IN THE SUPREME COURT OF THE STATE OF NEVADA

SANDS CHINA LTD., a Cayman Islands corporation,

Petitioner,

vs.

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

Respondents,

and

STEVEN C. JACOBS,

Real Party in Interest.

Case Number: 67576

District Court Case Number: A627691-B

PETITION FOR WRIT OF PROHIBITION OR MANDAMUS RE MARCH 6, 2015 SANCTIONS ORDER

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RULE 26.1 DISCLOSURE

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

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

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I. INTRODUCTION

A. The District Court's Sanctions Order—the Run-Up to a Jurisdictional Evidentiary Hearing on April 20, 2015

Petitioner Sands China Ltd. ("SCL") does business in Asia; it is at home in Macau where its principal place of business is located. SCL does not do business in Nevada, nor has it done so in the past. When the company was sued in Las Vegas by Plaintiff, it moved to dismiss for lack of jurisdiction, which the district court denied in 2011, holding that SCL's "pervasive contacts" with Nevada subjected it to personal jurisdiction in Las Vegas.

In August 2011, this Court granted SCL's writ petition, vacated the district court's order denying the company's motion to dismiss because the court did not specify what made up the "pervasive contacts" with Nevada, and ordered the district court to hold an evidentiary hearing and make findings of fact to determine whether SCL can be subjected to jurisdiction here. That jurisdictional evidentiary hearing is scheduled to take place on April 20, 2015 (the "April 20 hearing"), but SCL will not be permitted to participate and present its defense to jurisdiction then or ever, unless this Court grants this petition for mandamus. Here's why:

On March 6, 2015, the district court, following an evidentiary hearing on sanctions, entered its Decision and Order (the "Sanctions Order") prohibiting SCL from presenting any evidence at the April 20 hearing. Why? Because during "jurisdictional discovery," SCL redacted personal data (identity information) from documents located and produced from Macau, SCL's home jurisdiction, in compliance with Macau's Personal Data

Protection Act ("MPDPA") when it produced documents to Plaintiff in response to orders of the district court. There's more:

The district court also stated that it will draw an adverse inference at the hearing that all documents containing the redactions (which are not relevant to jurisdiction) "would contradict SCL's denials as to personal jurisdiction and would support [Plaintiff's] assertion of personal jurisdiction over SCL." Thus, SCL may not present its defense at its own jurisdictional hearing. And one more thing: The Sanctions Order requires SCL to pay $250,000 to various law-related organizations and to reimburse Plaintiff for his attorneys' fees.

The district court imposed these extraordinary sanctions, without explaining exactly why the redacted data was relevant to jurisdiction over SCL. Nor did the court dispute SCL's evidence showing that Macau's laws *required* SCL to make the redactions. Instead, the court largely adopted Plaintiff's conclusory assertions of "prejudice" and "willfulness" without providing any analysis of its own of the five factors this Court previously directed it to consider in its Order on August 7, 2014 in Case No. 62944 that allowed the sanctions hearing to proceed and resulted in the Sanctions Order that this Petition addresses.

Thus, the Sanctions Order brings us full circle 3-1/2 years after the Court reversed the district court for its failure to find facts to support its conclusion in 2011 that SCL is subject to personal jurisdiction in Nevada because of its "pervasive contacts" here.

The draconian sanctions imposed by the Sanctions Order, unless overturned by this Court, will ensure that SCL will be subject to jurisdiction ***not by evidence*** of its pervasive contacts with this state taken at

the April 20 hearing, as ordered by the Court in 2011, ***but by sanction*** for redacting personal data having no relevance to the jurisdictional issue. The Sanctions Order is a profound, clear abuse of the district court's discretion that jettisons the due process of law to which SCL and every litigant in Nevada's courts is constitutionally entitled. In order to allow this Court's review of the fundamental unfairness of the procedural status of this matter, SCL also requests postponement of the scheduled April 20, 2015 jurisdictional hearing before the district court.

B. This Court's Precedents Support Writ Review.

"This court has original jurisdiction to issue writs of prohibition and mandamus" and "also all writs necessary or proper to the complete exercise of its appellate jurisdiction." Nev. Const. Art. 6, § 4. Mandamus is the appropriate, and indeed the only, avenue available to SCL to challenge the district court's imposition of sanctions. *See Pengilly v. Rancho Santa Fe Homeowners Ass'n*, 116 Nev. 646, 5 P.3d 569 (2000) (Court lacked appellate jurisdiction to review contempt order); *City of Sparks v. Second Jud. Dist.*, 112 Nev. 952, 954, 920 P.2d 1014, 1015 (1996) (a writ of mandamus will lie to control a discretionary act where the district court's "discretion is abused or is exercised arbitrarily or capriciously") (overturning order imposing monetary sanction).

II. ISSUES PRESENTED BY THIS WRIT PETITION

(1) Whether the district court abused its discretion by concluding that Plaintiff had proven that SCL's redactions caused him "severe

prejudice" without determining whether the redacted data was even relevant to the jurisdictional issues before the court.

(2) Whether the district court abused its discretion by not properly considering the factors that this Court directed it to evaluate in determining what, if any, sanctions should be imposed on SCL.

(3) Whether the district court violated Due Process by imposing sanctions that (a) were grossly disproportionate to the nature of the alleged violation; and (b) deprived SCL of the opportunity to present any defense in the April 20 jurisdictional hearing.

III. STATEMENT OF FACTS

A. Plaintiff's Claims.

Plaintiff Steven C. Jacobs was formerly the CEO of SCL, which operates gaming, hotel and other business ventures in Macau through its wholly-owned subsidiary, Venetian Macau Ltd. ("VML"). March 6, 2015 Order ("March 6 Order"), PA43793 ¶¶ 1-3. SCL's stock is publicly traded on the Hong Kong Stock Exchange. *Id.* LVSC is SCL's majority shareholder. *Id.*

Jacobs was terminated as SCL's CEO in July 2010. *Id.* Three months later, he filed this lawsuit, claiming that LVSC had hired and then wrongfully terminated him. *Id.* Jacobs asserted only one claim against SCL, alleging that it breached a contractual obligation by refusing to honor Jacobs' attempt to exercise options to purchase 2.5 million shares of SCL

stock.[1] The option agreement (which was offered to Jacobs in China) provides that it is governed by Hong Kong law.

In December 2010, SCL moved to dismiss on the ground that SCL does business exclusively outside the United States and thus is not subject to the jurisdiction of the Nevada courts. After the district court denied the motion, SCL sought an extraordinary writ in this Court. *Id.* ¶¶ 4-5.

On August 26, 2011, this Court issued its Order Granting the Petition for Mandamus. PA234-37. In its Order, the Court directed the district court "to revisit the issue of personal jurisdiction" over SCL "by holding an evidentiary hearing and issuing findings regarding general jurisdiction," while staying all aspects of the underlying action "except for matters relating to a determination of personal jurisdiction." *Id.*

B. The District Court Allows Plaintiff to Take Jurisdictional Discovery.

On remand, the district court issued an order allowing Plaintiff to pursue jurisdictional discovery, including the depositions of four high-ranking LVSC executives (Sheldon Adelson, Michael Leven, Robert Goldstein, and Kenneth Kay) and document production in 11 broad categories of documents. PA539-44.

In December 2011, Plaintiff issued 24 Requests for Production of Documents ("RFPs") to SCL and LVSC. On March 22, 2012, the district court entered a Protective Order that expressly allowed the parties to redact information to comply with the MPDPA. PA547**,** ¶¶ 4(a), 7.

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[1] The district court recently allowed Jacobs to file a Third Amended Complaint, which adds conspiracy and defamation claims against SCL.

Defendants thereafter began producing responsive documents, most of which focused on LVSC's interactions with SCL.

C. The Discovery Obligations Imposed on SCL Conflict with Macau's Data Protection Act.

SCL did not immediately produce documents raising Macau data privacy issues in response to Plaintiff's RFPs because it was trying to persuade Macau's Office of Personal Data Protection (the "OPDP") to permit the transfer of documents containing personal data to the United States. PA4396 ¶¶ 10, 12; PA15911-30. SCL's subsidiary, VML, had initiated these discussions a year earlier, in May 2011, shortly before SCL alerted the district court to the potential impediment to document production posed by the MPDPA. PA4396 ¶ 9.

Prior to September 2012, SCL's General Counsel personally met with the OPDP on about a dozen occasions. PA4143:3-12. He testified that he obtained advice from Macanese lawyers and approached the OPDP "to see how we could overcome what I perceived to be a potential problem in delivering documents which had personal data." PA4114:21-23. Macanese officials told the General Counsel that "'under no circumstances could data of a personal nature be transmitted to Las Vegas in accordance with any requirement imposed on SCL'" without either the consent of the data subject or OPDP's approval. PA4115:1-18.

VML made several attempts to secure the OPDP's approval, arguing that it, as the data controller, had a legitimate reason for processing personal data to search for responsive documents and for transferring that data outside of Macau. PA4143:3-12; PA4396 ¶ 12 . It also suggested that,

insofar as this case is concerned, the interests of the data subjects could be protected through a protective order. PA15928. The OPDP rejected that position, and on August 8, 2012 refused to allow VML even to search data containing personal information in order to respond to the RFPs issued to SCL. PA15911-30.

D. The District Court's September 14, 2012 Order.

In June 2012, Defendants disclosed to the court that in 2010 LVSC had transferred over 100,000 emails and other ESI for which Plaintiff was the custodian from Macau to the United States for document preservation purposes. PA587:7-8. Defendants explained that the transfer was made "in error"—that is, without considering the ramifications of the MPDPA—and that it had not previously been disclosed because Defendants were concerned that producing the documents might constitute additional violations of the MPDPA. PA587:8-13. However, after meeting with OPDP, Defendants concluded that Macanese law did not preclude production of documents that had previously been transferred out of the country. PA587:6-16. Defendants promised to search all of the transferred data for responsive documents. PA587.

After Defendants disclosed the transfer of Plaintiff's ESI to the U.S., the district court *sua sponte* convened the first sanctions hearing from September 10-12, 2012. The hearing was to focus on whether the outside lawyers appearing before the district court had violated their duty of candor in not revealing the existence of the transferred data prior to the June disclosure. At the conclusion of the hearing, the court issued an order making no findings as to the outside lawyers, but shifting its focus to a

finding that the Defendants had "concealed" the transfer from the court prior to voluntarily disclosing it on June 27, 2012. PA1364 ¶ 30.

Based on this finding, the court sanctioned Defendants by, among other things, precluding them "[f]or purposes of jurisdictional discovery and the evidentiary hearing related to jurisdiction . . . from raising the MPDPA as an objection or defense to admission, disclosure or production of any documents." PA1367 ¶ b.

E. Macau Insists on Strict Compliance with its Data Privacy Act.

After Defendants publicly disclosed the 2010 transfer of Plaintiff's data from Macau to the United States, the OPDP initiated an investigation to determine whether that transfer violated the MPDPA. PA4633:13-4634:12; PA4397 ¶ 14. On August 2, 2012, Macau's Secretary for Economy and Finance announced that if the government found "any violation or suspected breach" of Macau's data privacy laws, government officials "will take appropriate action ***with no tolerance***. Gaming enterprises should pay close attention to and comply with relevant laws and regulations." PA4636:18-25 (emphasis added).

On August 8, 2012, the OPDP rejected SCL's request to transfer data to the United States to respond to document requests in this case and other matters. PA15911-30. The OPDP stated that SCL did not have "the legitimacy" under the MPDPA even to process the data, let alone to transfer it outside of Macau. Thus, the OPDP barred SCL from even searching relevant data to determine whether there were responsive documents in Macau. PA15914. The OPDP also warned SCL in writing that consents to data transfers had to be "freely" given, "specific" and "informed" and that,

particularly insofar as SCL's employees were concerned, it was important to ensure that the data subject was not "influenced by his or her employer" and was able to freely make a choice to consent or not. PA15921.

In October 2012, SCL retained new U.S. counsel, who travelled to Macau to meet with the OPDP in an attempt to convince the agency to reconsider its position. PA4144:13-18; PA1433:9-14. Following that meeting, the OPDP agreed to allow VML to search for documents responsive to Plaintiff's jurisdictional RFPs, so long as Macanese lawyers reviewed the documents identified as responsive. PA4109:13-22. Beginning at the end of November 2012 the deputy director of the OPDP advised SCL monthly that the company was not to transmit data out of Macau unless it had the data subject's consent. PA4115:1-18.

F. The District Court's December 18, 2012 Ruling.

On November 21, 2012, Plaintiff filed a Rule 37 motion claiming that SCL should be sanctioned because it had not yet reviewed the electronically-stored information in Macau. In response, SCL filed a motion for a protective order, stating that the OPDP had authorized the review of documents in Macau but had stated that Macanese lawyers would either have to redact the data or get consents. PA1433:9-24. SCL asked the court to allow it to limit its search to documents for which Plaintiff was the custodian, on the ground (among others) that Plaintiff already had the documents relevant to his jurisdictional case and that fundamental principles of fairness and proportionality required the court to limit SCL's production obligations.

On December 18, 2012, the district court denied Plaintiff's motion for sanctions on the ground that it had ***never*** entered an order requiring SCL to produce specific documents. PA1690:24-1691:1; 1686:20**.** The district court also denied SCL's motion for a protective order and ordered SCL to immediately produce all documents "relevant to jurisdictional discovery," giving it only 17 days, including Christmas and New Year's, to accomplish that task. PA1686:12-18. The district court did ***not*** order SCL to use Plaintiff's list of merits custodians, but rather left it to SCL to decide whose documents should be searched for jurisdiction purposes. At the same time, the district court in response to counsel's question stated "I didn't say you couldn't have redactions." PA43827 ¶ 64.

G. SCL's Response to the December 18, 2012 Ruling.

After the district court ruled, SCL immediately contacted FTI Consulting ("FTI") to handle the technical work in Macau. PA4420:9-12). FTI sent representatives from the United States and Hong Kong to set up a technology processing center at the Venetian Macau and built a dedicated server to collect, process, and search data. PA4422:3-15, PA4476:16-19. Once potentially relevant documents were identified through the use of search terms, Macanese contract lawyers reviewed the documents for responsiveness and then redacted all personal information before the documents were transferred to the United States for further processing and production. PA4508:6-17.

Between January 2 and 4, 2013, SCL produced 4,707 documents from Macau consisting of about 27,000 pages, most of which contained personal data redactions. PA15876. However, SCL also undertook extensive efforts

to locate duplicates of the documents produced from Macau in the United States, so those documents could be produced without MPDPA redactions.[2] PA43814 ¶ 93. This additional work increased SCL's costs to approximately $2.4 million. PA4438:11-13.

H. The District Court's March 27, 2013 Ruling.

At the district court's suggestion, PA1735:23-24, Plaintiff filed a renewed motion for sanctions on February 8, 2013 claiming, *inter alia*, that SCL had violated the court's December 18, 2012 Order and its September 14, 2012 Order by producing documents with MPDPA redactions.

In opposing the motion, SCL argued that it had not violated the court's prior orders, and cited the extensive steps taken by Defendants to mitigate the effects of the personal data redactions. PA1929-46. SCL explained that (1) LVSC had located 2100 duplicates of the redacted documents in the U.S. and produced them in unredacted form; and (2) SCL had created a "Redaction Log" that identified the entity that employed the individuals whose personal data was redacted. SCL also stressed that if Plaintiff identified any specific redacted documents that he believed could

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[2] In particular, SCL's vendor, FTI, transferred the hash code values of the documents located in Macau (which do not contain personal data) to the United States and searched LVSC's documents for duplicates. PA4428:21-4429:4. FTI also transferred the documents it had collected in the United States for LVSC to Macau and performed 11 separate search iterations in an attempt to locate documents in the LVSC database that were duplicates of the documents that SCL had located in Macau. PA4432:8-19, 4436:2-20. FTI was able to locate thousands of duplicate documents in the U.S., which were subsequently produced without MPDPA redactions in a series of replacement productions. (*Id*.).

be relevant to the jurisdictional issue, SCL would conduct additional searches for unredacted copies of such documents in the U.S. or attempt to obtain the consents of the specific individuals whose information was redacted. PA1941:15-1942:2; PA43717. Plaintiff never responded to SCL's offer.

On March 27, 2013, the Court issued an order finding that SCL had violated its September 14, 2012 order by redacting personal data from its January 4, 2013 production based on the MPDPA. PA2258:14-18. Although the order did not expressly prohibit redactions (and SCL did not understand the order to prohibit redactions of documents then in Macau, *see* PA4658:5-22; PA1689:8-11), the district court concluded that the redactions constituted a violation of its September 14, 2012 order. Accordingly, the court set a date for a hearing to "determine the degree of willfulness related to those redactions and the prejudice, if any, suffered by Jacobs." PA2258:14-18. The court also ordered SCL to search and produce by April 12, 2013 the documents of the 20 custodians that Plaintiff had identified for *merits* discovery. Finally, the court precluded Defendants from "redacting or withholding documents based upon the MPDPA." PA2258:19-59:3.

I. Defendants Seek Relief in This Court.

On April 8, 2013 Defendants filed for a Writ of Prohibition or Mandamus in this Court. While that writ petition was pending, the district court stayed its March 27, 2013 Order to the extent that it required the production of additional documents from Macau and postponed the planned sanctions hearing. On August 7, 2014, this Court denied

Defendants' Petition on the ground that its intervention would be premature before the district court decided if, or the extent to which sanctions, if any, were warranted. August 7, 2014 Order in Nevada Supreme Court Case No. 62944, on file herein, at 11-12. This Court then specified the factors that the district court must consider in determining "what sanctions, if any, are appropriate." *Id*. at 7-8.

J. SCL Seeks Relief Based on *Daimler AG*.

In January 2014, the U.S. Supreme Court issued a major ruling dealing with general jurisdiction. In *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 (2014), the Court held that the key issue in determining general jurisdiction is not where the corporation "does business," but where it is "at home"—a standard that typically will be met "***only*** where [the corporation] is incorporated or has its principal place of business.'" *Viega GmbH v. Eighth Judicial Dist.*, 130 Nev. Adv. Op. 40, 328 P.3d 1152, 1158 (2014 (Case No. 59976)) (emphasis added).

Based on *Daimler AG*, SCL filed a motion to recall this Court's August 26, 2011 mandate directing the district court to hold an evidentiary hearing on the issue of personal jurisdiction. *See* January 28, 2014 Mot. To Recall Mandate in Nevada Supreme Court Case No. 58294, on file herein. SCL argued that *Daimler AG* precludes the exercise of general jurisdiction over SCL in Nevada because SCL is a Cayman Islands corporation with its principal place of business in Macau. This Court denied SCL's motion on May 19, 2014, on the ground that "even under *Daimler AG*," the district court needed to make certain factual findings to resolve the jurisdictional

issue. *See* May 19, 2014 Order in Nevada Supreme Court Case No. 58294, on file herein.

On June 26, 2014, SCL filed a motion for summary judgment on jurisdiction, arguing that *Daimler AG* demonstrates that plaintiff's theories of general jurisdiction are no longer legally viable. PA2467-2478. In response to that motion, plaintiff argued, for the first time, that SCL's principal place of business was in Nevada because Nevada was supposedly SCL's "nerve center," where all key decisions are made. PA2502-2504. Plaintiff cross-moved for summary judgment. The district court denied both motions without any analysis of the legal issues the parties had raised, on the ground that unspecified issues of fact required an evidentiary hearing.

In October 2014, SCL raised *Daimler AG* again in a motion to reconsider the previously stayed portion of the district court's March 27, 2013 Order requiring SCL to produce unredacted documents from Macau. In its motion, SCL explained that *Daimler AG* repudiated at least two of Plaintiff's general jurisdiction theories. First, SCL could not be found to be "at home" in Nevada merely based on its purchase of goods and services from entities located in Nevada. *See Daimler AG*, 134 S. Ct. at 757. Second, SCL could not be sued in Nevada on the theory that LVSC acts as SCL's agent because *Daimler* specifically rejected that theory. 134 S. Ct. at 759-60.

SCL explained that in light of *Daimler* many if not most of Plaintiff's RFPs were utterly irrelevant, and that, in any event, LVSC's production of thousands of unredacted documents from Las Vegas provided the jurisdictional information that Plaintiff had requested. PA2745-50. SCL also noted that it had secured MPDPA consents from Messrs. Adelson,

Leven, Goldstein and Kay—the four LVSC executives Plaintiff had deposed—and that their names had been "unredacted" from the Macau documents. PA2750. Finally, SCL noted that it had asked Plaintiff to consent to have his personal data unredacted to facilitate discovery to him, but he refused to do so. PA2743.

The district court denied SCL's motion to reconsider. SCL thereafter produced the remaining documents from Macau, with personal data redacted except for the data of the four individuals who had given their consent.

Thus, at the time of the second sanctions hearing last month, SCL had produced over 17,500 documents—including approximately 9,600 documents containing no MPDPA redactions—in response to jurisdictional discovery. *See* PA15876; PA3066-3889; PA43505:1-6. In total, Defendants had produced over 41,000 documents consisting of more than 290,000 pages. *See id*. In addition, Defendants had made four of their executives available for deposition on the issue of jurisdiction. PA539. Finally, Plaintiff had in his possession approximately 40 gigabytes of data that he had taken from Macau following his termination. PA43828 ¶ "b."[3]

K. The Second Sanctions Hearing.

From February 29 to March 2, 2015, the district court conducted a second sanctions hearing in which SCL presented evidence addressing each of the factors identified in this Court's August 7, 2014 Order.

[3] By referencing the district court's order, SCL does not waive claims of privilege, and expressly reserves all rights with respect to the documents.

1. The Evidence Presented at the Hearing.

At the Hearing, Plaintiff called LVSC's Executive Vice President and Global General Counsel, who described the investigations conducted by U.S. lawyers in Macau and the access they had to Macanese documents. PA4014-4061. In an attempt to support his prejudice claim, Plaintiff cited only 27 redacted documents out of the more than 7,900 redacted documents produced by SCL. *See* PA4711-12, 4713-15, 4716-18, 4719, 4720, 4721-22, 4724-27, 4728-33, 4735-36, 4737, 4738-39, 4740-44, 42850-55, 42853, 42854-55, 42857, 42858, 42860-66, 42868-73, 42877-42877-A, 42878-42879-B, 42880, 42881-83, 42885-93, 42895-96, 42899, and 42901-02. Plaintiff provided no explanation of how the redacted personal data in those documents (or in any others) could be relevant to the jurisdictional issue.

Through videoconferencing, SCL presented the testimony of its General Counsel (from Macau and Hong Kong) and its Chief Financial Officer (from Macau). PA4106, 15555. SCL's General Counsel testified that he made the decision to redact the personal data in the Macau documents following a series of meetings with the OPDP. PA4109:13-22. As a result of those meetings, the General Counsel concluded that he had "no choice" but to redact personal information from the documents. PA4110:8-18. He explained that in light of the "very strict approach" taken by the OPDP, a decision not to redact the data would have been "irresponsible for a public company" and "contrary to my fiduciary obligations to protect the company and its shareholders." *Id*.; PA4636:14-24. He also noted that the OPDP had sanctioned VML in April 2013 for the 2010 transfer of Plaintiff's ESI to the United States. He added that the OPDP could impose additional fines for subsequent violations (up to 80,000 Macau dollars per event) and

that corporate officers and directors could be subject to imprisonment of up to two years. PA4118:22-4119: 2.

SCL also presented the testimony of a representative of FTI, the e-discovery vendor retained by Defendants to search for and produce documents. PA4408. The FTI representative testified to the processes used to search for responsive documents. PA4408-4451.

2. The District Court's March 6, 2015 Order

On March 6, 2015, the district court issued an order finding that SCL had acted willfully and intentionally "to prevent the Plaintiff access to information discoverable for the jurisdictional proceeding." PA43827 ¶ "a." The court further found that Plaintiff had been "severely prejudiced" because he had been denied access to the redacted information, could not determine whether he "has received all of the discovery to which he is entitled," and had suffered delays in the litigation. PA43823 ¶ 140.

Based on these findings, the district court issued its March 6, 2015 Order precluding SCL from presenting any testimony or evidence at the jurisdictional hearing. PA43828 ¶ "c." In the Order, the court stated that it would also draw a rebuttable adverse inference (that SCL is prohibited from countering by testimony or documents) that documents with MPDPA redactions would support Plaintiff's jurisdictional theories (whatever they might be). PA43828 ¶ "d." Finally, the court ordered SCL to (1) pay a total of $250,000 to various law-related organizations; (2) conduct certain searches of Macau data that had been transferred to the U.S.; and (3) pay Plaintiffs' attorneys fees. PA43829.

IV. STATEMENT OF REASONS THE WRIT SHOULD ISSUE

The district court's decision imposing unprecedented sanctions of exceptional severity was an abuse of discretion warranting this Court's review. To appreciate the magnitude of the district court's errors, it is first necessary to review five critical facts that provide the context for the issues presented in this Petition.

First, under this Court's mandate**,** the sole issue before the district court was whether it has jurisdiction over a foreign corporation doing business in Macau. Under controlling law, this question generally involves a simple determination of where the foreign corporation is incorporated or where it maintains its principal place of business, which needs little discovery. Yet, in this case, the district court required both SCL and LVSC to provide discovery on a massive scale that is unprecedented and unnecessary in jurisdictional proceedings, including multiple depositions, the production of thousands of documents, and the creation of a special "Relevancy Log" to identify all documents that SCL withheld on grounds that they were irrelevant to jurisdiction. The resulting log is 37,000 pages. PA5263-15465, PA15951-42828.

Second, the alleged violation in this case differs in two dispositive respects from the violations in virtually every other case involving major discovery sanctions: (1) the alleged violation here consists of *redactions*, not a wholesale refusal to ***produce*** documents; and (2) the district court made ***no finding*** that the redacted data (which consists primarily of the names of Macanese residents) was in any respect relevant to the jurisdictional issue. The case thus presents a stunning contrast between the nature of the

alleged discovery violation and the disproportionately punitive sanctions imposed by the district court.

Third, SCL went to great lengths and expense to provide alternative sources for the redacted data in an effort to accommodate its discovery obligations within the framework of the MPDPA, the law of its home jurisdiction. Among other things, SCL requested a search in the U.S. for unredacted copies of the Macau redacted documents, and it obtained "consents" from LVSC's key executives to waive their rights under the MPDPA so that their names could be "unredacted" from the Macanese documents. SCL also asked Plaintiff to provide a similar waiver, *but he refused to do so*—thus invoking (ironically) his own rights under the MPDPA in a transparent effort to manufacture prejudice.

Fourth, the district court found that SCL redacted the personal data with an intent to prevent Plaintiff from obtaining "discoverable information." Yet nowhere in its Order did the district court provide *any* factual support for this critical finding. Nor did the court explain how this finding could be reconciled with (1) the undisputed evidence showing that the Macanese government *required* SCL to make the redactions; and (2) SCL's extensive efforts to find alternative ways to provide Plaintiff with the redacted information (such as searching for duplicate copies in the U.S. and securing "consents" from key executives). Finally, the court, in divining SCL's "intent," wholly ignored the compelling fact that SCL had absolutely ***no motive*** to redact the personal information for litigation advantage because the redacted data had no evidentiary value at all.

Fifth, the district court's Sanctions Order denies due process of law to SCL. The Order bars SCL from introducing any witnesses or evidence in

the jurisdictional evidentiary hearing the Court ordered the district court to hold 3-1/2 years ago. As a result, the Order prohibits SCL from affirmatively defending itself at its own jurisdictional hearing! The Order also gives the district court virtually unbounded discretion in deciding the jurisdictional issue, permitting it to draw the non-specific inference that all of the redacted documents "*would contradict SCL's denials as to personal jurisdiction and would support Jacobs' assertions as to personal jurisdiction*." (emphasis added). By reducing the jurisdictional hearing to a show trial in which SCL can present no evidence, these provisions violate both due process and NRCP 37.

Based on these facts—and for the reasons set forth below—the district court's decision was an abuse of discretion that should be vacated.

A. The District Court's Sanctions Order Rests on Both Legal and Factual Errors

In its August 7, 2014 Order, this Court identified the following five factors as relevant in determining "what sanctions, if any," should be imposed in a case involving an international data privacy statute:

1. the importance to the investigation or litigation of the documents or other information requested;
2. the degree of specificity of the request;
3. whether the information originated in the United States;
4. the availability of alternative means of securing the information; and
5. the extent to which noncompliance with the request would undermine important interests of the United States or compliance with the request would

> undermine importance interests of the state where the information is located.

(Aug. 7, 2014 Order, at 7-8). *Id.* at 7-8 (quoting the Restatement (Third) of Foreign Relations Law § 442(1)(c) (1987)). Under settled law, these factors require a court to engage in a "particularized analysis" that includes a careful balancing of competing interests and sets forth the specific facts supporting each of its conclusions. *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 543-44 n.29 (1987). In this case, the district court failed to conduct the requisite analysis in dealing with each of the five factors.

1. The District Court Made No Factual Findings that the Redacted Personal Data Was "Important" to the Jurisdictional Issue

The first factor cited by this Court—the "importance" of the withheld information—requires an assessment of two issues: (1) whether the evidence sought is "cumulative of existing evidence," *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1475 (9th Cir. 1992); and (2) whether the evidence is "essential" to the proof of Plaintiff's case. *Linde v. Arab Bank, PLC*, 269 F.R.D. 186, 193 (E.D.N.Y. 2010).

In this case, the district court made ***no detailed factual findings***—and provided no "***particularized analysis***"—on either issue. In addressing the "importance" of the redactions, the court cited no specific facts showing that the redacted information was "essential" to Plaintiff's ability to prove his jurisdictional claims. *See* PA43819 ¶ 118. Indeed, the court did not identify a single jurisdictional issue as to which the redacted data would be marginally relevant, much less "essential" or "important." *Id.* Instead, the

court relied entirely on conclusory assertions drawn from Plaintiff's proposed findings that likewise are unsupported by reason or specific facts. *See id.*

For example, the district court asserted that the redacted data was "important" to Plaintiff's ability to "test the adequacy of the search results," without explaining why the redactions would have this effect. PA43819 ¶ 18. Similarly, the court asserted that Plaintiff could not prove his jurisdictional case without knowing the "identities" of the redacted names in the Macau documents, but it provided no explanation as to why. PA43821 ¶ 127. Likewise, the court asserted that the personal redactions "effectively destroyed the evidentiary value" of the redacted documents, but it provided no explanation—and cited no examples—to support the claim. PA43816 ¶ 102, 43817 ¶ 108, 43821 ¶ 127.

With respect to the "non-cumulative" issue, the district court made *no finding of any kind* showing that the redacted data was non-cumulative to all the other evidence produced by Defendants, or the 40 megabytes of data that Plaintiff took with him from Macau. Indeed, the Order did not even describe the enormous amount of jurisdictional discovery produced by Defendants, much less explain why the redacted data was not cumulative in light of that enormous production.

Three characteristics of the redacted documents explain why the court was unable to make any findings showing that the redacted documents are "important:": (1) with rare exceptions, the redactions do not obscure or eliminate the central meaning of the documents; (2) even if the redactions do obscure the meaning, an unredacted copy provided by LVSC

is often available;[4] and (3) in most if not all of the redacted documents, the contents reflect SCL personnel discussing mundane topics, such as the logistics of Board meetings in Macau. *See*, *e.g.*, PA42853 (discussing the location of an event); PA42877 (list of purchase orders of gaming equipment).

Thus, at the sanctions hearing, Plaintiff failed to present *any evidence* showing that the redacted data was relevant to any jurisdictional issue, even though he bore the burden of proof to show "prejudice." To support his request for sanctions, Plaintiff presented *only 27 documents* (out of a total SCL production of more than 7,900 redacted documents) which he claimed were either "unintelligible" or otherwise not usable. *See* PA4711-12, 4713-15, 4716-18, 4719, 4720, 4721-22, 4724-27, 4728-33, 4735-36, 4737, 4738-39, 4740-44, 42850-55, 42853, 42854-55, 42857, 42858, 42860-66, 42868-73, 42877-42877-A, 42878-42879-B, 42880, 42881-83, 42885-93, 42895-96, 42899, and 42901-02. Yet even as to these documents Plaintiff could make no showing of prejudice. In the case of 15 of the 27 exhibits, LVSC had provided unredacted copies of the same documents (s*ee* documents

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[4] *Compare* PA4738-39 (Pl.'s Ex. 77) *with* PA42904-06 (SCL's Ex. 370); PA4719 (Pl.'s Ex. 28) *with* PA42908 (SCL's 372); PA4721-22 (Pl.'s Ex. 38) *with* PA42909-10 (SCL's 373); PA4735-36 (Pl.'s Ex. 62) *with* PA42911-12 (SCL's 374); PA42850-51 (SCL's Ex. 355) *with* PA42852-53 (355A); PA42852 (SCL's Ex. 357) *with* PA42856 (357A); PA42860-66 (SCL's Ex. 360) *with* PA42867 (360A); PA42868-73 (SCL's Ex. 361) *with* PA42874-42876-D (361A); PA42881-83 (SCL's Ex. 365) *with* PA42884-42884-B (365A); PA42885-93 (SCL's Ex. 366) *with* PA42894-42894-H (366A); PA42895-96 (SCL's Ex. 367) *with* PA42897-42898-A (367A); PA42900 (SCL's Ex. 368) *with* PA42900 (368A); and PA42901-02 (SCL's Ex. 369) *with* PA42903-42903-A (369A). These documents are also demonstrated side-by-side in SCL's closing argument presentation at PA43612-43617, PA43625, 43628-37, 43659-77, and 43744-89.

identified in n.4, *supra*), while four other exhibits pre-date SCL's corporate existence (s*ee* PA42853, PA42868-73, 42877-877-A, PA42901-02, and PA43638-40), and the remaining eight exhibits have irrelevant content, such as venues for lunch and a list of gaming equipment purchase orders (*see*, e.g., PA43645-6, 4737).

The following pages display one of the 27 supposedly "prejudicial" documents *cited by Plaintiff* and the unredacted version provided by Defendants.

REDACTED

Retention of Persona Law Firm

From:
Personal Redaction @venetian.com>

To:
"Personal Redaction @lasvegassands.com>, "Personal, "Personal @glprop.com>, "Personal Redaction @venetian.com.mo>, Personal "Per @pacificbasin.com>, "Personal Redaction @kcs.com>, Person @pacific-alliance.com, "Personal " <Personal @venetian.com>

Cc:
"Personal Redaction @lasvegassands.com>, "Personal Redaction @venetian.com.mo>

Date:
Thu, 02 Sep 2010 11:50:45 +0800

Attachments:
Written_Resolution_Appointment_Macao_Counsel.txt (2.68 kB)

Dear Board of Directors,

Please find attached a written resolution authorizing the Company to enter into an exclusive agreement with Personal *Law Firm for the provision of legal services in Macao.*

In consideration for the legal services provided, the Company will pay approximately US$1.3 million per year until terminated by either party providing 60 days written notice.

The authorization guidelines currently being discussed by the Board require the Company to seek Board approval for contracts exceeding US$1 million. I would therefore be grateful if you could review the attached resolution and sign where applicable. I apologise for the short notice, however as we wish to sign this Agreement tomorrow, I would appreciate a signed copy being scanned and emailed to me cc Personal *@venetina.com.mo or by fax to* Personal

Please send the original to:

Personal Redaction

Should you have any questions, please do not hesitate to contact me.

Personal Redaction

UNREDACTED

Retention of Alves Law Firm

From: "Siegel, Irwin" <irwin.siegel@venetian.com>

To: "Adelson, Sheldon" <adelson@lasvegassands.com>, "Leven, Michael" <mike.leven@lasvegassands.com>, "Schwartz, Jeffrey" <jschwartz@glprop.com>, "Toh, Benjamin" <benjamin.toh@venetian.com.mo>, David Turnbull <dmt@pacificbasin.com>, "Iain Bruce (KCS HK)" <iain.bruce@kcs.com>, rchiang@pacific-alliance.com, "Siegel, Irwin" <irwin.siegel@venetian.com>

Cc: "Hyman, Gayle" <gayle.hyman@lasvegassands.com>, "Tracy, Edward" <edward.tracy@venetian.com.mo>

Date: Thu, 02 Sep 2010 03:50:45 +0000

Attachments: Written_Resolution_Appointment_Macao_Counsel.txt (2.68 kB)

Dear Board of Directors,

Please find attached a written resolution authorizing the Company to enter into an exclusive agreement with Leonel Alves' Law Firm for the provision of legal services in Macao.

In consideration for the legal services provided, the Company will pay approximately US$1.3 million per year until terminated by either party providing 60 days written notice.

The authorization guidelines currently being discussed by the Board require the Company to seek Board approval for contracts exceeding US$1 million. I would therefore be grateful if you could review the attached resolution and sign where applicable. I apologise for the short notice, however as we wish to sign this Agreement tomorrow, I would appreciate a signed copy being scanned and emailed to me cc anne.salt@venetina.com.mo or by fax to +853 2888 33 81

Please send the original to:

The Venetian Macao Resort Hotel
Legal Department
Executive Offices - L2
Estrada da Baía de N. Senhora da Esperança, s/n
Taipa
Macau
(Attn: Ms. Anne Salt)

Should you have any questions, please do not hesitate to contact me.

Irwin A. Siegel
Macau Cell+853 6280 8000
Macau Office +853 8118 2038
Cell (404) 272-1822
Home (404) 467-9701
NC (828) 526-1793

This failure of proof reflects this inescapable fact: the personal data redacted from the Macau documents has *no jurisdictional significance at all.* Plaintiff's jurisdictional claims focus on Las Vegas as the alleged "nerve center" for SCL's operations. PA2503:1-4. To support this conjured theory, Plaintiff claims that the control of SCL's business in 2010 resided in Las Vegas, where LVSC executives allegedly made key decisions for SCL, including the decision to terminate Plaintiff. PA2501:16-19. Under this theory, the documents relevant to his jurisdictional claim would reside in Las Vegas—the alleged "nerve center," for SCL's operations and the home of the LVSC executives who allegedly masterminded SCL's affairs.

Thus, any personal data redacted from documents in Macau would not be relevant to Plaintiff's "Las Vegas-centered" jurisdictional claims. Therefore, the names, addresses and related personal identification information redacted from the *Macau* documents could not assist Plaintiff in proving that *Las Vegas* was the "nerve center" for SCL's Macau operations, and that the LVSC executives controlled SCL's operations, all of which the district court failed to consider.

Even if the SCL redactions could be viewed as marginally relevant, the redacted data is plainly cumulative of the more than 24,000 unredacted documents that LVSC produced in response to the *same* discovery requests—a production that *Plaintiff never claimed was inadequate.* This production included (among many other documents):

1. minutes and other records of SCL board meetings;
2. travel records of LVSC executives who attended the SCL board meetings in Hong Kong and Macau;
3. records of LVSC executives who served as acting executives for (or provided other services to) SCL;

4. e-mails and other communications among LVSC personnel and SCL personnel; and

5. contracts, agreements and other documents relating to the relationship between LVSC and SCL.

PA3473-3889. LVSC also submitted for deposition the four LVSC executives who allegedly "directed" SCL's affairs from Las Vegas.

In addition, SCL undertook what even the district court recognized were "extensive efforts" to locate and produce unredacted copies of the Macau documents in the U.S. PA43814 ¶ 93. SCL also provided Plaintiff with a "Redaction Log" that (among other things) identified the employer of each individual whose name SCL had redacted in the Macau documents. PA4225-4387, 4750-4751-5262. SCL also obtained "consents" from the four key LVSC executives to "unredact" their names from any documents originating in Macau—thus ensuring that the names of the executives who allegedly controlled SCL from Nevada were unredacted in *all* of the responsive documents produced by LVSC and SCL. PA43815 ¶ 95; PA3890-3893. Finally, SCL offered to conduct more searches for duplicate documents or seek specific consents for any documents Plaintiff identified as being important to his jurisdiction theories–but Plaintiff never responded to the offer.

In total, LVSC produced more than 24,000 responsive documents, and SCL produced more than 17,500 responsive documents, with approximately 7,900 of those documents containing redactions. PA43814-43815 ¶¶ 92-96. This enormous volume of discovery provided details on virtually every aspect of the SCL-LVSC relationship that could be even remotely relevant to Plaintiff's jurisdictional theories, including theories

that are no longer viable under *Daimler*. In light of this massive production, the redacted personal data in the Macau documents was plainly cumulative of evidence Plaintiff already received from Defendants and of the 40 gigabytes of data he had taken from Macau. The redactions are, therefore, inconsequential.

Thus, the facts of this case sharply contrast to the facts of *Richmark* and the other sanctions cases in which the courts have found the withheld information to be "important" to the litigation. In this case, the withheld information consisted only of redacted personal data, not entire documents. In addition, the redactions in this case were not relevant to Plaintiff's "Las Vegas-centered" jurisdictional claims, but even if they were, the redacted data was plainly cumulative of the extensive jurisdictional evidence produced by Defendants. Finally, in this case, unlike *Richmark* and the others, the district court made **no detailed factual findings**—and provided **no "particularized analysis**"—showing how the redacted personal data could relate to any jurisdictional issue, or why it was "important" to Plaintiff's jurisdictional claims.

For these reasons, the district court's Order should be vacated.

2. The Jurisdictional Discovery Was Broad and Unreasonably Burdensome

The second factor this Court ordered the district court to consider focuses on the "specificity" of the discovery requests and "how burdensome" the requests are. *Richmark*, 959 F.2d at 1475. This inquiry reflects the principle that "[g]eneralized searches for information" should be discouraged if a foreign law prohibits the disclosure of the information.

Richmark, 959 F.2d at 1475. This principle applies with special force to jurisdictional proceedings which, as the U.S. Supreme Court has noted, should not require "much in the way of discovery." *Daimler*, 134 S. Ct. at 762 n. 20.

In this case, the district court concluded that Plaintiff's discovery requests were "specific"—and therefore not unduly burdensome—because the court previously had reviewed and approved the requests. PA43819 ¶ 119. But as shown below, the mere fact that the court previously approved the requests does not establish either their specificity or diminish the unreasonable burden they imposed. Indeed, in this case, the district court issued two exceptionally burdensome orders governing jurisdictional discovery.

First, the district court issued an order permitting Plaintiff to conduct jurisdictional discovery on 11 broad categories of documents. PA539. Plaintiff thereafter served *both* LVSC *and* SCL with 24 Requests for Production ("RFPs"). The RFPs called for documents relating not only to the SCL Board and LVSC executives, but also to such far-ranging subjects as SCL's business dealings with Nevada companies, SCL's audit committee meeting minutes, SCL's initial public offering, and the financing analyses for various SCL projects in Macau. PA3058, 3060. The court also permitted Plaintiff to take the depositions of four senior LVSC executives (Messrs. Adelson, Leven, Goldstein and Kay). PA540 ¶¶ 1-4.

These requests were overbroad when issued, and even more so in light of subsequent decisions by this Court and the U.S. Supreme Court declaring that the controlling issue in determining jurisdiction over a foreign corporation is not where the corporation "does business," but

where it is "at home." *Viega GmbH v. Eighth Judicial Dist.*,; 130 Nev. Adv. Rep. 40, 328 P.3d at 1158 (emphasis added) (*quoting Daimler AG v. Bauman*, 134 S. Ct. 746, 761 (2014)). Under these decisions, a court can generally find a corporation to be "'at home' ***only*** where [the company] is incorporated or maintains its principal place of business." *Id. Viega*, 328 P. 3 at 1158.

Notwithstanding these decisions (which rendered many of Plaintiff's RFPs wholly irrelevant),[5] the district court insisted on full compliance with Plaintiff's requests. Accordingly, in 2012 and 2013, LVSC produced approximately 24,000 documents responsive to Plaintiff's requests, and SCL produced close to 5,700 responsive documents. PA15876, 3066-3347, 3473-3889. The SCL production included approximately 4,700 documents with personal data redacted, but SCL undertook "extensive efforts" to locate more than 2,100 copies of the Macau documents in the United States, which it then produced in unredacted form. PA43814-43815 ¶ 93-94; PA15876.

Nor is that all. On March 27, 2013, the district court *sua sponte* issued a second order directing SCL to substantially increase its document production by searching the records of 13 additional individuals whom Plaintiff had denominated *merits* custodians long before this Court issued its jurisdictional mandate. PA2257-60. The court imposed this search requirement without any finding of jurisdictional relevance, rejecting SCL's argument that such a broad search would inevitably result in thousands of

[5] As just one example, Plaintiff sought all documents relating to SCL's contacts with Nevada vendors for goods to be used *in Macau*, even though the fact that the goods were to be used in Macau made the documents irrelevant to the jurisdictional analysis. *Daimler AG*, 134 S. Ct. at 756-57.

non-responsive documents. *See Id.*; PA2211:14-23. The court also ordered SCL to log *all documents* that it retrieved through these additional searches (but withheld on relevance grounds), so that the court could then review the withheld documents and consider whether additional sanctions should be imposed. PA2258:26-2259:1.

In compliance with this order, SCL produced more than 4,000 additional documents that were located outside Macau and more than 7,000 documents that were located in Macau. PA15876, PA3348. For the Macau documents, SCL redacted personal data in compliance with the MPDPA, and produced a 37,000+-page "Relevancy Log" as required by the district court's order. PA5263-15465, 15951-42828.

In total, Defendants spent more than $4 million and produced more than 40,000 documents in compliance with the district court's jurisdictional discovery orders. PA15876, PA3066-3889; PA4438:5-14. Such grossly overbroad and oppressively burdensome orders for jurisdictional discovery are unprecedented in Nevada law. Indeed, SCL has found no case in *any* jurisdiction in which a court imposed discovery obligations of comparable breadth and burden on a foreign corporation for the sole purpose of jurisdictional discovery.

The discovery orders in this case contrast sharply with the discovery orders in other cases that uphold sanctions for non-compliance with discovery orders. In each of the other cases, the court dealt with requests for narrowly-defined categories of documents that were indisputably "crucial" to the litigation. For example, in *Richmark*, the plaintiff requested information about the defendant's "current assets" to facilitate the enforcement of a judgment, 959 F.2d at 1475, while in *Linde* the plaintiffs

requested information about specific bank accounts to prove a link between the defendant and terrorist groups. 269 F.R.D. at 193.

By contrast, in this case, the district court ordered SCL to produce documents dealing with virtually every aspect of SCL's relationship with LVSC—notwithstanding that LVSC had produced an enormous volume of documents in response to the same requests—and then *sua sponte* doubled the number of custodians that SCL was required to search without any showing of jurisdictional relevance. The court also ordered SCL to log every one of the resulting documents that SCL deemed jurisdictionally irrelevant so the court could review the documents to determine if additional sanctions were warranted.

The sweeping breadth of these requests—and the magnitude of the resulting costs and burdens on SCL—counsel heavily against the imposition of sanctions for redacting inconsequential personal identification information.

3. None of the Redacted Documents Originated in the U.S.

The third factor cited by this Court focuses on whether the requested documents (and the individuals required to produce them) reside in a foreign country. *Richmark*, 959 F.2d at 1475. If so, this factor **weighs against sanctions** because such individuals "are subject to the law of that country in the ordinary course of business." *Id.* at 1475.

In this case, the documents produced by SCL were documents that originated in Macau and could be found only in Macau. The district court did not dispute this fact, but said that it "does not militate against sanctions or their importance to jurisdictional issues," without any explanation for

this remarkable conclusion. PA34820 ¶ 120. In so concluding, the district court ignored this Court's directive, as well as settled law holding that the location of the relevant documents in a foreign country "weighs against requiring disclosure"—and thus weighs against the imposition of sanctions for obeying the foreign country's laws. *Richmark*, 959 F.2d at 1475.

4. Plaintiff Had Alternative Sources for the "Information Sought"

The rationale underlying the fourth factor cited by this Court is that "there is no reason to require a party to violate foreign law" if "substantially equivalent" means are available to obtain the relevant information. *Richmark*, 959 F.2d at 1475.

In its Order, the district court found that Plaintiff "does not have any 'substantially equivalent' means of obtaining *the redacted documents*." PA43821 ¶ 127 (Emphasis supplied). This finding, however, was error as a matter of law. The correct legal test is whether the "*information sought*"—as opposed to the actual documents—can be obtained from another source. *Richmark*, 959 F.2d at 1475.

Plaintiff clearly had an alternative means for obtaining the "information sought"—the discovery provided by LVSC *and* the 40 gigabytes of documents he took from Macau. As noted earlier, in response to Plaintiff's jurisdictional discovery requests, LVSC produced more than 24,000 unredacted documents, including unredacted copies of ***all responsive Macau documents found in the United States.***

Not only did this production respond to each of the *same* discovery requests that Plaintiff served on SCL, but it also provided Plaintiff with all

the evidence relevant to his jurisdictional claims. Not surprisingly, during the hearing, Plaintiff did not identify *a single jurisdictional fact or issue* that the LVSC documents and depositions did not adequately address. *Not one*.

Yet, in its four-sentence paragraph addressing the "alternative sources" factor, the district court did not mention the massive discovery that Plaintiff obtained from LVSC. PA43821 ¶ 127. As a result, the court made no determination as to whether the available documents and depositions provided a "substantially equivalent" means for obtaining the requested information. This, too, was error.

The district court also ignored one other critical fact: Plaintiff repeatedly refused to cooperate with Defendants in their efforts to locate alternative sources for the redacted data. When Defendants asked Plaintiff to waive his rights under the MPDPA and consent to the "unredaction" of his name from the Macau documents to increase his jurisdictional discovery, he refused to do so. PA4745-4749. When Defendants asked Plaintiff to identify any specific documents that he claimed had jurisdictional significance (so that Defendants could obtain relevant consents), Plaintiff refused to respond. PA1941:25-1942:2; PA43717. These refusals clearly show that Plaintiff had no genuine interest in "discovering the truth," but instead took every opportunity to generate false issues of "prejudice" by frustrating Defendants' efforts to provide alternative sources of discovery.

Thus, in dealing with the "alternative sources" factor, the district court applied the wrong legal test to determine the availability of alternative sources, it failed to address (or even mention) LVSC's production as a "substantially equivalent" alternative, and it ignored

Plaintiff's refusal to cooperate with Defendants in locating alternative sources. These critical failings provide another reason why the district court's Order should be vacated.

5. The District Court Failed to Properly Balance National Interests.

In its August 7, 2014 Order, this Court pointedly noted that the "existence of an international privacy statute is relevant to the district court's sanctions analysis in the event the order is disobeyed." *Las Vegas Sands v. Eighth Jud. Dist. Ct.*, 331 P.3d 876, 878 (2014). In such a case, the court must assess whether compelled disclosure would "affect important substantive policies or interests" of either the United States or Macau, giving due respect to the "special problems" of foreign companies faced with conflicting obligations. *Richmark*, 959 F.2d at 1476; *see also Aerospatiale*, 482 U.S. at 544 n.29 (1987).

The district court, however, gave *no weight* to Macau's interest in enforcing the MPDPA, finding instead, without evidence, the "lack of a true Macanese interest in this personal data," in part because the Macau government had failed to appear before the court in Las Vegas to advocate its interests. PA43822 ¶¶ 130, 134. (So much for comity.) The court reached this conclusion even though it contradicted other findings the court made in the Order, including the following:

(1) the OPDP informed SCL that "under no circumstances" could SCL transfer personal data from Macau to Nevada without either the consent of the subject or the agency's approval (PA43800 ¶ 42);

(2) the OPDP repeatedly rejected the suggestion that the U.S. legal system provided sufficient protection

for the confidentiality of the data to permit a transfer (PA43800 ¶ 43); and

(3) the OPDP was "furious" when it learned that in 2010 LVSC had transferred Plaintiff's data from Macau to Las Vegas without first obtaining the OPDP's consent (PA43801 ¶ 44).

In light of these express findings, the district court clearly erred in disregarding Macau's interest in the enforcement of its privacy statute.

The district court also erred in finding that the United States has an "*overwhelming* interest" in compelling the disclosure of the redacted personal data in this case. PA43822 ¶ 133 (emphasis added). To support that finding, the district court relied exclusively on conclusory and highly generalized statements that apply to every case in this country—*e.g.*, the United States has a compelling interest in "ensuring that its citizens, including Jacobs, receive full and fair discovery to uncover the truth of their judicial claims." *Id.*; *see also* PA43821 ¶ 129. At no point did the district court make any finding—or provide any analysis—showing how the redacted personal data *in this case* implicated any specific United States interest or the Plaintiff's "judicial claims."

This omission is yet another example of the Court's larger failure (discussed above) to explain exactly how the redacted personal data is relevant to any jurisdictional issue in the litigation. The March 6 Sanctions Order contrasts sharply with orders in other sanctions cases where the courts made detailed findings precisely showing how the withheld information implicated particular United States interests. For example, in *Linde*, the district court found that the withheld documents implicated "the substantial public interest in compensating victims of terrorism and

combating terrorism." 706 F.3d at 99. There is no public interest in compelling SCL to violate the laws of its home jurisdiction.

Accordingly, the district court erred in balancing the respective national interests by (1) giving no weight to Macau's interest in enforcing its data privacy law, notwithstanding the court's express findings demonstrating that interest; and (2) describing the interest of the United States as "overwhelming" without any explanation based on the facts of this case.

Thus, the district court committed multiple material legal and factual errors in applying this Court's five-factor sanctions analysis. Not only did the court fail to provide a "particularized analysis" with detailed explanations and specific factual support, but it also made "findings" that were contrary to both the evidence of record and other findings in the Order. For these reasons, the Order should be vacated and the case remanded with instructions to proceed directly to the jurisdictional hearing.

B. The District Court's Sanctions Order Violates Rule 37 Standards.

The district court's Order also violates the standards governing the imposition of sanctions under NRCP 37. Under these standards, a court should consider the prejudice suffered by the party seeking disclosure, the non-disclosing party's degree of willfulness, and the extent to which possible sanctions are "tailored" to fit the violation. *See, e.g., Sparks*, 112 Nev. 952, 920 P.2d at 1016.

These factors provide three additional reasons why the district court's order must be vacated.

1. No Evidence Supports the District Court's Finding that Plaintiff Suffered Prejudice.

The courts have repeatedly recognized that sanctions are not appropriate in cases where the alleged violation did not prejudice the opposing party. *See*, *e.g.*, *Gallagher v. Magner*, 619 F.3d 823, 844 (8th Cir. 2010). In this case, as shown above, the district court made no finding that the redacted personal data had any substantive importance for Plaintiff's jurisdictional case. Instead, the court based its prejudice finding primarily on the assertion that the redactions caused unspecified "delays" and the "permanent loss of evidence." PA43812-43813 ¶¶ 86, 89-90.

This finding not only lacks evidence to support it, but it is also contrary to the evidence showing that many factors contributed to the delays in the jurisdictional hearing, including (as the Order expressly notes) the district court's rulings on various privilege issues. PA43826 ¶ 153. On October 1, 2013, this Court granted a stay while it decided Defendants' Petition (Case No. 63444) challenging the district court's privilege rulings. After this Court decided Defendants' Petition on August 7, 2014, the district court required an additional four months to complete its review of Defendants' privilege designations. As a result, the resolution of the privilege issues alone delayed the jurisdictional hearing for more than 14 months.

Not surprisingly, then, in its Order, the district court does not explain the period of delay it attributes to the "redaction" issue or identify factual

basis that would support such an attribution. Nor does the Order identify any specific evidence that was "permanently lost" because of a delay attributable to the "redaction" issue.

Indeed, the only specific "lost evidence" identified in the Order is a single reference to the death of a former SCL (and LVSC) board member named Jeffrey Schwartz. PA43813 ¶ 89. Although the Order describes Mr. Schwartz as a "key witness," there is no description of the specific jurisdictional evidence he could have provided—or why that evidence would not have been cumulative of other evidence in the case.

Accordingly, the record contains no support for the district court's finding that the "redaction" issue caused "delays" that prejudiced Plaintiff.

2. No Evidence Supports the District Court's Finding that SCL Acted with an Intent to Prevent Access to Discoverable Information.

A Nevada district court can impose sanctions on a party only if the party engages in *willful noncompliance* with a discovery order. NRCP 37(b)(2). In assessing willfulness, the court is required to consider whether circumstances beyond the non-complying party's control "contributed to the non-compliance." *Societe Internationale Pour Participations Industrielles et Commericales, S.A. v. Rogers*, 357 U.S. 197, 211 (1958); *LeGrande v. Adecco*, 233 F.R.D. 253, 257 (N.D.N.Y. 2005). In this case, however, the district court concluded that SCL acted with an intent to prevent Plaintiff from obtaining discoverable information, PA43827 ¶ 154a, but nowhere in its Order did the court cite *any* facts to support this critical conclusion.

Nor did the court explain how this conclusion could be reconciled with the undisputed testimony provided by SCL's General Counsel showing that the OPDP *required* SCL to redact personal data. In that testimony—which the district court does not challenge in its Order—SCL's General Counsel described a series of meetings and communications with the OPDP in which the agency made increasingly clear that it would not permit unredacted documents to be transferred to the United States. PA4108:15-25 4114:12-4115:18, 4117:6-4118:2, 4143:3-12. To be sure, when the General Counsel and SCL's U.S. lawyers met with OPDP (following the district court's first sanctions order), the agency agreed to allow Macanese lawyers to review and redact the documents—but it continued to insist that the redactions must be made to comply with the MPDPA. PA4109:13-24, 4110:1-6, 4109-4410. Based on these and other OPDP communications, the General Counsel concluded that he had "no choice" but to comply with the "very strict approach" taken by the agency. PA4110:8-20, 4114; 12-4115:18, 4583:1-16, 4602:25-4603:3. These unchallenged facts establish that the OPDP's communications—which were obviously a factor beyond SCL's control—substantially "contributed" to SCL's decision to redact personal information from the documents, while obeying the district court's order to *produce the content of the documents*.

The district court's "intent" finding also ignores the extraordinary lengths to which SCL went in an effort to accommodate the MPDPA with the court's discovery orders. If SCL's goal was to conceal evidence by redacting personal data from the Macau documents, it would not have (1) dispatched its U.S. lawyers to Macau to try to persuade the OPDP to permit the production of the unredacted documents; (2) undertaken

"extensive efforts" to search in the U.S. for unredacted copies of the Macau documents (a step that even the district court "applauded," PA43814-15 ¶¶ 93, 97 n.15); or (3) obtained the consents of the LVSC executives to "unredact" their names in the Macau documents. Nor would SCL have engaged in its unsuccessful effort to obtain Plaintiff's cooperation by asking him to provide a similar consent or to identify specific documents that he claimed have jurisdictional importance. This entire course of conduct clearly impeaches the district court's "finding" that SCL acted with an intent to prevent Plaintiff from obtaining access to jurisdictional evidence. PA43826-7 ¶ 154a.

The district court also ignored the compelling fact that SCL had absolutely **no motive** to prevent Plaintiff from obtaining evidence by redacting personal data from Macau documents. As shown above, the redacted information has no evidentiary value at all. Neither Plaintiff nor the district court ever identified a single issue of jurisdiction to which the data has any relevance or importance. SCL would not have undertaken the enormously costly effort to redact the personal data from thousands of documents—or incurred the substantial risk of a sanctions finding in this proceeding—if it were not compelled to do so by Macanese law.

Finally, in its "Conclusions of Law," the district court made two statements that warrant special comment. First, the court stated that the "discovery abuses and use of the MDPA *appear to be driven by the client*." PA43825 ¶ 148 (emphasis added). The court cited absolutely no evidence to support this exceptionally unfair statement, nor could it do so—the statement is categorically wrong. Indeed, the court could not possibly have had a factual basis for its belief that the "client" drove the alleged

"discovery abuses" because Defendants did not waive their attorney-client privileges in either the first or second sanctions hearings—and the court disclaimed drawing any impermissible inference from Defendants' reliance on the attorney-client privilege.[6]

Second, in its "Conclusions of Law," the district court also stated that the "change in corporate policy regarding LVSC access to SCL data … was made *with intent to prevent the disclosure of the transferred data as well as other data*." PA43793 ¶ 112. The court appeared to base this conclusion (which tracks an identical conclusion set forth in its September 14, 2012 Order, PA1364, ¶ 29)[7] on the fact that Defendants have allegedly "selectively applied the MPDPA over the course of this litigation." PA43827, ¶ 106. But as noted above, the court could not have a factual basis for the belief that the corporate clients acted with an intent to engage in "discovery abuse" unless the court impermissibly drew an adverse inference from the companies' invocation of the attorney-client privilege.

This is particularly true in light of the undisputed evidence showing that the MPDPA is a relatively new law in Macau and that SCL's understanding of its requirements changed following the company's

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[6] No adverse inferences can be drawn from a party's decision not to waive the privileges and work product protection afforded by Nevada law, under NRS 49.095 and Nevada Rule of Civil Procedure 26(b)(3). *See*, *e.g.*, *Nabisco, Inc. v. PF Brands, Inc.*, 191 F.3d 208, 226 (2d Cir. 1999) (there is "no precedent supporting . . . an [adverse] inference based on the invocation of the attorney-client privilege").

[7] While, as this Court has noted, Defendants did not appeal the district court's imposition of sanctions in September 2012 for failing to disclose the transferred data, Defendants categorically dispute—then and now—the district court's conclusion that they acted with an intent to prevent the disclosure of evidence.

meetings with OPDP. (PA4163, ¶¶ 8-9; PA1360 ¶ 1). Most notably, the transfer of the Macau data that led to the district court's September 14, 2012 order occurred *before* SCL or VML had their first meeting with OPDP. *Id.* Furthermore, as stressed above, SCL had **no motive** to use the MPDPA for litigation advantage because the redacted names of Macanese residents have no evidentiary significance.

Whatever their basis, the fact that the district court unmistakably holds these wrongheaded beliefs is an insurmountable impediment to SCL obtaining a fair hearing in the district court. As discussed below, this reality, together with a long and unbroken pattern of unreasonable and grossly burdensome orders, compels SCL to request re-assignment of this case.

3. The District Court's Sanctions Were Not Tailored to Fit the Alleged Violation.

We know from precedent that "due process require[s] that discovery sanctions be just and that sanctions *relate to the specific conduct at issue*." *GNLV Corp. v. Serv. Control Corp.*, 11 Nev. 866, 870, 900 P.2d 323, 325 (1995) (emphasis added). This means that a court imposing sanctions "must design the sanction to fit the violation." *Sparks*, 112 Nev. 952, 920 P.2d at 1016.

To this end, the court should "weigh, among other factors, the harshness of the sanctions, the extent to which the sanctions are necessary to restore the evidentiary balance upset by incomplete production, and the non-disclosing party's degree of fault." *Linde, 706* F.3d at 115. For example, a "court could instruct a jury to presume the truth of a factual allegation

from a party's failure to produce key evidence *relevant to that allegation*." *Id.* at 92 (emphasis added).

In this case, however, the district court did not engage in any "tailoring" of any kind. At no point did the court explain why the exceptionally harsh sanction of precluding SCL from presenting any evidence at its own jurisdictional hearing is necessary to "restore the evidentiary balance" purportedly upset by SCL's decision to redact jurisdictionally meaningless personal data. The district court also failed to explain why the additional search of electronic data (with no showing of jurisdictional relevance) and the payment of $250,000 to various law-related organizations was "proportionate" to the nature of the alleged violation. Nor could the district court provide such an explanation. The decision to redact the data did not upset the "evidentiary balance" because the redacted data had *no evidentiary value*.

Furthermore, even if the redactions had some relevance, a tailored remedy would be to adversely infer that the redacted names are those of individuals Plaintiff chose as part of his effort to establish personal jurisdiction. *See In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 386-87 (9th Cir. 2010). Instead, the district court imposed *both* preclusion *and* adverse inference sanctions that are wholly disproportionate to the nature of the alleged violation.

SCL has found only two cases in which the courts imposed sanctions of comparable severity on foreign corporations. Both cases involve facts that are in no manner comparable to the facts here. In *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee.*, 456 U.S. 694 (1982)—a case that did not involve an international privacy statute—the U.S. Supreme

Court upheld the striking of a foreign company's jurisdictional defense after the company repeatedly refused to comply with orders to produce documents relevant to the "critical issue in proving personal jurisdiction"—*i.e.*, the companies' "contacts" with the forum state. 456 U.S. at 708. Because the evidence was critical to the jurisdictional defense, the companies' refusal to produce the evidence warranted a finding that their jurisdictional defense lacked merit. *Id*. at 709.

In *Linde*, a case favored by the Plaintiff, the district court sanctioned a foreign bank by precluding it from contesting certain issues at trial after it refused to comply with orders to produce documents that were "essential" to the plaintiffs' ability to prove "not only that defendant provided financial services to terrorists, but also that it did so knowingly and purposefully." *Linde*, 269 F.R.D. at 203. The court stressed that the bank's efforts to obtain its government's authorization to comply with the orders were "calculated to fail," *id*. at 199, and that, in any event, the bank's refusal to produce the documents in any form undermined the "substantial public interest in compensating the victims of terrorism and combating terrorism." *Linde*, 706 F.3d at 99.

By contrast, in this case, SCL did not engage in a wholesale refusal to produce entire documents, much less withhold documents that were "critical" to determining the merits of its jurisdictional defense. Nor did SCL make half-hearted approaches to the OPDP that were "calculated to fail" or undermine a substantial public interest in combating terrorism. Rather, SCL made **limited redactions** of personal data having no evidentiary value in compliance with the laws of its home jurisdiction, **while producing the content of the documents**. It then made "extensive

efforts" to find alternative sources for the redacted data in ways that even the district court "applaud[ed]." PA43814 15 ¶¶ 93, 97 n.15.

Accordingly, the facts of *Insurance Corp. of Ireland* and *Linde* underscore the district court's failure in this case to tailor the sanctions it imposed to fit the alleged violation.

C. The District Court's Order Violates Due Process

There can be no doubt that the district court's preclusion and adverse inference sanctions will deprive SCL of a fair hearing. By stripping SCL of its right to present any evidence, the sanctions are tantamount to a directed finding of personal jurisdiction.

The U.S. Supreme Court has recognized that a sanction can violate Due Process in two situations. First, the Court has held that a sanctions order can violate Due Process if the non-compliant party's refusal to produce documents does not support a presumption that the party's claim lacks merit. *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 351 (1909). This situation arises when the court's order requires the production of documents that are not relevant or material to the litigation. *Linde*, 706 F.3d at 116; *see also Insurance Corp of Ireland,* 456 U.S. at 705. In this case, as shown above, the redacted data has no relevance to the jurisdictional issue.

Second, the Court has held that a sanctions order can violate Due Process if the party's failure to comply was "due to inability and not to willfulness, bad faith, or any fault of petitioner." This holding reflects the rule that a party cannot be penalized "for a failure to do that which it may not have been in its power to do" and that "any reasonable showing of an

inability to comply" would have been sufficient. *Hammond Packing*, 212 U.S. at 351. *See also Rogers*, 357 U.S. at 209, 212.

This principle also applies here. SCL's decision to redact documents resulted not from bad faith or willful disobedience, but from the requirements of Macanese law. This, indeed, is the only rational explanation for SCL's many attempts to accommodate the conflicting demands of the OPDP and the district court by (among other things) producing unredacted copies of the documents found in the U.S. and attaining waivers from the LVSC executives.

Accordingly, the district court's order imposing preclusion, adverse inference and other sanctions on SCL violates due process and must be vacated.

D. This Case Should Be Reassigned.

The district court's punitive and grossly unjust sanctions order is the most recent in a long history of rulings, comments, and findings that create an "objectively reasonable basis for questioning" the court's impartiality, and its ability to effectively manage this litigation. *In re IBM*, 45 F.3d 641, 644 (2d Cir. 1995). This Petition is Defendants' fifth Petition for a Writ of Mandamus in this five-year-old case in which the district court has yet to determine whether it has jurisdiction over SCL. This Court granted three of Defendants' first four Petitions, and it denied the fourth to allow the district court to hold its planned sanctions hearing—which has now led to this fifth Petition.

This record of repeated writs and stalled litigation reflects, in part, the apparent bias that the district court holds against Defendants. The

mere fact that the district court believes, without a factual basis for its belief, that Defendants—the *clients*—decided to "conceal evidence" and "abuse" discovery demonstrates that the court cannot serve in this case as a "neutral, impartial administrator of justice." *United States v. Torkington*, 874 F.2d 1441, 1447 (11th Cir.1989). *See also*, 12/6/12 Tr., at 51:11-14 and 12/18/12 Tr., at 7:13-17) (court refers to "management's" decision to "mislead the court" and "avoid discovery obligations").

This animus has, at a minimum, created the appearance of a court that has pre-judged every major issue against SCL, including, of course, the March 6, 2015 sanctions decision. In its August 7, 2014 Order, this Court directed the district court to utilize the five specified factors to decide "what sanctions, ***if any***, are appropriate." Aug. 7, 2014 Order, at 10 (emphasis added). Yet, on remand, the district court made clear that it had *already decided* to impose sanctions, and it would conduct the hearing simply to determine what specific sanctions it would impose on SCL. 8/14/2014 Tr., at 29:10-13 ("There's going to be a sanction because I already had a hearing, and I made a determination that there is a sanction").

Even apart from its apparent bias, the district court has issued orders that are so unreasonable and burdensome as to call into question its ability to effectively and fairly manage this litigation. As one example, the extraordinary burden of requiring SCL to create a 37,000 page log of *irrelevant* documents so that the court could determine whether to impose additional sanctions is unprecedented. Compelling SCL to create this massive log served no purpose other than to increase SCL's burdens and costs in these proceedings—all *before the district court has even determined that its has jurisdiction over the company*. Equally, if not more burdensome,

was the unreasonable and, indeed, punitive two-week deadline the court imposed on SCL to produce documents from Macau in December 2012, over the holidays, as well as the court's *sua sponte* decision in March 2013 to double SCL's discovery obligations without any showing that the additional discovery had any jurisdictional relevance.

These decisions are so lacking in moderation and fundamental fairness as to require a new judge to preserve the appearance of a neutral forum to conclude litigating this case. SCL therefore requests to have this case reassigned if remanded.[8]

V. CONCLUSION

Petitioner respectfully requests that this Court grant the Petition and enter an order vacating the district court's March 6, 2015 order.

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[8] This Court has on occasion reassigned cases on remand. *See, e.g.*, *FCH1 LLC v. Rodriguez*, 335 F.3d 183, 190 (2014); *Boulder City, Nevada v. Cinnamon Hill Assocs.*, 871 P.2d 320, 327 (Nev. 1994); *Echeverria v. State*. 62 P.3d 743, 745-46 (Nev. 2003). The Court should do so here.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2007 in Palatino 14 point font.

I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 12,266 words.

Finally, I hereby certify that I have read this **PETITION FOR PROHIBITION OR MANDAMUS RE MARCH 6, 2015 SANCTIONS ORDER**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R. App. P. 28(e), which requires every section of the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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VERIFICATION

1. I, Wyn Hughes, declare:
2. I am the interim Co-General Counsel at Sands China Ltd., the Petitioner herein;
3. I verify that I have read the foregoing **PETITION FOR WRIT OF PROHIBITION OR MANDAMUS**; that the same is true of my own knowledge, except for those matters therein stated on information and belief, and as to those matters, I believe them to be true.

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

This declaration was executed on the 19th day of March, 2015 in Macao SAR, People's Republic of China.

Wyn Hughes

CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. P. 25, I certify that I am an employee of MORRIS LAW GROUP; that, in accordance therewith, I caused a copy of the **PETITION FOR WRIT OF PROHIBITION OR MANDAMUS RE MARCH 6, 2015 SANCTIONS ORDER** to be hand delivered, in a sealed envelope, on the date and to the addressee(s) shown below:

VIA HAND DELIVERY ON 3/23/15

Judge Elizabeth Gonzalez
Eighth Judicial District Court of
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