attempts to establish personal jurisdiction.

THE COURT: Thank you.

MR. MARK JONES: Thank you.

THE COURT: Mr. Bice.

MR. BICE: Yes, Your Honor. Good morning.

THE COURT: 'Morning.

MR. BICE: There seems to be from our end a rather large disconnect between what's presented this morning and actually what their motion says. If you read their motion, which I know the Court has done, the motion is all about a regurgitation of something that we've argued I think this will be at least fourth time, might be the fifth. I've sort of

lost track. This is the argument that Ms. Glaser made. Ms. Glaser made it again, seeking what she called clarification. Then when Munger Tolles & Olson entered the case they made the argument again, and then when Mr. Peek took on the role of representing both defendants they made the argument again, and now we have another set of new counsel, and the argument has returned. And so I don't want to -- I'm not going to waste a lot of your time rehashing that whole history about this argument about specific jurisdiction, which, let's be clear, that is what this dispute is really all about.

But since this is a court of law, I do want to just sort of talk about the law for a minute. Let's remember what the Supreme Court's actual order says. What it is says is that you are directed -- "You shall stay the underlying action except for matters relating to a determination of personal jurisdiction." That stay was sought, as we all remember, by Sands China, claiming that it had -- and I don't remember the number, Your Honor, was it -- a certain number of terabytes of documents in Macau that it was going to have to review that it didn't think it should have to review, it was burdensome, onerous, while it was contesting jurisdiction. That's the basis for the stay request.

So the Nevada Supreme Court didn't say that it stayed jurisdictional discovery, and it didn't say that there would be some other standard than the traditional rules under

Rule 26 and the traditional discovery mechanisms that apply to that jurisdictional discovery.

So let's remember what the standard is about discovery. Unlike a trial which we're addressing on the merits, we're going to have an evidentiary hearing on jurisdiction. So the rule is is the discovery being sought reasonably calculated to lead to admissible evidence that will be admissible at that jurisdictional hearing. That's the legal standard that we apply, are the questions designed to elicit testimony that could very well be admissible and determinative ultimately of the question of jurisdiction. That's the legal standard that governs. And that, of course, is being completely glossed over here by the defendants.

We have our -- again, I don't need to belabor our explanation for jurisdiction. We've asserted that there's agency, we've asserted that it's Sands China does here. No, we have not abandoned the alter ego theory. We've asserted specific and transient, as well. Now, they don't identify really what it is -- any specific questions, contrary to the argument about what they claim we shouldn't be allowed to get into it, but most of it seems to turn on this issue about, well, how much detail can one get into relative to the termination.

And that's important, Your Honor, because you've got to remember in a jurisdictional issue -- and this is the

dispute we had when Munger Tolles got into this case. When they came into the case they made this offer to us. They said, well, we'll stipulate to certain facts. But what they wanted to stipulate to were just sort of some basic facts about Mr. Adelson and Mr. Leven participated in board meetings via phone from Las Vegas, those sorts of things. And our objection to that was and the reason we said no to that was what matters in jurisdiction is magnitude, context, what is the substance of the contact. It's not just the, to use Mr. Peek's terminology, the who, the what -- or the who, the where, and the what. It's actually more than that. It is the who, the where and the what, but it's also and what was done relative to that contact, what is the substance of the contact, not just, well, Mr. Leven was in Las Vegas and talked about the termination, you can't get into anything else because we don't want to get into the merits of the case.

Your Honor, unquestionably, especially when you're talking about specific jurisdiction, merits and facts that go to merits and facts that go to jurisdiction are likely going to overlap. No one is disputing that's going to be an overlap. But that doesn't mean that the default is, okay, if there's an overlap then you don't get into it. No. If there's an overlap, we should be allowed to get into it, because we're allowed to develop the factual record to establish the jurisdiction of what would be admissible in the

evidentiary hearing. And that's all we are trying to accomplish here. Remember, they got the stay on the theory that they shouldn't have to produce all these documents. It's not burdensome or onerous to have to answer questions. And these are Las Vegas Sands executive who say they shouldn't have to answer questions that go to their activities in Nevada on behalf of Las Vegas -- or on behalf of Sands China Limited. And that's why, Your Honor, the stay shouldn't be extended to protect them from having to answer questions that will lead to the admissible evidence that goes to the question of jurisdiction, especially in the context of specific jurisdiction.

Let me give you an example of that, Your Honor. We had the story from Mr. Leven, and Mr. Peek made a point of it in his brief. Well, Mr. Leven said that he talked about termination with Mr. Adelson in Singapore. Ah. So that's it. So now you don't need to know any more. Well, yes, we do, Your Honor, because that was a month before the termination, and there was a month of activities by Mr. Leven. And guess where we believe he likely undertook those activities. Right out of Las Vegas before the termination was hatched. The letter was drafted here. Who all was involved in that? Who all reviewed it? Those are the specifics, because we need to understand the context and we need to understand the magnitude of the contact, where is the situs of the termination, where

was it hatched, executed, where did all of the things occur relative to it and what was the substance of it. It's not enough to just say, well, Mr. Leven said Singapore so now you just have to live with that answer. No. And that's what, of course, they want to do. And the answer is, no, that's not right. The law turns upon not just the who, the where, and the what, but the magnitude, the substance of it.

And so under the rules, Your Honor, if there's some question about, okay, well, maybe it goes to jurisdiction, maybe it goes to merits both, well, then we're entitled to do that discovery as long as it's reasonably calculated to lead to evidence that would aid us in establishing the jurisdictional facts. And that's all we have tried to accomplish relative to the depositions of these witnesses. And we have, of course, been obstructed in doing so. And that's why -- you know, I hear them telling us, you know, we're late on other things. Mr. Adelson's deposition was September the 6th, Your Honor. We're here now three months later over this issue? Because our point is we want and are entitled to develop the facts that are relevant to jurisdictional discovery.

And we've also brought a countermotion in this, Your Honor, for production of some travel records, because we have Mr. Adelson claiming he -- you know, he's travelling all over the world. He doesn't want to acknowledge that he's doing

business in Nevada -- or doing these events from Nevada. I don't know, and I'll address this as part of our other motion, Your Honor. I don't think we sufficiently highlighted it to you, but, you know, Mr. Adelson in his New York defamation claim, this is what he has to say about Nevada.

This has to do with the prostitution issue, Your Honor.

THE COURT: Your Honor, Mr. Bice is under a protective order in the Jacobs-Adelson case with respect to the Adelson deposition. He knows that. He negotiated it. And this is not to be part and parcel of a publication.

MR. BICE: They withdrew their -- there is no confidentiality designations on that order.

MR. PEEK: This is -- you're reading from the Adelson deposition in --

MR. BICE: No.

MR. PEEK: Oh. I apologize. I thought you were reading from the Adelson deposition in the Florida case.

MR. BICE: Well, first of all, I'm not. But second of all, even if I was --

MR. PEEK: I'm addressing the Court, Your Honor.

THE COURT: I understand.

MR. PEEK: Yeah.

MR. BICE: Mr. Adelson's counsel has withdrawn any confidentiality designations of Mr. Adelson's deposition

transcript in Florida. So --

THE COURT: The Florida deposition?

MR. BICE: Yes.

THE COURT: Well, but, see, I'm not the Florida judge.

MR. BICE: I understand.

THE COURT: And I'll get to that in a minute on the administrative hearing.

MR. BICE: But all I'm quoting here, Your Honor, is --

MR. PEEK: What I don't know is whether he's reading from the Florida deposition or from the --

THE COURT: The deposition that's protected or the deposition that's no longer protected. Interesting question, Mr. Peek.

MR. PEEK: I'm unaware of the fact that it was -- that it's no longer protected. But that's fine.

THE COURT: How about I don't need to worry about what's happening in New York right now.

MR. PEEK: And Florida.

THE COURT: Florida I have to worry about, but I don't need to really worry about that.

MR. BICE: I agree with you. All I wanted to point out to the Court is in his brief what he says is, "Mr. Adelson promulgates these policies and conducts his business from

Nevada, the state where he manages his personal funds." This is about his casino. "Indeed, the defamatory statements attack Mr. Adelson's casino business, which he unquestionably oversees from his residence in Nevada." This all -- this is his position --

THE COURT: Okay.

MR. BICE: -- in another court.

THE COURT: I don't think that's new information to us here.

MR. BICE: Well, it seemed to be when we deposed Mr. Adelson, because he had, of course, an altogether different story about how he couldn't tell us where he was at. That's why we've asked for the travel records.

THE COURT: Well, at some point in time we'll get to an actual evidentiary hearing, and I'll weigh testimony and make determinations on credibility.

MR. BICE: Right. So that's -- that's why we've asked for the countermotion for the travel records, Your Honor.

THE COURT: I understood that.

MR. BICE: So now let me just briefly address Mr. Jones. I guess --

THE COURT: Mr. Mark Jones, or Mr. Randall Jones?

MR. BICE: Mr. Randall Jones's I guess opening introduction.

THE COURT: At least I don't have Jim Randall here, too, because then I get truly confused.

MR. PEEK: Or Justin.

THE COURT: Or Justin Jones, yes.

MR. BICE: Mr. Jones says that we are filing these motions I guess as some cover for our own discovery lapses -- of course, he doesn't tell us what those are -- and that both sides have to be afforded procedural due process. We absolutely agree with that, and in fact we were the one -- as Mr. Jones doesn't know, we're the ones who weren't being afforded that at all at the conduct of the defendants when they were concealing information from us and from the Court for over a year.

They've also boasted to the Court about how much money they have spent producing documents since June. By our count, Your Honor, I think more than half of what they produced to us are in fact Mr. Jacobs's documents, the documents that we submitted to Advance Discovery and that they have reviewed. And that process, as Your Honor might know, has taken way longer than they had claimed it was going to. And all the money that they have incurred is because, as you will recall, Ms. Glaser -- and I think they have stuck to this position -- is they were going to review every piece of paper for privilege and produce a privilege log. Of course, our position was, and you might recall, was they were doing that

because that would inevitably delay the process. They insisted that that's not why they were doing it. But that's where they're incurring all their expense. They could have conducted a search of the documents, had they wanted to, relative -- by word terms, and then produced the documents. But I don't think a party can intentionally undertake a process that slows it down and than ask to be patted on the back for having incurred a lot of expense in a process that they wanted to undertake to simply give us our own documents. And that's really what has been going on since July of this year, Your Honor.

THE COURT: Thank you.

Mr. Peek, anything on the countermotion only?

MR. PEEK: I know you've said countermotion only, Your Honor, but there is --

THE COURT: I did.

MR. PEEK: And I understand that. But may I, with the Court's permission, correct some statements by Mr. Bice, who --

THE COURT: You can keep it under five minutes.

MR. PEEK: I can keep it all under five minutes. Mr. Bice and I were apparently not at the same deposition of Mike Leven when he asked Mike Leven after the where were you in Singapore all of the questions about the then conversation Mr. Leven had with the individual members of the board of

directors of Sands China Limited, where he was when that happened. He must not have been at the same deposition I was when he asked Mr. Leven who drafted the letter, where was the letter drafted, and did you carry it to Macau with you, did you have it in your possession when you went to Macau. I guess he wasn't at the same deposition I was with Mr. Adelson when he asked Mr. Adelson the very same questions. So when he says that I've been obstructive, I have allowed those types of questions. It is the questions that go beyond that where I have not -- where I have said, no, you're getting into merits.

When he talks about scope of discovery, remember, the Court set the scope of discovery, so you don't have the very broad standard of Rule 26. And also, Your Honor, the Supreme Court order talking about evidentiary hearing set forth that which was going to be heard at the evidentiary hearing. The Court knows that, and he's not trying to go beyond that by this broad scope, travel records.

What they now say is, we need to know where he was. Mr. Adelson testified, I was in the air many times, I was at my home in France many times, I was at my home in Tel Aviv many of those times, I was at my home in Nevada on many of those occasions, I was at my home in Boston on many of those occasions when I had phone calls, when I talked to Mr. Jacobs, when I talked to somebody else about activities of Sands China Limited. Those travel records that you allowed them to have

were travel records of what trips and when -- what trips do you take to Macau and Hong Kong, that's all. Now they want broader records. They talk about wanting international travel, they now want to talk about having calendars. That's one of those areas where the Court denied them discovery into calendars, specifically said in its order of March 8th, no calendars. So now they're trying to go back and relitigate that very same issue when they were denied access to calendars. They now want to change the scope of discovery to all international travel that each of the individuals had, as opposed to travel to Macau and as opposed to travel to Hong Kong, as opposed to travel to China. Those are the three areas in which they sought discovery, Your Honor.

THE COURT: And you've produced those records.

MR. PEEK: I have produced -- well, Your Honor, with the travel records -- I have produced those related to others, but with respect to Mr. Adelson and Mr. Leven I have not produced the individual travel records. I have, as I said, Your Honor, in my papers and as I said given that a spreadsheet of the number of times they travelled to Macau in 2010, 2009, number of times they've travelled through Hong Kong 2009-2010. That we had a dispute over back in March. But they came to this Court and said four weeks ago, we're ready to go. Haven't raised an issue at all about the specific days, the specific flight logs until just now, Your

Honor.

So they say on the one hand, we're ready to go; on the other, we're not. But they asked Mr. Adelson, they asked Mr. Leven, they asked Mr. Goldstein those very same questions about travel and where were you when certain things occurred, where were you when you did this activity, where were you when you did this activity. Mr. Adelson said, I can't tell you where I was specifically when that helped, I could have been in Vegas, I could have in the air, because I have wi-fi connection, satellite connection in my airplanes, I could have been in France, I could have been in Tel Aviv, I could have been in Boston. And we've said, Your Honor, in terms of the stipulation we'll stipulate that in terms of when he went to board meetings he was in Las Vegas.

But, Your Honor, getting to those specific travel records it's coming now too late to do that. They should have brought this motion to compel a long time ago, as opposed to the last minute. We've given them the information that the Court allowed them to have with respect to trips to Macau, trips to Hong Kong, trips to China. Thank you.

THE COURT: Thank you.

The countermotion is granted in part. It is granted as to those travel records that were ordered in paragraph 8 of my March 8th, 2012, order, which were the travel records for the four individuals that I've previously identified, as well

as any other LVSC executives that were having meetings related to Sands China.

Now, with respect to the protective order, I said on Tuesday when I spoke to you that my concern was navigating the stay that the Nevada Supreme Court has told me to enter related to discovery in the jurisdictional portion of this case. As a result, after a lot of briefing we entered the March 8th, 2012, order to govern the discovery in that case.

So while, Mr. Bice, I agree with you that typically we would have a broader discovery, we don't, because I've already limited the discovery in this case based on my interpretation of the stay order the Nevada Supreme Court has issued in the writ that was sent to me.

For that reason I'm going to grant the protective order in part. We are not going to inquire into the substance of any determinations, but the process of the decision making, the who, what, where, when, how, why, and then the implementation of the decision making --

MR. PEEK: Your Honor, you said why. Did you --

THE COURT: Sorry. I didn't mean why. "But not why" is what it says in my notes.

MR. PEEK: Okay. Thank you.

THE COURT: Who, what, where, how, when, and the implementation of those decisions. Because it's not just how a decision was made, it's also how the decision was

implemented.

MR. PEEK: Your Honor, I've allowed all of that examination already.

THE COURT: There have been some issues.

MR. BICE: Well, I disagree that he has, but we'll address --

THE COURT: And I am not going to limit the depositions of the four executives to the one day that has been asked. However, if the depositions become harassing because people are trying to get into the substance of the decision of the termination or the substance of any of the settlement negotiations, those would be inappropriate under the stay that I currently have in place.

Any other questions on that motion before I go to the administrative action issue?

MR. PEEK: Your Honor, I do have some more questions. When you say you're not going to permit the harassment, you're going to allow them to come back?

THE COURT: I am.

MR. PEEK: Is there any limitation at all? Because, Your Honor, with 200,000 pages of documents, one full day for each of them, and this sort of minutia because they want to say "the magnitude" of the contacts, if you will, is important to them, could extend well beyond two days, three days, and four days. I've already been in one day with Mr. Pisanelli

and two other days with Mr. Bice on the other depositions, and I know where it's going.

THE COURT: I don't think they could ever in any case finish a deposition in a day.

MR. PEEK: I know that, Your Honor. And that's what concerns me. I don't want to bring senior executives --

THE COURT: I'm not saying that they're not competent, I'm saying they're very thorough, and this is an issue that as a result of the writ that's been taken has a lot of attention that's going to be paid to it. So I'm not going to limit them. However, if you believe under Rule 37 that the deposition is becoming -- is it 37 or 26?

MR. PEEK: It be 37, Your Honor, if --

THE COURT: 37 --

MR. PEEK: It's been 26. But I already believe it is that way.

THE COURT: I disagree --

MR. PEEK: But you've told me I --

THE COURT: -- at this point.

MR. PEEK: You told me that I'm wrong.

THE COURT: Well, so far. I did agree with you once this week. So -- but if it gets to a point, Mr. Peaks and Mr. Joneses, that you believe that the depositions are becomes harassing, you may suspend the deposition and, you know -- you know what happens then.

MR. PEEK: I know what happens, Your Honor.

THE COURT: You'll come over here.

MR. PEEK: I don't want to put myself at that kind of risk. That's why I'm asking the Court --

THE COURT: I'm not going to limit the time.

MR. PEEK: -- to limit them just like we do in a trial, Your Honor.

THE COURT: I'm not going to limit the time.

MR. PEEK: To limit that.

THE COURT: I understand. However, if they're still going and they've gone for three days, I might think it's too many.

MR. PEEK: That's a -- that, Your Honor, sort of tells me something I really frankly didn't want to hear, that they should be allowed to even go three days. Even allowed to go two days, Your Honor, is rather excessive.

THE COURT: Two days is not of concern to me.

MR. PEEK: Pardon?

THE COURT: Two days is not of concern to me.

MR. PEEK: And I don't know how we're ever going to get to an evidentiary hearing, Your Honor, that we want to have right away.

THE COURT: I have a note right there.

MR. PEEK: I know.

THE COURT: I'm getting there.

Okay. If I could go to the administrative action in Florida. Let me make a statement. I'm not the judge in Florida. Now do you want to make your motion?

MR. PEEK: Your Honor, I don't think there's a whole lot more to say, because that really is the theme, is that this is going to be heard on the 13th of this month in Florida by the judge in Florida as to what the scope of the depositions will be that are being requested to be taken here. And there are actually six. I only represent three of the individuals. And we don't want to get into a debate here, as they want to, about the merits of the Adelson action and what he does in Florida versus what happened here in Nevada. We don't want to get into the issue of whether there are merits -- that they're allowed merits discovery here. That's an issue for the Florida courts. If they didn't like the questions in the deposition of Mr. Jacobs about merits, they could have suspended that deposition and gone to a Florida judge and said, there is a stay in place in Nevada and these folks are trying to violate that stay. These are issues, Your Honor, for the Florida court, and let's let the Florida court make these decisions, as opposed this court make those decisions. And that Florida court will tell all of us what the scope ought to be, because there's no coordination between this case and the Florida case.

THE COURT: I can't coordinate with another state

court judge unless the state court judge wants to.

MR. PEEK: Yeah. So, Your Honor, I think -- I think that really -- you know, I certainly -- we have set forth the request for production, we have that already. They have a motion to compel on that.

With respect to those documents, Your Honor, again, the custodian is Las Vegas Sands Corporation, not these individuals who are being sought -- from whom they're seeking documents. If they have that, they should seek those from Las Vegas Sands.

Your Honor, the subpoenas and the questioning of Leven and Goldstein should be limited to the issue of -- that's framed by the complaint and not in the entire merits, because they want to try to get to merits of the termination. And certainly, Your Honor, we hope to get to the merits ourselves very soon.

And then with respect to the subpoena to Mr. Reese, as we've said, that ought not to be -- that deposition ought not go forward at all. Mr. Reese said, I know nothing about prostitution in Macau or the issue or the statements made by Mr. Jacobs in his declaration to this Court in June of this year about the so-called prostitution strategy. Thank you.

THE COURT: Thank you.

Mr. Bice.

MR. BICE: Your Honor, I'm a little confused because

it's their motion, but apparently they don't want you to really address their motion. It seems like let's have the Florida judge decide the motion. They didn't make this motion -- these employees didn't make this motion in Florida. There were six. Only three of them have filed a motion, and, of course, it's the three that currently work there, because this is, again, Mr. Adelson directing the litigation relative to claims that he has asserted in the state of Florida that grow out of this lawsuit and this Nevada proceeding.

So I don't need to spend a lot of time on this, because you can just simply look at the gentleman's complaint, look at his own lawyer's acknowledgements in Florida, and they contradict everything that now Mr. Adelson through these three employees has submitted relative to the current motion before this Court.

What they have tried to claim is that the stay in this action or the stay in your action that you are the judge on stays or insulates Mr. Adelson and these executives from discovery relative to the Florida action. Now, one only has to look at the caselaw to know that simply isn't the law, and in fact Mr. Adelson's lawyer acknowledged that quite gleefully when he was deposing Mr. Jacobs. Unremarkably in our experience with Mr. Adelson and his litigation tactics, that tune quickly changed, of course, once we started seeking discovery from Mr. Adelson and Mr. Adelson's executives. Now

THE COURT: Okay.

MR. PISANELLI: All right.

THE COURT: So if you want to identify them so it makes our life easier to be able to identify the particular items that are going to be in dispute as part of the refreshed recollection issue, then we can do it.

MR. BRIAN: I would just say, just to preview the argument, Your Honor, I think this is the --

THE COURT: I don't need you to preview the argument. I know what you're going to say.

MR. BRIAN: I'm just going to say two words, Club Vista.

THE COURT: This isn't Club Vista.

MR. BRIAN: I think it's a --

THE COURT: This is a very serious violation of duties of candor to the court by counsel who are representing a party.

MR. BRIAN: I understand.

THE COURT: That's why I'm here, Mr. Brian.

MR. BRIAN: I know that. I understand --

THE COURT: All right. This isn't Club Vista.

MR. BRIAN: I understand your concern, Your Honor. But I'm just saying the policy --

THE COURT: Mr. Brian, you don't understand my concern. You've not understood my concern since the issue

arose in May.

MR. BRIAN: I have, Your Honor. Trust me, I have.

THE COURT: So -- Mr. Pisanelli, if you would like to identify the documents, I would appreciate it.

MR. PISANELLI: Thank you, Your Honor.

BY MR. PISANELLI:

Q Mr. Jones, I want to do this the best way for you. So if it's easiest to say let me start with the John Owens or let me start with the non John Owens or start chronologically, whatever it is easiest for you to recall the 10 to 15, feel free to do so. Let's start, if it makes sense, with the dates of the emails. Do you recall the dates of the emails that you used to refresh your recollection?

A Somewhere in May of 2011. Others were in August, September of 2011.

Q I take it you don't remember the specific dates of any of them?

A I do not.

Q All right. So let's take a different approach. Let's talk about the authors or recipients, would that be an easier way for you to identify for the court the emails that you used to refresh your recollection?

A Sure.

Q Okay. Who were the authors of the emails that you reviewed to refresh your recollection?

A In May the author was Steve Peek. I don't recall on other emails from May. The authors and recipients of the emails in August and September of 2011 were myself and in-house and outside counsel.

Q Were you in -- focusing on the May emails, were you the recipient of the emails from Mr. Peek?

A Yes.

Q Okay. Anyone else copied on those emails?

A Not to my recollection.

Q So the body of email that you used to refresh your recollection about your testimony today from May were email communications solely between you and Mr. Peek. Do I have that right?

A That's my recollection.

Q How many in May?

A One.

Q Now, let's move over to August. This was -- I'm sorry, between you and outside counsel?

A Both in-house counsel and outside counsel.

Q All right. Who -- were you the author?

A Some of them I was the author, some of them I was the recipient.

Q All right. On the ones where you were the author, who were you writing to?

A Varied by email, but generally Mr. Peek, counsel

from Glaser Weil, and in-house counsel.

Q Who at Glaser weil?

A Mr. Ma and perhaps Ms. Glaser on one or two of them.

Q And on the emails where you were the recipient, who was or who were the authors?

A Mr. Ma, Mr. Rubenstein.

Q Were there any other recipients besides yourself?

A Were there recipients? Yes. A Ms. Salt was an author of an email that I recall.

Q And who else were the recipients of those? Let's start with the emails from Mr. Ma, who was he writing to?

A I don't recall specifically. To the best of my recollection, there would have been at least one of the in-house counsel.

Q And Mr. Rubenstein, who was he writing to?

A I don't recall if -- who the other recipients were. There may have been other recipients. There probably were other recipients.

Q And Ms. Salt, who was she writing to?

A The best of my recollection, that was directed back to the legal team that included in-house and outside counsel.

Q And who were those individuals?

A Myself, Mr. Peek, Ms. Glaser, Mr. Ma, Mr. Sedlock, Mr. Fleming, Mr. Rubenstein, Mr. Kostrinsky, Ms. Hyman.

Q Anyone else?

A Not that I can recall.

Q Now, we've been going through the body of emails I think that you labeled as the August email. But earlier you said there was a body from May and a body from August, September. Just so we're clear, everything we just went through under the August label, that includes what you had earlier described as August/September, fair enough?

A Correct.

Q All right. Good. Were there any other emails that you reviewed to refresh your recollection other than those that you've just described?

A Not that I recall.

MR. PISANELLI: Your Honor, did I understand you correctly that you did not want the witness to disclose if there were re lines or subject lines in these emails?

THE COURT: I'd rather not go through that --

MR. PISANELLI: Okay.

THE COURT: -- process, because I think it's too likely to have an inadvertent waiver of reform. Mr. McCrea can get up and object.

MR. PISANELLI: Fair enough.

BY MR. PISANELLI:

Q Are there any other identifiers in these emails that you can disclose to Her honor that would not disclose what otherwise may be an attorney-client privileged communication

or work product information?

MR. McCREA: Objection, Your Honor. Attorney-client privilege.

THE COURT: That's a yes or a no, Mr. Jones.

THE WITNESS: I'm sorry. I don't know what other identifiers you would be referring to.

BY MR. PISANELLI:

Q Well, I doubt that it happened --

A Sorry.

Q -- but for instance, a Bates number could have been put on these things?

A On the emails themselves?

Q Yes.

A No.

Q Okay. You're a litigator; right?

A Yes.

Q And so you can brainstorm this issue as much as I can. I'm just trying to --

A I can't think of anything Mr. Pisanelli.

Q That's all I'm asking. Okay. Good. Thank you.

MR. PISANELLI: Now, Your Honor, it is not for me to direct Mr. Jones to assemble these records, but I would ask Your Honor to direct him to do so only so we won't have to challenge or test or rely upon Mr. Jones's memory as the briefing goes on. In all likelihood, this may last more than

a month or so, and it certainly is in everyone's best interest if they are assembled and preserved waiting for Your Honor's resolution on what to do about them.

THE COURT: I understand what you're saying, Mr. Pisanelli. Thank you.

MR. PISANELLI: I will take your silence as a rejection of my request and I will move on.

THE COURT: Very perceptive.

MR. PISANELLI: Yes.

BY MR. PISANELLI:

Q To the yes or no questions, Mr. Jones, do these emails reflect in any manner a reason why you no longer participated in the defense of this case?

MR. McCREA: Objection. Attorney-client, work product.

THE COURT: Sustained.

BY MR. PISANELLI:

Q Let's talk about the billing records. Have you segregated those billing records that you used to refresh your recollection?

A To be clear, I didn't look at a physical billing record. We have a system called DTE Axiom at my office. I clicked back through to the months that I wanted to look at, pulled open the entry for Las Vegas Sands and reviewed the date for that particular entry.

Q Did you review your own entries on the bill, is that what you mean?

A Well, it wasn't a physical bill. I enter my time on my computer, it comes up on my computer screen in DTE Axiom. And so I went back to that particular date and clicked on that particular entry. So kind of bill per say.

Q Is this program that you're using, does it show only your entries?

A Yes.

Q Okay. Once again, if you were called upon to go back and print hard copies of the particular entries that you reviewed to refresh your recollection, do you believe you'd have the ability to do that?

A Yes.

Q Have you made any notation or any type of memorialization of the dates of your billing entries that you reviewed to refresh your recollection?

A No.

MR. McCREA: Objection. Work product.

THE COURT: Overruled.

BY MR. PISANELLI:

Q So as you sit here today, the only source of information concerning the billing entries that you reviewed to refresh your recollection would be your own memory?

A Yes.

Q All right. Besides your -- the email that you described and the billing entries that you've described, were there any other documents or information that you reviewed to refresh your recollection about today's testimony?

A I don't believe so.

THE COURT: Mr. Jones, I'll tell you the same thing I tell all witnesses. If you need to take a break at some point in time, you let us know.

THE WITNESS: Oh, I don't want to take a break.

THE COURT: Just telling you. Treating you like any other witness, you've got M&M's --

THE WITNESS: Appreciate that.

THE COURT: -- you've got water, you're entitled to a break if you need it.

BY MR. PISANELLI:

Q So I believe we started on this path because you were certain of the date that you reviewed the emails. Do I have that right?

A I believe my testimony, Mr. Pisanelli, was that it was approximately May 19th.

Q And again, I apologize, Mr. Jones, if you've told us this before, but prior -- well, strike that. You knew about the existence of the emails in the United States prior to the day that you went over to review them; right?

MR. McCREA: Objection. Work product.

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
Las Vegas, Nevada 89146

Florence M. Hoyt — 9/13/12

FLORENCE HOYT, TRANSCRIBER — DATE

EXHIBIT 2

PB | PISANELLI BICE

DEBRA L. SPINELLI
ATTORNEY AT LAW
702.214.2100 TEL
702.214.2101 FAX
DLS@PISANELLIBICE.COM

October 26, 2012

VIA E-MAIL

J. Stephen Peek, Esq.
HOLLAND & HART
9555 Hillwood Drive. Second Floor
Las Vegas, NV 89134

Re: ***Steven C. Jacobs v. Las Vegas Sands Corp., et al.*; Case No. A627691**

Dear Steve:

I write regarding the documents that Justin Jones reviewed in preparation for his testimony at the September 12. 2012, evidentiary hearing. Recall, Mr. Jones testified that he reviewed certain billing records and email communications to prepare for his testimony and reviewing such records and communications did refresh his recollection and provide the basis for his testimony. *See* 9/12/12 Trans. at 30:4-45:5.

Mr. Jones' use of documents to refresh his recollection in preparation for testimony is a waiver of any claim of privilege that could have existed. NRS 50.125; *Means v. State*, 120 Nev. 1001, 1010, 103 P.3d 25, 31 (2004); *Laxalt v. McClatchy*, 116 F.R.D. 438, 454 (D. Nev. 1987).

Accordingly, we request production of those documents reviewed by Mr. Jones in preparation for his testimony. Please advise as soon as possible whether you will comply with this request or whether a motion to compel is required. If you intend to decline, please advise of your availability to conduct a EDCR 2.34 conference.

Regards,

Debra L. Spinelli

cc: Brad D. Brian, Esq., Henry Weissmann, Esq., and John B. Owens, Esq.
Samuel S. Lionel, Esq. and Charles H. McCrea, Jr., Esq.
Justin C. Jones, Esq.

EXHIBIT 3

HOLLAND&HART

J. Stephen Peek
Phone 702-222-2544
Fax 702-669-4650
SPeek@hollandhart.com

November 9, 2012

Via E-Mail: dls@pisanellibice.com
And Regular U.S. Mail

Debra L. Spinelli, Esq.
Pisanelli Bice
3883 Howard Hughes Pkwy, Suite 800
Las Vegas, Nevada 89169

Re: Jacobs v. Las Vegas Sands Corp., et al.

Dear Ms Spinelli:

In response to your letter of October 26, 2012 requesting documents that Justin Jones reviewed prior to the evidentiary hearing, I respectfully decline your request. Because I do not perceive your request and my declination of your request to be a discovery dispute, I do not see the need for an EDCR 2.34 conference.

Very truly yours,

J. Stephen Peek

J. Stephen Peek

JSP/dmb

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MOTN
J. Stephen Peek, Esq.
Nevada Bar No. 1759
Robert J. Cassity, Esq.
Nevada Bar No. 9779
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
(702) 669-4600
(702) 669-4650 – fax
speek@hollandhart.com
bcassity@hollandhart.com

Attorneys for Las Vegas Sands Corp. and Sands China, LTD.

J. Randall Jones, Esq.
Nevada Bar No. 1927
Mark M. Jones, Esq.
Nevada Bar No. 000267
Kemp Jones & Coulthard, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
(702) 385-6000
(702) 385-6001 – fax
m.jones@kempjones.com

Attorneys for Sands China, LTD.

DISTRICT COURT

CLARK COUNTY, NEVADA

STEVEN C. JACOBS,

Plaintiff,

v.

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

Defendants.

/

AND ALL RELATED MATTERS.

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

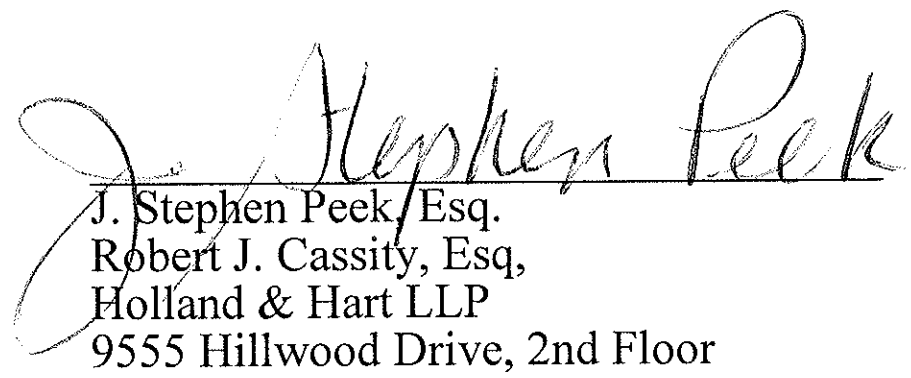
Date: n/a December 6, 2012
Time: n/a 8:30 a.m.

DEFENDANT SANDS CHINA LTD.'S MOTION FOR A PROTECTIVE ORDER ON ORDER SHORTENING TIME

Defendant Sands China Ltd. ("SCL" and/or "Defendant") moves this Court pursuant to Rule 26(c), this Court's March 8, 2012 Order, and the Nevada Supreme Court's Order Granting SCL's Petition for Writ of Mandamus, for a protective order with respect to the scope of its

obligation to search electronically stored information ("ESI") that is located in Macau.

DATED December 4, 2012.



J. Stephen Peek, Esq.
Robert J. Cassity, Esq,
Holland & Hart LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

Attorneys for Las Vegas Sands Corp. and Sands China Ltd.

and

J. Randall Jones, Esq.
Nevada Bar No. 1927
Mark M. Jones, Esq.
Nevada Bar No. 000267
Kemp Jones & Coulthard, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169

Attorneys for Sands China, Ltd.

Holland & Hart LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

EX PARTE APPLICATION FOR ORDER SHORTENING TIME

As set forth in the Affidavit of J. Stephen Peek, Esq. below, good cause exists to hear Defendant Sands China Ltd.'s Motion for a Protective Order on an order shortening time. Plaintiff Steven C. Jacobs ("Plaintiff" and/or "Jacobs") has brought a Motion for Sanctions pursuant to NRCP 37 against SCL on the theory that SCL is violating its ongoing discovery obligations, including a supposed obligation to extensively search ESI in Macau. A hearing on Plaintiff's Motion for Sanctions is scheduled for December 27, 2012. However, Plaintiff's Motion for Sanctions jumps the gun. As explained below, the parties have a significant dispute about the ***scope*** of SCL's obligation to search ESI in Macau, in light of the limited nature of the jurisdictional discovery the Court has allowed and the extensive document production that has already been completed based on searches of ESI on LVSC's servers (including ESI for which Messrs. Adelson and Leven or their secretaries are the custodians) and of the Jacobs ESI that was transferred from Macau to the United States in 2010. Unless and until that dispute is resolved ***and*** unless and until SCL violates whatever order this Court might enter, Plaintiff's Motion for Sanctions is hopelessly premature.

On November 30, 2012, Plaintiff moved, on an order shortening time, for both discovery and an evidentiary hearing on his Motion for Sanctions. That motion has been set for Thursday, December 6, 2012 at 8:30 a.m. The Court should not rule on that Motion until it has an opportunity to consider SCL's Motion for a Protective Order, which SCL believes should obviate the need to hold any hearing at all on Plaintiff's Motion for Sanctions.

SCL's request for an order shortening time is made in good faith and is not made for any improper purpose, and accordingly SCL requests that this Motion be heard on an order shortening time.

DATED December 4, 2012.

J. Stephen Peek, Esq.
Robert J. Cassity, Esq,
Holland & Hart LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

Attorneys for Las Vegas Sands Corp. and Sands China Ltd.

and

J. Randall Jones, Esq.
Nevada Bar No. 1927
Mark M. Jones, Esq.
Nevada Bar No. 000267
Kemp Jones & Coulthard, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169

Attorneys for Sands China, Ltd.

DECLARATION OF J. STEPHEN PEEK, ESQ.

I, J. STEPHEN PEEK, ESQ., being duly sworn, state as follows:

1. I am one of the attorneys for Sands China Ltd. ("SCL") in this action. I make this Declaration in support of Defendant Sands China Ltd.'s Motion for a Protective Order in accordance with EDCR 2.34 and in support of its Ex Parte Application for an Order Shortening Time. I have personal knowledge of the facts stated herein, except those facts stated upon

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Las Vegas, Nevada 89134

information and belief, and as to those facts, I believe them to be true. I am competent to testify to the matters stated herein.

2. Plaintiff has taken the position, in correspondence and in a number of meet-and-confer sessions, that SCL and its indirect parent corporation, Las Vegas Sands Corporation ("LVSC") each has an independent obligation to produce any and all documents in its possession, custody or control that are responsive to the Requests for Production of Documents ("RFPs") that Plaintiff served on each Defendant. In addition, Plaintiff has interpreted those RFPs in an extremely broad manner, as requiring each Defendant to produce ***every*** document necessary to show ***every*** detail of ***every*** contact SCL had with the State of Nevada during the period from January 1, 2009 to October 20, 2010, whether directly or indirectly through LVSC. To date, Defendants have together produced over 168,000 pages of documents in response to Plaintiff's jurisdictional discovery at a cost we estimate to exceed $ 2.3 million.[1] Nevertheless, Plaintiff still claims that the production is deficient because certain "electronic records" (including ESI in Macau) have not been searched. *See* Pl. Motion for Sanctions at 6.

3. In meet-and-confer sessions and letters sent to Plaintiffs' counsel in May and June 2012, prior counsel for SCL made SCL's position clear that the production efforts of both Defendants must be viewed collectively and that, in light of the extensive production LVSC has provided, the documents SCL has already produced, and SCL's commitment to produce documents from the Jacobs ESI in the United States, SCL has no obligation to search ESI in Macau for purposes of jurisdictional discovery. Nevertheless, as a precautionary measure, SCL agreed to search ESI in Macau for which Jacobs was the custodian to ensure that there are no responsive documents that were not captured by the search of the Jacobs ESI in the United States. SCL also offered, as late as October 30, 2012, when new counsel appeared for SCL, to meet and confer with Plaintiff about ESI production in Macau.

4. Plaintiff ignored SCL's offer to meet and confer about that issue, but has also not brought a motion to compel, as SCL suggested it should do more than four months ago. Instead,

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[1] This is a rough (but conservative) estimate that represents our current best guess of how much has been spent on searching, reviewing and producing documents and the associated privilege logs.

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Las Vegas, Nevada 89134

Plaintiff has brought a Motion for Sanctions, in which he argues that SCL's failure to search its ESI in Macau (as opposed to the Jacobs ESI in the United States, which has been searched and from which over 15,000 pages of documents have been produced) was sanctionable. Indeed, Plaintiff cited the efforts of SCL's new counsel to meet and confer on the issue of ESI in Macau as evidence of SCL's supposed bad faith discovery conduct. Pl. Motion for Sanctions at 4.

5. In light of Plaintiff's Motion for Sanctions, it is clear that the parties are at an impasse and that additional efforts to meet and confer concerning the scope of SCL's remaining discovery obligations would not be fruitful. Accordingly, SCL has brought this Motion for a Protective Order to obtain a ruling from the Court that it is ***not*** required to search ESI in Macau except ESI for which Jacobs was the custodian.

6. SCL's request for an order shortening time is made in good faith and is not made for any improper purpose, and SCL specifically requests that the Court hear this Motion on an order shortening time.

7. I declare under penalty of perjury that the foregoing is true and correct.

J. Stephen Peek

J. Stephen Peek, Esq.

ORDER SHORTENING TIME

The Court having reviewed the Ex Parte Application for Order Shortening Time, and good cause appearing,

IT IS HEREBY ORDERED that the foregoing **DEFENDANT SANDS CHINA LTD.'S MOTION FOR A PROTECTIVE ORDER** shall be heard on shortened time on the 6th day of Dec, 2012, at the hour of 8 : 30 a.m./p.m. in Department XI of the Eighth Judicial District Court.

DATED this 4th day of Dec., 2012.

DISTRICT COURT JUDGE

WH

Holland & Hart LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT SANDS CHINA LTD.'S MOTION FOR A PROTECTIVE ORDER

I.

INTRODUCTION

In his recently-filed Motion for Sanctions (at 6), Plaintiff accuses Defendants of failing to follow through on the promises Defendants made to the Court on June 28, 2012, to re-double their efforts to fully comply with their discovery obligations. In fact, Defendants have done exactly what they told the Court they would do — and much more. As explained in greater detail below, Defendants have, as promised, produced responsive documents (i) from the Jacobs ESI that was transferred in 2010 to the United States from Macau and (ii) based on a new search of emails on LVSC's server between a long list of LVSC custodians and Jacobs. In addition, although Defendants do not believe they were required to do so, LVSC searched new custodians and applied expanded search terms to custodians whose ESI it had already searched in an effort to address Jacobs' assertions that there were inadequacies in the existing document production. As a result of all of these efforts, Defendants have produced approximately 148,000 additional pages of documents to Plaintiff since the June 28 status hearing, at an estimated cost in excess of $2 million.[2] The ***only*** discovery task that Defendants promised to do that they have yet to complete is a search of ESI in Macau for which Jacobs was the custodian to determine whether there are any additional responsive documents still in Macau that for some reason were not in the Jacobs ESI that was transferred to the U.S. SCL always made clear that searching ESI in Macau for which Jacobs was the custodian would be the last task it undertook, and it is that task to which SCL has now turned.

In his Motion for Sanctions, Plaintiff simply ignores Defendants' extensive document production over the course of the last several months and tries to twist the one piece that remains

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[2] Defendants estimated that it would take until Labor Day to review and produce the documents in the Jacobs ESI in the United States and to conduct the further Jacobs-related email review on the LVSC servers using Defendants' original search terms. 6/28/12 H'rng Tr., attached hereto as Ex. A, at 13. Defendants made that deadline. Production continued thereafter because Defendants expanded their search terms after meet-and-confer sessions with Plaintiff and applied those terms over all custodians whose ESI had previously been reviewed.

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to be completed (the Macau search of the Jacobs ESI) into a total failure to comply with SCL's discovery obligations. But as Jacobs well knows, that is not true. For months, the parties have had a dispute — which Plaintiff does not even acknowledge in his Motion for Sanctions — about whether SCL has an obligation to search its ESI for documents beyond those for which Jacobs was the custodian. SCL has consistently argued that it does not. SCL's position is based on a variety of factors, including the nature of Plaintiff's requests, which focus on interactions between LVSC and SCL and the activities of Messrs. Adelson and Leven (whose ESI resides on LVSC servers); the fact that LVSC has engaged in extensive production efforts that, in Defendants' view, go far beyond its obligations; and the enormous burden of conducting a review of ESI in Macau that is likely to be entirely duplicative and unnecessary to Jacobs' efforts to prove his case on jurisdiction. To give a simple example, for purposes of the limited jurisdictional discovery the Court ordered, SCL should not be required to search its ESI in order to identify and produce emails to or from LVSC employees when LVSC has already produced those very same emails. Yet Plaintiff has taken the position that each Defendant must produce all documents in its possession, custody or control that are responsive to Plaintiff's incredibly broad interpretation of his document requests and that SCL is, accordingly, required to duplicate all of the efforts LVSC has already undertaken in Las Vegas in Macau.

Plaintiff has refused to talk about any lesser proposal, despite SCL's stated willingness to do so. Indeed, Plaintiff's counsel simply ignored attempts by SCL's new counsel to meet and confer about ESI in Macau. Although SCL has suggested on more than one occasion that Plaintiff should bring a motion to compel if he disagrees with SCL's understanding of the scope of its discovery obligations, Plaintiff failed to file such a motion. It was not until Plaintiff filed his Motion for Sanctions that it became apparent that the parties are at an impasse on this issue. Accordingly, SCL now brings this Motion for a Protective Order, seeking a determination that it has no obligation to conduct any ESI searches in Macau — apart from running the precautionary Jacobs ESI comparison it has already promised to perform — on the off-chance that it might find a document that could be deemed responsive to one or more of Plaintiff's requests that has not already been produced.

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As demonstrated in greater detail below, the Court should grant SCL's motion pursuant to NRCP 26(c) because Defendants have together fully responded to all of the jurisdictional discovery the Court allowed and because requiring SCL to conduct further searches of ESI in Macau (apart from searches of the Jacobs ESI) would likely yield only duplicative and cumulative documents that Jacobs does not need and that, in any event, could not as a matter of law support his claim that this Court has general jurisdiction over SCL.

II.

BACKGROUND FACTS AND PROCEDURAL HISTORY

A. The Court's Order on Jurisdictional Discovery

In September 2011, shortly after the Nevada Supreme Court issued its Order on SCL's Petition for Mandamus, Jacobs' counsel moved for leave to conduct jurisdictional discovery. Plaintiff's counsel asked the Court to allow them to take depositions of four individuals who reside in Nevada (Messrs. Adelson, Leven, Goldstein and Kay) and to seek fifteen categories of documents. In the hearing on Plaintiff's motion, Jacobs' counsel stated that he had "***tried to narrowly confine what it is that we want to do***" with respect to jurisdictional discovery. 9/27/11 H'rng Tr., attached hereto as Ex. B, at 20 (emphasis added). One purpose of the discovery, Plaintiff's counsel said, was to determine whether SCL's "primary officers [whom he identified as Mr. Adelson and Mr. Leven] are directing the management and control of that company from the offices [of LVSC] here on Las Vegas Boulevard." *Id.* at 21. In support of that theory, Plaintiff sought documents that would enable him to determine whether two or more directors attended SCL Board meetings while located in Las Vegas, *id.* (Request #6[3]) and when and how often the deponents and other LVSC employees traveled to China on SCL-related business (Request #7). Plaintiff also sought documents related to Michael Leven's service as acting CEO of Sands China and/or Executive Director of the SCL Board (Request #9).

Plaintiff's counsel argued that he also needed discovery to "see what Sands China is doing in Nevada." *Id.* at 24. He emphasized that Jacobs was not pursuing an alter ego theory under

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[3] References herein to Plaintiff's Requests are to the numbered paragraphs in the Court's March 8 Order, attached hereto as Ex. C, in which the Court granted Plaintiff's request to take discovery with respect to eleven categories of documents.

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which LVSC's contacts with the forum would be attributed to SCL. *Id.* at 23-24. Instead, Plaintiff's counsel said he was trying to determine what SCL did "on its own" in Nevada, whether through its own officers, directors or employees, or through LVSC, supposedly acting as SCL's agent. *Id.* at 26. In support of these theories, Plaintiff asked for contracts that SCL had entered into with entities based in or doing business in Nevada, including shared services and other agreements between SCL and LVSC, as well as documents reflecting work performed by or on behalf of SCL in Nevada. *See* Requests # 10, 11, 13, and 16. Plaintiff also sought documents reflecting services performed by LVSC or its executives on behalf of SCL, as well as documents reflecting amounts (if any) that SCL paid to LVSC executives to reimburse them for work performed for SCL. *See* Requests # 12, 15, and 18.

The Court granted all of these requests, which were limited to the time period of January 1, 2009 to October 20, 2010, while denying four other requests.[4] When SCL subsequently sought clarification of the Court's ruling, the Court imposed as an "overriding limitation" on all discovery that "[t]he parties are permitted to conduct discovery related to activities that were done for or on behalf of Sands China." *See* March 8, 2012 Order at 6.[5] As SCL understands this limitation, Plaintiff is not entitled to discovery into activities that LVSC executives or employees engaged in on behalf of LVSC itself, which would include LVSC's supervisory activities as SCL's parent; instead, Plaintiff can only seek discovery into the actions of individuals acting directly for SCL (such as Messrs. Adelson or Leven, when they were wearing their SCL "hats") or LVSC executives or employees who were acting for or on behalf of SCL, pursuant to (for example) a shared services agreement.[6]

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[4] The Court also allowed Plaintiff to seek documents that SCL provided to the Nevada Gaming Commission during the period from January 1, 2009 to October 20, 2010. This category is not at issue because SCL has never conducted a gaming business in Nevada and thus does not provide documents to the Gaming Commission. *See* Sands China Ltd.'s Response to Plaintiff's First Request for Production, attached hereto as Ex. D, at 29.

[5] Although the Court's Order was not entered until March 8, 2012, it provided this clarification in a hearing held on October 13, 2011.

[6] Plaintiff's theory appears to be that LVSC acted as SCL's agent when it provided products and services pursuant to the Shared Services Agreement between LVSC and SCL. Defendants disagree. That Agreement did not purport to create an agency relationship, nor did it give SCL the right to control the manner in which LVSC performed the services in question. Without control, there is no principal-agent

B. Plaintiff's Discovery Requests

The Court's Order granting in part Plaintiff's Motion for Jurisdictional Discovery was not self-executing. *See* 10/13/11 H'ring Tr., attached hereto as Ex. E, at 65 ("You're going to have to do formal discovery requests. . . let's not assume that just because I said you can do these things . . . . that that means that [Defendants] have to immediately respond. They don't"). Although Plaintiff knew in mid-October that he would have to serve discovery requests on Defendants, it was not until more than two months later that Plaintiff finally propounded Requests for Production of Documents ("RFPs") separately to SCL and LVSC, on December 23 and 27, 2011. Those RFPs (attached hereto as Exs. F and G) were broader in a number of respects than the Court's Order granting discovery.

SCL and LVSC served timely objections and responses to the RFPs on January 23 and 30, 2012 respectively. *See* Exs. H and I hereto. Plaintiff responded by attacking Defendants' objections, demanding an immediate meet-and-confer, and threatening a prompt motion to compel. *See* Exs. J and K hereto. Among many other things, Plaintiff's counsel took the position that LVSC and SCL each had an independent obligation to produce all documents in its possession, custody or control that were responsive to the requests, even if those documents were completely duplicative. *See* 2/1/12 Letter from D. Spinelli to S. Peek, Ex. K hereto, at 1 (LVSC's response that the information sought by certain Requests could be derived from documents that SCL would produce, such as SCL Board minutes, was "insufficient" because LVSC supposedly had an independent duty to produce those documents). Notwithstanding the statements made in Plaintiff's initial letters, Plaintiff chose not to file a motion to compel. Instead, the parties did what they are supposed to do under the Nevada rules — they met and conferred repeatedly about their differences in an attempt to resolve them without seeking the Court's assistance.

On March 7, 2012, Munger Tolles sent a letter to Plaintiff's counsel offering detailed stipulations about the facts sought by Plaintiff in his RFPs as an alternative to the lengthy (and

(continued)

relationship. *See Hunter Mining Labs., Inc. v. Management Assistance, Inc.*, 763 P.2d 350, 352 (Nev. 1988) ("In an agency relationship, the principal possesses the right to control the agent's conduct"). However, for discovery purposes Defendants have assumed that any services LVSC provided to SCL in Nevada pursuant to the Shared Services Agreement would be deemed to have been provided "for or on behalf of SCL."

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likely contentious) discovery process that appeared to be in the offing. *See* Ex. L hereto.[7] Three weeks later, Plaintiff turned down SCL's offer to stipulate, stating that, although he "appreciated" the effort to streamline the proceedings, he wanted to proceed with discovery on each and every one of his RFPs. *See* Ex. O hereto. Thus, for example, Plaintiff was not content with a stipulation that Messrs. Leven and Adelson attended all telephonic Board meetings during the period in question from Las Vegas or with a stipulation as to how many trips Messrs. Adelson or Leven had made to China on SCL business during the relevant period. Plaintiff stated that the proposed stipulations were insufficient because he wanted to know not only the date, time and location of SCL Board meetings, but also what was on the agenda and what was being discussed at SCL Board meetings. Similarly, Plaintiff declined to stipulate to the seemingly simple RFP seeking information about the trips that Messrs. Adelson, Leven, Goldstein and others made to China during the period in question, on the ground that he was entitled to "***any*** document referencing the travel, which will likely include information as to what they were doing and why." T. Bice 3/28/12 Letter to J. Owens, Ex. O hereto, at 2 (emphasis added). Munger Tolles responded a week later by withdrawing the proposed stipulations, but noting that SCL would be producing documents during the week of April 9 (following the Court's entry of a negotiated protective order) and that SCL hoped to revisit the possibility of short-cutting discovery through stipulations after document production began. *See* Ex. P hereto.

C. Defendants' Document Production in April and May

SCL did in fact produce documents in April. Those documents related to the location and attendees at Board meetings (#6 of the March 8 Order), to Mr. Leven's appointments by the SCL Board (#9) and included contracts SCL had entered into directly with entities that are located or do business in Nevada (#11), contracts between SCL and LVSC (#13), and documents relating to

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[7] Munger Tolles' March 7, 2012 Letter took another request the Court had allowed (#18) out of play. The Court permitted Plaintiff to seek documents reflecting reimbursements made to any LVSC executive for work performed or services provided related to SCL, during the relevant time period. SCL explained that "LVSC reimburses its employees for business-related travel relating to providing services for SCL," but that "LVSC does not otherwise reimburse its employees for any services performed for SCL." *See* March 7 Letter at 9. SCL subsequently produced "connected transaction reports," which disclose all the accounting entries for services LVSC provided to SCL under their shared services agreement. *See* July 17, 2012 Munger Tolles Letter, Ex. M hereto, at 2; Index to SCL Doc. Production, Ex. N hereto.

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services performed by LVSC executives on behalf of SCL (#15). *See* SCL's First Supplemental Response to Plaintiff's RFPs, attached hereto as Ex. D. LVSC also produced documents, on a rolling basis. A letter from Munger Tolles dated July 17, 2012, attached hereto as Ex. M, at 1-2, explains in detail the process LVSC initially used to electronically search the LVSC database for responsive documents prior to the May 24, 2012 status check.

At meet-and-confer sessions held during the spring, Defendants' counsel took the position that their document production efforts should be evaluated on a collective basis. Many of the categories of documents the Court allowed were aimed at LVSC or at communications between LVSC and SCL; SCL took the position that it was not required to conduct duplicative searches in order to locate and produce (for example) the SCL end of an email that had been sent to someone at SCL by an LVSC executive (or vice versa).[8] *See, e.g.,* Letter dated May 18, 2012, attached hereto as Ex. Q, at 1-2. Similarly, SCL's view was that it was not required to produce agreements between SCL and LVSC that LVSC had already produced. Plaintiff disagreed, consistently arguing that SCL and LVSC had independent obligations to search and produce the very same universe of documents. While continuing to argue the point, ***Plaintiff never filed a motion to compel asking the Court to resolve this dispute.***

D. Jacobs' Electronic Media

While LVSC and SCL were producing documents on a rolling basis, the parties were also still negotiating over the deposit with the Court-appointed ESI vendor, Advanced Discovery, of the electronic media Jacobs had taken with him when he left Macau. In December 2011, the Court ordered Jacobs to produce to Advanced Discovery by December 9, 2011, a full mirror image of all electronic storage devices that were in his possession, custody or control when he was terminated. *See* Order Regarding November 22, 2011 Status Conference, attached as Ex. R hereto. Nevertheless, it was not until more than five months later, shortly before the May 24,

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[8] For example, LVSC was best situated to produce documents reflecting work Mr. Goldstein performed for SCL as an employee, officer or director of LVSC (#12), as well as documents reflecting work performed by LVSC on behalf of SCL (#15). That was also true with respect to Plaintiff's request for documents relating to Mr. Leven's service as acting CEO or Executive Director of SCL (#9). Mr. Leven did not have a Macau ("mo.com") email address, but instead used his Las Vegas Sands email address for both LVSC and SCL business. Mr. Adelson ESI was also located on the LVSC server.

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2012 status check, that Jacobs submitted any of his electronic media (the "Jacobs Collection") to Advanced Discovery to be imaged.

E. The May 24, 2012 Status Check

When the parties appeared at the May 24 status check, LVSC's counsel reported that LVSC was still producing documents but that it was close to completing its production efforts. Munger Tolles reported that all SCL had left to produce was responsive documents for which Jacobs was the custodian. Mr. Weissmann acknowledged that SCL had not yet searched the Jacobs ESI, stating that the search would involve an elaborate process and that SCL was waiting to conduct its own search until the Jacobs Collection held by Advanced Discovery could be searched. 5/24/12 H'ring Tr., attached hereto as Ex. S, at 12-14. The Court responded that this kind of "staggered" approach to discovery was improper, expressed her disappointment that discovery was proceeding so slowly and that the parties had not yet reached the deposition stage, and vacated the June hearing date. *Id.* at 14-15. The Court then instructed the parties to return for another status on June 28 and asked for status reports to be filed before that hearing. *Id.* at 20.

F. The June 28, 2012 Status Check

In their June 27 Joint Status Conference Statement, attached hereto as Ex. T, Defendants explained that they believed they had substantially completed their document production, with the exception of documents for which Jacobs was the custodian. Defendants stated that they had produced close to 20,000 pages of documents at a cost of well over $300,000. *Id.* at 2, 4. Defendants also described their plan to review the Jacobs ESI. The first step was to review the Jacobs ESI in the United States. Defendants disclosed that Jacobs' emails and other ESI had been transferred from Macau to the United States in 2010; Defendants promised to search and produce responsive documents from this collection. *Id.* at 5 (¶ 1). They also promised to search the emails of a large number of LVSC custodians who either received email from Jacobs or sent email to him during the relevant period with search terms designed to yield potentially relevant documents. *Id.* (¶ 2). Finally, as a precautionary measure, SCL said that it would take the results of this production and run searches on its subsidiary's (VML's) servers in Macau to see if there was any ESI for which Jacobs was the custodian in Macau that was not also in the United States.

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Id. at 6 (¶ 4). If so, SCL's proposal was to attempt to obtain permission from the Macau authorities (the Office for Personal Data Protection or "OPDP"), to the extent it was necessary to do so, to transfer that data to the United States for production to Jacobs. *Id.*at 6-7 (¶ 5).

In his Status Memorandum on Jurisdictional Discovery, also filed on June 27, attached as Ex. U hereto, Plaintiff reported on the status of the Jacobs Collection, noting that he was scheduled to provide his search terms to cull out his own privileged/private materials by July 2. Plaintiff then discussed at length Defendants' disclosure that the Jacobs ESI had been transferred to the United States in 2010. *Id.* at 3. Plaintiff asked the Court to establish a "prompt time period" for Defendants to review and produce documents from the Jacobs ESI in the United States and then to set a date for the evidentiary hearing — without any suggestion that Plaintiff thought that SCL was required to undertake additional searches of ESI in Macau. *Id.* at 2. The final portion of Plaintiff's Memorandum was devoted to an attack on the completeness of Defendants' document production. That portion of Plaintiff's status report was supported by a Declaration from Jacobs claiming that there were many categories of documents relating to LVSC's contacts with SCL that should have been produced, but had not been. Although it was clear that Jacobs' Declaration had been ***drafted*** to support a motion to compel, Plaintiff chose not to file a motion to compel, either then or later.[9]

At the June 28 status hearing, SCL's counsel noted that until Plaintiff filed his status report, SCL had "never heard about" any of Jacobs' specific complaints about documents that were supposedly "missing" from Defendants' production. 6/28/12 H'rg Tr., attached hereto as Ex. A, at 10. He noted that the appropriate way to deal with such issues was through the meet-and-confer process and, if the issues could not be resolved, by filing a motion to compel. *Id.* at 12. The Court agreed, stating "[i]t is the appropriate way, you're absolutely right." *Id.*; *see also id.* at 12-13 (noting that the Court had marked as a court exhibit a table Defendants had prepared with respect to their production to quickly respond to Jacobs' Declaration, "but I anticipate always that issues related to compelling documents will be handled by a motion").

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[9] When it was served, Jacobs' Declaration was captioned as being in support of a motion to compel. When it was filed, it became simply a Declaration.

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SCL's counsel also explained its plan for producing the Jacobs ESI going forward. He started by explaining that on May 29, 2012, the OPDP had informed SCL that it could produce documents from the Jacobs ESI that had been transferred to the United States without violating the Macau Personal Data Protection Act (the "MPDPA") — although it might still face penalties for the original transfer of those documents from Macau to the United States in 2010.[10] *Id.* at 4-5. In light of the OPDP's letter, SCL's counsel promised that "[w]e are going to double and redouble our efforts to move this thing along and review the Jacobs documents that are in the United States and get those documents that are responsive to jurisdiction produced as quickly as we can." *Id.* at 12.[11] He then noted that SCL had authorized counsel to

> increase staffing, increase the expense, and get it done. And we think that we can get all of the documents, other than documents in Macau – and we have to decide what the Court is going to do with that, because documents in Macau are a whole different situation and involve legal issues that may or may not have to be resolved on the jurisdictional issue. But we think we can get through all of the Jacobs documents and all of the other documents in the United States by Labor Day and get those produced so that if, Your Honor – if there's no discovery disputes and discovery motions, we think we'd be in a position to have a hearing in October. That's our best bet.

Id. at 13-14.

G. Defendants' Post-June 28 Document Production

Although the Court knows what happened thereafter with respect to the sanctions hearing, it has yet to hear the full story of what happened with discovery after June 28 — because until recently neither side asked for the Court's assistance with respect to any discovery disputes. After the June 28 hearing, Defendants' counsel engaged in numerous meet-and-confer sessions with Plaintiff's counsel in an effort to agree on a set of expanded search terms that LVSC could use to search the custodians whose documents had already been searched and a long list of custodians

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[10] As the Court knows, the OPDP has initiated an investigation into the original transfer. *See* Defendants' Statement Regarding Investigation by Macau Office of Personal Data Protection, filed on 8/7/12 and attached hereto as Ex. V.

[11] At page 6 of his recently-filed Motion for Sanctions, Plaintiff quotes SCL's counsel as saying that SCL was going to "double and re-double its efforts" and then claims that counsel was promising to review documents ***in Macau***. But, as the full quotation shows, the promise was to review and produce documents from the Jacobs ESI that was ***in the United States.*** SCL made no promises at all with respect to Macau and in fact reiterated the difficulties of producing documents that were located in Macau. *See* 6/28/12 H'rng Tr., Ex. A hereto, at 13.

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who traded emails with Jacobs during the relevant period. Eventually, Plaintiff's counsel simply refused to discuss search terms further, taking the position (as they do in Plaintiff's Motion for Sanctions) that Defendants should choose their own search terms and run their searches. Eventually, LVSC did just that.

LVSC unilaterally expanded its original search by adding four additional custodians and increasing the scope of the search terms used to identify potentially relevant information. LVSC also used the expanded search terms it generated to (i) identify responsive documents in the Jacobs ESI that had been transferred to the United States in 2010 and (ii) to identify emails on the LVSC server that were sent to or from a large number of LVSC custodians. *See also* Munger Tolles July 17, 2012 Letter, Ex. M hereto (explaining in detail the process Defendants intended to follow). This process has recently been completed, with documents produced to Plaintiff and privilege logs submitted. ***In total, Defendants have now produced more than almost 168,000 pages of documents in response to Plaintiff's jurisdictional discovery requests — an enormous undertaking that has cost more than $2.3 million.***[12]

In his Motion for Sanctions (at 6), Plaintiff claims that "LVSC and Sands China have still to this day conducted no search of numerous electronic files both in Macau and Las Vegas." But Plaintiff offers no explanation of ***which*** electronic files he thinks should have been searched or ***what*** documents he believes are missing. More importantly, Plaintiff does not even try to explain in what way the massive document production he has received fails to provide him with the evidence he needs in order to make whatever arguments he intends to make on the jurisdictional issue. As the Court noted in June, ***if*** Plaintiff has a complaint about the scope of Defendants' production, the appropriate way to handle it is by seeking a meet-and-confer and then, if an impasse is reached, bringing a motion to compel. Plaintiff cannot leap over those basic steps and seek sanctions simply because he claims that there are electronic files that have yet to be searched.

Although Plaintiff complains in his sanctions motion in a generalized way about SCL's

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[12] In addition, Defendants had produced approximately 36,000 pages of documents to Plaintiff before discovery was stayed in the summer of 2011; many of those documents are also responsive to Plaintiff's jurisdictional discovery requests.

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failure to review ESI in Macau, the fact is that Plaintiff has known for six months that SCL's position was and is that Jacobs is the only Macau custodian whose ESI SCL needed to search. In a July 30 letter, attached hereto as Ex. W, memorializing the parties' discussions of this issue, Munger Tolles explained that a broader review based on a larger group of custodians would be unduly burdensome and would be unreasonable and unnecessary in light of (i) the extensive review and production LVSC had done of documents showing the interaction between executives at LVSC's headquarters in Las Vegas (including Messrs. Adelson and Leven) and SCL and (ii) Defendants' agreement to produce responsive documents from the Jacobs ESI, beginning with the ESI that LVSC had transferred to the United States. SCL's counsel noted that Plaintiff had suggested during meet-and-confer sessions that SCL should take the initiative to resolve the dispute as to the scope of SCL's remaining discovery obligations by seeking a protective order; SCL responded that Plaintiff should file a motion to compel — a step Plaintiff never bothered to take.

H. SCL Retains New Counsel Following the Court's September 14 Order

That was the state of play in October 2012, when the undersigned new counsel substituted for Munger Tolles as counsel for SCL. Shortly thereafter, Mark Jones, along with Mr. Peek, attempted to meet and confer with Plaintiff's counsel about discovery of ESI in Macau. As Plaintiff admits, his counsel took the position that there was nothing to discuss. *See* Pl. Motion for Sanctions, at 4. Accordingly, SCL's new counsel took steps to complete the discovery that SCL had promised of the Jacobs ESI in Macau — a process that SCL had ***always*** said would come ***after*** the review and production of the Jacobs ESI that LVSC transferred to the United States from Macau in 2010.

SCL recognizes that in its sanctions Order the Court told SCL that it could not rely on the MPDPA as a basis for objecting to the production of documents. Nor has SCL done so: Defendants have produced all responsive documents in the Jacobs ESI in the United States without making any objections based on the MPDPA. However, we do not read the Court's Order as prohibiting SCL from attempting to comply with the procedures the OPDP requires under the MPDPA ***before*** producing documents from Macau that raise data privacy issues. That is what

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SCL's new counsel have done.

As SCL has previously reported, in August 2012, SCL received the OPDP's long-awaited response to its request to transfer data to the United States in order to respond to document requests in this case and other matters. *See* Defs. Statement on Potential Sanctions, filed 9/11/12, Ex. X hereto, at 12; *see also* the OPDP's August 8, 2012 letter attached as Ex. Y hereto. In that letter, the OPDP not only rejected SCL's request, but stated that SCL's own lawyers could not even ***review*** documents in Macau that are subject to the MPDPA to determine whether they are responsive to U.S. discovery requests or subpoenas. *Id.*

After the status check on October 30, 2012, Mark Jones and Michael Lackey of Mayer Brown LLP immediately flew to Macau to meet with the OPDP, along with in-house counsel for SCL and its operating subsidiary VML, in an attempt to convince the OPDP to allow counsel retained by VML to review documents so it can be determined (as SCL had said it would do all along) whether there are any unique responsive documents in Macau for which Jacobs was the custodian. *See* Ex. Z hereto, which is a copy of the written request SCL and VML submitted. On November 29, SCL received a response from the OPDP, a copy of which is attached hereto as Ex. AA, which gives SCL's subsidiary (VML) permission to review documents containing personal data by automated means so long as that review is conducted by either VML's in-house lawyers in Macau or by external Macau lawyers. Those lawyers would be responsible for identifying personal information and either obtaining the individual's consent to transferring the data or redacting it before the documents identified through the electronic search could be provided to external SCL lawyers in Hong Kong, who would review them for responsiveness, privilege, and other allowable restriction. By following the procedure OPDP has prescribed, SCL hopes to be able to discharge both its obligations to this Court and to the government of its home jurisdiction.

For the reasons outlined below, SCL's remaining obligations to search for responsive documents in Macau should be limited to what SCL has already agreed to do — search ESI for which Jacobs was the custodian to ensure that all responsive documents have in fact been produced from that collection.

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III.

LEGAL ANALYSIS

NRCP 26(b)(2) provides that the Court "shall" limit discovery if it determines that

> (i) the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

In this case, all three of these reasons combine to support SCL's motion for a protective order against Plaintiff's apparent demand for open-ended discovery of SCL's ESI in Macau. First, Plaintiff has had "ample opportunity" to obtain the information he seeks in discovery; indeed, Defendants together have produced documents that fully responded to all of the discovery the Court permitted. Second, any additional ESI discovery in Macau would likely be "cumulative or duplicative" of the discovery Plaintiff has already received from LVSC. Finally, the burden and expense of requiring SCL to search its ESI in Macau beyond the ESI for which Jacobs was the custodian would be wholly unjustified not only because it would likely produce only duplication, but also because Plaintiff already has all of the evidence he needs (and more) to make whatever arguments he chooses to make on the limited issue of jurisdiction.

Plaintiff convinced the Court to grant him jurisdictional discovery by representing that he was seeking discovery that was "narrowly confine[d]" to particular jurisdictional theories and could be quickly completed. 9/27/11 H'rng Tr., attached hereto as Ex. B, at 20. Yet once the hearing date had been postponed and his discovery requests were finally served, Plaintiff took a remarkably expansive view of what he was entitled to seek, asking not only for documents that would enable him to identify SCL's contacts with Nevada, but also all of the ***details*** concerning those contacts — details that have little or no relevance to the jurisdictional analysis. Notwithstanding their disagreement with Plaintiff's view of the scope of discovery the Court permitted, Defendants expanded their searches and have now produced almost 168,000 pages of documents in response to Plaintiff's requests for jurisdictional discovery at a cost we estimate to

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exceed $2.3 million. In addition, in accordance with the Court's March 8 Order, Defendants have presented Messrs. Adelson, Goldstein and Leven for deposition (with Mr. Kay scheduled for December 18). Yet Plaintiff is still not satisfied, although he has refused to engage in any meet-and-confer process or to file a motion to compel seeking specific categories of documents that he claims have yet to be produced. For the reasons outlined below, it is clearly time to call an end to further disputes over discovery — as well as sanctions motions — and to finally get to the hearing the Nevada Supreme Court ordered this Court to conduct.

A. Plaintiff Has Obtained All Relevant Discovery

Defendants have produced all contracts between SCL and LVSC during the period in question, including a shared services agreement pursuant to which LVSC provided SCL with certain procurement and other services. These documents fully responded to Request #13 (for all agreements for shared services between SCL or its subsidiaries and LVSC). SCL also produced the handful of contracts it had during the period in question with Nevada entities other than LVSC. *See* Request #11 (for contracts SCL entered into with Nevada entities). SCL told Plaintiff that it had never filed any documents before the Nevada Gaming Commission (Request #19), had not executed any contracts for financing in Nevada (Request #10) (although it acknowledged that LVSC had been involved in certain of SCL's funding efforts), and had never reimbursed LVSC executives directly for their work for SCL (Request # 18) (although SCL produced documents showing the compensation it had paid to LVSC for those services). In addition, Defendants produced travel records showing business travel by LVSC executives to Hong Kong, Macau or mainland China during the relevant period (Request #7). Defendants also produced documents showing where SCL's in-person Board meetings were held and who attended telephonic meetings (Request #1); Defendants offered to stipulate that Messrs. Adelman and Leven attended all telephonic meetings from Las Vegas. Munger Tolles, March 7 Letter, Ex. L hereto, at 1.

Two other requests (#9 and #12) sought documents reflecting the activities of Michael Leven and Robert Goldstein for or on behalf of SCL. LVSC produced documents for which Mr. Leven and Mr. Goldstein were custodians and thus should have captured all of the responsive documents for these requests as well.

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That leaves only the two broadest (and largely overlapping) requests (#15 and #16), in which Plaintiff was allowed to seek documents reflecting (i) services performed by LVSC on behalf of SCL during the relevant period, including but not limited to services relating to five specific activities and (ii) services performed on behalf of SCL in Nevada, including communications with a number of non-LVSC entities based in Nevada. To answer these requests, LVSC initially searched ESI for which Messrs. Adelson, Leven, Goldstein, Kay, and Chiu (also an LVSC executive) were custodians; in terms of Macau custodians, it has been clear since June 2012 that SCL planned to search only the ESI for which Jacobs was the custodian. This limitation of custodians was reasonable. Plaintiff himself argued in seeking jurisdictional discovery that "the three key witnesses in this entire debate I would argue are Mr. Jacobs and these two gentlemen [Messrs. Adelson and Leven]." 9/27/11 H'rng Tr., Ex. B hereto, at 19-20. Limiting ESI searches to the documents held by key individuals is widely accepted as an appropriate practice to enable the parties to "balanc[e] the cost, burden, and need for electronically stored information." THE SEDONA CONFERENCE, SEDONA PRINCIPLES ADDRESSING ELECTRONIC DOCUMENT PRODUCTION, Principle 2 (2d ed. 2007) ("SEDONA PRINCIPLES"). *See* SEDONA PRINCIPLES, Cmt. 6(b) (explaining that it is preferable to "collect[] electronically stored information from repositories used by key individuals rather than generally searching through an entire organization's electronic information system").

After Jacobs filed his Declaration on June 27, LVSC attempted to meet and confer with Plaintiff to agree on an expanded list of custodians and search terms for the ESI on LVSC's server that would capture documents that Plaintiff claimed should have been produced. Ultimately, Plaintiff declined to continue efforts to reach an agreement and so Defendants applied their own list of expanded search terms, to an expanded list of custodians in the LVSC data base (including custodians who corresponded with Jacobs) and to the Jacobs ESI that had been transferred to the U.S. in 2010. That is precisely what courts have suggested parties should do when the other side refuses to agree on custodians and search terms. *See, e.g.*, *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 374 (S.D.N.Y. 2006) (holding that defendant "should have proceeded unilaterally, producing all responsive documents located by its search" when plaintiff refused to stipulate to a search

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methodology). Having refused to participate in efforts to craft appropriate search terms, Plaintiff should not be heard to claim now that any search using those terms was inadequate.

In any event, neither in his Motion for Sanctions nor in his communications with Defendants has Plaintiff offered any specific complaints about the adequacy of Defendants' discovery responses. Before the June 28 status, Jacobs provided this Court with a Declaration listing a variety of documents that he claimed should have been produced in response to his RFPs, but were "missing" from the production. By contrast, Plaintiff's recently-filed Motion for Sanctions is devoid of ***any*** specific complaint about documents or categories of documents that have not been produced. That silence, in and of itself, confirms that Defendants have discharged their obligation to provide Plaintiff with the documents this Court allowed him to request.

B. Searches Of Other Custodians' ESI In Macau Would Produce Only Duplication

In his Motion for Sanctions (at 6), Plaintiff claims that Defendants "have still to this day conducted no search of numerous electronic files both in Macau and Las Vegas." But what files? And what custodians? Under the Sedona Principles, electronic discovery is supposed to be tailored to avoid "unreasonable overbreadth, burden, and cost" to the responding party, SEDONA PRINCIPLES, cmt. 6(b); *see also So. Capitol Enters., Inc. v. Conseco Servs., LLC*, No. 04-705, 2008 U.S. Dist. LEXIS 87618, at *7 (M.D. La. Oct. 24, 2008) (denying in part motion for further discovery because "the likely benefit that could be obtained from [further discovery on the topic was] outweighed by the burden and expense of requiring defendants to renew their attempts to retrieve the electronic data."). Thus, "[d]iscovery should not be permitted to continue indefinitely merely because a requesting party can point to undiscovered documents and electronically stored information when there is no indication that the documents or information are relevant to the case, or further discovery is disproportionate to the needs of the case." SEDONA PRINCIPLES, cmt. 6(b); *see also Rimkus Consulting Grp., Inc. v. Cammarata,* 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) ("Whether . . . discovery conduct is acceptable in a case depends on what is reasonable, and that in turn depends on whether what was done—or not done—was proportional to that case and consistent with clearly established applicable standards"); *Daugherty v. Murphy*, No. 1:06-cv-0878-SEB-DML, 2012 WL 4877720, at *7 (S.D. Ind. Nov. 23, 2010) (denying plaintiffs' motion

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to compel because the time and expense involved in additional discovery outweighed the benefits to be gained from the additional discovery and "its importance to the issues to be resolved" in the case at bar). Here, there is no reason to believe that still more searches would turn up new documents or information that would be relevant to the narrow jurisdictional issue, which is the ***only*** issue that is now before the Court.

Specifically, there is no reason to believe that searching the ESI in Macau of custodians other than Jacobs would lead to the identification of additional, non-cumulative documents that would be relevant to the issue of jurisdiction. Certainly, it would make no sense to force SCL to go through the considerable expense of searching its emails so that it could produce the other half of emails to or from LVSC executives or emails to or from Messrs. Adelson or Leven. Plaintiff's theory is that SCL was run by Messrs. Adelson and Leven from Las Vegas or that LVSC executives acted on behalf of SCL in Nevada to such an extent that SCL should be deemed to be "present" here. While we disagree with that theory as a matter of law, the fact that Plaintiff himself focuses on SCL's interactions with LVSC and on Messrs. Adelson and Leven, whose ESI resides on the LVSC server, means that virtually all of what Jacobs himself claims he needs to support his jurisdictional arguments should already have been produced as a result of LVSC's extensive production efforts. In addition, Plaintiff has the contracts and other information outlined above from SCL, as well as the documents Defendants have produced from the Jacobs ESI that was transferred to the U.S. in 2010 and by searching emails between Jacobs and a long list of LVSC custodians. Finally, as a result of the Court's September 14, 2012 Order, Jacobs is also free to use anything (other than the documents as to which Defendants have claimed privilege) that he brought back with him from Macau to support his jurisdictional arguments. There is no reason to believe, nor does Plaintiff even argue, that a search of ESI in Macau would yield any previously unproduced documents that would not be merely cumulative of the documents Jacobs already has.

C. Even If There Were Unique Documents Yet To Be Found In Macau, The Cost Of Searching For Them Far Outweighs Any Need Plaintiff Could Claim.

We do not know what kind of search Plaintiff thinks SCL is required to conduct of ESI in

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inquire of Mr. Justin Jones?

MR. BRIAN: No, Your Honor.

THE COURT: Thank you, Mr. Jones. Have a very nice day.

That takes us to a short break before we begin with I believe Mr. Singh. So 10 minutes.

MR. PEEK: Thank you, Your Honor.

(Court recessed at 10:59 a.m., until 11:07 a.m.)

THE COURT: Mr. Brian --

MR. BRIAN: Yes.

THE COURT: -- the case I was trying to tell Mr. McCrea about, the name I couldn't remember, is Francis versus Wynn.

MR. BRIAN: Okay. That's the case name?

THE COURT: 127 Nev. Adv. Opn. 60. So it's a 2011 case.

MR. BRIAN: Okay. Thank you.

THE COURT: Unfortunately, I have the carry on of that case, and Mr. Pisanelli had the first part of that case, I think. Mr. Bice had the first part.

MR. BRIAN: And that's the Fifth Amendment case you were talking about?

THE COURT: Yeah.

MR. BRIAN: Yeah.

THE COURT: And I read in the paper that the jury

about setting up that schedule, because it's going to have to be briefed for Your Honor.

I would just ask Your Honor to take into account the situation that everybody was in in assessing what you think is appropriate. I would argue, and I mean this not as a spin, but as a defense, and not that they didn't step over the line, it wasn't perfect, and, Your Honor, it may have been bad judgment, and Your Honor's impression may have been understandable. I'm not quarrelling with that. But should they be convicted, if you will, of knowingly and wilfully saying something false? And given the information they had and the dilemma they had and the binds they had in their ethical obligations to their own clients, I would respectfully submit that this proceeding itself has stigmatized them, and I would ask for the Court's understanding going forth.

THE COURT: Thank you.

I will issue a written decision, and you will have it by the beginning of next week.

Anything else? Have a nice day.

THE PROCEEDINGS CONCLUDED AT 5:01 P.M.

* * * * *

INDEX

* * *

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
Las Vegas, Nevada 89146

9/13/12

FLORENCE HOYT, TRANSCRIBER — DATE

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09/14/2012 10:39:25 AM

CLERK OF THE COURT

FFCL

DISTRICT COURT

CLARK COUNTY, NEVADA

STEVEN JACOBS,

Plaintiff(s),

vs

LAS VEGAS SANDS CORP, ET AL,

Defendants.

Case No. 10 A 627691
Dept. No. XI

Date of Hearing: 09/10-12/12

DECISION AND ORDER

This matter having come on for an evidentiary hearing before the Honorable Elizabeth Gonzalez beginning on September 10, 2012 and continuing day to day, based upon the availability of the Court and Counsel, until its completion on September 12, 2012; Plaintiff Steven Jacobs ("Jacobs") being present in court and appearing by and through his attorney of record, James Pisanelli, Esq., Todd Bice, Esq., and Debra Spinelli, Esq. of the law firm of Pisanelli Bice; Defendant Las Vegas Sands appearing by and through its counsel J. Stephen Peek, Esq. of the law firm of Holland & Hart and counsel for purposes of this proceeding, Samuel Lionel, Esq. and Charles McCrea, Esq., of the law firm of Lionel Sawyer & Collins; Defendant Sands China appearing by and through its counsel J. Stephen Peek, Esq. of the law firm of Holland & Hart, Brad D. Brian, Esq., Henry Weissman, Esq., and John B. Owens, Esq. of the law firm of Munger Tolles & Olson and counsel for purposes of this proceeding, Samuel Lionel, Esq. and Charles McCrea, Esq., of the law firm of Lionel Sawyer & Collins; the Court having read and considered the pleadings filed by the parties and the transcripts of prior hearings; having reviewed the evidence admitted during the trial; and having heard and carefully considered the testimony of the witnesses called to testify; the Court having considered the oral and written arguments of counsel, and with the intent of deciding the limited issues before the Court related to lack of candor and nondisclosure of information to

the Court and appropriate sanctions pursuant to EDCR 7.60. The Court makes the following findings of fact and conclusions of law:

I.
PROCEDURAL POSTURE

On August 26, 2011, the Nevada Supreme Court issued a stay of proceedings in this matter pending the conduct of an evidentiary hearing and decision on jurisdictional issues related to Sands China. The Court granted Jacobs request to conduct jurisdictional discovery prior to the evidentiary hearing. The order granting the jurisdictional discovery was ultimately entered on March 8, 2012.

II.
FINDINGS OF FACT[1]

1. Prior to litigation, in approximately August 2010, a ghost image of hard drives of computers used by Steve Jacobs in Macau[2] and copies of his outlook emails were transferred by way of electronic storage devices (the "transferred data") to Michael Kostrinsky, Esq., Deputy General Counsel of Las Vegas Sands.[3]

---

[1] Counsel for Las Vegas Sands objected on the basis of attorney client privilege to a majority of the questions asked of the counsel who testified during the evidentiary hearing. Almost all of those objections were sustained. While numerous directions not to answer on the basis of attorney client privilege and the attorney work product were made by counsel for Las Vegas Sands, sustained by the Court, and followed by the witnesses, sufficient information was presented through pleadings already in the record and testimony of witnesses without the necessity of the Court drawing inferences related to the assertion of those privileges. See generally, Francis v. Wynn, 127 NAO 60 (2011). The Court also rejects Plaintiff's suggestion that adverse presumptions should be made by the Court as a result of the failure of Las Vegas Sands to present explanatory evidence in its possession and declines to make any presumptions which might arguably be applicable under NRS Chapter 47.

[2] There is an issue that has been raised regarding the current location of those computers and hard drives from which the ghost image was made. The Court does not in this Order address any issues related to those items.

[3] According to a status report filed by Las Vegas Sands on July 6, 2012, there were other transfers of electronically stored data. Based upon testimony elicited during the evidentiary hearing, counsel was unaware of those transfers prior to the preparation and filing of the status report.

2. Kostrinsky requested this information in anticipation of litigation with Jacobs after learning of receipt of a letter by then general counsel for Las Vegas Sands from Don Campbell.

3. This transferred data was placed on a server at Las Vegas Sands and was initially reviewed by Kostrinsky.

4. The attorneys for Sands China at the Glaser Weil firm were aware of the existence of the transferred data on Kostrinsky's computer from shortly after their retention in November 2010.

5. The transferred data was reviewed in Kostrinsky's office by attorneys from Holland & Hart.

6. On April 22, 2011, in house counsel for Sands China, Anne Salt, participated in the Rule 16 conference by videoconference and responded to inquiry by the Court related to electronically stored information and confirmed preservation of the data.

7. At no time during the Rule 16 conference did Ms. Salt or anyone on behalf of Sands China advise the Court of the potential impact of the Macau Personal Data Privacy Act (MDPA) upon discovery in this litigation.

8. Following the Rule 16 conference with the Court, the parties filed a Joint Status Report on April 22, 2011, in which they agreed that the initial disclosure of documents pursuant to NRCP 16.1 would be made by Sands China and Las Vegas Sands prior to July 1, 2011. The MDPA is not mentioned in the Joint Status Report as potentially affecting discovery in this litigation.

9. Following the Rule 16 conference, no production or other identification of the information from the transferred data was made.

10. Beginning with the motion filed May 17, 2011, Sands China and Las Vegas Sands raised the MDPA as a potential impediment (if not a bar) to production of certain documents.

11. At a hearing on June 9, 2012, counsel for Sands China represented to the Court that the documents subject to production were in Macau; were not allowed to leave Macau; and, had to be reviewed by counsel for Sands China in Macau prior to requesting the Office of Personal Data Protection in Macau for permission to release those documents for discovery purposes in the United States.

12. At the time of the representation made on June 9, 2012, the transferred data had already been copied; the copy removed from Macau; and reviewed in Las Vegas by representatives of Las Vegas Sands.

13. The transferred data was stored on a Las Vegas Sands shared drive totaling 50 – 60 gigabytes of information.

14. Prior to July 2011, Las Vegas Sands had full and complete access to documents in the possession of Sands China in Macau through a network to network connection.

15. Beginning in approximately July 2011, Las Vegas Sands access to Sands China data changed as a result of corporate decision making.

16. Prior to the access change, significant amounts of data from Macau related to Jacobs was transported to the United States and reviewed by in house counsel for Las Vegas Sands and outside counsel, and placed on shared drives at Las Vegas Sands.

17. At no time did Las Vegas Sands or Sands China disclose the existence of this data to the Court.[4]

18. At no time did Las Vegas Sands or Sands China provide a privilege log identifying documents which it contended were protected by the MDPA which was discussed by the Court on June 9, 2011.

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[4] While Las Vegas Sands contends that a disclosure was made on June 9, 2011, this is inconsistent with other actions and statements made to the Court including the June 27, 2012 status report, the June 28, 2012 hearing and the July 6, 2012 status report.

19. For the first time on June 27, 2012, in a written status report, Las Vegas Sands and Sands China advised the Court that Las Vegas Sands was in possession of over 100,000 emails and other ESI that had been transferred "in error".

20. In the June 27, 2012 status report, Las Vegas Sands admits that it did not disclose the existence of the transferred data because it wanted to review the Jacobs ESI.[5]

21. Any finding of fact stated hereinabove that is more appropriately deemed a conclusion of law shall be so deemed.

III.
CONCLUSIONS OF LAW

22. The MDPA and its impact upon production of documents related to discovery has been an issue of serious contention between the parties in motion practice before this Court since May 2011.

23. The MDPA has been an issue with regards to documents, which are the subject of the jurisdictional discovery.

24. At no time prior to June 28, 2012, was the Court informed that a significant amount of the ESI in the form of a ghost image relevant to this litigation had actually been taken out of Macau in July or August of 2010 by way of a portable electronic device.

25. EDCR Rule 7.60 provides in pertinent part:

* * *

(b) The court may, after notice and an opportunity to be heard, impose upon an attorney or a party any and all sanctions which may, under the facts of the case, be reasonable, including the imposition of fines, costs or attorney's fees when an attorney or a party without just cause:

* * *

(3) So multiplies the proceedings in a case as to increase costs unreasonably and vexatiously.

---

[5] The Court notes that there have also been significant issues with the production of information from Jacobs. On appropriate motion the Court will deal with those issues.

26. As a result of the failure to disclose the existence of the transferred data, the Court conducted needless hearings on the following dates which involved (at least in part) the MDPA issues:

May 26, 2011

June 9, 2011

July 19, 2011

September 20, 2011[6]

October 4, 2011[7]

October 13, 2011

January 3, 2012

March 8, 2012

May 24, 2012

27. The Court concludes after hearing the testimony of witnesses that the 100,000 emails and other ESI were not transferred in error, but was purposefully brought into the United States after a request by Las Vegas Sands for preservation purposes.

28. The transferred data is relevant to the evidentiary hearing related to jurisdiction, which the Court intends to conduct.

29. The change in corporate policy regarding Las Vegas Sands access to Sands China data made during the course of this ongoing litigation was made with an intent to prevent the disclosure of the transferred data as well as other data.[8]

30. The Defendants concealed the existence of the transferred data from this Court.

---

[6] This hearing was conducted in a related case, A648484.

[7] This hearing was conducted in a related case, A648484.

[8] While the Court recognizes that several other legal proceedings related to certain allegations made by Jacobs were commenced during the course of this litigation including subpoenas from the SEC and DOJ, this does not excuse the failure to disclose the existence of the transferred data; the failure to identify the transferred data on a privilege log, or the failure produce of the transferred data in this matter.

31. As the transferred data had already been reviewed by counsel, the failure to disclose the existence of this transferred data to the Court caused repeated and unnecessary motion practice before this Court.

32. The lack of disclosure appears to the Court to be an attempt by Defendants to stall the discovery, and in particular, the jurisdictional discovery in these proceedings.

33. Given the number of occasions the MDPA and the production of ESI by Defendants was discussed there can be no other conclusions than that the conduct was repetitive and abusive.

34. The conduct however does not rise to the level of striking pleadings as exhibited in the Foster v. Dingwall, 227 P.3d 1042 (Nev. 2010) or the entry of default as in Goodyear v. Bahena, 235 P.3d 592 (Nev. 2010) cases.[9]

35. After evaluating the factors in Ribiero v. Young, 106 Nev. 88 (1990), the Court finds:

a. There are varying degrees of willfulness demonstrated by the Defendants and their agents in failing to disclose the transferred data to Plaintiff ranging from careless nondisclosure to knowing, willful and intentional conduct with an intent to prevent the Plaintiff access to information discoverable for the jurisdictional proceedings;[10]

b. There are varying degrees of willfulness demonstrated by the Defendants and their agents ranging from careless nondisclosure to knowing, willful and intentional conduct in concealing the existence of the transferred data and failing to disclose the transferred data to the Court with an intent to prevent the Court ruling on the discoverability for purposes of the jurisdictional proceedings;

---

[9] The Court recognizes no factors have been provided to guide in the evaluation of sanctions for conduct in violation of EDCR 7.60, but utilizes cases interpreting Rule 37 violations as instructive.

[10] As a result of the stay, the court does not address the discoverability of the transferred data and the effect of the conduct related to the entire case.

c. The repeated nature of Defendants and Defendants' agents conduct in making inaccurate representations over a several month period is further evidence of the intention to deceive the Court;

d. Based upon the evidence currently before the Court it does not appear that any evidence has been irreparably lost;[11]

e. There is a public policy to prevent further abuses and deter litigants from concealing discoverable information and intentionally deceiving the Court in an attempt to advance its claims; and

f. The delay and prejudice to the Plaintiff in preparing his case is significant, however, a sanction less severe than striking claims, defenses or pleadings can be fashioned to ameliorate the prejudice.

36. The Court after evaluation of the evidence and testimony, weighing the factors and evaluating alternative sanctions determines that evidentiary and monetary sanctions are an alternative less severe sanction to address the conduct that has occurred in this matter.

37. Any conclusion of law stated hereinabove that is more appropriately deemed a finding of fact shall be so deemed.

IV.

ORDER

Therefore the Court makes the following order:

a. For purposes of jurisdictional discovery and the evidentiary hearing related to jurisdiction, Las Vegas Sands and Sands China will be precluded from raising the MDPA as an objection or as a defense to admission, disclosure or production of any documents.[12]

---

[11] There is an issue that has been raised regarding the current location of those computers and hard drives from which the ghost image was made. The Court does not in this Order address any issues related to those items.

[12] This does not prevent the Defendants from raising any other appropriate objection or privilege.

b. For purposes of jurisdictional discovery and the evidentiary hearing related to jurisdiction, Las Vegas Sands and Sands China are precluded from contesting that Jacobs ESI (approx. 40 gigabytes) is not rightfully in his possession.[13]

c. Defendants will make a contribution of $25,000 to the Legal Aid Center of Southern Nevada.

d. Reasonable attorneys' fees of Plaintiff will be awarded upon filing an appropriate motion for those fees incurred in conjunction with those portions of the hearings related to the MDPA identified in paragraph 26.

Dated this 14th day of September, 2012

ELIZABETH GONZALEZ
District Court Judge

Certificate of Service

I hereby certify that on or about the date filed, this document was copied through e-mail, or a copy of this Order was placed in the attorney's folder in the Clerk's Office or mailed to the proper person as follows:

J. Stephen Peek, Esq. (Holland & Hart)

Samuel Lionel, Esq. (Lionel Sawyer & Collins)

Brad D. Brian Esq. (Munger Tolles & Olson)

James J. Pisanelli, Esq. (Pisanelli Bice)

Dan Kutinac

[13] This does not prevent the Defendants from raising any other appropriate objection or privilege.

MOT
James J. Pisanelli, Esq., Bar No. 4027
JJP@pisanellibice.com
Todd L. Bice, Esq., Bar No. 4534
TLB@pisanellibice.com
Debra L. Spinelli, Esq., Bar No. 9695
DLS@pisanellibice.com
PISANELLI BICE PLLC
3883 Howard Hughes Parkway, Suite 800
Las Vegas, Nevada 89169
Telephone: (702) 214-2100
Facsimile: (702) 214-2101

Attorneys for Plaintiff Steven C. Jacobs

DISTRICT COURT

CLARK COUNTY, NEVADA

STEVEN C. JACOBS,

Plaintiff,

v.

LAS VEGAS SANDS CORP., a Nevada corporation; SANDS CHINA LTD., a Cayman Islands corporation; DOES I through X; and ROE CORPORATIONS I through X,

Defendants.

AND RELATED CLAIMS

Case No.: A-10-627691
Dept. No.: XI

PLAINTIFF STEVEN C. JACOBS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS USED BY WITNESS TO REFRESH RECOLLECTION

Hearing Date:

Hearing Time:

Plaintiff Steven C. Jacobs ("Jacobs") moves this Court for an order compelling the production of documents used by Justin C. Jones to refresh his recollection in preparation for testifying at the September 12, 2012, sanctions hearing. Pursuant to NRS 50.125, Jacobs is entitled to the immediate production of all documents Mr. Jones reviewed to refresh his memory in preparation for testifying at the sanctions hearing.

This Motion is made pursuant to NRS 50.125 and is based on the following Memorandum of Points and Authorities, any and all exhibits thereto, the papers and pleadings on file herein, and any oral argument this Court may consider.

DATED this 16th day of November, 2012.

PISANELLI BICE PLLC

By: _____

James J. Pisanelli, Esq., Bar No. 4027
Todd L. Bice, Esq., Bar No. 4534
Debra L. Spinelli, Esq., Bar No. 9695
3883 Howard Hughes Parkway, Suite 800
Las Vegas, Nevada 89169

Attorneys for Plaintiff Steven C. Jacobs

PISANELLI BICE PLLC
3883 HOWARD HUGHES PARKWAY, SUITE 800
LAS VEGAS, NEVADA 89169

NOTICE OF MOTION

PLEASE TAKE NOTICE that the undersigned counsel will appear at Clark County Regional Justice Center, Eighth Judicial District Court, Las Vegas, Nevada, on the ___ day of _____, 2012, at __ _.m., in Department XI, or as soon thereafter as counsel may be heard, to bring this **PLAINTIFF STEVEN C. JACOBS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS USED BY WITNESS TO REFRESH RECOLLECTION** on for hearing.

DATED this 16th day of November, 2012.

PISANELLI BICE PLLC

By: _____

James J. Pisanelli, Esq., Bar No. 4027
Todd L. Bice, Esq., Bar No. 4534
Debra L. Spinelli, Esq., Bar No. 9695
3883 Howard Hughes Parkway, Suite 800
Las Vegas, Nevada 89169

Attorneys for Plaintiff Steven C. Jacobs

PISANELLI BICE PLLC
3883 HOWARD HUGHES PARKWAY, SUITE 800
LAS VEGAS, NEVADA 89169

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

During the sanctions hearing against Defendants, Justin C. Jones, a former attorney for Las Vegas Sands Corp. ("LVSC"), testified to reviewing documents to refresh his recollection in preparation for testifying. Such documents included Mr. Jones' billing entries for May, August and September 2011, as well as approximately ten to fifteen emails relating to this matter. After Mr. Jones' examination, Jacobs requested production of these documents based on NRS 50.125 and the relevant case law. Defendants refused but provided no legal basis for doing so. NRS 50.125 establishes a simple rule: all documents used by a witness to refresh his recollection either before or while testifying must be produced.

II. RELEVANT BACKGROUND

On September 10, 11 and 12, 2012, the Court held an evidentiary hearing regarding Defendants lack of candor to the Court. During this three-day hearing, the Court and Jacobs' counsel elicited testimony from various witnesses, including Justin C. Jones. Mr. Jones testified to having reviewed certain documents in preparation for testifying, and testified that the documents he reviewed refreshed his recollection:

> Q Did you review your billing records prior to coming to court?
>
> A I reviewed a few billing records.
>
> Q For what purpose?
>
> * * *
>
> THE WITNESS: To refresh my recollection as to certain dates.
>
> BY MR. PISANELLI:
>
> Q Okay. And did the billing records actually refresh your recollection?
>
> A Yes, they did.
>
> Q Do you know which billing records you actually reviewed that did in fact refresh your recollection about events in this case?
>
> A I reviewed my billing records for the third week in May to determine what day it was.

PISANELLI BICE PLLC
3883 HOWARD HUGHES PARKWAY, SUITE 800
LAS VEGAS, NEVADA 89169

Q Those the only ones you reviewed?

A No.

Q What else did you review?

A What other billing records did I review?

Q Yes.

A I reviewed some billing records from I know the end of August or early part of September.

Q Of what year?

A 2011.

Q For the purpose of refreshing your recollection again?

A Yes.

Q Did they in fact refresh your recollection about the events in this case?

A Yes.

Q Okay. Did you review anything else?

A Did I review any other documents in preparation for appearing here today?

Q That's a better way to put the question, yes.

A Yes.

* * *

Q What else did you review?

A I reviewed some emails.

Q Which ones?

* * *

THE WITNESS: I reviewed emails that refreshed my recollection as to the timing of events in this case. I also reviewed the transcript from the July -- the transcript that Her Honor referenced.

THE COURT: July 19th, 2011.

THE WITNESS: July 19th.

BY MR. PISANELLI:

Q Okay. And did all of those documents refresh your recollection about the events in this case?

PISANELLI BICE PLLC
3883 HOWARD HUGHES PARKWAY, SUITE 800
LAS VEGAS, NEVADA 89169

A Yes.

Q Let's start with the emails. Who were the parties to the emails?

A There were several parties.

Q Okay. First of all, how many emails were there?

A How many emails did I review in preparation for appearing today?

A [sic] Yes, sir.

A I don't recall.

Q Approximately?

A Ten to 15.

THE COURT: Let me recharacterize that question. How many emails did you review to refresh your memory in preparation for appearing today?

THE WITNESS: Ten to 15.

* * *

Q Before we got to the identities, I just want to know, what did you do with those 10 to 15 emails that you used to refresh your recollection about testimony [sic] today?

A I looked at them. I provided copies of some of them to counsel.

Q To whom?

A John Owens.

Q You didn't provide all of them to Mr. Owens?

A No.

Q If called upon, Mr. Jones, to reassemble those 10 to 15 emails, do you believe you'd have the ability to do that?

A Yes.

Q Did you maintain hard copies of them somewhere in your office or wherever?

A Some of them.

Q Okay. Would you have to go off of memory to assemble the 10 or 15? In other words, that's what I'm getting at, do you have them already segregated, or would you have to go back and recollect them?

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A I could assemble the ones I sent to Mr. Owens.

Q Okay. What about the --

A I don't recall about the other ones.

Q I'm sorry?

A I couldn't tell you about the other ones.

Q You would have to just go off your best recollection?

A Yes.

Q All right. How many did you send to Mr. Owens?

A I don't remember, six or seven.

* * *

Q Mr. Jones, I want to do this the best way for you. So if it's easiest to say let me start with the John Owens or let me start with the non John Owens or start chronologically, whatever it is easiest for you to recall the 10 to 15, feel free to do so. Let's start, if it makes sense, with the dates of the emails. Do you recall the dates of the emails that you used to refresh your recollection?

A Somewhere in May of 2011. Others were in August, September of 2011.

Q I take it you don't remember the specific dates of any of them?

A I do not.

Q All right. So let's take a different approach. Let's talk about the authors or recipients, would that be an easier way for you to identify for the court the emails that you used to refresh your recollection?

A Sure.

Q Okay. Who were the authors of the emails that you reviewed to refresh your recollection?

A In May the author was Steve Peek. I don't recall on other emails from May. The authors and recipients of the emails in August and September of 2011 were myself and in-house and outside counsel.

Q Were you in -- focusing on the May emails, were you the recipient of the emails from Mr. Peek?

A Yes.

Q Okay. Anyone else copied on those emails?

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A Not to my recollection.

Q So the body of email that you used to refresh your recollection about your testimony today from May were email communications solely between you and Mr. Peek. Do I have that right?

A That's my recollection.

Q How many in May?

A One.

Q Now, let's move over to August. This was -- I'm sorry, between you and outside counsel?

A Both in-house counsel and outside counsel.

Q All right. Who -- were you the author?

A Some of them I was the author, some of them I was the recipient.

Q All right. On the ones where you were the author, who were you writing to?

A Varied by email, but generally Mr. Peek, counsel from Glaser Weil, and in-house counsel.

Q Who at Glaser weil [sic]?

A Mr. Ma and perhaps Ms. Glaser on one or two of them.

Q And on the emails where you were the recipient, who was or who were the authors?

A Mr. Ma, Mr. Rubenstein.

Q Were there any other recipients besides yourself?

A Were there recipients? Yes. A Ms. Salt was an author of an email that I recall.

Q And who else were the recipients of those? Let's start with the emails from Mr. Ma, who was he writing to?

A I don't recall specifically. To the best of my recollection, there would have been at least one of the in-house counsel.

Q And Mr. Rubenstein, who was he writing to?

A I don't recall if -- who the other recipients were. There may have been other recipients. There probably were other recipients.

Q And Ms. Salt, who was she writing to?

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A The best of my recollection, that was directed back to the legal team that included in-house and outside counsel.

Q And who were those individuals?

A Myself, Mr. Peek, Ms. Glaser, Mr. Ma, Mr. Sedlock, Mr. Fleming, Mr. Rubenstein, Mr. Kostrinsky, Ms. Hyman.

Q Anyone else?

A Not that I can recall.

Q Now, we've been going through the body of emails I think that you labeled as the August email. But earlier you said there was a body from May and a body from August, September. Just so we're clear, everything we just went through under the August label, that includes what you had earlier described as August/September, fair enough?

A Correct.

Q All right. Good. Were there any other emails that you reviewed to refresh your recollection other than those that you've just described?

A Not that I recall.

* * *

Q Let's talk about the billing records. Have you segregated those billing records that you used to refresh your recollection?

A To be clear, I didn't look at a physical billing record. We have a system called DTE Axiom at my office. I clicked back through to the months that I wanted to look at, pulled open the entry for Las Vegas Sands and reviewed the date for that particular entry.

Q Did you review your own entries on the bill, is that what you mean?

A Well, it wasn't a physical bill. I enter my time on my computer, it comes up on my computer screen in DTE Axiom. And so I went back to that particular date and clicked on that particular entry. So kind of bill per say.

Q Is this program that you're using, does it show only your entries?

A Yes.

Q Okay. Once again, if you were called upon to go back and print hard copies of the particular entries that you reviewed to refresh your recollection, do you believe you'd have the ability to do that?

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A Yes.

Q Have you made any notation or any type of memorialization of the dates of your billing entries that you reviewed to refresh your recollection?

A No.

* * *

Q So as you sit here today, the only source of information concerning the billing entries that you reviewed to refresh your recollection would be your own memory?

A Yes.

Q All right. Besides your -- the email that you described and the billing entries that you've described, were there any other documents or information that you reviewed to refresh your recollection about today's testimony?

A I don't believe so.

(Ex. 1, 9/12/12 Trans., 30:4-45:5 (excerpted and omitting overruled objections).)

On October 26, 2012, Jacobs requested production of those documents Mr. Jones used to refresh his recollection, citing the applicable legal authority requiring the production. (Ex. 2, Oct. 26, 2012 Ltr. from D. Spinelli to S. Peek.) Defendants declined Jacobs' request, but provided no contrary legal authority allowing them to withhold such production.[1] (Ex. 3, Nov. 9, 2012 Ltr. from S. Peek to D. Spinelli.)

III. DISCUSSION

Nevada Revised Statute 50.125 governs writings used to refresh a witness' memory before testifying. This statute provides as follows:

> 1. If a witness uses a writing to refresh his or her memory, either before or while testifying, an adverse party is entitled:
> (a) To have it produced at the hearing;
> (b) To inspect it;
> (c) To cross-examine the witness thereon; and
> (d) To introduce in evidence those portions which relate to the testimony of the witness for the purpose of affecting the witness's credibility.

[1] Defendants also refused Jacobs' request for an EDCR 2.34 conference stating they did not see the need for such a conference.

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Based upon the plain, unambiguous language of the statute, any document used by a witness to refresh his recollection in preparation for testifying must be produced.

Presumably, Defendants will object to such production on the grounds of privilege as they did during the related questioning of Mr. Jones. However, there is no exception to the rule for documents otherwise governed by the attorney-client privilege or work product exception. Notably, the Nevada Supreme Court has stated that "the work product doctrine is not an exception to the inspection rights conferred in NRS 50.125 . . . ." *Means v. State*, 120 Nev. 1001, 1010, 103 P.3d 25, 31 (2004). While in the *Means* case the client was attempting to gain access to his own attorney's notes, there is nothing in the language of NRS 50.125 or *Means* itself, limiting the statute's application to those circumstances. The statute clearly indicates that any writings used to refresh a witness' recollection must be produced.

Case law discussing Federal Rule of Evidence 612 is instructive because Nevada's Rules of Civil Procedure are modeled after the Federal Rules. The applicable federal authority holds that the use of any material to refresh a witness' recollection in preparation for testifying waives ***both*** the attorney-client privilege and the work product privilege. Federal Rule of Evidence 612 provides, in relevant part:

> (a) Scope. This rule gives an adverse party certain options when a witness uses a writing to refresh memory:
>
> (1) while testifying; or
> (2) before testifying, if the court decides that justice requires the party to have those options.
>
> (b) Adverse Party's Options; Deleting Unrelated Matter. Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony.

The rule does not provide an exception to production for otherwise privileged documents. *See, e.g., Server Tech., Inc. v. Am. Power Conversion Corp.*, No. 3:06–CV–00698–LRH, 2011 WL 1447620, at *6 (D. Nev. April 14, 2011). After examining various cases where privileged documents were used to refresh a witness' recollection, the United States District of Nevada held that "[i]t thus seems that the general rule requires waiver of privilege when the document is used

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to refresh recollection." *Laxalt v. McClatchy*, 116 F.R.D. 438, 454 (D. Nev. 1987) (citing *United States v. 22.80 Acres of Land*, 107 F.R.D. 20, 25 (N.D. Cal. 1985)).

The case of *Ehrlich v. Howe*, 848 F. Supp. 482 (S.D.N.Y. 1994), provides another example, albeit involving deposition testimony. In *Ehrlich*, the plaintiff deposed two defendants who reviewed a memorandum prior to their examinations. *Id.* at 492. When the defendants brought the memorandum to their depositions, plaintiff's counsel demanded to see it. *Id.* Defendants' counsel objected on the basis of the attorney-client privilege and work product doctrine. *Id.* Plaintiff's counsel made a motion to compel that was originally denied by the magistrate on the basis of the attorney-client privilege and work product doctrine. *Id.*

The district court reversed the magistrate's ruling, holding "Federal Rule of Evidence 612 provides a wholly independent basis for ordering disclosure of the Memorandum, even if it is work product or protected by the attorney-client privilege." *Id.* at 493. After surveying cases, the court concluded that, "when '[c]onfronted with the conflict between the command of Rule 612 to disclose materials used to refresh recollection and the protection afforded by the attorney-client privilege . . . ***the weight of authority holds that the privilege . . . is waived.***'" *Id.* at 493-94 (emphasis added) (quoting *S & A Painting Co. v. O.W.B. Corp.*, 103 F.R.D. 407, 408 (W.D. Pa.1984) (collecting cases); *United States v. Marcus Schloss & Co.*, No. 88 CR. 796 (CSH), 1989 WL 62729, at *4 (S.D.N.Y. June 5, 1989)).

Courts routinely hold the attorney-client privilege is waived when a privileged document is used to refresh a witness' recollection. *Amerisure Ins. Co. v. Laserage Tech. Corp.*, 96-CV-6313, No. 96–CV–6313, 1998 WL 310750 (W.D.N.Y. Feb. 12, 1998); *Stern v. Aetna Cas. & Sur. Co.*, 159 A.D.2d 1013, 1014 (N.Y. Sup. Ct. 1990); *R. J. Hereley & Son Co. v. Stotler & Co.*, 87 F.R.D. 358, 359 (N.D. Ill. 1980); *Wheeling-Pittsburgh Steel Corp. v. Underwriters Labs., Inc.*, 81 F.R.D. 8, 10-11 (N.D.Ill. 1978).

Disclosure, even of allegedly privileged documents, is mandatory because the use of the document to refresh a witness' recollection waives the privilege. NRS 50.125; *Means*, 120 Nev. at 1010, 103 P.3d at 31. Any and all documents used by Mr. Jones to refresh his recollection in preparation for testifying must be produced, including the ten to fifteen emails and his billing

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entries from May, August, and September of 2011, and regardless of whether or not these documents would otherwise be privileged.[2]

IV. CONCLUSION

Based on the foregoing, Jacobs respectfully requests the Court order the production of the documents used by Mr. Jones to refresh his recollection in preparation for testifying, including, but not limited to, the billing records and ten to fifteen emails identified by Mr. Jones during his examination.

DATED this 16th day of November 2012.

PISANELLI BICE PLLC

By: _____

James J. Pisanelli, Esq., Bar No. 4027
Todd L. Bice, Esq., Bar No. 4534
Debra L. Spinelli, Esq., Bar No. 9695
3883 Howard Hughes Parkway, Suite 800
Las Vegas, Nevada 89169
Attorneys for Plaintiff Steven C. Jacobs

PISANELLI BICE PLLC
3883 HOWARD HUGHES PARKWAY, SUITE 800
LAS VEGAS, NEVADA 89169

[2] Further, the billing entries do not enjoy any privilege as an initial matter. *Clarke v. Am. Commerce Nat. Bank*, 974 F.2d 127, 130 (9th Cir. 1992) (holding that billing statements are not protected by privilege).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 16th day of November, 2012, I caused to be sent via email and United States Mail, postage prepaid, true and correct copies of the above and foregoing **PLAINTIFF STEVEN C. JACOBS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS USED BY WITNESS TO REFRESH RECOLLECTION** properly addressed to the following:

J. Stephen Peek, Esq.
Robert J. Cassity, Esq.
HOLLAND & HART
9555 Hillwood Drive, Second Floor
Las Vegas, NV 89134
speek@hollandhart.com
rcassity@hollandhart.com

J. Randall Jones, Esq.
Mark M. Jones, Esq.
KEMP, JONES & COULTHARD
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, NV 89169
r.jones@kempjones.com
m.jones@kempjones.com

Samuel S. Lionel, Esq.
Charles H. McCrea, Esq.
LIONEL SAWYER & COLLINS
300 South Fourth Street, Suite 1700
Las Vegas, NV 89101
slionel@lionelsawyer.com
cmccrea@lionelsawyer.com

Kimberly Peets

An employee of PISANELLI BICE PLLC

PISANELLI BICE PLLC
3883 HOWARD HUGHES PARKWAY, SUITE 800
LAS VEGAS, NEVADA 89169

EXHIBIT 1

COPY

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
SEP 13 2012

BY, BILLIE JO CRAIG, DEPUTY

STEVEN JACOBS Plaintiff vs. LAS VEGAS SANDS CORP., et al. Defendants	CASE NO. A-627691 DEPT. NO. XI **Transcript of Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

COURT'S SANCTION HEARING - DAY 3

WEDNESDAY, SEPTEMBER 12, 2012

APPEARANCES:

FOR THE PLAINTIFF:	JAMES J. PISANELLI, ESQ. DEBRA SPINELLI, ESQ. TODD BICE, ESQ.
FOR THE DEFENDANTS:	J. STEPHEN PEEK, ESQ. BRAD D. BRIAN, ESQ. HENRY WEISSMAN, ESQ. JOHN OWENS, ESQ.
FOR HOLLAND & HART	CHARLES McCREA, ESQ. SAMUEL LIONEL, ESQ.
FOR MR. KOSTRINSKY:	JEFFREY A. GAROFALO, ESQ.

COURT RECORDER:	TRANSCRIPTION BY:
JILL HAWKINS District Court	FLORENCE HOYT Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

LAS VEGAS, NEVADA, WEDNESDAY, SEPTEMBER 12, 2012, 9:26 A.M.

(Court was called to order)

MR. PEEK: Your Honor, my apologies for a --

THE COURT: Not your problem. I mean, there was a flood yesterday, and I went down and looked at the wall this morning and it was still wet. So it affected the equipment, and I know it affected the people down there. So don't worry about it.

MR. PEEK: Thank you.

MR. BRIAN: Your Honor, both sides got a message from Mr. Kostrinsky's counsel that he wanted to come back this morning and offer some supplemental or clarifying or correcting testimony. He thought it would be short. I think both of agree that that can -- which should proceed first if that's convenient to the court.

THE COURT: Sure. Mr. Kostrinsky, why don't you come on back up.

MR. BRIAN: There may be, as you probably anticipate, a privilege issue, but we'll deal with that. But procedurally we all agree.

THE COURT: Mr. Garofalo, so nice of you to join us today.

MR. GAROFALO: Good morning, Your Honor, Jeff Garofalo for the witness.

THE COURT: I had Mr. Lee in the box where you

A Yes.
Q May 19th, was that right?
A That's my recollection.
Q Did you review your billing records prior to coming to court?
A I reviewed a few billing records.
Q For what purpose?
MR. McCREA: Objection. Work product.
THE COURT: Overruled.
THE WITNESS: To refresh my recollection as to certain dates.
BY MR. PISANELLI:
Q Okay. And did the billing records actually refresh your recollection?
A Yes, they did.
Q Do you know which billing records you actually reviewed that did in fact refresh your recollection about events in this case?
A I reviewed my billing records for the third week in May to determine what day it was.
Q Those the only ones you reviewed?
A No.
Q What else did you review?
A What other billing records did I review?
Q Yes.

A I reviewed some billing records from I know the end of August or early part of September.

Q Of what year?

A 2011.

Q For the purpose of refreshing your recollection again?

A Yes.

Q Did they in fact refresh your recollection about the timing of events in this case?

A Yes.

Q Okay. Did you review anything else?

A Did I review any other documents in preparation for appearing here today?

Q That's a better way to put the question, yes.

A Yes.

MR. McCREA: Objection, Your Honor. Work product.

THE COURT: Overruled.

BY MR. PISANELLI:

Q What else did you review?

A I reviewed some emails.

Q Which ones?

MR. McCREA: Your Honor, same objection.

THE COURT: Overruled.

THE WITNESS: I reviewed emails that refreshed my recollection as to the timing of events in this case. I also

reviewed the transcript from the July -- the transcript that Her Honor referenced.

THE COURT: July 19th, 2011.

THE WITNESS: July 19th.

BY MR. PISANELLI:

Q Okay. And did all of those documents refresh your recollection about the events in this case?

A Yes.

Q Let's start with the emails. Who were the parties to the emails?

A There were several parties.

Q Okay. First of all, how many emails were there?

A How many emails did I review in preparation for appearing today?

A Yes, sir.

A I don't recall.

Q Approximately?

A Ten to 15.

THE COURT: Let me recharacterize that question. How many emails did you review to refresh your memory in preparation for appearing today?

THE WITNESS: Ten to 15.

THE COURT: Okay.

MR. PISANELLI: Thank you, Your Honor.

//

BY MR. PISANELLI:

Q What did you do with those 10 to 15 emails --

MR. BRIAN: Your Honor, may we be heard briefly on this?

THE COURT: Absolutely, you can be heard. I think I dealt with this issue yesterday, Mr. Brian.

MR. BRIAN: No. I think it's a little different -- I think it's different, Your Honor. And I think this is an example of one of the problems I think of when we have a situation of a proceeding where counsel is now examining a lawyer at the firm currently representing the client. Because it's not the same, I would argue to Your Honor, about a lawyer who refreshes -- a witness who normally would refresh recollection, I understand the rules on that.

Here you have a situation where quite -- in a quite extraordinary proceeding, Your Honor, it's permitting counsel to do an extensive examination of lawyers at firms that are currently representing. Those documents would otherwise be privileged. And I think in that circumstance, given the nature of this proceeding that the -- whether you call it the witness advocate rule or whether you call it the legal system we now have, I think it puts the parties and counsel in a very difficult situation. And I don't think it's appropriate to then cause privileged documents to be produced when a witness used them to try to figure out dates and the like. I think

it's not the normal situation, Your Honor.

THE COURT: I understand what you're saying, Mr. Brian. Right now the question is who were the recipients on the emails and who were the addressees. That's not the same issue that you're addressing.

MR. BRIAN: That's fine, Your Honor.

THE COURT: I'm not there yet.

MR. BRIAN: Okay. That I appreciate, Your Honor.

THE COURT: Mr. Pisanelli, you may continue.

MR. PISANELLI: Thank you.

BY MR. PISANELLI:

Q Before we got to the identities, I just want to know, what did you do with those 10 to 15 emails that you used to refresh your recollection about testimony today?

A I looked at them. I provided copies of some of them to counsel.

Q To whom?

A John Owens.

Q You didn't provide all of them to Mr. Owens?

A No.

Q If called upon, Mr. Jones, to reassemble those 10 to 15 emails, do you believe you'd have the ability to do that?

A Yes.

Q Did you maintain hard copies of them somewhere in your office or wherever?

A Some of them.

Q Okay. Would you have to go off of memory to assemble the 10 or 15? In other words, that's what I'm getting at, do you have them already segregated, or would you have to go back and recollect them?

A I could assemble the ones I sent to Mr. Owens.

Q Okay. What about the --

A I don't recall about the other ones.

Q I'm sorry?

A I couldn't tell you about the other ones.

Q You would have to just go off your best recollection?

A Yes.

Q All right. How many did you send to Mr. Owens?

A I don't remember, six or seven.

Q So let's start with the others. We'll call it five to 10. Actually, strike that. Let's just test your memory the best we can and go through and identify for me each of the emails as best you can whether it be by author, recipient, date, subject matter, whatever it is. Do what you can to identify them for us.

THE COURT: Mr. Pisanelli, we've got to be very careful about subject matter. I don't have a problem with the identification by date and recipient, because that information is something that should be on the privilege log, or at least

arguably should be on the privilege log. If it is subject matter, I get into issues of concern.

MR. PISANELLI: Understood, Your Honor. The only point I would make, and not to debate you, is this isn't as Mr. Brian characterized, a general litigation issue, this is a specific Nevada statute as Your Honor knows. And there is no exception for the circumstances of this proceeding. There's no exception at all, it is a mandatory disclosure in Nevada when a party does what Mr. Jones did. And so I think that they are openly discoverable at this point.

THE COURT: Not a party, a witness.

MR. PISANELLI: I'm sorry. A witness. And so they are openly discoverable in non-privileged records as we stand.

THE COURT: I understand what we're going to do. You're going to identify them for me and then we're going to have a motion --

MR. PISANELLI: Okay.

THE COURT: -- and you're going to ask for them to be produced. And Mr. Brian's going to file a brief and he and Mr. Peek are going to -- and Mr. Lionel and Mr. McCrea are going to say why they shouldn't be produced.

MR. PISANELLI: Okay.

THE COURT: And then I'm going to have an argument and then I'm going to rule.

MR. PISANELLI: I hear you loud and clear.

Q Did you review your own entries on the bill, is that what you mean?

A Well, it wasn't a physical bill. I enter my time on my computer, it comes up on my computer screen in DTE Axiom. And so I went back to that particular date and clicked on that particular entry. So kind of bill per say.

Q Is this program that you're using, does it show only your entries?

A Yes.

Q Okay. Once again, if you were called upon to go back and print hard copies of the particular entries that you reviewed to refresh your recollection, do you believe you'd have the ability to do that?

A Yes.

Q Have you made any notation or any type of memorialization of the dates of your billing entries that you reviewed to refresh your recollection?

A No.

MR. McCREA: Objection. Work product.

THE COURT: Overruled.

BY MR. PISANELLI:

Q So as you sit here today, the only source of information concerning the billing entries that you reviewed to refresh your recollection would be your own memory?

A Yes.

Q All right. Besides your -- the email that you described and the billing entries that you've described, were there any other documents or information that you reviewed to refresh your recollection about today's testimony?

A I don't believe so.

THE COURT: Mr. Jones, I'll tell you the same thing I tell all witnesses. If you need to take a break at some point in time, you let us know.

THE WITNESS: Oh, I don't want to take a break.

THE COURT: Just telling you. Treating you like any other witness, you've got M&M's --

THE WITNESS: Appreciate that.

THE COURT: -- you've got water, you're entitled to a break if you need it.

BY MR. PISANELLI:

Q So I believe we started on this path because you were certain of the date that you reviewed the emails. Do I have that right?

A I believe my testimony, Mr. Pisanelli, was that it was approximately May 19th.

Q And again, I apologize, Mr. Jones, if you've told us this before, but prior -- well, strike that. You knew about the existence of the emails in the United States prior to the day that you went over to review them; right?

MR. McCREA: Objection. Work product.

THE COURT: Overruled.

BY MR. PISANELLI:

Q Were you able to refresh your recollection to determine when you learned that the emails were here in the United States?

A No more than I already testified.

Q Okay. Your best estimate, how long prior to you going over on or around May 19th, did you learn that the emails were here in the United States?

A I know that I knew in April. I don't recall of any before then.

Q All right. Now, you were responsible for preparing the 16.1 disclosures in this case; is that right?

A I believe so, yes.

Q You actually signed them?

A If you -- I'll accept your representation that I signed them, yes.

Q Now, the first one that you made in this case was May 5th of 2011; is that right?

A Again, if you want to show me a document, otherwise I'll accept your representation.

Q You knew at the time of the preparation and execution of Las Vegas Sands Corp's first 16.1 disclosure of the existence of these emails in the United States, did you not?

A I did.

Q All right. Yet, none of the emails are on that 16.1 disclosure, are there?

A If you could show me the 16.1 disclosure I'd appreciate it.

Q Do you recall putting anything about those emails on that 16.1 disclosure?

MR. McCREA: Objection. Work product.

THE COURT: Overruled.

THE WITNESS: Again, if you want to show me the document, I'd be happy to review it. I don't recall putting them on there, no.

Q All right. Do you recall producing to the plaintiffs in this case a privilege log concerning the emails that you knew to exist in the United States at the time of that disclosure?

A I don't recall.

Q If I were to tell you that the plaintiffs have never seen one, would that be inconsistent with your knowledge of what happened in this case?

A I can only testify with regard to my involvement in the case. If there wasn't a privilege log before I left the case, then I accept your representation.

Q Okay. Thank you. So there was a second delivery of data from Macau to the United States that occurred around, on

or around November of 2010, are you aware of that?

MR. McCREA: Objection, Your Honor, attorney-client.

THE COURT: Overruled.

Mr. Jones, if you're aware of it from some source other than an attorney-client communication because it's been put in public documents filed by the Sands, you're welcome to tell him about it. But if it comes solely from an attorney-client communication, just tell me you don't have any non-privileged information,

THE WITNESS: I'm not sure I can answer that question.

BY MR. PISANELLI:

Q Okay. I don't want you, as Your Honor instructed, to tell me what you and Mr. Kostrinsky talked about while you were both in Macau. I want you to tell us, if you can, what you saw. Okay? Did you witness Mr. Kostrinsky bring some form of storage device back to the United States during that trip?

A I did not witness him bring it back to the United States.

Q Did you see any storage devices that Mr. Kostrinsky had with him while on your trip to Macau?

A While we were in Macau I witnessed a foil envelope handed to Mr. Kostrinsky. What became of that after that I'm not entirely certain.

Q Can you describe the envelope for Her Honor.
A It was foil and had bubble wrap around it, the kind you would expect a hard drive to come in.
Q How big was it?
A 4 by 6.
Q Did you witness what Mr. Kostrinsky did with that envelope?
A No.
Q Did you ever see it again?
A No.
Q Did you ever have the opportunity to review the data, if any, that was on it?
A Not to my knowledge.
Q Let's talk about that trip for a few minutes. What was the purpose of that trip?
MR. McCREA: Objection. Attorney-client privilege.
THE COURT: Sustained.
BY MR. PISANELLI:
Q Who went on that trip to Macau?
A Michael Kostrinsky, Gayle Hyman, Patty Glaser.
Q While on that trip, did you have an opportunity to review any documents?
A I don't specifically recall reviewing documents while we were there, that was not the purpose of the trip.
Q Did you witness any of the other people that went on

the trip with you reviewing documents?

A Not to my recollection.

Q Did you witness anyone reviewing electronic information?

A No.

Q Did you review any electronic information?

A No.

Q All right. Did you have an opportunity to inspect Mr. Jacobs's office while you were there?

A No.

Q Did you witness anyone else inspecting that office?

A I'm not sure that I knew where Mr. Jacobs's office was, so not to my recollection.

Q Did you have any communications with any government officials while you were there?

A No.

Q Did you ever have any communications with any Macau government officials concerning this case --

A No.

Q -- or Mr. Jacobs?

A No.

Q Did you bring back anything back?

A My luggage.

Q It was a very unclear and poorly worded question.

THE COURT: You brought back balls that broke.

MR. PISANELLI: I remember that from a hearing.

BY MR. PISANELLI:

Q Did you bring back any --

A Actually, that was on a subsequent trip, Your Honor.

THE COURT: Okay.

BY MR. PISANELLI:

Q Did you bring back any evidence concerning this case?

A Absolutely not.

Q Did you witness, other than that envelope, any other person bring evidence back from Macau?

A No. And I think that I testified that I did not see Mr. Kostrinsky bring that envelope back. So --

Q Okay. You said you just saw it handed to him?

A Correct.

Q Okay. Fair enough. Did you see any other forms of evidence handed to anyone else that you were on that trip with?

A No.

Q All right. Yes or no question, do you have any reason to believe that any form of evidence concerning this case was brought back as part of that trip?

MR. McCREA: Objection. Attorney-client privilege.

THE COURT: Sustained.

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BY MR. PISANELLI:

Q Now, there was a third delivery of electronically stored information from Macau to the United States in February or March of 2011. Are you aware of that?

A I have heard that in connection with these proceedings.

Q Is that the first time you'd heard of it?

A To my recollection, yes.

Q Okay. I'll represent to you that your client has represented to Her Honor that on or around that time two hard drives were delivered to the United States, the first one containing images of a hard drive from two employees. Had you known of that fact prior to these proceedings?

A Las Vegas Sands is not my client.

Q Had you known about the delivery of two hard drives in February or March of 2011, to the United States from Macau?

A Did I know then? Absolutely not.

Q Was a hearing in these proceedings the first time you learned of it?

A Best of my recollection.

Q You said Las Vegas Sands is not your client?

A I am not doing any work for Las Vegas Sands. I haven't done any since September of 2011. They may be my firms client, but not mine.

Q Thank you for that clarification. You threw me for

a loop for a half a second there. So then fair for us to understand that while you were working on this case -- well, back up a minute. You were working on this case on behalf of Las Vegas Sands in February, March of 2011; correct?

A Correct.

Q All right. And despite that you're working on this case, you didn't learn about the delivery of these two hard drives to the United States until you were sitting in this courtroom listening to it?

A I learned before sitting in this courtroom. I think I said in connection with these proceedings.

Q So you read it in some papers that were filed?

A Yes. Or was told be another --

MR. McCREA: Objection, Your Honor.

THE COURT: Sustained.

BY MR. PISANELLI:

Q Here's what I'm getting at. Mr. Jones, you filed and -- you didn't file, strike that. You served three supplements to the 16.1 disclosures throughout 2011. Do you recall that?

A I don't.

Q Does it sound like the right date that you served a supplement on July 28th, 2011?

A I'll accept your representation.

Q And on the -- the second supplement was served August 1st, 2011?

A I'll accept your representation.

Q And the third supplement was served August 5th, 2011?

A And I'll accept your representation.

Q Okay. All right. Is it your testimony today that despite that all three of these deliveries of electronically stored information from Macau had occurred prior to all of those supplements? You were never made aware that that information was in United States?

MR. McCREA: Objection, Your Honor. Attorney-client privilege.

THE COURT: Sustained.

MR. PISANELLI: Well, Your Honor, if I may --

THE COURT: Uh-huh.

MR. PISANELLI: The reason why I think that last question is important is one of the exercises we're going through today is trying to determine what counsel knew when they made representations to you. And if Mr. Jones's position is that he didn't know that any of this information was in the United States, that certainly will be relevant to any analysis of his representations to you.

THE COURT: But the client is, if they decide, permitted to make the attorney-client privilege objection. And if I brought an adverse inference related to that, that's one of the things that happens. But they're allowed to direct

their counsel not to answer that question.

MR. PISANELLI: Okay.

THE WITNESS: And again, the adverse inference is --

THE COURT: I'm dealing with party issues --

THE WITNESS: All right.

THE COURT: -- at this point.

MR. McCREA: Your Honor, I'm deeply concerned about your repeated comments that --

THE COURT: I've said it about 25 times in the last three weeks, Mr. McCrea.

MR. McCREA: I know. And I respectfully direct the Court's attention to NRS 49.405, which says that no inference is to be drawn from the assertion of the privilege. And, in fact, if we were in front of a jury we would be entitled to instruction to the jury admonishing the jury that no inference could be taken from the assertion of the privilege.

THE COURT: You know, there's this case that's a couple years old where there's a Fifth Amendment privilege assertion in a civil case and it talks about the inferences that can be made. Because of the nature of the issues in this case, the attorney-client privilege is being used in this particular case more in the nature of a Fifth Amendment privilege objection by Sands, and I think that may be an issue that is briefed at some point in time, but, unfortunately, a corporation can act only through its officers, employees, and

agents, and so I don't have a person here who is the Las Vegas Sands who can make that sort of provision. So I have not made a decision as to the type of inference that will be drawn. That is certainly something I will entertain argument on. But given the Nevada Supreme Court's analysis of the way in which a trial court is supposed to draw conclusions related to the assertion of certain privileges, I didn't want anyone to be surprised if I ultimately made a decision that an adverse inference was appropriate to be made. That's all I'm trying to say, Mr. McCrea. I'm trying to make sure nobody gets blindsided by what may happen. And I certainly haven't decided what that appropriate standard is at this time.

MR. McCREA: Thank you for the clarification.

MR. BICE: Your Honor, I just would like to be heard just briefly on the legal point so that the record is clear on this.

THE COURT: Do we really need to do it now?

MR. BICE: Well, I can tell from your tone that I do not.

THE COURT: Thanks.

All right. Since we're on interruption, let me go back to one of the questions. And this is -- it may elicit an objection, and, if so, don't answer it. So if you see Mr. McCrea start to move or start to object, please be cautious.

On the hearing where you and I were having the

discussion and you told me you couldn't go back to Macau Ms. Glaser had told me that, we're, and she was including the attorneys, not even allowed to look at documents on a work station here in the U.S. Is there a reason that you didn't tell me you'd already looked at the documents on the work station that day?

MR. McCREA: Objection, Your Honor. Attorney-client privilege.

THE COURT: Okay. Thanks.

BY MR. PISANELLI:

Q I want to start a little earlier than the hearing Your Honor referenced. I want to start a hearing on April 22nd, 2011. It was the mandatory Rule 16 conference. Do you remember that?

A I believe I was present.

Q Do you remember participating in that hearing?

A I remember I was present. I don't know how much I participated or not.

Q Let's do this. Do you see that?

A Yes.

Q Court was involved in a discussion with Ms. Salt where she asked, "Do you know how the electronically stored information is kept? Is it emails, is it kept in some other type of server than an email server?" And Ms. Salt stated, "I think the vast majority is kept in an email server." The

Court then asked, "And is that an email server that is maintained by Sands China, or is it maintained by a separate vendor?" And Ms. Salt said, "No, it's maintained by a Sands China subsidiary."

MR. PEEK: Mr. Pisanelli, I didn't hear the page. Could you tell me the page.

MR. PISANELLI: I'm sorry. I think it's page 19.

MR. PEEK: Thank you. I just didn't hear it.

BY MR. PISANELLI:

Q Do you recall that conversation, Mr. Jones?

A I see the transcript. I don't recall it, no.

Q Now, I know from your testimony that you had not yet reviewed the emails that were located in the United States, but you were aware of them in April of 2011; correct?

A Yes.

Q Were you aware that those emails were here in the United States when Ms. Salt was representing that they are maintained by a Sands China subsidiary?

A I don't recall.

Q Do you recall whether you ever took any action to inform Her Honor that you were aware that Ms. Salt's statement was not completely true?

A I didn't inform the Court of that. I'm not sure that I would agree with your characterization of Ms. Salt's testimony, and I don't know that I'm here to opine as to Ms.

Salt's veracity.

Q Well, at the time that she said that it is maintained in Sands China subsidiary, a hundred thousand or so emails were in the United States; is that right?

A I don't know how many emails were stored in the United States.

Q The Jacobs emails were here in the United States at the time she made that statement?

A It was my understanding that a copy of the emails had been transported to the United States, not the original.

Q Fact of the matter is no one during that Rule 16 conference informed Her Honor of that fact; is that right?

A Correct.

Q All right. So let's take a look at now at the June 9th, 2011, hearing, starting on page 52.

THE COURT: Which one.

MR. PISANELLI: Oh. Wrong one. Sorry.

THE COURT: Which one, Mr. Pisanelli?

MR. PISANELLI: June 9th, page 52, Your Honor.

THE COURT: Thank you. I was just trying to put mine back in chronological order, so --

THE WITNESS: You said page 52, Mr. Pisanelli?

BY MR. PISANELLI:

Q Yes, sir. Thank you.

Now, by June of 2011 you had reviewed the emails;

correct?

A I had reviewed some emails, yes.

Q Yes. And you were at this June 9th hearing; correct?

A Yes, I was.

Q All right. And you were sitting at defense table when Ms. Glaser said to Her Honor that, "Documents get," this is at line 7, "must be reviewed in Macau." See that?

A Yes.

Q When she made that remark you were very well aware that documents were being reviewed in the United States; isn't that true?

A Documents were not being reviewed in the United States at that time.

Q Emails were reviewed at --

A Emails of Mr. Jacobs --

Q -- at Mr. Kostrinsky's desk, were they not?

THE COURT: Wait. Only one at a time, please.

THE WITNESS: Can I finish my answer?

THE COURT: Yes.

BY MR. PISANELLI:

Q I'm sorry. I was in the middle of a question. But go ahead.

THE COURT: He hadn't finished the one before you started the next one.

THE WITNESS: Let me rephrase. There may have been other documents that were being reviewed in the United States at that time. We were trying to get discovery going. With regards to what I expect the questioning was with regards to Mr. Jacobs's emails, those were not being reviewed in the United States.

BY MR. PISANELLI:

Q Mr. Jacobs's emails were not being reviewed in the United States; is that what you just said?

A Not in June.

Q They'd already been reviewed in the United States?

A There had been a very limited review in May of 2011.

Q Very limited by you.

A Correct.

Q But Mr. Peek had reviewed some himself; right?

A Again, I understood Mr. Peek's review also to be fairly limited.

Q Did you know what Mr. Kostrinsky's review was?

A I did not.

Q Did you know what anyone else at Las Vegas Sands' review was?

MR. McCREA: Objection, Your Honor. Attorney-client privilege.

THE COURT: Sustained.

//

BY MR. PISANELLI:

Q The bottom line is that when Ms. Glaser told Her Honor that the documents must be reviewed in Macau, you were at this table with complete knowledge that they had already, at least in part, been reviewed in Las Vegas; right?

A I knew that some had been reviewed, that it was our understanding at that time, at this hearing, that the Office of Data Privacy in Macau had been quite clear that no further review could happen.

MR. McCREA: Objection, Your Honor. Attorney-client.

THE COURT: Sustained.

BY MR. PISANELLI:

Q My point is not about what would be done in the future. My point is very simply that you never told Her Honor when you heard Ms. Glaser make this remark that documents had already been reviewed in the United States, did you?

A That is correct.

Q And when she says in the next line that, "They are in Macau," that, too, was untrue; right?

A You examined Ms. Glaser. I can't get in her head and know exactly what documents she was referring to.

Q That is a fair point, Mr. Jones. But you knew that a statement that the documents are in Macau was at least partially untrue, because you knew the Jacobs emails were on

Las Vegas Boulevard; right?

A I knew that Jacobs -- there was a copy of Mr. Jacobs's emails at Las Vegas Sands.

Q And you did not take any action to inform Her Honor that Ms. Glaser had made a false statement, did you?

A I did not.

Q Okay.

A I'm not sure that I would agree with the characterization of Ms. Glaser's statement as false, but --

Q Well, how about the next one, where she says, "They are not allowed to leave Macau"? You knew when she made that remark that some of them did leave Macau; right?

A At the time we were in the process of trying to figure out how we were going to accomplish the Court's goal of getting things reviewed as quick as possible. We got direction from OPDP that we couldn't --

MR. McCREA: Objection, Your Honor. Attorney-client.

THE COURT: Sustained.

BY MR. PISANELLI:

Q My simple question to you is when you heard Ms. Glaser say that, "They are not allowed to leave Macau," you knew that they already had; correct?

A I knew that some had.

Q Yes. And you didn't say anything to Her Honor to

correct that statement, did you?

A I did not.

Q She then says, "We have to review them there." You knew that was false, too, because you had reviewed them here; right?

A Again, Mr. Pisanelli, I understood at the time that no one was going to be reviewing the documents from Las Vegas Sands, either in Las Vegas or in Macau. So, yes, at the time that statement was made I wasn't going over to the Sands to review those documents, and I wasn't going over to Macau to review those documents.

Q But you already had reviewed them here?

A I reviewed some of them, you are correct.

Q And you remained silent when Ms. Glaser said they have to review them there; right?

A Correct.

Q And now it is your testimony to Her Honor that you believe at this time that it was only Sands China lawyers that could review the records in Macau; is that right?

MR. McCREA: Objection. Work product. Calls for his mental impression.

MR. PISANELLI: He just said --

THE COURT: Overruled.

THE WITNESS: That was my understanding.

//

BY MR. PISANELLI:

Q All right. As of the date of this hearing you didn't believe that Las Vegas Sands was entitled to review any documents at all; right?

MR. McCREA: Objection. Attorney-client.

THE COURT: Sustained.

BY MR. PISANELLI:

Q Okay. Isn't it true, Mr. Jones, that even after this hearing you told Her Honor that Las Vegas Sands could review the documents but they had to do it in Macau?

A I don't recall.

Q Let me read something to you, see if it refreshes your recollection. I'm reading a document entitled "Las Vegas Sands Corp.'s Motion to Compel Return of Stolen Documents Pursuant to Macau Personal Data Protection Act." Do you remember that brief?

A I do.

Q You signed it?

A I believe so.

Q Yep. And I'm going to turn to page 6 of 7, the last remark you made to Her Honor.

MR. McCREA: Is that in your witness book; Counsel?

MR. PISANELLI: I don't know the answer to that, but I have copies.

THE COURT: Can you see it on the screen, Mr. Jones?

THE WITNESS: Yes.

MR. BICE: The answer to Mr. McCrea's question is no, it is not in the book.

MR. PISANELLI: Your Honor, would you like a courtesy copy? Got it on the screen?

THE COURT: I do.

BY MR. PISANELLI:

Q So this proceeding that we were talking about was the position taken by Las Vegas Sands that Steve Jacobs had stolen records. You remember that?

A Yes.

Q And that he was not entitled to keep them in his possession during the pendency of this case; right?

A Correct.

Q As a matter of fact, it was Las Vegas Sands' position that Mr. Jacobs was not entitled to keep possession of them at all; right?

A Correct.

Q And the position that Las Vegas Sands took, your client, was that Mr. Jacobs was not obligated to return them to Sands China, but he was obligated to return the documents to Las Vegas Sands. That's the position you took in the papers you've signed; right?

A Yes.

Q And you even said to the Court, contrary to what you

just said a moment ago, that the appropriate manner to address this issue is for Jacobs to return stolen company documents to LVSC, and, if necessary, LVSC will then review the documents in Macau. That's what you told Her Honor; right?

A That's what I stated in here, yes.

Q Right. You didn't tell her in that paper as you just did that it was only Sands China lawyers that could review records in Macau; right?

A I did not state that here.

Q You didn't. And you also didn't state in this document that you and other Las Vegas Sands lawyers had already reviewed Macau documents here in the United States; right?

A I did not.

Q Now let's turn to page 55, going back to the June 9th, 2011, hearing.

Prior to this hearing, before we talk about this, Mr. Jones, did you personally inform a lawyer at Campbell & Williams that Las Vegas Sands had possession of Steve Jacobs's emails here in Las Vegas?

A I don't recall.

Q And Mr. Peek states at line 5 -- start at line 6, where the substance of his remark starts, "That same Data Privacy Act, Your Honor, also implicates communications that may be on servers and email communication and hard document --

hard-copy documents in Las Vegas."

I will represent to you that Mr. Peek has taken a position in this proceeding that this statement satisfied his disclosure obligations to the Court. My question to you is do you agree that this statement satisfied your disclosure obligations to the Court concerning the transfer of data from Macau to the United States?

MR. McCREA: Work product, Your Honor. Objection.

THE COURT: Overruled.

THE WITNESS: I heard Mr. Peek's testimony. I know that he would never make a misrepresentation to this Court. And so I believe that that was -- satisfied the obligation, yes.

BY MR. PISANELLI:

Q Satisfied your obligation?

A Yes.

Q And you held that belief at the time of this hearing?

A I don't recall what I thought at the time of the hearing, Mr. Pisanelli, to be quite frank.

Q Is your statement -- in all fairness, Mr. Jones, is your statement, then, nothing more than your current state of mind in support of Mr. Peek?

MR. McCREA: Objection, Your Honor. Mental impressions, work product.

THE COURT: Sustained.

BY MR. PISANELLI:

Q Is it your testimony, then, that you don't recall what your state of mind was concerning your obligations of candor and disclosure to the Court at the time that you were listening to Ms. Glaser's remarks?

MR. McCREA: Object.

THE COURT: Sustained.

BY MR. PISANELLI:

Q Did you believe at the time that you heard Mr. Peek make the remarks that he did on page 55 that he was referring Her Honor to the existence of the Jacobs emails here in Las Vegas?

MR. McCREA: Same objection.

THE COURT: Sustained.

BY MR. PISANELLI:

Q Now, on page 56 Mr. Peek tells Her Honor that your law firm is not going to be able to make the date for the production of documents, which was July 1st. Do you see that?

A Yes.

Q Now, you had been reviewing the documents, as you told us earlier, as early as May of that same year; right?

A I think you're mixing documents here, Mr. Pisanelli. We're reviewing a whole lot of documents --

Q Well --

A -- more than just Mr. Jacobs's emails.
Q Correct.
A I reviewed thousands and thousands and thousands of documents in this case.
Q Did you take any action to inform Her Honor during this portion of the discussion that the review of the emails had already occurred at least in part?
A I did not.
Q Now, Mr. Peek said during this discussion that he would be producing documents not implicated by the Macau Data Privacy Act. Do you see that?
A Yes.
Q Okay. If he was making that representation in June, can you explain to this Court why none of the documents that were here in Las Vegas showed up on any of the 16.1 disclosures following this representation by Mr. Peek?
MR. McCREA: Objection. Attorney-client, work product.
THE COURT: Sustained.
BY MR. PISANELLI:
Q On page 58 we're back to Ms. Glaser's remarks, where she says to Her Honor that, "All documents from Sands China have to get permission from the Office of Privacy." Do you see that?
A Yes.

Q The documents that you had reviewed on Las Vegas Boulevard prior to this hearing had not gone through or been permitted by the Office of Privacy, had they?

MR. McCREA: Objection. Attorney-client, work product.

THE COURT: Sustained.

BY MR. PISANELLI:

Q Did you take any action to determine whether the emails that you were reviewing here in Las Vegas had gone through the Office of Privacy in Macau?

MR. McCREA: Work product. Objection.

THE COURT: Sustained.

BY MR. PISANELLI:

Q Did you do anything to tell Your Honor that there were records here in Las Vegas even raising the issue of whether Ms. Glaser was telling the truth when she was telling Her Honor about this Office of Privacy requirement?

A Other than Mr. Peek's statement, no.

Q The earlier statement on page 55?

A Correct.

Q Okay. Let's turn to some remarks that were made in July -- on July 19th of 2011. Here on page 5 -- I'm sorry, page 6, Ms. Glaser tells Her Honor that her client, Sands China is on the cusp of violating the law. Do you see that?

A Yes.

Q Again, at the risk of belaboring this point, at the time she made this remark hundred thousand-plus emails were here in Las Vegas already; right?

A I don't know how many emails were here.

Q But you knew the Jacobs were here?

A Yes.

Q And you understood Ms. Glaser's remark about being on the cusp of violating the law to be at best misleading in light of the documents that were here in Las Vegas?

MR. McCREA: Objection. Mental impression, work product.

THE COURT: Sustained.

BY MR. PISANELLI:

Q Well, let's just talk about what you did. What did you do to inform Her Honor about the existence of those documents here in Las Vegas in light of Ms. Glaser telling Her Honor that they were on the cusp of violating the law?

A I did not inform the Court at that hearing that there were certain documents here in Las Vegas.

Q Now, the same theme continued on onto the next page. On page 7, line 9, Ms. Glaser says, "We're not allowed to look at documents at a station here." Earlier she said that you have to go -- the law requires them to go to Macau. Do you see that?

A Yes.

Q Now, when you sat here listening to her say that people had to go to Macau to review the documents, you couldn't review them at a station here, you had already done that exact same thing; right? You did exactly what she was saying could not be done; right?

A Two months prior and before we had learned from OPDP that we should be doing so.

MR. McCREA: Objection, Your Honor. Attorney-client.

THE COURT: Sustained.

BY MR. PISANELLI:

Q What did you do to tell Her Honor -- after you heard Patty Glaser say that documents could not be reviewed at a station here, what did you do to inform Her Honor that documents had already been reviewed at a station here?

A I did nothing.

Q I think Her Honor covered this point, but Ms. Glaser said that you can't go to Macau on line 13. You see that?

A Yes.

Q Did that catch you by surprise when she said you can't go?

A Again, I think I already clarified this with Her Honor. The context of this was not that I couldn't go over there and gamble or enjoy myself, it was that I couldn't go over there to review documents as a Las Vegas Sands Corp.

lawyer.

Q Were you concerned that Her Honor and everyone else in this courtroom was under the understanding that the government wanted you out of their country?

MR. McCREA: Objection, Your Honor. Lack of foundation.

THE WITNESS: No. And I'm sorry if I --

THE COURT: Overruled.

THE WITNESS: -- that impression. It certainly wasn't my intent. I thought quite and clear and after reading the transcript I honestly don't believe that there should have been any confusion. I apologize to Her Honor of there was the impression that the government of Macau had barred me personally from going over to their country.

BY MR. PISANELLI:

Q Okay. So your only point, then, when you said -- or you allowed -- well, actually, you did participate in it. You said, "I'm prohibited from going, actually, by the Macau government." Actually your words; right?

A Yes. And if you continue reading down, Ms. Glaser talks about the fact that the Macau government said they have to review the documents in Macau.

Q Did she --

A That was the context, Mr. Pisanelli.

Q All right. Well, let's talk about context. Right

there on that same statement she started off with, "The only people that can go are people that represent Sands China." Do you see that?

A Yes.

Q That's exactly opposite of what you said in the brief we just discussed from September; right?

A Mr. Pisanelli, I can't get back to my mental impression in that brief. The best that I recollect with regards to that line in that brief was that we needed the documents back. I don't know what the point of Las Vegas Sands doing the review in that brief was. However, at the time we knew -- we only knew that there were 11 --

MR. McCREA: Objection, Your Honor. Attorney-client.

THE COURT: Sustained.

BY MR. PISANELLI:

Q So what I want to know from you, Mr. Jones, is we have you sitting silent when Ms. Glaser tells Her Honor that only Sands China people can go and review the documents in Macau, and we have you later, a month or later saying that Las Vegas can go to China and review the documents. As you sit here today, which is your position?

MR. McCREA: Objection. Mental impression, work product.

THE COURT: Sustained.

BY MR. PISANELLI:

Q Well, we're trying to figure out, Mr. Jones, whether you sat silent as a misrepresentation was made to the Court. So my question to you is did you make misrepresentation in the written brief we've talked about?

A Perhaps it should have said "Sands China do the review," Mr. Pisanelli.

Q Even then, as you now say that it should have said Sands China, that's all the while with the open concession that you and many other Las Vegas Sands people reviewed the documents here in Las Vegas?

MR. McCREA: Objection, Your Honor. Mischaracterizes the testimony.

THE COURT: Overruled.

THE WITNESS: I don't believe that there were many. As we testified, myself and Mr. Peek reviewed some documents, and staff went over and made an index of them.

BY MR. PISANELLI:

Q All right. You're aware that Mr. Rubenstein reviewed those emails here in Las Vegas?

A I don't know.

Q You're aware that Mr. Kostrinsky did?

MR. McCREA: Objection, Your Honor. Attorney-client.

THE COURT: Overruled.

THE WITNESS: I understood that Mr. Kostrinsky had reviewed some. I don't know what he reviewed.

BY MR. PISANELLI:

Q You're also aware that O'Melveny & Myers reviewed those documents in the United States?

A I don't know.

Q Okay. Ms. Glaser made the same remark on page 12, did she not, line 6, where she said, "It is only Sands China lawyers who are being allowed to even start the process of reviewing documents"? Do you see that?

A I do.

Q That was a patently false remark in light of what occurred Mr. Kostrinsky's office, was it not?

A I wouldn't characterize it that way, no, Mr. Pisanelli.

Q Did you do anything to at least clarify for Your Honor what happened on Las Vegas Boulevard prior to her making this remark?

A I did not inform the Court that we had two months prior performed a limited review prior to -- I will discontinue my answer.

THE COURT: Thank you.

BY MR. PISANELLI:

Q Let's take a look at at what happened on what may have been my first appearance in this case on September 16th,

2011. Do you remember participating in that hearing?

A Not specifically, but --

Q My best recollection was that you and I were standing up at the podium, and Ms. Glaser was on the telephone. Does that ring a bell to you?

A I see that I'm on here, so I'll take the transcript as it is.

Q On page 3 Ms. Glaser said to Her Honor -- in opposition to my request for additional time to get up to speed she said the following. "We are very much opposed to continuing the evidentiary hearing." Do you see that?

A Yes.

Q She was talking about the evidentiary hearing on the issue of jurisdiction over Sands China; right?

A I'll take your representation.

Q You don't remember that?

A I don't. I haven't been in this case for a year, Mr. Pisanelli.

Q Okay. Now, on September 16th, 2011, Ms. Glaser said in reference to the hearing, "It's not till November 21st. I'm not trying to be unprofessional," she said, "because I appreciate that counsel's just coming into this case. But -- and again, at the risk of sounding pedantic, this should not become our problem," she said. "Sands China if appropriate wants out."

Now, you understood that Ms. Glaser was trying to convince the Court that the evidentiary hearing should go forward without a continuance in November; right?

A Again, I don't really have a recollection of this hearing. I'm reading this now. Ms. Glaser said what she said.

Q She goes on to say on page 10, starting at line 20, "Your Honor, disclosure is required today. Your prior order was that we were to exchange witnesses and documents. The November 21st evidentiary hearing is two months away. We urge, please, please, urge the Court not to continue that date."

When Ms. Glaser was telling Her Honor, please, please don't continue the date, today's the disclosure date, you knew standing at Her Honor's desk that all of the Jacobs emails sitting on Las Vegas Boulevard had not been produced to the plaintiffs, didn't you?

A Yes.

Q And you didn't say a word to Her Honor in response to Patty Glaser's plea that the evidentiary hearing go forward without the disclosure or even the identification of a hundred thousand-plus emails sitting at Las Vegas Sands here in Las Vegas. You didn't say a word.

A I didn't, Mr. Pisanelli. There were also many, many, many other documents that had not yet been produce and a

team of reviewers going over things during the summer. And, no, not everything had been produced yet, because it was a very lengthy, tedious process of review.

Q Knowing that Ms. Glaser was pleading, please, please let this hearing go forward, and understanding your remark just now about all the work that needed to be done, remember this is the disclosure day when she said it. Was it in the works to produce those emails to the plaintiffs prior to the start of the evidentiary hearing?

MR. McCREA: Objection, Your Honor. Attorney-client, work product.

THE COURT: Sustained.

BY MR. PISANELLI:

Q Was it the exact opposite --

MR. McCREA: Objection. Same objection.

BY MR. PISANELLI:

Q -- for the defendants -- let me get the question out. Was it the exact opposite for the defendants to do what they could to move forward with that hearing without ever giving one of those emails or even the idea and the knowledge of the existence of those emails to the plaintiffs?

MR. McCREA: Same objection.

THE COURT: Sustained.

MR. PISANELLI: Thank you, Your Honor.

THE COURT: Would any of the defense team like to

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
SEP 13 2012
BY, BILLIE JO CRAIG, DEPUTY

STEVEN JACOBS

Plaintiff

vs.

LAS VEGAS SANDS CORP., et al.

Defendants

CASE NO. A-627691

DEPT. NO. XI

Transcript of Proceedings

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

COURT'S SANCTION HEARING - DAY 3

WEDNESDAY, SEPTEMBER 12, 2012

APPEARANCES:

FOR THE PLAINTIFF:	JAMES J. PISANELLI, ESQ. DEBRA SPINELLI, ESQ. TODD BICE, ESQ.
FOR THE DEFENDANTS:	J. STEPHEN PEEK, ESQ. BRAD D. BRIAN, ESQ. HENRY WEISSMAN, ESQ. JOHN OWENS, ESQ.
FOR HOLLAND & HART	CHARLES McCREA, ESQ. SAMUEL LIONEL, ESQ.
FOR MR. KOSTRINSKY:	JEFFREY A. GAROFALO, ESQ.
COURT RECORDER:	TRANSCRIPTION BY:
JILL HAWKINS District Court	FLORENCE HOYT Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

testimony about the removal of documents from a shared drive?

A Yes.

Q Okay. And you have no other source of information concerning the removal of documents from a shared drive other than that email from Anne Salt; is that right?

A To the best of my recollection, that's right.

MR. PISANELLI: Thank you, Your Honor.

THE COURT: Anything else?

Anything else, Mr. Kostrinsky, that you wanted to tell us?

THE WITNESS: No.

THE COURT: Have a very nice day. Thank you, Mr. Garofalo, for visiting with us.

MR. GAROFALO: Thank you, Your Honor.

THE COURT: All right. Now, we were going to go to either Mr. Singh or Mr. Justin Jones depending upon court availability. Since I see Mr. Justin Jones in the courtroom, I'm assuming you want to go to Mr. Justin Jones next. Just an assumption on my part.

MR. PEEK: That is correct, Your Honor. I'd arranged with him.

THE COURT: Okay.

JUSTIN JONES, COURT'S WITNESS, SWORN

THE CLERK: Please be seated. State your name and spell it for the record, please.

THE WITNESS: Justin Jones, J-O-N-E-S.

DIRECT EXAMINATION

BY THE COURT:

Q Good morning, Mr. Jones. How are you today?

A Great.

Q That's delightful to hear. I only have a few questions to you. Some of them may elicit an attorney-client objection. If they do, I'll rule on the objection and then I'll decide whether I'm going to stop asking questions and let Mr. Pisanelli or Mr. Bice start. On July 19th, 2011, in a court hearing you told me you could not be involved in the review of Jacobs's information and were prohibited from going to Macau. Do you recall that?

A Yes.

Q Okay. Why did you tell me that?

MR. McCREA: Objection, Your Honor. Foundation --

THE WITNESS: I'm happy to answer, but --

MR. McCREA: -- and attorney-client privilege.

THE COURT: Okay.

BY THE COURT:

Q Did you review ESI from an image of the hard drive of Mr. Jacobs's computer in the United States?

A I reviewed email correspondence.

Q And was that at Mr. Kostrinsky's computer at the Las Vegas Sands?

A Yes, that is correct.
Q And when did you do that review?
A Approximately May 19th, 2011.
Q What were you told about the source of that ESI?
MR. McCREA: Objection, Your Honor. Attorney-client privilege.
THE COURT: Objection's sustained.
BY THE COURT:
Q Were any portions of ESI converted to hard copy while you were in Mr. Kostrinsky's office? In other words, did you print any of them?
A Yes.
Q What did you do with the ones that you printed?
A I placed them on Mr. Kostrinsky's desk with a Post-it note.
Q Okay. Well, I'm not going to ask what the Post-it note says, because I know what that will elicit. Can you tell me why you failed to disclose to the court the mirror -- or the information that you were reviewing at Mr. Kostrinsky's office?
MR. McCREA: Objection, Your Honor. Attorney-client privilege.
BY THE COURT:
Q Were you, in fact, precluded from going back to Macau by the authorities?

A I could have gone there and gambled if I wanted. But it was my understanding that I could not participate in the review of documents because I was not counsel for Sands China or VML.

Q So it wasn't that you couldn't go to Macau?

A Correct. And if -- I apologize to the court if that was --

Q I thought you'd done something and they wouldn't let you back in the country.

A I'm not aware that I did anything that would prevent me from going back there. It was in the context of Ms. Glaser's comments with regards to communications from OPDP with regards to review of documents by anyone other than Sands China counsel.

MR. McCREA: Your Honor, objection. I don't want him to get into any communications he had with any attorneys for Las Vegas Sands or Sands China.

THE COURT: Okay. I'm not going to ask any more questions of Mr. Jones, because everything else I want to know from Mr. Jones would probably elicit an attorney-client objection and is probably cleaner if one of the attorneys for Mr. Jacobs now asks the question so I can just rule on objections.

Thank you, Mr. Jones.

THE WITNESS: May I ask a question?

THE COURT: Sure.

THE WITNESS: Since I haven't been involved in this case for a year now and am only -- have only limited knowledge as to what the purpose of this proceeding is, I've heard Your Honor make some comments with regards to adverse inferences of the invocation of the privilege. Since I am an attorney sitting here that you're questioning, is that adverse inference going to be directed at me since you have questions about me, because I --

THE COURT: That is probably unlikely given the limited --

THE WITNESS: Okay. Because --

THE COURT: -- involvement that you had.

THE WITNESS: -- that's of concern to me.

THE COURT: So let me -- let me tell you, it's probably unlikely given the limited involvement that you had in the proceedings. However, I anticipate there will some day be another Rule 37 motion that is filed by the plaintiffs and that they're going to ask for a hearing. And I can't tell you what will happen at that hearing.

THE WITNESS: Understood.

THE COURT: There is primarily issues related to sanctioning every party that is involved in my proceeding as opposed --

THE WITNESS: Okay.

THE COURT: -- sanctioning of an attorney.

THE WITNESS: Thank you for the clarification.

THE COURT: But I do not, you know, we'll see what happens if something else happens in the future.

THE WITNESS: All right.

THE COURT: I'm ready.

MR. PISANELLI: Thank you, Your Honor.

THE COURT: I'm ruling on objections. Now I'm taking notes.

MR. PISANELLI: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. PISANELLI:

Q Mr. Jones, there was a time during dependency of this litigation that you were involved in the representation of one or more of the defendants; is that right?

A One of the defendants.

Q Which defense?

A Las Vegas Sands.

Q And when did your involvement in this litigation begin?

A Either the very end of October or beginning of November, 2010.

Q Now, did there come a time when you ever were involved in joint representation of both defendants?

A No.

Q Okay. When did you stop working on this case?
A End of September, 2011.
Q Why did you stop working on it?
MR. McCREA: Objection, Your Honor. Attorney-client privilege.
THE COURT: Sustained.
BY MR. PISANELLI:
Q Did you ask or demand to be removed from this case?
A No.
Q Was your removal from this case based upon any of your concerns of ethical violations that were occurring?
MR. McCREA: Objection, Your Honor. Attorney-client privilege, work product.
THE COURT: Sustained.
BY MR. PISANELLI:
Q When did you first learn that the Macau Data Privacy Act was going to be used as a -- I'm going to use the word reason, as neutral a word as I can find, for one or both of the defendants to not produce documents that originated out of Macau?
MR. McCREA: Objection, Your Honor. Attorney-client privilege.
MR. PISANELLI: The date, Your Honor.
THE COURT: The date only.
THE WITNESS: To the best of my recollection, that

would have been in connection with my trip to Macau the fourth week in May 2011.

BY MR. PISANELLI:

Q And how did you learn that that law of Macau would be used as a reason for not producing documents in this case?

MR. McCREA: Objection. Attorney-client privilege.

MR. PISANELLI: Didn't ask what the communication was, Your Honor, just the nature of the communication.

THE COURT: How he learned, whether it was a communication in writing of an in-person conversation, something like that. To the extent it was only a how the communication was given to you.

THE WITNESS: There were verbal communications with other attorneys for Sands China.

BY MR. PISANELLI:

Q Were these in-house attorneys or outside counsel?

A Both.

Q Was Anne Salt the in-house attorney?

A She was an attorney.

Q Was Mr. Melo one of the attorneys?

A No.

Q I'm sorry, not Mr. Melo. Who was the in-house attorney?

A David Fleming.

Q Who were the outside counsel?

A I don't recall. We met with two law firms when we were in Macau. I heard reference to one of the firm names yesterday -- or for Ms. Glaser the other day, but I don't recall.

Q Do you recall either of the counsel, the law firms? Do you remember any of their individual names?

A I don't.

Q Other than those conversations that occurred while you were in Macau, did you ever independently analyze the Macau Data Privacy Act?

A No.

Q Did anyone at Holland & Hart?

MR. McCREA: Objection, Your Honor. Work product, attorney-client privilege.

THE COURT: Sustained.

BY MR. PISANELLI:

Q Let's talk about the transfers of the data from Macau to Las Vegas. I'd like to get a feel for the depth of your understanding of what occurred. You understand that the first delivery of data from Macau to the United States occurred on or around August of 2010?

A I have heard that.

Q Where have you heard it?

A In connection with these proceedings.

Q Okay. When did you first learn that data had been

transferred from Macau to the United States?

A Early part of 2011.

Q And did you understand that that data that was sent here was Mr. Jacobs's email?

MR. McCREA: Objection, Your Honor. Attorney-client privilege, work product.

BY MR. PISANELLI:

Q I'll ask it broadly. What do you understand the transfer of data to be -- what data was transferred --

MR. McCREA: Same objection.

THE COURT: Overruled.

THE WITNESS: I had an understanding that there were email files of Mr. Jacobs that had been transferred.

BY MR. PISANELLI:

Q Did you also understand that a hard drive had been transferred to the United States?

A I have a recollection to that extent. I don't know that I ever was aware of any other documents that were contained on the hard drive.

Q Okay. Did you understand the body of emails to be separate and apart from the hard drive?

MR. McCREA: Objection. Attorney-client work product.

THE COURT: Sustained.

//

BY MR. PISANELLI:

Q You said that you first learned about this transfer of data in September of 2011; is that right?

A No.

THE COURT: He said, early 2011.

BY MR. PISANELLI:

Q I'm sorry, the spring. Can't even read my own writing. Spring?

A I believe what I said, Mr. Pisanelli, was the early part of 2011.

Q Can you be a little more clear on that point.

A I know that it was prior to April. I can't pinpoint it any further than that.

Q Why do you know it was prior to April?

MR. McCREA: Objection. Attorney-client, work product.

THE COURT: Sustained.

BY MR. PISANELLI:

Q All right. So from your answers to Your Honor we are to understand that you did have an opportunity to review those emails?

A Yes.

Q And at the time that you did, you were acting as counsel for Las Vegas Sands Corp; is that right?

A Yes.

Q What was the purpose of your review?

MR. McCREA: Objection, Your Honor. Work product.

MR. PISANELLI: We've already heard Mr. Peek give a long explanation of what his purpose was.

THE COURT: I understand. The objection's overruled.

THE WITNESS: To understand the allegations in Mr. Jacobs's complaint.

BY MR. PISANELLI:

Q Did you hear Mr. Peek's testimony about why he was reviewing them?

A I did.

Q Do you share that explanation as to why you were reviewing them?

A Yes.

Q Okay. Did you review all of them?

A No.

Q How did you determine which to review and which not to review?

MR. McCREA: Objection. Attorney-client, work product.

THE COURT: Sustained.

BY MR. PISANELLI:

Q As between the work that you did and that Mr. Peek did, do you have a belief that both of you had completed a

review of all of the email that had been transferred concerning Mr. Jacobs from Macau?

A No.

Q Okay. Without telling me the thought process, was there some type of measure you were using as to which email to review and which not to review?

MR. McCREA: Objection, work product.

THE COURT: It's only a yes or no, was there a thought process?

THE WITNESS: Yes, there was a thought process.

BY MR. PISANELLI:

Q In other words, it wasn't just simply a random review, there were certain things that you had an objective of reviewing and certain things you just let go. Something to that effect?

A Yes.

Q Okay. Fair enough. Did you review emails between Mr. Jacobs and his wife?

MR. McCREA: Objection. Work product, attorney-client.

THE COURT: Sustained.

BY MR. PISANELLI:

Q Did you review emails between Mr. Jacobs and his personal counsel?

MR. McCREA: Same objection.

THE COURT: Sustained.

BY MR. PISANELLI:

Q Where were you when you made this review?

A Mr. Kostrinsky's office.

Q You were actually sitting at his desk?

A I was.

Q All right. And you were using the same computer that Mr. Kostrinsky had testified to that contained these emails?

A I didn't listen to Mr. Kostrinsky's testimony. It was my understanding that it was his laptop.

Q Okay. That's -- the laptop that he just used on a day-to-day basis in other words?

A Yes.

Q All right. How many of the emails did you print?

A I don't recall.

Q Can you give us your best estimate.

A Twenty-five to 30.

Q What was the purpose of printing those emails?

MR. McCREA: Objection. Work product.

THE COURT: Sustained.

BY MR. PISANELLI:

Q Did you print them for the purpose of circulating them?

MR. McCREA: Same objection.

THE COURT: Sustained.

BY MR. PISANELLI:

Q Did you circulate them?

A No.

MR. McCREA: Objection.

THE COURT: You've got to be faster, Mr. McCrea.

MR. McCREA: Doing my best.

BY MR. PISANELLI:

Q You left them on Mr. Kostrinsky's desk with a Post-it note?

A Yes.

Q Post-it note directed to Mr. Kostrinsky?

MR. McCREA: Objection, Your Honor. Work product.

THE COURT: Overruled.

THE WITNESS: The Post-it note was directed to someone?

A Yes.

Q Who was it directed to?

A My staff.

Q How did you expect your staff to read that Post-it note if it was left on Mr. Kostrinsky's desk?

A The staff was going to go over and index the documents.

Q Okay. So without telling me what was on there, you were leaving some type of instruction for your staff of what

to do with those documents?

A No.

Q What was the purpose of the Post-it note?

MR. McCREA: Objection. Work product.

THE COURT: Sustained.

BY MR. PISANELLI:

Q I think you already answered this, Mr. Jones, and if you did I apologize, but did you review the emails that Mr. Peek printed?

A Not to my recollection.

Q Were you aware that he had printed out email?

A Yes.

Q All right. Did you have any idea one way or another whether you were printing out duplicates of what he had already printed out?

MR. McCREA: Objection. Work product.

THE COURT: Sustained.

BY MR. PISANELLI:

Q I got the impression from Mr. Peek's testimony that you were both combining your efforts to complete a particular task. I think the words that he used is that he didn't complete the review or the assignment and that you came in after him to review it. Did you view your work in that same manner?

A He performed some searches, I performed some

searches. I was only in Mr. Kostrinsky's office because of the circumstances of the timing for approximately two hours. I did not feel that I completed any task.

Q Did you have an intention of going back to review those records?

A I don't recall --

MR. McCREA: Objection. Work product.

THE COURT: Sustained.

BY MR. PISANELLI:

Q Well, when you left, did you just say a moment ago that you only reviewed emails for a couple of hours?

A Correct.

Q At the completion of those couple of hours, did you believe that your review was complete?

MR. McCREA: Objection. Work product.

MR. PISANELLI: I think he just said this a second ago, Your Honor.

THE COURT: I think he did, too. The objection's overruled.

THE WITNESS: I don't believe so.

BY MR. PISANELLI:

Q Okay. And when you went to go perform these searches that you just described, were there any restrictions imposed upon you about which emails you could review and which you could not?

MR. McCREA: Objection. Attorney-client, work product.

THE COURT: Sustained.

BY MR. PISANELLI:

Q Was there any restrictions imposed upon you at some later date that prohibited you from going back and completing the project you were working on?

MR. McCREA: Same objection.

THE COURT: Sustained.

BY MR. PISANELLI:

Q After leaving those email -- printed emails in Mr. Kostrinsky's office did you ever see them again?

A No.

Q Did your staff go in and complete the assignment you had given them?

A The staff had gone back to index documents, yes. I don't recall whether it was I or Mr. Peek that gave specific direction.

Q It was staff and not lawyers that went back?

A Correct.

Q All right. Did any lawyers from Holland & Hart go in to review the emails?

A Other than myself and Mr. Peek?

Q Yes, sir.

A No.

Q Okay. Mr. Anderson go for any reason?

A No.

Q And it's your understanding that Bob Cassity didn't review any of these email either?

A Not to my knowledge.

Q Okay. Without telling me what was on the documents, did you or your staff create any summaries about the emails you had reviewed?

MR. McCREA: Objection. Work product.

THE COURT: Sustained.

MR. PISANELLI: Your Honor, as you notice from the question, all I'm asking is the existence --

THE COURT: I understand, Mr. Pisanelli.

MR. PISANELLI: -- of a document that would be something that would be on the privilege log.

THE COURT: A summary may not be in a privilege log.

MR. PISANELLI: Well, depending upon who it was circulated to it would.

THE COURT: A summary that was created by counsel is unlikely to appear on a privilege log.

MR. PISANELLI: Depending if it was circulated to someone other than their law firm then -- that's my point is only to know if certain documents exist.

THE COURT: The objection is sustained.

MR. PISANELLI: Okay.

THE COURT: Thank you.

BY MR. PISANELLI:

Q Did you have any -- well, strike that. The visit that you took to Mr. Kostrinsky's office, that was the only time you went there to review those emails; is that right?

A Correct.

Q Did you have the opportunity to review the emails in some other form?

A No.

Q Do you have any knowledge as to whether Holland & Hart was provided electronic access to those email?

MR. McCREA: Objection. Work product, attorney-client.

THE COURT: Overruled.

THE WITNESS: Not to my knowledge.

BY MR. PISANELLI:

Q Did you receive any hard-copy emails from Mr. Kostrinsky?

A I received many emails from Mr. Kostrinsky. Are you referring specifically to emails printed out from Mr. Jacobs's computer?

Q Yes, sir. Right.

A I heard Mr. Peek reference that there may have been. I don't specifically have a recollection, there may have been.

Q Okay. You recall -- actually you may not recall, I

haven't turned around much during these proceedings, but were you here for Mr. Ma's testimony?

A I believe I was here for all of Mr. Ma's testimony.

Q Were you here for his followup testimony when he came back to correct some earlier answers?

A Yesterday?

Q Yes.

A I think I was.

Q Okay. Were you -- happened to be paying attention when he talked about these notebooks that he had received from a client that contains some emails and other documents?

A I did hear that.

Q All right. Did you -- strike that. Did Holland & Hart receive similar notebooks of documents and emails from your client?

MR. McCREA: Objection. Work product.

THE COURT: Overruled.

THE WITNESS: I don't have a recollection of that. I don't recall what time frame Mr. Ma was referencing. I was out of the case by September. So if he was referencing something that postdated my involvement I don't know, but not to my recollection.

Q Okay. All right. I know you said that Mr. Kostrinsky would send emails to you about the case all the time. I don't want to know about those specifically unless

they contained attachments of the Jacobs's emails. And again, I think you just answered this, but were there any such emails?

A Like I said, I heard Mr. Peek reference that there may have been. I don't have a specific recollection, but I don't want to say no.

Q Do you have a belief, one way or another, of whether Glaser Weil was aware of the existence of the emails at or around the same time you were aware of them?

MR. McCREA: Objection. Work product, attorney-client.

THE COURT: Sustained.

BY MR. PISANELLI:

Q Did you provide any of the emails to Glaser weil?

MR. McCREA: Objection. Attorney-client, work product.

THE COURT: Sustained.

BY MR. PISANELLI:

Q Did you discuss the existence of the emails with Glaser Weil?

MR. McCREA: Same objection.

THE COURT: Sustained.

BY MR. PISANELLI:

Q Now, following -- you were pretty precise on the date that you reviewed those emails, were you not?

A Yes.
Q May 19th, was that right?
A That's my recollection.
Q Did you review your billing records prior to coming to court?
A I reviewed a few billing records.
Q For what purpose?
MR. McCREA: Objection. Work product.
THE COURT: Overruled.
THE WITNESS: To refresh my recollection as to certain dates.
BY MR. PISANELLI:
Q Okay. And did the billing records actually refresh your recollection?
A Yes, they did.
Q Do you know which billing records you actually reviewed that did in fact refresh your recollection about events in this case?
A I reviewed my billing records for the third week in May to determine what day it was.
Q Those the only ones you reviewed?
A No.
Q What else did you review?
A What other billing records did I review?
Q Yes.

A I reviewed some billing records from I know the end of August or early part of September.
Q Of what year?
A 2011.
Q For the purpose of refreshing your recollection again?
A Yes.
Q Did they in fact refresh your recollection about the timing of events in this case?
A Yes.
Q Okay. Did you review anything else?
A Did I review any other documents in preparation for appearing here today?
Q That's a better way to put the question, yes.
A Yes.
MR. McCREA: Objection, Your Honor. Work product.
THE COURT: Overruled.
BY MR. PISANELLI:
Q What else did you review?
A I reviewed some emails.
Q Which ones?
MR. McCREA: Your Honor, same objection.
THE COURT: Overruled.
THE WITNESS: I reviewed emails that refreshed my recollection as to the timing of events in this case. I also

reviewed the transcript from the July -- the transcript that Her Honor referenced.

THE COURT: July 19th, 2011.

THE WITNESS: July 19th.

BY MR. PISANELLI:

Q Okay. And did all of those documents refresh your recollection about the events in this case?

A Yes.

Q Let's start with the emails. Who were the parties to the emails?

A There were several parties.

Q Okay. First of all, how many emails were there?

A How many emails did I review in preparation for appearing today?

A Yes, sir.

A I don't recall.

Q Approximately?

A Ten to 15.

THE COURT: Let me recharacterize that question. How many emails did you review to refresh your memory in preparation for appearing today?

THE WITNESS: Ten to 15.

THE COURT: Okay.

MR. PISANELLI: Thank you, Your Honor.

//

BY MR. PISANELLI:

Q What did you do with those 10 to 15 emails --

MR. BRIAN: Your Honor, may we be heard briefly on this?

THE COURT: Absolutely, you can be heard. I think I dealt with this issue yesterday, Mr. Brian.

MR. BRIAN: No. I think it's a little different -- I think it's different, Your Honor. And I think this is an example of one of the problems I think of when we have a situation of a proceeding where counsel is now examining a lawyer at the firm currently representing the client. Because it's not the same, I would argue to Your Honor, about a lawyer who refreshes -- a witness who normally would refresh recollection, I understand the rules on that.

Here you have a situation where quite -- in a quite extraordinary proceeding, Your Honor, it's permitting counsel to do an extensive examination of lawyers at firms that are currently representing. Those documents would otherwise be privileged. And I think in that circumstance, given the nature of this proceeding that the -- whether you call it the witness advocate rule or whether you call it the legal system we now have, I think it puts the parties and counsel in a very difficult situation. And I don't think it's appropriate to then cause privileged documents to be produced when a witness used them to try to figure out dates and the like. I think

it's not the normal situation, Your Honor.

THE COURT: I understand what you're saying, Mr. Brian. Right now the question is who were the recipients on the emails and who were the addressees. That's not the same issue that you're addressing.

MR. BRIAN: That's fine, Your Honor.

THE COURT: I'm not there yet.

MR. BRIAN: Okay. That I appreciate, Your Honor.

THE COURT: Mr. Pisanelli, you may continue.

MR. PISANELLI: Thank you.

BY MR. PISANELLI:

Q Before we got to the identities, I just want to know, what did you do with those 10 to 15 emails that you used to refresh your recollection about testimony today?

A I looked at them. I provided copies of some of them to counsel.

Q To whom?

A John Owens.

Q You didn't provide all of them to Mr. Owens?

A No.

Q If called upon, Mr. Jones, to reassemble those 10 to 15 emails, do you believe you'd have the ability to do that?

A Yes.

Q Did you maintain hard copies of them somewhere in your office or wherever?

A Some of them.

Q Okay. Would you have to go off of memory to assemble the 10 or 15? In other words, that's what I'm getting at, do you have them already segregated, or would you have to go back and recollect them?

A I could assemble the ones I sent to Mr. Owens.

Q Okay. What about the --

A I don't recall about the other ones.

Q I'm sorry?

A I couldn't tell you about the other ones.

Q You would have to just go off your best recollection?

A Yes.

Q All right. How many did you send to Mr. Owens?

A I don't remember, six or seven.

Q So let's start with the others. We'll call it five to 10. Actually, strike that. Let's just test your memory the best we can and go through and identify for me each of the emails as best you can whether it be by author, recipient, date, subject matter, whatever it is. Do what you can to identify them for us.

THE COURT: Mr. Pisanelli, we've got to be very careful about subject matter. I don't have a problem with the identification by date and recipient, because that information is something that should be on the privilege log, or at least

arguably should be on the privilege log. If it is subject matter, I get into issues of concern.

MR. PISANELLI: Understood, Your Honor. The only point I would make, and not to debate you, is this isn't as Mr. Brian characterized, a general litigation issue, this is a specific Nevada statute as Your Honor knows. And there is no exception for the circumstances of this proceeding. There's no exception at all, it is a mandatory disclosure in Nevada when a party does what Mr. Jones did. And so I think that they are openly discoverable at this point.

THE COURT: Not a party, a witness.

MR. PISANELLI: I'm sorry. A witness. And so they are openly discoverable in non-privileged records as we stand.

THE COURT: I understand what we're going to do. You're going to identify them for me and then we're going to have a motion --

MR. PISANELLI: Okay.

THE COURT: -- and you're going to ask for them to be produced. And Mr. Brian's going to file a brief and he and Mr. Peek are going to -- and Mr. Lionel and Mr. McCrea are going to say why they shouldn't be produced.

MR. PISANELLI: Okay.

THE COURT: And then I'm going to have an argument and then I'm going to rule.

MR. PISANELLI: I hear you loud and clear.

THE COURT: Okay.

MR. PISANELLI: All right.

THE COURT: So if you want to identify them so it makes our life easier to be able to identify the particular items that are going to be in dispute as part of the refreshed recollection issue, then we can do it.

MR. BRIAN: I would just say, just to preview the argument, Your Honor, I think this is the --

THE COURT: I don't need you to preview the argument. I know what you're going to say.

MR. BRIAN: I'm just going to say two words, Club Vista.

THE COURT: This isn't Club Vista.

MR. BRIAN: I think it's a --

THE COURT: This is a very serious violation of duties of candor to the court by counsel who are representing a party.

MR. BRIAN: I understand.

THE COURT: That's why I'm here, Mr. Brian.

MR. BRIAN: I know that. I understand --

THE COURT: All right. This isn't Club Vista.

MR. BRIAN: I understand your concern, Your Honor. But I'm just saying the policy --

THE COURT: Mr. Brian, you don't understand my concern. You've not understood my concern since the issue

arose in May.

MR. BRIAN: I have, Your Honor. Trust me, I have.

THE COURT: So -- Mr. Pisanelli, if you would like to identify the documents, I would appreciate it.

MR. PISANELLI: Thank you, Your Honor.

BY MR. PISANELLI:

Q Mr. Jones, I want to do this the best way for you. So if it's easiest to say let me start with the John Owens or let me start with the non John Owens or start chronologically, whatever it is easiest for you to recall the 10 to 15, feel free to do so. Let's start, if it makes sense, with the dates of the emails. Do you recall the dates of the emails that you used to refresh your recollection?

A Somewhere in May of 2011. Others were in August, September of 2011.

Q I take it you don't remember the specific dates of any of them?

A I do not.

Q All right. So let's take a different approach. Let's talk about the authors or recipients, would that be an easier way for you to identify for the court the emails that you used to refresh your recollection?

A Sure.

Q Okay. Who were the authors of the emails that you reviewed to refresh your recollection?

A In May the author was Steve Peek. I don't recall on other emails from May. The authors and recipients of the emails in August and September of 2011 were myself and in-house and outside counsel.

Q Were you in -- focusing on the May emails, were you the recipient of the emails from Mr. Peek?

A Yes.

Q Okay. Anyone else copied on those emails?

A Not to my recollection.

Q So the body of email that you used to refresh your recollection about your testimony today from May were email communications solely between you and Mr. Peek. Do I have that right?

A That's my recollection.

Q How many in May?

A One.

Q Now, let's move over to August. This was -- I'm sorry, between you and outside counsel?

A Both in-house counsel and outside counsel.

Q All right. Who -- were you the author?

A Some of them I was the author, some of them I was the recipient.

Q All right. On the ones where you were the author, who were you writing to?

A Varied by email, but generally Mr. Peek, counsel

from Glaser Weil, and in-house counsel.

Q Who at Glaser weil?

A Mr. Ma and perhaps Ms. Glaser on one or two of them.

Q And on the emails where you were the recipient, who was or who were the authors?

A Mr. Ma, Mr. Rubenstein.

Q Were there any other recipients besides yourself?

A Were there recipients? Yes. A Ms. Salt was an author of an email that I recall.

Q And who else were the recipients of those? Let's start with the emails from Mr. Ma, who was he writing to?

A I don't recall specifically. To the best of my recollection, there would have been at least one of the in-house counsel.

Q And Mr. Rubenstein, who was he writing to?

A I don't recall if -- who the other recipients were. There may have been other recipients. There probably were other recipients.

Q And Ms. Salt, who was she writing to?

A The best of my recollection, that was directed back to the legal team that included in-house and outside counsel.

Q And who were those individuals?

A Myself, Mr. Peek, Ms. Glaser, Mr. Ma, Mr. Sedlock, Mr. Fleming, Mr. Rubenstein, Mr. Kostrinsky, Ms. Hyman.

Q Anyone else?

A Not that I can recall.

Q Now, we've been going through the body of emails I think that you labeled as the August email. But earlier you said there was a body from May and a body from August, September. Just so we're clear, everything we just went through under the August label, that includes what you had earlier described as August/September, fair enough?

A Correct.

Q All right. Good. Were there any other emails that you reviewed to refresh your recollection other than those that you've just described?

A Not that I recall.

MR. PISANELLI: Your Honor, did I understand you correctly that you did not want the witness to disclose if there were re lines or subject lines in these emails?

THE COURT: I'd rather not go through that --

MR. PISANELLI: Okay.

THE COURT: -- process, because I think it's too likely to have an inadvertent waiver of reform. Mr. McCrea can get up and object.

MR. PISANELLI: Fair enough.

BY MR. PISANELLI:

Q Are there any other identifiers in these emails that you can disclose to Her honor that would not disclose what otherwise may be an attorney-client privileged communication

or work product information?

MR. McCREA: Objection, Your Honor. Attorney-client privilege.

THE COURT: That's a yes or a no, Mr. Jones.

THE WITNESS: I'm sorry. I don't know what other identifiers you would be referring to.

BY MR. PISANELLI:

Q Well, I doubt that it happened --

A Sorry.

Q -- but for instance, a Bates number could have been put on these things?

A On the emails themselves?

Q Yes.

A No.

Q Okay. You're a litigator; right?

A Yes.

Q And so you can brainstorm this issue as much as I can. I'm just trying to --

A I can't think of anything Mr. Pisanelli.

Q That's all I'm asking. Okay. Good. Thank you.

MR. PISANELLI: Now, Your Honor, it is not for me to direct Mr. Jones to assemble these records, but I would ask Your Honor to direct him to do so only so we won't have to challenge or test or rely upon Mr. Jones's memory as the briefing goes on. In all likelihood, this may last more than

a month or so, and it certainly is in everyone's best interest if they are assembled and preserved waiting for Your Honor's resolution on what to do about them.

THE COURT: I understand what you're saying, Mr. Pisanelli. Thank you.

MR. PISANELLI: I will take your silence as a rejection of my request and I will move on.

THE COURT: Very perceptive.

MR. PISANELLI: Yes.

BY MR. PISANELLI:

Q To the yes or no questions, Mr. Jones, do these emails reflect in any manner a reason why you no longer participated in the defense of this case?

MR. McCREA: Objection. Attorney-client, work product.

THE COURT: Sustained.

BY MR. PISANELLI:

Q Let's talk about the billing records. Have you segregated those billing records that you used to refresh your recollection?

A To be clear, I didn't look at a physical billing record. We have a system called DTE Axiom at my office. I clicked back through to the months that I wanted to look at, pulled open the entry for Las Vegas Sands and reviewed the date for that particular entry.

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

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

Volume 2 of 3

MORRIS LAW GROUP
Steve Morris, Bar No. 1543
Rosa Solis-Rainey, Bar No. 7921
900 Bank of America Plaza
300 South Fourth Street
Las Vegas, Nevada 89101

KEMP, JONES & COULTHARD, LLP
J. Randall Jones, Bar No. 1927
Mark M. Jones, Esq., Bar No. 000267
3800 Howard Hughes Pkwy, 17th Flr.
Las Vegas, Nevada 89169

HOLLAND & HART LLP
J. Stephen Peek, Esq., Bar No. 1759
Robert J. Cassity, Esq., Bar No. 9779
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

Attorneys for Petitioners

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

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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 **APPENDIX TO 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
James J. Pisanelli
Todd L. Bice
Debra Spinelli
Pisanelli Bice
3883 Howard Hughes Parkway, Suite 800
Las Vegas, Nevada 89169

Attorneys for Steven C. Jacobs, Real Party in Interest

DATED this 23rd day of January, 2013.

By: /s/ PATRICIA FERRUGIA

STMT
J. Stephen Peek, Esq.
Nevada Bar No. 1759
Robert J. Cassity, Esq.
Nevada Bar No. 9779
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
(702) 669-4600
(702) 669-4650 – fax
speek@hollandhart.com
bcassity@hollandhart.com

Attorneys for Las Vegas Sands Corp. and Sands China, LTD.

Brad D. Brian, Esq.
Henry Weissmann, Esq.
John B. Owens, Esq.
Bradley R. Schneider, Esq.
Munger Tolles & Olson LLP
355 S. Grand Avenue
Los Angeles, California 90071
213-683-9100
brad.brian@mto.com
henry.weissmann@mto.com
john.owens@mto.com
bradley.schneider@mto.com

Attorneys for Sands China, LTD.

DISTRICT COURT

CLARK COUNTY, NEVADA

STEVEN C. JACOBS,

Plaintiff,

v.

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

Defendants.

_____/

AND ALL RELATED MATTERS.

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

Date: n/a
Time: n/a

DEFENDANTS' STATEMENT REGARDING HEARING ON SANCTIONS

5735107_1

In advance of the August 30-31, 2012 hearing, Defendants Las Vegas Sands Corporation ("LVSC") and Sands China Ltd. ("SCL") submit this brief concerning data transfers and Macau's Personal Data Protection Act ("PDPA") and explaining why sanctions should not be imposed.

I. INTRODUCTION

After Defendants filed a Status Conference Report that discussed the transfer from Macau of certain electronically stored information ("ESI"),[1] including ESI for which Plaintiff was the custodian, the Court sua sponte ordered a hearing to consider the imposition of sanctions. The Court stated that it would evaluate whether Defendants' previous arguments about data transfers and the PDPA had (1) violated EDCR 7.60(b) by causing the Court and plaintiff to waste time on the PDPA, or (2) breached Defendants' duty of candor to the Court.

We deeply regret that our conduct has given rise to the Court's concerns. We file this brief in the dual hope of addressing those concerns and providing context for the issues, each of which will be discussed in detail below. With regard to the first question, the July 31, 2012 announcement by the responsible Macau government agency of an investigation into past data transfers from Macau, together with the agency's August 8, 2012 official rejection of the companies' position that data can be transferred from Macau for purposes of producing documents in discovery in this case and to the United States Government, demonstrate that the application of the PDPA and attendant privacy issues remain very real hurdles to discovery and that the defendants' concerns were well-founded.

With regard to the second question, it is our sincere hope to satisfy the Court that there was neither a violation of the duty of candor nor any violation of our discovery obligations as they arose and in the context of competing international legal considerations. On June 9, 2011, LVSC's counsel informed the Court that the PDPA "implicates" some of its documents in Las

[1] On June 27, 2012, Defendants filed a Joint Status Conference Report in which they disclosed that ESI for which Plaintiff was the custodian, as well as certain other data, had been transferred from Macau to the United States (Attached hereto as Exhibit DD). (Defendants submit concurrently herewith one (1) volume of exhibits, constituting the pleadings and transcripts discussed in this submission. Defendants also submit concurrently herewith an Appendix that sets forth a chronological discussion of their statements.) On July 6, 2012, Defendant filed a Statement Regarding Data Transfers, which described these and other data transfers (Attached hereto as Ex. EE). The data that was transferred from Macau to the United States as described in those filings is referred to herein as the "Subject Transfers."

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Vegas. Because LVSC does not do business in Macau, LVSC's invocation of the PDPA could only mean that it possessed in the United States documents that had come from Macau. At the same hearing, Plaintiff's counsel stated that "foreign law" was not a basis for refusing to produce documents that are "in the jurisdiction in which the litigation is taking place like they are here." In subsequent meet-and-confer communications, Plaintiff's counsel specifically denied that LVSC "would be entitled to withhold documents in its possession in Las Vegas on the grounds that production of the same would violate the Macau Act." Plaintiff's counsel stated that he would bring a motion to compel once he knew "what materials are being withheld." Yet Plaintiff never asked what SCL documents were outside Macau or what documents in LVSC's possession came from Macau. Had Plaintiff asked those questions, a truthful answer would have been given. But the question was not asked, and in adversarial litigation, that fact makes a difference. There was, as we show below, no legal or ethical duty to volunteer.

In hindsight, Defendants acknowledge that their statements could have been clearer and more detailed and, had they been so, this hearing would not have been necessary. But the failure to do so was at most an honest mistake, not a violation of a legal duty and certainly not a fraud on the Court as Plaintiff has suggested. Defendants sincerely regret failing to meet the Court's expectations, but respectfully submit that sanctions are unwarranted for several reasons.

First, Defendants properly invoked the Macau Data Protection Act in pleadings and arguments to this Court. The PDPA was and remains a genuine impediment to the production of documents in Macau. Although Defendants transferred certain data from Macau to the United States, including data for which Plaintiff was the custodian, a far larger quantity of potentially responsive documentary information remains in Macau. Indeed, Plaintiff initially demanded that SCL review data from 38 custodians employed by SCL's operating subsidiary in Macau, Venetian Macau Limited ("VML"). SCL estimated that those custodians' data, which was and is housed in Macau and has not been transferred to the United States, amounted to 2 to 13 terabytes of data or more.

Since May 2011, the Macau Office for Personal Data Protection ("OPDP"), the agency charged with enforcement of the PDPA, has made clear to VML that transfers of personal data

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from Macau are subject to the PDPA, that OPDP will strictly enforce the PDPA, and that failure to comply with the PDPA may result in civil and criminal penalties. On July 31, 2012, following Defendants' disclosures to this Court of the Subject Transfers and related press accounts, OPDP commenced an official investigation into the alleged transfer from Macau by VML to the United States of certain data. In addition, on August 3, 2012 Francis Tam, Macau's Secretary for Economy and Finance, stated that the Macau government will have "no tolerance" for breaches of the PDPA. In sum, there can be no question that the PDPA remains applicable to documents that are still located in Macau and the PDPA therefore remains a significant issue in this litigation, regardless of the Subject Transfers.

Plaintiff has criticized LVSC for seeking to compel Plaintiff to return data that he took upon his departure from SCL without disclosing the Subject Transfers to the Court. But Defendants had a reasonable basis—both for PDPA and non-PDPA reasons—for distinguishing the Subject Transfers from the Plaintiff's transfers. For one thing, the PDPA was not the only, or even the first, argument LVSC made in support of its LVSC's efforts to obtain a return of the data taken by Plaintiff; LVSC also relied on grounds wholly independent of the PDPA, such as ownership, confidentiality, and privilege. Insofar as the PDPA was concerned, LVSC focused on the possibility that Plaintiff would publicly disclose documents containing personal data that he had removed from Macau. In this context, LVSC had a reasonable basis for invoking the PDPA, whose central purpose is to prevent public disclosure of personal data.

By contrast, the Subject Transfers did not endanger privacy interests in the same way as did Plaintiff's possible disclosures, which could have exposed VML to adverse consequences under Macau law. LVSC's removal of data from Macau would in no way justify Plaintiff's public disclosure of Macau data, whether taken by him or someone else. LVSC's arguments concerning Plaintiff's transfers were neither frivolous, vexatious nor a waste of the parties' or the Court's time, regardless of the Subject Transfers.

Second, Defendants did not make any false or misleading factual representations to the effect that they had ***not*** transferred any data from Macau. On the contrary, SCL correctly stated that "the overwhelming majority" of SCL's documents were in Macau. That statement truthfully

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conveys two things: That most of the documents are in Macau, and that some were not. In addition, as noted, LVSC told the Court and Plaintiff's counsel that it had documents in Las Vegas that implicated the PDPA, which could only mean documents that had come from Macau.

Third, Defendants had a reasonable basis for not disclosing the Subject Transfers sooner. Defendants had a legitimate concern that a premature disclosure of the Subject Transfers could have led to an adverse reaction by the Macau authorities. Beginning on May 13, 2011, Defendants pursued numerous discussions with OPDP to address the PDPA. It was not until a meeting with OPDP on May 28, 2012 that Defendants achieved a level of comfort that LVSC could produce in this case the documents that had been transferred from Macau to the United States, although even then VML faced the possibility of an enforcement action in respect of past transfers should the disclosure result in frustration of the purposes of the PDPA. Subsequent events have confirmed that Defendants' concerns were well-founded, as OPDP's recently-announced official investigation demonstrates. In addition, Defendants did not violate—let alone willfully violate—any order of the Court. Defendants had a reasonable basis for concluding that they were not under an immediate obligation to disclose the Subject Transfers before VML pursued additional communications with OPDP, given that their document production was not complete.

*****

Defendants understand that the hearing on August 30-31, 2012 is the *Court's* hearing, at which the Court will ask questions and hear presentations about the issues of concern to the Court. Mr. Peek will attend the hearing, and we understand that Ms. Glaser will as well. In addition, Michael Kostrinsky (LVSC's former Associate General Counsel) and Manjit Singh (LVSC's Chief Information Officer) will be available to answer the Court's questions.

Although the Court has indicated that Plaintiff's counsel will be permitted to ask questions, the Court should not permit Plaintiff's counsel to misuse the hearing to pursue their own agenda. Plaintiff's counsel have given every indication that they will attempt to do just that. On the evening of August 23, Plaintiff's counsel sent an email in which they attached proposed subpoenas for Michael Leven, LVSC's Chief Operating Officer, a 30(b)(6) designee on the topics

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that were covered by their 30(b)(6) deposition notice (including two that the Court ruled they could not pursue pending further briefing), and Manjit Singh.

The email went on to demand that ten lawyers attend the hearing, including not only Mr. Peek and Ms. Glaser, but also their colleagues Justin Jones, Stephen Ma, and Andrew Sedlock. Even more disturbing, the email demands the attendance of Gayle Hyman and Robert Rubenstein (in-house LVSC lawyers that the Court has already ruled cannot be deposed), David Fleming (SCL's General Counsel, who resides in Macau), and Brad Brian and Henry Weissmann (attorneys of record for SCL). The email states that "[w]hile it is not our intent to seek testimony from any of the above-listed counsel during the hearing (and hence no subpoenas are attached for any of them), since they all have played some role in the disclosures or non-disclosures to the Court, we believe it would be prudent if each/all were present upon chance the Court wishes to ask them questions directly (rather than proceed through a game of telephone)." The email then threatens to subpoena these lawyers if Defendants do not agree to produce them at the hearing.

The Court's concerns, which led it to set this hearing, are not a license for Plaintiff's counsel to engage in such abusive litigation tactics. Despite the Court's repeated statements about the limited scope of the hearing, Plaintiff's counsel persists in trying to turn this hearing into a courtroom circus. Plaintiff continues to threaten to file his own motion for sanctions. To date, however, he has not done so, and the only motion calendared for hearing on August 30-31 is the Court's own motion. The Court should not countenance Plaintiff's counsel's harassing and improper behavior.

II. ARGUMENT

This section sets forth the governing legal standards and then applies those standards to the statements Defendants have made in pleadings and in open court.[2]

A. Legal Standards

"The general rule in the imposing of sanctions is that they be applied only in ***extreme***

[2] In order to present a complete record, Defendants discuss the statements made prior to the Supreme Court's August 26, 2011 order staying non-jurisdictional issues. (Attached hereto as Exhibit M). Defendants respectfully submit, however, that the Supreme Court's stay order limits the Court's authority to impose sanctions for conduct that does not directly relate to jurisdiction. Defendants reserve all rights in this regard.

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circumstances where willful noncompliance of a court's order is shown by the record." *Finkelman v. Clover Jewelers Boulevard, Inc.*, 91 Nev. 146, 147, 532 P.2d 608, 609 (1975) (emphasis added). In *Finkelman*, defendant was ordered to produce certain documents, and the copies produced were "illegible, unintelligible, unidentifiable and so badly reproduced as to be worthless for examination." *Id.* As a sanction, the trial court ordered the defendant's answer stricken and entered judgment for the plaintiff. The Nevada Supreme Court reversed, finding "nothing in the record that indicates willful disregard of the district court's order to produce documents....We have here...an incident where the parties have partially complied with the court's order and have provided an explanation for their failure to fully comply. This, of course, negates willfulness." *Id.*

As discussed below, Defendants did not disobey an order of the Court or any other requirement; they had a reasonable basis for the arguments they presented to the Court; and they did not misrepresent the facts. Accordingly, sanctions are not warranted.

1. EDCR 7.60(b)

The Eighth Judicial District Court Rule ("EDCR") rule governing sanctions provides:

> The court may, after notice and an opportunity to be heard, impose upon an attorney or a party any and all sanctions which may, under the facts of the case, be reasonable, including the imposition of fines, costs or attorney's fees when an attorney or a party without just cause:
> (1) Presents to the court a motion or an opposition to a motion which is obviously frivolous, unnecessary or unwarranted.
> (2) Fails to prepare for a presentation.
> (3) So multiplies the proceedings in a case as to increase costs unreasonably and vexatiously.
> (4) Fails or refuses to comply with these rules.
> (5) Fails or refuses to comply with any order of a judge of the court.

EDCR 7.60(b). Defendants understand the Court's concerns are based on clauses (1) and (3). There has been no suggestion that counsel failed to prepare for a presentation or that the nondisclosure of the Subject Transfers violated the rules or a court order.

Clauses (1) and (3) embody the standards set forth in Nev. R. Civ. P. 11, which requires the person submitting a pleading to certify, "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," that the pleading "is not

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being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation," that the legal contentions "are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law," and that the factual contentions "have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."

Indeed, EDCR 7.60 must be construed as coextensive with Rule 11 because Nev. R. Civ. P. 83 permits district courts to adopt local rules only if such rules are "not inconsistent" with the Nevada Rules of Civil Procedure. "[U]nder NRCP 83, district court rules must be consistent with the Nevada Rules of Civil Procedure. Therefore, EDCR 7.60 cannot exceed the scope of NRCP 37(b)." *Nevada Power Co. v. Fluor Illinois*, 108 Nev. 638, 644, 837 P.3d 1354, 1359 n.4 (1992). The same reasoning applies with respect to the relationship between EDCR 7.60(b) and NRCP 11.

Sanctions under NRCP 11 may be imposed only when the claim is "frivolous," i.e., when it "is 'both baseless and made without a reasonable and competent inquiry.' Thus, a determination of whether a claim is frivolous involves a two-pronged analysis: (1) the court must determine whether the pleading is 'well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law'; and (2) whether the attorney made a reasonable and competent inquiry." *Bergmann v. Boyce*, 109 Nev. 670, 676, 856 P.2d 560, 564 (1993) (citations omitted).

The Supreme Court has cautioned against imposition of Rule 11 sanctions for claims that are novel and ultimately unsuccessful. "Rule 11 sanctions are not intended to chill an attorney's enthusiasm or creativity in reasonably pursuing factual or legal theories, and a court should avoid employing the wisdom of hindsight in analyzing an attorney's action at the time of the pleading." *Marshall v. District Court*, 108 Nev. 459, 465-66, 836 P.2d 47, 52 (1992); *see also K.J.B, Inc. v. Drakulich*, 107 Nev. 367, 370, 811 P.2d 1305, 1307 (1991) (claim was "warranted by ambiguities" in existing law and "a reasonable belief" that the claim might be barred if brought later; "[w]e cannot fault appellant's counsel for zealously protecting his client's interests").

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In *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009), the Supreme Court reversed the imposition of sanctions under NRCP 11 and EDCR 7.60 for filing a motion to disqualify the trial court judge. The Court noted that sanctions may be imposed for a frivolous motion, but the "district court must determine if there was any credible evidence or reasonable basis for the claim at the time of filing." 125 Nev. at 411, 216 P.3d at 234. Although the motion "may have been without merit, that alone is insufficient for a determination that the motion was frivolous, warranting sanctions." *Id.*

Clause (3) of EDCR 7.60(b) is also similar to 28 U.S.C. § 1927, which provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

In construing this statute, federal courts have held that it does not permit the imposition of sanctions "absent a finding that counsel's conduct resulted in bad faith, rather than misunderstanding, bad judgment, or well-intentioned zeal." *LaSalle Nat'l Bank v. First Conn. Holding Group, LLC,* 287 F.3d 279, 289 (3d Cir. 2002). As EDCR 7.60(b)(3) uses the same wording, it should be construed in the same way. *See Edgington v. Edgington*, 119 Nev. 577, 584, 80 P.3d 1282, 1288 (2003) (recognizing that state statutes substantially similar to previously-enacted federal statutes should be construed in the same manner).

2. Duty of Candor

Nevada Rule of Professional Conduct Rule 3.3, entitled "Candor Toward the Tribunal," states:

> (a) A lawyer shall not knowingly:
> (1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
> (2) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

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> (3) Offer evidence that the lawyer knows to be false....
> (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 3.3(a)(1) thus prohibits an attorney from making a false statement of fact or making a statement of fact that is misleading due to the failure to disclose other facts. *See* Official Commentary to Model Rules of Professional Conduct 3.3(a) ("There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation."); *Gum v. Dudley*, 505 S.E.2d 391, 402 (W.Va. 1997) ("[I]n determining whether an attorney's silence violated the general duty of candor owed to a court, it must be shown by a preponderance of the evidence that (1) the silence invoked a material misrepresentation, (2) the court believed the misrepresentation to be true, (3) the misrepresentation was meant to be acted upon, (4) the court acted upon the misrepresentation, and (5) that damage was sustained."); *cf. Brody v. Transitional Hospitals Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002) ("To be actionable under the securities laws, an omission must be misleading, in other words it must affirmatively create an impression of a state of affairs that differs in a material way from the one that actually exists.").

An attorney does not, however, have a generalized duty to disclose all facts in an adversarial proceeding. This is made clear by NRPC 3.3(d), which imposes a duty on an attorney ***in an ex parte proceeding*** to disclose all material facts. This special duty demonstrates that in an adversarial proceeding such as this one, no such duty to disclose all material facts exists.

The limited scope of the duty imposed on attorneys to disclose adverse facts was discussed in *Apotex Corp. v. Merck & Co., Inc.*, 229 F.R.D. 142 (N.D. Ill. 2005). Apotex sued Merck for patent infringement with respect to a drug. Merck prevailed on the ground that it had invented the process before Apotex had filed the patent, and that Merck had not concealed or suppressed the invention. Some years later, in a separate lawsuit, Merck's witness testified that the use of a compound in the production of the drug was a trade secret. Apotex sued Merck, claiming that the prior failure to disclose to the court that the role of this compound was a trade secret was improper—indeed, fraudulent. Specifically, Apotex challenged Merck's argument in the prior case that it had not suppressed the process for making the drug. The court disagreed. It

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found that Merck's statements "were not an attempt to characterize the truth as an omniscient observer might see it. Rather, they were comments on the sufficiency of the evidence that was submitted in the case." *Id.* at 147. The court continued:

> It was not a "fraud" for Merck to argue the inferences from the evidence that had been presented in the case-even if it now turns out that the evidence that was presented might not have represented the full story. Absent a showing that Merck had withheld or concealed evidence requested in discovery or presented false testimony or evidence, the contention in its briefs that there was no concealment of the Vasotec process was an appropriate argument regarding the evidence that had been offered....
> Apotex seems to suggest that by raising the § 102(g) issue, Merck effectively assumed an obligation to make full disclosure of all the evidence bearing on that issue, helpful or harmful, even without appropriate discovery requests by Apotex. But for better or worse, that is not the way civil litigation works. Our system of justice largely leaves it to the adversarial process to ferret out the truth. That process does not always work perfectly even if all parties comply with their obligations; sometimes one side or another does not ask the right questions and as a result fails to uncover helpful evidence. But when that happens in a civil case, the other side has no independent obligation to produce what it has not been asked to produce, unless a statute or rule requires it to do so.

Id. at 147-48.

The court noted that "nondisclosure does not amount to fraud absent a duty to speak," and concluded that there was no duty to "volunteer information" to a litigation opponent absent a request or a statutory requirement. *Id.* at 148. The court also found that the prior statements were not a "half-truth," i.e., "a disclosure that is misleading because it omits important information." *Id.* at 149. The prior statements were accurate, and the witness did not "say or imply that the explanations" were anything more than a "summary." *Id.* Apotex's failure to inquire further in discovery into the process did "not suggest fraud on the part of Merck." *Id.*

The court specifically addressed the attorney's duty of candor under Illinois' version of Rule 3.3, stating: "The Rules [of Professional Conduct] do not bar a lawyer in a civil case from arguing the evidence in the case, even if that evidence does not represent the truth as an omniscient observer might see it." *Id.* at 148. *See also Winkler Construc. v. Jerome*, 734 A.2d 212 (Md.1999) (a subcontractor claiming a mechanic's lien does not have to disclose that there is a dispute about the work; a party is not required to present adverse evidence supporting a defense, especially in a proceeding that is not ex parte).

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By contrast, in *Sierra Glass & Mirror v. Viking Industries, Inc.*, 107 Nev. 119, 808 P.2d 512 (1991), the defendant, which contested personal jurisdiction, read at trial the deposition of a sales representative. While representing that the entire deposition was being read, defendant's counsel omitted the portion in which the representative stated that she resided in Nevada. In holding that this omission violated the duty of candor, the Nevada Supreme Court also expressly recognized that there is no general duty for an attorney to disclose all facts that the opponent might find helpful in its arguments: "An attorney has no obligation to proffer evidence that helps the opponent. But if an attorney represents that he or she is proffering an entire document, omitting pertinent portions of that document is a blatant fraud." 107 Nev. at 126, 808 P.2d at 516. Defendant's counsel compounded this misrepresentation by arguing in its appellate brief that the sales representative did not live in Nevada, even though defendant's counsel knew or should have known that this representation was false. When plaintiff specifically challenged this statement, the defendant failed to correct it. The Court found that this "failure to correct the misstatement once it was brought to their attention" was an especially "egregious action." 107 Nev. at 127, 808 P.2d at 516.

In sum, the duty of candor imposed by NRPC 3.3 prohibits an attorney from making a false statement of fact or a statement that is rendered misleading by the omission of important information. But the rule does not impose an obligation to disclose all facts in an adversarial proceeding.

B. <u>Defendants Did Not Engage In Sanctionable Conduct By Invoking the PDPA</u>

1. The PDPA Was and Remains an Obstacle to the Production of Documents in this Action

Macau's PDPA was and remains in effect and applies to the transfer of personal data from Macau to the United States, including for purposes of production in this case. The PDPA is not unique. It is based on Portuguese law and is similar to data protection laws through Europe, in particular, the European Privacy Directive of 1995 (Directive 95/46/EC). Declaration of David Fleming ("Fleming Decl.") at ¶ 3, August 21, 2012. (Attached hereto as Exhibit HH at APP00871). All of these laws, including the PDPA, restrict automated data processing, entitle

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data subjects to object to automated data processing, and mandate protections and restrictions on processing certain types of data for certain purposes. *Id.*

Article 19 of the PDPA prohibits transfers of personal data to a destination outside Macau, unless the destination jurisdiction ensures "an adequate level of protection," and subject to compliance with the conditions imposed by the PDPA. *Id.*, ¶ 6. The PDPA defines the phrase "adequate level of protection" in terms similar to those used in the European Directive. Transfers may be made only if the destination jurisdiction, or the transfers themselves, appear on a list maintained by the OPDP. No such list has yet been published by the OPDP, whose approach is to deal with requests for consent on a case-by-case basis. *Id.* European nations have determined that the United States does not provide an "adequate level of protection" within the meaning of the European Directive.

Article 20 of the PDPA enumerates "derogations" or exceptions to Article 19, which are similar to the exceptions contained in Article 26 of the European Directive. Generally speaking, a transfer of personal data to a destination outside Macau requires the consent of the data subject, or consent from the OPDP, to be obtained prior to the transfer taking place. The OPDP has indicated that it would be unlikely to consent to a transfer of personal data to a jurisdiction that did not provide an adequate level of protection for personal data, similar to the "safe harbor" or "safe haven" protection measures provided to individuals in European jurisdictions. The alternative option would be for the public or judicial authorities in the destination jurisdiction to approach the Macau Special Administrative Region, through the usual diplomatic or mutual legal assistance channels, to obtain assistance with facilitating a transfer of personal data. *Id.*, ¶ 7.

Violations of the PDPA may be enforced as administrative offences, analogous to civil penalties, punishable by fines, and as crimes, punishable by larger fines and penalties and/or imprisonment. *Id.*, ¶ 5.

Defendants' past transfers of ESI for which Plaintiff and others were custodians do not mean that the Court's attention to the PDPA was wasted or that PDPA is a sham, as Plaintiff suggested in oral arguments. Since May 2011, OPDP has made clear to VML that transfers of personal data from Macau are subject to the PDPA, that OPDP will strictly enforce the PDPA,

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and that failure to comply with the PDPA may result in civil and criminal penalties. *Id.*, ¶ 9. Representatives of LVSC, SCL, and VML met with OPDP on March 7, 2012 and argued that transfers of data for purposes of compliance with discovery obligations in this case, and for purposes of production to the SEC, should be regarded as consistent with the PDPA. *Id.*, ¶ 10. VML confirmed and elaborated on these points in a June 27, 2012 letter. *Id.*, ¶ 12. OPDP, however, disagrees. At the March 7, 2012 meeting, OPDP stated that the PDPA does not permit VML to transfer personal data in order to comply with discovery obligations imposed by United States law on LVSC and SCL, and stated that OPDP must approve any transfer consistent with the PDPA. *Id.*, ¶ 10. VML received OPDP's formal response to VML's June 27, 2012 letter on August 14, 2012. It rejects VML's position in favor of procedures available under international legal assistance provisions of the law. *Id.*, ¶ 16.

Following Defendants' disclosures to this Court on June 27, 2012 and July 6, 2012, and related press accounts, OPDP sent a letter on July 31, 2012, notifying VML that OPDP had launched an official investigation procedure in relation to the alleged transfer from Macau by VML to the United States of certain data. *Id.*, ¶¶ 13-14. This notification was made public with the knowledge of the OPDP in a filing by SCL with the Hong Kong Stock Exchange followed by an SEC filing by LVSC. On August 2, 2012, Francis Tam, Macau's Secretary for Economy and Finance, made a statement that was reported in the press, in which he stated that if OPDP finds "any violation or suspected breach" of the PDPA, the government "will take appropriate action with no tolerance. Gaming enterprises should pay close attention to and comply with relevant laws and regulations." *Id.*, ¶ 15. Nor is VML the only entity subject to the PDPA. On June 3, 2012, OPDP confirmed that it had begun investigation procedures into the disclosure of personal information by Wynn Macau Ltd. as part of a report on removed director Kazuo Okada.[3]

As OPDP has made clear, the PDPA remains applicable to documents that are still located in Macau. Notwithstanding the Subject Transfers, vast quantities of data that Plaintiff seeks in discovery remain in Macau and are subject to the PDPA. Plaintiff's initial discovery demand was

[3] http://www.macaudailytimes.com.mo/macau/34267-GPDP-launches-Wynn-privacy-probe-Google-fined-for-Street-View.html

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for SCL to review data from 38 VML custodians whose data is housed in Macau. On May 2, 2011, Plaintiff served his "Initial Identification of ESI Search Terms and Date Ranges," in which he demanded that Defendants search the email accounts of 76 custodians, of which 38 are VML employees whose data resides in Macau. (Attached hereto as Exhibit A). SCL estimated that these requests would call for review of approximately 2 terabytes to 13 terabytes of data, or more, in Macau. SCL's Renewed Motion for Stay (July 14, 2011) at 5 (Sedlock Decl., ¶ 10); Fleming Declaration, ¶ 7. (Attached hereto as Exs. J at APP00177 & I at APP00172). This is far more data than in the Subject Transfers. Regardless of when Defendants disclosed the Subject Transfers, the Court would have to address whether Defendants should be ordered to produce documents located in Macau in light of the PDPA.

The Subject Transfers do not render Defendants' invocation of the PDPA frivolous or inappropriate. SCL filed two motions for stay pending its writ petition on its personal jurisdiction motion—one on May 17, 2011 and the second on July 14, 2011. Each motion argued (1) there was a potential conflict between the obligations imposed by NRCP 16 and the PDPA, and (2) compliance with NRCP 16 would require its counsel to travel to Macau to review documents, which would be costly and burdensome. Specifically, the May 17, 2011 motion argued that the PDPA may "be an impediment, if not a bar, to SCL retrieving, reviewing and producing certain information and documents, including ESI, that may be subject to Nevada Rule of Civil Procedure ("NRCP") 16 disclosure requirements or that Jacobs may demand be produced," although it noted that "this advice was not definitive." Krum Decl., ¶ 6. (Attached hereto as Exhibit B at APP00010). *See also* May 26, 2011 Tr. 5:14-19. (Attached hereto as Exhibit C at APP00084). These statements were all correct.

SCL's July 14, 2011 stay motion attached a declaration from SCL's General Counsel, who reported that OPDP stated that production of ESI "and other documents stored in Macau will require strict compliance with relevant Macau law," and that the PDPA "will be strictly enforced by the Macau government, in particular the Macau OPDP, and failure to comply may result in civil and criminal penalties." Fleming Decl., ¶¶ 4, 8. (Attached hereto as Exhibit I at APP00172, APP00173). *See also* Motion at 4-5 (Sedlock Decl., ¶¶ 6-12). (Attached hereto as Exhibit J at

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APP00177). At the hearing on the motion, SCL's counsel stated that documents in Macau had to be reviewed in Macau and presented to OPDP before being transferred out of Macau:

> [Ms. GLASER:] Documents get – must be reviewed in Macau. We're starting that process now. We have gone through the process and represent to the Court we have gathered electronic documents, as well as hard copy.
> THE COURT: Correct.
> Ms. GLASER: They're in Macau. They are not allowed to leave Macau. We have to review them there, and then to the extent that the Privacy Act, which is read very broadly according to our Macau written opinion counsel, it's read very broadly, it then -- then you go to the office that supervise the privacy Act, say, okay, with respect to these group of documents, not the whole universe, but these group of documents we want to take them out of Macau, produce them in this litigation, and we do that pursuant to a stipulation and hopefully court order that says, of course, these are only going to be used in connection with this litigation and for no other purpose.
> We then hope to and anticipate being able to convince the Macau court, not a problem, okay, go – Macau office that we – indeed, the government says, yes, you can do these in the Jacobs litigation.

June 9, 2011 Tr. 52:7-53:2 (Attached hereto as Exhibit D at APP00151-APP00152); *see also* July 19, 2011 Tr. 6:1- 8:24. (Attached hereto as Exhibit K at APP00218- APP00220).

These factual statements were and remain true, and the legal arguments were not frivolous. Documents were in Macau and they were and remain subject to the PDPA. Neither prong of NRCP 11 (which is also the standard under EDCR 7.60(b)) is met in this situation. Defendants' arguments about the PDPA were well grounded in fact and had a reasonable basis in law. *Bergmann*, 109 Nev. at 676, 856 P.2d at 564; *Rivero*, 125 Nev. at 440, 216 P.2d at 234. Moreover, Defendants' counsel made a "reasonable and competent inquiry," *Bergmann*, 109 Nev. at 676, 856 P.2d at 564, as shown by the multiple communications with OPDP.

2. LVSC's Actions To Obtain Return Of Documents In Plaintiff's Possession Was Not Sanctionable

LVSC filed three sets of pleadings to compel Plaintiff to return the documents that he took upon his departure from SCL. On September 13, 2011, LVSC filed a motion to amend the counterclaim, attaching a proposed counterclaim that alleged that the documents Plaintiff took upon his departure were LVSC's property, that they contained information that was confidential,

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proprietary, and/or privileged, and that "upon information and belief, the documents stolen and/or wrongfully retained by Jacobs contain personal data that is subject to Macau's Personal Data Protection Act, the violation of which carries criminal penalties in Macau." Proposed Amended Counterclaim, ¶¶ 53-56. (Attached hereto as Exhibit N at APP00250). On the same date, LVSC filed a motion to compel return of stolen documents, which argued that Plaintiff's refusal to return "stolen company documents exposes LVSC and its indirect subsidiaries, SCL and VML to possible criminal action in Macau for potential violation of the Macau Personal Data Protection Act ('Macau Act')". Motion at 3. (Attached hereto as Exhibit P at APP00310). LVSC also asserted that it had "serious concerns that Jacobs will disclose company documents that contain personal data in violation of Macau law. The Macau Act provides for serious sanctions in such circumstances, sanctions which could potentially be levied against LVSC and/or its indirect subsidiaries SCL and VML." Motion at 6. (*Id.* at APP00313.) Also on September 13, 2011, LVSC filed a motion for protective order and for return of stolen documents, which argued that Jacobs had wrongfully retained documents containing privileged information and/or trade secrets. (Attached hereto as Exhibit O). LVSC withdrew all three of these pleadings on September 19, 2011. (Attached hereto as Exhibit S).

After the Court indicated that the Supreme Court's stay prevented it from acting on those motions, LVSC filed a new action against Jacobs, Case No. A-11-648484-B, on September 16, 2011. (Attached hereto as Exhibit Q). The complaint was similar to the proposed amended counterclaim. Also on September 16, 2011, LVSC filed an ex parte motion for Temporary Restraining Order, arguing that there was an immediate risk that Jacobs would disclose LVSC documents that were confidential, privileged, and subject to the PDPA. The motion also argued that Jacobs's disclosure may violate the PDPA, and that such violations might expose LVSC and/or its subsidiaries to penalties. (Attached hereto as Exhibit V).

On September 26, 2011, LVSC filed an Emergency Petition for Writ of Mandamus in the Nevada Supreme Court. The petition sought a writ to modify the stay to permit this Court to consider motions to return the documents in Plaintiff's possession. Similar to the pleadings filed with this Court, LVSC's petition argued that it was entitled to relief because the documents taken

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by Plaintiff contain attorney-client privileged correspondence, trade secrets, documents protected from disclosure by contract, and may include personal data protected by the PDPA. LVSC noted the sanctions for violations of the PDPA and stated it wished to "recover these materials stolen by Jacobs and to ensure that these materials will not in any way be reviewed, distributed or used by Jacobs, his agents (including his attorneys) or any other third parties." Petition at 13-14. (Attached hereto as Exhibit U at APP00439- APP00440).

The factual predicate for these actions was that Plaintiff removed data from Macau that he was not entitled to possess at all after his termination, let alone remove from Macau. Those facts are not rendered untrue or misleading by the additional fact that Defendants transferred data from Macau.

Nor do the Subject Transfers render frivolous the legal arguments made in support of the efforts to compel Plaintiff to return the data he removed from Macau. First, the PDPA was not the only, or even the first, ground for those efforts, which also argued that the documents Plaintiff obtained while employed remain company property, and that they include material that is confidential, proprietary and/or subject to the attorney-client privilege and/or work product doctrine. The argument that Plaintiff's removal of the data violated the PDPA was only an additional ground. Hence, the PDPA argument did not unreasonably and vexatiously multiply proceedings in violation of EDCR 7.60(b)(3).

Second, LVSC's arguments based on the PDPA were reasonable. This is shown conclusively by OPDP's July 31, 2012 notice of investigation. Even absent OPDP's action, there was a reasonable basis for the concern at the time, which was sufficient to justify LVSC's position under NRCP 11 and EDCR 7.60(b). *K.J.B.*, 107 Nev. at 370, 811 P.2d at 1307.

Third, LVSC's PDPA-based arguments remain reasonable when considered in light of the fact of the Subject Transfers. Plaintiff's actions implicated the policies of the PDPA in a way that the Subject Transfers did not. LVSC's arguments focused on the possibility that Plaintiff would disclose publicly documents containing personal data that he had removed from Macau.[4] The

[4] Defendants' concerns about leaks to the press of documents containing personal data were borne out by recent articles in the press quoting documents that include attorney-client communications. Defendants do not yet know who was the source of those leaks.

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purpose of the PDPA is to protect individuals' privacy and personal data, and Plaintiff's threatened disclosure of that data to third parties would have undermined that purpose. LVSC also expressed concern that it would be subject to penalties under Macau law if Plaintiff were to publicly disclose personal data that he had removed from Macau.

By contrast, the transfer of data from Macau, and LVSC's continued possession of that data in the United States, did not implicate the same concerns. LVSC had control of the data from the Subject Transfers and any required production would be made subject to appropriate safeguards—not disseminating it to the public.

In any event, even if LVSC's position might somehow have been weakened by disclosure of the Subject Transfers, a failure to disclose that a party has arguably acted inconsistently with its own tenable legal position is not a sufficient basis to impose Rule 11 sanctions. In *Dunn v. Gull*, 990 F.2d 348 (7th Cir. 1993), plaintiff sued for trademark infringement, alleging that defendant's "restaurant sign and the names and symbols contained therein were substantially similar to [plaintiff's] restaurant signs." *Id.* at 349. After filing suit, plaintiff applied to register three trademarks with the U.S. Patent and Trademark Office ("USPTO"). *Id.* The USPTO denied one of the applications on the ground that plaintiff's proposed mark "did not identify or distinguish its services from those of others." *Id.* Plaintiff then moved for summary judgment against defendant, without disclosing the USPTO's denial of its application. *Id.* Later still, Plaintiff voluntarily dismissed its suit, stating that defendants had changed their sign. *Id.* Defendants, who had learned on their own of the denial of plaintiff's trademark application, moved for sanctions. *Id.* The district court denied the motion.

On appeal, the Seventh Circuit affirmed. Rejecting the defendants' argument that plaintiff's failure to disclose the USPTO's decision was fraudulent, the court explained that while the decision "bears weight, it [was] not enough to render [plaintiff's] motion for summary judgment legally baseless." *Id.* at 352. The court also emphasized that plaintiff "did not make false factual or legal representations." *Id.* Finally, the court cited the district court's finding that the nondisclosure was not intentional. *Id.*

Similarly, the Subject Transfers did not render LVSC's filings sanctionable. As in *Dunn*,

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LVSC's arguments were not legally baseless and LVSC did not make false factual or legal representations in presenting its position. *See id.* at 352.

C. Defendants Did Not Engage In Sanctionable Conduct By Failing To Disclose The Data Transfers Sooner

The prior section explains why the legal arguments Defendants made with respect to the PDPA do not justify the imposition of sanctions; this section explains why Defendants' factual representations with respect to data transfers were neither false nor misleading.

1. Defendants Did Not Make Any False Or Misleading Statements of Fact Regarding The Subject Transfers

Defendants did not make any false or misleading statements of fact with respect to the transfer of data from Macau. Defendants did not represent to the Court that they had not transferred data from Macau to the United States.

On June 9, 2011, the Court heard argument on SCL's motion to dismiss. After the motion was argued, there was an extended discussion of the impact of the PDPA on discovery in the case. In the course of that discussion, SCL's counsel stated that documents in Macau had to be reviewed in Macau, and that OPDP had to authorize the removal of particular documents from Macau. Tr. 52:12-53:5 (Ex. D at APP00151- APP00152). Further in the same vein, SCL's counsel stated:

> [Ms. GLASER:] [W]e have to get permission to get documents out of Macau.
> THE COURT: All documents from Sands China have to get permission from the Office of Privacy?
> MS. GLASER: Oh, yeah. Absolutely.

Id. at 58:11-14 (APP00157). Because the last statement immediately followed the reference to the documents still in Macau, the statement that OPDP's permission was required for all SCL documents meant all documents located in Macau.

SCL's counsel did not state or imply that all SCL documents were in Macau. In fact, SCL was careful to state just the opposite. For example, in a motion for stay filed soon after the June 9, 2011 hearing, SCL stated that the "overwhelming majority" of its responsive documents were

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located in Macau. SCL's Renewed Motion for Stay (July 14, 2011) at Motion at 4 (Sedlock Decl., ¶ 6). (*See* Ex. J at APP00177). This statement makes clear that some responsive documents, albeit a minority, were not located in Macau. *See also* SCL's First Motion for Stay (May 17, 2011) at 9 (stating that PDPA may prevent SCL's compliance with "certain" NRCP 16 disclosure obligations and "certain" discovery requests). (*See* Ex. B at APP00014). Although SCL did not specifically identify the Subject Transfers at that time, SCL did not represent that all responsive documents were located solely in Macau and, indeed, indicated to the contrary.

This point is reinforced by statements made by LVSC's counsel at the same June 9, 2011 hearing:

> MR. PEEK: let me just add one thing, because I didn't address this. ***That same Data Privacy Act, Your Honor, also implicates communications that may be on servers and email*** communication ***and hard document - - hard-copy documents in Las Vegas - -.***
> THE COURT: Here in the States?
> MR . PEEK: -- Sands, as well.
> THE COURT: Well, you can take the position
> MR. PEEK: Well, we are told that by the - -
> THE COURT: It's okay.
> MR. PEEK: Office of Data Privacy
> THE COURT: You can take the position - -
> MR. PEEK: - - counsel, Your Honor . And I'll we'll brief that with the Court . Again--
> THE COURT: And then I'll decide.

Tr. 55:5-19 (emphasis added) (*See* Ex. D at APP00154). Since LVSC operates in the United States and not in Macau, LVSC's invocation of the PDPA indicates that it possessed in the United States documents that had come from Macau. The only reason the PDPA could apply to documents in Las Vegas is if those documents originated in Macau. This statement therefore made clear that some data from Macau was in the United States, which negates any suggestion that Defendants stated or implied that no data had been transferred to the United States from Macau.

Later in the same hearing, Plaintiff's counsel denied that the PDPA could be used to block discovery: "There's a United States Supreme Court case right on point that says, we don't care what foreign law says, you've got to produce documents, *particularly when they're in the jurisdiction in which the litigation is taking place like they are here*." Tr. 59:11-15 (emphasis

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added). (*See* Ex. D at APP00158). Plaintiff's counsel thus understood the comments by LVSC's counsel to mean that LVSC was asserting that "foreign law" (i.e., the PDPA) applied to documents "in the jurisdiction" (i.e., in Nevada), which could only mean that such documents had come from Macau.

In follow-up meet-and-confers with Plaintiff's counsel, LVSC again disclosed that LVSC possessed information subject to the PDPA. On June 22, 2011, Mr. Peek wrote an email to Plaintiff's counsel, Colby Williams, stating that the PDPA "make[s] it difficult for *LVSC* and SCL to meet the initial disclosure deadlines...." (Attached hereto as Exhibit E; (emphasis added)).[5] Again, LVSC's invocation of the PDPA indicates that it possessed in the United States documents that had come from Macau. Mr. Williams responded on June 24, 2011, writing that Plaintiff did not agree "that LVSC would be entitled to withhold documents in its possession in Las Vegas on the grounds that production of the same would violate the Macau Act." Mr. Williams noted that a motion to compel would "not be ripe until we know what materials are being withheld." (Attached hereto as Exhibit G).

On July 8, 2011, Mr. Williams wrote an email to Defendants' counsel requesting an agreement that the PDPA does not provide a basis for withholding documents in the litigation "at least insofar as [Jacobs's] production is concerned." Mr. Williams stated that the parties could debate later whether the PDPA provides a basis for Defendants to withhold documents. (Attached hereto as Exhibit H). Mr. Williams' July 8 email also discloses that Plaintiff possessed approximately 11 GB of emails received during his tenure with Defendants, including emails from LVSC and SCL attorneys. The July 8, 2011 email was submitted to the Court on numerous occasions and was marked as a Court exhibit at the October 13, 2011 hearing. (Attached hereto as Exhibit AA). Hence, the Court was again apprised of LVSC's position that the PDPA could be applicable to documents in LVSC's possession, further demonstrating that LVSC was not concealing that it possessed documents in Las Vegas that had been transferred from Macau to the United States.

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[5] Several of the exhibits to this Statement are authenticated in the Declaration of J. Stephen Peek, Esq., attached hereto as Exhibit II.

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Plaintiff never served discovery—or even an informal request—for more information about the Macau data held by LVSC. This failure is all the more notable in light of the Court's suggestion at the June 9, 2011 hearing that Plaintiff serve discovery or otherwise inquire into what materials may have been provided to the SEC. Tr. 62:12-63:3 (*See* Ex. D at APP00161-APP00162). Despite the meet and confer emails in which Plaintiff's counsel noted the need to address further what documents LVSC was withholding based on the PDPA, Plaintiff never followed up about the nature of those documents.

Nor did Defendants make any other statement of fact that was rendered misleading by the nondisclosure of the Subject Transfers. SCL's motions for stay noted that there was a potential conflict between SCL's discovery obligations under Rule 16 and the restrictions imposed by the PDPA. (*See* Exs. B & J). These statements did not imply that there were no documents in the United States that had been transferred from Macau. The factual predicate for the argument in the stay motion was that documents in Macau would be subject to disclosure obligations under Rule 16, not that *all* of SCL's documents were only in Macau. Indeed, SCL's July 14, 2011 motion for stay specifically referred only to the "overwhelming majority" of the information to which the PDPA was applicable being in Macau:

> 6. After receiving Jacobs' "Initial Identification of ESI Search Terms and Date Ranges" (the "Search Terms), both SCL and LVSC undertook an analysis of the applicable law of the jurisdiction, Macau, Special Administrative Region of the People's Republic of China ("Macau"), in which the ***overwhelming majority*** of this information is currently located.
>
> ...
>
> 8. Counsel for SCL have since undertaken an analysis of the Macau Act as well as met with the Macau Office for Personal Data Protection (the "Macau OPDP") to determine the most efficient and compliant method to review and produce ESI ***currently stored in Macau*** in compliance with the Macau Act.

SCL's Renewed Motion for Stay (July 14, 2011) at Motion at 4 (Sedlock Decl., ¶ 6, 8). (*See* Ex. J at APP00177) (emphasis added).

That factual predicate was and remains true. As noted, Plaintiff's initial demand was for SCL to search the email accounts of 38 VML custodians whose data resides in Macau, with an estimated volume of 2 to 13 terabytes or more of data. The fact that *some* of the SCL information

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requested by Plaintiff, including ESI for which Plaintiff was the custodian, had already been transferred to the United States, did not make it misleading to say that the PDPA applied to documents still in Macau, especially with the qualification that the documents in Macau were only the "overwhelming majority" of the documents to which the PDPA might apply, not all such documents.

Also at the July 19, 2011 hearing, again the context of SCL's argument that the review of documents in Macau would be burdensome and costly, there was a discussion of whether LVSC's counsel could participate in the review of documents in Macau. Defendants stated that LVSC's counsel could not go to Macau to review documents, because only attorneys who represent SCL could review documents there. Tr. 7:9-24. (*See* Ex. K at APP00219).[6] There was no discussion of whether LVSC's counsel could review documents *in Nevada* that had come from Macau. In fact, as Defendants have previously described, LVSC's counsel reviewed data from the Subject Transfers in Las Vegas. Defendants' Statement Regarding Data Transfers (July 6, 2012) at 3. (Attached hereto as Exhibit EE at APP00823).

Another discussion of the PDPA occurred at a status check on May 24, 2012. At that hearing, Plaintiff's counsel raised issues regarding the status of document discovery, and particularly the production of Plaintiff's email. In response, LVSC's counsel stated:

> [MR. PEEK:] With respect to Jacobs, Jacobs - - I'll have to let Mr. Weissman deal with Mr. Jacobs, because those are issues that are of Sands China, because he was a Sands China executive, not a Las Vegas Sands executive. So we don't have documents on our server related to Mr. Jacobs. So when he says we haven't searched Mr. Jacobs, he is correct; because we don't have things to search for Mr. Jacobs.
>
> THE COURT: So he didn't have a separate email address within the Las Vegas Sands server or Macau
>
> MR. PEEK: That is my understanding, Your Honor.

Tr. 9:23-10:7. (Attached hereto as Exhibit CC at APP00798-APP00799). In context, the statement that Plaintiff's data was not on LVSC servers meant that Plaintiff did not have an LVSC email account separate from his SCL email account—not that Plaintiff's data had never

[6] VML specially authorized O'Melveny & Myers LLP, which reported to the LVSC Audit Committee, to collect and review documents in Macau. We are informed that O'Melveny did so, but did not transfer any documents out of Macau.

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been transferred from Macau. In addition, Defendants disclosed the transfer of Jacobs' data soon thereafter on June 27, 2012, and LVSC clarified this comment in its Statement on Data Transfers on July 6, 2012, where it said that the reference to not having searched Plaintiff's data was made in the context of the review of Plaintiff's data for the purpose of responding to Plaintiff's jurisdictional discovery requests. Defendants' Statement Regarding Data Transfers (July 6, 2012) at 3 n.2. (*See* Exhibit EE at APP00823).

In reviewing the record in this case in connection with the preparation of this brief, Defendants have identified one additional statement, albeit not directly with respect to the Subject Transfers, that warrants further comment. On July 19, 2011, the Court heard argument on SCL's renewed motion for stay pending the disposition of its writ petition. As noted, at this hearing, SCL's counsel explained that, under the PDPA, Defendants believed that documents in Macau had to be reviewed in Macau. Tr. 5:25-8:19. (*See* Ex. K at APP00217- APP00220). In response, Plaintiff's counsel (Colby Williams) observed that SCL would have to engage in the same document review process in connection with investigations by the United States Government. *Id.* at Tr. 10:20-11:16. (APP00222- APP00223). SCL's counsel replied:

> [MS. GLASER:] [T]he government investigations that are occurring, they have the same roadblock, the same stone wall that every else has. They are not – they are not even permitting the government to come in and look at documents, period. It is only Sands China lawyers who are being allowed to even start the process of reviewing documents. There are no documents that have been produced that have – from Sands China to the federal government in any way, shape, or form.

Id. at Tr. 12:2-10. (APP00224). As of the date of the July 19, 2011 hearing, O'Melveny & Myers LLP, which reported to the LVSC Audit Committee, had produced to the United States Government certain legal bills that had been presented to Sands entities in Macau and subsequently transferred by these Sands entities to Nevada. In addition, O'Melveny produced to the United States Government certain SCL and VML policy and procedure documents. As of July 19, 2011, O'Melveny had not produced to the United States Government any ESI for which Plaintiff was the custodian. We understand that Ms. Glaser will attend the August 30-31, 2012

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hearing and, subject to privilege considerations,[7] be prepared to address her comments in light of (1) the fact that the legal bills were in Nevada, and (2) her lack of knowledge, then or now, of any other document productions by O'Melveny to the United States Government prior to the July 19, 2011 hearing.

In sum, Defendants did not violate the duty of candor by failing to specifically identify the Subject Transfers. Indeed, Defendants' statements and omissions are less problematic than those analyzed in *Apotex*, where the defendant presented evidence and argument that portrayed a certain set of facts without disclosing other facts that pointed in the opposite direction, yet the court found no violation. Here, the existence of the Subject Transfers was not inconsistent with Defendants' argument. That argument was and is legitimate. So too is its core factual predicate.

Unlike *Sierra Glass & Mirror*, moreover, Defendants did not make assertions that were misleading absent the disclosure of the Subject Transfers, let alone affirmative misrepresentations about those transfers. Further, Defendants did voluntarily disclose the Subject Transfers themselves, in contrast to counsel in *Sierra Glass & Mirror*, who argued on appeal that the employee did not live in Nevada and then failed to correct that misstatement when it was brought to their attention. 107 Nev. at 126-27, 808 P.2d at 516.

2. Defendants Had A Reasonable Basis For Not Disclosing The Transfers Sooner

Defendants had a reasonable basis for not disclosing the data transfers sooner than they did. Because Defendants can explain their conduct, such conduct cannot be deemed "willful." *Finkelman*, 91 Nev. at 148, 532 P.2d at 609.

First, there was a reasonable ground for concern that public disclosure of past transfers of data from Macau could have led the OPDP to take adverse action. Beginning on May 13, 2011, VML pursued numerous communications with OPDP. Throughout these discussions, OPDP made clear it regards the transfer of personal data from Macau as being subject to the PDPA, that OPDP will strictly enforce the PDPA, and that failure to comply with the PDPA may result in

[7] Defendants do not intend to, and do not, waive any applicable privilege. Defendants will seek the Court's guidance on the scope of privilege in the context of responding to specific questions at the August 30 hearing.

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civil and criminal penalties. During the course of those communications, VML became concerned that OPDP might be compelled to take enforcement action if publicity surrounding the Subject Transfers resulted in frustration of the purpose of the PDPA.

It was not until a meeting between SCL's General Counsel and OPDP on May 28, 2012 that Defendants achieved a level of comfort that LVSC's production in this case of documents previously transferred from Macau to the United States would not constitute a separate violation of the PDPA by LVSC. Nevertheless, VML remains at risk for past transfers of data from Macau to the extent that such transfers result in the disclosure of personal data, particularly a public disclosure, in a manner that undermines the purposes of the PDPA.[8]

These concerns about the OPDP's response to a public disclosure of prior data transfers were well-founded, as conclusively demonstrated by OPDP's July 31, 2012 letter notifying VML of the launch of OPDP's official investigation into alleged data transfers. Also relevant is Secretary Tam's August 2, 2012 comments to the effect that OPDP has a policy of "no tolerance" for breaches of the PDPA. These developments underscore that Defendants' concerns about disclosure of past transfers were legitimate, and that their efforts to communicate with OPDP prior to the disclosure were reasonable.

Second, Defendants had a reasonable basis for concluding that they were not under an immediate obligation to disclose the past data transfers before VML pursued additional communications with OPDP. As discussed elsewhere in this submission, Defendants did not state or imply that data had not been transferred from Macau to the United States, and their representations to the Court and Plaintiff's counsel about the PDPA did not trigger a legal duty to disclose the Subject Transfers. In addition, Defendants had not completed their production of documents in response to Plaintiff's jurisdictional discovery requests.[9] Nor was there any order

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[8] We are informed that, subsequent to the July 19, 2011 hearing, O'Melveny produced to the United States Government additional documents that originated in Macau, but had been previously transferred by the company to Nevada. These productions did not involve a public disclosure; indeed, the particulars of what was produced to the Government remain confidential. These productions therefore presented different considerations than the public disclosure of the Subject Transfers and the production of documents from the Subject Transfers in discovery in this case.

[9] Defendants also had not completed their Rule 16.1 disclosures when the Supreme Court issued the writ staying non-jurisdictional proceedings.

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requiring the production of documents from the Subject Transfers by a date certain, or indeed at any time.

In these circumstances, there was a reasonable basis for not disclosing the Subject Transfers earlier. Hence, there was not a willful violation that would justify the imposition of sanctions.

III. PROCEDURE FOR HEARING

Because the hearing was set by the Court sua sponte, the hearing should be limited to the specific issues that the Court has identified as its concern. The purpose of the hearing is to answer the Court's questions and concerns, and thereby protect *Defendants'* rights.

The purpose of the hearing is decidedly not to give Plaintiff's counsel a forum to harass Defendants, their executives and their counsel for their own ends. On July 10, 2012, the Court denied Plaintiff's motion for leave to depose Ms. Hyman and Mr. Rubenstein. Yet, Plaintiff's August 23, 2012 email demands that they appear at the hearing. Aug. 23, 2012 Email from D. Spinielli to S. Peek et al. attaching subpoenas. (*See* Ex. JJ at APP00883). At the August 2, 2012 hearing, the Court stated that the information Plaintiff was seeking in its 30(b)(6) deposition notice was not the Court's concern in the hearing it had set: "if that discovery doesn't get done before my hearing, it's not going to bother me, because the questions I'm going to ask are going to be rather direct and to the point." Tr. 30:19-22. (Attached hereto as Exhibit GG at APP00863). Yet, Plaintiff's August 23, 2012 email proffers a proposed subpoena for a 30(b)(6) witness on these same topics—even topics 10-11, regarding communications with O'Melveny and the Compliance Committee, which the Court said Plaintiff could not depose a witness about, pending further briefing. At the August 23, 2012 hearing, in response to statements by Plaintiff's counsel about their intention to subpoena Mr. Leven and Mr. Singh, the Court stated that what it "really want[ed] to know is why didn't anyone tell me" about the PDPA, Tr. 30:24-25 (Attached hereto as Exhibit KK at APP00929), that this was a question for Ms. Glaser and Mr. Peek, *id.* at 31:2-4 (APP00930), and that "the only people who have spoken to me about the Macau Data Privacy Act and their inability to produce the documents are lawyers," *id.* at 32:15-17 (APP00931). Yet, later that same evening, Plaintiff's counsel sent an email that not only seeks to subpoena Mr. Leven,

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9555 Hillwood Drive, 2nd Floor
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but expands the list to a 30(b)(6) witness, which they had never previously raised with Defendants and without any support for the proposition that a subpoena for a 30(b)(6) witness at a hearing (as opposed to a deposition) is appropriate.

Plaintiff's counsel exhibited even more reckless behavior in demanding that Brad Brian and Henry Weissmann, counsel of record for SCL, appear at the hearing. Mr. Brian and Mr. Weissmann certainly will be present at the hearing, but the implication of Plaintiff's letter is that those attorneys also made representations to the Court that Plaintiff's counsel thinks were questionable. There is no basis for this implication. At the hearing on August 23, 2012, Plaintiff's counsel suggested that Defendants' Statement on Data Transfers (filed July 6, 2012) was "untrue" because it did not disclose that Mr. Peek and attorneys at Glaser Weil had VPN access to the Sands network. Tr. 13:21-14:21. (*See* Ex. KK at APP00912- APP00913). On the contrary, the Statement said that LVSC created "'shared drives' [which] were document repositories that allowed authorized personnel, such as inside *and outside counsel*, to review images of documents that had been collected…" Defendants' Statement Regarding Data Transfers (July 6, 2012) at 3:24-4:2 (emphasis added). (*See* Ex. EE at APP00823). Although the word "VPN" was not used, this passage makes patently obvious that outside counsel could access documents on the LVSC network. The Statement also disclosed that Mr. Peek and others had reviewed certain emails on Mr. Kostrinsky's computer. *Id.* at 3:11-14. (APP00823). Plaintiff's counsel's claim that the Statement was "untrue," and their implication that the conduct of Messrs. Brian and Weissmann is the subject of the Court's concern, is recklessly false.

The larger point is that Plaintiff's counsel should not permitted to hijack the Court's hearing or try to distract Defendants further by creating a wedge between counsel and their clients. On August 24, 2012, Defendants' counsel informed Plaintiff's counsel that the demands set forth in the August 23, 2012 email were wholly improper and that Defendants' counsel would not accept service of any subpoenas. On Sunday, August 26, 2012, Plaintiff's counsel persisted in their gamesmanship by sending an email providing notice of their intention to serve seven subpoenas, including one on former LVSC General Counsel Gayle Hyman, whom the Court ruled on July 10, 2012 could not be deposed. The continued effort to harass the Defendants will be

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9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

addressed in a separate motion to quash. Respectfully, the Court should not countenance Plaintiff's irresponsible behavior. Plaintiff has filed no motion and has no right to dictate the scope of the hearing or to seek any relief. The Court should limit the hearing to the specific concerns the Court has articulated.

IV. CONCLUSION

Defendants deeply regret that their conduct has caused the Court to express the concerns it has stated. Defendants acknowledge, with the benefit of hindsight, that their statements could have been clearer and more detailed. Defendants sincerely regret failing to meet the Court's expectations, but respectfully submit that sanctions are unwarranted.

DATED August 27, 2012.

J. Stephen Peek, Esq.
Robert J. Cassity, Esq,
Holland & Hart LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

Attorneys for Las Vegas Sands Corp. and Sands China Ltd.

Brad D. Brian, Esq.
Henry Weissmann, Esq.
John B. Owens, Esq.
Bradley R. Schneider, Esq.
Munger Tolles & Olson LLP
355 S. Grand Avenue
Los Angeles, California 90071

Attorneys for Sands China, LTD.

Holland & Hart LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that on August 27, 2012, I served a true and correct copy of the foregoing **DEFENDANTS' STATEMENT REGARDING HEARING ON SANCTIONS** via e-mail and by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

James J. Pisanelli, Esq.
Debra L. Spinelli, Esq.
Todd L. Bice, Esq.
Pisanelli & Bice
3883 Howard Hughes Parkway, Suite 800
Las Vegas, Nevada 89169
214-2100
214-2101 – fax
jjp@pisanellibice.com
dls@pisanellibice.com
tlb@pisanellibice.com
kap@pisanellibice.com – staff
see@pisanellibice.com – staff

Attorney for Plaintiff

An Employee of Holland & Hart LLP

Holland & Hart LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

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