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 AND THE HONORABLE ELIZABETH GONZALEZ, DISTRICT JUDGE,

Respondents,

and

STEVEN C. JACOBS,

Real Party in Interest.

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR MANDAMUS TO PROTECT PRIVILEGED DOCUMENTS

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I. INTRODUCTION

Plaintiff's Answer provides no credible response to the straightforward question of law presented by this Petition: Does NRS 50.125 compel the disclosure of documents reviewed by a party's attorney before testifying at a hearing, even though the documents are unquestionably protected by the attorney-client privilege and the work product doctrine—and even though the party opponent did not seek production of the documents until months after the attorney had testified, the hearing had concluded, and a final ruling had issued?

The Petition seeks relief from an Order entered by the district court on January 17, 2013. LVSC/SCL0569-71. Four months earlier, the court had convened a hearing to consider whether to impose sanctions on defendants. The court ordered several attorneys to testify. Before the hearing, one of the attorneys, Justin Jones, who had not been involved in the case for some time, reviewed 10-15 e-mails and his own timekeeping entries to refresh his memory about the time-line of the litigation. There is no real dispute that the documents reviewed by Mr. Jones are protected by the attorney-client privilege and that they are core "opinion" work product. There is also no dispute that plaintiff did not seek the production of the documents until long after the hearing had concluded and the district court had issued a final order. And there is no showing that the documents had any bearing on personal jurisdiction, the only issue properly before the district court. Despite all that, the district court ordered defendants to produce the privileged documents. That Order rests on three fundamental errors of law.

First, the January 17 Order erroneously construed NRS 50.125 to require the automatic forfeiture of privileges whenever a witness reviews a privileged document to refresh his or her memory before testifying-regardless of whether the important interests served by the privilege outweigh any interest in testing the witness's credibility (as they do here). The district court reached this extraordinary result even though (i) NRS 47.020 mandates that privileges apply "at all stages of all proceedings," (ii) NRS 50.125 does not even mention privilege, much less purport to abrogate it in all cases, and (iii) courts construing the federal analog to NRS 50.125 apply a case-by-case balancing test, rather than the rigid automatic-forfeiture theory adopted by the district court.

Second, the January 17 Order nullifies the plain language and limitations of NRS 50.125. By its terms, the statute allows the court to compel the production of documents that a witness at a hearing used to refresh his or her recollection, for the sole purpose of assessing the witness' credibility *at the hearing*. But the January 17 Order compelled the production of privileged documents long *after* the hearing had ended and the court had ruled. The witness' credibility with respect to the matters on which his recollection was refreshed (which was never challenged in the first place) was simply not at issue at that point.

Third, the January 17 Order goes far beyond the narrow boundaries this Court set in its August 26, 2011 Order. Under that Order, the underlying action is stayed "except for matters relating to a determination of personal jurisdiction, until a decision on that issue has been entered." LVSC/SCL0128. Nevertheless, the district court compelled the production of privileged documents without even *considering* whether those

documents are related in any way to the issue of jurisdiction (which they are not).

Plaintiff's Answer fails to overcome any of these fatal errors. In fact, the bulk of plaintiff's Answer does not even address the issues presented by the Petition. Instead, plaintiff argues about issues that are *not* presented by the Petition, including the merits of the district court's earlier sanctions order and other discovery disputes that arose thereafter. As he has done since the day he filed this action, plaintiff resorts to baseless, hyperbolic accusations of wrongdoing, arguing that defendants are not entitled to relief because they supposedly have committed "a fraud against the judicial process." Answer at 28. Plaintiff evidently hopes that mudslinging will succeed where legal argument cannot, or at least will distract the Court from the patent errors the Petition seeks to remedy. Although plaintiff's accusations are irrelevant to the real and important issues raised by defendants' Petition, defendants respond to them briefly in Part I below to set the record straight.

II. ARGUMENT

A. This Court's Intervention Is Appropriate Because Petitioners Have No Adequate Remedy At Law And Because The District Court's Order Raises Important Questions Of First Impression.

There are multiple grounds for granting defendants' request for extraordinary relief. First, absent this Court's intervention, Petitioners would be irreparably harmed by the January 17 Order because "the assertedly privileged information would irretrievably lose its confidential and privileged quality and petitioners would have no effective remedy, even by a later appeal." *Wardleigh v. Dist. Ct.*, 111 Nev. 345, 350-51, 891 P.2d 1180, 1184 (1995). Second, the issue presented- the interplay between

NRS 50.125, the attorney-client privilege, and core "opinion" work product- is "an important issue of law" that this Court has never decided and that "needs clarification." *Sonia F. v. Eighth Judicial Dist. Ct.*, 125 Nev. 495, 498, 215 P.3d 705, 707 (2009) (citation omitted). Third, the January 17 Order violates this Court's prior order staying all proceedings other than those necessary to decide jurisdiction, and thus implicates this Court's supervisory power.

Plaintiff offers no real dispute on any of these points. Instead, he tries to change the subject, arguing that the Court should deny the Petition because it should not "aid in the suppression of evidence." Answer at 17. But this Petition is not about "suppressing" evidence. It is instead about protecting work product and privileged documents that were created long after this lawsuit was filed from being handed over, for no good reason, to defendants' adversary. Defendants thus seek to protect, not to subvert, the judicial process.

1. The Court Should Disregard Plaintiff's Irrelevant Assertions About Defendants' Conduct Leading Up To The Sanctions Order.

Although one would never know it from plaintiff's Answer, the sanctions hearing in September 2012 was triggered by defendants' *voluntary* disclosure in June 2012 that a copy of Jacobs' emails and other ESI had been transferred from Macau to Las Vegas shortly after Jacobs was terminated. LVSC/SCL0267-75. The district court found that the 2010 data transfer, which was made at the behest of an in-house attorney for Las Vegas Sands Corp. ("LVSC"), was for preservation purposes. LVSC/SCL0362. Defendants explained to the court that the data had been transferred "in error"- that is, unknowingly in violation of Macau's strict

data privacy laws - and that until late May 2012 it was unclear whether defendants would be deemed to have violated those laws a second time if they produced documents from the transferred data. LVSC/SCL0267-75. In late May 2012, representatives of Sands China Ltd. ("SCL") and its subsidiary, Venetian Macau Ltd., met with Macau's Office of Personal Data Protection (the "OPDP") and obtained assurances that additional transfers would not result in any adverse consequences. *Id.* Thereafter, they voluntarily disclosed the fact that LVSC had a copy of Jacobs' ESI on its servers in Las Vegas. *Id.*

The district court convened the September 2012 sanctions hearing to determine whether defense counsel had misled her by not volunteering at an earlier point in time that Jacobs' ESI had been transferred to the U.S., while at the same time arguing the difficulties of producing documents from Macau, in light of Macau's data privacy laws. LVSC/SCL0357-65. With the exception of LVSC's Chief Information Officer, all the witnesses at the sanctions hearing were lawyers or former lawyers for LVSC or SCL. That put defendants on the horns of a dilemma: either (i) waive privilege and fully answer questions posed at the hearing or (ii) preserve privilege but take the risk that the district court would draw an adverse inference and enter sanctions.

Defendants chose not to waive privilege, and the court sustained most of the objections defendants made to questions posed by the court and counsel for plaintiff. *See, e.g.*, LVSC/SCL0282, 283, 286. In its sanctions order issued on September 14, 2012, the court said that it had not drawn any adverse inference from defendants' invocation of privilege. LVSC/SCL0358 at n.1. Nevertheless, the court made a number of findings

that could only have been based on such an adverse inference.[1] Thus, for example, the court found that the defendants themselves (as opposed to their counsel) had "concealed" the transferred ESI prior to their voluntary disclosure on June 27, 2012, "with an intent to prevent the plaintiff access to information discoverable for the jurisdictional proceedings." LVSC/SCL0363. It also concluded that LVSC changed its corporate policy in July 2011 to limit its access to data from Macau, not because it had gained a better understanding of Macau's data privacy laws, but to "prevent the disclosure of the transferred data as well as other data." LVSC/SCL0362. It was apparently based on those findings that the court prohibited the defendants from relying on Macau's data privacy laws to block production of documents during jurisdictional discovery - a ruling it recently interpreted to prevent SCL from complying with the explicit instructions of Macanese authorities to redact personal data before documents can be transferred to the U.S.

On April 8, defendants filed another Petition seeking relief from the district court's March 27, 2013 Order, which interprets the September 14 sanctions order as precluding SCL from even redacting personal data from documents it produces in response to jurisdictional discovery out of Macau and treats the fact that SCL produced redacted documents as sanctionable, despite the fact that the Macanese authorities have required such redactions. That Petition, docketed as No. 62944, challenges some of the district court's findings in its September 14 Order.[2] But for purposes of *this*

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[1] *See, e.g., Nabisco, Inc. v. PF Brands, Inc.*, 191 F.3d 208, 226 (2d Cir. 1999) (there is "no precedent supporting. . . an [adverse] inference based on the invocation of the attorney-client privilege").

[2] On April 19, 2013, this Court accepted that Petition and set a briefing schedule.

Petition, whether those findings or the sanctions the court imposed were warranted is entirely irrelevant. The only issue here is whether the privileges that attach to work-product and attorney-client communications created *after* this lawsuit was filed should be ignored simply because a lawyer-witness reviewed those documents prior to testifying at the sanctions hearing.

2. The Parties' Other Discovery Disputes Are Also Irrelevant.

In his Answer (at 16), plaintiff also contends that defendants' supposed "obstructionism" of jurisdictional discovery continued after the court issued its sanctions order. But far from obstructing discovery, defendants have spent millions of dollars producing over 200,000 pages of documents in response to the "jurisdictional" discovery the district court allowed; in addition, they have submitted four senior executives to seven days of depositions that were supposed to be limited to the jurisdictional issue.

Notwithstanding the enormous efforts defendants have undertaken to comply with the supposedly narrow jurisdictional discovery the court ordered, plaintiff continues to accuse defendants of concealing evidence, and the district court has continued to move the discovery goal posts. For example, in November 2012 plaintiff moved for sanctions because SCL had not yet reviewed ESI stored in Macau - even though the Macanese government did not allow that review until the end of November. The district court denied the motion for sanctions, but then ordered SCL to produce documents from Macau on an expedited basis, giving it only 17 days (including Christmas and New Year's) to comply. Despite numerous practical difficulties, SCL complied. LVSC/SCL0509-16. Then plaintiff

filed a renewed motion for sanctions, complaining, among other things, that SCL had not searched the records of all of the custodians that plaintiff had identified as "merits" custodians. In its March 27 Order, the district court ordered SCL to undertake an expanded search of the files of all of the custodians plaintiff had identified and *sua sponte* ordered it to prepare a log of any documents it was withholding on the grounds that they related to merits rather than jurisdiction.

In the Petition they filed on April 8, defendants challenge this portion of the March 27 Order on the ground that it goes well beyond the narrow task this Court ordered the district court to accomplish when it granted defendants' first Petition on August 26, 2011. For purposes of the present Petition, however, these discovery issues are wholly irrelevant. Plaintiff has never claimed, nor could he claim, that the documents Mr. Jones reviewed to refresh his recollection of the timeline are relevant to jurisdictional discovery. Instead, plaintiff sought to compel discovery of those documents based solely on his assertion that NRS 50.125 automatically entitles him to obtain a copy of those documents. LVSC/SCL0366-67.

3. The Court Owes No Deference To The District Court's Erroneous View Of The Law.

In addition to attempting to divert the Court's attention from the January 17 Order, plaintiff tries to water down the Court's review by asserting that this Court generally reviews discovery orders for "abuse of discretion." Answer at 18. But the Order at issue here did not involve any exercise of discretion. To the contrary, the district court held that it had *no* discretion and that NRS 50.125 automatically required the forfeiture of privilege. LVSC/SCL0569-71. In any event, "[w]hile review for abuse of

discretion is ordinarily deferential, deference is not owed to legal error." *AA Primo Builders, LLC v. Washington*, 126 Nev. Adv. Op. 53, 245 P.3d 1190, 1197 (2010). The district court's errors here are pure errors of law, and no deference is due.

4. There Is No Basis For Plaintiff's Post Hoc Arguments That The Documents Created By Petitioners' Attorneys Are Not Privileged.

The January 17 Order proceeds from the correct premise that the documents at issue are privileged, but then erroneously finds that NRS 50.125 compels the automatic forfeiture of those privileges. With the automatic-forfeiture theory crumbling, plaintiff now argues that the post-litigation documents authored or received by defendants' attorneys are not really privileged after all. Plaintiff's thinly-sketched arguments on these points are baseless.

First, plaintiff complains in a footnote (at 18, n.11) that the documents were not listed on a privilege log. Plaintiff did not make this argument before the district court ruled, nor does the argument make any sense. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (a point not raised in the district court is deemed to have been waived and will not be considered on appeal).

The documents were not logged *before* the hearing because they were created by outside counsel and were not responsive to plaintiff's jurisdictional discovery requests. Nor was there any need to log them *after* the hearing, since plaintiff had already obtained through cross-examination at the hearing the information that appears in a privilege log (*e.g.*, the author and date of each document) and, in addition, was able to explore the bases of the assertion of privilege in detail. LVSC/SCL0279-0356.

In the same footnote, plaintiff argues that "billing statements" are "not privileged." None of the records at issue here are billing statements; most are e-mails by and between attorneys, and the rest are detailed time-keeping entries that describe Mr. Jones' legal work and his thought processes. *Id.*

Finally, plaintiff makes the untenable claim (which also was not raised before the district court ruled) that defendants waived privilege by "rais[ing] the issue of privileged communications" in the sanctions hearing. Answer at 19. But at the hearing defendants consistently *refused* to disclose privileged communications. *See, e.g.*, LVSC/SCL0282, 283, 286. That was also true of Mr. Jones: he did not testify about the contents of any of the documents he had reviewed; instead, he simply reviewed them to refresh his recollection of the time-line.

B. The January 17 Order Fashions An Extreme, Automatic-Forfeiture Rule That Is Contrary To Law.

The district court's first error of law-its misreading of NRS 50.125 to compel the automatic forfeiture of all privileges-is founded solely on the district court's view that NRS 50.125 itself does not expressly list the attorney-client privilege or other protections as an exception. LVSC/SCL0570. As the Petition demonstrates, the district court improperly read NRS 50.125 in a vacuum. There was no need for the legislature to repeat all the various privileges as an express exception within NRS 50.125, because it already codified the attorney-client privilege in NRS 49.035-NRS 49.095. And to re-emphasize the point, the Legislature mandated in NRS 47.020 that "the provisions of chapter 49 of NRS with

respect to privileges apply at all stages of all proceedings."[3] The proper approach, then, is not to abrogate the privilege (as the district court did) but to balance the policy of that privilege against the need (if any) for a particular document, based on the specific facts of the case. That is the approach taken by the weight of authority in the federal courts. Any proper balance under these facts would weigh in favor of the privilege. Plaintiff's attempts to avoid the balancing test and defend the district court's automatic-forfeiture theory are baseless.

1. Plaintiff Misreads NRS 47.020.

Plaintiff argues (at 22) that NRS 47.020 (which preserves privilege "at all stages of all proceedings") contains an exception that eliminates privilege whenever NRS 50.125 is involved. Reading the statute in "totality," as plaintiff suggests, refutes his position.

NRS 47.020 contains three subsections. Subsection 1 states where the provisions of "[t]his title" (the rules of evidence set forth in title 4, chapters 47 through 56) apply: to "proceedings in the courts of this State and before magistrates." Subsection 2 addresses privileges, and gives them a broader application than the other rules of evidence. While subsection 1 applies to "proceedings in the courts. . . and before magistrates," subsection 2 extends the rules of privilege to "all stages of all proceedings." Thus, the rules of privilege apply outside the courtroom (like discovery) and in proceedings outside the judicial system (like administrative agency proceedings). Further, the privilege rules apply even in the special circumstances described in subsection 3 (such as issuance of arrest warrants), even though "[t]he other provisions of this title do not apply" in those contexts. In other

[3] Likewise, Nev. R. Civ. P. 26(b)(3) preserves absolute protection for "opinion" work product without any exceptions.

words, the rules of privilege apply wherever the rules of evidence (including NRS 50.125) apply, *and* in many contexts where NRS 50.125 and the other rules of evidence do not apply.

Subsection 2 contains one exception: the rules of privilege apply "[e]xcept as otherwise provided in subsection 1." In turn, subsection 1 provides an exception where the rules of evidence are "relaxed by a statute or procedural rule applicable to the specific situation."

The Subcommittee has identified only one statute that "relaxe[s]" the provisions of title 4 and thereby qualifies as an exception to NRS 47.020. That exception is NRS 47.060, which addresses a judge's determination of "[p]reliminary questions concerning the qualification of a person to be a witness, the existence of a privilege or the admissibility of evidence." NRS 47.060 states that in making such a determination, "the judge is not bound by the provisions of this title except the provisions of chapter 49 of NRS with respect to privileges." Notably, the statute's text expressly exempts the proceeding in that context from "the provisions of this title," and then separately addresses the rules of privilege. Further, the Subcommittee's accompanying comment expressly confirms that NRS 47.060 is an exception to NRS 47.020.

Plaintiff contends that NRS 50.125 is also an exception to the rules of privilege preserved by NRS 47.020, but fails to provide any support for this naked conclusion from any Subcommittee comments, any legislative history, or any case law. Answer at 22. Plaintiff's argument fails for two reasons. First, NRS 50.125 does not purport to "relax" the "provisions" of title 4 or the rules of evidence contained therein. In fact, NRS 50.125 *is* a rule of evidence, and it is *part* of title 4. This is in sharp contrast to NRS

47.060, which expressly relaxes the rules of evidence by stating that "the judge is not bound by the provisions of this title."

More importantly, NRS 50.125 does not "relax" the rules of *privilege*. It does not even mention privilege. Nor does it address "the specific situation" presented here, in which a lawyer-witness reviews privileged materials before testifying. Again, this is in sharp contrast to NRS 47.060, which expressly states what happens to "the provisions of this title" (they are relaxed) and to "the provisions of chapter 49 of NRS with respect to privileges" (they are maintained). Further, unlike NRS 47.060, the Subcommittee's comments to NRS 50.125 do *not* say that NRS 50.125 is an exception to NRS 47.020.[4]

In the end, plaintiff's argument about the exception to NRS 47.020 brings us back to the same error of law the district court made. The January 17 Order construed NRS 50.125 to abrogate privilege, even though NRS 50.125 says nothing about privilege. Given that NRS 47.020 expressly *preserves* privilege "at all stages of all proceedings," and requires any exception to be "specific," a statute like NRS 50.125 that is *silent* about privilege cannot support the automatic forfeiture of privilege that the district court imposed.

[4] NRS 47.020, NRS 47.060, and NRS 50.125 were all part of the same 1971 enactment. If the Legislature had intended the refreshed-memory provision of NRS 50.125 to be an absolute exception to NRS 47.020, the text would have expressly referenced the rules of evidence and privilege (as NRS 47.060 does) and the Subcommittee would have identified NRS. 50.125 as an exception to NRS 47.020 (as it did with respect to NRS 47.060). NRS 50.125 does neither.

2. Plaintiff Misreads This Court's Decision In *Means v. State*.

Plaintiff fares no better by relying on *Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004); Answer at 19-21. In *Means*, a criminal defendant claimed that his former counsel was ineffective, and the former attorney used notes to refresh his recollection while testifying in the defendant's post-conviction hearing. *Id.* at 1005-06; 103 P.3d at 28. "*Under that circumstance*," the former client "was entitled under [NRS 50.125] to demand to see the notes." *Id.* at 1010, 103 P.3d at 31 (emphasis added). The Petition showed that the facts of this case are very different from the unique "circumstance" addressed by *Means*:

- Unlike this case, *Means* did not involve the attorney-client privilege, because it arose out of a dispute between attorney and client;
- Unlike this case, *Means* did not involve the absolute protection afforded to "opinion" work product;
- Unlike this case, *Means* addressed work product in the unusual context in which a former client seeks disclosure – a situation that the Court took pains to distinguish from the setting here, in which the attorney's adversary seeks disclosure and in which "[t]he work product doctrine is most commonly and appropriately invoked." 120 Nev. at 1010, 103 P.3d at 31.
- Unlike this case, *Means* did not involve a party opponent who waited until long after the hearing had concluded and a ruling had issued before requesting production of the documents.

Plaintiff fails to address these distinctions. Instead, Plaintiff's first response is that the difference in facts is irrelevant, and that *Means* establishes an absolute rule against all privileges in all cases. But that would render most of the *Means* opinion superfluous. If *Means* had eliminated all factual distinctions, it would not have drawn such a clear

distinction between the attorney-client dispute before it and the more common dispute among adversaries that is presented here. 120 Nev. at 1010, 103 P.3d at 31. It would not have devoted a lengthy paragraph to analyzing a federal case and showing that work product protection is attenuated in attorney-client disputes. *Id.* at 1009-10, 103 P.3d at 31. And it would not have limited its holding to the specific "circumstance" before it. *Id.* at 1010, 103 P.3d at 31. Plaintiff is improperly trying to take a carefully limited, case-specific analysis covering four pages, and turn it into an absolute one-sentence dictate for all cases.

Plaintiff's other argument simply mischaracterizes the Petition. According to plaintiff, defendants "claim that *Means* is limited to the circumstance when a client seeks production of privileged materials." Answer at 20. The Petition makes no such claim. *Means* is limited to the circumstance when a client is seeking production of *ordinary work product*. Plainly, *Means* does not address a party opponent's request for the compelled disclosure of privileged materials (that is, documents protected by the attorney-client privilege) at all. In *Means*, the documents were not privileged because, as plaintiff himself recognizes, "documents are not privileged as between an attorney and their client." Just as plainly, *Means* does not address the production of work product to an adversary, because the Court made clear that the adversarial context presented here was "not the case at hand" in *Means*. 120 Nev. at 1010, 103 P.3d at 31.

3. Plaintiff Misreads FRE 612, The Federal Analog To NRS 50.125.

The question facing this Court now is one the federal courts have already answered. As in Nevada, the federal rule on privilege (which the Subcommittee used as a model for NRS 47.020) states that "[t]he rules on

privilege apply to all stages of a case or proceeding" without making an exception for materials reviewed before testifying. Fed. R. Evid. 1101(c). As in Nevada, the federal analog to NRS 50.125 (FRE 612) addresses materials used by a witness, but does not address privilege. The district court here ignored NRS 47.020, and erroneously decided that NRS 50.125 automatically trumps privilege in all cases. By contrast, the great weight of authority in the federal courts holds that FRE 612 does *not* automatically defeat privilege. Rather, federal courts "resolve the conflict by balancing the competing principles underlying both Rule 612 and privilege law" on the facts of each case. Wright & Gold, *Federal Practice and Procedure* § 6188. *See also Server Tech., Inc. v. American Power Conversion Corp.*, No. 3:06-CV-00698-LRH, 2011 WL 1447620 at *6, *11 (D. Nev. April 14, 2011) ("FRE 612 does ***not*** mandate the disclosure of documents used to refresh a witness' recollection prior to . . . testimony" even though FRE 612 "does not expressly exempt privileged matter from disclosure") (emphasis added).

Plaintiff himself acknowledged below that "Nevada's Rules of Civil Procedure are modeled after the Federal Rules" and that "[c]ase law discussing Federal Rule of Evidence 612 is instructive" on the issues presented by his motion. LVSC/SCL0376. But now, seeing that federal case law is *fatal* to the district court's automatic-forfeiture theory, plaintiff runs away from federal law, arguing that the text of FRE 612 differs from NRS 50.125. Answer at 25-27. Plaintiff's about-face fails, because the textual difference does not affect the outcome here.

The slight difference between FRE 612 and NRS 50.125 concerns a separate question: whether documents reviewed before testifying should be treated differently than documents reviewed while the witness is on the stand. FRE 612(a)(2) 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. The House Judiciary Committee's notes explain that Congress added this clause to preserve the distinction "under existing federal law" between materials reviewed before testimony versus materials reviewed during testimony, and because "permitting an adverse party to require the production of writings used before testifying could result in fishing expeditions among a multitude of papers which a witness may have used in preparing for trial." FRE 612 Judiciary Committee Notes, ¶ 1. NRS 50.125 does not contain that clause, because it was based on a draft of FRE 612 rather than the final version. *See* NRS 50.125, Subcommittee comment.

But the clause added to FRE 612 says nothing about privilege. When it comes to privilege, FRE 612 and NRS 50.125 are the same. Neither one mentions privilege, and certainly neither one says that it automatically abrogates all privileges. As Section B.1 explains, this makes perfect sense, because both the federal and Nevada rules contain a separate provision that preserves privileges in all stages of all cases: NRS 47.020 and FRE 1101. After discussing the treatment of materials reviewed before testimony, the House Judiciary Committee wrote a second note to FRE 612 addressing the separate question of privilege. That note confirms "that nothing in the Rule [should] be construed as barring the assertion of a privilege with respect to writings used by a witness to refresh his memory." FRE 612 Judiciary Committee notes, ¶ 2. Similarly, nothing in NRS 50.125 purports to bar the assertion of any privilege, and the district court's attempt to insert such a bar is contrary to the preservation of privilege in NRS 47.020.

4. The District Court's Order Cannot Satisfy The Balancing Test Required By Law.

The proper way to reconcile privilege and NRS 50.125 is the one taken by the federal courts applying FRE 612: to balance the policy interest in protecting privilege against the interest in testing the accuracy of the refreshed testimony in the particular hearing. Instead, the January 17 Order adopts a rigid, one-sided approach in which privilege always loses even if the refreshed testimony is undisputed and/or immaterial and even if the party opponent seeks the documents long after the witness has testified and the hearing has concluded.

The reason why plaintiff advocated such an extreme result below and tries to defend it here is simple: as the Petition demonstrates, any balancing test in this case would inevitably come out in favor of privilege. The weight on the privilege side of the scale is heavy indeed: the documents here are obviously protected communications by and between counsel, including core "opinion" work product and attorney-client communications.

Conversely, under the facts of this case, the interests served by NRS 50.125 carry no weight at all. The statute serves the limited purpose of helping the finder of fact at a hearing to assess the accuracy and credibility of the testimony that has been refreshed. *See* NRS 50.125(1)(d). Plaintiff has not disputed Mr. Jones' refreshed recollection of the litigation time-line, nor has he ever made any showing that the credibility of that time-line was in any way important to the sanctions hearing. To the contrary, the district court ruled on the sanctions issue before plaintiff even *moved* to compel production of the Jones documents, which shows conclusively that those documents are *im*material.

In an attempt to manufacture a credibility issue after the fact, plaintiff accuses Mr. Jones of trying to "distance himself" from the Jacobs ESI dispute. Answer at 13. Mr. Jones' "distance" results from the undisputed facts that he had no involvement in the case for several months and was running in a hotly-contested election campaign. Far from "distancing" himself, Mr. Jones reviewed documents to refresh his recollection so he could provide more accurate answers.

C. The District Court's Order Improperly Transforms NRS 50.125 From A Limited Rule Of Evidence Into An Open-Ended Fishing License.

1. The District Court Ignored The Statute's Express Limitations.

In addition to misreading NRS 50.125 to compel the automatic forfeiture of privilege, the January 17 Order compounded its error by overriding the statute's express limitations. By its plain terms the statute's reach is limited to the "testimony of the witness" that has been refreshed and "the hearing" at which that witness testifies. If the witness uses a writing to refresh his or her memory, the adverse party may have it "produced *at the hearing*"; then may "inspect" the writing and "*cross-examine the witness* thereon"; and finally "*introduce in evidence* those portions which relate to *the testimony of the witness* for the purpose of affecting the witness' credibility." NRS 50.125(1)(a)-(d) (emphases added). The January 17 Order does none of those things. Instead, it compels the disclosure of privileged communications months after "the witness" had testified, "the hearing" had closed, and the district court had ruled on the sanctions issue that "the hearing" was convened to address. The Order is thus contrary to NRS 50.125.

Unable to confront the statute's plain language, plaintiff tries to shift the debate to inapposite case law, arguing that "courts routinely order the production of documents used to refresh a recollection after the witness has testified." Answer at 21. Both of plaintiff's citations, however, deal with testimony at depositions, a distinction plaintiff acknowledges but tries to brush off as "immaterial." *Id.* at 21 n.12. In fact, the difference is critical. In a deposition, there is no judge or jury, and no ruling on the merits of the case occurs. Further, when the defending party refuses to produce the documents, the adverse party continues the deposition until the dispute is resolved. In the deposition context, then, the court rules on disclosure while "the hearing" is still underway, before the "testimony of the witness" is complete, and before the finder of fact has ruled. Here, by contrast, the judge was present at the hearing and ruled on the sanctions issue. The "hearing" is over, and the witness' recollection and credibility regarding the undisputed time-line were plainly immaterial.

Plaintiff's strained analogy to *Means* (Answer at 20-21) is equally inapt. In *Means*, the adverse party moved *at the hearing* to obtain his former attorney's notes. The trial court denied the motion and then ruled against him on the merits of his post-conviction petition. The adverse party appealed, and this Court reversed and remanded for a new hearing. Thus, disclosure was ordered for use *at the new hearing*.

Further, the notes in *Means* bore on a critical issue of the case (whether the adverse party had instructed his former attorneys to appeal his conviction), and clearly impacted the witness' testimony on that issue (because the witness "testified directly from" those notes on the stand). 120 Nev. at 1008, 103 P.3d at 30. Here, by contrast, neither the plaintiff nor the district court made any showing that the refreshed testimony (or the

documents at issue) had any bearing on the outcome. Nor could they, because the January 17 Order came long after the sanctions hearing was over and decided.

Plaintiff's last resort is the accusation that "Petitioners' discovery misconduct. . . is ongoing." Answer at 21. But while plaintiff has filed several sanctions motions since the September hearing at which Mr. Jones testified, he has never claimed that Mr. Jones' refreshed testimony would be relevant to any of them. Plaintiff's argument is nothing more than rank speculation that he *might* file still more sanctions motions and that some aspect of Mr. Jones' testimony *might* somehow be relevant. Such speculation cannot support the wholesale invasion of privilege that the district court ordered. That is particularly true when plaintiff makes no showing that the specific testimony that was refreshed (the time-line of events in the litigation) is inaccurate, or that there is any real chance that testing the credibility of that specific testimony will ever be relevant in any future proceeding.

In any event, plaintiff's speculation about future proceedings cannot support the district court's Order under NRS 50.125. The production of a document under the statute is plainly limited to "the hearing" at which the witness testifies. The legislature's use of the definite article "the" coupled with the singular "hearing" make it quite clear that NRS 50.125 applies only to the specific hearing at which "the testimony of the witness" occurs. NRS 50.125 does not give a district court a blank check to compel the production of documents (especially privileged documents) *after* "the hearing" is finished, just because the adverse party thinks the documents might be useful in some unspecified other hearing that might take place at some unspecified time in the future.

2. The January 17 Order Extends To All Documents "Reviewed" By The Witness, Not Just Those That Refreshed His Recollection.

To make matters worse, the district court's January 17 Order compels the production of "all documents Justin Jones *reviewed* in preparation for testifying at the evidentiary hearing," not just the documents that refreshed Mr. Jones' recollection. LVSC/SCL0570 (emphasis added). Plainly, the district court misread NRS 50.125 as a tool for plaintiff to obtain open-ended discovery *outside* the hearing, not as an evidentiary rule for the hearing itself. Recognizing that the Order's broad scope is indefensible, plaintiff argues that the district court did not really mean what it said. Plaintiff suggests (at 28) that the Order was really limited to specific documents (listed early in the Order) that refreshed Mr. Jones' memory. That assertion sinks as soon as one reads the Order. After listing the specific documents, the Order plainly states that it is "not limited to" those documents, and that it extends to all documents "reviewed by" Mr. Jones. LVSC/SCL0569-71.

D. The District Court's Order Violates This Court's August 26, 2011 Order Staying The Action Except For Matters Relating To A Determination Of Personal Jurisdiction.

In addition to the other errors of law described above, the district court's January 17 Order violates the plain terms of this Court's August 26, 2011 Order, which stayed the underlying action "except for matters relating to a determination of personal jurisdiction." LVSC/SCL0128. The district court's Order compels the production of privileged documents that indisputably do *not* relate to personal jurisdiction.

Plaintiff does not dispute this basic point, and again resorts to diversion. Plaintiff argues that regardless of this Court's stay order, the

district court still had power to convene a sanctions hearing. Answer at 28-31. But whether or not the district court could hold a hearing or enter the September 2012 sanctions order is beside the point. As shown above, Plaintiff has made no showing that Mr. Jones' refreshed memory about the time-line of the litigation, or the documents that Mr. Jones reviewed, were material in any way to the hearing or the sanctions order. The January 7 Order is simply a standalone order compelling discovery that has no bearing on jurisdiction *or* sanctions, and thus falls outside the limited bounds established by this Court.

III. CONCLUSION

For the reasons set forth above and in their Petition, defendants respectfully request that this Court exercise its discretion to entertain the Petition and grant a writ of prohibition or mandamus directing the district court to set aside its erroneous Order.

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. P. 25(b) and NEFR 9(f), I hereby certify that I am an employee of Morris Law Group; that on this date I electronically filed the foregoing **REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR MANDAMUS TO PROTECT PRIVILEGED DOCUMENTS** with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (Eflex). Participants in the case who are registered with Eflex as users will be served by the Eflex system as follows:

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I further certify that I caused a copy of the **REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR MANDAMUS TO PROTECT PRIVILEGED DOCUMENTS** to be hand delivered, in a sealed envelope, on **April 24, 2013** and to the addressee(s) shown below:

Judge Elizabeth Gonzalez
Eighth Judicial District Court of
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Regional Justice Center
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Las Vegas, Nevada 89155

Respondent

DATED this 23rd day of April, 2013.

By: /s/ PATRICIA A. FERRUGIA