IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioners,

vs.

CLARK COUNTY DISTRICT AND THE HONORABLE ELIZABETH GONZALEZ, DISTRICT JUDGE,

Respondents,

and

STEVEN C. JACOBS,

Real Party in Interest.

District Court
Case No. A627691-B

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

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I. INTRODUCTION

The writ petition in this extraordinary proceeding was prompted by the district court's order directing defendants to produce more than 11,000 of their privileged documents to plaintiff Jacobs because he supposedly falls within an undefined "sphere of persons" who may inspect a corporation's privileged documents and use them against the corporation in litigation. Pet. at 1. The issue presented by the petition that this Court directed Jacobs to answer was framed as follows:

> Whether a corporation's former executive has a right to review the corporation's privileged documents, disclose them to his attorneys, and then use those documents against the company in litigation [i.e., *this* lawsuit].

Pet. at 4.

So how did plaintiff "answer" this issue of first impression that the Court found of "arguable merit"? Order Directing Answer, 06/28/13. After 20 pages of arguing questions neither the district court nor this Court considered, Jacobs tells the Court to disregard the district court's "privilege busting" order as a "fiction," sermonizing that "Petitioners should be thankful" for the aberrant order. He then returns to arguing meritless points the district court did not address and for which there is no factual support, all of which are premised on waiver or a variant of waiver — according to Jacobs, the defendants have by sloth or choice abandoned their right to recover the documents in issue that plaintiff surreptitiously took from them when he left the employ of defendant Sands China Limited ("SCL").

These baseless theories are preceded by a novel waiver argument not made at all in the district court: that defendants supposedly waived

privilege because SCL's parent company, Las Vegas Sands Corp. ("LVSC") filed a separate suit to recover the documents but then abandoned that suit to litigate the privilege issues in the instant suit instead. This contention is not only untimely, it is also wrong. Defendants did not "abandon" their privileges; they have been defending them in this suit (pursuant to a costly court-ordered review process that consumed over a year) *because this suit is the one in which the district court directed them to deal with privilege issues*. PA3225-26.

Plaintiff's waiver theories — however articulated— are without merit. The district court's June 19 Order states that it "does not need to address . . . whether Defendants waived the privilege" PA3141, ¶ 10. For this reason alone, this Court need not address waiver as an original appellate issue, as Jacobs invites the Court to do. "The question" presented by this Petition, as the district court acknowledged, is a pure question of law — whether plaintiff falls within some special, heretofore-unknown, undefined and unrecognized "sphere of persons" that can possess and use defendants' privileged documents against them in this lawsuit. *Id*. ¶¶ 10, 12. This is the only question before the Court.

Plaintiff's efforts to avoid the issue he was ordered to answer and forego addressing it in all but the most cursory manner underscores the obvious: the district court's June 19 Order is indefensible.[1]

[1] Consider the ad hominem caption to the statement of "Facts" in plaintiffs' answer: "Jacobs Shines Brightly Until He Questions Sheldon Adelson's Dictatorship." What does this splenetic remark have to do with the issue of privileged documents that are the core of the writ petition?

II. ARGUMENT

A. The District Court's "Sphere of Persons" Theory Is Indefensible.

1. Decisions on Point by State Courts and the United States Supreme Court Cannot Be Dismissed As "Irrelevant."

There is no dispute that the defendants are corporate "clients" and that they own the privileges in dispute. In fact, the district court acknowledged that "any privilege related to these documents in fact belongs to the Defendants." PA3027. A short time ago, the district court said it would be "happy to evaluate the claim of privilege" and was ready to receive additional information supporting that claim. PA2900. But then the court changed its mind. PA3141, ¶ 10. It decided that even if "Defendants had valid claims of privilege to assert to the documents as against outsiders," they could not assert privilege against *plaintiff*. *Id*. ¶¶ 11, 13. The court concluded that Jacobs is within a special "class" or "sphere of persons" legally entitled to view those documents and use them against defendants, because he is "a former executive" who obtained the privileged documents "before his termination" and he "is currently in possession . . . of the documents" (because he surreptitiously downloaded the documents in electronic form and took them with him after he was terminated). *Id*. ¶¶ 10, 12.

The Order is wrong and must be vacated for two reasons. First, Nevada law does not recognize *any* "sphere of persons" that can appropriate a client's privileged documents for use against the client. Indeed, Nevada law is expressly otherwise: Nev. Rev. Stat. 49.095 confers "a privilege [on the client]. . . to prevent *any other person* from disclosing" privileged communications. (Emphasis added). Second, even if such a

class of super-privileged persons existed, the U.S. Supreme Court has made it clear that plaintiff, as a former executive of SCL, does not belong in it: "when control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well." *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 349 (1985). Thus, "displaced managers" like plaintiff cannot exercise dominion or control over the corporation's privilege, "*even as to statements that the former [managers] might have made to counsel*." *Id*. (Emphasis added.)

Nevada's federal court found the Supreme Court's *Weintraub* ruling "very convincing" and held that a "former manager" who sued his ex-employer "may not access [the company's] attorney-client privileged communications." *Montgomery v. eTreppid Techs, LLC*, 548 F. Supp. 2d 1175, 1187 (D. Nev. 2008). Other courts have reached the same result. Pet. at 14-18 (collecting cases).

Unable to deal with this authority on the merits, plaintiff declares it "irrelevant." He asserts that these cases apply only when a former manager asks a court to help him *obtain* privileged documents. This case is "different," according to plaintiff (at 25), because he already possesses the privileged documents (because he took them *without* permission of the defendants or a court order allowing him to do so). This sophistic distinction is legally meaningless. The Petition shows that courts consistently apply the Supreme Court's analysis in *Weintraub* to former employees like Jacobs, who take privileged documents on termination. *See In re Marketing Investors Corp.*, 80 S.W.3d 44, 50 (Tex. App. 1998) ("We conclude the attorney-client privilege applies against" a terminated executive notwithstanding his "possession of the Corporate documents"); *Gilday v. Kenra, Ltd.*, No. 1:09–cv–00229–TWP–TAB, 2010 WL 3928593, at *1,

*4 (S.D. Ind. Oct. 4, 2010) (corporation "may assert the attorney-client privilege against [former employee], even as to privileged documents she accessed during her employment," and even though the former employee "copied several documents" and took them with her when she was terminated).

Likewise, this Court has never adopted plaintiff's view that an adverse party's mere possession of the client's privileged documents destroys their privileged status. The Court (and Nevada rules) require the adverse party to "promptly notify" the affected client so it can assert and preserve its privilege. Model Rules of Prof'l Conduct R 4.4(b); *Merits Incentives, LLC v. Eighth Judicial Dist. Ct.*, 127 Nev. Adv. Op. 63, 262 P.3d 720, 725 (2011). Jacobs just ignores these pertinent authorities and offers none to overcome them. His "ostrich" analogy (Answer at 6) is a good one, although it is he, not the defendants, who has his mind elsewhere than on the law that disapproves of his conduct and impeaches the district court's privilege-busting order.

The Courts' rejection of plaintiff's claim that possession trumps privilege makes good sense and sound judicial policy. Plaintiff's theory of entitlement by misappropriation essentially concedes that if he had not taken the documents at issue and instead had asked the district court to require defendants to produce those documents in discovery, the Supreme Court's *Weintraub* ruling would apply and he would lose. Thus, according to Jacobs, he escapes the law of privilege and renders *Weintraub* irrelevant by resorting to self-help—surreptitiously taking the privileged documents with him following his termination to use in litigation against his former employer in the future. To articulate plaintiff's position is to state the

reason it fails. Taking property of another does not confer the right to possess and use it against the owner.

2. Plaintiff's "Split Of Authority" Has Nothing To Do With The District Court's Error In This Case.

Plaintiff's next tactic to avoid application of the law to him is to claim that a "split of authority" exists on whether former executives can obtain their former corporate employer's privileged documents. Answer at 26. Although a few courts outside Nevada have allowed former managers to access privileged documents of a former employer, they have *not* done so using the district court's radical "sphere of persons" theory under review here. Instead, the cases plaintiff cites have invoked an entirely different theory that is inapplicable to Jacobs – that a former manager who was a "joint" or "collective" client of the corporation's attorney during the employment relationship may access joint client documents. This theory is irrelevant here because Jacobs *never even asked* the district court to adopt the joint-client theory nor does he ask this Court to adopt that theory now.

That is not surprising because there is no evidence to support the application of a joint-client theory here: Jacobs never even attempted to show that he consulted defendants' attorneys in his personal capacity. Furthermore, the "joint client" exception to privilege has been widely rejected. In the words of the Nevada federal court, the "seminal case" for the joint-client theory (the unpublished Delaware opinion in *Kirby v. Kirby*, 1987 WL 14862 (Del. Ch. 1987)) "relied on absolutely no authority at all" and "many more courts have rejected the reasoning" of the joint-client cases. *Montgomery*, 548 F. Supp. 2d at 1186; s*ee also Nunan v. Midwest, Inc.*, No. 2004-00280, 2006 WL 344550 at *7 (N.Y. Sup. Jan. 10, 2006) (describing joint-client cases as "discredited authority" and stating that "most of the

more recent cases embrace the view that . . . the privilege belongs to the corporation"); *Dexia Credit Local v. Rogan*, 231 F.R.D. 268, 277 (N.D. Ill. 2004) (stating that joint-client cases are "in this Court's view, as well as in the view of many other federal courts—unpersuasive"); *Fitzpatrick v. American Int'l Group*, 272 F.R.D. 100, 108-09 (S.D.N.Y. 2010) (rejecting joint-client theory because it "is fundamentally inconsistent with the rationale for the privilege" and because of its "perverse implications").

The June 19 Order of the district court erred by adopting an aberrant "sphere of persons" theory that would place Nevada far outside the legal mainstream. That a few courts in other jurisdictions have adopted a *different* erroneous outlier theory—one that even plaintiff does not argue would apply here—does not counsel in favor of upholding the district court's erroneous "special class" theory to give Jacobs the privileged documents of his former employer.

3. Plaintiff's Defense Of The "Sphere of Persons" Theory Is Undermined By The Very Cases Plaintiff Cites to Support It.

The only "circumstance" that plaintiff can point to in which courts have authorized the disclosure of a company's privileged communications is one not presented here: a dispute between a company and its former in-house attorney. Answer at 23. In their Petition, defendants showed that such cases are inapposite because they rely on an established exception to privilege that is limited to attorney-client disputes. *See Willy v. Administrative Review Bd.*, 423 F.3d 483, 496 (5th Cir. 2005) (relying on exception in model rule that allows a "*lawyer*" to reveal information "in a controversy between the *lawyer* and the client"); *Fox Searchlight Pictures, Inc. v. Paladino*, 106 Cal. Rptr. 2d 906, 922 (Ct. App. 2001) (relying on California

statute that provides an exception to privilege for "a communication relevant to an issue of breach, by the *lawyer* or the client, of a duty arising out of the *lawyer*-client relationship"). Similarly, Nevada's statutory exception for attorney-client disputes is expressly limited to "a communication relevant to an issue of breach of duty *by the lawyer* to his or her client or by the client *to his or her lawyer*." Nev. Rev. Stat. 49.115(3) (emphasis added).

The cases plaintiff features in his Answer to argue an exception to privilege, *Van Asdale v. International Game Technology*, 577 F.3d 989 (9th Cir. 2009), and *Kachmar v. SunGard Data Systems, Inc.*, 109 F.3d 173 (3d Cir. 1997), are additional but inapposite attorney-client cases. Neither case addresses disclosure of privileged documents through misappropriation by the person seeking to avoid the application of privilege. They merely decided that suits by former in-house attorneys could proceed. The courts ruminated about possible *safeguards* to *limit* the disclosure of privileged communications, but each expressly avoided any decision about discovery. *See Kachmar*, 109 F.3d at 181 ("It is premature at this stage . . . to determine the range of the evidence [the former attorney] will offer and whether or how it will implicate the attorney-client privilege."); *Van Asdale*, 577 F.3d at 995 ("[I]t is not at all clear to us to what extent this lawsuit actually requires disclosure of IGT's confidential information."). Neither case is "instructive" (Answer at 23) or even relevant to the district court's June 19 Order directing the release of thousands of privileged documents in this suit by a non-attorney. They clearly do not override the established principle that former managers may not defeat the corporate privilege by taking privileged documents with them when they leave their employment.

What plaintiff is trying to do here is to *rewrite* the narrow statutory exception for attorney-client disputes to cover "former employees" and self-described "whistleblowers." But that would require rewriting the privilege statutes, the rules of professional conduct, and the very opinions on which plaintiff relies. Plaintiff claims without any analysis (Answer at 24) that it is "nonsensical" to give attorneys "special" treatment, but he does not point to any authority that says by denouncing established law as "nonsensical" he may escape its application to him.

With the attorney-client cases out of his reach, Jacobs is left with a single New York decision: *People v. Greenberg*, 851 N.Y.S.2d 196 (Ct. App. 2008). But *Greenberg* is a one-off application of a unique New York law to a unique set of facts, neither of which is present here.

- *Greenberg* relied on New York law giving former directors a right to inspect corporate documents generated during their tenure. *Id*. at 199. Plaintiff does not point to any analogous law giving him similar rights.
- The corporation in *Greenberg* waived privilege by voluntarily producing many of its documents to the SEC. *Id*. at 202. Jacobs does not contend such a waiver occurred for the documents he took with him. Although he has advanced other waiver theories (*see* Section II.B) the district court did not reach them.
- In *Greenberg*, the former directors did not sue the corporation, as plaintiff has done here; to the contrary, the former directors and the company were aligned as defendants in a suit by the New York Attorney General. *Id*. at 198.

Plaintiff's Answer ignores the first two distinctions and omits critical facts concerning the third. He claims (at 23) that the directors in *Greenberg*

were "plainly adverse" to the corporation, but there is no escaping the fact that, unlike plaintiff, these directors did *not* sue their corporation. True, the company resisted production of privileged documents, but this was done because a voluntary production might "cause[] a waiver" with respect to others. Answer at 22. *Greenberg* does not support the district court's "special sphere" theory as an exception to the law of privilege involved in this case.

B. The Defendants Did Not Abandon or Otherwise "Waive" Their Exclusive Right to the Privileged Documents at Issue, Nor Did the District Court Consider Waiver.

The district court could not have been more clear: "[t]he Court does not need to address (at this time) . . . whether Defendants waived the privilege." PA3141, ¶ 10. Nevertheless, Jacobs tries to recast the district court's Order in this Court as a "waiver" decision, by asserting (Answer at 17) that the district court found that defendants did not meet their "burden" of disproving waiver. But that is not what the court said: the references to "burden" arise entirely in the context of the special-class theory adopted by the court and occur right after the district court said it would address *only* that theory and not plaintiff's separate arguments about waiver. After erroneously holding that a "sphere of persons" can use a corporation's privileged documents against it, the district court compounded its error by shifting the burden to defendants to *disprove* that Jacobs is a member of that "special class," saying that defendants "failed to sustain their burden of demonstrating that *Jacobs* cannot review and use [the] documents." PA3141, ¶ 11; *see also* PA3141, ¶ 13 (deciding that defendants "failed to sustain their burden of demonstrating" that their privileges "attach to the documents *relative to Jacobs' review and use of* them"). This is a remarkable

ruling; it requires the defendants to *prove* a negative, that plaintiff is not a member of a "special class" of persons that Nevada law does not recognize! Jacobs does not defend what the district court actually did; instead he wrenches the word "burden" out of context to support his waiver *theory du jour*, which the district court expressly said it would not consider.[2]

Notwithstanding this signal fact, the defendants will show that no waiver occurred.

1. The District Court Directed Defendants To Pursue Their Privilege Claims In This Case, Rather Than In A Separate Action.

Plaintiff's major "waiver" theory is based on abandonment: LVSC filed a separate lawsuit to recover the documents Jacobs secretly took with him following his termination (including the privileged documents at issue here), but abandoned the suit and chose to litigate the privilege issue in the present case instead. This theory of waiver appears nowhere in the district court's June 19 Order. Nor does it appear in any of the briefs plaintiff filed in the district court in support of his motion for release of the privileged documents. PA809-27, PA2955-76. This is a brand-new theory that plaintiff raises for the first time in his answer to the defendants' writ petition.

Under these facts and procedural circumstances, it is stunning that the first line of plaintiff's Answer accuses defendants of "fail[ing] to disclose" LVSC's separate lawsuit. Neither the district court nor plaintiff himself thought that lawsuit had any relevance to plaintiff's motion for

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[2] Plaintiff appears to be asking this Court to engage in a fact-finding exercise that the district court found unnecessary. That is, of course, something that this Court does not do. *See Zugel v. Miller*, 99 Nev. 100, 101, 659 P.2d 296, 297 (1983) ("This court is not a fact-finding tribunal.").

release of the privileged documents or to the district court's Order. As a result, the "waiver" introduced in this writ proceeding is plaintiff's. He did not raise the second, separate lawsuit as support for the district court's June 19 Order. "A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Dynamic Transit Co. v. Trans Pacific Ventures, Inc.*, 128 Nev. Adv. Op. 69, 291 P.3d 114, 119 n.4 (Dec. 2012) (quoting *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981)); *see also Pope v. Motel 6*, 121 Nev. 307, 319, 114 P.3d 277, 285 (2005) (declining to consider appellee's "alternative ground" for affirmance when appellee "did not raise this issue in the district court").

In any event, plaintiff's new theory is as substantively baseless as it is untimely. From the outset, defendants have sought to protect their privileges in *this* case, *e.g.*, by filing motions to prevent Jacobs from using their documents and asking the district court to compel him to return them. PA5-14. The district court expressed concern that it might not be able to address defendants' claims of privilege because this Court's August 26, 2011 Order "stay[ed] the underlying action" (PA3) except for matters relating to jurisdiction. PA3203-04, 3206. So as a precaution, LVSC filed a separate action addressing the documents Jacobs took, and the district court entered an interim order in that case, restraining plaintiff from disclosing or using the privileged documents. PA3193-95.

Jacobs then objected that the second suit was improper, because defendants' privileges "are all issues for the other case"—in other words, that the privilege issues belong in *this* case rather than the second suit. PA3220. In response to this objection, the parties agreed that the district court should establish a protocol for defendants to review the documents

and assert privilege, although they did not agree on specifics. PA3219, 3222. The district court decided that "[t]o the extent permitted under the stay order," it would "address the use of the documents . . . in the jurisdictional discovery before the evidentiary hearing on the jurisdictional issues that the Supreme Court has ordered in Case No. A-1627691" (*i.e.*, in this case). PA3225. It told the parties to work out a document review protocol, and dismissed the second case "without prejudice for you [defendants] to pursue it as a discovery dispute related to the jurisdictional evidentiary hearing issue" in the instant case (PA3226), which they did.

The defendants then spent several months (at great expense) negotiating a review protocol with plaintiff, more months negotiating modifications to the protective order, and still more months (at greater expense) reviewing nearly 100,000 files and preparing a privilege log with some 11,000 entries. Pet. at 5-8. Defendants' "hands" were most certainly not "idle" as plaintiff contends. Answer at 25.

Plaintiff now dismisses the 14-point protocol and the year-long process for privilege review it fostered as a meaningless exercise and a waste of time. He claims that instead of seeing that process through to its conclusion LVSC should have immediately appealed to this Court when the district court dismissed the second case and told defendants they could pursue recovery of the documents "as a discovery dispute related to the jurisdictional hearing issue" in *this* case. PA3226. That is absurd. The district court's orders in the second case did not aggrieve LVSC in any way. Indeed, LVSC achieved exactly what it needed in the second case: a temporary order preserving privileges while the parties worked out how to proceed in *this* case in light of this Court's stay of issues not related to jurisdiction. The second action was dismissed, but the order of dismissal

did so "without prejudice for you [LVSC] to pursue" its privilege objections in *this* case. PA3226. Both sides *and* the district court agreed that this case is the proper forum, so there was no reason for LVSC to appeal the dismissal, just as there is no legitimate reason to support plaintiff's contention that the dismissal and failure to appeal establishes waiver or abandonment of defendants' privilege claims.

2. Defendants Acted Promptly To Protect Their Privileges After Plaintiff Revealed That He Had Secretly Taken Defendants' Documents.

Plaintiff's other waiver arguments fare no better than his "second suit" theory. Waiver is "an intentional relinquishment of a known right." *Gramanz v. T-Shirts & Souvenirs, Inc.*, 111 Nev. 478, 483, 894 P.2d 342, 346 (1995). "In order to be effective, a waiver must occur with *full knowledge of all material facts.*" *Thompson v. City of North Las Vegas*, 108 Nev. 435, 439, 833 P.2d 1132, 1134 (1992) (emphasis added). Obviously, "a party cannot waive something unknown" to him. *Id*.

Here, defendants did *not* know that Jacobs had absconded from Macau with a vast storehouse of their proprietary documents, including thousands containing privileged and otherwise protected material, until his lawyer sent an email confessing that fact on July 8, 2011. *See* PA34-35, PA3089-90; PA3114-17. Even then, Jacobs's disclosure of what he misappropriated was woefully incomplete: his counsel initially stated that he had taken 11 gigabytes of data; months later, in late 2011, his counsel confessed that Jacobs had taken approximately 40 gigabytes of data (PA367, PA 494 § 2.5), but he *did not identify any specific documents* in this extraordinary mass of downloaded data he had taken that would inform of the defendants about the identity and number of privileged materials.

Thus, defendants did not have "full knowledge of all material facts" until they obtained access to the data through the court-approved protocol and completed their review in late 2012.

At any rate, upon receipt of plaintiff's July 8, 2011 confessional email, defendants acted promptly and vigorously to protect their rights. They began by securing a written commitment from plaintiff's counsel that they would "continue to refrain from reviewing the documents" and would not "produce them in the litigation until the issue is resolved by the Court." PA45. Then, as explained at length in the Petition (at 5-8), defendants vigorously pursued their privilege arguments by, among other things, filing appropriate motions, engaging in lengthy negotiations and hearings that resulted in a 14-point protocol for reviewing the data Jacobs had taken with him, and finally reviewing over 98,500 data files to produce a privilege log identifying approximately 11,000 documents that contain privileged or otherwise protected material.

This record unmistakably shows that Jacobs cannot establish that defendants by word or deed "intentional[ly] relinquish[ed] a known right" (*Gramanz*, 111 Nev. at 483), let alone that they did so with "full knowledge of all material facts" (*Thompson*, 108 Nev. at 439).

3. Plaintiff's Claim That Defendants Should Have Expected Plaintiff To Secretly Download and Make Off With Company Data Has No Basis In Law Or Fact.

Jacobs says the defendants should have known (or expected) that he would secretly download thousands of privileged documents and take them with him following his termination. This argument is contrary to both law and common sense. Plaintiff, like other employees, was bound by written company policies and his own fiduciary obligations *not* to take or

disclose the contents of the corporation's confidential documents. *See* PA192-200. Indeed, one of the essential rationales for the attorney-client privilege—and the reason why so many courts have held that ex-managers have no power over their former employer's privileges—is to enable a corporate client to communicate freely with its attorneys *without* fear that its employees will leave and use the company's privileged communications against it. *See Dexia*, 231 F.R.D. at 277.[3] This Court should not create an exception to the attorney-client privilege that would encourage terminated executives to purloin their former employers' privileged documents in violation of the executives' terms of employment and fiduciary duties.

Plaintiff next asserts (Answer at 4) that his counsel "confirmed [plaintiff's] possession of a 'multitude' of [SCL] documents" in a November 2010 letter, which is demonstrably wrong. The 2010 letter makes no such disclosure—which is why plaintiff does not actually quote the letter, but instead simply lifts the word "multitude" out of the letter and then manufactures the remainder of this condemnable assertion. *Id. In fact*, the 2010 letter merely states that "corporate executives are often . . . in possession of a multitude of documents during the ordinary course of employment." PA31. The letter's author did *not* disclose that his client, Jacobs, had helped himself to and had *taken with him* a "multitude" of defendants' documents following his termination. Nor did Jacobs's counsel

[3] Plaintiff offers the cynical assertion that defendants should have expected him to take their documents because (he now alleges) he was terminated for being a "whistleblower." Of course, defendants vigorously disagree with plaintiff's claims about the reasons for his termination. That is a dispute to be resolved at a trial of the merits. At any rate, secretly taking company documents, violating company policies, and suing the company and its parent for millions of dollars are hardly the actions one would expect of a self-anointed corporate saint, as plaintiff suggests he is.

identify specific documents that plaintiff took or disclose that some of the documents might be privileged. On the contrary, the lawyer pleaded ignorance about what documents plaintiff held, stating that he had not yet "had an opportunity to address the contents of your letter with my client, Mr. Jacobs." *Id*.

Equally baseless is plaintiff's argument (Answer at 5) that defendants should have known early on that Jacobs had taken massive quantities of privileged documents because he attached three emails as exhibits to his opposition to SCL's motion to dismiss. These documents are not privileged; furthermore, that Jacobs had *three* such documents in his possession (two of which were sent to him to advise him about his own compensation and SEC reporting requirements) was hardly enough to alert defendants that he had appropriated thousands of other privileged documents and intended to use them later against his former employer.

For the same reason, plaintiff's claim (Answer at 5) that following his termination defendants "focused on attempting to recover three documents" does not establish waiver. While SCL's counsel did demand the return of those specific documents, plaintiff's lawyers did not disclose that plaintiff had any other company documents, let alone the thousands of privileged documents defendants found two years later, when they were finally able to review what Jacobs took. PA3009, PA3011. Certainly plaintiff did not "reaffirm[] his possession of volumes of documents"—an expression of wishful thinking, unsupported by reference to any evidence. Answer at 5.

4. It Was Not Defendants' Burden to "Disprove" Waiver.

In Jacobs's view, defendants had to file "affidavits" proving that they *did not* know he took their proprietary documents before his attorneys disclosed that fact in July 2011. This is a throwaway contention designed to distract attention from the absence of facts or law that would support Jacobs' filching of the defendants' property.

First, plaintiff did not make this burden argument before the district court issued its June 19 Order. Moreover, the district court declined to reach the issue of waiver at all, let alone assign whose burden it would be to establish waiver.

Second, this Court has never held that a party whose privileged documents have been taken without his knowledge or permission must "disprove" that he has not relinquished his right to exclusive possession and confidentiality of the documents. On the contrary, the Court has held that, in general, the burden of proving waiver rests on "*the party asserting waiver*" (here, Jacobs). *Gramanz*, 111 Nev. at 483, 894 P.2d at 346. This is consistent with the statute defining the elements of privilege. It does not list "non-waiver" among the elements that a privilege-holder must prove to maintain a claim of privilege. Nev. Rev. Stat. 49.095. Rather, waiver is defined in a separate statute that does not assign a burden of proof. Nev. Rev. Stat. 49.385.

Third, shifting the burden of proof to defendants would be improper under the facts of this case. Unlike the out-of-state cases Jacobs relies on, this is not a case in which the waiver claim is based on the knowing disclosure of privileged communications by the privilege holder.[4] In that

[4] *See United States v. Mejia*, 655 F.3d 126 (2d Cir. 2011) (prisoner disclosed privileged matter in telephone call and conceded that he knew the call was

type of situation, it may make sense to put the burden of disproving waiver on the privilege-holder because he has better access to evidence about the nature and extent of the disclosure. Here, by contrast, Jacobs took the documents without defendants' permission, and therefore *he* should bear the burden of proving that defendants somehow waived their rights by supposedly not doing enough to retrieve them.

Finally, the evidence in the record for this writ proceeding is more than sufficient to refute plaintiff's waiver claim, no matter which party bears the burden of proof. The record plainly shows that in July 2011 plaintiff's attorneys revealed Jacobs's massive download of corporate documents, and defendants filed an affidavit to that effect when they first sought judicial relief. PA34-35, 37-38. The record also shows that defendants acted promptly to protect their rights by securing the agreement of plaintiff's attorneys not to review or disclose the documents until a ruling by the court might allow them to do so. PA40-45. The defendants promptly bought the issue to the district court. PA5-14. If plaintiff had in fact revealed his download of corporate documents before July 2011, he would be able to point to the date of the alleged earlier disclosure. Instead, he relies entirely on (i) a *post hoc* attempt to rewrite a November 2010 letter, and (ii) speculation that defendants should have

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being recorded by the Bureau of Prisons); *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18 (9th Cir. 1981) (privilege-holder disclosed communication with counsel in deposition, and also released communication to government); *Williams v. District of Columbia*, 806 F. Supp. 2d 44 (D.D.C. 2011) (privilege-holder disclosed protected documents to opponent in discovery and claimed disclosure was inadvertent). Plaintiff's other "burden" citation, *Aramony v. Paulachak*, 88 F.3d 1369 (4th Cir. 1996) did not even involve a claim of waiver; rather, the question was whether the party asserting privilege had an attorney-client relationship with an attorney representing his employer.

guessed that he would download company documents in violation of his fiduciary obligations and company policy.

This record establishes that plaintiff's waiver claims are baseless.

III. CONCLUSION

For the reasons set forth in this reply and in the Petition, petitioners/defendants respectfully request that this Court grant the Petition by: (1) declaring that a corporation's former CEO has no right to possess and/or use privileged communications of the corporation and its affiliates in a suit against those companies; and (2) directing the district court to vacate its June 19 Order to the contrary.

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CERTIFICATE OF SERVICE

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

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I further certify that I caused a copy of the **REPLY BRIEF IN SUPPORT OF EMERGENCY PETITION FOR WRIT OF PROHIBITION OR MANDAMUS TO PROTECT PRIVILEGED DOCUMENTS** to be hand delivered, in a sealed envelope, on **August 28, 2013** and to the addressee(s) shown below:

Judge Elizabeth Gonzalez
Eighth Judicial District Court of
Clark County, Nevada
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155

Respondent

DATED this 28th day of August, 2013.

By: /s/ PATRICIA FERRUGIA