IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 62489

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

Petitioners,

v.

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

Respondents,

and

STEVEN C. JACOBS,

Real Party in Interest.

ANSWER TO PETITION FOR WRIT OF PROHIBITION OR MANDAMUS

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TABLE OF CONTENTS

PISANELLI BICE PLLC
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LAS VEGAS, NEVADA 89169

TABLE OF AUTHORITIES

Cases

Statutes

PISANELLI BICE PLLC
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LAS VEGAS, NEVADA 89169

Other Authorities

Rules

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

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LAS VEGAS, NEVADA 89169

I. INTRODUCTION

To hear Petitioners Las Vegas Sands Corp. ("LVSC") and Sands China, Ltd. ("Sands China") tell it, they are the victims of a rogue district court that has lost its way. That court supposedly is failing to restrain real-party-in-interest Stephen C. Jacobs ("Jacobs"), does not know the proper scope of jurisdictional discovery, and will not follow this Court's simple instruction to holding an evidentiary hearing. Proof of their victimization purportedly lays in the district court's ordered production of a handful of documents that one of their attorney-witnesses used to refresh his recollection in providing testimony relative to ongoing discovery misconduct. But as this Court will discover – just as the district court did – this is a case where the distance between what Petitioners will say and what is reality is vast.

The disturbing but indisputable fact is that LVSC and Sands China undertook a fraud against the judicial process, seeking to sabotage Jacobs' legal rights. They hoped to corrupt the jurisdictional fact-finding process by deceiving the district court as to the location, their access to, and their clandestine review of evidence in this case. They ground to a halt the search for truth while simultaneously clamoring that the district court should conduct its evidentiary hearing, trying to procure a jurisdictional ruling before their secret was revealed. Once that failed, LVSC and Sands China redeployed their limitless financial resources to further delay the process by defying more orders. Now, they bemoan the self-inflicted consequences of their deception.

Sheltering a few documents – those that attorney Justin Jones ("Jones") admitted using to refresh his recollection about the unconscionable misconduct from which he sought to distance himself – is certainly not the present petition's overarching objective. Instead, because their scheme unraveled, LVSC and Sands China ask this Court to intercede and insulate them from the consequences of their attempts to achieve an illegitimate outcome through a corrupted factual picture. Their request that Jones' recollection of events be immunized from further

examination – going so far as to enlist his state senator status – is but another step in their continued campaign.

Contrary to the Petitioners' hopes and wants, the book on their misrepresentations and obstructionism is hardly closed. The accuracy of a witness' testimony concerning misrepresentations to the courts (particularly by legal counsel) remains at issue, especially with LVSC and Sands China's ongoing violation of the district court order that they claim closes the matter. LVSC and Sands China's attempts to enlist this Court's extraordinary relief because they want to keep a lid on the truth must be rejected. A litigant's fraud upon the court does not cease to be at issue simply because one of the attorney-witnesses is not presently on the stand. The petition should be denied. There has been more than enough concealment of the facts in this case.

II. FACTS

A. Sands China Wants To Debate Personal Jurisdiction, But Only If It Can Control What Facts Are Revealed.

The present issue grows out of LVSC's and Sands China's deception about the location and their review of evidence because, ironically, Sands China wanted to contest personal jurisdiction. Recall, Sands China came to this Court by way of a prior writ petition, arguing that it is not subject to personal jurisdiction in the State of Nevada. (1 App. LVSC/SCL0023-68). To underscore its claims of unfairness should it have to produce discovery while contesting jurisdiction, Sands China portrayed the tremendous costs of compliance, including the supposed catch-22 it would be placed in under the claimed strictures of the Macau Personal Data Privacy Act ("MPDPA"), a foreign blocking statute. To bolster this story, Sands China proffered a sworn declaration from its in-house Macau counsel as to how no data

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LAS VEGAS, NEVADA 89169

could be transported to the United States without complying with a burdensome protocol.[1] (1 Supp. App. 0086).

This Court granted Sands China's petition, concluding that a more comprehensive factual record was needed. (1 App. LVSC/SCL0126-29). Accordingly, this Court directed the district court to conduct an evidentiary hearing and to make findings. *Id.* It further directed that the case be stayed pending the resolution of that hearing on jurisdiction. *Id.*

But the old adage – be careful what you ask for – could not have been far from the minds of LVSC, Sands China, their executives, or their counsel. They knew that Jacobs would seek jurisdictional discovery to carry his burden. And, they knew that honest compliance with such discovery would reveal a secret that they did not want the district court, this Court, or government investigators to know.

B. The Truth About Where Key Evidence Resided And The Ease Of Access.

LVSC and Sands China hoped to keep secret that they had brought extensive key evidence in this case from Macau to the United States, some of it even before this litigation commenced. Specifically, in response to a Jacobs demand letter in August 2010, LVSC's then-deputy general counsel, Michael Kostrinsky, directed Macau executives to ship data out of Macau and to Las Vegas, including what was supposed to be a copy of Jacobs' computer drives.[2] (III Supp. App. 0605-11, 0622-23). Subsequently, in March of 2011, LVSC directed that electronically

[1] As this Court will soon see, to brand this early story as incomplete and misleading is an understatement. At the time of this representation, volumes of data already had been brought to the United States and were being reviewed. The misstatements were early and often.

[2] On a November 2010 fact-finding trip to Macau attended by Kostrinsky, as well as counsel for Sands China (Patricia Glaser) and LVSC (Justin Jones), an additional unknown hard drive was transported back to Las Vegas. (IV Supp. App. 0714-16). Petitioners now claim that it has disappeared and they claim to not know what was on it. (II Supp. App. 0256).

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stored information ("ESI") of several other key executives be transferred from Macau to Las Vegas as well. (II Supp. App. 0257). In total, hard drives containing documents from five other executives were brought into the United States. Among the data was ESI of Sands China's general counsel, Luis Melo, who was terminated not long after Jacobs was terminated. (V Supp. App. 0864).

The ease by which data flowed from Macau to Las Vegas certainly was not in keeping with the picture LVSC and Sands China painted to either this Court or the district court. But, in reality, this is how LVSC had always managed its Macau operations. As Kostrinsky later confirmed, he was not aware of any restrictions on transmitting data from Macau related to any litigation; that is, until around the time the United States government issued subpoenas. (III Supp. App. 0587-88, 0657). Indeed, as LVSC's Chief Information Officer, Manjit Singh, later acknowledged, LVSC had long maintained a data link between Las Vegas and Macau and there was a free flow of information. (III Supp. App. 0768, 770, 775-76). As a result, Macau data was freely accessible from Las Vegas in the ordinary course of business.

Faced with discovery from Jacobs and the government investigations this litigation spawned, quick access to data no longer suited Petitioners' self-interest. As Singh subsequently revealed, the company abruptly changed its policies regarding access to Macau data in the spring of 2011, and effectively constructed a "stone wall" against accessing information in Macau. (IV Supp. App. 0763-64, 766, 772-73). The long-existing data ports between Las Vegas and Macau were switched off and prohibitions were imposed on obtaining information from Macau. Tellingly, none of these material facts found their way into disclosures to this Court or the district court. As they say, silence is golden.

The newly-imposed obstacles to access company data in Macau still did not diminish the fact that extensive data, including Jacobs' ESI, already had been transferred to Las Vegas. (IV Supp. App. 0795). Neither the Petitioners nor their

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counsel can pretend that they did not know the significance of this fact. Not long after the transmittal, a vendor for LVSC's audit committee working with another of its outside counsel, O'Melveny and Myers, copied all of the drives and data brought from Macau. (III Supp. App. 0628). Again, this fact was concealed from Jacobs and the district court. Indeed, the magnitude of this deception was compounded by the subsequent revelation that this data processing had occurred in March of 2011 in connection with responding to the Security and Exchange Commission's subpoena. (II Supp. App. 0257-58). But that is not what Petitioners told Jacobs or the district court at the time. To the contrary, trying to convince the district court of the seriousness of the prohibitions on producing documents in the United States, Sands China told the district court in July of 2011:

> [MS. GLASER:] The government investigations that are occurring, they have the same roadblock. The same stonewall that everyone else has. They are not – they are not even permitting the government to come in and look at documents,. 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. And I need to be very clear about that, your honor.

(I Supp. App. 0118).[3] Glaser's statements were crystal clear and clearly false.

Furthermore, LVSC's counsel in this case, J. Stephen Peek ("Peek"), acknowledged that in May of 2011, he went to Kostrinsky's office and spent an afternoon reviewing Jacobs' emails.[4] (II Supp. App. 0401). In combing through the records, Peek printed copies of certain email. But, tellingly, he purposely did

[3] Considering the number of inconsistent statements and representations from Petitioners and their counsel, it is hard to keep the stories straight. Presumably, LVSC either did produce the documents to the United States government or it similarly deceived it, like it was doing to the district court, in order to hide evidence from a government subpoena. Noticeably, Petitioners have not wanted to answer that question once their deception began to unravel.

[4] Of course, this was well before Sands China's representations to this Court in seeking a stay or the various representations that were made to the district court falsely claiming that the documents were in Macau and inaccessible.

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not retain a copy of the documents he printed. He instead left them in a folder in Kostrinsky's office. (II Supp. App. 0402). Peek's colleague, Jones, repeated that same exercise on another day. Like Peek, Jones purposely did not retain copies of the Jacobs emails that he printed, and also left them in Kostrinsky's office. (IV Supp. App. 0676-77). Neither Petitioners nor their attorneys ever denied that their purpose in leaving the documents was so that they could later claim that "technically" they did not possess any.[5]

C. Petitioners Deceive The District Court And Jacobs To Obstruct Discovery.

LVSC's and Sands China's plan was as clear as it was fraudulent: They would use their newly-minted document policy and sudden affection for the MPDPA to obstruct access to documents that remained in Macau. They would flat out conceal the existence of the documents they already had transported to Las Vegas. This left them to only have to confront the evidence that Jacobs possessed (because he had retained extensive copies of documents that he had possessed when he was wrongfully terminated).

Underscoring their arrogance and total contempt for their duty of candor to the court, LVSC and Sands China actually asserted that Jacobs was required to return all documents that he possessed because he had stolen them, and by bringing them to the United States, he had exposed LVSC and Sands China to possible criminal liability for violating the MPDPA. (I Supp. App. 0123). These are, of course, the very same parties who themselves transported volumes of data to the United States. In addition, this accusation and representation was made by one of

[5] LVSC's Chief Information Officer also revealed that other means of accessing the data had been provided to counsel all the while they were claiming that the documents were in Macau. LVSC had placed Jacobs' emails on a computer drive in Las Vegas, which then could be remotely accessed by their litigation counsel. (IV Supp. App. 0757, 0759). However, counsel later denied that they had actually used that mechanism to review the documents. (II Supp. App. 0279-80).

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the very same attorneys who were clandestinely reviewing documents when Petitioners claimed they were not allowed to do so. For months, Sands China and LVSC wrangled with Jacobs over whether his counsel could access his documents, keeping quiet that they had brought volumes of documents into the United States before they decided that they wished they had not. But it was not enough to simply keep quiet. To keep the secret, affirmative lies were required. Indeed, but for the fact that their representations were recorded and transcribed, it would be hard to accept that litigants would be so cavalier in their misrepresentations to a court of law.

For instance, even before this Court's stay relative to resolving the jurisdictional issue, Sands China told the district court that all of its documents must be reviewed in Macau. "They're in Macau. They are not allowed to leave Macau. We have to review them there . . . ." (I Supp. App. 0052).[6] These representations were false, but would be repeated and expanded upon hearing after hearing.

In fact, when seeking their original stay from the district court pending their petition to this Court, Sands China wanted to convince the Court about how serious the problem was, asserting that it was "on the cusp of violating the [MPDPA] law, Your Honor." (I Supp. App. 0112).[7] Petitioners went on to make the following outlandish misrepresentations to the district court:

> GLASER: [] We're not allowed to look at documents at a station here in --

[6] At the district court's evidentiary hearing, Glaser sought to save herself, claiming that she did not know about the secret stash that Jones and Peek had reviewed. (II Supp. App. 0280). This is contrary to Kostrinsky's testimony, where he confirms that the Glaser Weil firm was informed of the data transfers to the United States and that the matter had been discussed routinely. (II Supp. App. 0641). Moreover, Jones was present in the courtroom representing LVSC when Glaser made this representation. He knew full well where the documents were. (IV Supp. App. 0729-30).

[7] Of course, they knew full well that they had brought volumes of documents to the United States and were simply misleading the Court as to how documents could not be brought over without violating the MPDPA. It had occurred a year earlier.

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> COURT: Mr. Jones is going to go. …
>
> GLASER: Actually, Mr. Jones can't go.
>
> COURT: I'm sorry to hear that, Mr. Jones.
>
> GLASER: The only people that can go are people that represent Sands China, and they to do it [sic] in Macau. …

(I Supp. App. 0113).

These representations were beyond knowingly false. In fact, Jones had himself sat at a station in Las Vegas – Kostrinsky's computer – just months earlier and had reviewed the very documents that they were claiming they could not produce because they were supposedly in Macau. (IV Supp. App. 0676-77).

The deception continued at other hearings as well:

> GLASER: Your Honor, you made a comment, well, you should be able to start producing documents now.
>
> COURT: True.
>
> GLASER: My only comment to you is that we have to get permission ***to get documents out of Macau***.
>
> COURT: ***All documents from Sands China have to get permission from the Office of Privacy?***
>
> GLASER: ***Oh yeah. Absolutely.***
>
> PEEK: ***Yes.***

(I Supp. App. 0058) (emphasis added). Of course, this was just more falsehoods. Peek, for one, knew that some of the most critical documents from Sands China, Jacobs' emails, had already been brought to the United States. He previously sat in Kostrinsky's office and reviewed and printed them.

These claims – misrepresentations – went on for months, even after the district court granted Jacobs' motion to conduct jurisdictional discovery and required LVSC and Sands China to comply. Once again, although they knew the truth, Petitioners continued to mislead the district court and Jacobs into believing that Sands China's responsive documents were in Macau, and the (newly-contrived

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LAS VEGAS, NEVADA 89169

"stone wall") MPDPA precluded Sands China from complying with its Nevada jurisdictional discovery obligations.

D. The Fraud Begins To Unravel And The District Court Convenes An Evidentiary Hearing.

As oftentimes happens, the magnitude of the deception grew with each successive hearing in order to keep the district court and Jacobs in the dark. It reached its apex on May 24, 2012. Peek actually told the district court that there were no documents in Las Vegas to search and produce relative to Jacobs:

> With respect to Jacobs, Jacobs – I'll have to let Mr. Weisman 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.***

(I Supp. App. 0189-90) (emphasis added).

They needed to keep up the ruse. Thus, Sands China continued to falsely portray Jacobs' ESI as being in Macau and that it would be a long, drawn out process to review them, a process that they supposedly had not even commenced. (I Supp. App. 0193-94). Based upon that spin, the district court had to once again vacate the evidentiary hearing. The district court thus gave Petitioners approximately thirty days to report back the status of their document review in Macau. (I Supp. App. 0194).

It is the district court's refusal to let Sands China and LVSC get away with not reviewing Jacobs' ESI (which was supposedly located in Macau) that ultimately forced a revelation of the long-kept secret. Petitioners could not continue to perpetuate their lies about the location of the documents and their inaccessibility. Thus, the day before a court-ordered status check, Petitioners filed a report and finally admitted where the documents were truly located: Las Vegas, Nevada.

But even then, LVSC and Sands China did not come clean. They sought to once again spin the facts and claimed that the data had been transferred to

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Las Vegas "in error." (I Supp. App. 0207). As the district court later determined, this representation was also untrue. Such transfers were routine under LVSC's long-standing policy, and Kostrinsky had undertaken the relevant transfers at the express direction of LVSC's general counsel. There was no error whatsoever. It was all simply a fraud against the court and Jacobs.

LVSC's and Sands China's deception stalled this case for over a year. Accordingly, the district court *sua sponte* ordered an evidentiary hearing to "make a determination as to the failure of the defendants to disclose the existence of the information that was removed from Macau . . . ." (II Supp. App. 0241). Specifically, the purpose of the district court's hearing was to determine "limited issues . . . related to lack of candor and nondisclosure of information to the Court and appropriate sanctions pursuant to EDCR 7.60." (2 App. LVSC/SCL0357-58). The court also permitted limited discovery to allow Jacobs to learn, as best he could, the magnitude of the fraud. It is through that process, despite selective claims of attorney-client privilege to garble the facts, that the transfers were unearthed and the clandestine review exposed.[8]

E. The Sanctions Hearing And Jones' Admissions.

The district court's sanctions hearing lasted approximately three days. There, the court questioned and heard from Kostrinsky, Singh, Peek, Jones, Glaser, and Stephen Ma, another of Sands China's attorneys. Being the one non-attorney, Singh's testimony proved highly revealing, in part, because Petitioners could not obstruct it as easily with selective claims of attorney-client privilege.

> BICE: So it would be accurate to say that since August of 2010, Mr. Jacobs' emails that had been brought over from Macau had been on the server of the Las Vegas Sands here in Las Vegas since then?

[8] After some of this discovery had occurred, Petitioners apparently thought they should once again try to minimize it by filing a self-serving statement regarding data transfers, where they once again claimed that they were going to come clean. (II Supp. App. 0254-62).

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SINGH: That would be correct.

(IV Supp. App. 0795).

> BICE: [T]ell Her Honor how much data, in other words, size, was in this Macau data that had been sitting on the Las Vegas Sands server?
>
> SINGH: Okay. Now, I don't recall specifically, but I believe that it was around 50 to 60 gigabytes worth of data. But I don't recall specifically.
>
> BICE: 50 to 60 gigabytes?
>
> SINGH: Yeah.
>
> BICE: Okay. And it's your belief that those were emails?
>
> SINGH: Yes.

(IV Supp. App. 0807). Singh confirmed: (1) the previously-existing company policy about the free flow of data from Macau to Las Vegas and (2) how that data had been accessed and reviewed by Petitioners' counsel. (IV Supp. App. 0768, 770, 775-76). These and other revelations exposed the deception perpetrated against the district court and Jacobs for over a year. Of course, LVSC and Sands China did their best to obstruct the revelations by advancing misplaced claims of attorney-client privilege at almost every turn.[9]

Despite the distractions, Jones had to confirm he did nothing to inform the court of the truth despite repeated misrepresentations. Specifically, in the face of Glaser's claims of how data could only be reviewed in Macau and by counsel for Sands China, not LVSC, Jones acknowledged he did nothing to inform the court of the truth:

[9] Indeed, as this Court can see from reviewing the hearing transcript, Petitioners routinely and selectively sought to invoke claims of attorney-client privilege when it suited their ends but allowed testimony that they thought might be of assistance to them. (II Supp. App. 0263-425; III Supp. App. 0426-667; IV Supp. App. 0668-847) (So the Court can appreciate the magnitude of the fraud upon the court, the entire transcript of the district court's sanctions hearing is included in Jacobs' Supplemental Appendix.)

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PISANELLI: 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?

JONES: That is correct.

PISANELLI: And when she says in the next line that, "they are in Macau," that, too, was untrue; right?

JONES: You examined Ms. Glaser. I can't get in her head and know exactly what documents she was referring to.

PISANELLI: 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 that Jacobs' emails were on Las Vegas Boulevard; right?

JONES: I knew that Jacobs – there was a copy of Mr. Jacobs' emails at Las Vegas Sands.

PISANELLI: And you did not take any action to inform Her Honor that Ms. Glaser had made a false statement, did you?

JONES: I did not.

(IV Supp. App. 0729-30). And the revelations continued:

PISANELLI: My simple question to you is when you heard Ms. Glaser say that, "they are not allowed to leave Macau," you knew they already had; correct?

JONES: I knew that some had.

PISANELLI: Yes. And you didn't say anything to Her Honor to correct that statement, did you?

JONES: I did not.

* * *

PISANELLI: But you had already reviewed them here?

JONES: I reviewed some of them, you are correct.

PISANELLI: And you remained silent when Ms. Glaser said that they have to review them there [Macau]; right?

JONES: Correct.

(IV Supp. App. 0730-31).

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But the ruse went even further. Sands China actually had been trying to force the district court into holding the jurisdictional evidentiary hearing before the truth came out:

> PISANELLI: She goes on to say at 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?
>
> JONES: Yes.

(IV Supp. App. 0745). Of course, Jones knew full well about the emails because he had reviewed them and sat silent while the court was routinely and repeatedly misled.

It is Jones' attempts to distance himself from this case and the wrongdoing involved (*i.e.*, he repeatedly emphasized how he had ceased serving as counsel for LVSC, though his law firm remained LVSC's representative), that triggered the issue about documents that he reviewed in order to testify. Specifically, because Jones seemed not to have been involved in the case for a substantial period of time, he highlighted how he needed to review certain documents to refresh his recollection about past events:

> 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?

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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.

***

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

***

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

A. Yes.

Q. Okay. Did you review anything else?

***

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?

A Yes.

(IV Supp. App. 0697-99). Jacobs' counsel then requested Jones identify the parties to the emails as well as the number of emails and the date range of the billing statements reviewed. (IV Supp. App. 0699-711). When asked if he could reassemble these 10 to 15 emails and billing statements he used to refresh his recollection, he answered affirmatively. (IV Supp. App. 0701, 711).

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Accordingly, Jacobs claimed the right to examine these documents as permitted under NRS 50.125. Considering the repeated objections and instructions not to answer on assertions of privilege, the district court cut to the chase that LVSC and Sands China would require briefing on the point:

> 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.

(IV Supp. App. 0703-04).

F. The District Court Finds That Petitioner Engaged In Intentional Misconduct To Delay And Obstruct Jurisdictional Discovery.

While Petitioners now complain that discovery "lurches on," they omit disclosing how their own misrepresentations created the standstill. As the district court found, LVSC and Sands China intentionally concealed evidence relevant to the court's jurisdictional determination. (2 App. LVSC/SCL0362-63). They did this to stall jurisdictional discovery. *Id.* That misconduct was repetitive and abusive, and caused repeated and unnecessary motion practice. *Id.*

As a result, the district court ordered sanctions against Petitioners, both monetary and evidentiary. (2 App. LVSC/SCL0364-65). The district court ruled that LVSC and Sands China would no longer be able to enlist the MPDPA as grounds for failing to comply with discovery obligations. *Id.* The district court emphasized that its ruling was limited to the court's *sua sponte* imposition of

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LAS VEGAS, NEVADA 89169

sanctions and was without prejudice to Jacobs' rights to obtain further relief under NRCP 37 if warranted. (2 App. LVSC/SCL0358) (II Supp. App. 0267).

The district court entered its sanctions ruling just a few days after the completion of the evidentiary hearing. But, as directed by the district court at the evidentiary hearing, Jacobs subsequently filed a motion to compel production of the documents Jones admits to having used to refresh his recollection at the evidentiary hearing. (2 App. LVSC/SCL0366-403). In response, LVSC and Sands China merely claimed that because Jones was off the stand, NRS 50.125 no longer applied. They did not present any affidavits establishing any proof of privilege; they provided no privilege log; they did not submit the documents *in camera* for review asking the court to weigh their relevancy. (2 App. LVSC/SCL0490-502). In reply, Jacobs noted that simply because Jones technically was no longer on the stand did not and could not immunize his recollection from further challenge. (3 App. LVSC/SCL0503-08). That the court gave the parties an opportunity to brief the issue did not mean Jacobs' entitlement to examine the records is lost. The district court agreed, and ordered that Jacobs is entitled to examine the documents Jones had used to refresh his recollection in providing testimony. (3 App. LVSC/SCL0569-71).

G. The Obstructionism Continues.

Jacobs did not need to be clairvoyant to know that the district court's sanctions hearing was just the tip of the iceberg, and that further proceedings over Petitioners' misconduct would be inevitable. LVSC and Sands China have made clear the lengths they will go to avoid revelation of the truth about what occurred in Macau.

Not long after the district court entered its sanctions order, noncompliance was yet again afoot. Yet, without disclosing the real facts, LVSC and Sands China ask this Court for a pat on the back, claiming that they have produced some 168,000 pages of documents by December 2012 and then after December 2012,

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3883 HOWARD HUGHES PARKWAY, SUITE 800
LAS VEGAS, NEVADA 89169

Sands China produced an additional 27,000 pages. (Pet. at 8, n.4.) Petitioners claim to have been so cooperative to have produced their four jurisdictional witnesses for depositions. *Id.* Of course, Petitioners omit that what little they did produce by way of discovery occurred only after multiple motions, the entry of sanctions, and a year's worth of delay caused by their deception.

Despite admonishments and sanctions orders, as of February of this year, Petitioners still had not reviewed or produced documents from the cache brought to the United States. They furthermore defied the district court's sanctions disallowing the MPDPA as a defense by simply redacting documents under the MPDPA (rendering them utterly useless). As a result, the district court scheduled yet another evidentiary hearing to commence on May 13, 2013, to address the scope of the willful noncompliance with its sanctions and related discovery orders. (V Supp. App. 1074-75). The book is hardly closed on the massive noncompliance by these Petitioners. The fact that any witness, including Jones, is not literally on the witness stand at this moment does not put documents he used in providing prior testimony out of reach.

III. REASONS WHY THE WRIT SHOULD NOT ISSUE

A. This Court's Intervention By Extraordinary Writ Should Not Be Invoked To Aid In The Suppression Of Evidence.

This Court's discretion concerning extraordinary relief should not be exercised to aid litigants and their counsel in withholding evidence about their fraud upon the judicial process. "A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion." NRS 34.160; *Int'l Game Tech. v. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (citations omitted). A writ of prohibition "serves to stop a district court from carrying on its judicial functions when it is acting outside its jurisdiction." *Sonia F. v. Dist. Ct.*, 125 Nev. 495, 498, 215 P.3d 705, 707 (2009) ; NRS 34.320.

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LAS VEGAS, NEVADA 89169

Within the context of writs of prohibition or mandamus, this Court reviews an order compelling discovery for abuse of discretion. *See Sonia F.*, 125 Nev. at 498, 215 P.3d at 707; *State v. Second Jud. Dist. Ct. ex rel. County of Washoe*, 120 Nev. 254, 262-63, 89 P.3d 663, 668 (2004).[10]

The fact that a party claims privilege does not entitle them to relief from this Court. Notably, the Court in *Valley Health* denied the requested writ because the documents sought were not privileged under the statutory basis relied upon by the moving party. *Valley Health Sys., LLC v. Eighth Judicial Dist. Ct.*, 127 Nev. Adv. Op. 15, 252 P.3d 676, 679 (2011). Here, the documents sought by Jacobs lost any purported privileged status[11] when Jones reviewed the records to refresh his recollection for purposes of testifying. In other words, for all intents and purposes, these documents are no longer privileged, much like the documents in *Valley Health Systems* were not privileged, and as such, the Court should deny the requested writ.

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LAS VEGAS, NEVADA 89169

[10] "In contrast to a direct appeal of a discovery order, which is reviewed only for an abuse of discretion, . . . a party seeking a writ of mandamus must have no other adequate means to attain the relief he desires, and must demonstrate that his right to the writ is clear and indisputable." *In re Motor Fuel Temperature Sales Practices Litig.*, 641 F.3d 470, 487 (10th Cir. 2011) (internal citations and quotations omitted) (involving claim of privilege under First Amendment). "Thus, although a simple showing of error may suffice to obtain reversal on direct appeal, a greater showing must be made to obtain a writ of mandamus." *Id.* (internal quotations and alterations omitted). "Indeed, there must be more than what we would typically consider to be an abuse of discretion in order for the writ to issue." *Id.* (same) (emphasis added).

[11] Jacobs uses the term purported because Petitioners have never provided a privilege log identifying these documents. In fact, that failure to provide an appropriate privilege log, in and of itself, is a basis for waiving privilege. *See, e.g.*, Disc. Cmmr. Op. #10, (explaining "Generalized, non-specific claims of privilege may waive any otherwise applicable privilege") (*citing Ritacca v. Abbott Labs*, 49 Fed.R.Serv.3d 1052 (N.D.Ill. 2001)); *Diamond State Ins. Co. v. Rebel Oil Co., Inc.*, 157 F.R.D. 691, 698 (D. Nev. 1994) (finding the party failed to establish privilege with its insufficient privilege log). Further, the documents Jones testified to reviewing included billing statements, which as a threshold matter, are not privileged. *Clarke v. Am. Commerce Nat. Bank*, 974 F.2d 127, 130 (9th Cir. 1992) (holding that billing statements are not protected by privilege).

In *Wardleigh v. Second Judicial District Court*, the Court held that because the petitioner had raised an issue in their pleadings to which privileged communications were needed to prove that issue, "fairness requires that the privilege be waived" and such communications were not protected. 111 Nev. 345, 357, 891 P.2d 1180, 1187 (1995). Similarly here, Petitioners raised the issue of privileged communications when LVSC's own former attorney reviewed communications to refresh his recollection for purposes of testifying and did testify to that refreshed recollection. "[F]airness requires that the privilege be waived," and such communications relied upon by Jones are not protected. *Id.*

B. NRS 50.125 Requires The Production Of *Any* Documents Used By A Witness To Refresh His Memory In Preparing For Testimony.

LVSC and Sands China attempt to create an exception to the mandatory application of NRS 50.125 when none exists. Based on the plain, unambiguous language of the statute, ***any*** document used by a witness to refresh his memory must be produced to the opposing party. As the statute provides:

> 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.

There are no exceptions to these requirements and the production of the documents used by the witness to refresh his memory is compulsory.

Contrary to Petitioners' argument, this is not an issue of first impression in Nevada. This Court has already ruled a privilege is not an exception to the right to inspect documents a witness uses to refresh his memory. In *Means v. State*, 120 Nev. 1001, 1010, 103 P.3d 25, 31 (2004), this Court addressed a similar set of circumstances, and held "the work product doctrine is not an exception to the inspection rights conferred in NRS 50.125 . . . ." *Id.* *Means* unequivocally states,

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"NRS 50.125(b) allows ***an adverse party*** to inspect ***any writing*** used to refresh a witness's recollection. It further allows the ***adverse party*** to cross-examine the witness about the writing and to introduce into evidence relevant portions affecting the witness's credibility." 120 Nev. at 1008, 103 P.3d at 29-30 (emphasis added).

On that basis, this Court went on to reject the State's position that the work product doctrine served as a *carte blanche* preclusion of the production of an attorney's file. Instead, it found that when a witness uses a document to refresh his recollection, that document is subject to production and not protected by the work product doctrine. *Id*. at 1010, 103 P.3d at 31.

LVSC and Sands China's attempt to distinguish *Means* fails. First, they claim that *Means* is limited to the circumstance when a ***client*** is seeking production of privileged materials. Hardly. If that was really the issue, NRS 50.125(b) would be irrelevant because documents are not privileged as between an attorney and their client. Moreover, because the work-product privilege is held by both the client *and* the attorney, it is immaterial that the former client is the one who sought the production. *See In re Grand Jury Proceedings*, 43 F.3d 966, 972 (5th Cir. 1994) (explaining that unlike the attorney-client privilege, the work product privilege is held by both the client and attorney and as such, even if the client waives it, the attorney may still claim privilege). Thus, *Means* plainly applies to situations in which one of the holders of the privilege, in that case the attorney, refuses to waive the privilege and voluntarily produce the documents.

Petitioners further misstate *Means* when they claim that NRS 50.125 only applies while the witness is presently testifying and on the stand. (2 App. LVSC/SCL0389-90). Ironically, Petitioners are essentially arguing Jacobs should not have complied with the Court's directive. but, the procedural history in this matter – with the district court directing subsequent briefing before ruling on the issue – is strikingly similar to *Means* (albeit with the district court rendering an opposite ruling). In *Means*, during the hearing where the witness used attorney

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work product to refresh his recollection, the questioning party moved to inspect those notes and have them introduced into evidence. *Means* at 1006, 103 P.3d at 29. The court refused the request but reserved a final ruling until after the parties briefed the issue. *Id*. at 1008, 103 P.3d at 30. After briefing and oral argument, the court denied the motion. *Id*.

This Court reversed and remanded the matter to allow the moving party "the opportunity to inspect the notes reviewed by [the witness] in aid of his testimony at the first post-conviction hearing." *Id.* at 1020, 103 P.3d at 38. The fact the district court made its decision post-hearing and the hearing had been concluded did not permit the withholding of the evidence. In fact, courts routinely order the production of documents used to refresh a witness's recollection after the witness has testified. *See, e.g., Rouse v. Cnty of Greene*, 115 A.D.2d 162 (N.Y. Sup. Ct. 1985) (compelling the production of documents used to refresh the witness' recollection at a deposition after the deposition concluded); *Wheeling-Pittsburgh Steel Corp. v. Underwriters Labs. Inc.*, 81 F.R.D. 8, 11 (N.D.Ill. 1978) (granting defendants' motion to compel documents used by a witness to refresh his recollection for purpose of testifying at a deposition).[12]

Once again, LVSC and Sands China seek to game the system. Because they repeatedly, routinely, and wrongly asserted privilege at the evidentiary hearing, the district court ordered briefing on the documents Jones reviewed. But, according to Petitioners, because Jones got off the stand and the court entered sanctions, the matter is closed and Jones' recollection is no longer subject to challenge. That is neither the law nor the relevant facts arising out of Petitioners' discovery misconduct, which is ongoing.

[12] It is immaterial that these cases involve deposition testimony versus trial testimony as examination and cross-examination of witnesses at a deposition may proceed as permitted at trial. NRCP 30(c).

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i. The privilege statutes provide for a limitation to the application of privilege in situations where privileges are relaxed by a procedural rule, e.g., NRS 50.125.

LVSC and Sands China next attempt to manufacture an exception to NRS 50.125 by pointing to the absence of language expressly stating that the statute serves as a waiver of the attorney-client privilege and work product doctrine and touting the attorney-client privilege as serving the interests of "impartial justice." They are incorrect. NRS 50.125 is silent regarding privileges because there are no exceptions to its disclosure mandate. Conversely, a review of Nevada's privilege statutes demonstrates that NRS 50.125 is a waiver of the attorney-client privilege and work product doctrine.

Petitioners cite to the NRS 47.020 in support of their argument that privileges apply "at all stages of the proceedings," but they ignore the statutory limitations to this application. NRS 47.020(1) and (2) read *in totality:*

> 1. **This title governs proceedings in the courts of this State** and before magistrates, **except**:
> (a) **To the extent to which its provisions are relaxed by a statute or procedural rule applicable to the specific situation**; and
> (b) As otherwise provided in subsection 3.
> 2. **Except as otherwise provided in subsection 1**, the provisions of chapter 49 of NRS with respect to privileges apply at all stages of all proceedings.

(emphasis added).

NRS 50.125 is exactly the type of statute or procedural rule that relaxes the applicability of privilege in a "specific situation" contemplated by the Nevada legislature in adopting Nevada's evidentiary rules. Petitioners are flat wrong that "the attorney-client privilege statute (Nev. Rev. Stat. 49.095) does not list Nev. Rev. Stat. 50.125 as an exception to the rule of privilege . . . ." (Pet. at 18). NRS 47.020(1) expressly states the privilege statutes do not apply if a "procedural rule," e.g. NRS 50.125, alters its application.

ii. Petitioners claim a "policy interest" in the application of the attorney-client privilege, which ignores the narrow construction afforded to a privilege and the policy interest of NRS 50.125.

Searching about for any reason to keep the truth from view, LVSC and Sands China next contend that "policy interests" of the attorney-client privilege are "undermined" by the district court's order. (Pet. at 15). In doing so, they ignore the law of privilege and the policy interests in requiring the production of all writings used by a witness to refresh a recollection.

First off, "the attorney-client privilege obstructs the search for the truth, it should be narrowly construed." *Whitehead v. Comm'n. on Jud. Discipline*, 110 Nev. 380, 415, 873 P.2d 946 (1994). This means that all "doubts must be resolved against the party asserting the privilege." *Roberts v. Heim*, 123 F.R.D. 614, 636 (N.D. Cal. 1988); *Burrows Welcome Co. v. Barr Lab., Inc.*, 143 F.R.D. 611, 617 (E.D.N.C. 1992) ("[T]he court has strictly construed the privilege . . . and has resolved all doubts in favor of disclosure."). Petitioners must prove that an actual privilege exists which has not otherwise been waived. *Rogers v. State*, 255 P.3d 1264, 1268 (Nev. 2011); *In re Keeper of Records*, 348 F.3d 16, 22 (1st Cir. 2003) ("[T]he party who invokes the privilege bears the burden of establishing that it applies to the communications at issue and has not been waived."); *Granite Partners v. Bear, Sterns & Co., Inc.*, 184 F.R.D. 49, 52 (S.D.N.Y. 1999) (same). Petitioners seek to turn the concept of privilege on its head and make it a broad, all-encompassing protection that usurps all other rules of evidence, which is simply not the case.

The exceptions to privilege under NRS 50.125 are not in isolation. In fact, consistent with narrowly construing privilege, many situations exist in which a privilege has been waived (or no longer applies). Inadvertent disclosure, voluntary disclosure to a third party, and reliance on the advice of counsel waive the privilege but are not listed in NRS 49.115. *See, e.g., United States v. SDI Future*

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LAS VEGAS, NEVADA 89169

Health, Inc., 464 F. Supp. 2d 1027, 1041 (D. Nev. 2006) ("The privilege may be waived by implication, however, even when the disclosure was involuntary, if the privilege holder fails to pursue all reasonable means of preserving the confidentiality of the privileged matter."); *Cheyenne Const., Inc. v. Hozz*, 102 Nev. 308, 311-12, 720 P.2d 1224, 1226 (1986) ("If there is disclosure of privileged communications, this waives the remainder of the privileged consultation on the same subject."); *Aspex Eyewear, Inc. v. E'Lite Optik, Inc.*, 276 F. Supp. 2d 1084 (D. Nev. 2003) ("There are many contexts in which the courts have held a party waives the attorney-client privilege by affirmatively relying on the advice of counsel to support a claim or defense."). Simply because NRS 49.115 does not mention that using a document to refresh a witness's recollection waives the privilege does not mean a waiver does not occur.

The narrow construction of privilege ties in with the public policy interests of NRS 50.125. The purpose behind the rule requiring production of documents used to refresh a recollection is to serve the "increasing public interest in full disclosure of the sources of a witness' testimony." *Classified Ins. v. Strudwick*, 132 Wis.2d 475, *7 (Wis. Ct. App. 1986) (quoting *Prucha v. M & N Modern Hydraulic Press Co.*, 76 F.R.D. 207, 209 (W.D. Wis. 1977)).

> The rationale for requiring such disclosure, despite a claim of privilege, is to allow the opposing counsel full opportunity to conduct the complete cross examination and to prevent the witness and his counsel from taking unfair advantage of this situation by using only privileged writings to refresh recollection and insisting upon the protection of the privilege for damaging communications while disclosing other selective communications because they are self serving.

Timm v. Mead Corp., Case No. 91 C 5648, 1992 WL 32280, *2 (N.D. Ill. Feb. 7, 1992). Allowing a witness to review documents to refresh his recollection for purposes of testifying and then not allowing opposing counsel to inspect those documents is "unfair and unduly prejudicial." *United States v. 22.80 Acres of Land*, 107 F.R.D. 20, 26 (N.D. Cal. 1985).

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LAS VEGAS, NEVADA 89169

> To adopt such an exception [for privileged documents] would be to ignore the unfair disadvantage which could be placed upon the cross-examiner by the simple expedient of using only privileged writings to refresh recollection. This factor, coupled with the **intent to relinquish the privilege shown by their use for this purpose**, convinces the Court that plaintiff should be held to have waived the attorney-client privilege as to the documents in question.

Bailey v. Meister Brau, Inc., 57 F.R.D. 11, 13 (N.D. Ill. 1972) (emphasis added).

Petitioners' self-serving decree that there is "no question" as to the accuracy of Jones' testimony and thus no purpose would be served by the production. (Pet. at 21). But this proves Jacobs' point. Jones' testimony, and his attempts to distance himself from the misconduct, is most certainly subject to continuing challenge.[13]

C. Rule 612 Is Different Than NRS 50.125 And Cannot Be Used To Graft An Exception For The Benefit Of Petitioners.

Petitioners contend that this Court should amend NRS 50.125 through judicial interpretation, to make it parallel to the Federal Rule of Evidence 612 despite the lack of discretionary language in NRS 50.125. Of course, this Court has rightly rejected such attempts before. *See Braunstein v. Nevada*, 118 Nev. 68, 74, 40 P.3d 413, 417-18 (2002) (explaining that NRS 48.045(2), regarding admissibility of character evidence, was governed after the 1969 draft of the federal rules of evidence, not the revised version enacted in 1973, and as such contains "significant differences" from the federal rule).

Federal Rule of Evidence ("FRE") 612 provides, in pertinent 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**.

[13] Petitioners cite *Hiskett v. Wal-Mart Stores, Inc.*, 180 F.R.D. 403, 408 (D. Kan. 1998), as an example of a federal case in which the court denied production when the document used to refresh the witness' recollection had "minimal impact upon her testimony." (Pet. at 21.) However, in *Hiskett*, unlike the matter at hand, the adverse party already had all the information that would have been revealed by the production. *Id.*

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(Emphasis added). Similar to NRS 50.125, FRE 612 applies where a witness uses a document to refresh his recollection prior to a deposition. *See, e.g., Server Tech., Inc. v. Am. Power Conversion Corp*., 2011 WL 1447620, at *3 (D. Nev. April 14, 2011) (witness examined a letter to refresh his recollection in preparation for his deposition).

However, NRS 50.125 draws no distinction between documents used while testifying or those used before testifying. FRE 612 draws such a distinction and grants the court discretion to preclude disclosure for those documents used to refresh recollection prior to testifying. NRS 50.125 contains no such distinction.; *Means*, 120 Nev. at 1010, 103 P.3d at 31; *see Classified Ins. v. Strudwick*, 132 Wis.2d 475, *7-8 (Wisc. Ct.App. 1986) (recognizing that contrary to the federal rule, production of documents used to refresh a witness's recollection is mandatory pursuant to Wisconsin law, which mirrors Nevada law).

Petitioners' attempt to rely on *Server Technology* for support that privilege and work product is not waived by NRS 50.125 is unavailing. *Server Tech., Inc.*, 2011 WL 1447620, at *3. While this case ultimately did not compel the production of documents used to refresh recollection under FRE 612, it explicitly did so in reliance on the discretionary balancing test that does not exist in NRS 50.125. And, even when a federal court has discretion under FRE 612 to refuse to compel the privileged documents that were used to refresh a witness's recollection before a deposition, disclosure of such documents is the norm. *See Laxalt v. McClatchy*, 116 F.R.D. 438, 454 (D. Nev. 1987) ("[T]he general rule ***requires waiver of privilege when the document is used to refresh recollection.***") (citing *22.80 Acres of Land*, 107 F.R.D. at 25 (emphasis added).

In *Ehrlich v. Howe*, 848 F. Supp. 482 (S.D.N.Y. 1994) , when analyzing the interplay between FRE 612 and privileges, the court held "Federal Rule of Evidence 612 provides a wholly independent basis for ordering disclosure of the [reviewed document], ***even if it is work product or protected by the attorney-client privilege.***"

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Id. at 493 (emphasis added). After surveying cases, the *Ehrlich* 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*., 1989 WL 62729, at *4 (S.D.N.Y. June 5, 1989)). Thus, even the non-existing balancing test will not save Petitioners from having to disclose the documents here.

D. The District Court's Order Pertains To Documents Jones Used To Refresh his Recollection.

LVSC and Sands China continue their unrelenting attack upon the district court, claiming that it indiscriminately ordered production of all documents Jones "reviewed" not just those that refreshed his recollection. (Pet. at 26). But once again, reality takes a back seat to argument. The district court explicitly confined its order to the parameters of NRS 50.125 by ordering:

> Defendants' counsel shall produce all documents Justin Jones reviewed in preparation for testifying at the evidentiary hearing, including but not limited to, Jones' billing entries for the third week in May and end of August or early September 2011, and the approximately ten to fifteen emails dated May, August or September of 2011.

(3 App. LVSC/SCL0575).

In that same order, the district court found that Jones "testified that he reviewed certain documents in preparation for testifying and that the documents he reviewed refreshed his recollection as to the matters of his testimony," which were the emails and billing entries identified in the above-quoted language from the order. (3 App. LVSC/SCL0574-75). The district court entered findings that these documents ordered to be produced did refresh his recollection as to the matters of his testimony and identifying exactly which documents they were. Petitioners are

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grasping at straws by taking one word out of the entire order and ignoring the other provisions in the order that identify those documents reviewed by Jones to refresh his recollection (which were the documents ordered to be produced). In fact, even Petitioners concede in the writ petition that Jones admitted to reviewing these documents to refresh his recollection. (Pet. at 10).

Then Petitioners cite to the NRS 50.125(2) for the proposition that "disclosure is limited to the 'portions' of the document that actually affect the hearing testimony." Again, Petitioners misstate the law. The disclosure is limited to those documents used to refresh a witness's recollection and "***if it is claimed***" that the documents include matters "not related to the subject matter of the testimony," then the judge can examine a writing in chambers and redact any portions of the document that are "not related to the subject matter of the testimony." At no point before the district court did Petitioners claim that the documents include matters not related to the subject matter of Jones' testimony and request an in chambers review. Petitioners are precluded from now raising this argument,[14] one that is unmeritorious in any event because the district court found that the documents reviewed by Mr. Jones "refreshed his recollection ***as to the matters of his testimony***." (3 App. LVSC/SCL0574) (emphasis added). *See, e.g.*, *Wheeling-Pittsburgh Steel Corp.*, 81 F.R.D. at 11 (ordering production of the file that the deponent stated he reviewed and impacted his testimony).

E. This Court's Stay Order Does Not Protect A Fraud Against The Judicial Process.

The lengths to which LVSC and Sands China will go – more accurately, the depths to which they will stoop – is revealed by their closing argument that the

[14] It is improper to raise an issue in regards to an order compelling production when Petitioners did not raise that point before the district court. *See Valley Health Sys., LLC*, 127 Nev. Adv. Op. 15, 252 P.3d 676, 679-80 (finding it improper to raise issues not originally presented to the discovery commissioner when objecting to such findings).

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district court's order violates this Court's stay. Contrary to their needs, this Court's August 26, 2011 writ directing the holding of an evidentiary hearing on Sands China's personal jurisdiction defense did not suspend the Rules of Civil Procedure, the Rules of Professional Responsibility, or the prohibitions upon a party and counsel deceiving the district court.

The district court's sanctions hearing and the orders flowing from it, including that pertaining to Jones' documents, all grew out of LVSC and Sands China's hiding of evidence relating to jurisdictional discovery. As the district court found, they intended to prevent the disclosure of this transferred data, concealed its existence and made repeated misrepresentations with the intent to deceive the court. (2 App. LVSC/SCL0361-64). The district court further concluded "[t]he 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." *Id.*

Despite the wishes of LVSC, Sands China, and their counsel, the fact that this Court had entered a stay on the merits and directed an evidentiary hearing first be held on personal jurisdiction did not constitute a free pass for false statements and deception.

It is well-settled that as an officer of the court, attorneys "owe duties of complete candor and primary loyalty to the Court." *Malautea v. Suzuki Motor Co., Ltd.*, 987 F.2d 1536, 1546 (11th Cir. 1993). As such, an "attorney's duty to a client can never outweigh his or her responsibility to see that our system of justice functions smoothly." *Id.* This general principle is expressly codified by the Nevada rules of Professional Conduct: "It is professional misconduct for a lawyer to [e]ngage in conduct that is prejudicial to the administration of justice." NRPC 8.4(d). More specifically, pursuant to Nevada Rule of Professional Conduct 3.3(a)(1), "a lawyer shall not knowingly [m]ake a false statement of fact or

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law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."

Importantly, the duty of candor applies "even if compliance requires disclosure of [confidential] information otherwise protected by Rule 1.6." NRPC 3.3(c). In addition, Nevada Rule of Professional Conduct 3.4(a) mandates that "[a] lawyer shall not [u]nlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value." Likewise, an attorney shall not "[k]knowingly disobey an obligation under the rules of a tribunal." NRPC 3.4(c).

In *Bahena v. Goodyear Tire & Rubber Co.*, this Court stated that attorney "conduct is governed by Nevada Rule of Professional Conduct (RPC) 3.3, which addresses the standards of candor that a lawyer must have toward a court. This rule provides that the lawyers ***must not make a false statement of fact or law to a tribunal, fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer, or offer evidence that the lawyer knows to be false***." 126 Nev. Adv. Op. 57, 245 P.3d 1182, 1185 (2010) (emphasis added); *see also In re Pagaduan*, 429 B.R. 752, 760 (Bankr. D. Nev. 2010) (finding attorney violated rule by fabricating certifications of debt counseling and filing them with the court).

In *Sierra Glass & Mirror v. Viking Industries, Inc.*, 107 Nev. 119, 125, 808 P.2d 512, 516 (1991), this Court admonished that an attorney violates the duty of candor and honesty by misleading the court or their opponent. And, it is no defense to claim that either the court or opposing counsel should have caught the deception earlier. As this Court rightly condemned, what counsel calls "clever lawyering and proficient advocacy ***is nothing other than a fraud on the court*** when attorneys engage in such misbehavior." *Id.* (emphasis added).

There can be no safe harbor for a fraud against the court just because the case is presently confined to resolving a jurisdictional issue that ***Petitioners*** invited. As another court has aptly said:

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> Our adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice. However, because no one has an exclusive insight into truth, the process depends on the adversarial presentation of evidence, precedent and custom, and argument to reasoned conclusions – all directed with unwavering effort to what, in good faith, is believed to be true on matters material to the disposition. ***Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process.***

United States v. Shaffer Equipment Co., 11 F.3d 450, 457 (4th Cir. 1993) (emphasis added).

IV. CONCLUSION

Neither LVSC nor Sands China is the innocent victim they try to present. They undertook a fraud and now want to be relieved of some of the consequences after their fraud was uncovered. Protecting litigants from their deception is not the makings of a writ petition. Petitioners' application fails on both the law and the facts, and should be denied.

DATED this 19th day of March, 2013.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2007 in size 14 font in double-spaced Times New Roman.

I further certify that I have read this brief and that it complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and 11,297 words.

Finally, I hereby certify that to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in this brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 19th day of March, 2013.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Pisanelli Bice, and that on this 19th day of March, 2013, I electronically filed and served a true and correct copy of the above and foregoing **ANSWER TO PETITION FOR WRIT OF PROHIBITION OR MANDAMUS** properly addressed to the following:

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SERVED VIA HAND-DELIERY ON 03/20/13
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