

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 AND THE HONORABLE
ELIZABETH GONZALEZ,
DISTRICT JUDGE,

Respondents,

and

STEVEN C. JACOBS,

Real Party in Interest.

Case No. 63444

District Court Case No. A627691-B
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**OPPOSITION TO EMERGENCY
MOTION UNDER NRAP 27(e) TO
STAY THE DISTRICT COURT'S
JUNE 19, 2013, ORDER**

I. INTRODUCTION

Petitioners Las Vegas Sands Corp. ("LVSC") and its subsidiary Sands China Ltd. ("Sands China") (collectively, "Petitioners") have delayed this case for nearly three years by and through long-standing discovery obstruction. Needless to say, this delay has severely prejudiced Real Party in Interest Steven C. Jacobs ("Jacobs"). Petitioners' latest request rests on chants of the buzz words "privilege" and "irreparable harm," cognizant that such serious matters are their best hope for yet another delay. Petitioners also know, as the district court observed, any further stay would again delay the long-overdue evidentiary hearing.¹

In pursuit of their desired stay, LVSC and Sands China need to omit highly problematic facts. They, for instance, need to omit how they have known about Jacobs' possession, intended use, and actual use of the subject documents since the commencement of this case in 2010 (or even before). They similarly need to omit

¹ As the district court warned, this Court's temporary stay caused the vacating of the evidentiary hearing. Accordingly, Jacobs asks this Court for immediate relief against that temporary stay so that this matter may proceed at long last.

1 how the documents in question have been in Jacobs' possession, custody, control,
2 and use since before this case's commencement. And, they need to overlook that
3 they waited at least eight months to suddenly claim that they were privileged and
4 should be inaccessible by Jacobs' counsel. LVSC and Sands China made no
5 attempt to protect their supposed privileges in the face of Jacobs' possession and
6 overt use of the documents for this case.

7 The truth of Petitioners' long inaction is but one reason the district court
8 denied their request for more delay through a stay. Its Order hardly exposed
9 Petitioners to irreparable harm. To the contrary, it protected LVSC and
10 Sands China's interests more than the law warrants in these circumstances. The
11 district court long ago found that the documents Jacobs possessed were not stolen,
12 and had been rightly in his possession since before his July of **2010** firing. Rather
13 than deem Petitioners' knowing inaction a total waiver, the district court protected
14 LVSC and Sands China from the legal consequences of their silence. It did so
15 following authorities that hold that a former executive alleging wrongful
16 termination may discover² and use documents that the executive created, used, and
17 received in the course and scope of his or her duties, even in the face of privilege
18 claims. After all, if Jacobs was not entitled to access the documents, then his actual
19 possession and long-standing adverse use would necessarily effectuate a waiver.

20 In rejecting their requested stay, the district court could not ignore Petitioners'
21 knowing and long-standing inaction over Jacobs' access to and use of documents
22 they belatedly decided they preferred to shield with cries of privilege. As the
23 district court stated, Petitioners failed to present any evidence disputing their
24 obvious awareness of Jacobs' possession and use of the documents. Considering
25 that Petitioners are the ones who would have such evidence, its absence is telling
26 indeed.

27 ² In this case, Jacobs does not seek "discovery" of these documents. They are
28 and have long been in his possession, custody, and control.

1 This lack of evidence is in addition to Petitioners' well-documented record of
2 delay to preclude a fair jurisdictional hearing. That campaign took various forms,
3 including making knowingly false representations about the location and their
4 clandestine review of evidence in an attempt to preclude its production.³ When
5 that would no longer work, Petitioners resorted to objecting on every conceivable
6 ground, including protests of relevance and privilege. To be blunt, there likely are
7 no litigants in this Court's reported decisions who have profited more from
8 misconduct and noncompliance than LVSC and Sands China. Lesser misconduct
9 typically results in the striking of pleadings or evidence. But LVSC and
10 Sands China believe they are above the law; too big, too important, and too
11 influential to play by the rules.

12 It is with this attitude that they ground this action to a standstill. It is a
13 defendant's dream. This case is now nearly three years old with no end in sight. No
14 trial date is set. Witnesses are disappearing (or being fired). The testimony and
15 recollection of witnesses is being lost. The truth of documentary evidence is still in
16 doubt, and in confirmed circumstances, destroyed. The continuing paralysis of this
17 case, which the district court confirmed would necessarily follow from yet another
18 stay, is indefensible. Considering the lengthy history of this matter, it is unrealistic
19 to expect this Court to know or appreciate what the district court has encountered.
20 While a litigant's cries of privilege might typically be accepted as a sufficient
21 predicate for a stay, that knee-jerk reaction should not carry the day here.

22 Nonetheless, should this Court contemplate a stay, it should do so only on
23 terms that alleviate, at least part of, the prejudice to Jacobs; namely, the inability to
24

25 ³ In their Motion, Petitioners bemoan any reference to these events as an
26 "attack" upon themselves and their counsel. (Mot. at 5.) If exposing, reporting, and
27 successfully combating a fraud upon the judicial process – the concealment of
28 evidence and repeated misrepresentations about it – constitutes "attacking" an
opponent, then so be it. No legal system can expect to maintain public confidence
in its outcomes if such acts are tolerated or swept under the rug. Nor can a
profession that holds itself out as guardian of the legal system expect public
confidence or respect if its members are willing to rationalize or trivialize such acts.

1 preserve evidence in a case that is growing stale where witnesses are disappearing
2 and it will be claimed that memories have faded. This Court's original direction to
3 the district court to stay the entirety of the action – including for LVSC when there
4 is no question that it is subject to jurisdiction – has become a tool of delay serving
5 no legitimate ends.

6 When this Court directed the stay's entry, it could not have anticipated
7 Petitioners' admitted misrepresentations as to the location of, their access to, and
8 purposeful nonproduction of evidence that has resulted in a near two-year delay.
9 Whatever the merits of that original stay, events have overtaken it and there is no
10 defensible rationale for inflicting further prejudice upon Jacobs. Accordingly, any
11 stay, even a temporary one, of the district court's June 19, 2013, Order should only
12 be entered upon the condition that merits discovery proceed. The prejudice to any
13 litigant in having to endure a more than three year delay in even the preservation of
14 basic evidence due to a defendant's use of their limitless resources to obstruct
15 should not be condoned by any court.

16 **II. BACKGROUND**

17 **A. Sands China Wants To Dispute Personal Jurisdiction, So Long As** 18 **It Dictates What Evidence Comes To Light.**

19 The district court was hardly writing from a blank slate when it denied
20 Petitioners' stay request. That decision flowed from an extensive record of
21 noncompliance and obstruction. This action has been pending since October 20,
22 2010, when Jacobs filed his complaint after he was fraudulently terminated as part
23 of a misguided attempt to discredit him and prevent him from reporting
24 improprieties of senior LVSC and Sands China executives, including their common
25 chairman, Sheldon G. Adelson ("Adelson"). LVSC responded and asserted a
26 counterclaim. For its part, Sands China claimed that it had no Nevada contacts that
27 would subject it to this state's jurisdiction.
28

1 After the district court found that Sands China had "pervasive" Nevada
2 contacts, (APP000033) Sands China petitioned this Court for writ relief. This Court
3 held that the district court's findings were of a "summary nature" and thus
4 incomplete for review. (*Id.*) Sands China also and simultaneously insisted that it
5 would incur significant financial burdens (up to \$1 million) if it was forced to
6 participate in merits discovery while its personal jurisdiction defense was
7 unresolved. This Court accepted Sands China's assertion and "instruct[ed] the
8 district court to hold an evidentiary hearing on personal jurisdiction, to issue
9 findings of fact and conclusions of law stating the basis for its decision following
10 that hearing, and to stay the action as set forth in this order until after entry of the
11 district court's personal jurisdiction decision." (APP000034.)

12 Although LVSC was not a party to that petition, sought no relief, and did not
13 dispute the district court's jurisdiction over it, this Court directed the stay of Jacobs'
14 entire case, even his claims against LVSC. In other words, despite no dispute as to
15 Jacobs' right to proceed against LVSC with discovery and vice versa, those rights
16 have been frozen.

17 **B. LVSC and Sands China Undermine the Jurisdictional**
18 **Truth-Finding Process.**

19 How Petitioners have used this Court's stay directive to paralyze this case is
20 addressed in Jacobs' Answering Briefs to Petitioners' second and third writ
21 petitions, Case Nos. 62489 and 62994, presently pending before this Court. The
22 records in those proceedings outline the deceit LVSC and Sands China employed to
23 sabotage jurisdictional discovery and any resulting hearing.

24 Briefly, in the face of this Court's directive for an evidentiary hearing on
25 personal jurisdiction, Jacobs sought jurisdictional discovery. Despite LVSC and
26 Sands China's repeated attempts to avoid it, the district court entered its order on
27 March 8, 2012, approving jurisdictional discovery. (*See generally* APP000036-41.)
28 Petitioners had no intention of complying.

1 Confirming their apparent belief that the rules only apply to others, LVSC
2 and Sands China resorted to repeated misrepresentations about the location of and
3 their access to documents, as well as their [non-]compliance with their discovery
4 obligations. As the district court subsequently outlined in its sanctions order of
5 September 27, 2012 ("the September Sanctions Order"), Petitioners undertook a
6 year-long deception to conceal evidence, secretly reviewing evidence they had
7 brought to Las Vegas while repeatedly saying (falsely) that the evidence was in
8 Macau and inaccessible. (APP000049-55.) Petitioners reasserted these
9 misrepresentations month after month during multiple district court hearings
10 (including status checks). (APP000053.)

11 There can be no claim that these misrepresentations were anything but
12 knowing. The purpose, as the district court expressly found, was to avoid evidence
13 coming to light. (APP000054.) And, the jurisdictional discovery Jacobs obtained
14 to date confirms why Sands China and LVSC proffered to keep the truth from
15 view.⁴ They both knew the true nature of Sands China's contacts, particularly those
16 that relate to Jacobs' termination. In fact, despite their best efforts to obstruct by
17 instructing witnesses not to answer questions – instructions the district court
18 repeatedly overruled – Jacobs uncovered how the plan to terminate him was
19 conceived and directed from Las Vegas by executives purporting to act in the name
20 of Sands China. Specifically, Michael A. Leven, a Sands China board member,
21 confirmed that he and Adelson carried out the planning and execution of Jacobs'
22 firing from Las Vegas. (APP000095; APP000072.) Their Nevada activities
23 included the preparation of the initial termination letter while claiming to be acting
24 as Sands China's representatives in Nevada. (APP000067-71.) In fact, they had to
25

26 ⁴ Petitioners reaffirm their lack of remorse for their antics with their claim that
27 the district court has failed to "rein in" Jacobs and his counsel. What they really
28 mean is that the district court should have turned a blind eye to their obstructive
tactics in trying to keep these and other facts secret. Apparently, a court fails to
"rein in" an opponent of these Petitioners whenever it does not tolerate their cheat
to win approach.

1 manufacture fictitious "Sands China" letterhead in Las Vegas in order to print that
2 very letter. (*Id.*) Adelson signed the letter in Las Vegas, claiming to be acting on
3 Sands China's behalf. (*Id.*) The press releases – including those Jacobs maintains
4 are fraudulent – were prepared in Las Vegas by executives again purporting to act
5 as Sands China's representatives. (APP000076-77.) The legal team overseeing the
6 planning and execution of the termination was likewise based in Las Vegas and
7 supposedly acting for Sands China from Las Vegas. (APP000075-77.)

8 Even the subsequent termination letter manufactured after-the-fact to suggest
9 that Jacobs had been terminated for cause (and providing twelve fabricated reasons)
10 was created in Las Vegas. (APP000098-101.) Of course, these are the Nevada
11 contacts admitted by Petitioners' own witnesses relating only to Jacobs' fraudulent
12 termination. These do not even account for the more permanent contacts that the
13 district court knew about when it addressed Sands China's original motion to
14 dismiss.

15 Unfortunately, the district court's September Sanctions Order did not lead to a
16 material change in the course of conduct. Just weeks later, Sands China admitted
17 that, despite the fact that the district court had ordered jurisdictional discovery over
18 a year prior, it had not even begun the search for responsive documents.
19 (APP000059.) Thus, for over a year, Sands China had done nothing but mislead
20 the district court and Jacobs. Attempting to again halt the obstructionism, the
21 district court gave Sands China one last chance before imposing additional
22 sanctions, ordering it "to produce all information within their possession that is
23 relevant to the jurisdictional discovery" by January 4, 2013. (APP000084.)
24 Sands China has attempted to evade the ordered production, claiming that it
25 misunderstood the consequences of the district court's September Sanctions Order,
26 a contention that is the subject of Petitioners' third writ application with this Court,
27 Case No. 62944.

C. Needing To Exclude Jacobs' Own Evidence, Petitioners Belatedly Cry Privilege And Now Prejudice.

The means LVSC and Sands China employed to undermine the district court's ability to hold the ordered evidentiary hearing were as clear as they were improper. Petitioners changed their own internal document policies so as to claim that documents in Macau were now inaccessible. (APP000051.) They failed to mention the existence and location of evidence already in Nevada at the time when they conveniently changed their internal document policy, and hid the information from the district court and Jacobs. (APP000049-55.) This ruse left Petitioners to deal only with the evidence that Jacobs had long confirmed he possessed and intended to use (and has used) in this action. After all, LVSC and Sands China knew that in his role as CEO of all Macau operations, Jacobs would possess volumes of information, including communications with attorneys. The forced revelation that Sands China and LVSC had secretly transported Jacobs' ESI (*e.g.*, a ghost drive of Jacobs' desktop hard drive) to Nevada, some of it even before the litigation commenced, demonstrates that Petitioners have always known what Jacobs possessed.

But there is much more history that LVSC and Sands China omit. Just one month after Jacobs filed this action in 2010, Sands China's then-counsel proclaimed she "ha[d] reason to believe, based on conversations with existing and former employees and consultants of the Company," that Jacobs had "stolen" the documents in his possession and demanded that Jacobs return them. (APP000001-03.) Jacobs disputed the "stolen" assertion, and confirmed his possession of a "multitude" of documents he retained while overseeing LVSC's Macau operations. (APP000004-05.) Jacobs rightfully possessed that information, made no apologies, and made clear he was not giving up his sources of proof.

Because Jacobs would not yield to the stolen-documents mantra, Sands China had to admit what it really wanted. Confirming that they knew what Jacobs

1 possessed, Petitioners focused on three documents that they knew would expose
2 them to serious political and legal problems: three investigative reports on foreign
3 government officials, as well as individuals with whom they were doing business
4 that were suspected of having ties to Chinese organized crime, otherwise known as
5 Triads. (APP000006-08.) They knew what Jacobs had and why he retained the
6 copies.

7 In response and once again, Jacobs affirmed his possession of volumes of
8 documents from his role, and stated unequivocally the he would not surrender any
9 of them. Instead, Jacobs agreed only to return two "originals" of the background
10 investigations, while reiterating that he was keeping copies for use as evidence in
11 this case. (APP000009.)

12 Jacobs reaffirmed that fact yet again in February of 2011, giving LVSC and
13 Sands China further notice (as if they needed it) of his possession of and intent to
14 use his work documents, including communications with the company's legal
15 counsel. Specifically, Jacobs opposed Sands China's original motion to dismiss *by*
16 *attaching and relying upon* his communications with Sands China's in-house
17 counsel, among other things, to demonstrate personal jurisdiction over Sands China.
18 (APP000010-11.) These same communications with counsel were published to this
19 Court as part of Sands China's original writ proceedings. (*See, e.g.,*
20 Case No. 58294, Petitioner's Appx. at SCL000666.) Despite Jacobs' confirmed
21 possession and actual use of his communications with the company's in-house
22 counsel in filed documents, Sands China took no steps to safeguard any supposed
23 privileges or regain possession of any of the documents Jacobs had and confirmed
24 he was using.

25 A few months later, in May of 2011, as part of his initial disclosures pursuant
26 to NRCP 16.1, Jacobs disclosed and identified just some of his communications
27 with LVSC's general counsel, Gail Hyman, as additional evidence in the case.
28 (APP000026.) Again, neither Sands China nor LVSC made any claims of

1 privilege. Indeed, month after month passed with no action from Petitioners – until
2 they needed an excuse to obstruct Jacobs' proof in anticipation of the court-ordered
3 evidentiary hearing. In sum, Petitioners did nothing for at least eight months
4 before they sought any relief to protect their supposed privileges.

5 Tellingly, this Court would know none of these facts by reading Petitioners'
6 portrayal. They prefer instead to pretend that they first learned of Jacobs'
7 possession of supposedly privileged documents through a July 8, 2011, email from
8 Jacobs' then-counsel, Colby Williams, and thereafter acted promptly. Hardly. As
9 Williams made clear, in reviewing additional documents for production, he came
10 across what he thought might be privileged communications that were *unrelated* to
11 the claims at issue in this case. (APP000030-31.) Counsel reaffirmed Jacobs' right
12 and intended usage of all communications relating to the claims at issue, including
13 those with Petitioners' counsel, but was not interested in potentially privileged
14 communications that were irrelevant to this case. And, once again, LVSC and
15 Sands China made no assertions that Jacobs and his counsel could not use
16 documents relating to the claims and defenses in this action, even if they were
17 between Jacobs and Petitioners' counsel. (*Id.*)

18 It was not until Jacobs changed counsel and filed a motion for jurisdictional
19 discovery that Petitioners apparently decided to change their approach belatedly
20 claiming that all of Jacobs' proof was off limits because of privilege. Stated more
21 bluntly, the very communications that LVSC and Sands China knew Jacobs had
22 possessed for over a year, including communications with in-house counsel that he
23 affirmatively used as evidence, were now (belatedly) privileged and off limits to
24 even inspection by Jacobs' new counsel, despite that Jacobs and his prior counsel
25 had been reviewing them with Petitioners' knowledge and inaction.⁵

27 ⁵ Despite the offer from Jacobs' prior counsel to allow Petitioners to review
28 Jacobs' records and identify unrelated communications over which they would
claim privilege, Petitioners chose an all-or-nothing approach. They would either

D. The District Court Orders That Jacobs' Counsel May Access Jacobs' Documents And Sets The Long-Awaited Evidentiary Hearing.

For purposes of responding to Petitioners' stay request, Jacobs will not recite the lengthy history and one-sided procedures created for the Petitioners' benefit, allowing them to review all of Jacobs' documents even *before* his counsel. It suffices to note that Petitioners were given multiple months of one-sided access to Jacobs' records. After extensive briefing, and then rebriefing sought by Petitioners, the district court concluded with its June 19, 2013, Order that Jacobs' new counsel could review Jacobs' documents for purposes of this litigation, including establishing jurisdiction over Sands China. (APP000143.)⁶ In doing so, the district court found that LVSC and Sands China had "failed to sustain their burden of demonstrating that Jacobs cannot review and use documents to which he had access during the period of his employment in this litigation," and likewise had "failed to sustain their burden of demonstrating that they have privileges that would attach to the documents relative to Jacobs' review and use of them in this litigation." (APP000142.)

The end effect is that the district court returned the parties to the previous status quo— Jacobs' counsel having access and use of his documents, including Jacobs' communications with company counsel, with Petitioners' knowledge. Despite Petitioners' strident attack on the district court, its Order actually protects them against the legal consequences of their own inaction. The district court did

bar access to all communications in Jacobs' possession or none; a strategic decision they appear to now want to blame on the district court instead of taking ownership.

⁶ For one of their lower blows, Petitioners claimed that the district court is responsible for the "emergency" here because it "delayed" the process for the entry of its order. But, the delay stemmed from Petitioners' objection to the form of order, and an unsolicited brief about the form of order. Moreover, when the district court quickly set a status conference to address Petitioner's objections (as well as to discuss scheduling the evidentiary hearing), *Petitioners* asked for the near two-week postponement about which they now complain (which the district court originally refused to do but subsequently acquiesced) in order to accommodate the vacation of one of the four attorneys who appear as counsel below.

1 not, for instance, hold that Petitioners' delayed claims of privilege – over eight
2 months after they had notice – constituted a complete waiver for all purposes.
3 Instead, the district court preserved their ability to resist disclosure in favor of third
4 parties by holding that there was no waiver by virtue of Jacobs' possession and use
5 of the documents in this litigation.

6 The district court preserved Petitioners' ability to claim privilege as against
7 third parties despite their months of inaction based upon cases holding that former
8 executives may have use of what are claimed to be privileged documents in
9 litigation without it constituting a waiver. The truth is that the district court
10 over-accommodated Petitioners from the consequences of their all-or-nothing
11 position. Indeed, if Jacobs is not among a class of persons entitled to review,
12 access, and use the documents without it constituting a waiver, then Petitioners
13 necessarily waived any claim of privilege since they had known of his possession,
14 review, and use without taking any steps to assert or preserve claims of privilege.

15 With the drawn-out access to Jacobs' own evidence resolved, the
16 district court turned to a prompt scheduling of the long-awaited evidentiary hearing.
17 The district court did not abruptly set the evidentiary hearing so as to make it appear
18 as though it was actually doing something. It has been doing something. Rather,
19 the district court set the date based upon the resolution of the issue and her calendar.
20 The district court noted that if it did not promptly hold the evidentiary hearing,
21 other pending matters precluded its scheduling for the considerable future.

22 Thus, the district court's denial of Petitioners' stay request is not as they
23 crassly wish to portray. As the district court noted, an additional stay delaying
24 access to Jacobs' own documents by his counsel would necessarily result in a
25 postponement of the long-delayed evidentiary hearing. (APP000148.) The
26 prejudice to Jacobs is stark. Almost three years after filing this action, Jacobs is no
27 closer to obtaining a resolution of his legal rights. LVSC and Sands China have
28 manipulated what this Court plainly designed as a *temporary* stay into prolonged

1 paralysis with no end in sight. While that happens, witnesses disappear, memories
2 erode, and more and more evidence fades away.⁷

3 **III. ARGUMENT**

4 **A. The Purpose Of A Stay Is To Promote Justice, Not Reward Those**
5 **Preferring Delay So As To Prejudice Their Opponent.**

6 The district court's denial of a further stay is in accord with this Court's
7 criteria for assessing whether and when a stay is appropriate pending resolution of a
8 petition for extraordinary relief:

- 9 (1) Whether the object of the appeal or writ petition will be defeated
10 if the stay is denied;
11 (2) Whether appellant/petitioner will suffer irreparable or serious
12 injury if the stay is denied;
13 (3) Whether respondent/real party in interest will suffer irreparable
14 or serious injury if the stay is granted; and
15 (4) Whether appellant/petitioner is likely to prevail on the merits in
16 the appeal or writ petition.

17 *Hansen v. Eighth Jud. Dis. Ct.*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000) (denying
18 the request for stay). No individual factor predominates, and whether a stay is
19 warranted rests with the court's broad discretion. *See Mikohn Gaming Corp. v.*
20 *McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004) ("We have not indicated that
21 any one factor carries more weight than the others, [however,] if one or two factors
22 are especially strong, they may counterbalance other weak factors."). Considering
23 its comprehensive knowledge of the *actual* events leading up to its June 19 Order,
24 as well as the extreme prejudice further delay imposes upon Jacobs, the
25 district court rightly rejected Petitioners' further request for more delay. Jacobs
26 asks this Court to do likewise.

27 ⁷ Again, just as the district court said would happen, the evidentiary hearing
28 has again been postponed due to this Court's temporary stay. (APP000150.) The
continuing prejudice to Jacobs is apparent.

1 ***1. The writ's object does not necessitate an interim stay.***

2 LVSC's and Sands China's stay request turns upon a mischaracterization of
3 the district court's June 19, 2013, Order. The district court did not compel the
4 production of any privileged documents. Nor did it "bust" any privileges as
5 Petitioners passionately proclaim. Every one of the documents at issue is and
6 always has been in Jacobs' possession, custody, and control. All the district court's
7 Order does is permit Jacobs' counsel to review those documents – the same
8 documents that Jacobs' prior counsel was reviewing and affirmatively using in this
9 litigation with Petitioners' knowledge – so as to prepare for the long-delayed
10 evidentiary hearing. (*See* APP000143.)

11 Petitioners whitewash their knowing acquiescence in Jacobs' review,
12 possession, and use of his communications with the company's counsel in this
13 litigation. But the reality is that the district court actually protected them against
14 their own failures. Rather than treating their knowing inaction as the waiver that it
15 is (if Petitioners are right that Jacobs' possession and use is actually prohibited), the
16 district court preserved any other claims of privilege by holding that the documents
17 could not be disseminated outside of Jacobs' legal team. It directed that all of
18 Jacobs' documents are to be maintained as confidential under the terms of the
19 parties' Stipulated Confidentiality Agreement and Protective Order. (*Id.*)

20 Considering what the challenged Order ***actually*** provides, LVSC and
21 Sands China fail to show that the object of their proffered petition is necessarily
22 defeated absent a stay. *See Hansen*, 116 Nev. at 657, 6 P.3d at 986 (discussing the
23 first factor); *see also Imation Corp. v. Koninklijke Philips Elecs. N.V.*,
24 Civil No. 07-3668 (DWF/AJB), 2009 WL 1766671 (D. Minn. June 22, 2009)
25 (denying motion to stay requiring party to produce otherwise privileged documents
26 because the protective order adequately protected the parties and "[f]urther delay of
27 their production would harm [the respondent] and potentially delay discovery and
28 the proceedings in this action."); *Professionals Direct Ins. Co. v. Wiles, Boyle*,

1 *Burkholder & Bringardner Co., LPA*, 2008 WL 5378362, *1 (S.D. Ohio Dec. 24,
2 2008) (denying stay pending appellate court's decision on party's writ petition
3 regarding the production of privileged documents because if mandamus were
4 ultimately granted, then the privileged documents could be excluded from
5 evidence). The limited relief of the district court's Order and the safeguards
6 imposed alone defeat the need for any further stay.

7 **2. *Petitioners' knowing delays defeat any claim of harm.***

8 For the second prong, Petitioners decree that they face irreparable injury due
9 to the loss of their supposed privileges. But, of course, their real-world conduct
10 belies that belated assertion.

11 Plainly, if Jacobs' possession and use of documents he has long possessed
12 were legitimate grounds for relief, the undisputed pattern of inaction by LVSC and
13 Sands China defeats any claim of harm now. Indeed, the district court addressed
14 this very point during its hearing on Petitioners' motion for stay, explaining:

15 If it was really that your forensic consultant had done an analysis and
16 believed that Mr. Jacobs had stolen information, I would have
17 anticipated sometime in that early time frame [of November 2010] I
18 would have seen a report from the forensic analysis, who would have
19 said, gosh, look, Judge, this is all he stole. To date I still haven't seen
20 it. This is now June 2013.

21 (APP000147.)

22 The law is settled that a party who claims privilege necessarily waives it,
23 involuntarily or even inadvertently, by failing to take reasonable measures "to
24 prevent the disclosure of privileged documents [or to] recover privileged documents
25 once they are disclosed." *Bowles v. National Ass'n of Homebuilders*, 224 F.R.D.
26 246, 253 (D.D.C. 2004). As the Ninth Circuit has admonished, the party claiming
27 the privilege must undertake all efforts "reasonably designed" to preserve an
28 asserted privilege and the privilege is waived if they fail "to pursue all reasonable
means of preserving the confidentiality of the privileged matter." *Accord In re*
Grand Jury (Impounded), 138 F.3d 978, 981 (3rd Cir. 1998) (including as a factor

1 in waiver are "the steps taken by a party to remedy the disclosure and any delay in
2 doing so").

3 The law provides that the failure to take reasonable steps to recover so-called
4 privileged documents that are in the hands of one's adversary constitutes a waiver.
5 *Bowles*, 224 F.R.D. at 253 (Party waives its privilege in "documents, and in all
6 documents of the same subject matter, by failing to take reasonable steps *to recover*
7 *the documents and preserve any privilege once it was aware they were in the*
8 *hands of a party opponent*") (emphasis added). This means that if the adversary
9 announces intent to retain the documents and use them in the case, then a
10 reasonable litigant must obtain prompt judicial relief or else the privilege is gone.
11 *United States v. SDI Future Health, Inc.*, 464 F. Supp. 2d 1027, 1046-47 (D. Nev.
12 2006).

13 This is precisely why LVSC and Sands China omit all of the facts about their
14 studied inaction. To begin, it bears noting that they appear to acknowledge how
15 they knew even *before* Jacobs filed this suit that he possessed "approximately
16 40 gigabytes" of documents from his employment at Sands China, and yet they
17 refuse to explain when, how or from whom they first learned this fact. (Mot. at 1.)
18 The district court specifically referenced Petitioners' silence and not wanting to
19 address the point as one of its bases for denying the stay. (APP000147; *see also*
20 *Reingold v. Wet 'N Wild Nev., Inc.*, 113 Nev. 967, 970, 944 P.2d 800, 802 (1997)
21 ("Where relevant evidence which would properly be part of the case is within the
22 control of the party whose interest it would naturally be to produce it, and he fails to
23 do so, without satisfactory explanation, the jury may draw an inference that such
24 evidence would have been unfavorable to him."), overruled in part on other
25 grounds, *Bass-Davis v. Davis*, 122 Nev. 442, 134 P.3d 103 (2006).

26 The reason Petitioners chose not to address this point is because it would
27 only reinforce their knowing inaction. Recall, in November of 2010, Sands China's
28 own counsel acknowledged that Jacobs possessed the documents. (APP000001-03.)

Jacobs confirmed his intent to use the documents as evidence, attaching his own communications with Sands China's in-house legal counsel; the very category of documents over which Petitioners now claim privilege. (APP000010-11.) The notice to Petitioners repeated itself in May of 2011 when Jacobs disclosed his possession of communications with LVSC's in-house counsel pursuant to NRCP 16.1 as additional evidence.⁸ (APP000026.) A party cannot feign ignorance simply because they cannot reconcile their knowing inaction with the desire to claim privilege after the fact.

Petitioners' months of inaction in the face of Jacobs' review and use of his documents, including communications with the company's counsel, undermines any claim of injury or grounds for emergency relief. Indeed, if Petitioners' legal argument were to be accepted – that Jacobs' status as a former executive bestows upon him no right to possess or review the documents – then his long-standing possession and use necessarily constitutes a waiver for all purposes. *United States v. de la Jara*, 973 F.2d 746, 750 (9th Cir. 1992) (allowing adverse party to possess documents for six months is a waiver); *In re Grand Jury (Impounded)*, 138 F.3d at 981 (failing to file motion to recover privileged documents for four months is a waiver); *see also Baxter Travenol Labs., Inc. v. Abbott Labs.*, 117 F.R.D. 119, 121 (N.D. Ill. 1987) ("Where prior to the assertion of the privilege, the documents have been examined and used by the opposing party, it may be unfair and unrealistic to uphold the privilege.")).

3. *Jacobs is the party prejudiced by the continuing delays.*

Considering LVSC's and Sands China's inaction, it is apparent which party is actually prejudiced by the continuing delays. Petitioners have now effectively converted what this Court intended to be a *temporary* merits stay into a near two-year reprieve. This action has been pending for nearly three years and Jacobs'

⁸ Confirming what this dispute is actually about, these same documents now conveniently are claimed as privileged on the Petitioners' privilege log, despite the documents being openly disclosed and used for over a year.

1 rights remain frozen as a consequence of Petitioners' perpetual noncompliance.
2 This Court's precedents have long recognized the prejudice inflicted by such undue
3 delays. *See Skeen v. Valley Bank of Nev.*, 89 Nev. 301, 303, 511 P.2d 1053, 1054
4 (1973) ("***Diligent parties are entitled to be protected against interminable delay***
5 ***and uncertainty as to their legal rights.***") (emphasis added).

6 The district court confirmed what a further stay would entail – a further delay
7 of the long-postponed evidentiary hearing. Make no mistake about it, delay is what
8 benefits LVSC and Sands China the most. The district court reminded LVSC and
9 Sands China of this end effect, reiterating its prior ruling (one never challenged by
10 Petitioners) that they would not be permitted to examine Jacobs until his counsel
11 was given access to the sources of proof in his possession, custody and control.
12 (APP000107 (district court: "I'm not letting you take his depo until he has his
13 documents.")) This was all the more obvious, as addressed by the district court,
14 since Petitioners were using this process to bar Jacobs' counsel from reviewing even
15 nonprivileged information in Jacobs' documents. Petitioners failed to follow settled
16 practice that legitimate claims of privilege must be redacted from nonprivileged
17 information. As the district court stated, Petitioners would not be afforded yet more
18 advantages through noncompliance. (*See* APP000148.)

19 **4. Jacobs, not Petitioners, is likely to prevail.**

20 Petitioners' attack on the district court is a case study in irony. The
21 district court chose to protect Petitioners from the legal consequences of their
22 strident position. Again, if Jacobs' status as a former executive who created,
23 received and used the documents in question affords him no right of access, then his
24 long-standing possession, stated intent to use, and actual use ends the debate.
25 LVSC and Sands China waived any claim of privilege. The law affords them no
26 ability to have their cake and eat it too.

27 Despite their rhetoric of how the district court's Order (which actually
28 protects them) is unsupported by law, reality is otherwise. *See, e.g., In re Braniff*,

1 *Inc.*, 153 B.R. 941, 946 (N.D. Fla. 1993) (former executive is entitled to otherwise
2 privileged communications he authored, received or was copied on during his
3 tenure based upon notions of fundamental fairness); *People v. Greenberg*,
4 851 N.Y.S.2d 196, 202 (N.Y. Sup. Ct. 2008) (former executives "are among the
5 class of persons legally allowed to view those privileged communications" and thus
6 granting a motion to compel production of privileged documents so that former
7 executives' counsel could have access to them).

8 This reality is further evidenced by cases where access to privileged
9 communications is most routinely at issue: disputes between a former in-house
10 counsel and the company. *See, e.g., Willy v. Admin. Review Bd.*, 423 F.3d 483, 499
11 (5th Cir. 2005) (finding that a former employee, even if a lawyer, "does not forfeit
12 his rights simply because to prove them he must utilize confidential information.

13 Nor does the client gain the right to cheat the lawyer by imparting confidences to
14 him."); *Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 173, 182 (3d Cir. 1997)
15 ("[T]he district court may use a number of equitable measures at its disposal
16 'designed to permit the attorney plaintiff to attempt to make the necessary proof
17 while protecting from disclosure client confidences subject to the
18 privilege[, including] the use of sealing and protective orders, limited admissibility
19 of evidence, orders restricting the use of testimony in successive proceedings, and,
20 where appropriate, in camera proceedings."); *Van Asdale v. Int'l Game Tech.*,
21 577 F.3d 989 (9th Cir. 2009) (relying on *Willy* and *Kachmar* and finding that
22 plaintiff-attorney should be allowed to use purportedly privileged documents in
23 action against former employer, based upon the trial court's ability to adequately
24 safeguard the information against unnecessary disclosures above and beyond
25 permitting the plaintiff to use the proof).

26 Plainly, Jacobs' former position as CEO of Sands China is one where he
27 would create and receive communications with the company's counsel, among a
28 host of other people, in order to do his job well and successfully. Thus, if LVSC

1 and Sands China want to claim that Jacobs has no ability to retain and use those
2 communications to prove wrongful termination in violation of public policy, then
3 their knowingly permitting him to do so month after month constitutes a waiver. In
4 reality, if the district court is to be criticized, it is only because it overprotected
5 LVSC and Sands China with its ruling.

6 **B. Any Stay Must Mitigate Against The Protracted Harm And**
7 **Prejudice To Jacobs.**

8 Obviously, Jacobs maintains that no stay is appropriate here. But if this
9 Court believes otherwise, Jacobs asks that it only be entered under circumstances
10 that permit Jacobs to at least partly mitigate the continuing harm to him; namely,
11 that merits discovery proceeds. After all, the law is settled as to a court's ability to
12 impose conditions that will reduce the prejudice to a party aggrieved by a stay. *See,*
13 *Clark v. Clark*, 543 N.W.2d 685, 688 (Minn. Ct. App. 1996) (on considering writ of
14 prohibition to restrain immediate enforcement of court-ordered changing child
15 custody, court noted that the "district court has discretion to place conditions on a
16 stay"); *Home Fire Ins. Co. v. Dutcher*, 67 N.W. 766, 769 (Neb. 1896)
17 ("Inasmuch as the allowing of a stay is wholly a matter of discretion, it follows that
18 the court may, in allowing the stay, affix such conditions as, in its judgment, are
19 necessary for the protection of the parties."); *see also Aspen Fin. Servs. v. Dist. Ct.*,
20 289 P.3d 201, 210 (Nev. 2012) (noting that "a stay [with] an indefinite, and likely
21 protracted, duration . . . would further frustrate the district court's interest in
22 managing its case load and expeditiously resolving the underlying suit given its
23 complexity for").

24 Here, there can be no debate as to the unfair prejudice heaped upon Jacobs by
25 the perpetual delays secured by LVSC and Sands China. Despite commencement
26 of this case in October of 2010, it has gone nowhere, just as LVSC and Sands China
27 desire. Despite the passage of almost three years, there is no prospect of a trial date.
28

1 The testimony of witnesses is not being preserved. Witnesses are disappearing⁹ and
2 for those who can be subsequently located, the passage of time will permit them to
3 claim that their memories have faded, whether real or by desire. This prejudice is
4 exacerbated by Petitioners' admission that they have already lost evidence in this
5 case.¹⁰

6 The perpetuation of the status quo – the indefinite stay of the fact-finding and
7 truth-preserving process – will only exacerbate the prejudice that Jacobs has
8 suffered. Thus, this Court should not consider any further stay absent directing the
9 district court to lift the present stay on merits discovery. Indeed, LVSC does not
10 even dispute that it is subject to this Court's jurisdiction. It can have no objection
11 short of admitting that its real objective is to simply procure more advantage
12 through delay.

13 The same is true for Sands China. The basis for this Court's original directive
14 for a merits stay – conserving judicial and party resources in the face of
15 Sands China's assertion that it had no Nevada contacts – can no longer be uttered
16 with any legitimacy.¹¹ Indeed, the basis for Sands China's request to this Court was
17

18 ⁹ Jacobs believes that multiple witnesses have either been terminated from
19 LVSC and Sands China or have otherwise departed, which will make accessing
20 them all the more difficult. Indeed, Jacobs believes that two witnesses, the
21 IT Director for LVSC and the IT Director for Sands China, have both been fired
since the commencement of this litigation based upon the facts and circumstances
that give rise to the claims in this case. And, as recently as last week – on June 25,
2013 – LVSC announced the departure of its CFO, Ken Kay (a witness on both
jurisdiction and merits).

22 ¹⁰ Petitioners admit that an unknown hard drive from Macau that was brought to
23 the United States has gone missing. They further have been forced to reveal that
24 they scrubbed one of the hard drives used by Jacobs in Macau of all data and only
25 preserved a ghost image of it. Their own former IT director concedes that this
ghost image was created in such a fashion as to not reveal what documents they
may have deleted from Jacobs' computer before they scrubbed it clean.
(APP000045.)

26 ¹¹ At the end of the day, Sands China will be a party in this case. Presently, the
27 district court views the merits stay as prohibiting Jacobs from amending his
28 complaint, even to augment his claims which would reinforce his theories for
jurisdiction. Regardless, when allowed, Jacobs will be amending his Complaint to
assert, among other things, claims for abuse of process against both Sands China

1 its assertion that it would be forced to expend a million dollars in complying with
2 merits discovery. But now Sands China claims to have spent (without providing
3 any evidence, of course) four times that amount. (APP000111.) To be sure,
4 whatever the true amount actually spent, it was not spent to comply with discovery,
5 but rather expended in an attempt to avoid it. Whatever the merits of the original
6 stay, it cannot be seriously suggested that it serves any legitimate purpose now.

7 It has long been the law that "the power to stay proceedings is incidental to
8 the power inherent in every court to control the disposition of the causes on its
9 docket with economy of time and effort for itself, for counsel, and for litigants."
10 *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). But of course the flip side is
11 equally true: That same inherent power justifies the lifting of a stay when the facts
12 so warrant. "Logically, the same court that imposes a stay of litigation has the
13 inherent power and discretion to lift the stay." *Canady v. Erbe Elektromedizin*
14 *GmbH*, 271 F. Supp. 2d 64, 74 (D.D.C. 2002). "When circumstances have changed
15 such that the court's reasons for imposing the stay no longer exist or are
16 inappropriate, the court may lift the stay." *Id.* at 74; *Ho Keung Tse v. Apple, Inc.*,
17 2010 WL 1838691 (N.D. Cal. May 5, 2010) ("A court may lift the stay if the
18
19

20 and LVSC over their long-standing pattern of litigation abuse. Because those
21 actions occurred in the State of Nevada, Sands China will not be able to continue to
22 pretend as though it has no Nevada contacts. *General Refractories Co. v. Fireman's*
23 *Fund Ins. Co.*, 337 F.3d 297, 311 (3rd Cir. 2003) (party can maintain claim for
24 abuse of process because party filed various motions in an effort to obstruct
25 discovery, "knowingly made bogus claims of privilege in response to discovery
26 requests, hid documents, and made misrepresentations to opposing counsel and the
27 court."); *McDonald v. Davis*, Civil No. 2004-93, 2009 WL 580456, at *12
28 (March 5, 2009, D.V.I.) ("Examples of conduct that may constitute an abuse of
process include intentionally withholding critical documents, ignoring court orders,
permitting false testimony at depositions and misrepresenting facts to opposing
counsel and the Court."); *Givens v. Mullikin*, 75 S.W.3d 383, 402 (Tenn. 2002)
(court explained that abuse of process claim lies when "the civil discovery
procedures are used with the specific and malicious intent to weaken the resolve of
the other party" because the opponent "may rightfully claim that the procedures
were being used 'to accomplish some end which is without the regular purview of
the process.'"). Continued delay to debate personal jurisdiction over Sands China is
an exercise in futility.

1 circumstances supporting the stay have changed such that the stay is no longer
2 appropriate.").

3 Moreover, lifting the merits stay comports with well-settled law. Under this
4 Court's jurisprudence, "[o]nce a defendant challenges personal jurisdiction, the
5 plaintiff may proceed to show jurisdiction by one of two distinct processes." *Trump*
6 *v. Eighth Jud. Dist. Ct.*, 109 Nev. 692, 857 P.2d 743 (1993). First, the plaintiff may
7 "prove personal jurisdiction by a preponderance of the evidence" at "a full
8 evidentiary hearing on the personal jurisdiction issue prior to trial." *Id.* at 693, 857
9 P.2d at 744. The second, and "more frequently utilized process" allows "a plaintiff
10 [to] make a *prima facie* showing of personal jurisdiction prior to trial and then
11 prove jurisdiction by a preponderance of the evidence at trial." *Id.* at 692, 857 P.2d
12 at 743.

13 The purpose of this Court's original directive for an evidentiary hearing has
14 been overtaken by events that were the product of Petitioners' long-standing
15 discovery misconduct. There can be no debate about the fact that there is a *prima*
16 *facie* showing of personal jurisdiction. Again, the entire enterprise undertaken to
17 terminate Jacobs was hatched in and carried out from Las Vegas by executives
18 claiming to act for Sands China.

19 Accordingly, if this Court is inclined to delay counsel's access and use of
20 Jacobs' own documents, it should do so only under terms that will provide some
21 level of mitigation for the prejudice Jacobs has suffered by the perpetual delay of
22 this case. There can no longer be any claim for a continued stay of merits
23 discovery, particularly considering that the continued passage of time will only lead
24 to further loss of testimony as witnesses disappear (some involuntarily) and even
25 those that can be found will have diminished memories. If Sands China really
26 wants to continue to debate the district court's personal jurisdiction over it, it can do
27 so at a subsequent evidentiary hearing or at the trial on the merits. But it cannot
28

1 continue to delay resolution of that point so as to obstruct merits discovery in the
2 hopes that more and more evidence will disappear.

3 **IV. CONCLUSION**

4 Sands China has converted what was to be a temporary stay into a permanent
5 reprieve, with it and its parent company, LVSC, benefitting. It is not the
6 district court that has missed the mark here. The district court did not order
7 production of any privileged documents. The documents in question have been in
8 Jacobs' possession, custody, control, and use since before this case commenced.
9 LVSC and Sands China have known about that reality and chose to sit idle. Their
10 choice was hardly one of accident. It seems likely that they consciously chose not
11 to highlight their awareness of what Jacobs possessed, lest their long-kept secret
12 about clandestinely transporting the ESI of Jacobs and other executives might be
13 exposed (and it eventually was).

14 Petitioners have shown no entitlement to yet another stay which inevitably
15 leads to further delay of Jacobs' day in court. No stay is justified, especially given
16 the extreme prejudice to Jacobs. No litigant should have to endure nearly three
17 years of stalling tactics and watch as evidence fades. Thus, if this Court were to
18 consider to a stay, it must be conditioned upon allowing Jacobs to conduct merits
19 discovery and thus preserve evidence so that the truth-finding and preserving
20 purpose of litigation is allowed to work.

21 DATED this 2nd day of July, 2013.

22 PISANELLI BICE PLLC

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Pisanelli Bice PLLC, and that on this 2nd day of July, 2013, I caused to be e-filed and sent via email and United States Mail, postage prepaid, true and correct copies of the above and foregoing **OPPOSITION TO EMERGENCY MOTION UNDER NRAP 27(e) TO STAY THE DISTRICT COURT'S JUNE 19, 2013 ORDER** properly addressed to the following:

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SERVED VIA HAND-DELIVERY ON JULY 3, 2013

Judge Elizabeth Gonzalez
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An employee of Pisanelli Bice PLLC