

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioners,

vs.

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

Respondents,

and

STEVEN C. JACOBS,

Real Party in Interest.

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**PETITION FOR WRIT OF  
PROHIBITION OR  
MANDAMUS RE  
MARCH 27, 2013 ORDER**

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### **Rule 26.1 Disclosure**

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

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

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## I. INTRODUCTION

### A. The District Court's Finding of Sanctionable Conduct.

This Petition for a Writ of Mandamus arises from the district court's March 27, 2013 Order finding that SCL, a foreign corporation, engaged in sanctionable conduct by redacting personal data from certain discovery documents in compliance with the laws of Macau. PA2257.<sup>1</sup> The ruling came nearly 18 months after this Court vacated the district court's earlier jurisdictional ruling and directed the district court to stay *all aspects* of the litigation *other than* a determination of the court's jurisdiction over SCL. PA234. Notwithstanding this Court's express mandate, the district court found the redactions mandated by Macau law to be sanctionable with no showing that the redacted data (consisting of names, addresses and similar personal information) has any relevance to the jurisdictional issue—and with no dispute that the Macau government *required* SCL to make the redactions to protect the privacy rights of individuals.

Furthermore, the district court based its ruling on a finding that the redactions violated a September 14, 2012 order, even though that order did not mention redactions at all—and even though the district judge stated in open court after the entry of the order that SCL *could redact* the documents. PA 1689:10–21.

In addition, in its sanctions ruling, the district court did not acknowledge or consider the extraordinary lengths to which defendants have gone to provide discovery on the limited jurisdictional issue. These efforts include (1) producing more than 165,000 pages of unredacted documents; (2) submitting four senior executives for multiple depositions

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<sup>1</sup> References are to the Petitioners' Appendix submitted herewith.

by the plaintiff; (3) searching for and finding in the United States approximately 2,100 unredacted copies of Macau documents that were originally produced with personal redactions; and (4) providing a "Redaction Log" identifying the employers of each of the individuals whose names were redacted in the remaining Macau documents. To date, defendants have spent more than \$4 million to comply with the jurisdictional discovery ordered by the district court. PA1919.

Nor is that all. In its March 27 Order, the court *sua sponte* directed SCL to greatly increase its production of electronic documents by searching the records of 13 additional individuals whom the plaintiff had demanded as *merits* custodians long before this Court issued its jurisdictional mandate—again without any finding that this voluminous additional discovery would be both relevant to jurisdiction and non-cumulative. Finally, the district court ordered SCL to log *all documents* that it retrieves through these additional electronic searches (but withholds on relevance grounds), so that the court can review the withheld documents and consider whether additional sanctions should be imposed.

For these reasons, this case is no longer the limited jurisdictional inquiry mandated by this Court in its August 26, 2011 Order. Instead, it has now veered completely off track, as the district court has given the plaintiff virtually everything he has demanded, while ignoring the defendants' repeated objections that the discovery the plaintiff seeks is not likely to be *both* relevant to jurisdiction and non-cumulative to the massive discovery already conducted. So, after producing thousands of documents at an extraordinary cost, SCL now finds itself faced with sanctions for redacting, in compliance with Macau law, "personal data" having no demonstrated relevance to any jurisdictional issue; a discovery order



requiring the company to search the records of 13 additional custodians with no finding that the searches are likely to yield evidence that is both relevant to jurisdiction and non-cumulative or worth the additional cost involved; and an unprecedented requirement to log documents withheld on relevance grounds so that additional sanctions can be considered—all before the district court has even determined that it has jurisdiction over SCL.

Through this Petition, defendants urge the Court to put this case back on the path this Court ordered in its August 26, 2011 mandate by entering an order (i) holding that SCL cannot be sanctioned for redacting personal data in compliance with Macau law, particularly in the absence of any showing of jurisdictional relevance, and (ii) vacating the district court's March 27, 2013 Order.

**B. This Court's Precedents Support Writ Review.**

"This court has original jurisdiction to issue writs of prohibition and mandamus" and "also all writs necessary or proper to the complete exercise of its appellate jurisdiction." Nev. Const. Art. 6, § 4. *See also Vista Fin. Servs., LLC v. Eighth Judicial Dist. Ct. of Nev.*, Nev. Adv. Op. 21, 276 P.3d 246, 249 (2012) (Writ relief is appropriate to "arrest the proceedings of a district court" when "such proceedings are in excess of the jurisdiction of the district court"). In this case, over the course of the last 18 months, defendants have found themselves mired in an endless cycle of ever-increasing discovery demands and motions practice, even though the district court has authority to address only a very narrow jurisdictional issue. The only way to break that cycle and to ensure that this Court's August 26, 2011 mandate is enforced is for this Court to intervene. *See Vista Fin. Servs.*, 276 P.3d at 249 (writ relief is appropriate where defendants

have no "plain, speedy and adequate remedy in the ordinary course of law").

Mandamus is also an appropriate remedy where, as here, the district court has put a party in the untenable position of having to choose between being sanctioned for non-compliance with a discovery order and being forced to risk civil and criminal penalties by violating its home country's privacy laws. *See, e.g., Credit Suisse v. United States District Court*, 130 F.3d 1342, 1346 (9th Cir. 1997); *Wardleigh v. Dist. Ct.*, 111 Nev. 345, 350, 891 P.2d 1180 (1995).

**C. The District Court's Decision Prohibiting SCL from Complying with Macau law also Raises an Important Issue of First Impression.**

"[T]he consideration of an extraordinary writ is often justified 'where an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction.' " *Sonia F. v. Eighth Judicial Dist. Ct.*, 125 Nev. 495, 498, 215 P.3d 705, 707 (2009) (citation omitted). The district court's decision to sanction SCL for complying with Macau's data privacy laws is just such an issue. Foreign data privacy laws raise important questions concerning international comity and require a delicate balancing approach. But the district court refused even to consider balancing the interests at stake here, holding instead that a prior sanctions order precluded SCL from making the redactions even though the redacted data had no demonstrated relevance to jurisdiction.

This Court has never before considered the intersection of Nevada's discovery rules with foreign data privacy laws. The issue is an important one that is likely to recur, particularly in light of the billions of dollars that

Nevada-based companies have invested in Macau and other countries with similar data privacy laws.

## **II. ISSUES PRESENTED BY THIS WRIT PETITION**

(1) Whether the district court abused its discretion by holding that SCL can be sanctioned for redacting personal data in compliance with Macau law, even though the district court stated that the documents could be redacted and made no finding that the redacted data was relevant to any jurisdictional issue; and

(2) Whether the district court exceeded the limited scope of its authority under this Court's remand order by greatly expanding SCL's discovery obligations, without any finding that the additional discovery is both relevant to jurisdiction and non-cumulative in light of the extensive discovery the defendants have already provided and that this additional burden and cost is proportional in resolving the jurisdictional issue.

## **III. STATEMENT OF FACTS**

### **A. Plaintiff's Claims.**

Plaintiff Steven C. Jacobs was formerly the CEO of SCL, which operates gaming and other ventures in Macau through its wholly-owned subsidiary, Venetian Macau Ltd. ("VML"). PA78 (¶3), PA83 (¶26). SCL's stock is traded on the Hong Kong Stock Exchange, and LVSC is SCL's majority shareholder. PA78 (¶3), PA84 (¶29).

Jacobs was terminated as SCL's CEO in July 2010. PA85 (¶31). Three months later, he filed this lawsuit, claiming that LVSC had hired and then wrongfully terminated him. Jacobs asserts only one claim against SCL, alleging that it breached an option agreement by refusing to honor Jacobs' attempt to exercise options to purchase 2.5 million shares of SCL stock.

PA88 (¶47). The option agreement (which was offered to Jacobs in China) provides that it is governed by Hong Kong law. PA35. On its face, the option agreement precludes a breach of contract claim because Jacobs was terminated before any of his options vested.<sup>2</sup> Plaintiff alleges, however, that under an agreement with LVSC (*not* SCL) his options were supposed to vest immediately if his termination was "not for cause." PA88 (¶45).

In December 2010, SCL moved to dismiss on the ground that SCL is not subject to the jurisdiction of the Nevada courts. PA1. Jacobs responded that SCL's "de facto executive headquarters" is in Las Vegas, where LVSC is headquartered, and that SCL is therefore subject to the general jurisdiction of the Nevada courts. PA196.<sup>3</sup> The district court denied SCL's motion in April 2011, on the ground that SCL had "pervasive contacts" with Nevada. PA94. SCL promptly sought an extraordinary writ in this Court, arguing that the district court had improperly predicated jurisdiction over SCL on its parent company's contacts with the forum. PA96.

On August 26, 2011, this Court issued its Order Granting Petition for Mandamus. The Order noted that it was "impossible to determine the basis for the district court's order" because the order did not specify what "contacts" the court had relied on in concluding that there was general

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<sup>2</sup> The agreement provides that no options would vest until January 1, 2011 and that if Jacobs was terminated for any reason before any options vested, the options would expire. PA32; PA88 (¶44). As noted, Jacobs was terminated in July 2010.

<sup>3</sup> Jacobs also argued that the court had jurisdiction over SCL because he served the summons and complaint on SCL's acting CEO in Las Vegas. In its August 26 Order, the Court directed the district court to consider the merits of this "transient jurisdiction" argument only if it found that general jurisdiction was lacking. PA236.

jurisdiction over SCL. PA235. The Court explained that, absent veil-piercing, jurisdiction over a nonresident subsidiary cannot be based on its parent company's contacts with the forum. *Id.* Accordingly, this Court directed the district court to (1) "revisit the issue of personal jurisdiction" over SCL "by holding an evidentiary hearing and issuing findings regarding general jurisdiction"; and (2) "stay the underlying action, except for matters relating to a determination of personal jurisdiction." *Id.* PA236.

**B. The District Court Allows Plaintiff to Take "Narrowly Confine[d]" Jurisdictional Discovery.**

On remand, the district court scheduled the evidentiary hearing for the week of November 21, but later vacated that date after granting Jacobs leave to pursue what was supposed to be "narrowly confine[d]" discovery on the issue of jurisdiction. PA280; *see also* PA238.<sup>4</sup> Defendants argued that Jacobs had no need for *any* discovery because, as SCL's former CEO, he knew and could testify about whatever contacts SCL may have had with Nevada. PA252 n.3. The court rejected that argument and permitted plaintiff to seek 11 specific categories of documents from the defendants to support two conflicting theories of general jurisdiction. PA302-07. The first was that SCL's business is directed and controlled from LVSC's headquarters in Las Vegas and that Nevada should therefore be deemed SCL's headquarters as well. PA281. The second theory, which plaintiff

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<sup>4</sup> Another reason for the delay was Jacobs' confession that he had secretly downloaded his email and other documents from SCL's servers in Macau and had taken those documents with him after he was fired. PA316. After Jacobs refused SCL's demand that he return the documents, the court ordered him to give the original media on which the documents were stored with a court-appointed discovery vendor (PA532)—an order that Jacobs finally obeyed (at least in part) nearly six months later, in May 2012. PA566.

advanced for the first time on remand, is based on the opposite view—that SCL controlled LVSC, which acted as its agent, and that LVSC's conduct in Nevada should therefore be attributed to SCL. PA284-86; PA476.

The court also allowed plaintiff to take the depositions of four of defendants' senior executives, including Chairman Sheldon Adelson and Michael Leven. PA304. The court allowed plaintiff to question these witnesses about Jacobs' termination, to support yet another brand-new jurisdictional theory—that the court had specific jurisdiction over Jacobs' breach of contract claim against SCL. PA477-78. SCL argued that this theory was waived and outside the scope of this Court's Order (which limited the proceedings to the issue of *general* jurisdiction). PA484-85. But the district court rejected that argument and allowed the plaintiff to inquire about this theory as well. *Id.*

### **C. Discovery Begins.**

On March 8, 2012, the court entered an order memorializing the specific jurisdictional discovery it had allowed. PA539. Two weeks later, the court entered a Stipulated Confidentiality and Protective Order that specifically allowed the parties to redact information in compliance with the Macau Personal Data Protection Act (the "MPDPA"). PA545-48 (¶¶ 4(a), 7). As SCL had previously explained, it could not lawfully produce documents from Macau that contained personal data without either redacting that data or obtaining the individual's consent to the specific transfer. PA167-68; PA176-77.

Defendants began producing documents after the Protective Order was entered. LVSC produced the bulk of the documents, since most of the categories of documents covered by the March 8 Order were aimed at LVSC's interactions with SCL. PA1480-81; PA359-44. SCL produced

documents that did not raise Macau data privacy issues, including contracts between SCL and LVSC and accounting records reflecting transactions between SCL and LVSC pursuant to the shared services agreement. PA1473.

In May 2012, the parties appeared at a status check to report on their progress in advance of the hearing date, which had been rescheduled for June 25. LVSC reported that it was close to completing its production efforts. PA570-71. SCL said that the only documents it had left to produce were documents for which Jacobs was the custodian. SCL's counsel suggested that, to avoid the elaborate process of searching documents in Macau, a search should first be run on the large volume of documents that Jacobs had taken with him after he was terminated, which included Jacobs' email—documents that Jacobs had finally deposited with the court-appointed discovery vendor (Advanced Discovery). PA566; PA572-74. The district court, however, rejected this approach and vacated the June 25 hearing date to permit further discovery. PA574-75.

#### **D. The First Sanctions Hearing.**

In June 2012, defendants voluntarily disclosed that approximately 100,000 emails and other ESI for which Jacobs was the custodian had been transferred to LVSC's servers in Las Vegas in 2010.<sup>5</sup> PA587. Defendants explained that they had not previously disclosed the existence of these documents in the U.S. because they were concerned that producing them might constitute a violation of Macau's privacy law. However, based on a

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<sup>5</sup> LVSC described this transfer as having been made "in error"—that is, contrary to the requirements of the Macau data privacy laws. PA587 n.5. It is undisputed that the transfer was made by LVSC in-house counsel after Jacobs was terminated, for the purpose of preserving his documents. PA1364 (¶27).

meeting with Macau's Office of Personal Data Protection (the "OPDP") on May 29, 2012, defendants had concluded that Macanese law did not bar production of documents that had previously been transferred out of Macau. PA595-96.

In light of this new information, defendants suggested that LVSC should search and produce responsive documents from the Jacobs documents in LVSC's possession and then, as a precautionary measure, SCL would run searches in Macau to determine if there were additional responsive documents for which Jacobs was the custodian that were not in the United States. PA587-89. If so and if such documents contained personal data, SCL stated that it would seek permission from the OPDP to transfer that data to the United States for production to Jacobs. *Id.*

At the June 28 hearing, the court *sua sponte* scheduled a sanctions hearing because Defendants had not previously disclosed the transfer of documents to the United States. PA621. The court held the hearing on September 10-12, 2012. PA721-1157. Before the hearing, the court permitted plaintiff to take depositions of Michael Kostrinsky, the former LVSC in-house attorney who transferred Jacobs' documents from Macau to Las Vegas, and Manjit Singh, who was LVSC's Chief Information Officer and primarily responsible for LVSC's computer systems. PA1068; PA1262. The court itself chose the witnesses to appear at the hearing; with the exception of Mr. Singh, all of the witnesses were lawyers for either LVSC or SCL. PA731-32; PA757-58.

During the sanctions hearing, the questioning centered largely on what defendants' outside counsel knew about the transferred ESI, when they knew it, and why they did not disclose it earlier. PA756. The court conducted the initial questioning herself, but then allowed plaintiff's



counsel to question the witnesses at length. *Id.*; *see, e.g.*, PA791-847. Defendants chose not to waive either work product or attorney-client privilege. PA763. As a result, they objected to many of the court's and counsel's questions; the court sustained most of those objections. *See, e.g.*, PA791; PA797-98; PA814; PA885-86.

On September 14, 2012, the court issued its Decision and Order. The court found that defendants had "concealed" the transferred ESI from the court prior to voluntarily disclosing it on June 27, 2012. PA1364 (¶30). Although the court stated that it had *not* drawn any adverse inference from defendants' invocation of attorney-client and work product privileges (PA1360 n.1), it nevertheless found that the defendants themselves (as opposed to their counsel) had willfully and intentionally failed to disclose the existence of the transferred data in the U.S. "with an intent to prevent the Plaintiff access to information discoverable for the jurisdictional proceedings." PA1365 (¶35a).

Based on these findings, the court imposed monetary sanctions on defendants,<sup>6</sup> precluded them from arguing during the jurisdictional hearing that the documents Jacobs had taken from Macau were not rightfully in his possession, and precluded defendants from raising the Macau Personal Data Privacy Act ("MPDPA") as an "objection or defense to admission, disclosure or production of any documents" in the jurisdictional proceedings. PA1366-67.

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<sup>6</sup> Defendants were ordered to make a \$25,000 charitable contribution and pay plaintiff's fees for portions of certain hearings at which the MPDPA was discussed. PA1368. Defendants promptly made the charitable contribution. PA1368. Plaintiff has yet to file the contemplated fee petition.

### E. Discovery Expands.

In June 2012, Jacobs submitted a declaration claiming that he knew of many documents that LVSC should have produced but had not. PA592M.<sup>7</sup> Although plaintiff never raised these claimed deficiencies in a meet-and-confer (PA602-03), LVSC nevertheless decided to expand its document production efforts in the summer and fall of 2012. As it had promised, LVSC searched the Jacobs' documents it had transferred from Macau to the U.S., as well as an expanded universe of LVSC custodians, and it applied expanded search terms to the custodians it had already searched. PA1472-79. By December 2012, LVSC had produced more than 165,000 pages of documents in response to plaintiff's jurisdictional requests at a cost of more than \$2.3 million. PA1419.

SCL's discovery efforts, by contrast, remained constrained by the MPDPA. As SCL advised the court before the sanctions order, after defendants voluntarily disclosed the 2010 transfer of Jacobs' data from Macau to the United States, the OPDP initiated an investigation to determine whether that transfer violated the MPDPA. PA643. On August 2, 2012, Macau's Secretary for Economy and Finance commented that if the OPDP found "any violation or suspected breach" of Macau's personal data protection laws, the government) "will take appropriate action *with no tolerance*. Gaming enterprises should pay close attention to and comply with the relevant laws and regulations." PA644 (emphasis added). On August 8, 2012, SCL received the OPDP's long-awaited

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<sup>7</sup> None of the supposedly "missing" documents was even remotely relevant to jurisdiction. Instead, Jacobs' declaration was a transparent attempt to smear defendants in general and Mr. Adelson in particular by making baseless allegations of wrongdoing against them. See PA592M-S.

response to its request to transfer data to the United States to respond to document requests in this case and other matters. PA1504. In that letter, the OPDP not only rejected SCL's request, but stated that SCL's own lawyers could not even *review* documents in Macau to determine if they were responsive to U.S. discovery requests. PA1515-16; PA1170.

Rather than seeking review of the September 14 Order in this Court, SCL sought a way to accommodate the requirements of Macanese law with the district court's order barring the use of the MPDPA as an objection to the production of documents. Toward that end, SCL retained new counsel, who went to Macau in November 2012 to meet with the OPDP in an attempt to convince the agency to reconsider its position. PA1525; PA1530. Following that meeting, the OPDP agreed to relax its prior ruling, allowing VML to transfer documents outside Macau to respond to Jacobs' discovery requests so long as Macanese lawyers first reviewed the documents and redacted any personal data. PA1559-63.

Although the OPDP's November 29 letter gave SCL a path forward, there was still an issue concerning *whose* documents should be searched. Since May 2012, SCL had consistently maintained that LVSC's extensive document production had provided plaintiff with far more documents than he needed to make his jurisdictional arguments. *See, e.g.*, PA1480-81. Nevertheless, in October 2012, SCL's new counsel reached out to plaintiff's counsel seeking a meet-and-confer to determine whether plaintiff believed that there were additional custodians in Macau whose documents should be searched. Plaintiff's counsel declined *even to discuss the issue*. PA1419.

On November 21, 2012, plaintiff filed a Rule 37 motion for sanctions, arguing that sanctions should be imposed because SCL had yet to review electronically-stored information in Macau. PA1374. SCL responded by,

among other things, filing a motion for a protective order. PA1416. That motion explained that SCL had just received permission from the OPDP to review documents in Macau and that SCL would be producing documents after they had been reviewed and personal data had been redacted by Macanese lawyers. PA1433. SCL asked the court to allow it to limit its search to documents for which Jacobs was the custodian, on the ground that plaintiff already had the documents he needed to make his jurisdictional case and that principles of fairness and proportionality required some limits on SCL's production obligations. PA1433-41.

**F. The December 18 Ruling.**

At a December 18, 2012 hearing, the district court denied both SCL's motion for a protective order and plaintiff's motion for sanctions. PA1686. The court noted that sanctions were premature because it had never entered an order requiring SCL to produce specific documents. *Id.* The court then ordered SCL to immediately produce all documents "relevant to jurisdictional discovery," and gave SCL only 17 days, including Christmas and New Year's, to accomplish that task. *Id.*; PA1690; PA1762-68.

At the hearing, plaintiff argued that SCL should be required to search the documents of all 20 of the custodians he had identified in 2011 as potentially having documents relating to the *merits* of his claims. PA1680. The court did *not* order SCL to use plaintiff's list of merits custodians, but rather left it to SCL to decide whose documents should be searched. The court also said that *SCL could redact the documents it produced*, after SCL's counsel explained, once again, what the OPDP had required. PA1689:10–11 ("I didn't say you couldn't have redactions").

### **G. SCL's Compliance with the December 18 Ruling.**

Following the district court's December 18 ruling, SCL immediately undertook a massive effort to comply with the ruling within the holiday-shortened period the court had allowed. This effort included: recruiting a sufficient number of Macau attorneys to assist in completing the expanded search and review of documents in Macau;<sup>8</sup> enlisting a new vendor to process and handle the large volume of documents that had to be reviewed and produced; selecting custodians and search terms; and then reviewing tens of thousands of pages of documents. PA1702-04. SCL identified eight members of its senior management (in addition to Plaintiff) who were likely to have documents responsive to plaintiff's requests and then applied essentially the same expanded set of search terms that LVSC had used in the United States. PA1704-06.

In total, SCL produced more than 5,000 documents from Macau. PA1702. As the OPDP had required, many of these documents contained redactions of personal data. But the defendants did not stop there. At SCL's request, LVSC undertook a laborious process to locate in the U.S. unredacted copies of documents that SCL had produced in redacted form and other documents that would assist plaintiff in identifying the individuals whose names had been redacted. PA1928. As a result of this process, which is continuing, the plaintiff now has more than 3,000 *unredacted* documents, which is more than half of the documents that SCL produced from Macau. PA1937. These documents are in addition to the

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<sup>8</sup> Macau has fewer than 250 licensed lawyers (excluding trainees and interns), and many work for firms that cannot represent SCL because of conflicts. Nevertheless, by December 27, SCL had succeeded in engaging 22 Macanese attorneys to perform the initial data privacy review. PA1703.

more than 165,000 pages of documents that LVSC has produced. Finally, SCL provided plaintiff with a "Redaction Log" identifying the companies that employed the individuals whose names had been redacted—*e.g.*, "SCL employee," "LVSC employee," etc. PA1954.

#### **H. The February 28, 2013 Hearing.**

On February 7, plaintiff filed a renewed motion for sanctions claiming that SCL had violated its discovery obligations by (1) not searching the documents of every individual on plaintiff's list of merits custodians; and (2) not applying all of the search terms to all the custodians whose documents SCL did search. PA1769. Plaintiff also argued that SCL had violated the court's orders by redacting personal information from documents and producing an "unintelligible" "document dump." PA1770. Plaintiff completely ignored SCL's production of unredacted copies of the Macau documents that been located in the United States. Indeed, Plaintiff offered as examples of the supposedly unintelligible production 10 redacted documents, despite the fact that those 10 documents *had already been produced to him in unredacted form*. PA1937.

At the February 28 hearing on plaintiff's motion, the court stated that it had *not* intended to permit SCL to make any redactions of personal data. PA2192-93. When reminded of her statement on December 18 that redactions would be permitted, the court said that she had meant redactions of privileged information. *Id.* On this basis, the court found that plaintiff had made a *prima facie* showing that its orders had been violated and scheduled yet another three-day sanctions hearing for May 13-15, 2013, to evaluate willfulness and prejudice and to decide what sanctions to impose. PA2194; PA2211-12; PA2258 (¶¶1, 2).

The court next turned to plaintiff's demand that SCL search all of the merits custodians that the plaintiff had identified prior to this Court's August 2011 Order. Although plaintiff had neither filed a motion to compel nor explained why a search of these custodians was necessary or reasonable, the court ordered SCL to search all of their documents. The court reiterated that MPDPA redactions were not permitted, and it ordered SCL to apply *all* of the search terms to *all* of the custodians notwithstanding SCL's argument that such a broad search would inevitably result in thousands of non-responsive documents. PA2211; PA2217-20; PA2258.

In addition, the court *sua sponte* required SCL to take the unprecedented step of logging every document the search terms "hit" that SCL deemed irrelevant to jurisdiction so that the court could review those documents *in camera* to decide if they should have been produced. PA2258 & n.1. The court indicated that if it disagreed with SCL's decisions on responsiveness, that would be a basis for yet more sanctions hearings. PA2211.<sup>9</sup>

#### **IV. STATEMENT OF REASONS THE WRIT SHOULD ISSUE**

##### **A. The District Court's Holding that the Redaction of Personal Data to Comply with Macau Law Is Sanctionable Conduct Presents Important Issues of First Impression that Deserve this Court's Immediate Review.**

The district court did not dispute the legitimacy of the OPDP's determination that the MPDPA *required* SCL to redact personal data from

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<sup>9</sup> Although the court has granted plaintiff virtually everything he has asked for and more in discovery, it has so far refused to allow SCL to take Jacobs' deposition—on the theory that he should not have to sit for a deposition until he has every document to which the court decides he is entitled.

the Macau documents. Nor did the district court dispute that if SCL were to defy the OPDP, it could result in fines and criminal punishments, as well as adverse consequences to SCL's entire business—a business that depends on VML's ability to satisfy the Macanese government that it is complying with the conditions under which it is licensed to run a gaming business in Macau. Nevertheless, the court held that SCL violated the court's prior orders by redacting personal data in compliance with the OPDP's requirements and scheduled a hearing to decide whether and how SCL should be sanctioned for that conduct. This decision was an abuse of discretion that warrants this Court's review.

**1. SCL Should Not Be Sanctioned when the District Court Stated that Redactions Would be Permitted.**

Sanctions can be imposed "only when there has been *willful noncompliance* with [a] discovery order. . . ." *Clark Co. School Dist. v. Richardson Const. Co.*, 123 Nev. 382, 391; 168 P.3d 87, 93 (2007). As a matter of law, a court cannot find willful noncompliance if the underlying order was ambiguous or subject to interpretation. *See Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992).

In this case, the court concluded that SCL violated its September 14, 2012 Order barring SCL from relying on the MPDPA as the basis for objections to the "*admission, disclosure or production* of any documents." (emphasis added). However, the September 14 Order made no mention of SCL's ability to *redact* personal data from the documents it produced. This silence is especially notable in light of the court's earlier Protective Order, which expressly allowed SCL to make redactions based on the MPDPA. Based on these facts, the September 14 Order was, at a minimum, ambiguous on the question of redactions.



This ambiguity appeared to be resolved when the district court later stated in open court that redactions would be permitted. The court made this statement after SCL's counsel explained the constraints imposed on SCL by the MPDPA:

**Mr. Randall Jones:** . . . It's never been our position that our client can't look at the documents. *The issue is whether or not ... our client is allowed to take certain information out of the country.* And so I just want to make sure that's clear on the record. . . .

We will continue to do our best to try to comply with the Court's orders as best we can. . . . I hope the Court does appreciate this is a complicated situation, and . . . we're trying to make sure that we - - the lawyers and our client comply with your discovery.

**The Court:** I understand.

**Mr. Peek:** Yeah. We need to have redactions as part of that, as well, as that's - - I understood - -

**The Court:** *I didn't say you couldn't have redactions.*

**Mr. Peek:** That's what I thought.

PA1688-89.

Consistent with the district court's express statement, SCL redacted personal data in compliance with the MPDPA. In light of the court's statement—and in light of the ambiguity of the underlying order—SCL cannot be deemed to have acted with "willful noncompliance" as a matter of law.

This is true even though the judge *later* stated that she did not intend to permit the MPDPA redactions. By the time the court made this clarification, SCL had already produced the redacted documents in reliance on the court's earlier statement. As a result, the court's later clarification has no bearing on the issue of whether SCL acted with "willful

noncompliance" in redacting the data. Indeed, if anything, the very fact that the judge was required to later clarify the intent of her order provides compelling evidence of the order's ambiguity—and thus shows why the redactions cannot constitute sanctionable conduct as a matter of law.

**2. SCL Should Not Be Compelled on Pain of Sanctions to Produce Personal Data Having No Jurisdictional Significance.**

The district court not only found the redactions of personal data to be sanctionable conduct, but also barred SCL from making any similar redactions in future document productions. PA2259. Both rulings are contrary to the mandate of this Court, which directed the district court to hold an evidentiary hearing only on the question of jurisdiction, while staying all other aspects of the litigation.

Despite this mandate, the district court found SCL's redactions to be sanctionable without any finding that the redacted personal data has any relevance to the question of jurisdiction. Indeed, neither plaintiff nor the district court ever explained how personal data such as names and addresses could have any relevance to jurisdictional issues.

Nor could such an explanation be provided. Plaintiff's claim that a Nevada court has jurisdiction over SCL depends on the interaction between SCL and LVSC—not on the names, addresses or other personal data relating to particular individuals.

To the extent plaintiff ever addressed this issue at all, he merely made conclusory assertions that "who these emails are coming to . . . reflects upon the contacts that this company has with Las Vegas." PA2205. But plaintiff never cited a single document in which the *identities* of the

sender or recipient (as opposed to the identities of their employers which the Redaction Log provided) had any jurisdictional significance.

More importantly, the plaintiff's conclusory assertions ignore (1) the more than 165,000 pages of unredacted documents produced by LVSC; (2) the multiple depositions that the plaintiff has conducted of four of defendants' senior executives; (3) the 3,000 unredacted copies of the Macau documents that LVSC has produced; and (4) the Redaction Log provided by SCL which identifies the employers of the individuals whose names and other personal data were redacted from the remaining Macau documents.<sup>10</sup>

Given this extraordinary volume of discovery on the narrow issue of jurisdiction, it is not surprising that both the plaintiff and the district court failed to provide any explanation as to precisely how the personal data redacted by SCL would add anything to the jurisdictional inquiry ordered by this Court. Accordingly, in light of this Court's mandate limiting the district court's authority to a determination of its jurisdiction over SCL, the district court's March 27 Order should be vacated.

### **3. SCL Should Not Be Compelled on Pain of Sanctions to Produce Personal Data in Violation of Macanese Law.**

Especially in the absence of any showing of jurisdictional relevance, SCL should not be compelled on pain of sanctions to violate Macau's data privacy laws. As the U.S. Supreme Court has observed, American courts must "take care to demonstrate due respect for any special problem confronted by [a] foreign litigant on account of its nationality or the

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<sup>10</sup> At the February 28, 2013 hearing, the court was unable to locate on the Redaction Log one redacted document (SCL 102981) that plaintiff had attached as an exhibit to his motion. PA795. This was because the defendants had already produced the document in unredacted form—so there was no need to log it on the Redaction Log. PA2120.

location of its operations, and for any sovereign interest expressed by a foreign state." *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 546 (1987). That means conducting a careful balancing of the competing interests that are at stake whenever a foreign litigant's U.S. discovery obligations collide with the data privacy laws of its own country—something the district court did not even attempt to do here.

In *Aerospatiale* the Court listed a number of factors that a court should consider, including the "importance to the . . . litigation of the documents or other information requested," "the availability of alternative means of securing the information," and "the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located." *Id.* at 544 n.28 (quoting the Restatement of Foreign Relations Law of the United States (Revised) § 437(1)(c)). Other courts have taken into account additional factors, including the "hardship of compliance on the party of witness from whom discovery is sought [and] the good faith of the party resisting discovery." *Strauss v. Credit Lyonnais, S.A.*, 249 F.R.D. 429, 439 (E.D.N.Y. 2008) (internal quotation omitted).

In this case, these factors all weigh heavily in favor of allowing SCL to comply with Macau law by redacting personal data. This is not a case where the redacted personal information is critical to jurisdiction. Indeed, as noted above, the plaintiff has never even attempted to explain why the redacted personal data is relevant to his jurisdictional theories, which depend on the interaction between SCL and LVSC and not on what particular individuals did or said. Nor has he shown why he needs *any* additional documents from SCL over and above the 200,000 pages of

documents he already has and the deposition testimony of defendants' four senior executives. "Where the outcome of the litigation does not stand or fall on the present discovery order, or where the evidence sought is cumulative of existing evidence, courts have generally been unwilling to override foreign secrecy laws." *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1475 (9th Cir. 1992) (internal quotations omitted).

Basic principles of comity require the Court to defer to the strongly-held views of the Macanese government with respect to the obligations of companies like SCL that do business in Macau, in a situation like this, where there is no countervailing interest, either public or private, in the production of the information that has been redacted. In *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 139 (2d Cir. 2007), the Second Circuit held that if Russian law prohibited the plaintiff in that case from obtaining and producing certain documents even with the consent of the board of his company and an appropriate protective order, "then the matter is at an end"—production of the documents could not be compelled and the plaintiff could not be sanctioned for declining to produce those documents.<sup>11</sup> The same analysis should apply here, particularly given the potential penalties SCL would face were it to violate the OPDP's directive.

In *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 211 (1958), the Supreme Court noted that "fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance

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<sup>11</sup> See also *Reinsurance Co. of America, Inc. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1280 (7th Cir. 1990) (upholding the denial of discovery that would have violated Romania's state secrets law); *In re Rubber Chemicals Antitrust Litig.*, 486 F.Supp.2d 1078, 1081 & n.2 (N.D. Cal. 2007) (refusing to allow discovery in response to a letter by the EU opposing the discovery).

are those of a foreign sovereign." Here, the risks of noncompliance with the OPDP's instructions plainly constitute a "weighty excuse" for producing documents with the redactions mandated by the OPDP. That is particularly true because SCL acted in good faith by first seeking the right to produce documents in unredacted form in the United States and then, when the OPDP refused to allow SCL even to *review* documents for production, by having a follow-up meeting in which OPDP was persuaded to allow SCL to produce documents in the U.S. if personal data were redacted. See *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, 563 F.2d 992, 998 (CA Utah 1977) (finding good faith when company sought a waiver from foreign government).

It is no answer to this argument to say, as the district court did, that SCL lost the right to invoke the MPDPA for all purposes because it was being punished for past infractions. "[I]mplicit in the district judges' authority to sanction is that the district judge must design the sanction to fit the violation." *City of Sparks v. Second Judicial District*, 112 Nev. 952, 920 P.2d 1014, 1016 (1996). Here, the "violation" the court purported to be punishing was defendants' failure to volunteer at an earlier point in time that LVSC had transferred Jacobs' ESI and other documents from Macau to Las Vegas. Even assuming this was sanctionable conduct, forcing SCL to violate the MPDPA in the future—or imposing additional sanctions on it for not doing so—simply does not fit the violation.

Although it is far from clear, the district court seems to have concluded in its September 14 Order that LVSC ignored the MPDPA when it was convenient to do so and then invoked it to avoid providing discovery. Thus, the court pointed to the fact that before July 2011, LVSC had access to SCL's data through a network-to-network connection, but

that LVSC changed its corporate policy in July 2011 to limit that access. PA362 (¶¶14, 16). The court attributed the policy change to a desire to "prevent the disclosure of the transferred data as well as other data"—rather than a better understanding of and a desire to comply with the MPDPA. PA1364 (¶29).

This finding cannot support an order precluding SCL from making the redactions the OPDP has required. There was no evidence presented at the September hearing that defendants' stated concerns about complying with the MPDPA were not genuine or that defendants were motivated by a desire to obstruct legitimate discovery. The only way the court could have drawn such an inference would have been from the fact that defendants' assertions of privilege and work product at the sanctions hearing left their motivations to some extent unexplained. But the district court specifically said that it was *not* drawing an adverse inference from the invocation of privilege. PA1360 n.1. And there is "no precedent supporting . . . an [adverse] inference based on the invocation of the attorney-client privilege." *See, e.g., Nabisco, Inc. v. PF Brands, Inc.*, 191 F.3d 208, 226 (2d Cir. 1999).<sup>12</sup>

Furthermore, the court simply ignored the undisputed evidence that the MPDPA is a relatively new law in Macau and that SCL's and VML's understanding of what that law requires evolved over time. PA691 (¶8).

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<sup>12</sup> Defendants were at a distinct disadvantage at the sanctions hearing because the court never gave them notice of the specific charges lodged against them, other than its complaint that the existence of the transferred data in the U.S. should have been disclosed earlier. *See* PA756; PA768. To the extent the hearing detoured into other areas, such as the defendants' motives for limiting LVSC's access to data on VML's servers, the lawyer-witnesses the court itself had called to the stand were hamstrung by privileges.

The transfers that were the focus of the hearing occurred *before* representatives of VML met with the OPDP and were informed that it regarded transfers of personal data from Macau as being subject to the Act and intended to require strict compliance, on pain of civil and criminal penalties. *Id.* (§9). Not surprisingly, LVSC's decision to change its corporate policy to restrict its own access to data in Macau occurred two months *after* that meeting. Thus, there was an entirely innocent explanation for LVSC's change in policy that had nothing to do with a desire to conceal evidence.

In any event, LVSC's change in policy does not justify punishing *SCL* by imposing a blanket prohibition on redacting personal data in compliance with the MPDPA. A U.S. parent company has no obligation to take control of its foreign subsidiary's documents in order to enable litigants in the U.S. to avoid foreign data privacy restrictions. And the subsidiary should not be punished for abiding by the laws of the foreign jurisdiction in which it does business, particularly in a case like this, where the plaintiff has not yet shown that the subsidiary is even subject to jurisdiction in this State.<sup>13</sup>

These issues are important not only to defendants but also to other Nevada companies that have significant investments in Macau or other countries that have similar data privacy laws. Furthermore, how the Nevada courts resolve those issues—whether they do so with appropriate deference to the concerns of foreign governments — may well impact the

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<sup>13</sup> As noted above, neither the court nor plaintiff disputed that *SCL* faces serious consequences should it fail to abide by the requirements the OPDP specifically imposed on it.



ability of Nevada companies to continue to make and grow such investments.

**B. The District Court Abused Its Discretion By Exponentially Expanding SCL's Discovery Obligations.**

Ordinarily, defendants would not ask this Court to referee a dispute about a discovery order. But in this case the discovery process has taken on a life of its own, as the plaintiff has pursued a "discovery tort"—hoping to win the jurisdictional issue, not on the merits, but based on the imposition of sanctions for some perceived discovery misstep.

The district court's March 27 Order is just one of many examples of this problem. When SCL was ordered to produce documents over the Christmas and New Year's holidays, it chose as custodians nine members of its senior management who were most likely to have documents responsive to the specific categories of documents the court had allowed plaintiff to seek; it then applied search terms tailored to locate the specific kinds of responsive documents that each custodian was likely to have. This approach is consistent with the Sedona Principles, which require electronic discovery to be tailored to avoid "unreasonable overbreadth, burden, and cost" to the responding party. The Sedona Conference, *Sedona Principles Addressing Electronic Document Production* cmt. 6(b) (2d ed. 2007). Under those principles, "[d]iscovery should not be permitted to continue indefinitely merely because a requesting party can point to undiscovered documents and electronically stored information when there is no indication that the documents or information are relevant to the case, or further discovery is disproportionate to the needs of the case." *Id.*

If plaintiff had any concerns about SCL's search terms or custodians, he should have accepted SCL's invitation to convene a meet-and-confer,

and, if no agreement was reached, filed a motion to compel explaining why he supposedly needed documents from additional custodians to support his jurisdictional theories. Instead, plaintiff filed a renewed motion for sanctions, without even attempting to explain why additional searches were necessary or why he needed more than the 200,000 pages of documents he already has to make his jurisdictional arguments. That plaintiff immediately sought sanctions, rather than asking the court to require SCL to produce additional documents speaks volumes about his motives.

The district court's order requiring SCL to more than double the number of custodians it searched was a clear abuse of discretion. The order was the result of a fundamentally unfair procedure in which SCL had no inkling that the court was even *considering* such a massive expansion of its discovery obligations—an expansion that is entirely disproportionate to the evidentiary needs for the narrow jurisdictional issue before the court. This is particularly true in light of the vast discovery that has already been conducted on this limited issue.

Consider, for example, the court's *sua sponte* order requiring SCL to *log* every document that it "hit" when applying the search terms, but then withheld on the grounds it was deemed irrelevant to jurisdiction. Plaintiff did not ask for that relief. Nor are we aware of any precedent for requiring a party to undertake such an arduous and unnecessary task. The court's assertion that it intends to review the *nonresponsive* documents *in camera* and to sanction SCL if it believes that SCL did not properly draw the line between jurisdiction and merits (PA2219) strongly suggests that the court's latest discovery order will lead to yet another round of sanctions hearings.

Finally, the district court has steadfastly refused even to consider the merits of plaintiff's ever-changing jurisdictional theories in ruling on discovery issues. Given the limited nature of this Court's mandate, any discovery should have been closely tailored to the factors plaintiff would have to prove to establish general jurisdiction. Yet the district court has consistently refused even to consider curbing plaintiff's discovery demands by analyzing the merits of plaintiff's theories. In fact, the court has permitted plaintiff to pursue entirely contradictory theories of general jurisdiction, in which he claims in one breath that LVSC dominated and controlled SCL and in the other that SCL was controlling LVSC's actions as SCL's agent—a position that is absurd given that parent companies control their subsidiaries, not vice versa.<sup>14</sup>

For all these reasons, defendants respectfully request that the district court's March 27 Order be vacated so that the evidentiary hearing this Court ordered 18 months ago can finally be conducted.

## V. CONCLUSION

Petitioners respectfully request that this Court grant the Petition and enter an order (i) holding that SCL cannot be compelled, on pain of

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<sup>14</sup> Defendants have argued that, as a matter of law, plaintiff cannot prove general jurisdiction by showing that SCL's Chairman and acting CEO both lived in Las Vegas and sometimes made decisions or gave directions to SCL from Nevada. PA1405-09. And under clear U.S. Supreme Court authority, general jurisdiction also cannot be based on the fact that SCL purchased goods or services for its operations in Macau from entities, including LVSC, that were headquartered in Nevada. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 418 (1984), cited at PA1406. Defendants also argued that plaintiff's agency and specific jurisdiction theories failed as a matter of law and therefore further discovery could not possibly yield any benefit. PA1439-40. Plaintiff did not even bother to respond to most of these arguments, and the district court has shown absolutely no interest in any of them.

sanctions, to violate its obligations under Macau law; and (ii) vacating the district court's March 27, 2013 Order.

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## CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this **PETITION FOR WRIT OF PROHIBITION OR MANDAMUS RE MARCH 27, 2013 ORDER**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R. App. P. 28(e), which requires every section of the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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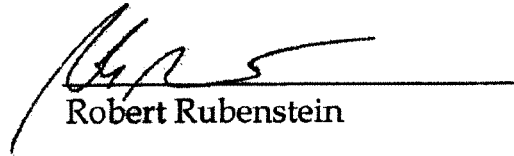
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## VERIFICATION

1. I, Robert Rubenstein, declare:
2. I am Vice President and Global Deputy General Counsel at Las Vegas Sands Corp., one of the Petitioners herein;
3. I verify that I have read the foregoing **PETITION FOR WRIT OF PROHIBITION OR MANDAMUS RE MARCH 27, 2013 ORDER**; that the same is true my own knowledge, except for those matters therein stated on information and belief, and as to those matters, I believe them to be true.

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




Robert Rubenstein

### VERIFICATION

1. I, David Fleming, declare:
2. I am the General Counsel and Company Secretary at Sands China, Ltd., one the Petitioners herein;
3. I verify that I have read the foregoing **PETITION FOR WRIT OF PROHIBITION OR MANDAMUS RE MARCH 27, 2013 ORDER**; that the same is true my own knowledge, except for those matters therein stated on information and belief, and as to those matters, I believe them to be true.

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

Executed on this 5th day of April 2013 in Broadbeach, Queensland, Australia.

  
\_\_\_\_\_  
David Fleming  
*5 April 2013*

## **CERTIFICATE OF SERVICE**

Pursuant to Nev. R. App. P. 25, I certify that I am an employee of MORRIS LAW GROUP; that, in accordance therewith, I caused a copy of the **PETITION FOR WRIT OF PROHIBITION OR MANDAMUS RE MARCH 27, 2013 ORDER** to be hand delivered, in a sealed envelope, on the date and to the addressee(s) shown below:

### **VIA HAND DELIVERY**

Judge Elizabeth Gonzalez  
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