

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 63444

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

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Petitioners,

v.

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

Respondents,

and

STEVEN C. JACOBS,

Real Party in Interest.

**ANSWER TO EMERGENCY PETITION FOR WRIT OF
PROHIBITION OR MANDAMUS TO PROTECT
PRIVILEGED DOCUMENTS**

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	FACTS	2
A.	Jacobs Shines Brightly Until He Questions Sheldon Adelson's Dictatorship	2
B.	Jacobs Possesses the Documents Both Before and After His Termination.....	3
C.	Jacobs Repeatedly Confirms His Possession of the Documents and Intent to Use Them as Evidence	4
D.	Petitioners Unsuccessfully Seek Injunctive Relief, Fail to Appeal, and then Abandon the Case.....	7
E.	Petitioners Return to Securing Delay Through Inaction.....	9
F.	The District Court Rejects Petitioners' Sweeping Claims of Privilege as to Jacobs for a Second Time	10
III.	REASONS WHY THE WRIT SHOULD NOT ISSUE.....	13
A.	Writ Relief is Not Available to Those Who Delay and Forego Available Legal Remedies	13
B.	Petitioners Further Failed to Carry Their Burden of Establishing Privilege, Especially in the Face of Jacobs' Long-Standing and Continued Possession and Use of the Documents	16
C.	This Case Presents No Platform for Deciding the Circumstances of When a Former Executive Can Compel Privileged Information ...	25
IV.	CONCLUSION	28
	CERTIFICATE OF COMPLIANCE	29
	CERTIFICATE OF SERVICE.....	30

TABLE OF AUTHORITIES

Cases

<i>Bass-Davis v. Davis</i> , 122 Nev. 442, 134 P.3d 103 (2006)	18
<i>Bldg. & Constr. Trades Council of N. Nev. v. State</i> , 108 Nev. 605, 836 P.2d 633 (1992)	15
<i>Bowles v. Nat'l Ass'n of Homebuilders</i> , 224 F.R.D. 246 (D.D.C. 2004).....	19
<i>Burrows Welcome Co. v. Barr Lab., Inc.</i> , 143 F.R.D. 611 (E.D.N.C. 1992).....	21
<i>Calderon v. U.S. Dist. Ct.</i> , 137 F.3d 1420 (9th Cir. 1998).....	14
<i>Clark Cnty. Liquor & Gaming Licensing Bd. v. Clark</i> , 102 Nev. 654, 730 P.2d 443 (1986)	15
<i>Clark Co. Liquor & Gaming Licensing Bd. v. Clark</i> , 102 Nev. 654, 730 P.2d 443 (1986)	15
<i>Commodity Futures Trading Comm'n v. Weintraub</i> , 471 U.S. 343 (1985)	26
<i>Cote H. v. Eighth Jud. Dist. Ct.</i> , 124 Nev. 36, 175 P.3d 906 (2008)	13
<i>Fox Searchlight Pictures, Inc. v. Paladino</i> , 106 Cal. Rptr. 2d 906 (Cal. Ct. App. 2001).....	23
<i>Glidden Co. v. Jandernoa</i> , 173 F.R.D. 459 (W.D. Mich. 1997)	26
<i>Gottlieb v. Wiles</i> , 143 F.R.D. 241 (D. Col. 1992)	26
<i>Guerin v. Guerin</i> , 114 Nev. 127, 953 P.2d 716 (1998)	13
<i>Harris v. Wells</i> , 1990 WL 150445 (D. Conn. 1990)	26
<i>In re Braniff, Inc.</i> , 153 B.R. 941 (N.D. Fla. 1983)	24
<i>In re Grand Jury (Impounded)</i> , 138 F.3d 978 (3d Cir. 1998)	20
<i>In re Young</i> , 11 A.3d 228, 2011 WL 10296 (Del. 2011).....	14
<i>Inter-Fluve v. Montana 18th Jud. Dist. Ct.</i> , 112 P.3d 258 (Mont. 2005)	26
<i>Kachmar v. SunGuard Data Systems, Inc.</i> , 109 F.3d 173 (3d Cir. 1997).....	24
<i>Kirby v. Kirby</i> , 1987 WL 14862 (Del. Ch. July 29, 1987)	26
<i>Las Vegas Sands Corp. v. Jacobs</i> , Case No. A-11-648484-B	7
<i>Milroy v. Hanson</i> , 875 F. Supp. 646 (D. Neb. 1995)	27
<i>Montgomery v. Etreppid Techs, LLC</i> , 548 F. Supp. 2d 1175 (D. Nev. 2008) ..	26, 27
<i>Nelson v. Heer</i> , 121 Nev. 832, 122 P.3d 1252 (2005).....	14

1	<i>New Markets Partners, LLC v. Sal. Oppenheimer Jr. & Cie</i> , 258 F.R.D. 95	
2	(S.D.N.Y. 2009)	26
3	<i>Nikkal Indus., Ltd. v. Salton, Inc.</i> , 689 F. Supp. 187 (S.D.N.Y. 1988)	20
4	<i>Pan v. Eighth Jud. Dist. Ct.</i> , 120 Nev. 222, 88 P.3d 840 (2004)	13
5	<i>Pengilly v. Rancho Santa Fe Homeowners Ass'n</i> , 116 Nev. 646, 5 P.3d 569	
6	(2000)	13
7	<i>People v. Greenberg</i> , 851 N.Y.S.2d 196 (N.Y. Sup. Ct. 2008)	22
8	<i>Reingold v. Wet'N Wild Nev., Inc.</i> , 113 Nev. 967, 944 P.2d 800 (1997)	18
9	<i>Resolution Trust Corp. v. Dean</i> , 813 F. Supp. 1426 (D. Ariz. 1993)	20
10	<i>Reynolds, Shannon, Miller, Blynn, White & Cox v. Flanary</i> , 872 S.W.2d 248	
11	(Tex. App. 1993)	14
12	<i>Roberts v. Heim</i> , 123 F.R.D. 614 (N.D. Cal. 1988)	21
13	<i>Rogers v. State</i> , --- Nev. ---, 255 P.3d 1264 (Nev. 2011)	17
14	<i>State v. Peekema</i> , 976 P.2d 1128 (Or. 1998)	15
15	<i>Tornay v. United States</i> , 840 F.2d 1424 (9th Cir. 1988)	25
16	<i>United States v. Aramony</i> , 88 F.3d 1369 (4th Cir. 1996)	16, 17
17	<i>United States v. Chen</i> , 99 F.3d 1495 (9th Cir. 1996)	17
18	<i>United States v. Craig</i> , 178 F.3d 891 (7th Cir. 1999)	6
19	<i>United States v. de la Jara</i> , 973 F.2d 746 (9th Cir. 1992)	19, 20
20	<i>United States v. Mejia</i> , 655 F.3d 126 (2d Cir. 2011)	16, 17
21	<i>United States v. SDI Future Health, Inc.</i> , 464 F. Supp. 2d 1027 (D. Nev. 2006) ..	19
22	<i>Van Asdale v. International Game Technology</i> , 577 F.3d 989 (9th Cir. 2009) ..	23, 24
23	<i>Wardleigh v. Second Jud. Dist. Ct.</i> , 111 Nev. 345, 891 P.2d 1180 (1995)	15
24	<i>Wechsler v. Squadron, Ellenoff, Pleasant & Sheinfeld, LLP</i> , 994 F. Supp. 202	
25	(S.D.N.Y. 1998)	26
26	<i>Weil v. Inv./Indicators, Research & Mgt., Inc.</i> , 647 F.2d 18 (9th Cir. 1981)	17
27	<i>Whitehead v. Nev. Comm'n on Jud. Disc.</i> , 110 Nev. 380, 873 P.2d 946	
28	(1994)	21, 25
	<i>Williams v. District of Columbia</i> , 806 F. Supp. 2d 44 (D.D.C. 2011)	20

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3 **Rules**

4 NRAP 3A(b)(3) 14

5 NRCP 16.1 6

I. INTRODUCTION

Petitioners' latest petition for extraordinary writ fails to disclose that two years ago, Las Vegas Sands Corp. ("LVSC"), on behalf of itself and Sands China Limited ("Sands China"), filed a separate lawsuit over the very same documents with the same claims of privilege. LVSC sought an emergency injunction seeking to compel Real Party in Interest Steven C. Jacobs ("Jacobs") to return those documents and to preclude Jacobs and his counsel from reviewing or using them. The same district court here denied the sought-after injunction two years ago. No appeal was pursued and the case was abandoned.

On top of that fatal problem, the district court could hardly find that the documents were privileged as against Jacobs considering that they are to this day, and always have been, in his possession, custody, and control. Considering that LVSC and Sands China declined to submit a single declaration or affidavit to substantiate their claims or explain their inaction, the district court's ruling – that they failed to sustain their burden – can hardly be doubted.

LVSC and Sands China's hyperbolic attack on the district court is an attempt at masking their own failure and inaction. Unable and unwilling to face the actual facts, they attempt to argue a legal issue that will not change the district court's decision – under what circumstances a former high-ranking corporate executive can compel production of privileged documents from the company for use in litigation. As the district court correctly noted, that is not the issue here. Jacobs always has had and used the documents. But even on the false premise from which LVSC and Sands China wish to argue, they wildly exaggerate in a misguided attempt to paint the district court's ruling in as false a light as possible.

The truth is that the district court's order actually protects LVSC and Sands China from the consequences of their own failures. They did not meet their burden of establishing any privilege for documents Jacobs has always possessed. Indeed, if Jacobs' possession is not permitted, the consequences for Petitioners are

1 stark – Jacobs' long-standing adverse possession and usage in the face of
2 Petitioners' inaction is then a waiver for all purposes. LVSC and Sands China's
3 desire to have their cake and eat it too fails.

4 The present writ application is procedurally barred and substantively wrong.
5 It should be denied.

6 **II. FACTS**

7 **A. Jacobs Shines Brightly Until He Questions Sheldon Adelson's** 8 **Dictatorship.**

9 While LVSC may be a financial powerhouse today as a result of its Macau
10 operations, that certainly has not always been true. In fact, LVSC was on the verge
11 of bankruptcy in 2009, with its independent auditors issuing a going concern
12 warning. (APP000002.) It is that near-collapse environment that brought Jacobs
13 into the LVSC picture. Initially, LVSC's management brought Jacobs on as an
14 outside consultant to aid it in avoiding its financial collapse and sent him to Macau
15 to salvage LVSC's operations there. Ultimately, LVSC brought Jacobs on as a
16 full-time employee under a binding "Offer, Terms and Conditions" (the
17 "Term Sheet") dated August 3, 2009. (APP000004.)

18 There can be no honest debate as to Jacobs' success. He and the team
19 successfully cut over \$365 million in costs and repaired strained relationships with
20 Chinese government officials who had soured on the acts of LVSC's Chairman,
21 Sheldon Adelson ("Adelson"). (APP000020-21.) As a result of that turnaround,
22 LVSC was able to spin off its Macau operations to form Sands China, thereby
23 raising over \$4 billion in desperately needed capital. (APP000020.)

24 Confirming his success, LVSC installed Jacobs as Sands China's CEO,
25 placing him on the Board, and awarded him his full bonus as well as an additional
26 2.5 million stock options in its newly-minted subsidiary. When assessing Jacobs'
27 performance, LVSC's COO Michael Leven ("Leven") proclaimed: "there is no
28

1 question as to Steve's performance[;] the Titanic hit the iceberg[,] he arrived and not
2 only saved the passengers[,] he saved the ship." (APP000021.)

3 Jacobs' involvement in the business, including as CEO both before and after
4 Sands China's spin off, was all encompassing: he ran operations; directed company
5 counsel and interacted with board members. In this broad role, Jacobs amassed a
6 large quantity of documents and communications – documents that go to the heart
7 of his tortious termination, an injunction request that the district court refused two
8 years ago, and the instant writ petition.

9 As the district court found, "[t]hese are documents that Jacobs authored, was
10 a recipient of, or otherwise possessed in the course and scope of his employment,"
11 (PA3189), which demonstrate not only Sands China's personal jurisdiction, but also
12 the real reason for Jacobs' termination: his refusal to acquiesce to Adelson's attempt
13 to keep the board of directors in the dark as to certain problems. When Jacobs
14 demanded that matters be placed on a board agenda for disclosure, Adelson and
15 Leven hastily orchestrated his termination. A candid email later sent by Leven
16 would confirm the real reasons: Jacobs "believe[d] he report[ed] to the board [of
17 Sands China], not the chair [Adelson]." (APP000383.)

18 **B. Jacobs Possesses the Documents Both Before and After His**
19 **Termination.**

20 "At issue are [the] documents that Jacobs has had in his possession since
21 before his termination on July 23, 2010." (PA3188.) Considering that the July 23,
22 2010 showdown occurred because Jacobs had amassed information for presentation
23 to the board, LVSC and Sands China cannot pretend that they did not know he
24 possessed the documents.

25 Despite the fact that Jacobs traveled extensively for work and thus had
26 extensive information stored electronically, no one asked him to surrender his
27 laptop computer or any other electronic devices on the date of his termination. Nor
28 did anyone attempt to retrieve any of his documents. Adelson and Leven were so

1 desperate to get Jacobs out of Macau before a scheduled board meeting, they had
2 security forcibly escort him to the Macau ferry on July 23, 2010, and he was told to
3 leave.

4 **C. Jacobs Repeatedly Confirms His Possession of the Documents and**
5 **Intent to Use Them as Evidence.**

6 The present petition rests upon ignoring the actual facts. As the district court
7 confirmed, neither LVSC nor Sands China chose to present any evidence disputing
8 that they had always known what Jacobs possessed or explaining their inaction
9 relative to what they belatedly characterize as critically privileged documents. The
10 reason for this silence appears tied to their earlier attempts at concealing that they
11 had transported all of Jacobs' electronic files from Macau and hid them from both
12 the district court and Jacobs.

13 They knew the significance of the documents as well as the problems they
14 presented, which is why they were immediately transferred. Hence, when the
15 district court ordered jurisdictional discovery, LVSC and Sands China either had to
16 admit possession of the documents in the United States or conceal the evidence. As
17 the district court found after its evidentiary hearing, LVSC and Sands China chose
18 the path of concealment. (PA770F).

19 Further confirming that they knew what Jacobs possessed, shortly after
20 Jacobs filed suit in 2010, Sands China's then-counsel sent a letter proclaiming she
21 "ha[d] reason to believe, based on conversations with existing and former
22 employees and consultants of the Company," that Jacobs had "stolen" certain
23 documents and demanded their return.¹ (APP000005-06.) Jacobs immediately
24 disputed the "stolen" assertion, but confirmed his possession of a "multitude" of
25 documents. (APP000008.) Jacobs rightfully possessed that information, made no
26

27 ¹ Despite claiming that they had evidence in 2010, LVSC and Sands China
28 notably never submitted any evidence from any of these employees or purported
consultants.

1 apologies, and made clear he was not surrendering his evidence. (APP000008-09;
2 APP000013.)

3 From then forward, LVSC and Sands China knew that Jacobs would not
4 relinquish the documents he possessed, including his communications with the
5 company's counsel. But Petitioners did nothing except confirm that they knew what
6 Jacobs possessed and why they wanted it back. They focused on attempting to
7 recover three documents considered most problematic and damaging for them:
8 three investigative reports on foreign government officials, as well as individuals
9 with whom they were doing business and who were suspected of having ties to
10 Chinese organized crime (Triads). (APP000010.)

11 Once again, Jacobs refused to relinquish any of his proof, reaffirming his
12 possession of volumes of documents and stating that he would not surrender them.
13 In fact, Jacobs agreed only to return two "originals" of the background
14 investigations, while reiterating that he was keeping copies for use as evidence.
15 (APP000013.) What did LVSC and Sands China do in 2010 in response to Jacobs'
16 explicit refusal to relinquish the documents he retained? Nothing.

17 And it is not as though Jacobs' revelations did not continue month after
18 month. In February of 2011, Jacobs again confirmed his possession of and intent
19 to use his work documents. Specifically, Jacobs opposed Sands China's original
20 motion to dismiss *by attaching and relying upon* his communications with
21 Sands China's in-house counsel, among other things, to demonstrate personal
22 jurisdiction. (*See* Case No. 58294, Petitioner's Appx. at SCL000666; *see also*
23 APP000335 (Petitioners acknowledging Jacobs' disclosure and use of purportedly
24 privileged documents in this case).) Despite Jacobs' confirmed possession and
25 actual use of his communications with the company's in-house counsel, Petitioners
26 took no steps to assert any supposed privileges or regain possession of any of the
27 documents Jacobs had and confirmed he was using. Tellingly, LVSC and
28 Sands China declined to address this problem with the district court or deny their

1 knowledge of the fact that Jacobs possessed volumes of documents, including his
2 communications with company counsel.

3 Petitioners' silence and inaction continued, even with further affirmations as
4 to Jacobs' possession and intended use of the documents he retained. In
5 May of 2011, as part of his initial disclosures pursuant to NRCP 16.1, Jacobs
6 reconfirmed his possession of communications with LVSC's general counsel,
7 Gail Hyman, disclosing one of them as additional evidence. (APP000046.) Again,
8 neither Sands China nor LVSC made any attempt to safeguard their supposed
9 privileges despite the passage of nearly eight months after Jacobs confirmed that he
10 would not surrender any proof he retained after his tortuous termination.

11 Unable to deny or explain their own acts, LVSC and Sands China now adopt
12 the ostrich defense.² They ignore the problems and pretend that they first learned
13 of Jacobs' documents through a July 8, 2011, email from Jacobs' then-counsel,
14 Colby Williams. In this alternate universe, LVSC and Sands China claim that they
15 acted promptly in asserting their privilege claims. Hardly.

16 As Williams made clear, in reviewing additional documents for production
17 under Rule 16.1, he came across what he thought could be privileged
18 communications that were *unrelated* to the claims at issue in this case.
19 (APP000050.) Williams reaffirmed Jacobs' right and intended use of all
20 communications relating to the claims at issue here, including those with the
21 company's counsel, but he was not interested in potentially privileged
22 communications that were unrelated to this case. (*Id.*) And, once again, LVSC and
23 Sands China made no assertions that Jacobs and his counsel could not use
24
25

26 ² The "ostrich defense" stems from what federal courts reference as issuing an
27 "ostrich instruction," which occurs when a party tries to pretend not having
28 knowledge of bad facts by purposely remaining ignorant of reality. *United States v. Craig*, 178 F.3d 891, 896-97 (7th Cir. 1999).

documents relating to the claims and defenses in this action, even if they were between Jacobs and the company's counsel.

D. Petitioners Unsuccessfully Seek Injunctive Relief, Fail to Appeal, and then Abandon the Case.

LVSC and Sands China changed course when Jacobs switched counsel, sought jurisdictional discovery, and reproduced all the same documents previously disclosed as evidence for a jurisdictional hearing. LVSC and Sands China would not be able to mislead the district court as to the existence and location of Jacobs' documents – like they had done with their own – and would need an alternate avenue to avoid Jacobs' disclosure.

Despite the passage of over a year of knowing the documents Jacobs possessed, LVSC and Sands China now attempted to hastily suppress his sources of proof, asserting that Jacobs had "stolen" those documents and claiming privilege. Initially, on September 13, 2011, they filed an emergency motion seeking to have the district court compel Jacobs to surrender all of the documents and to preclude Jacobs' new counsel from reviewing them. (*See generally* APP000052-58.) But they later voluntarily withdrew their request. (APP000188-90.)

They did so because, on September 16, 2011, LVSC filed a new action, naming Jacobs and his consulting company, Vagus Group, Inc., as defendants, *Las Vegas Sands Corp. v. Jacobs*, Case No. A-11-648484-B (the "Second Action") (*See generally* APP000112-21.)³ In the Second Action, LVSC, on behalf of itself and its subsidiaries, including Sands China, made the exact same claims raised in the present petition: LVSC asserted that Jacobs had "stolen" all of the documents, claimed that they were privileged and/or confidential and must be immediately surrendered. LVSC requested a temporary restraining order and preliminary injunction requesting the district court to immediately enjoin Jacobs and his counsel

³ The Second Action was also assigned to The Honorable Elizabeth Gonzalez, the presiding judge over the First Action.

1 from reviewing or using any of these documents. (*See generally* APP000122-35.)
2 Jacobs opposed that injunction motion, arguing, among other things, the ambush
3 tactics of trying to take advantage of the fact that Jacobs had just recently switched
4 counsel, and that any claims of privilege (assuming they ever existed) had long
5 been waived by LVSC and Sands China's inaction for over eight months. (*See*
6 APP000197-202; *see also* APP000280-81.)

7 The district court denied the requested injunction. (APP000211-12, 215-16.)
8 When doing so, the district court expressly noted that LVSC had failed to properly
9 seek relief from this Court in the First Action as it had directed. (APP000211-12.)
10 Instead, it entered what it labeled as an "Interim Order" which provided:

11 (1) For a period of fourteen (14) days, from the date of the hearing
12 up to and until October 4, 2011, Defendants shall not disseminate to
13 any third party the documents that Plaintiff believes are not rightfully
in the possession of Jacobs and/or Vagus Group;

14 (2) During the time frame, counsel for Jacobs and Vagus Group are
15 permitted to review the documents and take any other action related to
the documents (in accordance with the Nevada Rules of Professional
Responsibility) except dissemination to third parties;

16 (3) This order shall remain in full force and effect until October 4,
17 2011 ***and will not be extended.***

18 (APP000269 (emphasis added).)

19 At the same time LVSC was seeking injunctive relief in the Second Action, it
20 filed yet another emergency petition for writ of mandamus with this Court, on the
21 apparent theory that the district court wrongly refused to act on a motion for
22 protective order in the First Action. (*See generally* APP000219-243). As this Court
23 explained when denying that petition, LVSC's request was inappropriate because
24 "those motions have been withdrawn" and there was nothing for this Court to
25 decide relative to the First Action. (APP000328.) The Court further noted that
26 LVSC could not be seeking relief in the Second Action because it "provides no
27 documentation whatsoever indicating that the district court has refused to act."
28 (APP000328-29.)

Even though the district court denied LVSC's injunction request, thus being immediately appealable, LVSC took no action to challenge its refusal to compel Jacobs to surrender the documents or to stop him or his counsel from their review and use. But it gets even worse. In the Second Action, LVSC filed yet another motion claiming that Jacobs and his counsel had violated the Interim Order and requesting yet another injunction. (*See generally* APP000244-54) The district court found no violation of the Interim Order and refused to grant further injunctive relief. (APP000292-93.) And once again, LVSC failed to appeal or seek any relief from this Court. In short, after filing the Second Action, clamoring for emergency injunctive relief and sanctions over these very same documents and the claims of privilege, LVSC failed to pursue its available remedy of an appeal two years ago.

E. Petitioners Return to Securing Delay Through Inaction.

After failing to pursue their remedies in the Second Action, LVSC and Sands China lost interest.⁴ Thereafter, they returned to the First Action asserting that they should be given unfettered access to all of Jacobs' electronic storage devices so that they could review any document in his possession, even if they had nothing to do with this case.⁵ After considerable motion practice, the district court created a protocol whereby Jacobs would provide copies of his drives to a court-appointed third party administrator, Advanced Discovery, which would then

⁴ Incredibly, after all of the bluster and cries for emergency relief by LVSC in the Second Action, it effectively abandoned the claim, failing to prosecute it. The Second Action is now statistically closed due to inaction.

⁵ Of course, this was at the same time LVSC and Sands China misled the district court as to the location of their copies of Jacobs' electronically stored information. They had falsely claimed that the documents were located in Macau and that they could not even be reviewed by LVSC's counsel, let alone produced, because they were purportedly in Macau. As the district court would later find based upon its sanctions hearing, these representations were false. Petitioners had long had access to what Jacobs possessed because they had shipped his ESI to Nevada, some of it before the lawsuit commenced. (*See* PA770B-770E.)

1 make a copy of Jacobs' documents and return the originals to him. From the
2 Advanced Discovery copy, LVSC and Sands China would be allowed to review the
3 documents after those unrelated to this case were removed. LVSC and Sands China
4 were given access to inspect all of the documents commencing on May 17, 2012.
5 (PA2948.)

6 After months of delayed review of Advanced Discovery's copy, LVSC and
7 Sands China identified some 11,000 pages of documents over which it claimed
8 privilege and/or protection, which they then placed on a 3,000 page single-spaced
9 privilege log. (*See* APP000365-70.) Reinforcing Jacobs' belief that the real
10 purpose all along was to use this process as a means of delay and putting
11 problematic evidence out of sight, they claimed privilege and/or protection over
12 documents that had no identified authors or recipients, as well as communications
13 between non-attorneys and even those with third-parties. (*See id.*)⁶

14 **F. The District Court Rejects Petitioners' Sweeping Claims of**
15 **Privilege as to Jacobs for a Second Time.**

16 Contrary to their current claims of acting forthright and promptly, LVSC and
17 Sands China returned to the practice of delay through inaction. After they took
18 months to review Jacobs' documents and supposedly confirmed that he possessed
19 their privileged documents, LVSC and Sands China filed no motion with the
20 district court seeking return of the supposedly-privileged documents. They filed no
21 motion with the district court seeking to preclude Jacobs from reviewing the
22 documents or using them. Nor did they seek any relief in this Court, despite their
23 established propensity for filing emergency writ petitions. Simply put, yet another
24 year passed with Jacobs openly and adversely possessing the documents, with
25 LVSC and Sands China sitting on their hands.

26 _____
27 ⁶ Even after Jacobs protested these tactics, LVSC and Sands China continued
28 down the same path revising their privilege log by reducing it down to a mere
1,733 pages. But of course, the same improper attempts to claim privilege over
documents continued. (PA814-16.)

1 Jacobs had enough of LVSC and Sands China using the documents in
2 Advanced Discovery's possession as an excuse to delay the long-awaited
3 evidentiary hearing as to personal jurisdiction over Sands China. Thus, *he* filed a
4 motion with the district court seeking an order to direct Advanced Discovery to
5 release its copy of the documents that LVSC and Sands China had placed on their
6 privilege log. (*See generally* PA809-27.) Of course, Jacobs already possessed
7 these very same documents, but filing the motion would force the idle hands of
8 LVSC and Sands China.

9 Despite bearing the burden of any privilege claim, LVSC and Sands China
10 confirmed that they had no explanation for their abject inaction in the face of
11 Jacobs' open and adverse possession and use of the documents since before October
12 of 2010. Thus, they unremarkably submitted not a single affidavit supporting or
13 substantiating any claims of privilege, let alone addressing their inaction, even
14 when Jacobs again raised, as he had in the Second Action, their waiver and the
15 district court directed them to file supplemental authorities. They had nothing
16 positive to offer so they presented no evidence.

17 In the face of LVSC and Sands China's failure to submit *any* affidavits to
18 substantiate their claims of privilege, and their pattern of abject inaction, it could
19 hardly come as a surprise that the district court found that they had "failed to sustain
20 their burden of demonstrating that Jacobs cannot review and use documents to
21 which he had access during the period of his employment in this litigation," and
22 likewise had "failed to sustain their burden of demonstrating that they have
23 privileges that would attach to the documents relative to Jacobs' review and use of
24 them in this litigation." (PA3190.)⁷

25 _____
26 ⁷ As this Court should recall, as part of its September 14 sanctions order, the
27 district court had already precluded LVSC and Sands China from claiming that the
28 documents Jacobs possessed were not "rightfully in his possession." (PA770I.)
Thus, they could not now pretend that the documents had been "stolen" and they
consciously made no challenge to the district court's sanctions ruling.

1 As the district court would note, LVSC and Sands China attempted to avoid
2 the real issue in this case by arguing over are not presented; namely, whether a
3 former executive can compel the production of privileged information from his or
4 her former corporate employer. (PA3189.) That was hardly at issue here; Jacobs
5 has long adversely possessed and used the documents at issue. And, despite LVSC
6 and Sands China's snapping bark throughout the present petition, the district court's
7 order hardly altered the long-existing status quo. Jacobs always has had, and still
8 retains the documents. Indeed, the district court's order actually protects LVSC and
9 Sands China from the consequences of their inaction and failure to sustain their
10 burden.

11 The June 19 Order provides that since Jacobs is within the class of persons
12 that would otherwise be entitled to see the documents and use them in litigation, his
13 long-standing adverse possession did not constitute a waiver of the privilege as to
14 all others. (See PA3190.) The district court imposed further safeguards providing
15 that notwithstanding Jacobs' rightful possession of the documents, Advanced
16 Discovery's copy could not be disseminated beyond Jacobs' counsel and would be
17 maintained as confidential pursuant to the Stipulated Protective Order, unless and
18 until the district court ordered otherwise. (PA3190-91.) Considering the inaction
19 and wholesale failure of proof by LVSC and Sands China, the June 19 Order is
20 generous.

21 The district court knew this long history, which is why it denied LVSC and
22 Sands China's request for temporary stay of the June 19 Order. At that time, it
23 again noted LVSC and Sands China's longstanding failure to present any evidence
24 refuting that they have always known what Jacobs possessed and took no action:

25 If it was really that your forensic consultant had done analysis and
26 believed that Mr. Jacobs had stolen information, I would have
27 anticipated sometime in that early timeframe I would have seen a
28 report from the forensic analysis, who would have said, gosh, look,
Judge, this is all he stole. *To date I haven't seen it. This is now
June 2013.*

(APP000390-91.) To borrow Paul Harvey's famous tag line: "And now you know the rest of the story."

III. REASONS WHY THE WRIT SHOULD NOT ISSUE

A. Writ Relief is Not Available to Those Who Delay and Forego Available Legal Remedies.

1. *Failure to follow through on an injunction and appeal bars the present application.*

The present petition's silence – omitting the Second Action, the failed injunction request and failure to appeal nearly two years ago – is as telling as it is fatal. NRS 34.170 and this Court's precedents make a writ of mandamus available only when the petitioning party had no plain, adequate and speedy legal remedy to pursue. *Cote H. v. Eighth Jud. Dist. Ct.*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008).

Thus, failure to pursue available legal remedies, including an immediate appeal when available, forecloses writ relief. *Pan v. Eighth Jud. Dist. Ct.*, 120 Nev. 222, 224-25, 88 P.3d 840, 841 (2004) ("This court has previously pointed out, on several occasions, that the right to appeal is generally an adequate legal remedy that precludes writ relief. Additionally, writ relief *is not available* to correct an untimely notice of appeal.") (emphasis added); *Guerin v. Guerin*, 114 Nev. 127, 131, 953 P.2d 716, 719 (1998) (rulings on an injunction "are appealable and thus not appropriately considered in a writ petition.").⁸

Other courts also have properly dismissed writ petitions when the aggrieved party failed to timely pursue their interlocutory appellate rights from an adverse injunction ruling. *E.g., Calderon v. U.S. Dist. Ct.*, 137 F.3d 1420, 1421 (9th Cir. 1998) (dismissing mandamus petition because injunction rulings are immediately

⁸ This Court later abrogated the aspect of *Guerin* that held that contempt orders are immediately appealable and thus not subject to writ review. *Pengilly v. Rancho Santa Fe Homeowners Ass'n*, 116 Nev. 646, 5 P.3d 569 (2000).

1 appealable and failure to pursue appeal bars later sought writ relief);⁹ *Reynolds,*
2 *Shannon, Miller, Blynn, White & Cox v. Flanary*, 872 S.W.2d 248, 251 (Tex. App.
3 1993) (request to file petition for writ of mandamus "summarily denied" because
4 proper review of district court's preliminary injunction ruling is by appeal); *see also*
5 *In re Young*, 11 A.3d 228, 2011 WL 10296, *2 (Del. 2011) (table) (a petition for
6 extraordinary writ is not available when party fails to file timely appeal or pursue
7 their legal remedies).

8 LVSC had a plain, adequate and speedy legal remedy available two years ago
9 and failed to act. In the Second Action, LVSC, for itself and its subsidiary, made
10 the same claim presented by its so-called emergency writ petition now two years
11 later – that Jacobs had supposedly stolen the documents and both he and his counsel
12 must be precluded from reviewing them because they were privileged and
13 confidential. The district court's refusal to grant such an injunction was
14 immediately appealable. NRAP 3A(b)(3). The conscious decision to forego an
15 appeal which would have placed the matter before this Court two years ago
16 precludes writ relief now.

17 **2. *Petitioners' delays also preclude writ relief now.***

18 Even if the failure to pursue available legal remedies could be excused
19 (which it cannot), a writ of mandamus is not an appropriate vehicle here for other
20 salient reasons. This Court has repeatedly said that it will only entertain writ
21 intervention on discovery matters in two limited instances: (1) the trial court issues
22 blanket discovery orders without regard to relevance; or (2) a discovery order
23 requires disclosure of privileged information. *Clark Co. Liquor & Gaming*
24 *Licensing Bd. v. Clark*, 102 Nev. 654, 659-60, 730 P.2d 443, 447 (1986). The
25 rationale for limiting this Court's extraordinary intervention to such circumstances
26

27 ⁹ "[F]ederal decisions involving the Federal Rules of Civil Procedure provide
28 persuasive authority when this [C]ourt examines its rules." *Nelson v. Heer*, 121
Nev. 832, 834, 122 P.3d 1252, 1253 (2005).

1 is simple: the petitioning party may face irreparable harm because the bell cannot
2 be unrung after production takes place. *Wardleigh v. Second Jud. Dist. Ct.*,
3 111 Nev. 345, 350-51, 891 P.2d 1180, 1183-84 (1995).

4 Yet, the so-called bell of privilege rang more than three years ago on these
5 documents. And it has been ringing (loudly) ever since. Jacobs has openly and
6 adversely possessed these documents since July 23, 2010, when LVSC wrongfully
7 terminated him in an attempt to discredit him from blowing the whistle on corporate
8 improprieties. Jacobs has disclosed and used some of his documents – including
9 those for which Petitioners now shriek with cries of privilege – as proof in this case.
10 (Case No. 58294, Petitioner's Appx. at SCL000666; APP000046.) But of course,
11 they sought no legitimate relief in this Court despite the district court's repeated
12 rulings, including those from two years ago, that it would not compel Jacobs to
13 return the documents.¹⁰

14 Thus, even if a plain, speedy and adequate remedy at law (*i.e.*, an appeal)
15 were lacking (which it was not), Petitioners' failure to forthrightly present the issue
16 to this Court for nearly three years in the face of Jacobs' longstanding possession,
17 custody and control over these documents renders their present petition beyond
18 untimely. *See Bldg. & Constr. Trades Council of N. Nev. v. State*, 108 Nev. 605,
19 611, 836 P.2d 633, 637 (1992) ("As an extraordinary remedy, a writ of mandamus
20 is subject to the doctrine of laches" and waiting over a month was too long.); *State*
21 *v. Peekema*, 976 P.2d 1128, 1131 (Or. 1998) (to avoid doctrine of laches "generally
22 requires that a mandamus proceeding be filed within the statutory time frame
23 required for the filing of an appeal").

24
25 ¹⁰ Petitioners cannot be heard to claim that they "tried" to bring the matter to
26 this Court's attention when their petition was denied. As this Court said, they had
27 withdrawn their motions in front of the district court in the First Action in favor of
28 proceeding in the Second Action. Because they sought no further relief in the
Second Action after the district court denied their injunction request and because
they elected not to seek relief in the First Action, they never made a legitimate
attempt despite clear and timely avenues for doing so.

B. Petitioners Further Failed to Carry Their Burden of Establishing Privilege, Especially in the Face of Jacobs' Long-Standing and Continued Possession and Use of the Documents.

The present writ petition is as substantively deficient as it is procedurally barred. Even if Petitioners' failure to bring this issue to this Court for the last two to three years could be ignored, their characterization and criticism of the district court's June 19 Order rings hollow. Considering what LVSC and Sands China presented, or the lack thereof, the district court acted well within its discretion in finding that LVSC and Sands China had "failed to sustain their burden of demonstrating that they have privileges that would attach the documents relative to Jacobs' review and use of them in this litigation." (PA3190.) If anything, the district court was too kind.

LVSC and Sands China failed to substantiate any privilege claims with actual proof, could not explain their inaction in failing to preserve any privileges, or dispute the legal consequences of permitting their adversary to long possess the documents for which they belatedly sought to claim as privileged. As a sideshow, they sought to debate when a former executive can compel a company to produce allegedly privileged documents, a point the district court noted was not fairly at issue here. LVSC and Sands China's failures were, and remain, complete on all fronts.

A district court's ruling on claims of attorney-client privilege is generally reviewed for abuse of discretion. *United States v. Mejia*, 655 F.3d 126, 131 (2d Cir. 2011). Of course, if the issue turns purely upon a privilege's scope, a question of law, the standard is *de novo*. *Id.* But when the issue involves the sufficiency of evidence to substantiate a claim of privilege, or its non-waiver, the standard of review would be for "clear error." *United States v. Aramony*, 88 F.3d 1369, 1390 (4th Cir. 1996).

1 ***1. Petitioners present no evidence to substantiate claims of***
2 ***privilege.***

3 As proponents of the attorney-client privilege, LVSC and Sands China must
4 affirmatively demonstrate that each communication or document is one: (1) made in
5 confidence; and (2) for the purpose of facilitating legal services by the lawyer for
6 the client. *Rogers v. State*, --- Nev. ---, ---, 255 P.3d 1264, 1268 (Nev. 2011) ("As
7 the proponent of the privilege, Rogers bore the burden of establishing it.");
8 NRS 49.055 ("A communication is 'confidential' if it is not intended to be disclosed
9 to third persons other than those to whom disclosure is in furtherance of the
10 rendition of professional legal services to the client or those reasonably necessary
11 for the transmission of the communication."); *United States v. Chen*, 99 F.3d 1495,
12 1501 (9th Cir. 1996) (same).

13 Because maintaining "confidentiality" is necessary for the privilege to exist,
14 it is also a proponent's burden to establish that confidentiality was continually
15 preserved (*i.e.*, that no waiver or unnecessary dissemination of the information was
16 allowed to occur). *Mejia*, 655 F.3d at 132-33; *Aramony*, 88 F.3d at 1390 (party
17 claiming attorney client privilege also carries burden of demonstrating that "the
18 privilege was not waived."); *Weil v. Inv./Indicators, Research & Mgt., Inc.*,
19 647 F.2d 18, 25 (9th Cir. 1981) ("One of the elements that the asserting party must
20 prove is that it has not waived the privilege.").

21 The district court's conclusion that LVSC and Sands China failed to carry
22 their burden of proof, let alone their burden of persuasion, is squarely within its
23 prerogative on a record such as this. LVSC and Sands China failed to submit a
24 ***single*** affidavit to substantiate their claim. Their omission is no oversight. Jacobs
25 expressly noted their longstanding inaction, just as he had over a year earlier in the
26 Second Action, and the district court directed LVSC and Sands China to respond.
27 (PA2906.)
28

Petitioners consciously chose to submit no evidence whatsoever, underscoring the lack of any plausible proof to explain their years of inaction in the face of Jacobs' possession and use of the documents. As the district court would note in denying their emergency request for stay of the June 19 Order, LVSC and Sands China had long failed to present any proof. (APP000390-91.) And, of course, since the evidence would be within their possession, its absence now cannot be ignored. *Reingold v. Wet'N Wild Nev., Inc.*, 113 Nev. 967, 970, 944 P.2d 800, 802 (1997), *overruled in part on other grounds by Bass-Davis v. Davis*, 122 Nev. 442, 134 P.3d 103 (2006).

The record's absence of *any* evidence in support of LVSC and Sands China is hardly their only problem. Rather, the record is replete with proof of their inaction. Again, Jacobs has possessed and used these supposedly privileged documents since before the case's inception. LVSC and Sands China confirmed their knowledge of that fact in August of 2010, nearly three years ago. (PA770B (discussing Petitioners' transfer of Jacobs' ESI from Macau to Las Vegas).) Jacobs continually reaffirmed his possession of the documents, including communications with counsel, as well as his intent to use those documents as proof in this case. (APP000008-09; APP000013; APP000046.) In the face of this, LVSC and Sands China took no reasonable steps to assert, let alone preserve, their supposed privileges.¹¹

And that is not all. LVSC and Sands China's inaction reached its apex once they were allowed to review Advanced Discovery's copy of Jacobs' documents. According to LVSC and Sands China, they reviewed every single document that Advanced Discovery had copied from Jacobs' devices throughout the summer of 2012. As part of that review, they asserted that some 11,000 pages of documents were subject to some form of privilege, and identified them as early as

¹¹ Of course, the one step they did take – filing the Second Action – they chose to abandon without pursuing any relief from this Court.

1 September 2012. And what did LVSC and Sands China do after they supposedly
2 **confirmed** that Jacobs continued to retain these privileged documents? **Absolutely**
3 **nothing.** They sought no relief from the district court to have the documents
4 returned. They sought no bar against Jacobs' review of the documents he had
5 always possessed. Nor did they come to this Court. They took no steps, let alone
6 reasonable ones, to regain custody of what they now cry are their privileged
7 documents.

8 2. ***If Jacobs had no right to the documents, his longstanding***
9 ***possession and use is a waiver.***

10 LVSC and Sands China's failure to take appropriate steps in the face of their
11 adversary's possession and use of their supposed privileged documents forecloses
12 any claim of privilege now, especially as against Jacobs. The law rightly provides
13 that claims of privilege are lost when a litigant fails to take reasonable measures "to
14 prevent the disclosure of privileged documents [or to] recover privileged documents
15 once they are disclosed." *Bowles v. Nat'l Ass'n of Homebuilders*, 224 F.R.D. 246,
16 253 (D.D.C. 2004). As the Ninth Circuit notes, the party claiming privilege waives
17 it by failing "to pursue all reasonable means of preserving the confidentiality of the
18 privileged matter." *United States v. de la Jara*, 973 F.2d 746, 750 (9th Cir. 1992).

19 Failure to take reasonable steps to recover so-called privileged documents in
20 the hands of one's adversary constitutes a waiver. *Bowles*, 224 F.R.D. at 253 (party
21 waives its privilege "by failing to take reasonable steps **to recover the documents**
22 **and preserve any privilege once it was aware they were in the hands of a party**
23 **opponent**") (emphasis added). This means that if the adversary announces that it
24 intends to retain the documents and use them in the case, the privilege's proponent
25 must obtain immediate judicial relief or else the privilege is gone. *United States v.*
26 *SDI Future Health, Inc.*, 464 F. Supp. 2d 1027, 1046-47 (D. Nev. 2006); *see also*
27 *Bowles*, 224 F.R.D. at 254 ("**Merely asserting the privilege to an adversary is not**
28

1 *sufficient to protect the privilege*" and prompt judicial relief must be obtained to
2 recover the documents if the opponent refuses surrender them (emphasis added)).

3 Here, Jacobs openly and adversely possessed the documents at issue since
4 before this case commenced over three years ago. LVSC and Sands China's
5 admitted inaction month after month after month is beyond incompatible with any
6 claim of privilege, let alone claims of irreparable harm warranting extraordinary
7 writ relief at this late date. *See de la Jara*, 973 F.2d at 750 (failure to seek to
8 recover purportedly privileged/confidential documents for *six months* after notice,
9 the party allowed "the mantle of confidentiality which once protected the
10 documents" to be "irretrievably breached," and thereby waived any claim of
11 privilege or protection) (emphasis added); *In re Grand Jury (Impounded)*, 138 F.3d
12 978, 981 (3d Cir. 1998) (failure to file motion to recover privileged documents for
13 *four months* after notice constituted a waiver) (emphasis added).

14 Plainly, Petitioners' conscious decision not to submit any evidence explaining
15 their inaction – that before the Second Action or thereafter – is no accident. This
16 failure of proof, in and of itself, defeats any claim of privilege as against Jacobs.
17 *Compare Williams v. District of Columbia*, 806 F. Supp. 2d 44, 49 (D.D.C. 2011)
18 (burden of establishing that reasonable steps were taken to prevent and safeguard
19 against disclosure is not met by unsworn averments of counsel) and
20 *Nikkal Indus., Ltd. v. Salton, Inc.*, 689 F. Supp. 187, 192 (S.D.N.Y. 1988) (proving
21 nonwaiver requires actual evidence, not conclusory assertions of counsel, and thus
22 proponent "failed to meet its burden because it had not brought forth any evidence
23 of nonwaiver"), *with Resolution Trust Corp. v. Dean*, 813 F. Supp. 1426, 1429-30
24 (D. Ariz. 1993) (party demonstrated burden of non-waiver when it came "forward
25 and presented *testimony, under the penalty of perjury* affirmatively demonstrating
26 that they took precautions to secure confidentiality . . . ").

27 LVSC and Sands China's brash approach before the district court – assuming
28 that their years of inaction and lack of evidence would be excused – is contrary to

1 law. "Because both the work product and the attorney-client privileges obstruct the
2 search for truth . . . , they must be strictly confined within the narrowest possible
3 limits consistent with the logic of [their] principles." *Whitehead v. Nev. Comm'n on*
4 *Jud. Disc.*, 110 Nev. 380, 415, 873 P.2d 946, 968 (1994). All "doubts must be
5 resolved ***against*** the party asserting the privilege." *Roberts v. Heim*, 123 F.R.D.
6 614, 636 (N.D. Cal. 1988) (emphasis added); *Burrows Welcome Co. v. Barr*
7 *Lab., Inc.*, 143 F.R.D. 611, 617 (E.D.N.C. 1992) ("[T]he court has strictly construed
8 the privilege . . . and has resolved all doubts in favor of disclosure.").

9 It is an understatement to say that LVSC and Sands China failed to carry their
10 burden of proving privilege as to documents that have been in Jacobs' continued
11 possession, custody and use since before this litigation commenced as well as
12 during it. The district court can hardly be accused of error or of abusing its
13 discretion in the face of the complete lack of evidence by LVSC and Sands China,
14 not to mention a clear case of waiver.

15 ***3. The district court's order actually over-protects LVSC and***
16 ***Sands China from their failures of proof and timeliness.***

17 LVSC and Sands China's bluster against the district court's ruling – branding
18 it a "privilege-busting order" – is not only fiction, but a case study in irony. They
19 chide as preposterous the district court's holding that Jacobs is within the sphere of
20 persons allowed to view and possess these documents in litigation. They decree
21 that no such principle exists anywhere.

22 But in reality, Petitioners should be thankful. After all, it is that very
23 reasoning which does not render Jacobs' longstanding possession and review a
24 complete waiver despite their failures to present any proof and their repeated failure
25 to take action in the face of Jacobs' open and adverse use and possession of the
26 documents. If, as they would like to now suggest, Jacobs should be treated and
27 viewed as any other outsider, then LVSC and Sands China lost the ability to claim
28 privilege against anyone by failing to act timely and appropriately in the face of this

1 pretend stranger's possession of their supposed privileged communications. *See*
2 *Winbond Elec. Corp. v. Int'l Trade Com'n*, 262 F.3d 1363, 1376 (Fed. Cir. 2001)
3 (allowing strangers outside of the circle of permitted recipients to possess and retain
4 privileged communications constitutes a waiver of the privilege for "all purposes").
5 It is hardly the district court that fails to appreciate the law of privileges.

6 On the facts of this case – as opposed to what LVSC and Sands China wish
7 they were – the district court's framing of the issue is not only amply supported, but
8 it is all that stands between Petitioners and a full waiver. In *People v. Greenberg*,
9 851 N.Y.S.2d 196 (N.Y. Sup. Ct. 2008), for example, the court addressed when a
10 former high-ranking executive may seek discovery of purportedly privileged
11 documents from their former employer.¹² That court explained the issue succinctly:

12 The issue here is not whether the legal memoranda constitute
13 privileged attorney-client materials (they do) or whether Greenberg
14 and Smith are entitled to assert or waive AIG's privilege (they are
not), but whether Greenberg and Smith ***are among the class of***
persons legally allowed to view those privileged communications.

15 *Id.* at 202 (emphasis added). After framing the issue, that court concluded that the
16 former executives (and their counsel) were entitled to view the privileged materials
17 without causing a waiver because they "were privy to, and on many occasions
18 actively participated in, [the] legal consultations regarding the documents and
19 transactions at issue. *Id.* Just as the district court did here, with documents that
20 Jacobs prepared and/or possessed in the course of his duties that court held that the
21 corporation – the privilege's proponent – "failed to sustain its burden of establishing
22 that the privilege is assertible" against those former executives. *Id.*

23 LVSC and Sands China dismiss *Greenberg* asserting that the case "did not
24 involve a former officer's suit against the corporation; in fact, the former officers
25

26 ¹² Of course, the facts here are even more problematic for LVSC and
27 Sands China because Jacobs always has retained possession, custody and control of
28 the documents. He sought no order compelling production of any privileged
document.

1 and the company were aligned." (Petition at 24.) This is a distinction that even
2 they do not accept. Although the government brought that action, the former
3 executives were plainly adverse to the company. The dispute arose because the
4 former executives sought production of purportedly privileged documents which the
5 company opposed. 851 N.Y.S.2d at 197. If LVSC and Sands China were right, the
6 former executives lost all ability to access information once they are no longer with
7 the company, even if they had been on the same side of a case.

8 As this Court might imagine, another common circumstance where a former
9 employee's access to attorney-client privileged information arises is when a former
10 in-house attorney sues for wrongful termination. *See, e.g., Fox Searchlight*
11 *Pictures, Inc. v. Paladino*, 106 Cal. Rptr. 2d 906, 918 (Cal. Ct. App. 2001)
12 ("[F]ormer in-house counsel may disclose to her attorney all facts relevant to the
13 termination, including employer confidences and privileged communications."). Of
14 course, in-house attorneys owe their former employer (client) a fiduciary duty.¹³
15 But even in those extreme circumstances, courts recognize that the company cannot
16 necessarily erect privilege against their former employee over information that he or
17 she generated or received during their employment.

18 The Ninth Circuit's recent whistleblower decision, *Van Asdale v.*
19 *International Game Technology*, 577 F.3d 989 (9th Cir. 2009), is instructive.
20 There, two in-house attorneys brought a claim against their former employer, IGT,
21 for tortious discharge after they were terminated for whistleblowing on possible
22 corporate fraud. *Id.* at 992. IGT sought to dismiss the case, asserting that since the
23 former employees would necessarily have to use privileged information to prove
24 their case, the claim could not be maintained since they were not allowed to use or
25 access privileged information against the company's wishes. *Id.* at 994.

26
27 ¹³ Petitioners argue that Jacobs will violate his confidences and fiduciary duties
28 by using his documents in this case. (*See* Petition at 13.) Ironically, it was Jacobs'
sense of duty (*e.g.*, his duty to report matters to board members) that got him fired
in the first place.

1 The Ninth Circuit rejected this argument, reversed the trial court and directed
2 that the case could proceed even if it was ultimately determined that proving the
3 claim would require use and disclosure of privileged information. *Id.* at 995-96.
4 The Ninth Circuit embraced two other federal circuit decisions involving retaliation
5 claims brought by former corporate in-house attorneys: *Willy v. Administrative*
6 *Review Board*, 423 F.3d 483 (5th Cir. 2005), and *Kachmar v. SunGuard Data*
7 *Systems, Inc.*, 109 F.3d 173 (3d Cir. 1997).

8 In particular, the Ninth Circuit approved the *Kachmar* court's ruling that the
9 former employee might gain discovery of and use privileged information but that
10 the district court should take precaution through various measures to preclude
11 disclosure of any of the information to those outside of the case. Similar to the
12 precautions that the district court imposed here, such protective measures could
13 include sealing exhibits, limited admissibility of some evidence, orders restricting
14 the use of the information and, if necessary, *in camera* proceedings. *Kachmar*, 109
15 F.3d at 182. But since the plaintiffs were participants in the creation of the
16 supposedly privileged proof, they could not necessarily be denied access to it.
17 *Van Asdale*, 577 F.3d at 995-96; *see also In re Braniff, Inc.*, 153 B.R. 941, 946
18 (N.D. Fla. 1983) (former corporate officer is entitled to otherwise privileged
19 communications that he authored, received or was copied on during his tenure
20 based on "a notion of fundamental fairness in the law").

21 LVSC and Sands China say that these cases can be ignored because former
22 in-house attorneys have special rights. (Petition at 23-24.) They confirm that they
23 are merely sidestepping a problem with their own analysis when they can cite no
24 authority. In Petitioners' world, any former executive that also happens to be an
25 attorney can bring a retaliation claim for whistleblowing and gain access to
26 privileged information, but a former CEO (so long as he/she is not an attorney)
27 cannot access the same proof upon the same claims. It is unremarkable that LVSC
28 and Sands China cite no support for their nonsensical position. They again fail to

1 appreciate that all claims of privilege must be construed against them and "strictly
2 confined" and applied only when necessary. *Whitehead*, 110 Nev. at 415, 873 P.2d
3 at 968; *Tornay v. United States*, 840 F.2d 1424, 1428 (9th Cir. 1988).

4 It is not the district court that recklessly blew through any claims of privilege
5 here. The district court simply and rightly recognized that on the record presented,
6 including the utter lack of evidence from Petitioners, they had failed to carry their
7 burden of demonstrating that the documents presently in Jacobs' possession,
8 custody and control are shielded by privilege as against him. After all, it is not as
9 though he does not know that the documents exist; he possesses them and has had
10 free access and review for years. He cannot be given a lobotomy.

11 If LVSC and Sands China want to now pretend that Jacobs is just an ordinary
12 stranger to these documents, their own conduct (or lack thereof) would mean that
13 their privileges were waived for all purposes. Fortunately for them, the
14 district court has not (at least for now) held them to the consequences of their own
15 arguments.

16 **C. This Case Presents No Platform for Deciding the Circumstances of**
17 **When a Former Executive Can Compel Privileged Information.**

18 Attempting to avoid the actual facts of this case, LVSC and Sands China
19 propose a different question, one that would not alter the district court's decision.
20 They claim that this Court should decide whether a former executive can waive a
21 company's attorney-client privilege. (Petition at 14-18.) Of course, that is not the
22 issue here as any waiver that has occurred necessarily rests in the idle hands of
23 LVSC and Sands China. The district court did not rule and Jacobs has not claimed
24 that he can "waive" privileges. The same holds true for their desired debate to when
25 a former executive may compel production of a company's privileged information.
26 The June 19 Order presents no such question.

27 But not only do LVSC and Sands China ignore the facts of this case, they
28 even have to ignore significant contrary case law in their need to grasp at straws to

1 attack the district court. Indeed, they boldly decree that the law on the matter they
2 wish was at issue – when an executive can compel production of privileged
3 information – is a well "settled principle[]" in their favor. (Petition at 14.) They
4 simply cannot help themselves.

5 Their leading case, *Montgomery v. Etreppid Techs, LLC*, 548 F. Supp. 2d
6 1175, 1180 (D. Nev. 2008), acknowledges a wide split of authority, even noting that
7 its approach is not actually the "majority" rule. Further, numerous courts have
8 considered and held that a former high-ranking corporate executive can actually
9 compel from the company production of privileged documents to which that former
10 executive participated in the creation of, reviewed or had access to. *New Markets*
11 *Partners, LLC v. Sal. Oppenheimer Jr. & Cie*, 258 F.R.D. 95, 106 (S.D.N.Y. 2009);
12 *Wechsler v. Squadron, Ellenoff, Pleasant & Sheinfeld, LLP*, 994 F. Supp. 202, 211
13 (S.D.N.Y. 1998); *Glidden Co. v. Jandernoa*, 173 F.R.D. 459, 473-74 (W.D. Mich.
14 1997); *Gottlieb v. Wiles*, 143 F.R.D. 241 (D. Col. 1992); *Kirby v. Kirby*, 1987
15 WL 14862, *7 (Del. Ch. July 29, 1987); *Harris v. Wells*, 1990 WL 150445, *3-4
16 (D. Conn. 1990); *see also Inter-Fluve v. Montana 18th Jud. Dist. Ct.*, 112 P.3d 258,
17 264 (Mont. 2005) (to allow a company to assert the attorney client privilege against
18 former officer "would not promote the principles underlying the attorney-client
19 privilege.").¹⁴

20 Neither Jacobs nor the district court disputed the divergent approach of some
21 courts addressing the circumstances of when a former corporate officer could
22 compel production of privileged documents from the company, when they did not
23

24 ¹⁴ Petitioners also cite to *Commodity Futures Trading Comm'n v. Weintraub*,
25 471 U.S. 343 (1985) for their claim that Jacobs cannot have access to his
26 documents. Again, LVSC and Sands China ignore what the Court actually said. In
27 that case, the Court simply stated in dicta that a displaced manager may not assert a
28 privilege if the current managers do not seek to assert privilege. *Id.* at 348.
Weintraub does not speak to what happens when a former executive retains
possession of purportedly privileged communications that he authored, received or
was copied on during his tenure.

1 presently possess those documents. The cases cited by LVSC and Sands China of
2 *Montgomery*, 548 F. Supp. 2d at 1180 and *Milroy v. Hanson*, 875 F. Supp. 646
3 (D. Neb. 1995) are examples.¹⁵

4 Unremarkably, even when the point is actually at issue, it is often a matter of
5 some significance as to whether the former executive actually participated in
6 creating or truly had access to the documents at issue. *Compare Montgomery*,
7 548 F. Supp. 2d. at 1187 (noting that the executive "would have had access" to the
8 documents during his employ, but did not necessarily do so); *Milroy*, 875 F. Supp.
9 at 647 ("There has also been no showing that Milroy ever participated in any of the
10 meetings, conferences, or discussions that gave rise to the assertion of the
11 attorney-client privilege.").

12 The point is that even though this issue would not alter the outcome of the
13 district court's June 19 Order, LVSC and Sands China cannot help but exaggerate
14 and overstate what is plainly a hotly debated issue. The record in this case presents
15 no proper context for this Court to wade into the deep waters of when a former
16 executive can successfully compel production of attorney-client protected
17 documents. Jacobs sought and obtained no such relief from the district court in the
18 June 19 Order. Whether he will in the future remains to be seen. If and when he
19 does, there will be a record to address the point. But the district court's
20 June 19 Order – concluding that Petitioners had failed to establish claims of
21 privilege over documents that have long been in Jacobs' possession, custody and
22 control – does not present that highly debated issue.

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26 ¹⁵ Underscoring how LVSC and Sands China cannot pretend that this is not the
27 same issue presented by the failed injunction request in the Second Action, these
28 are the very same cases relied upon as serving as the basis for seeking immediate
injunctive relief in that case. (APP000132-33.)

1 **IV. CONCLUSION**

2 Extraordinary writ relief is not available in the face of a party's decision to
3 forego available legal remedies, particularly the district court's refusal to grant a
4 preliminary injunction over two years ago concerning these very same documents
5 and the same claims of privilege. Nor has LVSC or Sands China shown any
6 diligence in the assertion or promotion of their purported privileges. Despite being
7 well aware of Jacobs' possession and use of their purported privileged documents –
8 both before and after the Second Action – they effectively did nothing. Instead,
9 they stalled because that necessarily would delay the district court's ability to hold
10 the long-awaited evidentiary hearing over Sands China's personal jurisdiction
11 defense. Years of delay and inaction are not the recipe for emergency extraordinary
12 writ relief.

13 On top of that, LVSC and Sands China failed to present any actual evidence
14 to substantiate their claims of privilege, especially in the face of Jacobs'
15 longstanding possession and use of the documents in question. If anything, the
16 district court's June 19 Order protects LVSC and Sands China from the
17 consequences of their inaction. They face no irreparable harm now. Their
18 supposed privileges have been out for years.

19 LVSC and Sands China's latest petition for extraordinary writ relief – the
20 fifth that they have brought in this case – must be denied.

21 DATED this 5th day of August, 2013.

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1 **CERTIFICATE OF COMPLIANCE**

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

7 I further certify that I have read this brief and that it complies with the page
8 or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the
9 brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of
10 14 points or more and 10,582 words.

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

19 DATED this 5th day of August, 2013.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Pisanelli Bice, and that on this 5th day of August, 2013, I electronically filed and served a true and correct copy of the above and foregoing **ANSWER TO EMERGENCY PETITION FOR WRIT OF PROHIBITION OR MANDAMUS TO PROTECT PRIVILEGED DOCUMENTS** properly addressed to the following:

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