IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioners,

vs.

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

Respondents,

and

STEVEN C. JACOBS,

Real Party in Interest.

Case Number: 62944

District Court Case Number A627691-B

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR MANDAMUS RE MARCH 27, 2013 ORDER

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I. INTRODUCTION

Defendants filed their Petition for Writ of Prohibition or Mandamus to vacate the district court's March 27, 2013 Order, which made the following rulings:

1. SCL engaged in sanctionable conduct when it redacted personal data from certain discovery documents in compliance with the Macau Personal Data Privacy Act ("MPDPA");

2. SCL must produce unredacted documents in all future jurisdictional discovery notwithstanding the requirements of the MPDPA; and

3. SCL must search the electronic records of 13 additional custodians and log all documents that it withholds on relevance grounds.

Defendants based their Petition on several alternative grounds, including the district court's failure to make any finding that either the redacted personal data or the additional document production has any relevance to jurisdiction.

This point is underscored by the district court's *sua sponte* decision on June 18, 2013 to schedule the long-awaited jurisdictional hearing to begin in *less than one month,* on July 16, 2013 — notwithstanding the fact that the court had stayed its order with respect to the MPDPA redactions to enable this Court to rule on the Petition. PA2402-04; PA2413-14.[1] The timing of the scheduled hearing (which plaintiff expressly accepted) means that the

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[1] After filing their Petition, defendants sought a stay of the March 27, 2013 Order. PA2272. The district court granted that motion in part, postponing the sanctions hearing and staying SCL's obligation to produce additional documents from Macau—documents that the court had forbidden SCL to redact to comply with Macau's data privacy laws. PA2304-12.

district court will almost surely conduct the hearing *before* this Court resolves any of the discovery and sanctions issues raised by defendants' Petition—including whether SCL can redact personal data from discovery documents in compliance with Macanese law and whether SCL must conduct additional searches in Macau. The scheduling decision thus reflects the district court's determination (and plaintiff's agreement) that the redacted personal data and the additional searches have no jurisdictional relevance.

In his Answer, plaintiff reinforces the same point by failing to provide any explanation for the relevance of the challenged discovery. Nor does plaintiff provide any credible response to any of the other issues raised by defendants. Indeed, the most striking feature of plaintiff's Answer is its failure to challenge any of the critical facts underlying the four major arguments made by defendants.

First, plaintiff does not challenge any of the facts showing that defendants have already made a massive discovery production that is grossly disproportionate to the limited jurisdictional issue currently before the district court. In particular, plaintiff does not deny that defendants have produced more than 165,000 pages of unredacted documents, submitted four senior executives for deposition, and created a redaction log providing additional information about "senders" and "recipients" in Macau—all before the district court has even decided whether it has jurisdiction over SCL. Nor does plaintiff challenge defendants' assertion that this production has already provided plaintiff with all the evidence necessary to make whatever jurisdictional arguments he intends to make. Indeed, in his entire 29-page Answer, plaintiff never identifies ***any*** specific

jurisdictional claim needing additional discovery, or provide any other explanation for why additional discovery is needed.

Second, plaintiff provides no credible response to defendants' showing that the district court's finding of sanctionable conduct was contrary to Nevada law, which holds that sanctions are appropriate only in cases involving "willful non-compliance" with a clear and explicit order. As the Petition demonstrates, (1) the district court's initial order made no mention of MPDPA redactions; (2) the court later advised SCL in open court that it could redact the documents it produced; and (3) plaintiff never filed a motion to compel challenging the redactions made by SCL. While plaintiff now asserts that defendants "misstate" the judge's comments in open court, plaintiff never explains how the judge's statement "I didn't say you couldn't have redactions" could possibly be interpreted as a clear and explicit order ***barring*** MPDPA redactions.

Third, plaintiff does not dispute the facts showing that the district court's conclusion that MPDPA redactions are sanctionable is contrary to both this Court's jurisdictional mandate and decisions of the U.S. Supreme Court and other federal courts. Most importantly, plaintiff makes no attempt to challenge Petitioners' showing that (1) the redacted data has ***no jurisdictional significance*** of any kind; and (2) the district court's order is therefore contrary to this Court's mandate directing the trial judge to address only the question of jurisdiction. Indeed, in 29 pages of purported legal argument, plaintiff provides no explanation as to how the redacted data—consisting of names, addresses and similar personal information—could possibly have any relevance to any jurisdictional issue in this case. Nor does plaintiff deny that the district court failed to properly balance Macau's legitimate interests in its personal privacy laws against the

negligible litigation need for the redacted data, as the very cases plaintiff cites require.

Fourth, plaintiff makes no attempt to challenge defendants' showing that the district court exponentially increased their discovery burdens when it *sua sponte* directed SCL to search the electronic records of 13 additional individuals and to create a special "Relevance Log" of withheld documents—all with no determination that this massive additional discovery would be relevant, non-cumulative or worth the extraordinary increase in additional burdens and cost to SCL, a foreign corporation not yet found to be subject to the jurisdiction of the Nevada courts.

Thus, plaintiff makes no serious effort to challenge any of the four substantive arguments made in the Petition. Instead, plaintiff devotes almost the entirety of his Answer to direct attacks on defendants and their counsel. Plaintiff repeatedly accuses defendants of "defrauding the court" and concealing the "truth" about jurisdiction, even though the undisputed facts show that plaintiff has already received an enormous volume of jurisdictional discovery—and even though plaintiff cannot identify even a single jurisdictional issue that requires additional discovery.

The net result is a brief filled with shrill rhetoric, baseless claims, and inflammatory attacks, but devoid of any reasoned analysis based on relevant facts and legal precedent. Because plaintiff fails to credibly contest any of defendants' arguments showing that the March 27, 2013 Order was erroneous in several respects, the Order should be vacated in its entirety.

II. ARGUMENT

A. The Petition Is Neither "Premature" Nor "Untimely"

As a preliminary matter, plaintiff makes the inconsistent claims that the Petition is both "premature" and "untimely." Answer at 20-22. Both arguments are wrong.

Contrary to plaintiff's argument, the petition does not rest on "speculation about what a district court might do in the future." *Id.* at 21-22. As noted earlier, defendants filed their Petition to vacate three specific rulings embodied in the March 27, 2013 Order: (1) a finding that SCL engaged in sanctionable conduct based on the MPDPA redactions; (2) an order prohibiting SCL from making similar redactions in the future; and (3) an order directing SCL to search the electronic files of 13 additional custodians and to create a log of any documents withheld on relevance grounds. These rulings do not involve any elements of "speculation" or "anticipatory" relief. Rather, they are specific judicial decisions having a direct and immediate impact on defendants that are ripe for review by this Court.

Nor is the Petition untimely. Plaintiff asserts that "what LVSC and Sands China really want" is to set aside either the original 2011 order allowing jurisdictional discovery or the September 14, 2012 sanctions order. Answer at 22. But this claim is also wrong. Defendants seek review of the three specific rulings described above, which the district court did not make until its March 27, 2013 Order—long after it had issued its original discovery order and its September 14, 2012 sanctions order. The Petition is therefore timely, and plaintiff's claims to the contrary are without merit.

B. The District Court Erred In Imposing Sanctions With No Showing That Defendants "Willfully" Failed To Comply With A Clear And Explicit Order.

As one ground for the issuance of a Writ, defendants showed that the district court committed clear error when it found the MPDPA-based redactions to be sanctionable, even though the court never issued a clear and explicit order barring such redactions. Defendants stressed that (1) the September 14, 2012 Order did not prohibit or even mention MPDPA-based redactions; (2) the trial judge later told defendants in open court that they could make redactions; and (3) plaintiff never filed a motion to compel that challenged the MPDPA redactions.

In his Answer, plaintiff asserts that defendants "misstate the record" by making the "outlandish" claim that the district court authorized the MPDPA reactions. Answer at 13. Yet plaintiff never explains exactly what the judge meant when she stated in open court that defendants could redact the documents. This failure is not surprising since the transcript plainly shows that the court authorized the redactions immediately after SCL's counsel explained the constraints imposed by the MPDPA:

> **Mr. Randall Jones:** . . . *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 (emphasis added). Thus, the district court authorized redactions in direct response to SCL's explanation of the challenges posed by the MPDPA—and the MPDPA therefore provided the context for the court's authorization of redactions.

Plaintiff nevertheless implies that the court's subsequent remarks show that the judge did not authorize MPDPA redactions. But in those remarks, the court made no mention of either the MPDPA or SCL's ability to make redactions. Instead, the court simply noted that if SCL did not comply with the court's order, plaintiff could file a motion to compel:

> **The Court:** Well, Mr. Pisanalli, I've entered orders, I've now entered an order that says on January 4th they're going to produce the information. They're either going to produce[] it or they're not. And if they produce information that you think is insufficient, you will then have a meet and confer. And then if you believe they are in violation of my orders, and I include that term as a multiple order, then you're going to do something.

PA 1690. Notwithstanding the court's express invitation, plaintiff never scheduled a meet-and-confer or filed a motion to compel SCL to produce the documents in unredacted form. As a result, the district court never issued a discovery order explicitly forbidding SCL from making MPDPA redactions.

On these facts, the district court's finding of sanctionable conduct is erroneous as a matter of law. Under Nevada law, a district court cannot impose sanctions unless "there has been ***willful noncompliance*** with [a] discovery order. . . ." *Clark Co. School Dist. v. Richardson Constr. Co.*, 123 Nev. 382, 391; 168 P.3d 87, 93 (2007). "In order for an act to constitute

willfulness, *the court's order must be clear with no misunderstanding of the intent of the order* and, further, there is no other factor beyond the party's control which contributed to the non-compliance." *LeGrande v. Adecco*, 233 F.R.D. 253, 257 (N.D.N.Y. 2005) (emphasis added). As a result, if the underlying order is ambiguous or subject to interpretation, the court cannot find willful non-compliance. *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992).[2]

This logic applies here. Because the district court affirmatively told SCL that redactions were permissible (and, at the very least, did not issue a clear and explicit order barring MPDPA redactions), there can be no finding of willful non-compliance and hence no finding of sanctionable conduct.

C. The District Court Erred In Finding Sanctionable Conduct And Barring Future MPDPA Redactions With No Finding Of Jurisdictional Relevance And No Proper Balancing Of Competing Interests.

The district court also erred in concluding that SCL's conduct in producing documents with MPDPA redactions was sanctionable and in prohibiting SCL from making any such redactions in the future because (1) the district court made no finding that the redacted personal data is relevant to any jurisdictional issue; and (2) the district court failed to balance Macau's legitimate interests in its privacy laws against the negligible litigation need for the redacted data. Plaintiff's Answer does not rebut either argument.

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[2] *See also R.W. Int'l Corp. v. Welch Foods, Inc.*, 937 F.2d 11, 15 (1st Cir. 1991); *Salahuddin v. Harris*, 782 F.2d 1127, 1131 (2d Cir. 1986); *Bair v. California State Dept. of Transp.*, 867 F. Supp. 2d 1058, 1068 (N.D. Cal. 2012) (citing *Unigard*); *Am. Prop. Constr. Co. v. Sprenger Lang Found.*, 274 F.R.D. 1, 10 (D.D.C. 2011).

1. Plaintiff Makes No Showing That The Redacted Personal Data Has Any Jurisdictional Relevance.

In their Petition, defendants stressed that neither plaintiff nor the district court had ever explained how personal data such as names and addresses could have any relevance to the only issue properly before the district court—its jurisdiction over SCL. In so doing, defendants raised a very simple question: How can the redacted personal data be relevant to any jurisdictional claim that plaintiff intends to make?

Nowhere in his brief does plaintiff answer this simple question. Nor does plaintiff identify a single document in which the *identity* of the sender or recipient has any jurisdictional significance. Plaintiff's silence is not surprising since his claim that a Nevada court has general jurisdiction over SCL depends on the interaction between SCL and LVSC—not on the names, addresses or other personal data relating to specific individuals. This is undoubtedly why the district court determined (and plaintiff agreed) that the jurisdictional hearing could be conducted *without* any of the redacted personal data—a fact that powerfully demonstrates just how irrelevant the redacted data is to the jurisdictional inquiry.

Plaintiff's only attempt to address the issue of relevance is to note (at 15) that defendants did not redact personal data in documents LVSC produced from the United States. But the MPDPA applies only to the production of documents located in Macau. Defendants have been very clear that SCL redacted personal data because it was required to do so under the MPDPA. The fact that LVSC did not redact personal data from the documents produced from the United States does not mean that LVSC thought the data was relevant to any jurisdictional issue. It only means that LVSC thought it unnecessary to undertake the enormous burden and

expense of redacting such data when it was not under a legal obligation to do so.

Thus, plaintiff fails 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—and the district court has now underscored this failing by deciding to resolve the jurisdictional question without the redacted data. Given this Court's mandate limiting the district court's authority to a determination of its jurisdiction over SCL, this provides another basis for vacating the March 27 Order.

2. The District Court Did Not Engage In A Proper Balancing Of Competing Interests.

Plaintiff seeks to justify the district court's ruling by citing a number of cases in which U.S. courts either ordered a party to produce documents notwithstanding a foreign statute that blocked such discovery or imposed sanctions for failure to comply with such an order. Answer at 26-28. These cases, however, serve only to demonstrate the district court's error. In each of these cases, the court applied a balancing test to decide whether discovery should be compelled or sanctions were warranted in light of a variety of factors, including the importance of the documents at issue, the availability of alternative means to secure the information, and the likelihood that the party resisting discovery would face a real risk of prosecution in the foreign country for complying with U.S. discovery orders. *See, e.g., Linde v. Arab Bank, PLC*, 269 F.R.D. 186, 197 (E.D.N.Y. 2010); *In re Parmalat Sec. Litig.*, 239 F.R.D. 361, 362-63 (S.D.N.Y. 2006). Here, by contrast, the district court *never* purported to balance any of the relevant factors before concluding that MPDPA redactions were sanctionable.

Plaintiff argues that the cases he cites support the district court's decision to sanction defendants in its September 14 order by precluding them from raising the MPDPA as an "objection or defense to admission, disclosure or production of any documents" in the jurisdictional proceedings. PA1366-67. But, for the reasons outlined above, the September 14 sanctions order did not preclude SCL from redacting personal data in compliance with the MPDPA. It was not until the March 27, 2013 Order that the district court for the first time re-interpreted the September order to impose such a prohibition. In making that decision, the district court never conducted a proper balancing test.

The very cases cited by plaintiff support this position. Under those cases, the first factor a court must consider is the "importance of the requested discovery." *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 515-16 (N.D. Ill. 1984). In *Linde*, the court held that an adverse inference sanction was appropriate because the evidence the defendant bank had withheld was "not only relevant but also *essential* to proof of their claims." 269 F.R.D. at 197 (emphasis added). *See also Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1475 (9th Cir. 1992) (upholding sanctions order because, among other things, the evidence withheld was "crucial" to the proceedings). And in *United States v. Vetco, Inc.*, 691 F.2d 1281 (9th Cir. 1981), which plaintiff cites (at 26), the court held that the defendant in a criminal tax case could not redact the names of third parties because those names were relevant to the tax issue involved in that case.

Here, by contrast, plaintiff has not even attempted to show that the personal information redacted in compliance with Macau's data privacy laws was "essential" or "crucial" or indeed even relevant to his jurisdictional theories. On the contrary, as demonstrated in our Petition (at

20-21), the only fact that is even conceivably relevant is who employed the individuals in question; SCL's Redaction Log provides that information.[3] Under those circumstances, there was no basis for compelling SCL to produce the documents in unredacted form. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAWS OF THE UNITED STATES § 442, cmt. a ("it is ordinarily reasonable to limit foreign discovery to information necessary to the action—typically, evidence not otherwise readily obtainable—and directly relevant and material").

Plaintiff does not respond directly to this argument. Instead, he repeats his refrain that the redacted documents are all unintelligible and therefore SCL must have redacted the documents to impede his supposed search for "the truth." As he did in the district court, however, plaintiff simply ignores the fact that 11 of the 15 documents he cherry-picked to support his assertion that the documents were unintelligible had either been replaced with unredacted copies that LVSC was able to locate in the United States or were copies of documents that had already been

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[3] In *Linde*, the court noted that the defendant had not produced a "privilege log-like accounting of its withholding nor indicate[d] how many pages of documents responsive to plaintiffs' requests have been withheld" based on foreign data privacy laws. 296 F.R.D. at 198. In this case, by contrast, plaintiff has copies of the documents, knows precisely what has been redacted, and has a Redaction Log identifying the employers of the individuals whose personal data was redacted. Defendants also offered, if plaintiff identified specific documents for which the redacted personal information was important, to take additional steps to attempt either to find a duplicate or near-duplicate in the United States or seek consent of the individuals whose personal information was redacted. PA 1941-42. Plaintiff never even responded to this offer, no doubt because his principal concern is manufacturing a basis for sanctions, rather than seeking information that would support his jurisdictional arguments.

produced. PA1937; *compare* PA2119-59A (filed under seal) *with* Pl. Supp. App. 00534-94.

The four remaining documents were produced because they fell within the literal terms of one or more of plaintiff's document requests, but none of them could possibly be deemed critical or even relevant to plaintiff's attempt to prove jurisdiction. And all were perfectly comprehensible, particularly when viewed in conjunction with the Redaction Log. Two of the documents were emails between and among SCL employees, who were talking about attending the "Spring Gala" in January 2009 and about an individual's travel itinerary. Pl. Supp. App. 00537-39, 00543-44. A third document is a list of purchase orders for gaming equipment, including equipment that was purchased from Bally Macau Limited; the personal information that was redacted is third party information. *Id.* at 00563-65. And the fourth document is a drawing or photograph showing the view from the entryway of Cotai Strip Parcels 5 & 6, from which pictures and names of individual SCL employees were redacted. *Id.* at 00571-72; PA1938. The prosaic nature of the documents plaintiff has chosen to highlight illustrates just how far-fetched his accusations against SCL are: SCL had no possible motive to "hide" any of the redacted personal information on these documents.

Another factor plaintiff's own cases consider is whether the party resisting production has made a good faith effort to persuade the foreign government to allow it to comply with the court's discovery orders and whether it faces a real risk of prosecution or significant sanctions abroad for producing documents in the U.S. *See, e.g., Graco*, 101 F.R.D. at 516 (ordering defendant to make a good-faith effort to obtain permission from French authorities to comply with the court's order). The record in this

case shows that SCL's subsidiary, VML, has communicated on a number of occasions with the OPDP about producing documents for which it is deemed the "data controller." The OPDP initially informed VML that the Macau data privacy laws would be strictly enforced and that VML would need the OPDP's permission to transfer any personal data outside Macau.[4] PA167-68; PA 176-77. In August 2012, the OPDP not only refused to give its consent to such transfers to respond to discovery requests in this case, but also told VML for the first time that it could not even *review* documents to determine whether they were responsive to those requests. PA692-93; PA1515-16; PA1170. After SCL's new counsel flew to Macau and met with the OPDP, it relented and allowed Macanese counsel to conduct such a review; but the only way documents could be transferred outside of Macau was if all personal data was redacted. PA1559-63.

During the proceedings leading up to the March 27 Order, neither the district court nor plaintiff questioned that SCL was prohibited by Macanese law, as the OPDP interprets it, from producing unredacted documents from Macau; nor did they question that SCL faced significant penalties for violating those requirements. In his Answer (at 26), plaintiff now argues that before the court entered its sanctions order in September 2012, SCL "did very little to actually establish" that the MPDPA was a serious impediment to discovery. But that is not true. SCL provided the court with an affidavit from its general counsel in Macau (PA690-94) explaining VML's interactions with the OPDP, the fact that MPDPA violations could

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[4] The OPDP informed VML that such information could be transferred with consent of each individual, but the requirements for obtaining consent are so stringent that it would be impracticable to obtain consents with respect to the multitude of documents that SCL produced. PA165; PA1513-14.

lead to civil and criminal penalties, and that "VML's understanding of the PDPA, as well as the understanding of other companies operating in Macau, is evolving as affected companies and OPDP gain experience with its application." PA691. In any event, today there is and can be no question but that SCL is required to have Macanese attorneys review documents and redact personal data before the documents can be transferred to the United States for production and that violating that requirement would subject SCL and its subsidiary VML to significant penalties.[5]

As plaintiff notes, on April 16, 2013, the OPDP concluded the investigation that it had initiated in the summer of 2012 into the 2010 processing and transfer of plaintiff's email and other electronically stored information to the United States by imposing administrative penalties totaling 40,000 patacas on VML.[6] Plaintiff argues (at 19-20) that the relatively modest amount of the fine ($5,000) shows that the MPDPA lacks any real teeth and suggests that SCL and its subsidiary VML are therefore free to violate its requirements with impunity. But the fact that the fine the

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[5] Plaintiff also faults SCL for not following the "protocol" that he claims the district court had established for dealing with MPDPA issues. Answer at 9, 10. But the "protocol" the district court was referring to at PA2181-82 was simply a standard ESI protocol that the court established at the outset of the case for dealing with merits discovery. Nothing in that document (PA2261-71) discusses MPDPA issues. It is worth repeating that the only court-ordered protocol that deals with the MPDPA is the stipulated Protective Order the court signed in March 2012, which specifically allows redactions to be made to comply with the MPDPA. *See* Petition at 18, PA547-58 (¶¶ 4(a), 7).

[6] Defendants had publicly reported the initiation of this investigation in August 2012 and disclosed it to the district court in connection with the 2012 sanctions proceeding. PA643-52; *see also* Petition at 12.

OPDP assessed in April was relatively modest does not mean that subsequent penalties for *intentionally* violating the MPDPA now that its requirements are fully understood would also be modest.[7]

In the description of its reasoning for imposing a penalty on VML, the OPDP states unequivocally that a data controller like VML may "transfer the data [that is subject to Macau's data privacy rules outside of Macau] only after notifying [the OPDP], [and] having received a decision or obtained an authorization from [OPDP]." Pl. Supp. App. 00731. VML has sought authorization from the OPDP to enable SCL to comply with its obligations to provide the jurisdictional document discovery the District Court ordered. The OPDP ultimately provided that authorization in late November 2012, but required VML to have Macanese lawyers review the documents and redact personal data before the documents could be transferred to the United States. PA1559-63. A willful failure to abide by that explicit requirement could subject VML to much more severe penalties.

Administrative penalties are only one of the remedies set forth in the MPDPA. Criminal penalties can also be imposed, including substantially higher fines and imprisonment of up to one year. PA167; PA692; PA1522-23. In its communications with VML about transferring data to respond to

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[7] Plaintiff argues (at 19) that the OPDP's explanation of its ruling suggests that the MPDPA has an exception for compliance with a court order. But what the OPDP said is that if Jacobs (referred to as "X") had sued *VML* (referred to as "Company A") in the U.S., then the "concerned data when necessary, should be provided to a judicial authority." Pl. Supp. App. 00730. Plaintiff, however, chose not to sue VML, and the OPDP's letter to VML made clear that VML could not avoid the MPDPA's restrictions on transferring personal data because its parent company had been sued and had been ordered to produce documents. PA1511-12.

discovery in this very case, the OPDP has also reminded VML that it agreed to be bound by Macanese law in the contract it signed allowing it to operate a gaming business in Macau. PA1509-10. That raises the possibility not only of fines and criminal punishments if VML were deemed to have intentionally violated the requirements specifically imposed by the OPDP, but also of adverse consequences to SCL's entire business, which depends on its ability to satisfy the Macanese government that it is complying with the conditions under which its subsidiary was licensed to run a gaming business in Macau.

Other factors courts consider in balancing interests is whether the data in question originated in the U.S., whether there are other ways for the requesting party to obtain the information he needs, and the extent to which compliance or non-compliance would injure the respective interests of the United States or the foreign country. RESTATEMENT (THIRD), § 442(1)(a)(c). Plaintiff does not dispute that all of these factors weigh in favor of deference to the MPDPA. This case does not involve a criminal prosecution or attempts to transfer documents or operations to a foreign country to shield them from U.S. scrutiny. Furthermore, as explained in the Petition (at 15-16), LVSC undertook substantial efforts to locate duplicate or near-duplicate copies of the documents in question and offered to do more if plaintiff could identify particular redacted documents that actually had any importance to the jurisdictional analysis. PA1941-42.

Finally, as plaintiff notes, good faith is also an important issue in deciding whether conduct is sanctionable. Plaintiff claims that the district court properly concluded in its September 14 sanctions order that defendants' invocation of the MPDPA was in bad faith because LVSC supposedly changed its corporate policy in the summer of 2011 with

respect to ordinary course transfers of personal data out of a desire to stymie discovery in this case, rather than any desire to comply with the MPDPA. But there was no evidence that this was the motive for the change. Plaintiff assumes that the motive was sinister because of the timing of the decision. In fact, however, the timing is equally consistent with a dawning realization of just how broadly the OPDP intended to apply the MPDPA.[8] Moreover, plaintiff simply ignores the fact that LVSC *voluntarily* disclosed that data had been transferred to the U.S.—conduct that is utterly inconsistent with the notion that defendants invoked the MPDPA simply to avoid discovery.

In sum, the district court abused its discretion by failing to apply a proper balancing test before concluding that SCL should be sanctioned for producing documents with personal data redactions and then ordering SCL to produce even more documents from Macau in redacted form.

D. The District Court Erred By *Sua Sponte* Expanding The Scope Of SCL's Discovery Obligations.

The district court has now decided to hold the long-delayed evidentiary hearing on jurisdiction before this Court determines whether defendants must complete the additional discovery specified in the March 27, 2013 Order—including additional searches in Macau and the creation of a special "Relevance Log." This decision reflects the court's recognition (and the plaintiff's agreement) that the ordered discovery has no material

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[8] As the newspaper article plaintiff has appended to his Answer notes, VML is not the only subsidiary of a Nevada gaming company that has stumbled in attempting to comply with the MPDPA. Wynn Macau was also fined for violating the MPDPA for transferring data following the filing of a lawsuit in Nevada against the parent corporation by a dissident shareholder. Pl. Supp. App. 00727.

bearing on the jurisdictional issue. Furthermore, once the judge resolves the jurisdictional question, there will be no need for any additional jurisdictional discovery. For these reasons alone, the March 27, 2013 Order requiring SCL to conduct additional discovery should be vacated.

In addition, the special "Relevance Log" has no real justification. Plaintiff tries to defend it by arguing (at 25) that defendants have consistently failed to produce documents relevant to jurisdiction. The district court, however, never made such a finding. The court did, inexplicably, say at one point during the December 18, 2012 hearing that defendants had "violated numerous orders," Answer at 12.[9] But plaintiff conveniently omits the very next sentence in the transcript, in which the court admitted that "[t]hey haven't violated an order that actually requires them to produce information." PA 1690. Furthermore, to the extent that plaintiff's claims of discovery misconduct are based on the notion that defendants should have been producing documents relating to his termination, *see* Answer at 5-6, his argument fails because plaintiff's jurisdictional document requests failed even to *ask* for any such documents.[10]

This Court should also reverse the district court's order to the extent that it required SCL to search additional custodians in Macau. Plaintiff

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[9] We frankly do not know what the district court was referring to in saying that defendants "violated numerous orders."

[10] As noted in our Petition (at 29 n.14), plaintiff's jurisdictional theories have been all over the lot. Although he began with a theory of general jurisdiction and has subjected defendants to more than a year's worth of discovery on that basis, he appears to have switched to a theory of specific jurisdiction, under which the only factual issue (in plaintiff's mind) is whether the decision to terminate him was made in Las Vegas.

never filed a motion to compel to require the expansion of custodians and never offered any reason why the custodians whose documents were searched were insufficient to provide plaintiff with the jurisdictional discovery he sought. That the 20 custodians were all on plaintiff's list of custodians for *merits* discovery says nothing about whether their documents should have been searched for purposes of jurisdiction. Given the broad scope of ESI, a party can always claim that the other side could have searched more custodians. But absent a showing that such searches are apt to yield unique non-cumulative documents, plaintiffs' persistent demand for "more" must be rejected.

III. CONCLUSION

Petitioners respectfully request that this Court enter an order (i) holding that SCL cannot be compelled, on pain of 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 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 **REPLY BRIEF IN SUPPORT OF 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:

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DATED this 20th day of June, 2013.

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