

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.

Electronically Filed
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Clerk of Supreme Court
District Court Case Number
A627691-B

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

**Volume VI of XXXIII
(PA988 – 1177)**

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. P. 25, I certify that I am an employee of MORRIS LAW GROUP; that, in accordance therewith, I caused a copy of the **APPENDIX TO PETITION FOR WRIT OF PROHIBITION OR MANDAMUS RE MARCH 6, 2015 SANCTIONS ORDER Volume VI of XXXIII (PA988 – 1177)** to be served as indicated below, on the date and to the addressee(s) shown below:

VIA HAND DELIVERY (CD)

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

Respondent

VIA ELECTRONIC SERVICE

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DATED this 20th day of March, 2015.

By: /s/ PATRICIA FERRUGIA

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ORIGINAL

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

SEP 12 2012

BY *Billie Jo Craig*
BILLIE JO CRAIG, DEPUTY

STEVEN JACOBS

Plaintiff

CASE NO. A-627691

vs.

DEPT. NO. XI

LAS VEGAS SANDS CORP., et al..

Defendants

Transcript of
Proceedings

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

COURT'S SANCTION HEARING - DAY 2
VOLUME II

TUESDAY, SEPTEMBER 11, 2012

A-10-627691-8

TRANS

Transcript of Proceedings

1986086



APPEARANCES:

FOR THE PLAINTIFF:

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COURT RECORDER:

TRANSCRIPTION BY:

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District Court

FLORENCE HOYT
Las Vegas, Nevada 89146

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1 LAS VEGAS, NEVADA, TUESDAY, SEPTEMBER 11, 2012, 1:18 P.M.

2 (Court was called to order)

3 THE COURT: Mr. Peek, I'd like to remind you you're
4 still under oath.

5 THE WITNESS: Thank you, Your Honor.

6 THE COURT: Mr. Bice --

7 MR. BICE: Yes, Your Honor.

8 THE COURT: -- you may continue your examination.

9 MR. BICE: Thank you, Your Honor.

10 CROSS-EXAMINATION (Continued)

11 BY MR. BICE:

12 Q Where we stopped, Mr. Peek, we were talking about
13 the hearing on May 24. I'll ask you some followup questions
14 about it. Again, we're on pages -- let's start with pages 9
15 and 10 of the May 24 hearing.

16 THE COURT: Somebody still has some electronic
17 device on. Can we turn them all off. Just check and -- it's
18 okay. It's really funny when it's the marshal's who goes off,
19 but we've been lucky with this marshal.

20 THE WITNESS: Give me a moment, Mr. Bice.

21 BY MR. BICE:

22 Q Understood.

23 A My iPod is still on. I apologize.

24 I'm there, Mr. Bice.

25 Q Okay. We're, again, at the bottom of page 9 and

1 onto page 10.

2 A Yes, sir.

3 Q Okay. So when you made the statement to the Court
4 on May 24 of 2012 about -- you were representing Las Vegas
5 Sands at this hearing, or were you representing both?

6 A I represented both Las Vegas Sands and Sands China
7 Limited, Mr. Bice.

8 Q Okay. For purposes of this hearing were you
9 speaking on behalf of Sands China, or Las Vegas Sands Corp.,
10 or both?

11 A I think in this context, because I deferred to Mr.
12 Weissman, I was speaking as a Las Vegas Sands Corp. lawyer.

13 Q Okay. And the reason that you were deferring to Mr.
14 Weissman is because Mr. Weissman represented only Sands China
15 Limited; correct?

16 A That is correct, sir.

17 Q He does not represent Las Vegas Sands Corp.?

18 A That is correct. Plus he was also assisting my
19 office in production of documents for Las Vegas Sands.

20 Q Okay. So on May 24 of 2012 did Mr. Weissman know
21 about Las Vegas Sands Corp.'s possession of the emails?

22 MR. McCREA: Objection, Your Honor. Attorney-client
23 privilege, work product.

24 THE COURT: Sustained. And we're only talking about
25 the May 24th hearing; right?

1 MR. BICE: Right.

2 BY MR. BICE:

3 Q Okay. You don't dispute that Mr. Weissman was
4 present when you made these statements, however, do you?

5 A I do not, sir.

6 Q Okay. And you told the Court that, "We don't have
7 documents on our server related to Mr. Jacobs"; right?

8 A Those are my words, yes, sir, at that hearing.

9 Q So when he said, "We haven't searched Mr. Jacobs,"
10 he is correct, because we don't have things to search for Mr.
11 Jacobs; right?

12 A Yes, sir. I was referring to the email addresses
13 which -- I'll wait for the next question.

14 Q Okay. Well, you then said -- but you said before we
15 were going to have to defer to Mr. Weissman because Mr. Jacobs
16 was a Sands China employee; correct?

17 A The dispute with Jacobs was over his duties as a
18 president and CEO of Sands China Limited. So yes.'

19 Q And so you wanted Her Honor to understand that Mr.
20 Weissman was going to be speaking about Mr. Jacobs's data;
21 correct?

22 A I'm not sure I understand --

23 Q Well, did you tell the -- I apologize. I don't want
24 to cut you off.

25 A I mean, I just -- the words are what the words are.

1 I mean, I -- I'm sorry.

2 Q Well, you knew, did you not, that as of May 24 of
3 2012 Las Vegas -- or Sands China had represented to Her Honor
4 that everything pertaining to Mr. Jacobs was in Macau and had
5 to be reviewed in Macau? Do you recall that?

6 MR. McCREA: Objection, Your Honor.

7 THE WITNESS: I don't.

8 MR. McCREA: Mischaracterizes the testimony in this
9 case.

10 THE COURT: Overruled. You can explain, though.

11 THE WITNESS: I'm sorry. I lost the question. I
12 think --

13 BY MR. BICE:

14 Q Things pertaining from Sands China --

15 A What Mr. Weissman had said to the Court on this
16 date, or just over the course of the time that Mr. -- that
17 Munger Tolles came in in February? I'm trying to --

18 Q Fair enough. Let's back up a little bit. Prior to
19 Munger Tolles coming in Glaser Weil was representing only
20 Sands China; correct?

21 A Yes, sir.

22 Q And you were not representing Sands China at all?

23 A That is correct.

24 Q Okay. And prior to that -- or at that point in
25 time, prior to you representing Sands China, you were present

1 when Ms. Glaser told the Court that everything in Macau had to
2 be reviewed in Macau and was subject to the Macau Data --
3 Personal Data Privacy Act; right?

4 A I recall those words. Either I was present on that
5 day if it was the June hearing, or I read them if it was the
6 July 19th hearing. I don't recall specifically.

7 Q Okay. So when you on May 24 tell the Court you're
8 going to have to defer to Mr. Weissman about Mr. Jacobs's ESI,
9 you were trying to convey to the Court the message that you
10 were deferring to Mr. Weissman because that's where the data
11 was at; is that what you're saying?

12 A We had a meet and confer the previous day with you.
13 So I'm trying to put it in a context, if I'm -- may I put it
14 in context?

15 Q If you feel that it's appropriate.

16 A We had a meet and confer the previous day, I think
17 May 23rd, and at that time you asked Mr. Weissman whether or
18 not he had commenced the search of -- in Macau of Jacobs's
19 ESI. And I think he told you he had not.

20 Q I don't want to cut you off. Do you recall that the
21 day before that that you and I and Mr. Owens held a meet and
22 confer?

23 A If you say so. I don't recall. But I know we had a
24 number of meet and confers from March through May.

25 Q Okay. And do you recall telling me -- and if you

1 don't, I guess you'll tell us. Do you recall telling me
2 during that meet and confer that you and Mr. Owens couldn't
3 answer my questions about the status of reviewing Mr. Jacobs's
4 ESI because Mr. Weissman was handling it and you needed to
5 talk to him?

6 A I don't recall that, Mr. Bice.

7 Q Okay. So then, in any event --

8 A So I don't know that it -- I'm not saying -- I don't
9 recall a discussion, but I do know that Mr. Weissman -- I
10 don't know if this is what Mr. Weissman was on -- I think it
11 was when he was on holiday, but it may have been.

12 Q No, I don't believe so.

13 A That was a later -- okay.

14 Q But go ahead. So -- because Mr. Weissman did show
15 up at least the following day, on May 24; correct? He was at
16 the hearing in front of the Court on May 24.

17 A You said the next day. We had a meet and confer
18 with Mr. Weissman on the 23rd. Yeah, I remember. I was in
19 Phoenix, preparing for depositions in my Americo case in Reno.

20 Q Right.

21 A And I joined on that meet and confer from Phoenix.

22 Q Okay. And -- but Mr. Weissman -- well, I'm saying
23 he wasn't away on vacation in France, because he showed up at
24 the hearing the next day --

25 A Correct.

1 Q -- right?

2 A Correct.

3 Q Okay.

4 A Well, we had a meet and confer with Mr. Weissman on
5 the 23rd. He showed up also on the 24th, because Mr. Brian
6 had a bad back.

7 Q Okay. And at that point in time, at the meet and
8 confer on the 23rd, okay, do you recall me asking Mr. Weissman
9 about the status of reviewing Mr. Jacobs's ESI?

10 A I do recall you asking him a question along those
11 lines, yes, sir.

12 Q And do you recall what Mr. Weissman told me?

13 A I don't recall. That's one of the reasons why we
14 started having transcripts of these meet and confers. But I
15 -- something along the lines of we didn't feel that we had an
16 obligation under our view of jurisdictional discovery to
17 review Jacobs's ESI.

18 Q Okay. That's your understanding of Mr. Weissman --

19 A I'm trying to remember it, Mr. Bice. I -- you know,
20 you --

21 Q Did he tell me --

22 A -- frown at me as though as I don't -- you frown on
23 me as though I -- you know, you remember differently. So if
24 you want to -- I mean, that's why we started having
25 transcripts of all these hearings.

1 MR. MCCREA: Your Honor --

2 THE COURT: Wait. Can you let Mr. Peek finish, Mr.
3 McCrea.

4 MR. MCCREA: I'll try.

5 THE WITNESS: I'm done, Your Honor.

6 THE COURT: All right. Now Mr. McCrea.

7 MR. MCCREA: These meet and confers are well beyond
8 the scope of what was represented to the Court and what this
9 Court is attempting to focus on here. Now, it may have
10 something to do with a subsequent Rule 37 motion or something
11 like that, but as far as what this Court has scheduled these
12 two or three days to address, it's well beyond that scope.

13 THE COURT: You know how your two or three days
14 always go, Mr. McCrea. They turn into seven or eight.

15 MR. MCCREA: Unfortunately.

16 THE COURT: Mr. Bice, anything you want to say?

17 MR. BICE: Yes, Your Honor. The point is Mr. Peek
18 is the one who had asked -- when I was asking about these
19 statements he wanted to put it in context by referring to the
20 meet and confer and then explaining it so that he predicate
21 the context of his statements to the Court. So I'm asking
22 some followup questions about that context and what we were
23 told so as to shine some light on what you were going to be
24 told the next day by both Mr. Peek and by Mr. Weissman.

25 THE COURT: The objection is overruled given the

1 witness's wish to put it in context.

2 BY MR. BICE:

3 Q All right. Mr. Peek, do you recall Mr. Weissman
4 telling us that he didn't think that they should have to
5 produce it because the documents were subject to the Macau
6 Data Privacy Act?

7 A That certainly was one of -- one of the issues --

8 Q Okay.

9 A -- amongst others.

10 Q All right. Did Mr. Weissman disclose during that
11 call that the documents were in the United States?

12 A I don't believe that he did.

13 Q Did you disclose it?

14 A I did not, because I'd already previously -- well,
15 never mind.

16 Q And so your position is you had already previously
17 disclosed it a year ago so you didn't need to repeat yourself?

18 A I'd gone as far as I could go the previous time.

19 Q Let's take a look at what Mr. Weissman told the
20 Court after you'd said you were going to defer to him on
21 production of Mr. Jacobs's --

22 MR. MCCREA: What page is this, Counsel?

23 MR. BICE: This is the May 24 transcript, starting
24 at page 13, going on to page 14.

25 THE WITNESS: Thank you.

1 BY MR. BICE:

2 Q Now, just so that the Court is clear again, Mr.
3 Peek, Mr. Weissman was at no point in time representing Las
4 Vegas Sands Corp.; correct?

5 A He was not, sir.

6 Q Okay. So let's see what he told the Court. The
7 Court's question to him is, "Okay. So when are they going to
8 get produced?" Mr. Weissman's response, "In terms of process,
9 Your Honor, we're going to go through a very elaborate and
10 lengthy and costly process to review Mr. Jacobs's ESI. It
11 seems to us -- it seems to us that process should run its
12 course before we're --" he's talking about Sands China, right,
13 when he says "we're" obligated to go back and look at whatever
14 emails we have of his," right, "as well." Do you see that?

15 A I read it along with you, yes, sir.

16 Q Okay. And you understood at the time of that
17 statement that Mr. Weissman was talking about Sands China
18 Limited; right?

19 A No. What I thought he was talking about was the
20 elaborate lengthy and costly process to review the Jacobs ESI
21 that Mr. Jacobs had submitted to Advance Discovery pursuant to
22 the Court's order on January 3rd --

23 Q Right. So let's look at the next sentence.

24 A -- and that we were going to through that lengthy
25 and costly process to review the ESI that -- I don't know if

1 it by that time had been released to us, I don't know if Mr.
2 Jacobs had released it to us yet or not as of this date or
3 not.

4 Q All right. But the next sentence says, "It seems to
5 us that -- it seems to us that process should run its course
6 before we're obligated to go back and look at whatever emails
7 we have of his"; correct?

8 A Those are his words, yes, sir.

9 Q Okay. And he was speaking on behalf of Sands China
10 that day?

11 A I can't speak for him. I would imagine he was. I
12 can't speak for him when he said those words.

13 Q Did you think he was telling the Court about the
14 emails and ESI that Las Vegas Sands Corp. had here in the
15 United States?

16 A I didn't have a thought one way or the other, Mr.
17 Bice.

18 Q Well, do you recall what you said later on after the
19 Court terminated the jurisdictional discovery -- or the
20 jurisdictional evidentiary hearing?

21 A I don't. But do you want me to refer to it? Is
22 there a --

23 Q Yeah.

24 A -- place in the transcript where you'd like me to
25 look?

1 Q Yeah. Let's go to page 17 --

2 A Okay.

3 Q -- of the transcript. We'll start on line 16, and
4 I'll read it, and you follow along, make sure I don't misquote
5 it. "The Court: I certainly suspect there are going to be
6 issues about the admissibility of evidence --"

7 A I think she says "respect." You said "suspect."

8 Q "I certainly respect," you are correct, "there are
9 going to be issues about the admissibility of certain evidence
10 at the time of our evidentiary hearing, which is why I'm
11 shocked we haven't gotten -- or got to the deposition stage
12 yet, because I won't have any time to do evidentiary issues at
13 this point. So I don't know when you're going to be ready,
14 but clearly you're not going to be ready for a hearing at the
15 end of June." That was her statement; correct?

16 A Yes.

17 Q And you responded to her saying, "Well, we don't
18 even know, Your Honor, whether a search of the Jacobs on the
19 Macau server is going to be such that we couldn't be ready";
20 correct?

21 A Those are the words, yes, sir. You read them
22 correctly.

23 Q "So that's why -- I mean," and then you're going on,
24 "I appreciate you vacating the date, but we very well --" and
25 then got cut off by the Court; right?

1 A I wouldn't say that the Court cut me off.

2 Q Okay. Well, anyway, the transcript breaks, and the
3 Court begins to talk; is that fair?

4 A I mean, I don't -- I don't know how you --

5 Q Okay.

6 A It's what you interpret it, Mr. Bice.

7 Q Okay. Well, you --

8 A I mean, then the Court spoke.

9 Q You told her, did you not, that you were talking
10 about a search of the Jacobs on the Macau server; correct?

11 A That's what it seems to be. The context of this
12 still has to do with the Jacobs ESI that he had taken when he
13 left his employment.

14 Q You didn't tell her at this hearing that there were
15 emails that you had already reviewed that were here in the
16 United States, did you?

17 A That's right. I did not tell her that I had
18 reviewed emails that were in the United States.

19 Q In fact, you and Mr. Weissman led her to believe
20 that the documents were all over in Macau and that they would
21 have to be looked at over there and why go through that
22 process since we already had Mr. Jacobs's ESI that he
23 possessed in the United States. That's exactly what you and
24 Mr. Weissman wanted her to believe, isn't it?

25 A No.

1 Q That's why you told her -- you made reference to the
2 Macau server. You didn't tell her on May 24, you didn't make
3 any reference about the fact that you had the documents
4 already and you had been looking at them for nearly two years.
5 I apologize. Not two years. More than a year, 18 months you
6 had been looking at them.

7 A No, that's not correct.

8 Q You're right. It's 12 months, because this is
9 May 24th of 2012.

10 A I only looked at them one time in one month's period
11 of time and left them in Mr. Kostrinsky's office at that time.
12 So from that day forward I had not looked at any other Jacobs
13 ESI.

14 Q All right. You and Mr. Jones had reviewed all of
15 the emails --

16 A We've gone over that, sir, many times.

17 Q Okay.

18 A We can do it again, if you'd like.

19 Q And the point was on May 24, despite the fact that
20 you knew where those emails were at, you specifically wanted
21 the Court to think that they were on the Macau server, which
22 is why you told her the Macau server; right?

23 A That's not true, sir.

24 Q You could have volunteered and told her the truth
25 about where the documents were at, couldn't have you?

1 A Thought I'd already told her previously when I put
2 her on notice that I was constrained at least at this time, I
3 went as far as I could go.

4 Q You thought that you had told her back in -- I guess
5 what we're claiming is June of the following -- or the
6 preceding year; right?

7 A Yes, sir. The context of this one was you raised an
8 issue of -- to Mr. Weissman in the meet and confer the day
9 before, why hadn't you gone to Macau, and so this hearing had
10 to do with Macau.

11 Q And that's why you were referencing it, you felt?

12 A Well, that was what the hearing was about, because
13 you raised at that time -- you were -- you raised an issue
14 with the Court at this status check of the fact that Mr.
15 Weissman had told you the previous day that he had not gone
16 and looked and was not planning on going to look at -- because
17 he didn't -- well --

18 Q Didn't we -- so you're saying that we didn't ask you
19 whether or not you've searched Mr. Jacobs's emails?

20 A You mean the previous day? Is that what you're
21 asking me?

22 Q Yes, Mr. Peek.

23 A I don't know.

24 Q Because if we had asked that -- oh. I apologize.

25 A I think that you asked a question about whether we'd

1 gone to Macau to search his emails. Yes, you did ask that
2 question.

3 Q Did we ask you -- did we use the word "Macau," or
4 are you using that word today?

5 A I recall it as you used the word "Macau," have you
6 gone to Macau to look at Jacobs's ESI. Yes, sir, I recall it
7 that way.

8 Q Okay. So had we asked you the question, have you
9 searched Jacobs's emails, you would have then told us that you
10 had; is that what you're telling the Court?

11 A No, that's not what I'm telling the Court. I don't
12 know -- I'm sorry --

13 Q So whether we had said --

14 THE COURT: Wait. Only one at a time.

15 BY MR. BICE:

16 Q I apologize.

17 A I don't quite -- I'm not following you, Mr. Bice. I
18 apologize.

19 Q Well, you're saying that the reason that you thought
20 you could answer the question the way you did to us and the
21 way you did to the Court is because we had used the word
22 "Macau." That's as I understand your position. I just want
23 to make sure that we're -- all in this room are crystal clear.
24 Had we asked you, have you searched Jacobs's emails, you would
25 have still told us no; right? Whether we used the word

1 "Macau" or not.

2 A No, I would not have said no.

3 Q Okay. So had we not used the word "Macau," you then
4 would have felt obligated to have told us the truth about the
5 status of the documents; is that your position?

6 A You assume by that that I hadn't previously told you
7 or your previous counsel. And I know you said yesterday that
8 you were positive that I hadn't, so I accept you. But I know
9 that I had through the course of dealings with Mr. Williams
10 and Mr. Campbell been led to believe that they knew that we
11 had data here and that that date included Jacobs data.

12 Q Okay. And so, again, they -- Mr. Williams and Mr.
13 Campbell just dropped the ball and didn't pursue it with you
14 is your position?

15 A I can't speak for Mr. -- Mr. Jacobs and Mr. --

16 Q I understand. But --

17 A -- and Mr. --

18 Q But they didn't follow up; is that -- am I right?

19 A Sir, you keep interrupting me.

20 THE COURT: You've got to not interrupt, please.

21 THE WITNESS: And you don't let me answer. I

22 can't --

23 THE COURT: Have we done enough of the background to
24 put this in context?

25 MR. BICE: I don't know. We've got -- we're getting

1 a lot of statements here about, well, had you not used the
2 word "Macau" I guess I would have had to have disclosed it.

3 THE COURT: I understand what you're saying, Mr.
4 Bice. My question is can we go back to the focus of my
5 hearing. Because I let you have some leeway --

6 MR. BICE: Okay.

7 THE COURT: -- because the witness had said he
8 wanted to put things in context.

9 MR. BICE: Well, Your Honor, it's right out of the
10 transcript where Mr. Peek said, "...whether a search of the
11 Jacobs on the Macau server is going to be such we couldn't be
12 ready in two weeks."

13 BY MR. BICE:

14 Q Right? That's what we were talking about at the
15 time; correct, Mr. Peek?

16 A Mr. Bice, we had waited for about eight months for
17 you to deliver the Jacobs ESI. You delayed repeatedly from
18 September of 2011 --

19 Q Is that why you felt an appropriate --

20 THE COURT: Mr. Bice, don't interrupt.

21 MR. BICE: I thought he was done. How many --
22 again, Your Honor, I don't mind the speeches, but they're ont
23 answer to my question.

24 THE COURT: Excuse me. We're going to take a break.

25 MR. BICE: Understood, Your Honor.

1 (Court recessed at 1:39 p.m., until 1:42 p.m.)

2 THE COURT: Mr. Bice, can you approach.

3 MR. BICE: I apologize, Your Honor?

4 THE COURT: Can you approach, please.

5 MR. BICE: I can, Your Honor.

6 THE COURT: This is my fill-in-the-blank contempt
7 form. I haven't filled in the blanks. I'm giving it to you
8 just so I have it in case I get to a point, which will
9 probably be the next time you insist On interrupting or act
10 disrespectfully.

11 MR. BICE: Okay.

12 THE COURT: Then I will complete it.

13 MR. BICE: Thank you, Your Honor.

14 THE COURT: I don't think you've been in here when
15 I've been forced to complete one, so I'm giving you warning.

16 MR. BICE: I think I actually have, Your Honor, and
17 I -- Your Honor is correct. I should not have interrupted
18 him, and I apologize to the Court for my having done that.

19 THE COURT: Okay. So let's all please keep going.
20 The point is to get information so I can make an evaluation as
21 to whether a sanctionable action has occurred, and, if so,
22 what an appropriate sanction is.

23 MR. BICE: Understood, Your Honor.

24 THE COURT: Thank you.

25 MR. BICE: Again, my apologies to the Court and to

1 Mr. Peek for cutting him off.

2 BY MR. BICE:

3 Q Mr. Peek, do you recall the question that you wanted
4 to further elaborate on?

5 A I do not, sir. I --

6 Q All right. Mr. Peek, you'd earlier, again, just so
7 that we're clear, I think you made the statement that the
8 reason why you were referencing the Macau server is because
9 you thought that's what we were talking about; is that
10 correct?

11 A Yes, sir.

12 Q All right. If you take a look at that same
13 transcript, May 24th, if you go to page 4. I'll give you a
14 chance to read it.

15 A I read it, sir.

16 Q Okay. You knew that, did you not, Mr. Peek, that
17 you possessed Sands China's emails at that point in time
18 regarding Mr. Jacobs; correct?

19 A Yes, sir, I did know that.

20 Q Okay. And we specifically made reference to the
21 Court that Las Vegas Sands right there at line 7, "Well, all
22 right. Let's talk about it. I mean, where we are right now
23 is we have received some documents I believe we -- I believe
24 last week from Las Vegas Sands. Yesterday we were told that
25 they were not -- that they have not searched Mr. Jacobs's

1 emails"; correct?

2 A Yes.

3 Q Did you -- and so it's your position to the Court
4 that you understand that all I was talking about was his
5 emails back in Macau and you didn't believe you were under an
6 obligation to disclose the location of the set that you
7 possessed?

8 A Well, you've asked me two questions there. The
9 context, as I understood it, was, yes, the context of going to
10 Macau and searching not only Jacobs' emails, but other
11 custodian's emails. And then I don't remember the second part
12 of your question.

13 Q Well, the second part of my question is you didn't
14 believe that you were under any obligation either to the Court
15 or to us to disclose your possession of the other emails?

16 A I thought I had already done that, so I guess the
17 answer is, yes, I had done that previously in the manner in
18 which I was allowed to do.

19 Q And you recall, Mr. Peek, submitting a brief just a
20 day before that I've already showed you in footnote 4 where
21 you acknowledged that you hadn't disclosed it to us?

22 A The day before on May 23rd? I'm sorry, I don't have
23 that brief.

24 Q Maybe I have the -- no, I apologize. You were
25 correct. A month later on June 27th where you disclosed that

1 you hadn't disclosed it to us or where you stated you hadn't
2 disclosed it to us.

3 A At this time I disclosed what I disclosed in the
4 June 27th.

5 Q Okay. In the filing with the Court?

6 A Yes, sir.

7 Q Okay. You didn't say in there that you had already
8 disclosed this to Campbell and Williams like you keep
9 repeating to the Court --

10 A I think you've --

11 Q -- today; correct?

12 A -- told me that. You've already gone over that. I
13 mean, I'm happy to go over it again if you'd like me to.

14 Q No. Let's talk about --

15 MR. BICE: Because as I, Your Honor, understand from
16 one of the statements you had made at a prior hearing, let's
17 talk about whether or not information has been lost.

18 BY MR. BICE:

19 Q You learned --

20 MR. MCCREA: Your Honor, this is beyond the scope.

21 THE COURT: Information lost is one of the factors I
22 have to evaluate, Mr. McCrea.

23 BY MR. BICE:

24 Q Do you recall during this case that you had great
25 concern, or you told the Court you had great concern, about

1 Mr. Jacobs's -- the documents he possessed and his laptop
2 computer?

3 A You mean in a context of what he had taken out of
4 Macau when he left? Is that what you're --

5 Q Well, that's your characterization of it, but the
6 documents that he possessed.

7 A I don't know. I'm trying to ask you. I guess
8 I'm --

9 Q Okay.

10 A -- trying to just ask you if you could be more
11 specific --

12 Q Absolutely.

13 A -- because I'm not sure I understand your question.

14 Q The documents -- and I apologize. The documents
15 that he possessed during this litigation.

16 A I still have the same concerns.

17 Q Okay. Do you recall telling the Court that it was
18 critically important that there be a forensic image of his
19 laptop computer?

20 A Either I or Mr. Ma did. I don't remember which.
21 But certainly that would be my position --

22 Q Okay.

23 A -- that we should have a forensic image. And I'm
24 still even concerned today about that --

25 Q All right.

1 A -- with Mr. Jacobs.

2 Q When did you become aware that Sands China -- strike
3 that. When did you become aware that the image of Mr.
4 Jacobs's desktop machine that Las Vegas Sands possessed was
5 not a forensic image?

6 MR. MCCREA: Objection. Attorney-client.

7 THE COURT: He's just asking for a date, Mr. Peek.

8 BY MR. BICE:

9 Q Correct.

10 A I believe I knew that in December/January 2010/2011,
11 or one of those two months, as I've testified previously.

12 Q Okay.

13 A Because I knew what Mr. Kostrinsky had received was
14 not a quote, unquote, forensic image.

15 Q Okay. When did you become aware that the original
16 desktop machine that the ghost image had been created from
17 could no longer be located?

18 MR. MCCREA: Objection. Attorney-client privilege.

19 THE COURT: We're just looking for a date, Mr. Peek.

20 THE WITNESS: I first learned sometime in the late
21 summer 2011 that there was a question about whether or not a
22 forensic image had been made of all of his media devices that
23 -- that he used.

24 BY MR. BICE:

25 Q Okay. And, again, maybe I didn't sufficiently

1 articulate the question. When did you become aware that the
2 original desktop, the drive from the original desktop, had not
3 been preserved?

4 A I'll answer that again. In the late summer I
5 learned that there was a question about whether or not we
6 still had possession of Mr. Jacobs' -- one of the original
7 hard drives of the -- of one of the devices that he used.

8 Q Okay. When did you become aware that they thought
9 that they had found it?

10 A I'm not sure.

11 MR. MCCREA: Objection. Attorney -- well.

12 THE COURT: I'm just looking for a date, Mr. Peek.

13 THE WITNESS: I'm not sure. Here's what I do know,
14 and maybe -- if I -- if I may.

15 BY MR. BICE:

16 Q You may.

17 A If you don't -- I mean, I know it's a
18 question/answer, but if I -- if I may. I understood that
19 images had been made. I understood that one of those may not
20 be a forensic image. I learned that in the summer of 2011
21 that there was an image, it just wasn't a forensic image.
22 That's -- and that we were still trying to locate the original
23 media device. I don't know that that's -- that's -- I don't
24 have an answer as to whether or not that's still an ongoing
25 effort or not.

1 Q All right. And so is it your testimony as of today
2 you don't know whether the original media device even exists
3 as of today?

4 MR. MCCREA: Objection. Attorney-client privilege.

5 THE COURT: Sustained.

6 BY MR. BICE:

7 Q At the time that you were in front of Her Honor --
8 well, let's do it this way. I'll show you -- let's take a
9 look at the November 22, 2011, transcript.

10 A I'm there.

11 Q Do you recall, if you take a look at page 14 of that
12 transcript, please.

13 A I'm there.

14 Q Do you recall saying that you were wondering why
15 there was so much objection by Mr. Jacobs to providing the
16 independent ESI vendor the original media? Do you recall
17 that?

18 A Yes, I do recall that.

19 Q And do you recall telling the Court that, "And I
20 think the only way to assure the defendants in this case that
21 we have uncorrupted and forensically sound data is to get it
22 from the original media source"; correct?

23 A I don't know where you're reading from. Perhaps if
24 you could --

25 Q I believe I'm reading from line 8 through 18. Let

1 me grab the exact copy and make sure I have it right.

2 THE COURT: No, that's correct. That's where you
3 were.

4 THE WITNESS: Line 11? So it starts on line 11?

5 THE COURT: 8.

6 MR. BICE: 8.

7 THE COURT: It says what I'm wondering on page 14.

8 THE WITNESS: Okay. I'm sorry. I was on 15.

9 BY MR. BICE:

10 Q Did you see where I was reading from?

11 A I do see where you were reading from.

12 Q Okay. Now, at this point in time in November of
13 2011, just so we make sure we've got the timeline down, you
14 knew that your client did not possess the original media
15 source for the ESI that it was supposed to have preserved in
16 this case; correct?

17 A Yes, there was a question about whether we still had
18 it in our possession.

19 Q Well, how was -- I apologize. Were you done?

20 MR. McCREA: I'm sorry. I didn't hear that
21 question.

22 THE COURT: Me either.

23 MR. BICE: No, I just said -- I asked him if he was
24 done. I thought I had perhaps cut him off again and I didn't
25 want to do that because I don't really care to get in trouble

1 with Her Honor. So I'm trying to be careful. I hope I am,
2 anyway. And I think -- and I'll infer from his silence that
3 he was done, so I'll -- I will go on.

4 BY MR. BICE:

5 Q What did you do to ascertain, since you were telling
6 the Court that Mr. Jacobs needed to present his original media
7 source, what were you doing to obtain the original media
8 source that you knew had disappeared?

9 A I wasn't doing anything because it wasn't my client.

10 Q Okay.

11 MR. MCCREA: Please wait until he finishes the
12 question so I can object when --

13 THE COURT: Was there something else you wanted to
14 say, Mr. McCrea?

15 MR. MCCREA: I just wanted to lodge a work product
16 objection.

17 THE COURT: Objection is sustained.

18 BY MR. BICE:

19 Q Who was it, Mr. Peek, that was handling that
20 process?

21 MR. MCCREA: Same objection.

22 THE COURT: Sustained.

23 BY MR. BICE:

24 Q Were you aware at that same hearing, Mr. Peek, that
25 Her Honor made the observation that she was certain that it

1 had been preserved, your original -- or the defendants'.
2 original media source?

3 A What page are you on now, sir?

4 Q Go to page 56. Actually, it's probably better to go
5 to page 59. I take that back.

6 A Okay. Okay. What am I --

7 Q Look at line 19.

8 A Where she's talking to you?

9 Q Yes.

10 A Okay.

11 Q Where she says, I think it's line 19, "I'm certain
12 it was preserved because I entered an order and somebody sent
13 a preservation letter. And I'm certain they hired a forensic
14 consultant and I'm certain it was done correctly, and I'm not
15 worried about it today." Correct? Did I read that correctly,
16 sir?

17 A You did.

18 Q Okay. And -- but at that -- at that very hearing
19 you knew that the original media source was missing, didn't
20 you?

21 A Yes.

22 Q Okay. And you never told that to the Court?

23 A I did not tell that to the Court because we had not
24 completed, in my judgment, Sands China Ltd. -- from what I
25 had --

1 MR. MCCREA: Objection. Attorney-client privilege.

2 THE COURT: Sustained.

3 BY MR. BICE:

4 Q And I guess we're here, and I lose track of the
5 date. Today is September 11th.

6 THE COURT: The 11th of September.

7 MR. BICE: Right.

8 BY MR. BICE:

9 Q On September 11, nearly a year later, and you still
10 don't know, is that fair?

11 MR. MCCREA: Objection, Your Honor. Work product,
12 attorney-client privilege.

13 THE COURT: Overruled.

14 You can answer.

15 THE WITNESS: I do not know as I sit here today.

16 BY MR. BICE:

17 Q Now, you were present, were you not, for Mr. Singh's
18 -- well, I know you were, so I'm just -- this is an
19 affirmative statement just as a predicate for the question.
20 You were present for Mr. Singh's testimony where he
21 acknowledged that the image, the ghost image that you had
22 possessed or that your client had possessed since August of
23 2010 would not reflect documents that might have been deleted
24 from the original media source prior to the image being made.
25 Do you recall that?

1 A As I understand, that's the difference between
2 forensic versus ghost. So we wouldn't be able to show what
3 documents Mr. Jacobs had deleted during the course of his
4 service as president of Sands China Ltd.

5 Q Okay. And you also wouldn't be able to show or we
6 wouldn't be able to learn what documents had been deleted
7 prior to the ghost image being created; correct?

8 A Well, if I -- that would be correct, but I think the
9 ghost image was created on or about the day he departed, which
10 was the 23rd of July 2010.

11 Q Didn't your disclosure statement to the Court reveal
12 that the image had not been created until the 27th?

13 A I don't know. If you --

14 Q I'm --

15 A I don't know, Mr. Bice. I mean, my recollection is
16 that Mr. Kostrinsky was handling that. I thought it was done
17 immediately at his direction, but you could be right. I don't
18 know.

19 Q Well, was any investigation done to determine who
20 was -- who, if anyone, had accessed Mr. Jacobs's computer in
21 the days following his termination and being escorted off the
22 island?

23 MR. MCCREA: Objection, Your Honor. Work product
24 and beyond the scope.

25 THE COURT: Overruled.

1 THE WITNESS: No. There's a lot of things that you
2 said in there. First of all, that he was escorted off the
3 island. That's your interpretation. But the day that he
4 departed, I don't know specifically what the IT department
5 did. You'd have to ask probably somebody other than me.

6 BY MR. BICE:

7 Q Well, do you -- sorry. I want to make sure. Do you
8 know whether or not Mr. Leven was on Mr. Jacobs's computer
9 prior to the creation of the ghost image?

10 MR. McCREA: Objection.

11 THE WITNESS: I do not know.

12 MR. McCREA: Object, Your Honor. Attorney-client
13 privilege.

14 THE COURT: Sustained.

15 MR. McCREA: Work product.

16 BY MR. BICE:

17 Q Do you know whether any other board members from Las
18 Vegas Sands were on that computer prior to the creation of the
19 ghost image?

20 MR. McCREA: Same objection.

21 THE COURT: Sustained.

22 BY MR. BICE:

23 Q Is it fair to say that you have not conducted any
24 investigation as to whether or not Sands executives had access
25 -- when I say Sands, Las Vegas Sands executives, whether they

1 wear two hats or one hat, were on that computer for the three
2 days preceding the creation of the ghost image?

3 MR. MCCREA: Objection. Work product,
4 attorney-client privilege.

5 THE COURT: Sustained.

6 BY MR. BICE:

7 Q So if somebody was on it and somebody deleted
8 documents from that computer, we wouldn't be able to know that
9 now, would we?

10 MR. MCCREA: Same objection.

11 THE COURT: Overruled.

12 THE WITNESS: I don't know, Mr. Bice. I'm not a
13 computer person.

14 BY MR. BICE:

15 Q Okay.

16 A And I don't believe that you're -- you're correct in
17 that statement, but I don't know for sure because I'm not a
18 computer person.

19 Q Well, just so that we understand, Mr. Singh
20 testified that if something was deleted before the ghost image
21 was created, it was gone, or at least you couldn't determine
22 that from the ghost image, is that fair?

23 A Is it fair what Mr. Singh testified? You'd have to
24 show me the transcript.

25 Q What is -- is that your recollection of what he

1 said?

2 A I believe it was something along those lines, but I
3 also believe from -- I'm hesitant to go here because I don't
4 think Mr. McCrea --

5 THE COURT: I'm waiting for Mr. McCrea --

6 THE WITNESS: -- knows this.

7 THE COURT: -- to stand up.

8 MR. MCCREA: Yeah. If you're going beyond what Mr.
9 Singh testified in his deposition, I am going to object.

10 THE COURT: Okay. And you're going to object on the
11 basis of attorney-client?

12 MR. MCCREA: I am.

13 THE COURT: Okay.

14 Mr. Peek, so are you going to follow that?

15 THE WITNESS: I am going to follow that.

16 THE COURT: All right.

17 BY MR. BICE:

18 Q Were you also aware -- strike that. When did you
19 become aware that there was also a foil envelope that Mr.
20 Kostrinsky had brought back from Macau that had gone missing?

21 MR. MCCREA: Objection. Attorney-client privilege.

22 THE COURT: Sustained.

23 MR. BICE: I'm merely asking when.

24 THE COURT: I understand, Mr. Bice.

25 MR. BICE: Mr. Singh had testified, Your Honor, that

1 it happened.

2 THE COURT: See, I don't know what Mr. Singh
3 testified to because I wasn't there.

4 MR. BICE: Okay. I'll how about if I start this
5 way.

6 THE COURT: Sure.

7 BY MR. BICE:

8 Q Do you recall Mr. Singh testifying at his
9 deposition, Mr. Peek, that it's his understanding that a foil
10 -- Mr. Kostrinsky brought back a foil envelope with something
11 inside of it from --

12 A I do recall that testimony.

13 Q -- from Macau?

14 A I do recall that testimony.

15 Q And that it is now missing?

16 A I believe he testified that he has conducted a
17 search and as of that time he had not located that foil
18 envelope.

19 Q When did you become aware that such a foil -- just
20 so that we're all clear, you understand what -- what is
21 typically transported in foil envelopes?

22 A I do not.

23 Q Okay.

24 A I know now because I was told --

25 Q Okay.

1 A -- during Mr. Singh's testimony.

2 Q It's designed to protect electronic devices against
3 magnetism.

4 A I know that now.

5 Q Okay. When did you learn that whatever was in that
6 envelope could no longer be accounted for?

7 A Objection. Attorney-client privilege.

8 THE COURT: Just the date, Mr. Peek.

9 THE WITNESS: I'm trying to think. It was June,
10 July, August because I'm trying to -- probably August of 2012.

11 BY MR. BICE:

12 Q Of this year?

13 A Yes. That's 2012, yes.

14 Q All right. And so prior to that you did not even
15 know that Mr. Kostrinsky had brought over something in a foil
16 envelope?

17 MR. McCREA: Objection. Attorney-client privilege.

18 THE COURT: Sustained.

19 BY MR. BICE:

20 Q Are you in -- since you are counsel for Las Vegas
21 Sands, isn't it -- has any investigation been conducted to
22 determine what happened to whatever was inside that foil
23 envelope?

24 MR. McCREA: Objection. Work product.

25 THE COURT: What did you say?

1 MR. McCREA: And attorney-client privilege.

2 THE COURT: Sustained.

3 BY MR. BICE:

4 Q Is it fair to say that even as of today, Mr. Peek,
5 you cannot -- your client cannot account for whatever was
6 inside that foil envelope?

7 MR. McCREA: Same objection.

8 THE COURT: Sustained.

9 BY MR. BICE:

10 Q Is it fair to infer that your client did not inform
11 you that the device or whatever was in that foil envelope had
12 been brought over from Macau by Mr. Kostrinsky?

13 MR. McCREA: Same objection.

14 THE COURT: Sustained.

15 BY MR. BICE:

16 Q Let's jump ahead now to the Macau -- I'm not sure
17 what the title of the office is, but we'll refer it to as the
18 office, I guess, has to approve the removal of data.

19 A It's called the OPDP is the acronym.

20 Q OPD --

21 A It's Office of Personal Data Protection, OPDP.

22 Q OPDP.

23 A Office of Personal Data Protection. I thought you
24 would have known about that from Mr. Wynn.

25 Q Okay. I'm not sure what your constant reference to

1 that is. I guess you believe that that somehow justifies the
2 conduct that's occurred in this case --

3 A No.

4 Q -- by yourself?

5 A All I know is that it makes -- it's just evidence
6 that this is a real act.

7 Q Okay.

8 A That Mr. Wynn has also been under investigation, as
9 well, for transfers that his company has made, and I know you
10 represent them in the Okada --

11 THE COURT: Just so we're all clear, today is not
12 Wynn-Okada. Okay? So we don't need to complicate the Sands-
13 Jacobs case with Wynn-Okada. Although many of the people in
14 this room are involved in the Wynn Okada case, we will deal
15 with that case next week.

16 MR. BICE: We will.

17 THE WITNESS: My apologies, Your Honor.

18 THE COURT: It's all right.

19 BY MR. BICE:

20 Q On May 24, Mr. Peek, is when the Court cancelled the
21 evidentiary hearing on jurisdiction because Sands China and
22 Las Vegas Sands, as we now know, did not search for emails on
23 the Jacobs ESI. Do you recall that?

24 A I recall the Court vacated it. I recall that she
25 was concerned about that lack of -- that lack of discovery

1 that had been undertaken.

2 Q Okay. And now I think you had submitted to the
3 Court in a brief a statement that Las Vegas Sands finally got
4 comfortable that it could produce those emails on May 28th.
5 It got comfortable on May 28th that it could produce those
6 emails.

7 A I believe that's a statement that we made in one of
8 the briefs. I don't remember which one. Perhaps if you'd be
9 so kind as to show that to me I could refer to it.

10 Q I apologize. I don't -- I just want it recalled if
11 that's -- or I just want to see whether that's your
12 recollection of the approximate date.

13 A I don't know. If you show me the brief, I'd be
14 happy to look at it and confirm that you're accurate in your
15 statement. But I don't know. You'd have to show me the
16 brief.

17 Q Were you involved in any of the communications with
18 the Macau government after May 24?

19 A No, I was no.

20 Q Do you know who was?

21 A Yes, I do.

22 Q And who was it?

23 MR. MCCREA: Objection. Attorney-client privilege.

24 THE COURT: Sustained.

25 MR. BICE: Your Honor, all I'm asking for is I want

1 the identity of the persons involved.

2 THE COURT: But the source of the information from
3 which make it to Mr. Peek would be giving you the answers from
4 an attorney-client communication.

5 MR. BICE: But a fact -- but a fact isn't privileged
6 just because it was provided to an attorney or even from an
7 attorney.

8 THE COURT: I am aware of that, Mr. Bice.

9 MR. BICE: And I'll ask a follow up question. I
10 understand, just so that the record is clear.

11 BY MR. BICE:

12 Q Was Mr. Weissman one of the people that was in
13 communication with the Macau government after May 24?

14 MR. MCCREA: Same objection.

15 THE COURT: Sustained. Although, I do think Mr.
16 Weissman told me that in a hearing.

17 MR. BICE: I think so, too, which is, of course, a
18 little --

19 THE COURT: We'll find out later.

20 THE WITNESS: Well, I'm just -- I'm just
21 following --

22 BY MR. BICE:

23 Q No, I'm not --

24 A I don't have a choice here, Mr. Bice.

25 Q I understand. I am not quarrelling with you on

1 that, Mr. Peek. But is it fair to say, and if it -- and if
2 you think I'm wrong, then say so. But is it fair to say that
3 whoever it was that was in communication with the Macau
4 government was able to give approval, or I guess get
5 comfortable, in that four-day window that the data could be
6 released to the Court here in Nevada?

7 A I don't know what the four-day window is, so I don't
8 -- I don't know what you -- what your reference to the
9 four-day window is. I do know that the statement of being
10 comfortable is -- is probably either Mr. Weissman said it or
11 we said it in a brief because I remember that that is -- that
12 is a correct -- I learned that --

13 Q Okay.

14 A -- from my contact with my client.

15 Q Okay. Do you know when the Macau government was
16 told that this data was here and had been here since August?

17 MR. MCCREA: Objection. Attorney-client privilege.

18 THE COURT: Sustained.

19 BY MR. BICE:

20 Q All right. Let's jump ahead to after June, I guess
21 it's 28 or 27. I'm not sure of the exact date. In any event,
22 I think it came in the brief to the Court when disclosure was
23 made that the data was here. Do you recall that?

24 A Was that the June 27th brief that you've shown me
25 before?

1 Q I believe so.

2 MR. McCREA: Your Honor, this is going beyond the
3 scope. Once we get to June 28th, all the disclosures have
4 been made. I don't know --

5 THE COURT: Really?

6 MR. McCREA: -- what the point is.

7 THE COURT: You know there's an issue about that,
8 Mr. McCrea.

9 MR. McCREA: Pardon me?

10 THE COURT: There's an issue about that, which is --

11 MR. McCREA: Okay.

12 THE COURT: -- part of why I think Mr. Brian asked
13 for an opportunity to do some things that might have resulted
14 in you guys getting involved.

15 MR. BRIAN: Although, Your Honor, just -- I think it
16 was our -- we don't think it's part of this hearing. That was
17 one of the points I was making.

18 THE COURT: Okay.

19 MR. BICE: We obviously disagree with that, Your
20 Honor.

21 THE COURT: I'm just trying to get information that
22 I need to evaluate.

23 BY MR. BICE:

24 Q Do you recall, Mr. Peek, that on or about July 6,
25 2012, that you submitted to the Court a document entitled

1 defendants' statement regarding data transfers?

2 A I do recall that, sir.

3 MR. BICE: May I show this to Mr. Peek, Your Honor?

4 THE COURT: You may.

5 MR. McCREA: Is it in your notebook, Counsel?

6 MR. BICE: It is, Charlie. I believe it's Number 5.

7 THE COURT: The June 27th filing?

8 THE WITNESS: No, this is July 6th.

9 MR. BICE: The July 6th, Your Honor, that
10 concerns --

11 THE WITNESS: The July 27th, Your Honor, is a
12 defendant joint status conference statement because we had a
13 status conference the next day.

14 MR. BICE: Did you find it, Charlie?

15 MR. McCREA: Yes.

16 MR. BICE: Okay.

17 BY MR. BICE:

18 Q You signed this brief; correct, Mr. Peek?

19 A I'm sure that I did.

20 Q Okay.

21 A Yeah, Mr. Weissman and I signed it.

22 Q Okay. And can you tell us from your perspective
23 what was the purpose of this brief?

24 MR. McCREA: Work product, Your Honor. Objection.

25 THE COURT: Overruled.

1 THE WITNESS: The Court had expressed concern, and
2 we were also concerned, based on the Court's comments to us,
3 and I think it was the July -- June 28th hearing. So we
4 wanted to disclose to the Court all of the data transfers, not
5 just the Jacobs transfers involving Mr. Kostrinsky. So that
6 was the purpose.

7 BY MR. BICE:

8 Q Okay. Is it -- and, again, I'm going to ask you
9 this question, and I -- you might not believe it, but I'm not
10 -- I'm not trying to be argumentative with you about it. But
11 is it fair to say, Mr. Peek, you're not happy to be in the
12 current situation. Is that fair?

13 A No, I'm not, Mr. Bice.

14 Q All right.

15 A I'm not happy at all --

16 Q Okay.

17 A -- to be sitting on this witness stand having you
18 examine me.

19 Q Understood.

20 A This is a very embarrassing time for me after 40
21 years of practice that I find myself in this position.

22 Q I understand.

23 A My anniversary of 40 years, I think, is the 17th of
24 September.

25 Q Okay.

1 A So, yes, I don't find this comfortable.

2 Q I wasn't trying to suggest that you did.

3 A I know you're not, and I know you're doing your job
4 and I --

5 Q But is it fair to say that once you knew that the
6 Court was questioning your -- your candidness and that of your
7 co-counsel and the prior counsel that you felt that it was
8 appropriate to make sure that you were up front with the Court
9 about what had really transpired?

10 A That assumes in that question that I hadn't gone as
11 far as I could go previously with the Court. But I certainly
12 wanted this Court to know that to the extent there hadn't been
13 disclosures previously that she felt I should have made and
14 that -- that hadn't been made other than the brief statement
15 in June that we covered everything. A lot of these I didn't
16 even know about.

17 I learned about all of these during the course of
18 the investigation that we -- I say we, I'm talking about
19 myself and Mr. Weissman and Mr. Owens and Mr. Brian, all of us
20 collectively -- did our best to canvass, scour, and do what we
21 could to give as much information to the Court about both data
22 transfers involving Mr. Jacobs and other data transfers, I
23 think, that had taken place even before that. And I'm not --
24 I think we referred to that, as well.

25 Q All right. Mr. Peek, are you aware of anywhere in

1 this brief that you submitted to the Court on July 6th of 2012
2 where you claim that you had made a disclosure to the Court
3 before this date?

4 A I don't believe there's anything in here because it
5 -- it wasn't -- it wasn't the purpose of this brief to do
6 that.

7 Q So the purpose --

8 A This was not an argumentative advocacy. This was
9 just a report.

10 Q Okay. So the purpose of this, from your
11 perspective, was to simply tell the Court everything that you
12 knew up at this point in time. Is that fair?

13 A It was to do our best from what we had learned as of
14 that date and canvassing and scouring as much as we could.

15 Q But you did know as of this date that you had
16 submitted this brief, did you not, that you had printed off --
17 you yourself had printed off about 100 of these emails;
18 correct?

19 A We've gone over that a number of times. And, yes, I
20 did know --

21 Q Okay.

22 A -- as of this date that I had reviewed Jacobs'
23 ESI --

24 Q Okay. Well --

25 A -- on Mr. Kostrinsky's computer at Las Vegas -- at

1 the Venetian Hotel and Casino.

2 Q And you know that Mr. Jones had done the same?

3 A I did.

4 Q Okay. And you knew that --

5 A I knew the paralegal had gone and done an index, and
6 I knew that those had been left in a Redwell, and I knew that
7 they had been left in Mr. Kostrinsky's office, and I knew that
8 they had not been produced.

9 Q Okay.

10 A I apologize. I know that's why you're -- I probably
11 shouldn't add so much.

12 Q Well, what I'm trying to understand is you knew all
13 those things and you also knew that Mr. Jones had printed off
14 some of the emails, as well.

15 A Yes, sir, I knew that.

16 MR. MCCREA: Your Honor, objection. This is getting
17 awfully repetitive and there are -- there are statements in
18 the brief itself which says exactly this. The record is
19 already established on these points, and I think this is just
20 going too far.

21 THE COURT: Thank you. Overruled.

22 BY MR. BICE:

23 Q Well, let's just deal with -- I'll ask a question
24 about what counsel here just said. All the things that you
25 just told me aren't in this; right?

1 A I haven't read it, so I don't know what's in here or
2 what's not in here.

3 Q Okay.

4 A I do know that during Mr. Kostrinsky's deposition
5 that came out.

6 Q Okay.

7 A Which preceded or was at or about the same day. I
8 think it might've been the day before that we -- we did that
9 deposition. It may have been the day after. I don't
10 remember. But I don't know whether it's in here or not. If
11 you want me to read it, I can.

12 Q I don't know that that's necessary. I just wanted
13 to make sure I understood the purpose of this document.

14 A It wasn't the purpose of this to -- to talk about
15 that. The purpose of this was to talk about all the data
16 transfers. That's what it -- that's what it says, statement
17 regarding data transfers.

18 Q Mr. Peek, do you know whether or not anyone from --
19 I should clarify. Do you know whether or not anyone on behalf
20 of the United States government has been provided copies of
21 these emails?

22 MR. MCCREA: Objection, Your Honor. Attorney-client
23 privilege.

24 THE COURT: Mr. Peek, to the extent that the
25 disclosure of information will require you to divulge

1 attorney-client privilege, I'd ask you not to. But if you
2 have another source of information, we'd like to hear it.

3 THE WITNESS: Your Honor, I have no independent
4 source of information.

5 THE COURT: Thank you.

6 THE WITNESS: I'm not involved in that process.

7 MR. BICE: Well, Your Honor, just so we're clear,
8 they have disclosed in a brief to you that they did disclose
9 some of them and Mr. Peek had signed it, so I guess I'm a
10 little unclear on what the position is.

11 THE COURT: I think their position is it's
12 attorney-client privilege because the source of his
13 information is from a client. I certainly understand they've
14 told me a lot of things that is information from clients, and
15 that's what lawyers do in briefs.

16 MR. BICE: And that --

17 THE WITNESS: I can only follow the instruction of
18 Mr. McCrea, Mr. Bice.

19 MR. BICE: And I think the problem we have, Your
20 Honor, is then they invoke privilege when you try to pierce
21 behind the representation to the Court.

22 THE COURT: Absolutely, Mr. Bice.

23 MR. BICE: And that's, I think, part of the --

24 THE COURT: I understand the frustration that you
25 are suffering from.

1 MR. BICE: Thank you.

2 BY MR. BICE:

3 Q I know how you're going to answer this, Mr. Peek,
4 and I'm not, again, trying to be argumentative with you, but
5 is it fair to say that you were directed to not tell the Court
6 and us about these emails by Ira Rafaelson?

7 MR. McCREA: Objection. Attorney-client privilege.

8 THE COURT: Sustained.

9 BY MR. BICE:

10 Q Mr. Peek, do you deny that Mike Leven knew the
11 status of these emails and had directed that they not be
12 disclosed to us or to the Court?

13 MR. McCREA: Same objection.

14 THE COURT: Sustained.

15 BY MR. BICE:

16 Q Do you deny that Mr. Adelson knew about the status
17 of these documents and directed that they not be disclosed to
18 us or to the Court?

19 MR. McCREA: Same objection.

20 THE WITNESS: I'd only know that if I talked --

21 THE COURT: Mr. Peek --

22 THE WITNESS: -- to Mr. Adelson.

23 THE COURT: -- you can't answer. He's objecting on
24 attorney-client.

25 Right?

1 MR. MCCREA: Yes.
2 THE COURT: Sustained.
3 MR. MCCREA: Thank you.
4 MR. BICE: I don't have anything further at this
5 time.
6 THE COURT: Thank you.
7 Did you want to ask any questions of Mr. Peek?
8 MR. BRIAN: I do, Your Honor.
9 THE COURT: Just so we're clear, Mr. McCrea, you
10 don't intent to object to Mr. Brian's questions on basis of
11 attorney-client privilege?
12 MR. MCCREA: I may, Your Honor.
13 THE COURT: You guys are on the same team. You
14 can't object.
15 MR. MCCREA: Your Honor, but we're -- we're
16 making --
17 THE COURT: You cannot object to his questions.
18 MR. MCCREA: If those -- those are my instructions,
19 I will obey them.
20 THE COURT: Well, no, you can't. He's on your team.
21 That's why I let you guys divide it up.
22 MR. MCCREA: But, Your Honor, we have a different
23 rule here, I think, than these lawyers.
24 THE COURT: Okay. Then we're going to take a break
25 so you and Mr. Brian can make sure that any questions that you

1 have a comfort level issue with don't get asked because you
2 can't object to his questions.

3 MR. MCCREA: Then I won't.

4 MR. BRIAN: Your Honor, may I -- may I make a
5 representation to the Court? I think I can solve the problem.
6 I intend to couch all of my questions not to call for Mr. Peek
7 to reveal attorney-client privilege communications. That is
8 my intent. I'm actually going to try to couch the first
9 couple in those terms expressly, and I would admonish Mr. Peek
10 on behalf of my client, and I think Mr. McCrea would join me,
11 not to reveal attorney-client privilege communication. So
12 it's not our intent to do that.

13 THE COURT: The problem is that if you're asking him
14 questions and you're couching it with "and don't give me
15 anything that's attorney-client", then we have a problem.

16 MR. BRIAN: Well, what I suggest, Your Honor, if the
17 question is objectionable I'm sure Mr. Bice will object. I'm
18 not going to do it, ask an objectionable --

19 THE COURT: Mr. Bice isn't objecting on the basis of
20 attorney-client. He's saying open the floodgates and let me
21 hear it all. That's --

22 MR. BRIAN: Can -- can we do it by --

23 THE COURT: Right, Mr. Bice?

24 MR. BICE: You are -- you are correct, Your Honor.
25 And actually, Your Honor, just so -- because we don't want to

1 have any issues going forward on this case, I will consent --
2 I know my consent is irrelevant, you are the one that decides
3 -- I will consent to Mr. McCrea making objections.

4 THE COURT: Really?

5 MR. BICE: I will.

6 THE COURT: Okay.

7 MR. BICE: Because --

8 THE WITNESS: I don't know what to do here, Your
9 Honor.

10 MR. BICE: And the reason I say that, Your Honor, is
11 because from my perspective, one of the grievances I have in
12 this is I think that there's partial --

13 And I apologize, Brad. I'm just getting up here so
14 she can hear me.

15 There seems to be sort of selective waivers going
16 on.

17 THE COURT: I've noticed that you're going to file
18 briefs on that.

19 MR. BICE: I am.

20 THE COURT: That's why I told you.

21 MR. BICE: And I want to make sure that Mr. McCrea
22 doesn't later on argue that the reason that this selective
23 waiver went on is because he wasn't allowed to make an
24 objection.

25 THE COURT: All right..

1 MR. BICE: That's my point.

2 THE COURT: Okay. The reason I'm uncomfortable in
3 the situation, and I'll tell you, but you can make the
4 objections, is because I typically do not allow a different
5 person to do the objections and the cross-examination, which
6 avoids the situation that I'm going to be in in a minute. So
7 given the comments that Mr. Bice had made, do what you need to
8 do, Mr. McCrea, and I hope we don't have too many problems.

9 THE WITNESS: Your Honor, may I -- may I -- I know
10 this may not be my position, but I also -- Las Vegas Sands is
11 not represented by Mr. Brian. And so they're -- they have to
12 be able to make objections.

13 THE COURT: Well, I know, but they're on the same
14 team. And, Mr. Peek, I'll remind you that if at any time you
15 need to take a break, you are the witness today, you have the
16 M&Ms and the water. So if at any time you need to take a
17 break, you let me know.

18 MR. BRIAN: Your Honor, I'll do the best I can. I
19 really don't -- I intend to get into things that are
20 non-privileged. The only thing I would say on the -- on the
21 privilege, and where I think we part company with Mr. Bice, is
22 I agree with Mr. Bice that a fact is not a -- is not covered
23 by attorney-client privilege. But when you ask a lawyer what
24 he knows and the only basis for that knowledge is the
25 communication, then that does call for attorney-client

1 privilege information.

2 THE COURT: It can call.

3 MR. BRIAN: It can call. That doesn't mean that if
4 they were to serve an interrogatory that asked for the fact
5 that we wouldn't have to answer it. But the different way of
6 getting at it by asking the lawyer to communicate what he
7 learned through privilege. That's the distinction I think
8 we've been having back and forth today. But let me see if I
9 can do it in a way that -- that addresses Your Honor's
10 concerns. I really -- I'm sensitive to them, I really am.

11 CROSS-EXAMINATION

12 BY MR. BRIAN:

13 Q Let me start with that big fat binder in front of
14 you where we -- Tab 5, the July 6th -- it's defendants'
15 statement regarding data transfers. Do you have that?

16 A They July --

17 Q July --

18 A You mean the June 9th?

19 Q No.

20 A You said July 6th.

21 THE COURT: I had Mr. Bice take those out, remember,
22 Mr. Brian?

23 THE WITNESS: Oh. I'm sorry. I'm sorry. I don't
24 have -- I don't have the -- my big fat binder is only the
25 transcripts. Mr. Bice removed out of this everything except

1 hearing transcripts.

2 BY MR. BRIAN:

3 Q Oh. I thought you had it in front of you.

4 A But I have that -- I just have the little -- can I
5 just --

6 Q You have the little one?

7 A Yes. Can I just use that instead of having the big
8 fat binder?

9 Q Just addressing your attention to the July 6th
10 document that you were shown called defendants' statement
11 regarding data transfers. Do you now have that in front of
12 you?

13 A Yes, I do.

14 Q Could you just turn to page 3 and look at lines 11
15 through 14.

16 A Yes.

17 Q And can you just read those lines into the record,
18 please?

19 A "Thank you for pointing this out. Mr. Kostrinsky
20 reviewed some of the emails. Stephen Peek and another
21 attorney from his law firm also reviewed certain emails on Mr.
22 Kostrinsky's computer. Some of Jacobs' emails were printed
23 and provided to or shared with outside and inside counsel. It
24 is possible that these emails were shared with other LVSC
25 employees."

1 Q Okay. Now, you were asked questions by Mr. Bice
2 about conversations you had, I think, on May 23, 2012, and
3 again on or about June 25th regarding a statement that you
4 made that you didn't believe you had a duty before then to
5 advise them about the company's transfers of Mr. Jacobs's ESI.
6 Do you recall that testimony generally?

7 A I recall that testimony generally, and the questions
8 generally.

9 Q Okay. I want to go back now to the June, July,
10 August time period of 2011. Do you have that in mind?

11 A Yes, sir.

12 Q I think you testified that during that time period
13 the plaintiff gave you a list of priority custodians. Do you
14 recall that?

15 A Yes, sir, I do.

16 Q Did the plaintiff -- I mean plaintiff's counsel, I
17 guess, at that time, provide you with search terms?

18 A Yes, they did.

19 Q And did the plaintiff's counsel identify custodians
20 that he wanted you in your capacity as counsel for Las Vegas
21 Sands to run those search terms on?

22 A When you say you, if you're including my firm, yes.
23 I think the letters were just Mr. Jones.

24 Q Okay. Let me --

25 MR. BRIAN: If you could put up the June 23rd letter

1 from Mr. Williams to Justin Jones and Stephen Ma.

2 THE COURT: Is there a reason we're using a letter?

3 MR. BRIAN: Pardon?

4 THE COURT: A letter is not part of a representation
5 made to me. See, this is what I keep trying to get --

6 MR. BRIAN: Well --

7 THE COURT: -- to narrow.

8 MR. BRIAN: -- the -- the --

9 THE WITNESS: This is also not a June. This is a
10 July 20th letter. Is that what you're talking about?

11 MR. BRIAN: It isn't, Your Honor, but the defense --
12 the defense, I think, that we're putting forward on behalf of
13 Las Vegas Sands and Sands China Ltd. was that there was no
14 legal duty to disclose this until Your Honor made Your Honor's
15 ruling on May 24th of 2012, in which case it was voluntarily
16 disclosed. And so I want the -- the record to show what
17 happened prior to that time. And it's related to the
18 cross-examination of Mr. Bice where he went into the back and
19 forth and he's going to testify to what happened leading up to
20 this -- to this day.

21 THE COURT: Okay. Let me ask you a question.

22 MR. BRIAN: Sure, Your Honor.

23 THE COURT: And I know, Mr. Brian, you haven't been
24 involved in this case really very long given its long history.
25 I've invited a motion on this issue related to the MDPA for

1 about two years and I can't get anybody to take me up on it
2 because nobody wants to lose the issue. Because I, after
3 doing the research I've done related to it, have certain
4 feelings about it, but I need to have the briefing put before
5 me by counsel.

6 For some reason you guys, and I'm using defendants
7 as a group, don't want to frame the issue. And that's okay.
8 But you can't keep relying on it as your defense when you
9 refuse to do what needs to be done.

10 MR. BRIAN: May I respond to that, Your Honor?

11 THE COURT: Absolutely.

12 MR. BRIAN: In looking at the transcripts in
13 connection with this hearing, and I'm sure Your Honor noticed
14 this in connection with the June 9th hearing and the July 19th
15 hearing, on both of those occasions counsel for the defense
16 brought up the issue of the Macau Data Privacy Act. On both
17 of those occasions Your Honor said the issue was not ripe and
18 said that you're not there yet, words to that effect, and I --

19 THE COURT: It had to do with a stay. It didn't
20 have to do with the MDPA. It had to do with a stay related to
21 whether I was going to force the production of information.

22 MR. BRIAN: As I read the transcript, and I wasn't
23 there, and Your Honor is -- I'm sure Your Honor's recollection
24 is better than mine because I wasn't there, but as I read
25 that, what I thought Your Honor was saying as I read that

1 transcript is that the Macau Data Privacy Act is -- the issue
2 is going to come up, and it will come up, is when there's a
3 motion to compel the production of documents in Macau, in
4 which case my client is going to have to decide, is going to
5 have to go through the hoops if they can go through them, and
6 there's some additional hoops that have been now set up by the
7 authorities

8 But assuming we could go through those hoops and we
9 can't satisfy them, that is the consent of the people whose
10 personal privacy, the consent of the authorities, if we can't
11 do that, then they would be briefing on the Act. I read Your
12 Honor's comments, frankly, the other night when I was looking
13 at it, as you didn't think that issue would be ripe until we
14 got to that stage. If I'm wrong, then we should accelerate
15 that briefing. That's how I read that.

16 THE COURT: Okay.

17 MR. BRIAN: But, I don't know.

18 THE COURT: Every time the issue was presented to me
19 it seemed to be presented in conjunction with Las Vegas Sands
20 and Sands China not having to do the work because of the MDPA
21 and asking for a stay, asking for a delay and me requiring
22 them to comply with their obligations under Rule 16.1 and
23 under the jurisdictional discovery that I had ordered. That's
24 every time the issue was presented to me, and every time
25 somebody asked for a stay, I said it's premature because you

1 haven't filed a brief yet. You haven't done it yet.

2 MR. BRIAN: Okay. I will go back and study those
3 transcripts, Your Honor, but my point of the question --

4 THE COURT: It started with Mr. Krum.

5 MR. BRIAN: But -- but the point of the questions
6 now, Your Honor, is simply to make a record on whether or not
7 Mr. Peek believed that he had a duty to do more than he did in
8 the summer of 2011. If Your Honor thinks the record, that you
9 have enough information on that, then I can move through it,
10 but --

11 THE COURT: I don't have enough information on what
12 Mr. Peek thought. I have no idea what Mr. Peek thought
13 because nobody will let him answer the question because Mr.
14 McCrea keeps directing him not to answer the questions on
15 attorney-client privilege and attorney work product.

16 MR. BRIAN: And I'm -- what I'm trying to do is put
17 information in the record that is non-privileged from which
18 Your Honor can draw an inference.

19 THE COURT: Well, you -- Mr. Brian, you do what you
20 need to do.

21 MR. BRIAN: That's what I was trying to do, Your
22 Honor. And I can do it -- I think I can do it relatively
23 quickly.

24 MR. BICE: Your Honor, I just want the record to
25 reflect that's fine, but you had previously stopped me from

1 using some --

2 THE COURT: I know. And I made you take them out of
3 the book.

4 MR. BICE: I'm going to bring them back in.

5 THE COURT: I don't want them back in.

6 MR. BICE: It can't be a -- it can't be a one-way
7 street.

8 THE COURT: I'm not looking at it.

9 MR. BICE: Okay. Well, Mr. Brian --

10 MR. BRIAN: Well, I thought -- I thought -- I don't
11 want this -- don't want to -- the record is the record, Your
12 Honor, and I don't want to argue what the record is, but Mr.
13 Bice was allowed to get into some of this.

14 THE COURT: Because Mr. Peek wanted to give context
15 to some of the answers that he was giving, and so I gave Mr.
16 Bice latitude that I typically would not give when I have
17 already said a hearing is going to be limited in deference to
18 Mr. Peek because he wanted to put certain things in context
19 and I think it's only fair to let him put things in context.
20 The problem I'm having is we can't use it as a sword and a
21 shield, which is what is being attempted to be done at this
22 point, at least from my prospective given what I've heard so
23 far in the last day and a half.

24 MR. BRIAN: Not on this issue. I mean, this -- this
25 -- these are --

1 THE COURT: Not on this letter.

2 MR. BRIAN: The letter is a different issue. You
3 may find it beyond the scope. It's not privileged, so I'm not
4 using a sword or shield. If Your Honor thinks that the
5 context is -- is --

6 THE COURT: Do you remember what I just told Mr.
7 Bice when I said lawyers put stuff in pleadings all the time
8 and the --

9 MR. BRIAN: Yes.

10 THE COURT: -- information they get for pleadings is
11 from communications with their clients? So if you ask them
12 why they put that in the pleadings, sometimes it's attorney
13 work product and sometimes it comes from an attorney-client
14 privilege. I've read the briefs. I've looked at the briefs.
15 Arguing with me about what's in the briefs is an argument as
16 opposed to something that perhaps should be the subject of
17 limited examination as opposed to broad examination. I didn't
18 let Mr. Bice go into any detail the reasons behind what was
19 put in those pleadings because my perception is lawyers
20 interview clients, look at information, gain that information,
21 and then synthesize it and put it in briefs. That's what they
22 get paid to do

23 MR. BRIAN: Correct.

24 THE COURT: But going behind what they've written in
25 the briefs sometimes is an invasion of the privilege and I

1 can't let you tell me, Mr. McCrea tell me, that we're not
2 going to go through that, and then have you do the same thing.

3 MR. BRIAN: Okay. Can I have about one minute to
4 consult with Mr. McCrea --

5 THE COURT: Sure.

6 MR. BRIAN: -- and Mr. Lionel?

7 MR. PISANELLI: Your Honor, while they're
8 consulting, would this be --

9 THE COURT: How about --

10 MR. PISANELLI: -- a good time --

11 THE COURT: No, wait, wait, wait.

12 MR. PISANELLI: -- for a comfort break?

13 THE COURT: Yes, we'll take a break for comfort.

14 THE WITNESS: I'm ready for a break, Your Honor.

15 (Court recessed at 2:38 p.m., until 2:45 p.m.)

16 MR. BRIAN: I'm done. I took your advice. I'm a
17 quick study, Your Honor.

18 (Off-record colloquy)

19 THE COURT: All right. I understand from Mr. Brian
20 he has no further questions for Peek, Mr. Peek.

21 MR. BRIAN: I'm a quick learner --

22 THE COURT: Unfortunately --

23 MR. BRIAN: -- Your Honor.

24 THE COURT: -- I have a question --

25 MR. BRIAN: No further questions.

1 THE COURT: -- for Mr. Peek, which may cause some
2 discussion.

3 Mr. McCrea, please feel free to object to my
4 question, but I am asking it as a follow up because Mr. Peek
5 used these words twice, and I need to understand what he
6 meant.

7 REDIRECT EXAMINATION

8 BY THE COURT:

9 Q Mr. Peek, in explaining why you made the statement
10 that you did on page 55 of the June 9, 2011, transcript where
11 you say, "Let me just add one thing because I didn't address
12 this. That same data privacy act, Your Honor, also implicates
13 communications that may be on servers and email communication
14 and hard document, hard copy documents in Las Vegas" -- I
15 interrupted you, and you said, "Sands, as well." A couple of
16 times during your examination you have indicated that was as
17 far as I was permitted to go. What did you mean by that?

18 MR. MCCREA: Your Honor --

19 THE WITNESS: In my --

20 THE COURT: Wait. I'm waiting for Mr. McCrea to
21 tell me what his objection is.

22 THE WITNESS: Okay. Well, I --

23 MR. MCCREA: Well, my -- my objection is
24 attorney-client privilege. To the extent he can answer that
25 question without invading that privilege, fine. But I would

1 caution the witness not to divulge any attorney-client
2 communication.

3 BY THE COURT:

4 Q So you're not to divulge any attorney-client
5 communication. If you can answer the question without doing
6 so, I would love you to tell me what you meant by using those
7 words.

8 A In my judgment, Your Honor, I went as far as I could
9 go because I was constrained by the MDPA as you have
10 characterized it. I thought I was putting -- I believe with
11 the statement -- not believe. I was, with that statement that
12 I made, putting you, opposing counsel on notice that there was
13 data in the U.S., but I did not feel I could specifically
14 identify what that data was as a result of the constraints of
15 the MDPA.

16 Q Okay. Thank you.

17 THE COURT: Mr. Bice, did you have any questions you
18 wanted to ask him in the limited examination from Mr. Brian
19 and me?

20 MR. BICE: I'm not sure Mr. Brian really got much of
21 a question out. I was going to stand up here and say that I
22 had another hour based on Mr. Brian's examination, but I'm not
23 sure Her Honor would find that amusing today. I do have a
24 couple of follow ups.

25 //

RECROSS-EXAMINATION

1
2 BY MR. BICE:

3 Q Mr. Peek, in reference to the statement that the
4 Court just read to you, you indicated that there may, if you
5 look at page 55 of the transcript that the Court is quoting
6 from, you indicated that there may be information; right?
7 There wasn't -- by the time you made that statement, if your
8 position is that what you were trying to do is trying to
9 disclose to the Court and to us that this data existed, there
10 was no maybe about it, was there?

11 A No.

12 Q Okay. And from your standpoint, as I understand it,
13 the Macau Data Privacy Act didn't stop you from reviewing
14 every one of those emails; correct? As counsel for Las Vegas
15 Sands?

16 A Not at that time.

17 Q It didn't stop you from copying more than 100 of
18 them; correct?

19 A Not at that time.

20 Q It didn't stop Mr. Kostrinsky from disseminating
21 some of them to the legal time inside the -- that was
22 representing the company; correct?

23 A Let me back up a little bit, Mr. Bice. When you say
24 "it didn't stop me", what I -- what I learned in May from
25 opinions of Macau counsel --

1 MR. BICE: I have no objection -- I don't want to
2 cut him off, Your Honor. I have no objections to him
3 testifying, but I --

4 THE COURT: No, I don't either. I'm waiting. Mr.
5 McCrea is not saying anything, so we're going to let Mr. Peek
6 answer.

7 MR. BICE: That's fine.

8 MR. MCCREA: I am going to object, Your Honor, if
9 he's going to start rendering --

10 THE WITNESS: I'm sorry. I'm not --

11 MR. MCCREA: -- testimony --

12 THE WITNESS: -- trying to. I was trying --

13 MR. MCCREA: -- of opinions received from other --

14 THE COURT: That's what he was saying, Mr. McCrea.

15 THE WITNESS: I may have misspoke in answer to your
16 question when you said that the -- it didn't stop me from
17 doing it. Once I got those opinions, yes.

18 MR. MCCREA: Your Honor, I have to object.

19 THE COURT: Mr. Peek, Mr. McCrea doesn't want you to
20 talk about --

21 THE WITNESS: Sorry.

22 THE COURT: -- what you did as a result of reading
23 those opinions.

24 THE WITNESS: I read the -- I read the Kostrinsky
25 emails.

1 MR. McCREA: Move to strike --

2 THE COURT: Granted.

3 MR. McCREA: -- his prior testimony.

4 THE COURT: Okay.

5 BY MR. BICE:

6 Q Those emails, again, Mr. Peek, you disseminated --
7 or Mr. Kostrinsky disseminated some of them amongst the legal
8 team; correct?

9 MR. McCREA: Your Honor --

10 THE WITNESS: Yes.

11 MR. McCREA: -- this is all starting to be argument.
12 It's very repetitive. These are asked and answered questions.
13 I don't know why we have to go over this time and time again.

14 THE COURT: I've already -- I think I've gotten the
15 answers about the dissemination.

16 MR. BICE: Okay.

17 BY MR. BICE:

18 Q Do you recall, since the Judge doesn't want us to
19 use documents, do you recall getting an email from Mr.
20 Williams telling you that once you tell them what they're
21 withholding on the grounds of the Macau Data Privacy Act, then
22 they can file a motion to compel?

23 MR. McCREA: Your Honor, this is beyond --

24 THE WITNESS: The same thing that Mr. Brian was
25 going to show me?

1 MR. BICE: No, it's not actually.

2 MR. McCREA: It's beyond the scope of his
3 examination and the Court's examination.

4 THE COURT: I agree it is, and I remember, Mr. Bice,
5 very well.

6 MR. BICE: Thank you, Your Honor.

7 THE COURT: Anything else?

8 THE WITNESS: Your Honor, there was one thing that
9 nobody asked me that I wanted to correct this morning.

10 THE COURT: Remember, Mr. Brian, Mr. Peek wanted to
11 ask to provide us some additional information?

12 THE WITNESS: He may not know --

13 THE COURT: And I made him --

14 THE WITNESS: -- what it is.

15 THE COURT: -- write it down so he wouldn't forget?

16 MR. BRIAN: Well, he didn't give it to me, so I
17 don't know what it is, Your Honor.

18 THE COURT: Mr. Peek, is there anything you wanted
19 to add?

20 THE WITNESS: Yesterday during an exchange with Mr.
21 Bice about whether or not Mr. Jacobs had a Venetian.com and he
22 said are you positive about that, and it was in context of the
23 May 24th. I've gone back to learn that in fact for a limited
24 period of time when Mr. Jacobs was a consultant in the April,
25 May, March, April, May, June period of time in 2009 that he

1 did have a Venetian.com address. But the emails that were the
2 subject of this litigation I understood were related to his
3 employment by Sands China Ltd. and it was a Venetian.com --
4 .mo or Venetian.mo. I'm not sure. That was the only
5 correction.

6 THE COURT: All right. Anybody need to ask any
7 additional follow up questions before I let Mr. Peek step
8 down?

9 Thank you, Mr. Peek.

10 THE WITNESS: Thank you, Your Honor.

11 THE COURT: Since it is 2:51, I would really like to
12 start with Mr. Kostrinsky, although I think that Mr. Justin
13 Jones will be shorter and could get out of here in 10 minutes
14 if we all work together.

15 MR. BICE: You're giving --

16 THE COURT: I was giving Mr. Justin Jones the
17 opportunity to leap up and try and beat --

18 MR. JONES: Your Honor, I've been here since the
19 beginning. I would love to get out of here quickly.

20 MR. PISANELLI: Your Honor, just out of a courtesy
21 to Mr. Kostrinsky and to do my best not to get one of those
22 pieces of paper you gave him --

23 THE COURT: His wasn't filled in.

24 MR. PISANELLI: I know. I don't think the
25 cross-examination of -- or the examination of Mr. Jones is

1 going to be ten minutes. The reason I bring that up is out of
2 a courtesy --

3 THE COURT: That's fine.

4 MR. PISANELLI: -- to Mr. Kostrinsky.

5 THE COURT: So my three questions that I have for
6 Mr. Jones you're saying would be the tip of the iceberg?

7 MR. PISANELLI: It will.

8 THE COURT: Okay.

9 So, Mr. Jones, I'm sorry. Sit back down.

10 MR. JONES: May I be excused, then?

11 THE COURT: Until when?

12 MR. PISANELLI: We don't have an objection if he
13 wants to come back tomorrow.

14 THE COURT: Mr. Jones, we'll see you tomorrow.
15 Drive safely. There's a flood out there. The north entrance
16 is closed.

17 All right. Mr. Kostrinsky, can you can come on up.

18 MICHAEL KOSTRINSKY, COURT'S WITNESS, SWORN

19 THE CLERK: Thank you. Please be seated. State
20 your name and spell it for the record.

21 THE WITNESS: Michael Kostrinsky;
22 K-O-S-T-R-I-N-S-K-Y.

23 Good afternoon, Your Honor.

24 //

25 //

DIRECT EXAMINATION

1
2 BY THE COURT:

3 Q Good afternoon, Mr. Kostrinsky. I know you aren't
4 with the Sands anymore because you're representing CECO in the
5 CityCenter litigation, which wouldn't be consistent with still
6 being employed at Las Vegas Sands. When did you leave?

7 A Right after Thanksgiving, shortly after Thanksgiving
8 of 2011.

9 Q Okay. How did you become involved in the transfer
10 of ESI related to Mr. Jacobs to the United States?

11 MR. McCREA: Objection, Your Honor. Attorney-client
12 privilege.

13 THE COURT: Was that the same objection that was
14 made at the deposition? Because, remember, I wasn't at the
15 deposition.

16 MR. PISANELLI: Your Honor, we have about
17 100-something pages of this very topic in his deposition.

18 THE COURT: Was it discussed?

19 MR. PISANELLI: Yes.

20 THE COURT: Mr. McCrea, have you looked at Mr.
21 Kostrinsky's deposition to see what he answered?

22 MR. McCREA: I have read Mr. Kostrinsky's
23 deposition, yes.

24 THE COURT: But didn't he answer on this topic? The
25 reason I think he answered on this topic is I had motion

1 practice related to some additional witnesses based on his
2 testimony. My recollection was this is one of the areas he
3 talked about.

4 MR. MCCREA: Your Honor, I think if they're
5 contending that he answered this in his deposition, that they
6 should show us where he answered this in his deposition.

7 THE COURT: All right. Then I am not going to ask
8 the questions.

9 Mr. Pisanelli, you're up.

10 MR. PISANELLI: All right. Thank you, Your Honor.

11 THE COURT: Sorry, Mr. Kostrinsky. I was going to
12 try and be short and to the point and get us done.

13 THE WITNESS: I appreciate that, Your Honor.

14 MR. PISANELLI: I'm not sure, Your Honor, how we
15 would do it, but if you find it appropriate to have an
16 accommodation for Mr. Lee who is Mr. Kostrinsky's personal
17 counsel so that he can be available in case he wants to make
18 an objection.

19 THE COURT: Well, I know Mr. Lee is here because he
20 was here on CityCenter this morning and I had to talk to him.

21 So, Mr. Lee, if you want to come sit in the jury box
22 or pull up a chair up here somewhere where if you need to make
23 an objection Jill will be able to hear you. And I know you
24 know not to interrupt.

25 MR. LEE: But I never received one of those contempt

1 notices.

2 MR. BICE: Well, here, David. Let me find that for
3 you.

4 THE COURT: All right.

5 MR. PISANELLI: Thank you, Your Honor.

6 THE COURT: And I'm going to permit Mr. Pisanelli to
7 examine because I have not had the benefit of reviewing the
8 transcript of Mr. Kostrinsky, so I will be unable to do what
9 Mr. McCrea has asked to be done with respect to the questions
10 I had intended to ask Mr. Kostrinsky.

11 MR. PISANELLI: I don't -- just so you know,
12 understanding that we are examining an in-house lawyer,
13 understanding that independent counsel came into the case so
14 as to preserve objections, I've done my best to have a
15 citation available for Your Honor for the topics that I'm
16 going to talk about. If any specific question I ask you want
17 to know where it is in the transcript, I'll do my best. I
18 don't know that I'll have them for every single subquestion,
19 but certainly for every topic I am drawing from the
20 examination so as to make sure that we are as efficient as we
21 can on that point.

22 THE COURT: That's fine, and I know Mr. McCrea will
23 appreciate that.

24 MR. PISANELLI: Okay.

25 CROSS-EXAMINATION

1 BY MR. PISANELLI:

2 Q Mr. Kostrinsky, how long did you work for the Las
3 Vegas Sands?

4 A Maybe 15 months.

5 Q Can you tell us the range, a range?

6 A April of 2010 to, I think, either the very end of
7 November or the very beginning of December 2011.

8 Q And what was your position with the company?

9 A I was one of a few deputy general counsel.

10 Q Did you have any general area of responsibility?

11 A Initially it was litigation, but it changed pretty
12 quickly.

13 Q Who did you report to?

14 A The person who hired me initially was Mr. Gonzalez.

15 Q And did you report to some other executives at Sands
16 -- or I should say Las Vegas Sands during the course of your
17 19 months there?

18 A Yes.

19 Q All right. Who else did you report to?

20 A I reported to the subsequent general counsel, Gayle
21 Hyman. I reported briefly to another general counsel, Ira
22 Rafaelson, and I reported for limited purposes to Rob
23 Rubenstein.

24 Q Are you able to identify the general date ranges of
25 when you were reporting to these different people?

1 A Sort of.

2 Q And the question presumes that you were switching
3 your reporting obligations based upon date range. Am I right
4 in making that assumption?

5 A Well, yeah. Everything is associated with a date,
6 so, yeah.

7 Q Okay. Did you have reporting responsibilities, in
8 other words, that related to the nature of the project you may
9 be working on?

10 A Yes.

11 Q So let's talk about the date range first. What were
12 the date ranges for each person you were reporting to?

13 A I reported to Mr. Gonzales for maybe a month, and
14 then he -- I believe he resigned. I don't have the details of
15 his departure. And then Gayle Hyman was the -- I believe she
16 was an interim general counsel, and then the permanent general
17 counsel, so I reported to her for both of those tenures.
18 Although, while she was still general counsel, the
19 responsibility of handling the Jacobs litigation that we're
20 here for and one or two other matters was transferred from Ms.
21 Hyman to an attorney named Rob Rubenstein, and that was in --
22 I'm assuming you want me to tell you the dates which is part
23 of your question?

24 Q And I think you're giving us a good idea. If Mr.
25 Gonzalez left after a month of your tenure, is it fair for us

1 to then understand that the remaining 18 months you had a
2 general reporting assignment to Ms. Hyman?

3 A Yeah, but when -- in April of 2011, that's when the
4 Jacobs litigation and one or two other matters, the
5 responsibility of those cases shifted from Ms. Hyman to Mr.
6 Rubenstein. So as to those matters I reported to Mr.
7 Rubenstein, and as to the other matters I still reported to
8 Ms. Hyman.

9 Q All right. Thank you. And you've referenced a
10 couple times already one or two other matters. What are
11 those?

12 A The response to the SEC subpoena.

13 Q Is there another one?

14 A I'm not sure of the third one if it was Mr.
15 Rubenstein or if I still reported to Gayle on it.

16 Q Is it that you're not sure of what the third one
17 was, or who you were reporting to?

18 A I can't recall specifically who I was reporting to.

19 Q Okay. What was the -- the general subject matter?

20 A It was -- there's a securities shareholder piece of
21 litigation, and I think that was with Mr. Rubenstein, as well.

22 Q When you referenced an SEC investigation or
23 subpoena, do you include any work that you had to do in
24 connection with the Department of Justice investigation, as
25 well?

1 A I think they were being administered jointly, so I
2 don't differentiate one from the other.

3 Q So anything related to the SEC or the DOJ you were
4 reporting to Mr. Rubenstein? Do I have that right?

5 A Yes.

6 Q Okay. Now, before we get into the work you did and
7 the Jacobs related work, not including the SEC subpoena and
8 DOJ and that topic, the Jacobs related work, let me first talk
9 about some of the work you did there for the Sands in those 19
10 months. Now, as part of your responsibility you worked on
11 projects that related to the Macau operations; is that right?

12 A There -- yeah, a few. Not many, but yes.

13 Q How many would you say?

14 A I think just one.

15 Q Just one? Was this pre-April 2011?

16 A The matter had started before I got to the company,
17 and so I was asked to work on it after I started.

18 Q By the way, is there a significance to the April
19 2011 date as it related to your work load?

20 A I don't understand the question.

21 Q You used a reference about switching your reporting
22 to Mr. Rubenstein for some of your work as of April 2011.
23 What was the significance of that date, if any?

24 A I don't know about any significance to the date.
25 That's when I was informed that the reporting requirement was

1 changing.

2 Q All right. All right. Fair enough. Now, prior to
3 that time working on the project or projects related to the
4 Macau operations, were you called upon to obtain information
5 from Macau as part of your work?

6 MR. MCCREA: Objection, Your Honor. Attorney-client
7 privilege.

8 MR. PISANELLI: Your Honor, Mr. Kostrinsky testified
9 to this topic during his deposition at page 66, line 23.

10 THE COURT: Mr. McCrea, can you look at that,
11 please.

12 MR. MCCREA: Page what?

13 MR. PISANELLI: 66.

14 THE COURT: 66, line 23.

15 MR. PISANELLI: It's probably fair, Charlie, to
16 start at line --

17 MR. BRIAN: Page 63 or 66?

18 MR. PISANELLI: Page 66. I would start at line 17,
19 moving over to the next page at line 4.

20 MR. PEEK: He didn't ask that question, but that's
21 all right.

22 MR. MCCREA: I don't think that was the question
23 that was asked, but --

24 THE COURT: Okay. What was the question that was
25 asked so I can evaluate it, please? I'm asking Mr. McCrea,

1 since he's there reading.

2 MR. McCREA: I'm sorry, Your Honor?

3 THE COURT: What was the question that was asked?

4 MR. McCREA: In the deposition?

5 THE COURT: Yes.

6 MR. McCREA: Okay. Well, there were several --
7 several questions, asked, Your Honor.

8 Question, "Had you been supplied with data that you
9 requested prior to March 2011? Had you been
10 provided with data from the Macau subsidiaries
11 pursuant to requests that you had made?"

12 "Yes, information, including documents."

13 THE COURT: Sure sounds like he was getting
14 information from Macau, huh?

15 MR. PISANELLI: Courtesy copy?

16 THE COURT: May I, please. It appears that this
17 area has already been discussed during the deposition of Mr.
18 Kostrinsky. I will overrule the objection. Thank you for
19 proving me with a copy of the deposition. I will now try and
20 keep up.

21 MR. PISANELLI: You're welcome.

22 BY MR. PISANELLI:

23 Q So as part of your work for -- you know what, let me
24 back up a minute. I think it's probably a very important
25 foundational question that I overlooked. Who were you

1 employed by?

2 A Las Vegas Sands Corporation.

3 Q All right. Any other company during those 19
4 months?

5 A No.

6 Q You didn't work for Sands China?

7 A No.

8 Q Okay. So as part of your work for Las Vegas Sands
9 you were called upon to obtain information from Macau;
10 correct?

11 A I don't -- I don't know if I can phrase it that way.
12 I was asked to work on a matter that was pending.

13 Q And as part of your duties and responsibilities on
14 that matter you were called upon to obtain some data from
15 Macau; right?

16 A I think all the -- all the data was already -- was
17 already in hand. I don't think I made specific requests for
18 data from Macau for that project.

19 Q Do you recall during your testimony where you told
20 us that there was -- when you needed data from Macau you would
21 simply call up Sands China in-house counsel, tell them what
22 you needed, and it would be sent to you? Do you remember
23 that?

24 A I do, but I don't know if it was in the context of
25 that project.

1 Q Fair enough. My --

2 THE COURT: Do you have --

3 MR. PISANELLI: My mistake for narrowing it.

4 THE COURT: -- a copy of the deposition that you can
5 provide to Mr. Kostrinsky --

6 MR. PISANELLI: Yes.

7 THE COURT: -- in case when you ask him questions he
8 wants to look at the transcript, as well?

9 MR. PISANELLI: Good idea.

10 THE COURT: That's why I'm here.

11 MR. PISANELLI: May I approach? May I approach?

12 THE COURT: Yes, you may.

13 BY MR. PISANELLI:

14 Q So the point I'm getting at, Mr. Kostrinsky, is that
15 when you needed data from Macau, no matter what the project
16 was, there were no restrictions on your access to that
17 information; is that right?

18 A At that point in time, that's -- that's correct.

19 Q Right. You were not aware of any policies for LVSC
20 that restricted your ability to obtain information; right?

21 A What's the time frame? At the time I was working
22 the project, that's correct. Yes.

23 Q Let's use as a trigger prior to April 14, 2011, you
24 were not aware of any policies restricting your access to
25 Macau data?

1 A No, that's not accurate.

2 Q I'm sorry?

3 A That's not accurate.

4 Q Okay. So let's turn to page 63. You there?

5 A Not yet. Do you have the one with the -- with the
6 -- when they put it on four pages?

7 Q I'm sorry?

8 A Do you have the transcript where they condense it?

9 MR. PISANELLI: Do you have it condensed?

10 BY MR. PISANELLI:

11 Q Is that one going upside down on every other page?

12 THE COURT: Here, why don't you use mine. Mine is
13 not upside down on the back pages. I'll switch with you.
14 I'll take the other one.

15 MR. PISANELLI: We have one that can go in the
16 binder, Your Honor.

17 THE COURT: Let's try this for a minute. Oh, no, I
18 think mine is the same as yours, Mr. Kostrinsky.

19 MR. PEEK: Your Honor, he can use mine.

20 MR. PISANELLI: Here we go.

21 MR. PEEK: Or the Court can use --

22 THE COURT: It's okay. Go.

23 MR. PEEK: Mine is in a three-ring binder. Would
24 you like it, Your Honor?

25 THE COURT: No, I can read upside down.

1 MR. BICE: Your Honor, we have the original if Her
2 Honor would like the original.

3 THE COURT: No, but I'd like the original published.

4 MR. BICE: Okay. Let's do that.

5 MR. PISANELLI: May I approach the clerk, Your
6 Honor?

7 THE COURT: Yes, please.

8 And, Mr. Kostrinsky, if any time you want to look at
9 the original deposition instead of the one you currently have
10 in your hand, please let me know and I will have the clerk
11 hand it to you. Otherwise, we'll just hold it over here and
12 mark it published.

13 MR. PISANELLI: Just so we're clear, the only bound
14 one, apparently, in the room is the original, so it'll be
15 easier for Mr. Kostrinsky if he wants to use it.

16 BY MR. PISANELLI:

17 Q So with my apologies for that inconvenience, Mr.
18 Kostrinsky, I have directed you to page 63. Let me know when
19 you're there.

20 A Okay. Okay.

21 Q There you were asked:

22 "Prior to April 14, 2011, were there any
23 restrictions upon your access to information from
24 the Chinese subsidiaries?"

25 And you answered, "Well, I had a practice of if I

1 needed a document or documents that I would make a
2 request through the legal department of the Sands
3 China property."

4 Next question, "Was that a company policy, or was
5 that your policy?"

6 A Yeah, I -- you were asking about policies.

7 Q And that's my question now, of whether you were
8 aware of any policies in Las Vegas Sands that restricted your
9 ability, prior to April 14, 2011, to obtain data from Macau?

10 A Yeah, there was -- there was not a policy in place
11 on April 14th.

12 Q Okay.

13 A But we do talk about it a little later on in the
14 deposition.

15 Q And you are not aware of any policies that
16 restricted executives, non-lawyer executives, from obtaining
17 information from Macau prior to April of 2011 either, were
18 you?

19 A No, I was not aware of those policies.

20 Q And Mr. Kostrinsky, there was never a time, was
21 there, when you asked for information from Macau but were
22 denied that request?

23 A No, there was a time when that occurred. That's
24 what I was trying to look for in the deposition a few minutes
25 ago.

1 Q Again, I'll ask you to turn to page 65. Let me know
2 when you're there.

3 A Okay.

4 Q Mr. Bice asked you:

5 "I'm not asking you what the position was. I'm just
6 asking you was there ever a time in which you were
7 denied access?"

8 And after Mr. Peek and Mr. Lee and Mr. Bice entered
9 into a little discussion, you answered:

10 "The way the question is phrased, the answer would
11 be no."

12 Do you see that?

13 A Yes.

14 Q Okay.

15 MR. McCREA: Your Honor, rule of completeness. He
16 ought to read the whole --

17 MR. BRIAN: Next page.

18 THE COURT: Sure.

19 THE WITNESS: Yeah, because we put it into context a
20 few lines after that. That's what I was trying to refer to
21 you earlier. And I had mentioned in the deposition that -- do
22 -- do I recall -- you asked me or Mr. Bice asked me:

23 "Did you ever ask for any information from any of
24 the Macau subsidiaries that was not supplied to
25 you?"

1 "In a way, yes."

2 "Okay. Tell me when."

3 And Mr. Peek asserted an objection or just when is
4 all he asked, and I said in March of 2011. Then we moved it
5 from the April 14th date back to the March date, just a few
6 weeks before that.

7 "Prior to March of 2011 had you ever not been
8 supplied with information that you asked for?"

9 And then I answered, "Not that I can recall."

10 BY MR. PISANELLI:

11 Q So are we to read from that, then, that the time
12 that you were thinking of where you denied access was between
13 March and April?

14 A Yes.

15 Q Okay. And do you remember what the circumstances
16 were?

17 MR. McCREA: Your Honor, objection. Privilege.

18 THE COURT: This is just a yes or no right now. He
19 either remembers or he doesn't.

20 THE WITNESS: I do.

21 BY MR. PISANELLI:

22 Q Okay. What were the circumstances?

23 MR. McCREA: Objection. Attorney-client privilege.

24 THE COURT: Sustained.

25 BY MR. PISANELLI:

1 Q All right. And so to be clear, however, prior to
2 March of 2011 you had never been denied access to Macau
3 information as an in-house counsel of Las Vegas Sands, fair
4 enough?

5 A That's fair.

6 Q Okay. Now, the types of information that you would
7 receive from Macau included email; is that right?

8 A Yes.

9 Q Okay. You also received from Macau company
10 governance, documents; is that right?

11 A Corporate records, yes.

12 Q You received documents concerning ongoing litigation
13 concerning Sands China; right?

14 A I think it was limited to status reports.

15 Q Well, you also -- we're going to talk about that in
16 little -- a lot more detail in a few minutes, but you also
17 received a lot of information concerning the Jacobs litigation
18 from Sands China; right?

19 A Yeah.

20 Q Okay. So let's talk about that. Did you understand
21 that the information that was being sought concerning the SEC
22 and the Department of -- Department of Justice investigations
23 were related to the Jacobs litigation and allegations?

24 MR. MCCREA: Objection, Your Honor. Attorney-client
25 privilege, work product privilege.

1 THE COURT: Sustained.

2 BY MR. PISANELLI:

3 Q You helped gather information to -- for analysis and
4 response to the SEC subpoena; is that right?

5 A Up to a certain point in time, yes.

6 Q Okay. When did you start that work?

7 A I think the subpoena is dated February 9th, so I
8 think it would probably be within a few days of that.

9 Q Now, you were doing all of this work, gathering
10 information at the direction of Mr. Rubenstein?

11 MR. MCCREA: Objection, Your Honor. Work product,
12 attorney-client privilege.

13 THE COURT: Sustained.

14 BY MR. PISANELLI:

15 Q Were you making your own individual decisions on
16 what to do by way of collection of documents?

17 A No.

18 Q Those were being made by people you report to?

19 MR. MCCREA: Objection, Your Honor. Attorney-client
20 privilege.

21 THE COURT: Sustained.

22 BY MR. PISANELLI:

23 Q You gathered documents related to Las Vegas Sands
24 for a response to the SEC subpoena; right?

25 A Yes.

1 Q And you were -- your primary goal in relation the
2 SEC subpoena was to gather documents that were located in the
3 United States, do I have that right?

4 A Yes.

5 Q Okay. And you did that by, in essence, just
6 reaching out and communicating to other employees of the
7 company; right?

8 MR. McCREA: Objection. Work product.

9 THE COURT: Overruled.

10 THE WITNESS: Could you rephrase the question?

11 BY MR. PISANELLI:

12 Q Sure. You sent emails out to other executives,
13 employees of Las Vegas Sands Corp in an effort to assemble
14 records or information that might be in other people's
15 possession; right?

16 MR. McCREA: Objection. Attorney-client privilege.

17 MR. PISANELLI: He already testified to it, Your
18 Honor.

19 THE COURT: But isn't this in -- I'm looking at the
20 page in the depo where it's discussed. I'm looking at page 69
21 and he's discussing it.

22 MR. PISANELLI: It's on page 43, as well, and page
23 44.

24 MR. McCREA: Very well.

25 THE COURT: Okay.

1 You can answer.

2 THE WITNESS: I can answer?

3 THE COURT: Did you send emails to people?

4 BY MR. PISANELLI:

5 Q Tell Her Honor generally what you did in order to
6 assemble this information to respond to the SEC subpoena.

7 A I did research to find out who may have the
8 pertinent information related to the request that was in the
9 subpoena. And I pretty much copied and pasted those specific
10 parts of the subpoena into an email in which it was sent out
11 to the people that may have that information requesting them
12 to review their records and see if they have anything
13 responsive and to provide it.

14 Q You characterized during your deposition that you
15 had sent those requests out to -- my best recollection was a
16 lot of people. Do you know as you sit here today
17 approximately how many people you were dealing with to
18 assemble this information?

19 A It was -- it was overkill. I can't tell you a
20 specific amount, but I rather would ask too many people for
21 information than too few people.

22 Q Sure. Let's just use a simple target. More or less
23 than 50?

24 A If I was -- if I was pinned down, I'd probably say
25 more.

1 Q Okay. Fair enough. What did you do with the
2 documents? Well, strike that. Let me back up a step. Did
3 you get responses from the people you were communicating with?

4 A Yes.

5 Q So you were -- you were getting documents and other
6 information in response to your emails, fair enough?

7 A Yeah, I -- there was more than just emails. I mean,
8 I had asked people as well if they were nearby and would
9 follow up with an email. And as part of the research process
10 I would have also asked them if they had the records
11 themselves. So it wasn't just solely email, but the records
12 that came in, yeah, I gathered those.

13 Q Did you review them?

14 A I reviewed a lot of them. Whatever I received would
15 go -- would be processed. I didn't make a decision whether
16 they were responsive or not or filter them. I just -- I just
17 processed them in terms of the protocol that had been set up.

18 Q All right. What do you mean when you use the word
19 process?

20 A Well, the documents that were being received were
21 being stored, and so people who were giving me responsive
22 documents, they were being stored. And I would review most of
23 those documents, but if I -- I didn't review all of them, they
24 would still be moved to whatever they were being responsive
25 to.

1 Q What form was this information that was being
2 presented to you? Was it electronic or hard copy?

3 A I think the majority, if not all of it, was
4 electronic.

5 Q And what did you do with it?

6 A I stored it on a special server, a storage server,
7 sort of like an electronic filing cabinet.

8 Q Okay. I think we may have used during your
9 deposition a phrase like a document repository. Is that fair?

10 A Yeah.

11 Q Also used phrases throughout your deposition of
12 share drives.

13 A Yes.

14 Q Same thing?

15 A Same thing.

16 Q All right. So you created through use of the IT
17 department a share drive or repository for this information
18 you had gathered domestically in the United States?

19 A Well, I don't know if I could say I created it.
20 This was a process that I was told to set up, and that's what
21 was set up.

22 MR. McCREA: Your Honor, objecting on scope. I
23 don't know what this -- it was covered in his deposition, but
24 I don't know what it has to do with this hearing.

25 THE COURT: Okay. The objection is overruled.

1 BY MR. PISANELLI:

2 Q And so the IT department set up this repository.
3 Did you understand this repository allowed people to access
4 the documents that were put on there, the data that was put on
5 it electronically, or remotely I should say?

6 A That was the purpose of it, yes.

7 Q Sure.

8 A Yeah.

9 Q And the only thing a person would need in order to
10 access this information would be the appropriate passwords or
11 whatever that information would be, fair enough?

12 A I would defer to the IT people as to the secured
13 access to it, but, yeah, they need to have a secured
14 authorization to get onto it, yeah.

15 Q Anyone -- strike that. Who could put documents onto
16 that repository you created?

17 A Again, I didn't create it. It -- you keep saying I
18 created it. It was set up, and that's what the protocol was
19 to put the documents onto.

20 Q And who had the ability to put documents on it?

21 A Whoever had access to it.

22 Q Okay. Who controlled who had access?

23 A The IT department was in charge of that.

24 Q Was there an executive who made the decision of who
25 would be given the passwords in order to access the documents?

1 A I believe that was the process.

2 Q And who was that executive at Sands that made the
3 determination of who would be given access?

4 A I can only tell you who I knew that was providing
5 access. It was who I reported to at that time.

6 Q And who was that?

7 A That was Gayle Hyman.

8 Q Okay. Now, did you learn -- well, let's back up a
9 step. You were collecting documents that were here in the
10 United States; right?

11 A I was.

12 Q All right. But as part of your work there were also
13 documents from outside the United States that were stored on
14 this repository; is that right?

15 A It could have been.

16 Q Okay. It could have been or it was?

17 A I don't have an independent recollection of whether
18 it was or it wasn't, that's why I was mentioning it in my
19 deposition.

20 Q Okay. You believe that there were documents from
21 outside the United States that were put on the repository?

22 A You know, if I saw what was on there before it was
23 taken over, then I can probably give you a better answer.

24 Q All right. Fair enough. And it's not a memory
25 test, so I appreciate your candor if you don't recall. But

1 you recall testifying in your deposition that you did believe
2 that documents from outside the United States were put on this
3 repository?

4 MR. McCREA: Your Honor, can we have a reference to
5 the deposition?

6 THE COURT: what page?

7 MR. PISANELLI: Page 23.

8 THE COURT: Thank you.

9 MR. PISANELLI: Line 20.

10 MR. PEEK: Page what again?

11 MR. PISANELLI: 23.

12 MR. PEEK: Line 20?

13 MR. McCREA: Line 12.

14 MR. PISANELLI: I'm sorry. Line 12.

15 BY MR. PISANELLI:

16 Q Do you see that testimony, Mr. Kostrinsky?

17 A Yeah, but then I indicated that I had to clarify
18 that answer, which is on the next page.

19 Q On the China repository?

20 A Yeah, I mean, I indicated that I wanted to clarify
21 the answer because I had the same -- without seeing the menus
22 or whatever you can provide as to what was in there, I had to
23 clarify that I couldn't really say for sure what was on that
24 drive, if there was stuff from China on that drive or if -- if
25 it didn't make it to that drive.

1 Q Sure. There were people from outside of Las Vegas
2 Sands that were given electronic access to that repository; is
3 that right?

4 A I -- again, I don't know who had access to it
5 besides a few people in Las Vegas.

6 Q What about people from Macau? Did they have access
7 to it?

8 A You know, unless you showed me who had access to it,
9 I -- I can't tell you if they had access to the one that was
10 -- the drive that was in Las Vegas or the drive that was
11 outside of Las Vegas.

12 Q Did Anne Salt have access to the Las Vegas
13 repository?

14 A She might have.

15 Q So let's talk about that. Now, there was a second
16 repository created; is that right?

17 A Yes.

18 Q That was created in relation to the documents in
19 China; right?

20 A That's right.

21 Q Okay. And when we say China, we're talking
22 primarily Macau; is that right?

23 A Yes.

24 Q Okay. Did you understand that Anne Salt had the
25 parallel responsibility you did, that being to assemble

1 documents located in Macau that may be responsive to the SEC
2 and DOJ investigations?

3 A That was the protocol that was set up, yeah.

4 Q Okay. And the same protocol applied to the
5 repository that was set up for her work in Macau, being that
6 electronic access was provided; correct?

7 A You know, I really can't testify as to the exact way
8 she did things. I just have a general understanding.

9 Q Okay. But your general understanding was that
10 people from LVSC had electronic access to the Sands China
11 repository that was set up in Macau?

12 A Again, I don't know who had access to which drives.
13 It was awhile. I can't recall who had -- who had access to
14 what. I know I had access to the Las Vegas drive and -- and
15 Gayle did. And I can't give you specifics without seeing
16 the --

17 Q Sure.

18 A -- whatever that might exist that shows who had
19 access to what.

20 Q So you're not certain who at Las Vegas Sands had
21 access to the China repository, is that your point?

22 MR. McCREA: Objection, Your Honor.
23 Mischaracterizes his testimony.

24 THE COURT: Overruled.

25 THE WITNESS: Yeah, I can't testify who had access

1 to the drive in -- in Macau.

2 BY MR. PISANELLI:

3 Q Is it your understanding that people in Las Vegas
4 had access to the Sands China repository?

5 A It's possible, Jim. I just -- I just don't recall.
6 I only had access to that repository for a very short period
7 of time.

8 Q Okay.

9 A Only a few weeks.

10 Q You also understood that the decision making of who
11 could have access to the Sands China repository was controlled
12 by Gayle Hyman here in Las Vegas?

13 MR. McCREA: Objection, Your Honor.
14 Attorney-client.

15 THE COURT: Do you have a citation, Mr. Pisanelli?

16 MR. PISANELLI: 29, Your Honor, line 9.

17 THE COURT: Thank you.

18 MR. McCREA: That -- that wasn't the question.

19 THE COURT: It says access would have had to have
20 been approved by at least Gayle Hyman. That's the answer.
21 Objection is overruled.

22 THE WITNESS: Well, the -- the question you refer to
23 is who had access to the database that was set up in the
24 United States.

25 MR. McCREA: Right.

1 MR. PEEK: Right.

2 BY MR. PISANELLI:

3 Q Sure. That's a fair point, Mr. Kostrinsky, so let
4 me clarify --

5 MR. PEEK: He's answered that question.

6 BY MR. PISANELLI:

7 Q -- let me clarify.

8 THE COURT: Mr. Peek, you're not a lawyer today.
9 You're a witness.

10 BY MR. PISANELLI:

11 Q Were you aware of any person other than Gayle Hyman
12 who had the authority to grant access to the Sands China
13 repository?

14 MR. MCCREA: Objection, Your Honor.
15 Attorney-client.

16 THE COURT: Sustained.

17 BY MR. PISANELLI:

18 Q Now, you understood that once access was granted to
19 either repository, a person could access those records from
20 any internet site in the world; right?

21 MR. MCCREA: Lack of foundation, Your Honor.

22 THE COURT: Overruled.

23 I don't want you to guess or speculate, but if you
24 have an understanding I would love to hear it.

25 THE WITNESS: Yeah, I -- I would be speculating as

1 to the -- as to that SEC drive.

2 BY MR. PISANELLI:

3 Q The Sands China drive, you mean?

4 A As to the remoteness. I wasn't aware of anyone
5 outside the company that had access to that -- the drive that
6 I had set up. So I don't know if anyone could access it
7 remotely.

8 Q Well, let me just ask you about your personal
9 experience. Now, you had access to the repositories; correct?

10 A I can testify I had access to the United States
11 repository.

12 Q Is it your testimony that you don't remember the
13 Sands China repository, or you did not have access?

14 A Well, of course I remember the Sands China
15 repository. I don't recall if I had access to the Sands China
16 repository. If I did, I did --

17 Q Right.

18 A -- and it would indicate somewhere, but I don't
19 specifically recall.

20 Q So let's -- let's talk about what you do recall in
21 relation to the Las Vegas based repository. You would be able
22 to sit at your desk and log on with some password in order to
23 access those records; right?

24 A Yes.

25 Q All right. Not saying you knew how to do it, but

1 did you understand that if you were, for instance, working
2 from home or remotely out of the office that if you had the
3 appropriate log on and passwords you'd be able to do the same
4 thing?

5 A Jim, I just don't have an understanding. I don't --
6 I never did that, accessed the drives remotely, so I'd just be
7 speculating. It was always accessed from my desk.

8 Q All right.

9 A But, yeah, I would dial it up from my desk.

10 Q So you limited your access to the repository to the
11 times you were sitting at your desk?

12 A I did.

13 Q All right. When you did that did you see or learn
14 of whether there was any restrictions upon you to print
15 anything out?

16 A I didn't know if there were restrictions to print
17 things out, no.

18 Q Did you, in fact, print anything out?

19 A I don't -- I don't recall if I did print anything
20 off from the SEC drive that was set up.

21 Q Okay.

22 A Could have been if I did print something out or
23 review it, it could have been from the email, it could have
24 been from the drive. I don't even recall printing stuff out
25 to review it.

1 Q Okay. Did you work on the SEC and Department of
2 Justice issues up to the time you left the company?

3 A No.

4 Q Okay. When did you stop working on them?

5 A March 21st or 22nd.

6 Q Was there a reason why?

7 A Yes.

8 Q What was the reason?

9 A There was specialty counsel that was retained to
10 handle the company's response, O'Melveny & Myers. And I met
11 with the and went over what had been the protocol so far, and
12 after that they said they were going to take over.

13 Q Who was O'Melveny representing?

14 A My understanding was the company's audit committee.

15 Q LVSC's audit committee?

16 A Las Vegas Sands Corp, yes.

17 Q Did O'Melveny have access to the Sands repository?

18 A You know, once they -- once they took it over, they
19 did what they did. I would have to be assuming, but I would
20 assume so, yeah. I know they knew about it and I know they
21 knew what was on it, and I know I showed it to them and went
22 through the items that were on there, so, yeah.

23 Q The items that were on what?

24 A That drive.

25 Q The share drive?

1 A The SEC drive, yeah.

2 Q The domestic or the China one?

3 A Only the domestic one.

4 Q Did someone else show O'Melveny the ones that were
5 on the China repository?

6 MR. McCREA: Objection, Your Honor. Work product,
7 attorney-client.

8 THE COURT: Sustained.

9 BY MR. PISANELLI:

10 Q So you did -- once O'Melveny came in and took over,
11 your work on that assignment was finished?

12 A Yes.

13 Q Okay. So let's talk, then, about what you did in
14 relation to the Jacobs litigation. Okay?

15 A Yes.

16 Q You were tasked with assembling evidence relating to
17 the -- this litigation; right?

18 A Well, I was part of the process of gathering related
19 information.

20 Q Did you have any role, other role in connection with
21 the litigation?

22 A I worked with outside attorneys and worked on the --
23 worked on the case for a certain amount of time, yeah.

24 Q Okay. What outside attorneys did you work with?

25 A I worked with the Holland & Hard lawyers, and I

1 worked with the Glaser Weil lawyers.

2 Q Anyone else?

3 A I really wasn't doing much work when the Munger
4 Tolles lawyers came aboard, so I probably didn't work much
5 with them.

6 Q Okay. Who at Holland & Hart were you working with?

7 A Mr. Peek, for a period of time Mr. Jones. I'm
8 trying not to mix up the lawyers from the firms. Is there a
9 lawyer named Mr. Cassity?

10 Q There is.

11 A I think -- I think I may have dealt with him.

12 Q Okay. Did you make the decision to Holland & Hard
13 firm?

14 A I did not. I didn't make a decision in hiring
15 either firm.

16 Q Did you make the decision to hire the Glaser Weil
17 firm?

18 A No, I didn't make the decision to hire any firm.

19 Q Any firm. I'm sorry.

20 A No.

21 Q I didn't hear you.

22 A Any firm for any case.

23 Q Who from Glaser Weil did you work with?

24 A Ms. Glaser, Mr. Krum --

25 Q Krum?

1 A Krum with a K. Mr. Sedlock, at some point Mr. Ma
2 came aboard. My role in the case became more limited after
3 Mr. Rubenstein took over, so the roles of dealing with the
4 attorneys, the newer attorneys that came on, it was a lesser
5 role of me dealing with the newer attorneys.

6 Q When did your role, I'll call it the dispute, in
7 relation to the Jacobs dispute begin?

8 A I -- I think Mr. Campbell, Don Campbell, I think he
9 made an initial notice of representation in July of 2010. I
10 think he followed up with some letters shortly after that.
11 Not to me. It was to Ms. Hyman.

12 Q And so in other words you started working on the
13 Jacobs dispute immediately upon being noticed by Mr. Campbell
14 that he had been engaged? Is that fair?

15 A No, Mr. Campbell notice had -- had communicated with
16 Ms. Hyman, and then Ms. Hyman informed me of what had
17 happened.

18 Q So just to put it in context, we're talking
19 somewhere around July or August of 2010 is when you got
20 involved?

21 A Yes.

22 Q All right. And what was the nature of your
23 involvement initially?

24 MR. MCCREA: Objection, Your Honor. Attorney-client
25 privilege.

1 THE COURT: Do you have a citation, Mr. Pisanelli?

2 MR. PISANELLI: Yes, Your Honor. 73, 18 and 19.

3 That's just the date, so give me a moment.

4 MR. MCCREA: 73 starting at line 18?

5 MR. PISANELLI: That's -- that's just the date of
6 his engagement, Charlie. One moment.

7 BY MR. PISANELLI:

8 Q You were asked at some point to begin assembling Mr.
9 Jacobs' computer records; is that right?

10 A Well, I believe the first one that was done was we
11 sent out preservation notices was the first thing.

12 Q All right. Who did you sent that out to?

13 A There's a -- I think it was like a blast, it went to
14 -- Gayle was in Macau at the time that the Macau preservation
15 notice went out. I sent a preservation notice on the U.S.
16 side. This was in July of 2010. And it was to large
17 recipients of emails. I couldn't imagine telling you all the
18 people that received it.

19 Q Who sent out the preservation letter to the Macau
20 operations?

21 A I think Mr. Mallo's name was on it. I'm not sure if
22 there were other names on it.

23 Q Okay. So what did you do next after the
24 preservation letter went out?

25 A I think I met with Ms. Hyman after she returned from

1 Macau.

2 Q Okay. Around that time was there a decision made to
3 gain possession of Mr. Jacobs' computer?

4 MR. MCCREA: Objection. Attorney-client privilege.

5 THE COURT: Do you have a citation?

6 MR. PISANELLI: I do. The citation will begin at
7 page 66, Your Honor.

8 THE COURT: Thank you.

9 MR. PISANELLI: I'm just flipping back because we go
10 all the way through 73 on this topic with discussion of
11 counsel.

12 BY MR. PISANELLI:

13 Q So the question I have for you initially, Mr.
14 Kostrinsky, is that you made a request to the employees at
15 Sands China to sent you Mr. Jacobs' electronically stored
16 information; is that right?

17 MR. MCCREA: Objection, Your Honor. Attorney-client
18 privilege.

19 MR. PISANELLI: You see that at the bottom of page
20 66. Moving on, Your Honor.

21 THE COURT: It appears to be right there in the
22 transcript. I was reading it upside down, so I didn't know
23 what page number it was on.

24 BY MR. PISANELLI:

25 Q Is that right, Mr. Kostrinsky?

1 MR. McCREA: Your Honor, I have an objection.
2 Attorney-client privilege.

3 THE COURT: Okay, Mr. McCrea. Let's read together.

4 MR. McCREA: Okay.

5 THE COURT: On page 66:

6 "Had you been supplied with data that you requested
7 prior to March of 2011? Had you been provided with
8 data from the Macau subsidiaries pursuant to
9 requests you had made to obtain information?"

10 "Yes."

11 "Information including documents?"

12 "Yes."

13 "What sort of information? Prior to March of 2011
14 what types of information did you get?"

15 And he goes on and describes it.

16 MR. McCREA: Your Honor, then we go on to page 68
17 where there's an objection lodged, attorney-client privilege,
18 by Mr. Peek.

19 MR. PISANELLI: You see right up to the top of page
20 68, Your Honor. Mr. Kostrinsky confirmed that the data he had
21 received from Macau was the data including --

22 THE COURT: About Mr. Jacobs.

23 MR. PISANELLI: -- corporate documents about Mr.
24 Jacobs.

25 THE COURT: Right. No, it's right there.

1 Mr. McCrea, it appears this issue was discussed in
2 the deposition. While there may be subsequent information
3 that is subject to a privilege because it hasn't been
4 discussed in the deposition, this one appears to.

5 MR. BRIAN: Could I just ask Your Honor for the
6 question to be read? I'm not sure I know which question is
7 pending.

8 THE COURT: No, you can't -- we don't do reading.

9 MR. BRIAN: You can't do that?

10 THE COURT: No.

11 MR. BRIAN: Sorry.

12 THE COURT: You can ask Mr. Pisanelli to restate it.

13 MR. BRIAN: Could I ask Your Honor to ask Mr.
14 Pisanelli to do that?

15 THE COURT: Mr. Pisanelli, could you give the
16 question to the witness again, please?

17 MR. PISANELLI: Sure.

18 BY MR. PISANELLI:

19 Q Let's just see if we can clear it up. Sometime
20 around August of 2010 you sent an email to the Macau
21 subsidiaries requesting Mr. Jacobs' electronically stored
22 information; is that true?

23 A I don't think that's accurate.

24 Q Tell me --

25 MR. MCCREA: Your Honor, I don't know --

1 BY MR. PISANELLI:

2 Q -- what's inaccurate about it.

3 MR. McCREA: -- where it is.

4 THE COURT: Page 69, line 10. The answer by the
5 witness, "August of 2010."

6 MR. McCREA: Okay.

7 THE COURT: So he's already discussed it.

8 BY MR. PISANELLI:

9 Q You sent the email to general counsel, isn't that
10 right?

11 A I did, yes.

12 Q Of the Macau properties, Mr. Mallo?

13 A Yeah, but you're -- you're giving me a general ESI
14 question, and I made specific requests, so that's why I'm just
15 having difficulty answering your question.

16 Q Fair enough, Mr. Kostrinsky. Tell me to the best of
17 your recollection what it was that you requested of Sands
18 China to be forwarded to you here in the United States
19 concerning Mr. Jacobs.

20 MR. McCREA: Objection, Your Honor. Attorney-client
21 privilege.

22 THE COURT: Hold on a second. Mr. Pisanelli, what
23 page is that specifically on?

24 MR. PISANELLI: I wasn't reading from it, Your
25 Honor, so let me find it. So looking down, Your Honor, at the

1 bottom of page 78 Mr. Kostrinsky was asked, "What information
2 were you ultimately provided?" And Mr. Bice clarified that he
3 was talking about the request regarding Mr. Jacobs in or
4 around August of 2010.

5 THE COURT: All right. Mr. McCrea, that appears to
6 be a question that has already been answered, therefore, it
7 would be inappropriate to maintain the attorney-client
8 privilege on something that it's already been waived on.

9 MR. PEEK: Your Honor, I know I'm a witness, but --

10 THE COURT: Will you talk to Mr. Brian. Bend over
11 and talk to him. It's okay, Mr. Peek. It's not going to
12 bother me.

13 MR. BRIAN: May we have a moment, Your Honor?

14 THE COURT: You may have a moment. We're going to
15 take a short break while we consult on how to deal with
16 privilege issues in a depo where it's already been waived.

17 (Court recessed at 3:46 p.m., until 3:55 p.m.)

18 THE COURT: Mr. Brian, did you and Mr. McCrea get a
19 chance to look through the transcripts?

20 MR. BRIAN: Yes, Your Honor.

21 THE COURT: And you consulted with Mr. Peek, who
22 wanted to talk to you?

23 MR. BRIAN: We did, and let me see if I can save
24 this -- I represent Sands China Limited, not Las Vegas Sands,
25 but as I understand this, I'm sure Mr. Pisanelli and Mr. Bice

1 will correct me. At the deposition, counsel for the
2 defendants and Mr. Peek on behalf of Las Vegas Sands
3 specifically, tried not to waive privilege and tried to allow
4 questions that did not invade the privilege. So for example,
5 the fact of a communication, when it was sent, those questions
6 were not objected to. It wasn't a question of waiver, it was
7 just -- the position was that those were not asking for
8 privileged communications. Information he received in the
9 document transfers, which Your Honor was interested in, no
10 objection again, on the ground it did not call for privileged
11 communications. But it's the questions that went to the
12 contents of communications, those were objected to.

13 And so, because Mr. Pisanelli, I don't mean to be
14 critical about this, he's not following it line by line, it is
15 difficult to track. But those were the ground rules that were
16 tried to -- that were tried to -- that were tried to be
17 established. I understood there was a statement at some point
18 at the deposition we're looking for by Mr. Bice where he
19 indicated that he agreed there had not been a waiver. I don't
20 know if that was positioned throughout, or at one point, but
21 we did try to state those ground rules.

22 Mr. McCrea is trying to preserve the record, there's
23 been no waiver. That's all.

24 MR. MCCREA: And we'll play by the same ground rules
25 we played in -- played by in this deposition, but with the

1 understanding that there is no intentional waiver of the
2 privilege.

3 THE COURT: But there is a waiver of the privilege
4 that's occurred to a certain extent. For instance, "and we
5 made a request for an image or a copy of what we thought was a
6 hard drive that would have been on his desk." I'm reading at
7 page 79.

8 "From a desktop computer," question.

9 Answer, "Yeah, for purposes of -- for preservation
10 purposes mostly."

11 Question, "All right."

12 Answer, "And have the copy sent over."

13 Question, "Now, when you say that you have requested
14 email, were there any parameters placed upon what email was
15 sought?"

16 Answer, "I don't believe so."

17 Question, "Did you receive the email?"

18 Answer, "I didn't."

19 Question, "Who did?"

20 Answer, "The IT people."

21 MR. BRIAN: The point I was trying to make, Your
22 Honor, was the line that was trying drawn at the deposition
23 was to those questions, counsel determined maybe incorrectly,
24 but was -- maybe they don't have authority. They don't have
25 authority to waive the privilege on behalf of Las Vegas Sands

1 or Sands China Limited. As I understand the law, and Mr.
2 Lionel can correct me, 'cause he's actually looking at the
3 issue right now, so -- but I understood the positions were
4 that they did call -- those questions did not call for
5 privileged information, because they were simply factual about
6 was a request sent and was information received. Now, it's
7 fuzzy, I understand that it can get very fuzzy in trying to
8 draw that line, but that as I understood from Mr. Peek and Mr.
9 Weissman based on the conversation we just had outside, that
10 was the line that was tried to be drawn.

11 THE COURT: And Mr. Peek and Mr. Weissman were both
12 at the deposition?

13 MR. BRIAN: At this point I've exhausted my
14 knowledge and if -- I'd turn it over to Mr. Weissman --

15 THE COURT: Yeah. I know. Mr. Peek --

16 MR. BRIAN: -- or Mr. Peek.

17 THE COURT: -- and Mr. Weissman were at the
18 deposition --

19 MR. BRIAN: Correct.

20 THE COURT: -- so we assume they represented their
21 client and took action appropriate for the client's purposes
22 at the deposition; right? That's what I have to do.

23 MR. BRIAN: Yes.

24 MR. PEEK: But apparently you're saying I didn't do
25 a very good job, because --

1 THE COURT: No. I'm not saying it.

2 MR. PEEK: -- I waived privilege.

3 THE COURT: I --

4 MR. PEEK: It was not my --

5 THE COURT: Here's the problem, judgment calls get
6 made all the time, that's part of what attorneys do, and I
7 recognize that, and that's part of what Mr. Brian's been
8 arguing throughout this process that maybe a bad judgment call
9 was made, but it wasn't intentional and therefore it's not
10 sanctionable. And that I think has been Mr. Brian's position.
11 Judgment calls get made every day by attorneys in making
12 decisions on how best to represent their client's interest.

13 I'm not going to criticize a decision that's been
14 made, but I can't have a selective waiver then being tried to
15 be imposed, which is the position I've been in for the last
16 two days. And I'm not going to make a decision on the
17 selective waiver without complete briefing, because of the
18 significance of that waiver.

19 So before I get to the Rule 37 hearing that I know
20 Mr. Bice and Mr. Pisanelli are some day going to file a motion
21 on, I'm assuming somebody's going to file briefing on that.
22 So I've been trying to the best of my ability to give Las
23 Vegas Sands and Sands China the benefit of the doubt when they
24 make an attorney-client objection, and to not delve too deeply
25 into that, because I'm assuming that you're making it in good

1 faith. There were some with this deposition though that if
2 we've already talked about it, and I know we talked about
3 because I had it in motion practice, we're not going to just
4 take -- assert the privilege when I've already had the subject
5 discussed.

6 MR. BRIAN: Your Honor, first of all, I don't
7 represent Las Vegas Sands and so I can't speak for that.

8 THE COURT: But Mr. McCrea does and Mr. Lionel does.

9 MR. BRIAN: He does, and I know they're under strict
10 instructions to assert the privilege where appropriate, and if
11 judgment calls were made erroneously at the deposition, I
12 think those were made not to waive privilege, but to say to
13 try to figure out what was or wasn't privileged in light of
14 Your Honor's legitimate concerns that have been expressed.

15 THE COURT: Mr. Lionel knows more about privileges
16 than anybody else in the room, because he's been practicing
17 law for what, 60 years?

18 MR. LIONEL: Your Honor, I'm looking -- I'm looking
19 at a case 115 Nev., in which the Court said, "while the
20 attorney may claim the privilege on the client's behalf, only
21 the client has the ability to waive it", citing 49.095.

22 THE COURT: And I agree with you, Mr. Lionel, that's
23 what the law is.

24 MR. LIONEL: You agree with me, Your Honor, I'm
25 pleased.

1 THE COURT: I do. The problem is that then I can't
2 have a selective waiver, which is the situation I'm in, which
3 is a little bit different than the entire waiver of the
4 privilege.

5 MR. LIONEL: I understand what Your Honor said.

6 MR. BRIAN: The other thing I would say, Your Honor,
7 the law on that, I don't think I would call it selective
8 waiver, but the law that bears is different for attorney-
9 client and work product.

10 THE COURT: Yes.

11 MR. BRIAN: That is that you can, lawyers do it
12 every day, where you'd --

13 THE COURT: Selectively waive work product.

14 MR. BRIAN: -- you choose to disclose to a court or
15 opposing counsel something that is work product. And when
16 we're dealing with an area of document collection, we're
17 sometimes dealing with work product, and not attorney-client
18 privilege.

19 THE COURT: True. So since this is the hearing that
20 I'm doing, and I have said I would give Sands the benefit of
21 the doubt with -- and by Sands I'm including both Sands
22 entities at this point, for purposes of this hearing with the
23 privilege issues to the extent that it's not a question that
24 was specifically asked in the deposition, and was specifically
25 answered then I'm going to probably sustain the privilege

1 objection, which is why I've been asking you for citations to
2 the deposition, and I've been reading along with everybody
3 else to the extent that I can.

4 And while I certainly understand Mr. Lionel's
5 position that the client has to be the one who holds that
6 privilege and makes the decision about its waiver, when I've
7 had a deposition taken of in-house counsel of the client, and
8 had a privilege -- or had a question directly answered I'm not
9 going to then let somebody claim privilege on it. I'm not
10 saying that you totally waived the privilege, but for purposes
11 of that question and answer we're not going to change the
12 rules.

13 Mr. Bice.

14 MR. BICE: Yes. I just want to make --

15 THE COURT: That's an interesting device in your
16 hand.

17 MR. BICE: Thank you. Since my colleague is getting
18 sort of triple teamed over here, I do want to just make for
19 the record, let's remember who it was that offered up Mr.
20 Kostrinsky as their witness on this subject matter. And that
21 was a decision that was made by these lawyers after they
22 consulted out in the hall, and presumably their clients knew
23 what was going on when Mr. Kostrinsky appeared for his
24 deposition, and I think that the case that Mr. Lionel is
25 citing is a case where lawyers can't inadvertently waive

1 privileges. But when clients start making decisions that they
2 were -- with all due respect to the defendants here, quite
3 frankly, I think they tried to pin this on Mr. Kostrinsky,
4 which is why he was offered up as -- remember, it was an error
5 that they originally claimed. It wasn't an error, it was how
6 they did business, until the United States issued a subpoena
7 to them, and then all of a sudden the way that they did
8 business suddenly change overnight and we're going to get into
9 that with Mr. Singh tomorrow. But to come in here now and
10 claim, oh, this isn't -- you know, this was just some
11 inadvertent -- they offered up Mr. Kostrinsky as their witness
12 about how the documents and the data got into the United
13 States, he testified to it. He can't then claim well now that
14 it turned out not to be so good for us, we want to claim
15 privilege.

16 THE COURT: Well, here's what we're going to do
17 because this is not an issue that's going to go away. For
18 purpose of this hearing, which is my hearing that I scheduled
19 as opposed to some future Rule 37 hearing that somebody else .
20 might file a motion on some day, I'm going to let Mr.
21 Kostrinsky answer any questions which he previously answered
22 during the deposition. However, if there is a different area
23 even though it might be related, and might arguably have had a
24 waiver of the privilege as a result of the prior other answers
25 at the deposition, I'm not going to require him to answer,

1 because I think you need further briefing on the selective or
2 partial waiver issues.

3 MR. BRIAN: Your Honor, may I make just three
4 comments then we can proceed.

5 THE COURT: Why, I don't have any control in this
6 room it's clear.

7 MR. BRIAN: One, and we'll argue this later, we have
8 never taken the position that the transfer was inadvertent as
9 Mr. Bice keeps saying. We've never used that word, that is
10 not our position.

11 Secondly, Mr. Peek responded to a specific question
12 on June 28th, which led to the identification of Mr.
13 Kostrinsky. The characterization that the defense tried to
14 quote "pin it on him" is unfair, and I would argue
15 inappropriate in the presence of Mr. Kostrinsky.

16 Third, I fully understand and appreciate what Your
17 Honor's rule with respect to the questions that Mr.
18 Kostrinsky's deposition that you want to say whatever was
19 happened if a question was answered, so be it, you allow that
20 answer now. I would only ask Your Honor to reserve judgment
21 on whether that constitutes a waiver or whether it's -- it
22 simply was a determination appropriately that it didn't call
23 for privileged information. That should be the subject of a
24 subsequent motion.

25 THE COURT: I think that's -- you and I are saying

1 the same thing.

2 MR. BRIAN: I think so too.

3 THE COURT: I'm just using a term selective waiver
4 and you're saying whether it was a waiver or not because it
5 may not have been privileged.

6 MR. BRIAN: Thank you, Your Honor.

7 THE COURT: So I think we're on the same page on the
8 briefing related to that. However, unfortunately history in
9 this case when I asked for briefing on legal issues doesn't
10 always happen, and that's not just one side that seems to be
11 all sides, because it takes longer to get to the issue than I
12 think it should take. So I'm not really criticizing anybody
13 it just -- it seems to take you guys a long time to get your
14 briefing done. Anything else before I let Mr. Pisanelli try
15 to resume his examination?

16 Mr. Lee, --

17 MR. LEE: Your Honor --

18 THE COURT: -- I know you stood up for a reason.

19 MR. LEE: I suspect this one to be very painfully
20 difficult. And if your intent is to only to let him answer
21 questions he already answered in his deposition, I suspect
22 that it might be significantly briefer for you to do that by
23 just reading the document.

24 THE COURT: I don't want to read the deposition.
25 That was a nice thing for you to suggest.

1 MR. LEE: 'Cause there will be -- there will be a
2 question, several pages worth of depositions by all parties,
3 objections --

4 THE COURT: So can I ask a question that has a
5 scheduling issue? Given the schedule I've imposed in the
6 CityCenter case, is Mr. Kostrinsky or you supposed to be in
7 depositions this week that I've ordered multi-tracked?

8 MR. LEE: Your Honor, Mr. Kostrinsky is supposed to
9 be in a deposition tomorrow. In fact, I was just trying to
10 figure out what we could do about that in light of 4 o'clock
11 today. I am supposed to be in a deposition also, but not a
12 part of the triple-track CityCenter depositions that are
13 going.

14 THE COURT: Okay. Mr. Pisanelli, I assume you have
15 more questions to ask?

16 MR. PISANELLI: Indeed, Your Honor. Thank you.

17 BY MR. PISANELLI:

18 Q You made the request for information from Macau
19 based upon a discussion you had with Gayle Hyman; is that
20 right?

21 A On a directive, yes.

22 Q Sorry?

23 A A directive, yes.

24 Q And as a result of your request for information from
25 Macau, you received -- well, first of all, let's back that up.

1 What did you request from Macau?

2 MR. McCREA: Objection, Your Honor, attorney-client
3 privilege.

4 THE COURT: Sustained. The question was, what'd you
5 get from Macau? Was the one that was in the depo.

6 MR. PISANELLI: Fair enough, Your Honor.

7 BY MR. PISANELLI:

8 Q What did you receive from Macau following your
9 request?

10 A From my understanding the IT department received
11 emails from the Jacobs mailbox that was in Macau, and a copy
12 of the hard drive that was on his desk.

13 Q You specifically requested an image -- strike that.
14 You requested an image or a copy of his hard drive; is that
15 right?

16 A Well, one or the other.

17 Q Did you understand them to be different things?

18 A No. The request was for a copy of the hard drive
19 with the directives that the original stay secure.

20 Q Okay. And so you -- someone from the IT department
21 in Macau sent electronically stored information to the IT
22 department of Las Vegas Sands; is that right?

23 A They sent those two items to the IT department in
24 Las Vegas.

25 Q Okay. And they were sent via delivery company; is

1 that right?

2 A Yes.

3 Q DHL?

4 A That's my understanding.

5 Q Let's talk about the emails. What happened with the
6 email, the electronically stored email that came from Macau?

7 A To my understanding the device that it came over on
8 was secured in the secured data vault.

9 Q Did you have an opportunity to review it?

10 A The emails, yes.

11 Q Okay. And how were you able to review those emails?

12 A The -- a copy of whatever was on that device was
13 loaded onto my computer and I had access to review them.

14 Q Okay. Was -- were the emails loaded onto a shared
15 drive that you've described earlier?

16 A I don't think so, could have been.

17 Q So how much time did you spend reviewing those
18 emails?

19 A I didn't track my time that I spent on the emails.

20 Q Did you review all of them?

21 A No.

22 Q Okay. Did you print any of them?

23 A A few.

24 Q What'd you do with those hard copies?

25 A I probably gave them to the person that I was

1 working with.

2 Q What do you mean by that?

3 A Well, if Gayle would have asked me to look for
4 something or seeing if something regarding a specific
5 accusation from Mr. Jacobs was pertinent, I may have printed
6 something out and showed it to her.

7 Q Did you send any of the hard copies you'd printed
8 out to outside counsel?

9 A It's possible.

10 Q You don't remember one way or another?

11 A I don't recall what I specifically printed out and
12 sent to them.

13 Q Okay. But do you recall that you did in fact send
14 some of them to the outside counsel?

15 A I don't know that for a fact if I sent them the
16 specific emails that I may have printed out.

17 Q Now, other people were given access to your laptop
18 to review these emails; is that right?

19 A Well, it was the -- it was the computer that was on
20 my desk, but yeah, if people wanted to review it they had
21 access to it.

22 Q Did anyone actually sit at your desk or in your
23 office with your computer and review the Jacobs emails?

24 A Yes.

25 Q Who?

1 A Mr. Peek did.

2 Q Anyone else?

3 A There was another lawyer from his firm that did, as
4 well. And there were people in-house that looked at some
5 emails.

6 Q Do you know who it was in-house that looked at them?

7 A Gayle looked at some, Mr. Rubenstein looked at some.

8 Q These were all the emails from Macau? That's what
9 you're talking about right now?

10 A Yeah. The emails that came -- that were sent over
11 through the DHL.

12 Q I'm just clarifying, thank you. Who else looked at
13 them?

14 A That's all I can recall.

15 Q I'm sorry to interrupt you. Who else knew that you
16 had the Jacobs emails from Macau?

17 MR. McCREA: Objection, Your Honor, attorney-client
18 privilege.

19 THE COURT: Do you have a citation, Mr. Pisanelli?
20 BY MR. PISANELLI:

21 Q I'll be a little more specific. The lawyers at
22 Glaser Weil knew that you had the emails from Macau, didn't
23 they?

24 MR. McCREA: Objection, Your Honor, attorney-client
25 privilege.

1 THE COURT: Do you have --

2 MR. PISANELLI: 97, line 7.

3 MR. PEEK: What line?

4 THE COURT: 97, line 7. And there appears to be an
5 answer. So you can go ahead and answer, sir.

6 THE WITNESS: Yeah. Yes.

7 BY MR. PISANELLI:

8 Q They knew. And they knew right around the time that
9 they were hired; right?

10 A It could be.

11 Q Well, that's what you told us; right? In your
12 defense you used the word probably, at line 14.

13 A It was probably shortly after they were retained.

14 Q When were they retained?

15 A Like it says here, I didn't know if they were
16 retained before the lawsuit or after the lawsuit.

17 Q We're talking in 2010 the Glaser law firm knew that
18 you had emails from Macau here in Las Vegas; right?

19 A Probably.

20 Q And they knew that it was the Steve Jacobs emails?

21 A Those were the only emails that would have been
22 discussed.

23 Q Okay. O'Melveny and Myers also had these emails;
24 right?

25 THE COURT: That's on the top of page 100 you

1 answered that question. I'm sorry.

2 BY MR. PISANELLI:

3 Q The name -- yeah, the name's on the last line of 99.

4 A So the question was, did they have them?

5 Q Yep.

6 A Yes.

7 Q They actually came into your office and copied your
8 computer; right?

9 A That was part of the protocol.

10 Q You've used that word a couple of times, the
11 protocol. What do you mean by that?

12 A Well, there was a list of computers, a long list of
13 computers they were copying for their purposes, and I was one
14 of the people that were on the list.

15 Q How do you know there was a long list of computers
16 that O'Melveny was copying?

17 MR. McCREA: Objection, Your Honor, attorney-client.

18 THE COURT: Sustained.

19 BY MR. PISANELLI:

20 Q What other computers did O'Melveny copy?

21 MR. McCREA: Objection, attorney-client, work
22 product.

23 THE COURT: Citation, Mr. Pisanelli? Sustained.

24 BY MR. PISANELLI:

25 Q I'm sorry, Mr. Kostrinsky, I think I asked you

1 this, but I'm not sure what your answer was. You created a
2 share drive of the information you received in connection with
3 the Jacobs matter; is that right?

4 A No.

5 THE COURT: He said the IT people did about an hour
6 ago.

7 BY MR. PISANELLI:

8 Q Fair enough. A share drive was created for the
9 Jacobs documents; right?

10 A Yes.

11 Q Okay. And were the Jacobs emails put on that share
12 drive?

13 A I don't recall if they were.

14 Q Okay. When you looked at the Jacobs emails, did you
15 look solely at the versions you had on your computer?

16 A I'm not sure I understand the question.

17 Q We're trying -- see if I can refresh your
18 recollection as to whether the Jacobs email that had been
19 delivered from Macau had been put on the share drive that your
20 IT department created. And so, my question to you is if you
21 recall looking at the Jacobs emails at a time when you were
22 looking at the documents that were on the share drive as
23 opposed to the times you were looking at the stored version of
24 the email on your personal laptop computer?

25 A So -- so what's the question?

1 Q Do you --

2 THE COURT: He's trying to find out where the emails
3 stored in two places. One on the hard drive on your computer
4 and on the share drive, or was it only in one place?

5 THE WITNESS: I don't know if they were on the
6 shared drive, as well, Jim.

7 THE COURT: Mr. Pisanelli, I have a question.

8 MR. PISANELLI: Yes, of course.

9 THE COURT: Given the manner by which we are having
10 to do this examination, which I will tell you, I told my staff
11 was like having an extraction done without any anesthetic.

12 MR. PISANELLI: Imagine from this perspective.

13 THE COURT: So, I know there is a reason you want a
14 live witness for purposes of this hearing.

15 MR. PISANELLI: Okay.

16 THE COURT: And I appreciate Mr. Kostrinsky and his
17 counsel being here for the last day and a half. My question
18 is, are we going to make productive use of this time or would
19 it be easier to just play the video with all the objections.
20 I noticed it's a video depo.

21 MR. PISANELLI: It is a video depo.

22 THE COURT: I was reading it looking at the
23 transcripts.

24 MR. PISANELLI: It's a long one.

25 THE COURT: I can tell.

1 MR. PISANELLI: I've got to tell you, Your Honor --
2 I'll confer with my counsel for a minute, but I don't have an
3 objection if Your Honor wants to see exactly what this witness
4 had to say. We do get through this problem of second guessing
5 the trial counsel who was at the deposition.

6 THE COURT: That's why I'm suggesting it, because of
7 the manner by which we're having to do this examination.

8 MR. PISANELLI: That's a fair point.

9 MR. BRIAN: Your Honor, could I suggest a
10 modification of that? I don't think -- Mr. McCrea and Mr.
11 Lionel could read it, but I think we would have an objection
12 to Your Honor reading --

13 THE COURT: I'm not going to review it outside. I
14 did that for Mr. Peek once. I had to stay up till 3:00 in the
15 morning and then be here for trial the next day, and I'm not
16 doing it ever again. I told him that at the time. I can't
17 remember how many years ago it was, but I got caught in that
18 once. It's not happening ever again, Mr. Brian. Thank you.
19 You will suffer with me.

20 MR. BRIAN: It was a two-part suggestion. Since you
21 didn't like my first part, I won't go to the second part, was
22 to suggest that if you were willing to read it, that Mr.
23 Pisanelli could show selected portions to observe the demeanor
24 and the like. But I understand Your Honor's reluctance to do
25 that.

1 THE COURT: So my question to you, Mr. Pisanelli, do
2 you want to consult with your team and see if we really want
3 to keep going through this effort, because I've been able to
4 observe Mr. Kostrinsky, and I've known Mr. Kostrinsky for
5 almost 20 years off and on, just like I've known everybody
6 else who's here and is listed as a witness, so I've gotten the
7 flavor that you would typically want me to do by having a live
8 witness instead of a deposition or a video deposition. If you
9 feel there is an important issue that is having us all go
10 through this process where you ask a question, there's an
11 objection, I ask you for a citation, we all read the
12 transcript together, and then I look at Mr. Kostrinsky and
13 say, you can answer, and he reads the answer from the
14 deposition?

15 MR. PISANELLI: Hard to argue with your point. One
16 moment?

17 THE COURT: Yes.

18 Then my question will be to you, Mr. Brian, Mr.
19 McCrea, and Mr. Lionel, after I get the answer to that is are
20 there questions you would like to ask Mr. Kostrinsky while
21 he's here in the courtroom. Because if there are, then I have
22 different issues. So you guys can consult while we anticipate
23 what their answer is going to be.

24 MR. BRIAN: I was going to ask for a comfort break,
25 since last time I asked, he asked for a comfort break. But it

1 turns out that the comfort room wasn't open.

2 THE COURT: Yeah. Because if I let you on a comfort
3 break, we're not going to get back. There's a flood here in
4 the building. And then that would solve Mr. Lee's problem,
5 which he's been unable to solve as he's been sitting here in
6 the courtroom, because he's not supposed to be using his
7 electronic device.

8 (Pause in the proceedings)

9 MR. BRIAN: Your Honor, I think I can respond to
10 your question.

11 THE COURT: I want them to respond first. I'm not
12 putting pressure on you.

13 (Pause in the proceedings)

14 MR. PISANELLI: Your Honor, let me ask a few
15 questions, and I mean a few. I'm sure they'll be objected to,
16 and then we'll fall back and get ourselves all out of this
17 dentist chair and watch the video, and you can see for
18 yourself everything Mr. Kostrinsky had to say without the
19 lawyers jumping up and without us all flipping pages.

20 THE COURT: Well, they'll be jumping up on the depo,
21 on the video, but that's okay, because then I won't be doing
22 it twice.

23 MR. PISANELLI: Okay.

24 THE COURT: So do you think you can ask your few
25 questions now?

1 MR. PISANELLI: Just a very few.

2 THE COURT: And then, Mr. Lee, that means you will
3 be okay tomorrow for the depositions scheduled.

4 MR. LEE: Thank you, Your Honor.

5 THE COURT: It's not just for you that I'm doing
6 this, Mr. Lee.

7 BY MR. PISANELLI:

8 Q In the share drive that you created the information
9 -- I'm sorry. I know you don't like that phrase, and I'm
10 stuck on it. On the share drive that was created of which the
11 information that you would have assembled was loaded on to did
12 you ever have occasion to see the volume of data that is on
13 that share drive?

14 A Yeah. Yes.

15 Q What volume did you understand to be on that shared
16 drive?

17 A There were a lot of documents, but I couldn't equate
18 it to -- not gigabytes, it wasn't big like that, it was just a
19 document that may be responsive to the allegations and you put
20 it on the share drive for people to look at, but it wasn't
21 massive data by any means.

22 Q Well, are you saying you cannot estimate by way of
23 electronic volume like gigabyte, that type of thing?

24 A I can't do that. Sorry.

25 Q Can you estimate by way of number of documents?

1 A I would think it's under a hundred. If someone said
2 -- showed me something and it was more, I don't know that I'd
3 dispute it, but I don't think it was over a hundred.

4 Q Prior to the time you left the company were you made
5 aware of anyone taking action to remove documents from that
6 share drive?

7 A No.

8 Q Now, you're talking about the domestic share drive;
9 right?

10 A Well, there's only one Jacobs share drive that I'm
11 aware of, a share drive related to this lawsuit that we're
12 here for. I'm only aware that only one was created.

13 Q What about the volume of documents on the SEC share
14 drive?

15 A Again, it would be measured by documents and not by
16 volume, because --

17 Q That's fine. Your best estimate.

18 A -- there wasn't any massive data dump in there,
19 either. It was just documents came in that I put it on there.
20 If I had to compare the two, I'd -- the SEC probably had more.

21 Q Best estimate?

22 A Of what?

23 Q How many documents were on the SEC share drive?

24 A I couldn't estimate. Because we had -- when the
25 request for the SEC came in it wasn't specific. So if there

1 was a document that the Pennsylvania property had, I would get
2 their stuff, and then I would get it from Las Vegas, and it
3 all went on there. So I really -- I'm not comfortable trying
4 to estimate it.

5 Q Okay. Were you ever made aware of the volume of
6 documents on the China share drive?

7 MR. MCCREA: Objection, Your Honor. Attorney-client
8 privilege, work product.

9 THE COURT: Do you have a citation?

10 MR. PISANELLI: No.

11 THE COURT: Objection sustained.

12 BY MR. PISANELLI:

13 Q Did you ever look at the share drive in China?

14 MR. MCCREA: Same objection.

15 THE COURT: Yes or no.

16 THE WITNESS: If I had access to it, I did. I just
17 don't have a recollection. When I'm dealing with the SEC I'm
18 trying to put as much data together as I can.

19 BY MR. PISANELLI:

20 Q So when you're telling me about this volume of
21 documents that are on these share drives, what time frame are
22 you talking about?

23 A Well, my experience with the SEC share drive was
24 from when it started, which I think was a few days after
25 February 9th. So let's say between the 12th and the 15th

1 estimate until O'Melveny took over, which -- I mean, they took
2 over before March 22nd, but that was the time when they said,
3 you know, we're going to start gathering the documents, we
4 want to take it over from here.

5 Q Okay.

6 A So between those couple of weeks for the SEC and the
7 share drive for the Jacobs case was set up towards the very
8 end of 2010, and it was still there when I left, but I'm not
9 sure of the volume of data that was put on there, it kind of
10 tapered off quite a bit.

11 Q You were never made aware of documents being taken
12 off any of these share drives prior to you no longer working
13 on these assignments; fair enough?

14 MR. McCREA: Objection, Your Honor. Attorney-
15 client, work product.

16 THE COURT: Do you have a citation?

17 MR. PISANELLI: Nope.

18 THE COURT: Okay. The objection's sustained.

19 MR. PISANELLI: All I'm asking him, Your Honor, just
20 for his personal experience of whether he is personally aware
21 that records were taken off these share drives. And the
22 reason -- I'll tell you why I'm asking. Because we have
23 reason to believe and we have a great concern that -- and
24 you're going hear this from other witnesses that the same
25 volume of documents are no longer on these share drives.

1 THE COURT: I understand that's going to be one of
2 your arguments. I think you've previewed that to me in other
3 stuff. The objection's sustained.

4 BY MR. PISANELLI:

5 Q All right. Did you personally participate in making
6 the Jacobs email that was delivered from Macau available for
7 production to the United States Government?

8 A I wasn't involved in any responses to the
9 Government.

10 Q Now, you had an opportunity to travel to Macau in
11 connection with your work on the Jacobs litigation; is that
12 right?

13 A Yes. I went there once.

14 Q And you went there with Gayle Hyman?

15 A She was part of the folks that went over there, yes.

16 Q And Justin Jones?

17 A Mr. Jones was there.

18 Q Patty Glaser?

19 A Ms. Glaser went, too, yes.

20 Q You brought some electronically stored information
21 back from Macau with you on that trip; is that right?

22 MR. McCREA: Objection, Your Honor. Work product,
23 attorney-client.

24 MR. PISANELLI: Page 143, line 12.

25 THE COURT: Thank you.

1 Okay. You can answer.

2 THE WITNESS: I can answer?

3 Yeah. Mr. Williams, one of the lawyers at Macau,
4 had put some corporate documents onto a CD and had given me a
5 copy when I was there, but it was similar stuff to what had
6 already been provided.

7 BY MR. PISANELLI:

8 Q How do you know it was a CD?

9 A Or a DVD -- the round thing with a hole in the
10 middle.

11 Q Was it in an envelope?

12 A I don't know if he -- if his was in an envelope.

13 Q You don't recall --

14 A No.

15 Q -- that that was the only thing you brought back
16 from Macau?

17 A My recollection was that was what I had brought
18 back. And I had reviewed some documents which indicated that
19 I may have brought back a -- an envelope from one IT
20 department and given it to the IT department in Las Vegas, and
21 then I followed up in writing with the folks in Las Vegas as
22 to what was in that envelope to see if it pertained to the
23 Jacobs's case.

24 Q And I'm sorry, Mr. Kostrinsky, I think you just said
25 this, but you reviewed everything that was on that CD?

1 A On the CD, yes.

2 Q Yeah. And you shared everything that was on that CD
3 with outside counsel?

4 A It was put on the hard drive -- or the shared drive.

5 Q The shared drive?

6 A Yeah.

7 Q You testified that you shared everything -- or
8 anything, I should say was your word, anything you had in the
9 Jacobs's case you shared with outside counsel; is that right?

10 A It went onto the shared drive.

11 Q Okay. Did you share it with outside counsel in any
12 other form?

13 A Well, there were meetings and phone calls and --
14 certainly, you know, just to communicate with the shared
15 drive, but yeah.

16 Q You told us a moment ago that you had the Jacobs's
17 email on your desktop?

18 A Yes.

19 Q And you don't recall whether you or anyone put the
20 Jacobs's email on the shared drive; is that right?

21 A I don't recall if the emails went onto that shared
22 drive or not.

23 Q Okay. So when you said on page 144 that, "Anything
24 I had in the Jacobs's case was shared with counsel," can you
25 tell Her Honor how you shared the Jacobs's email with outside

1 counsel if it was not on the shared drive.

2 A Well, Mr. Peek came to my office and spent a few
3 hours at my desk.

4 Q How did you share the email -- the Jacobs's email
5 with the Glaser Weil firm?

6 A It was discussed in various calls or various meeting
7 that it was there. Like I said, I don't recall that they came
8 to the office and reviewed them the way Mr. Peek's firm did.

9 Q Did you understand the Glaser Weil firm the have
10 access to the shared drive?

11 A The emails were open to whoever wanted to see them.

12 Q And you just said a moment ago that you've discussed
13 their existence with the Glaser Weil firm?

14 MR. McCREA: Objection, Your Honor. Privilege --

15 MR. PISANELLI: He just answered it, Your Honor.

16 THE COURT: He answered that question a little while
17 ago about the Glaser law firm.

18 Objection's overruled.

19 THE WITNESS: There were numerous -- there were
20 numerous calls and meetings with counsel and the emails were
21 part of the topics from time to time.

22 BY MR. PISANELLI:

23 Q And you specifically discussed this with Patty
24 Glaser?

25 A You know, I don't -- I don't know --

1 MR. MCCREA: Objection, Your Honor, attorney-client.

2 THE COURT: Sustained.

3 BY MR. PISANELLI:

4 Q Okay. You had these phone calls around the time
5 that you obtained the emails in 2010?

6 A There were normal course phone calls there quite
7 often.

8 Q Sure. But they started -- .

9 A I didn't have them. They were set up, and you
10 participated by calling in through.

11 Q Sure. I just want the date when you said that the
12 Jacobs's emails were discussed with the Glaser Weil firm.
13 That occurred around the time that you obtained them in 2010?

14 THE COURT: He testified earlier, it was either
15 right before or right after the law suit was filed and they
16 were retained; right?

17 THE WITNESS: That's when they were retained, which
18 specific call or which specific meeting that that was part of
19 the topics, I couldn't tell you which ones, but they were
20 discussed.

21 BY MR. PISANELLI:

22 Q They, being the Jacobs's email?

23 A Yes.

24 MR. PISANELLI: Okay. I've promised to be brief on
25 just a few points, Your Honor. So with that, we will defer to

1 -- hold on a minute, I've got a Post-it.

2 BY MR. PISANELLI:

3 Q Probably going to mispronounce his name. Do you
4 know Mr. Manjit?

5 A I know Mr. Manjit.

6 Q Do you know that he was deposed in this case?

7 A Yes.

8 Q Did you read his deposition transcript?

9 A I did not.

10 Q Okay. Did you read anything to prepare for today's
11 testimony?

12 A Yes.

13 Q What did you read?

14 A I read my transcript. I read I think the last
15 hearing with Mr. Reese, that transcript. I read the statement
16 that Mr. Peek had filed with the court, the declaration back
17 in July of 2012. A couple of emails. There may have been
18 another transcript of a proceeding.

19 Q Why did you read the emails?

20 A The question arose regarding if I had brought
21 something back from Macau. So I had asked to see if there was
22 an email related to that, to see if I had followed up with
23 that, and that's what I had reviewed.

24 Q And where did you review it?

25 A With Mr. Lee.

1 Q Mr. Lee had copies of these email?

2 MR. LEE: Now, I'm going to object to my -- this
3 would be attorney-client privilege.

4 THE COURT: Objection sustained. However, if
5 there's a particular document that the witness used to refresh
6 his recollection --

7 MR. PISANELLI: That's my next question.

8 THE COURT: Can I finish.

9 MR. PISANELLI: Oh, I'm sorry.

10 THE COURT: To refresh his recollection for purposes
11 of his testimony, you should give us the emails without
12 telling us what you talked to him about.

13 Okay. David, you email them, they'll be ready
14 tonight. I don't need them.

15 MR. LEE: I think Mr. Kostrinsky can answer that
16 question, because I think it's a single email. So --

17 THE COURT: Okay.

18 THE WITNESS: Can I go ahead?

19 THE COURT: Yes.

20 THE WITNESS: The question arose whether I had
21 brought something back other than the CD. So I was inquiring
22 and I was shown that I had given the IT --

23 MR. MCCREA: Your Honor, I have an objection. If
24 this was an email that was generated while he was in-house
25 counsel for Las Vegas Sands, and it was just to or from

1 employees of Las Vegas Sands or their lawyers, I would assert
2 the attorney-client privilege.

3 THE COURT: I think there's a significant issue if
4 he used it to refresh his recollection for purposes of this
5 proceeding. I mean -- and that's really where I think the
6 difference comes down to, it could be privileged every day of
7 the week. But if he uses it to refresh his recollection, it
8 then is something that is -- has to be made available to the
9 other side where you have the opportunity to review it.

10 MR. MCCREA: Okay. Could we have foundation on
11 that, then?

12 THE COURT: I don't know, because I'm waiting to
13 find out.

14 MR. MCCREA: Okay.

15 THE COURT: Does anybody know where this email is,
16 anything?

17 MR. BRIAN: They put -- Your Honor, the foundation I
18 think that counsel is referring to is, did it refresh his
19 recollection? I think that foundation has to be laid.

20 THE COURT: You told me that you didn't remember, so
21 you asked for the email?

22 THE WITNESS: I asked if there were any that --

23 THE COURT: And somebody sent the email to Mr. Lee?

24 THE WITNESS: I think that's how it happened.

25 THE COURT: And then you read it?

1 THE WITNESS: I did.

2 THE COURT: And now you remember better?

3 THE WITNESS: Part, yeah.

4 THE COURT: Okay.

5 MR. PEEK: That's an interesting way to get to
6 refresh your recollection, Your Honor.

7 MR. BRIAN: That's how you lay a foundation, Your
8 Honor.

9 MR. PEEK: You remember better.

10 THE COURT: Well, if there's a jury here, I make the
11 witness actually lay the piece of paper down, look up, and
12 then now the question gets asked, you know, did it refresh
13 your recollection, yeah. Sorry.

14 BY MR. PISANELLI:

15 Q And so after reading the email that refreshed your
16 recollection, you are now of the belief that the only thing
17 you brought back from Macau is the CD you described a little
18 earlier?

19 A You know, I don't recall receiving the request from
20 the IT folks to bring this -- drop it off with the other IT
21 folks, but I recall that I followed up with the IT department
22 to see if there was anything that was related to the Jacobs's
23 case that was on whatever it was that was in this envelope.

24 Q Okay. Who'd you give the envelope to?

25 A I can only tell you what the -- who was on the other

1 side of the email.

2 Q I'm talking about the envelope you received from
3 Macau, what did you do with it?

4 A I gave it to the IT department.

5 Q In Las Vegas?

6 A In Las Vegas.

7 Q All right. You didn't keep a copy of it?

8 A No. I didn't open it.

9 Q Didn't you tell us a little earlier that you did
10 review what was on that CD?

11 A No. The CD that Mr. Williams -- Dillon Williams,
12 the attorney from Macau who handles the corporate matters,
13 gave me a CD that was in Macau and I brought that back and I
14 put that on the hard drive. Although most of the information
15 that was on the CD he had already given to me before and it
16 was already on the hard drive, it was just updated. Then the
17 question was, was there anything else? And I followed up with
18 the company to see if there was anything else. And I saw this
19 email to see if it refreshed my recollection of bringing
20 something else back.

21 Q Okay. And it was a sealed envelope that you didn't
22 open?

23 A It was an envelope that I didn't open, yes. I gave
24 it to the IT folks and then I followed up in writing asking
25 them what was on it.

1 Q Who did you give it to specifically?

2 A It was either -- it was one of the two Steves, Steve
3 Eden or Steve Allmer [phonetic].

4 Q Okay. And how long after you delivered it did you
5 send the email asking them what was on it?

6 A Probably -- I have to see the date on it. It wasn't
7 much longer I would assume.

8 Q Okay. Did -- to get a response?

9 A I didn't see a response, but would just be guessing
10 right now.

11 Q You don't remember?

12 A I don't recall, but my practice would be to follow
13 up.

14 Q Okay. But you don't remember one way or another if
15 you got a response?

16 A As I sit here right now, no.

17 Q As you sit here right now, do you have a belief as
18 to what was in that envelope?

19 A I have a -- I would be guessing, but I really don't.

20 Q I don't want you to guess. I just want to know if
21 you have a belief.

22 A Not particularly, no.

23 Q Not particularly suggests to me you do, you just
24 don't believe firmly in it.

25 A I would be guessing. I really don't have a --

1 THE COURT: We don't want you to guess respecting
2 it.

3 THE WITNESS: Yeah. That's --

4 BY MR. PISANELLI:

5 Q What is your -- whatever it is, whether it's a
6 guess, a speculation, an estimate, a sneaking suspicion,
7 whatever it is, what is it based upon?

8 MR. LEE: Objection. Attorney-client privilege.

9 BY MR. PISANELLI:

10 Q Is the source of your information of what was in
11 that envelope communications you received from your lawyer?

12 A Yes.

13 Q And we're talking your personal lawyer, Mr. Lee?

14 A Yes.

15 Q Did you review any documents in preparation for
16 today's examination that refreshed your recollection about
17 what was in that envelope?

18 A I don't have an understanding what was in the
19 envelope. So I don't have a recollection of what was in
20 there.

21 Q Did you review any emails in preparation for today's
22 testimony that made reference to what is in that envelope?

23 A I don't know what was in there, so I can't give you
24 an indication.

25 Q Well, I'm not asking you to attest to what's in it.

1 I'm just asking if there was a written document you saw in
2 preparation for today's testimony that made reference to what
3 was in it?

4 A No.

5 Q Is it fair then for us and Her Honor to understand
6 that the sole source of any belief you may have about the
7 contents of that envelope is statements from your personal
8 counsel?

9 A I don't understand the question.

10 Q I want to know if there is a source of information
11 you're relying upon for any level of belief you may have for
12 the contents of that envelope other than what Mr. Lee said to
13 you?

14 A I -- yes, I was asked -- I was asked to see if it
15 was possible that another CD or another piece of information
16 may have been in that envelope.

17 Q Who asked you that?

18 A The Sand attorneys.

19 Q When?

20 A In the past couple weeks.

21 Q Who contacted you about this topic?

22 A Initially? Mr. Peek called me when I initially was
23 asked to have my deposition taken.

24 Q What did he say to you?

25 A That the judge ordered to have my deposition taken

1 and I may be receiving a subpoena from Mr. Bice.

2 Q All right. What else did he say?

3 A He -- I asked him if they were waiving the
4 privilege, because I was an in-house counsel it seemed to be
5 somewhat of a strange thing to do, and he said, no. And --
6 that was about it.

7 Q What did he say about this envelope?

8 MR. PEEK: Your Honor, I know Mr. McCrea's not --
9 this is privileged communication, because he's --

10 MR. PISANELLI: This is a witness arguing, Your
11 Honor.

12 MR. PEEK: -- he is a former --

13 THE COURT: Okay.

14 MR. PEEK: I'll let Mr. McCrea --

15 THE COURT: Hold on a second. Mr. McCrea, did you
16 miss --

17 MR. MCCREA: Objection. Attorney-client privilege,
18 former counsel.

19 THE COURT: Okay. Now the question comes up as to
20 whether he is currently adverse to the Las Vegas Sands and
21 Sands China or not, or whether he is still somebody who's
22 being represented and is a former employee. Because he's of a
23 -- if he is adverse to the Sands, then it doesn't always apply
24 if there's an attorney-client privilege. And I do not know,
25 based on some of the information I've heard in the hearings,

1 as to whether there is any adverse position or not.

2 MR. MCCREA: I don't know an adverse position that
3 we have with Mr. Kostrinsky.

4 THE COURT: But you're new.

5 MR. MCCREA: So what my knowledge --

6 MR. PEEK: Will you let me speak, Your Honor?

7 THE COURT: Sure, Mr. Peek, you can speak.

8 MR. PEEK: Your Honor, we take no adverse position
9 to Mr. Kostrinsky. But I believe that the communications that
10 I had with Mr. Kostrinsky would be as a former general
11 counsel, and those conversations would be privileged.

12 MR. PISANELLI: That was something more than
13 conclusory. I'm not sure that I actually heard anything of
14 substance from Mr. Peek on that point.

15 MR. PEEK: But, Your Honor, under --

16 THE COURT: Wait, wait. Remember, don't interrupt.
17 It's been a long day, Mr. Peek.

18 MR. PEEK: I don't want to get one of those papers,
19 either.

20 THE COURT: Mr. Pisanelli, do you want to finish.

21 MR. PISANELLI: Yeah. It's one thing to say that we
22 have a deposition where new counsel disagrees with trial
23 counsel on how he was asserting objections, when, where, and
24 why. And now they want to put restrictions and parameters on
25 every question and every answer. We've been sitting here now

1 hearing from Mr. Kostrinsky we'll just call it two or three
2 minutes, maybe an exaggeration, but not by much, where he's
3 telling us about a conversation he had with Mr. Peek. And
4 then all of a sudden when we get to a part of the conversation
5 they don't like, that's when they're putting the gate up
6 again. Now we have a battery of present counsel that had an
7 opportunity to speak up that this conversation was privileged.
8 It's only when we got to the point they didn't like that they
9 spoke up. Well, at that point it was too late.

10 THE COURT: Anything else?

11 MR. PEEK: Your Honor, I'd like to respond to that,
12 if I might.

13 THE COURT: I'm listening.

14 MR. PEEK: This characterization that I'm somewhat
15 -- don't want to have that conversation heard is inappropriate
16 on his part. I did it because I didn't see Mr. McCrea doing
17 it. And so I jumped up because I believe, perhaps Mr. McCrea
18 doesn't, that on behalf of my client that when I prepare a
19 former counsel or a senior executive who's within the scope of
20 that Upjohn rule or the Pioneer rule, whichever one --

21 THE COURT: Or whatever the current limit is.

22 MR. PEEK: -- you want to use, because they're both
23 the same, that that's an attorney-client communication and
24 it's privileged to prepare him. There is nothing untoward,
25 contrary to what Mr. Pisanelli is suggesting, that I said to

1 him that I'm trying to hide. I apologize to Mr. McCrea if he
2 takes offense at my remark, but he wasn't jumping up fast
3 enough. And I'm concerned about the waiver here of the
4 privilege. So I jumped up.

5 MR. PISANELLI: Mr. McCrea wasn't jumping up fast
6 enough, neither was Mr. Peek.

7 THE COURT: Mr. Pisanelli, I understand what you're
8 saying.

9 MR. PEEK: But Mr. Peek --

10 THE COURT: Wait. Gentlemen, can I finish, please.
11 It's what happens when you've known people for a long time,
12 sometimes they step on you. So perhaps I can finish.

13 I certainly understand Mr. Pisanelli's position that
14 the delay in asserting the privilege may be determinative.
15 For purposes of the hearing that I am currently conducting I
16 am going to sustain the objection without prejudice for you to
17 brief it as part of the other issues. And if upon briefing I
18 make a decision that in fact there was a waiver by the period
19 of time that Mr. Kostrinsky was answering the question before
20 the privilege was asserted, I will let you ask Mr. Kostrinsky
21 those questions again.

22 MR. PISANELLI: Very well. Thank you. Thank you,
23 Your Honor.

24 THE COURT: All right. Did you have any more
25 questions for Mr. Kostrinsky? Because it's now 4:49 and

1 you've gone on more than you told me you were going to.

2 MR. PISANELLI: I know. It's a curse. Very
3 quickly, I promise.

4 BY MR. PISANELLI:

5 Q While you were in Macau did you review any hard
6 documents, hard-copy documents?

7 A You know, we didn't go to Macau for purposes of
8 obtaining documents, it was more of a fact-finding/
9 interviewing thing, and if someone came with a document or two
10 as part of the interview, it's possible we looked at it. But
11 we didn't ask for anything and --

12 Q Did you review -- more specifically, Mr. Kostrinsky,
13 did you have an opportunity to see a file of hard-copy
14 documents kept in Mr. Jacobs's office that was labeled
15 "Outrageous File"?

16 MR. MCCREA: Objection, Your Honor, privileged,
17 attorney-client privileged, work product.

18 THE COURT: Sustained.

19 BY MR. PISANELLI:

20 Q Did you bring anything back to the United States
21 that was from Mr. Jacobs's office?

22 MR. MCCREA: Same objection, Your Honor.

23 MR. PISANELLI: We're here talking about the
24 transfer of information from Macau to the United States and
25 whether the defendants have properly disclosed it to you. If

1 Mr. Kostrinsky brought information back from Mr. Jacobs, that
2 goes to the heart of what we've been doing here for two days.

3 THE COURT: It does. But it may also be privileged
4 and protected by the attorney work product doctrine, which, if
5 the client wants to assert it, that's fine. It may cause me
6 to draw certain inferences which may be adverse at some other
7 time, but I'm not there yet.

8 BY MR. PISANELLI:

9 Q Okay. Who gave you that envelope?

10 A I -- it was from the IT department. I couldn't tell
11 you who for sure.

12 Q You heard Mr. Peek testify about putting the printed
13 emails from your office, printed Jacobs emails in a Redwell
14 and leaving them in your office? You heard him testify about
15 that?

16 A Yes.

17 Q Did you do anything with those emails prior to
18 leaving the company?

19 A I kept them in the office in the area with the
20 Jacobs matters.

21 Q In connection -- I'm sorry, I didn't hear you.

22 A In connection with the Jacobs matter.

23 Q You have a hard copy or a file of hard-copy
24 documents in your office concerning the Jacobs litigation; is
25 that what you mean?

1 A Yes.

2 Q All right. Final thing I wanted to ask you before
3 we adjourn for the evening is you -- if I understood you
4 correctly, there were no restrictions on you obtaining
5 information from Macau prior to March of 2011; right?

6 A Yes.

7 Q But then after 2011 there was a change in that
8 policy; is that right?

9 A Well, I think the problem we were having before was
10 referring to a policy. It wasn't a specific policy that
11 occurred in March of 2011.

12 Q Was there a change in practice?

13 A Yes.

14 Q What was the change in practice after March of 2011?

15 A I was not getting any documents from -- my requests
16 for documents went to the Macau legal department, and the
17 Macau legal department told me that I --

18 MR. MCCREA: Objection, Your Honor.

19 THE COURT: Sustained.

20 BY MR. PISANELLI:

21 Q Do you know whether there was a change in practice
22 companywide, or are you only telling us about a change of
23 practice that affected you?

24 A I can't testify as to companywide. I can only tell
25 you what was [inaudible].

1 Q So what you just described was just what happened to
2 you personally?

3 A It was referred to the legal department, so --

4 MR. MCCREA: Objection, Your Honor.

5 THE COURT: Sustained.

6 Mr. Brian, Mr. McCrea, and Mr. Lionel, do you have
7 any questions you'd like to ask Mr. Kostrinsky?

8 MR. BRIAN: No, Your Honor.

9 THE COURT: Thank you, Mr. Kostrinsky. We
10 appreciate your time.

11 Mr. Lee, thank you for being here with him. Have a
12 nice day -- evening. Drive safely.

13 For those of you who will be coming back tomorrow,
14 we will be starting at 9:00 o'clock if you can all be here.
15 If some of you have places to be in the morning and they're
16 for hearings, if you'll tell me, I'll try and work with your
17 schedule.

18 MR. PEEK: Your Honor, for purposes of talking to my
19 partner and Mr. Manjit Singh is that you're going to look at
20 the video for four and a half hours tomorrow the first thing
21 in the morning? I know that's extracting teeth, I agree. Or
22 were you going to start -- so I can just let Mr. Jones know,
23 as well as Manjit?

24 THE COURT: You guys want to do a live witness
25 tomorrow, or do you want to watch a video with me?

1 MR. BICE: We prefer to start with live witnesses.

2 THE COURT: Well, do you want to do Mr. Singh or Mr.
3 Jones? I have questions for both, although, as you know, my
4 questions are much briefer than yours.

5 MR. BICE: I believe, Your Honor, our preference
6 would be to start with Mr. Weissman.

7 THE COURT: Who?

8 MR. BICE: Mr. Weissman.

9 MR. McCREA: Your Honor, we object.

10 THE COURT: Wait. Wait. Remember what I said, Mr.
11 Bice, in my opening remarks was I had a list of people that I
12 thought were relevant, and I was going to have those people go
13 through my process.

14 MR. BICE: Yes.

15 THE COURT: I've got two more on my list I haven't
16 got to, those would be Mr. Jones and Mr. Singh. When I
17 finished my list I would then ask you if you had any
18 additional witnesses you thought I should listen to, and then
19 you would tell me why, and I would make a decision on a
20 witness-by-witness basis if I was going to let them go. So
21 I've got two people, Jones and Singh. What do you want?
22 Anybody care?

23 MR. BICE: Let's start with -- no, I don't think we
24 care.

25 MR. PEEK: I don't, Your Honor. I'll let Mr. Jones

1 know.

2 THE COURT: Okay. Here's the only issue. If it's
3 going to cause a problem with a court hearing with another
4 judge, please tell Mr. Jones he can go to that, and bring me
5 Mr. Singh. I've already outlined my examination for both. I
6 anticipate that the cross -- or the examination by the
7 plaintiffs will be lengthy with both of them.

8 MR. BICE: Yes.

9 THE COURT: So it doesn't really matter which of
10 them comes, we'll get through them both.

11 MR. BICE: I understand.

12 THE COURT: So it'll take a morning to do one or the
13 other is my guess.

14 MR. PEEK: So I may have one come at 9:00 and one at
15 10:00, then, probably, Your Honor.

16 THE COURT: Okay.

17 MR. PEEK: I'll just find out, does it matter to --
18 would you ask the counsel whether it matters to them in case
19 Mr. Jones, who I say would be first, has a court hearing and
20 can't be here at 9:00?

21 THE COURT: I already said, so it doesn't matter
22 what matters to them. I already --

23 MR. PEEK: Thank you.

24 THE COURT: -- said if Mr. Jones has a court
25 hearing, bring me Mr. Singh.

1 MR. PEEK: So it matters -- it matters to you, okay.
2 I will bring whoever can be available, Your Honor.

3 THE COURT: Because I don't want to disrupt another
4 judge because I've got Mr. Jones here so it's causing problems
5 for another judge. I'd rather he do what he has to do, and I
6 can handle another witness.

7 MR. PEEK: Thank you, Your Honor. I'll --

8 THE COURT: But order is not important to me.

9 MR. PEEK: Okay.

10 THE COURT: All right. Anything else that anybody
11 wants to tell me of a housekeeping nature, other than we need
12 to get a hold of the A-V guy so that we can make sure that the
13 damage Mr. Pisanelli did to the A-V wires will not impede our
14 ability to play the video deposition?

15 And you can step down and go.

16 MR. PEEK: Hopefully it will, Your Honor.

17 MR. PISANELLI: Your Honor, I honestly do not mean
18 this in an inflammatory manner or argumentative or otherwise.

19 THE COURT: Wait. Wait. Wait. Wait. Let's let
20 Mr. Kostrinsky leave the well so that it's -- you know, he's
21 not feeling threatened by you.

22 All right. Go.

23 MR. PISANELLI: I would ask Your Honor to direct
24 counsel to do their best so that we don't do what we did again
25 today, to read Mr. Singh's depo as carefully as they can so

1 that we don't have this inconsistent assertion of privileges
2 when it -- those same privileges on same questions did not
3 occur at the deposition.

4 THE COURT: Well, Mr. Singh is not a lawyer, he's an
5 IT guy.

6 MR. PISANELLI: Either way -- yeah -- that -- you
7 would think. But there's still a number of privileges.

8 THE COURT: There's not a whole lot of attorney-
9 client privilege that goes on when I've got an IT guy.

10 MR. PEEK: And, Your Honor, he was actually the
11 30(b)(6) guy.

12 THE COURT: Okay.

13 MR. PEEK: For your information, he was the --

14 THE COURT: For IT.

15 MR. PEEK: No, no, no. There were -- whatever the
16 topics were, most of them were IT issues, but he was the
17 30(b)(6) guy.

18 MR. PISANELLI: And here's why there was an
19 assertion of privilege.

20 THE COURT: Mr. McCrea, you better read Mr. Singh's
21 deposition before you come. That's all I'm going to say. I
22 don't have a copy, so I'll be probably in the same position I
23 am if you make an objection or you're going to have
24 significant objections. I will probably do what I did with
25 Mr. Kostrinsky and not ask my questions, which for Mr. Singh

1 are about a page long and, give it to Mr. Pisanelli or Mr.
2 Bice. My pages for Mr. Kostrinsky were three pages long. Mr.
3 Pisanelli called -- handled all of them that I think you would
4 not have objected to. I had several you would have objected
5 to. And so, you know --

6 MR. PISANELLI: Your Honor, would you like for your
7 own use a copy of Mr. Singh's depo tonight?

8 THE COURT: No.

9 MR. PISANELLI: Or we can lodge it with the Court.

10 THE COURT: I don't think you understand. When I
11 was a brand-new Judge I let a lawyer tell me to take these
12 things home and do it overnight and then come back the next
13 day for my bench trial. That lawyer was Steve Peek. It's not
14 ever happening again, because it's not fair to me to get four
15 hours of sleep and come back and deal with you guys when you
16 all got sleep. It's just not fair.

17 MR. PISANELLI: I didn't mean to read it instead of
18 the testimony. You just didn't have one. You made a note
19 that you didn't have his depo transcript. So --

20 THE COURT: I don't want it unless it's an issue
21 tomorrow.

22 MR. PISANELLI: Should we lodge the original
23 tomorrow or just do it now for housekeeping?

24 THE COURT: You can give it to Billie Jo right now.
25 She'd love to have it. Anything else?

1 MR. BICE: May I -- what would you like me to do
2 with this order for summary punishment? Would you like me to
3 keep it? May I --

4 THE COURT: I want you to keep it, and I want you --

5 MR. BICE: May I leave it with the court?

6 THE COURT: I have a stack here. I made 10 copies
7 while I was out --

8 MR. BICE: Okay.

9 THE COURT: -- so that I could cool down and not do
10 anything adverse to anybody who was in the case. Because I
11 have a little sign, and the sign says, "Patience is a virtue,
12 don't put them in jail." So when I feel like I need to read
13 that sign, I get up, and if I need to take some more time, I
14 make my assistant type the caption on this form. And then I
15 go to the copy machine and I make copies, because that takes
16 time, too. And then I come back and hand it to you.

17 MR. BICE: Understood. I just wanted to make -- I
18 wanted to know --

19 THE COURT: No, I have -- I have lots more.

20 MR. BICE: Understood. I will keep this one for
21 myself, Your Honor, as a reminder.

22 THE COURT: For your edification.

23 MR. BICE: Thank you.

24 THE COURT: Not to interrupt.

25 MR. BICE: Understood.

1 THE COURT: Anything else? You all have a lovely
2 evening.

3 MR. BICE: Thank you, Your Honor.

4 (Court recessed at 5:00 p.m., until the following day
5 Wednesday, September 12, 9:00 a.m.)

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* * *

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
Las Vegas, Nevada 89146

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DISTRICT COURT

CLARK COUNTY, NEVADA

STEVEN C. JACOBS,

Plaintiff,

vs.

LAS VEGAS SANDS CORP., a Nevada
corporation; et al.,

Defendants,

AND ALL RELATED CLAIMS.

CASE NO.: A627691-B
DEPT. NO.: XII

**DEFENDANTS LAS VEGAS SANDS
CORP.'S AND SANDS CHINA
LIMITED'S STATEMENT ON
POTENTIAL SANCTIONS**

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INTRODUCTION

"Data privacy is the biggest challenge for lawyers and accountants conducting multinational investigations or cross-border litigation.... 'Multinational investigations such as FCPA matters present complex challenges for legal teams, including data privacy laws, time pressures and language barriers....'"¹

On August 24, 2012, this Court invited the parties to address what sanctions would be appropriate if the Court finds that Defendants or their counsel engaged in sanctionable conduct with respect to their statements and arguments regarding the proscriptions imposed by Macau's Personal Data Protection Act ("PDPA") in this multinational case. If the Court determines that the conduct of Defendants and/or their counsel warrant the imposition of sanctions, this brief informs the Court of the range of sanctions available to the Court.²

As discussed below, under Nevada law, any sanction must be reasonably proportionate to a litigant's misconduct. This overarching principle, coupled with an analysis of the factors set forth in *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 787 P.2d 777 (1990), make clear that in light of the numerous mitigating facts in this case, a severe sanction—such as striking a pleading or otherwise impairing Defendants' ability to defend this case—would be excessive and unwarranted.

Although Defendants have discussed those facts at length in previous submissions, it is worth reciting at the outset some of the facts that make it wholly inappropriate to impose severe sanctions here. First, on June 9, 2011, LVSC's counsel stated:

MR. PEEK: let me just add one thing, because I didn't address this. That same Data Privacy Act, Your Honor, also implicates communications that may be on servers and email communication and hard document -- hard-copy documents in Las Vegas --. [Emphasis added.]

¹ Study Says Data Privacy #1 Obstacle in Multinational Probes, *The Wall Street Journal*, September 5, 2012 (copy of article attached as Exhibit 1). The referenced study was conducted by FTI Consulting Inc. Although Defendant Las Vegas Sands Corp. is a client of FTI Consulting Inc. it did not contribute in any way to the study and had no knowledge of it until the cited article was published on September 5, 2012.

² Respectfully, Defendants reserve the right to challenge the imposition of any sanction.

1 THE COURT: Here in the States?
2 MR. PEEK: -- Sands, as well.
3 THE COURT: Well, you can take the position
4 MR. PEEK: Well, we are told that by the --
5 THE COURT: It's okay.
6 MR. PEEK: Office of Data Privacy
7 THE COURT: You can take the position --
8
9 MR. PEEK: -- counsel, Your Honor . And I'll we'll brief
10 that with the Court . Again--
11 THE COURT: And then I'll decide.

12 Tr. 55:5-19. (Ex. D at APP00154). Defendant thereby disclosed that there were documents in
13 Nevada that were potentially subject to Macau's data privacy law, i.e., that documents had come
14 from Macau.

15 *Second*, Defendants voluntarily disclosed, during a stay of merits discovery and before
16 the close of jurisdictional discovery, the transfer of ESI for which Plaintiff was the custodian,
17 and will produce non-privileged documents from that collection that are responsive to Plaintiff's
18 discovery requests. Plaintiff thus has not been prejudiced by Defendants' conduct.

19 *Third*, Defendants' representations and arguments concerning the PDPA were correct.
20 The Macau government is currently investigating SCL's Macau subsidiary, Venetian Macau
21 Limited ("VML"), for potential violations of the PDPA in connection with the very transfers that
22 prompted this hearing.

23 *Finally*, Defendants' conduct shows that a severe sanction is not necessary to serve any
24 deterrent function. After the Court first raised its concerns, Defendants immediately began an
25 investigation into not only the transfer of the ESI for which Plaintiff was the custodian but also
26 other transfers of potentially relevant data. Defendants filed a report with the Court disclosing
27 their initial findings to the Court. Defendants, moreover, have apologized to the Court.
28

1 **I. ANY SANCTIONS MUST BE JUST AND REASONABLY PROPORTIONATE**

2 In selecting an appropriate sanction, the Nevada Supreme Court has explained that
3 “[d]espite the district court’s broad discretion to impose sanctions, ‘[a] district court may only
4 impose sanctions that are *reasonably proportionate* to the litigant’s misconduct.’” *Emerson v.*
5 *Eighth Judicial Dist. Ct.*, 127 Nev. Adv. Op. 61, 263 P.3d 224, 230 (2011) (quoting *Heinle v.*
6 *Heinle*, 777 N.W.2d 590, 602 (N.D. 2010)) (second alteration in original and emphasis added).
7 “Proportionate sanctions are those which are roughly proportionate to sanctions imposed in
8 similar situations or for analogous levels of culpability.” *Id.* (internal quotations omitted and
9 emphasis added).

10 In the sections below, Defendants discuss the range of potential sanctions available to the
11 Court with these principles in mind.

12 **II. THE YOUNG FACTORS COUNSEL AGAINST IMPOSING A SEVERE**
13 **SANCTION ON DEFENDANTS OR THEIR COUNSEL**

14 In *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 787 P.2d 777 (1990), the Supreme
15 Court identified several factors that are relevant to determining the appropriate sanction for
16 discovery violations. As this Court has noted, while *Young* addresses sanctions under NRCP 37
17 and therefore is not controlling here, the *Young* factors are relevant in choosing an appropriate
18 sanction for any type of litigation misconduct.

19 “*Young* set out eight, non-exhaustive factors that a court may consider before ordering
20 dismissal with prejudice as a discovery sanction: (1) the degree of willfulness of the offending
21 party; (2) the extent to which the non-offending party would be prejudiced by a lesser sanction;
22 (3) the severity of dismissal relative to the severity of the abusive conduct; (4) whether evidence
23 has been irreparably lost; (5) the feasibility and fairness of alternative and less severe sanctions,
24 such as an order deeming facts relating to improperly lost or destroyed evidence to be admitted
25 by the offending party; (6) the policy favoring adjudication on the merits; (7) whether sanctions
26 unfairly operate to penalize a party for the misconduct of his or her attorney; and (8) the need to
27 deter both the parties and future litigants from similar abuses.” *GNLV Corp. v. Service Control*
28 *Corp.*, 111 Nev. 866, 900 P.2d 323 (1995).

1 In *Young*, the Supreme Court held that a heightened standard of review applies where a
2 district court dismisses an action with prejudice as a sanction for violating a discovery order. *Id.*
3 at 779. Subsequently, the Supreme Court stated that “[d]ismissal for failure to obey a discovery
4 order should be used only in *extreme situations*; if less drastic sanctions are available, they
5 should be utilized.” *Nevada Power Co. v. Fluor Illinois*, 108 Nev. 638, 837 P.2d 1354, 1359
6 (1992) (emphasis added).

7 In *Young*, the Supreme Court affirmed a district court dismissal of a complaint as a
8 sanction where plaintiff had fabricated key evidence. *Id.* at 794 (noting that the fabricated
9 evidence was “highly relevant to the determination” of plaintiff’s claims). Likewise, in *Foster v.*
10 *Dingwall*, 126 Nev. Adv. Op. 6, 227 P.3d 1042, 1049 (2010), Supreme Court upheld a district
11 court’s decision to strike parties’ pleadings as a sanction for repeated and abusive discovery
12 violations, including their violation of a sanctions order that expressly warned of terminating
13 sanctions if the parties failed to comply. *Id.* at 1049 (concluding that appellants’ “continued
14 discovery abuses and failure to comply with the district court’s first sanction order evidence their
15 willful and recalcitrant disregard of the judicial process”). Other cases have involved similarly
16 abusive or flagrant misconduct. See, e.g., *Stubli v. Big D Intern. Trucks, Inc.*, 107 Nev. 309, 314,
17 810 P.2d 785, 788 (1991) (affirming dismissal of action pursuant to NRCP 37 based on counsel’s
18 willful loss of evidence in product defect case where defense experts opined that the discarded
19 evidence made it impossible for them to establish their defense theory).

20 The Supreme Court has also affirmed sanctions short of dismissal, such as striking a
21 defendant’s affirmative defenses. But even in these cases, the Supreme Court has required a
22 showing of serious and prejudicial misconduct. In *Clark County School Dist. v. Richardson*
23 *Const., Inc.*, 123 Nev. 382, 168 P.3d 87 (2007), for example, a defendant’s employee submitted
24 an affidavit to the district court attesting that all relevant files had been produced to the plaintiff.
25 *Id.* at 391. At trial, however, the employee testified that at least one file existed that had not been
26 produced. *Id.* The next day, the employee turned over 1,700 documents to the court, “500 to
27 700 of which had not been previously produced, even though they were subject to NRCP 16.1
28 production provisions and were relevant to the litigation.” *Id.* This untimely disclosure resulted

1 in a one-week delay of the trial. *Id.* The Supreme Court held that the district court did not abuse
2 its discretion in striking the defendant's affirmative defenses as a sanction. *Id.* at 391-92.

3 And in *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. Adv. Op. 26, 235 P.3d 592,
4 (2010), the district court found that the defendant had engaged in a pattern of discovery
5 misconduct for the purpose of delaying trial. *Id.* at 595. The district court found that continuing
6 the trial date was not an appropriate remedy "since the prejudice was extreme and
7 inappropriate." *Id.* at 595-96. The district court emphasized that the plaintiffs included "a 14-
8 year-old who had been in a persistent vegetative state for the past two years together with the
9 estates of three dead plaintiffs." *Id.* at 596. After analyzing the *Young* factors, the district court
10 sanctioned the defendant by striking its answer as to liability—a sanction that the Supreme Court
11 held was within the district court's discretion. *Id.*

12 By contrast, in *GNLV*, the Supreme Court held that a district court abused its discretion in
13 dismissing a defendant's cross-claim as a sanction for the defendant's destruction of evidence, a
14 bath mat involved in a slip-and-fall accident. 900 P.2d at 326. In reversing, the Supreme Court
15 emphasized that there was no evidence that the defendant had intentionally or deliberately
16 destroyed the bath mat, all evidence concerning the bath mat was not lost, and "lesser sanction
17 could have been imposed without substantial prejudice to" the cross-claim defendant. *Id.* The
18 Supreme Court also cited the policy in favor of adjudicating cases on the merits. *Id.*

19 Here, an analysis of the *Young* factors makes clear that a case-concluding sanction (or, as
20 Plaintiff has recently requested,³ striking SCL's defense of personal jurisdiction) would be unjust
21 and disproportionate. Instead, there are sanctions the Court could impose, such as an oral
22 reprimand and/or a monetary penalty—either of which would be quite sufficient to deter a
23 repetition of the conduct that has caused the Court's concerns.

24 1. *Degree of willfulness.* There are a number of mitigating factors that counsel
25 against a harsh sanction. Most importantly, Defendants' representations and arguments
26 regarding the PDPA and its application to relevant documents in Macau, even if found
27

28 ³ Plaintiff Steve C. Jacobs Brief on Duty and Sanctions at 7 (filed Sept. 7, 2012)
("Plaintiff's Brief").

1 inadequate, were fundamentally truthful and accurate. LVSC's counsel, moreover, expressly
2 disclosed to the Court and opposing counsel that the PDPA potentially applied to documents that
3 were in LVSC's possession in Nevada, which could only have been the case if documents
4 containing personal data had previously been transferred from Macau to the United States.
5 Further, Defendants voluntarily disclosed the Subject Transfers,⁴ a factor that strongly militates
6 against a finding that Defendants acted willfully. If Defendants or their counsel can be faulted, it
7 is for not disclosing these transfers in more detail earlier. But that failure is far more akin to the
8 negligence in *GNLV* than the fabrication of evidence in *Young*.

9 2. *Prejudice to Plaintiff.* This factor is critical: the Supreme Court has never upheld
10 a severe sanction in the absence of prejudice to the non-offending party. Here, Plaintiff has not
11 suffered any prejudice, let alone the "extreme and inappropriate" prejudice that was found in
12 cases such as *Bahena*. In sharp contrast to *Clark*, for example, Defendants disclosed the Subject
13 Transfers of ESI well before trial, while a stay on merits discovery was in place and the parties
14 were still in the midst of jurisdictional discovery. LVSC will review ESI for which Plaintiff was
15 the custodian and produce non-privileged documents that are responsive to Plaintiff's document
16 requests. Thus, the Subject Transfers from Macau to Nevada, and their representations and
17 disclosures concerning the PDPA and data transfers, have not impaired Plaintiff's ability to
18 pursue his claims.

19 3. *The severity of dismissal relative to the severity of the abusive conduct.*
20 Defendants respectfully submit that their conduct, even if found to have fallen short of the
21 Court's expectations, still does not rise to the level of "abusive conduct." As Defendants have
22 explained, and as the Macau government's recent actions and statements make absolutely clear,
23 the PDPA is a real statute that presents real obstacles to the review and production of the vast
24 amount of relevant data that remains in Macau subject to PDPA scrutiny. Indeed, Defendants'
25 Macau subsidiary is under investigation by the Macau authorities for the very transfer that
26 prompted this hearing. Imposing a severe sanctions on Defendants or their counsel under these

27
28 ⁴ As defined in Defendants' Statement Regarding Hearing on Sanctions (Aug. 27, 2012)
at 2 n. 1.

1 circumstances would be needlessly punitive and harsh.

2 4. *Whether evidence has been irreparably lost.* This factor is not applicable.
3 Although Plaintiff has accused Defendants of losing relevant evidence, there is no spoliation
4 issue currently before the Court. Defendants note, however, that they made a ghost image of
5 Plaintiff's hard drive three days after Plaintiff's termination – employing essentially the same
6 technology that Plaintiff himself claims to have used to make a copy of the hard drive on his
7 personal laptop. There has also been testimony that in November 2010, Michael Kostrinsky may
8 have removed a foil envelope from Macau, and that the foil envelope and its contents are
9 currently unaccounted for. That issue is also not before the Court. And in any event, there is no
10 evidence in the record that this foil envelope contained any data or documents that are relevant to
11 this case.

12 5. *The feasibility and fairness of alternative sanctions.* This factor strongly weighs
13 against imposing severe sanctions. First, this Court could impose an oral admonishment (private
14 or on the record) against the parties or their counsel. *See, e.g., Williams v. State*, 103 Nev. 106,
15 112, 734 P.2d 700, 704 (1987) (noting that “attorneys who cannot conform to the proper norms
16 of professional behavior, whether inside or outside the courtroom, should recognize they are
17 assuming the risk of formal, public censure in our opinions”); *Yates v. State*, 103 Nev. 200, 206,
18 734 P.2d 1252, 1256 (1987) (noting that a trial court can impose a range of sanctions for attorney
19 misconduct, including “a reprimand, delivered on the spot or deferred until the jury has been
20 excused from the courtroom”). An oral admonishment is not a mere slap on the wrist. As the
21 Fifth Circuit has explained:

22 Judges are prone to forget the sting of public criticism delivered
23 from the bench. Such criticism, while potentially constructive, can
24 also damage a lawyer's reputation and career. The judge should
25 take care, therefore, that what is said is commensurate with the
26 violation. There is a distinction between bad practice and lack of
27 integrity. Being guilty of the former does not invariably justify a
charge of the latter. At the same time, enforcing Rule 11 is the
judge's duty, albeit unpleasant. A judge would do a disservice by
shying away from administering criticism or reproval where called
for.

28 *Thomas v. Capital Sec. Services, Inc.*, 836 F.2d 866, 878 (5th Cir. 1988) (internal quotation

1 marks omitted). Given the publicity this case has garnered, any criticism by the Court is bound
2 to be widely-reported, amplifying the “sting” of this sanction and possibly influencing jury
3 deliberations.

4 As an alternative or in addition to an admonishment, this Court might choose to impose a
5 monetary penalty for litigation misconduct. In *Thomas v. City of North Las Vegas*, 122 Nev. 82,
6 96, 127 P.3d 1057 (2006), for example, an attorney falsely represented to the Supreme Court that
7 the appellant had “abandoned its appeal” rather than face Rule 11 sanctions. *Id.* at 1067. The
8 Supreme Court found that this was a “gross misrepresentation” that warranted sanctions. *Id.*
9 (noting that while “zealous advocacy is the cornerstone of good lawyering and the bedrock of a
10 just legal system . . . zeal cannot give way to unprofessionalism, noncompliance with court rules,
11 or, most importantly, to violations of the ethical duties of candor to the courts and to opposing
12 counsel”). Accordingly, the Supreme Court sanctioned the lawyer \$1,000 for his “egregious and
13 improper” advocacy, while “remind[ing] him of his duty to practice law in a professional and
14 honest manner.” *Id.*

15 Similarly, in *Sobol v. Capital Management Consultants, Inc.*, 102 Nev. 444, 726 P.2d 335
16 (Nev. 1986), the Supreme Court found that appellee had “blatantly misrepresented” to the Court
17 the stipulated facts in the case and had also quoted language from a case as though it were the
18 holding of the case, when in fact the language came from the dissent. The Supreme Court found
19 that appropriate sanction was for appellee to pay \$5,000 to the Clark County Law Library
20 Contribution Fund. See also *Greene v. State*, 113 Nev. 157, 170-171, 931 P.2d 54, 62 (1997),
21 *overruled on other grounds by Byford v. State*, 116 Nev. 215, 235-36, 994 P.2d 700, 713-14
22 (2000) (fining a prosecutor \$250 as a sanction for repeatedly ignoring district court’s
23 admonitions regarding his opening statement); *McGuire v. State*, 100 Nev. 153, 159, 677 P.2d
24 1060, 1065 (1984) (fining a prosecutor \$500 for “extreme and outrageous” misconduct that
25 required two new trials).

26 Nevada district courts have also imposed monetary fines for serious litigation
27 misconduct. In *Feldgreber v. Arbuckle Drive Homeowner Ass’n, Inc.*, 2011 WL 3556662
28 (Eighth Judicial Dist. Nev. July 27, 2011), for example, the president and owner of the defendant

1 falsely testified at his deposition that certain subpoenaed documents had been destroyed in a fire
2 and that electronic copies were lost when defendant's server crashed. The defendant's closing
3 argument revealed that it did have documents responsive to the subpoena. Plaintiff moved for a
4 new trial and sanctions, including striking defendant's answer. After holding an evidentiary
5 hearing, the district court found that defendant's president had "lied to the Court" and failed to
6 comply with discovery orders to produce documents. Applying the *Young* factors, the trial court
7 concluded that a fine, rather than striking the defendant's answer, was an appropriate sanction,
8 emphasizing that the evidence withheld would not have made a difference at trial.
9 Accordingly, the court ordered defendants and its president to both pay \$500 to the Legal Aid
10 Center of Nevada.

11 Here, the conduct of Defendants and their counsel is far less culpable than that of the
12 sanctioned litigants in *Thomas, Sobol, and Feldgreber*.

13 6. *The policy of adjudicating cases on the merits.* This factor weighs decisively in
14 favor of a less severe sanction in this case. See *GNLV*, 900 P.2d at 326. As Defendants have
15 acknowledged, their statements could have been clearer and more detailed. But their failure in
16 this regard was at most an honest mistake, and it does not change the reality that Defendants'
17 statements and arguments concerning the PDPA and data transfers were fundamentally well-
18 grounded in fact and law. The PDPA is a genuine and substantial issue in this case, one with
19 which the parties and the Court will have to grapple. Under these circumstances, it would be
20 unjust to impose sanctions that would impair Defendants' ability to present a defense to
21 Plaintiff's claims.

22 7. *Whether sanctions unfairly operate to penalize a party for the misconduct of his*
23 *or her attorney.* Defendants respectfully reserve the right to address this factor at the conclusion
24 of the evidentiary hearing if appropriate.

25 8. *The need to deter both the parties and future litigants from similar abuses.* An
26 oral admonishment and/or fine would provide more than enough deterrence. In *Feldgreber*, with
27 respect to this factor, the district court noted that it would "impress upon [defendant and its
28 president] the importance of fully participating in the discovery process." 2011 WL 3556662 at

1 *3. The Nevada Supreme Court, moreover, has implicitly found that a \$1,000 to \$5,000 fine is
2 sufficient deterrent against egregious breaches of the duty of candor. Here, Defendants
3 respectfully submit that their conduct and that of their counsel does not approach the culpability
4 of counsel in *Thomas* and *Sobol*. And they can assure the Court that they will endeavor to meet
5 the Court's expectations, and adhere to the highest professional standards of conduct, going
6 forward in this case.

7
8 **III. ANALOGOUS CASES FROM OTHER JURISDICTIONS CONFIRM THAT AN**
9 **ADMONISHMENT OR FINE WOULD BE PROPORTIONATE**

10 Case law from other jurisdictions, involving conduct analogous to that alleged here,
11 confirms that an oral admonishment or monetary fine would be "roughly proportionate" to any
12 litigation misconduct that the Court finds here. See *Emerson*, 263 P.3d at 230.

13 The federal district court decision in *Travel Sentry, Inc. v. Tropp*, 669 F. Supp. 2d 279
14 (E.D.N.Y. 2009), is particularly instructive. There, plaintiff violated discovery obligations, and
15 its counsel breached the duty of candor, by failing to disclose that they had obtained relevant
16 documents from a former Transportation Security Administration (TSA) official. *Id.* at 281.
17 Some of the documents contained sensitive security information ("SSI"), the unauthorized
18 disclosure of which is unlawful. *Id.* Plaintiff failed to produce the documents in response to
19 Defendant's document requests—and falsely represented that it had produced all responsive,
20 non-privileged documents. *Id.* at 281. At the same time, Plaintiff sought to obtain some of the
21 documents from the TSA (i.e., those helpful to its case), without disclosing that it already had the
22 documents it was requesting. Plaintiff obtained several discovery extensions by representing that
23 it needed more time to obtain these documents from the TSA. Ultimately, "[c]ornered by its own
24 deception," plaintiff had to disclose that it already had the documents it was purportedly seeking.
25 *Id.* at 282.

26 The district court affirmed a magistrate judge's imposition of a \$10,000 fine, finding that
27 Plaintiff and its counsel had committed "flagrant and willful" violations of its discovery
28 obligations and misled the court. *Id.* at 287 (plaintiff's attorneys "knew that they were
misleading the court (as well as [defendant] and TSA), and made no attempt to correct the false

1 impressions that their statement left").⁵ While Plaintiff sought to excuse its conduct by claiming
 2 that it had been trying to reconcile the conflict between its discovery obligations and national
 3 security, the court emphasized the Plaintiff "never alerted TSA that agency security had been
 4 breached Nor did it seek assistance of the Court." *Id.* at 285. At the same time, the court
 5 concluded that more serious sanction, such as evidentiary preclusion, was not warranted. *Id.* at
 6 283.

7 *Travel Sentry* bears some similarity to this case—more so than any other case that
 8 Defendants have found. Yet the differences between the conduct of Plaintiff and its counsel in
 9 *Travel Sentry*, and the conduct of Defendants here, is marked. First, plaintiff's counsel in *Travel*
 10 *Sentry* misled opposing counsel by falsely asserting that it had produced all non-privileged,
 11 responsive documents, despite the fact that it was withholding the TSA documents. Defendants
 12 never made any such representation to Plaintiff; the Supreme Court imposed a stay on non-
 13 jurisdictional discovery before Defendants' Rule 16.1 disclosures were complete, and
 14 jurisdictional discovery is ongoing. Nor did Defendants seek an extension of discovery or any
 15 other relief from the Court based on the representation that LVSC did not have possession of ESI
 16 for which Plaintiff was the custodian. On the contrary, Defendants disclosed the Subject
 17 Transfers while merits discovery was stayed and while the parties were still in jurisdictional
 18 discovery.

19 Second, unlike the plaintiff in *Travel Sentry* (who never approached the court with its
 20 concerns about documents containing SSI), Defendants *did* apprise the Court and opposing
 21 counsel early in the case about the PDPA and its potential application to documents in *Nevada*.
 22 See SRHS at 21. When LVSC expressly raised this point at the June 9, 2011, the Court
 23 responded that the issue was not ripe. See 6/9/11 Hr'g Tr. at 55:5-19. In light of the stay, which
 24 remains in place, and absent any inquiry by Plaintiff as to the nature of the Macau documents in
 25

26 ⁵ The court also ordered plaintiff and plaintiff's counsel to pay defendants' attorney fees
 27 and expenses incurred in connection with additional merits discovery and the defendant's
 28 sanctions motion. *Travel Sentry*, 669 F. Supp. 2d at 283. Here, Defendants' conduct has not
 necessitated additional discovery and it would be inappropriate for the Court to award Plaintiff
 any attorney's fees.

1 LVSC's possession, Defendants had a reasonable basis for believing that they did not have an
2 obligation to specifically identify the Subject Transfers earlier than they did. While this decision
3 may be questioned, it is certainly less blameworthy than the calculated misconduct at issue in
4 *Travel Sentry*.

5 Third, Defendants' contemporaneous actions corroborate, rather than undercut, its stated
6 concerns with disclosure of the Subject Transfers. While the *Travel Sentry* plaintiff never raised
7 any purported national security concerns with the TSA (calling into question whether those
8 concerns were truly legitimate), Defendants reached out to the Macau agency responsible for
9 enforcing the PDPA, OPDP, to discuss how LVSC and SCL could comply with their obligation
10 to respond to the SEC subpoena and discovery in this action without running afoul of Macau
11 law. Indeed, far from trying to hide behind the PDPA as a barrier to discovery, Defendants have
12 devoted more than a year attempting to persuade the OPDP to allow them to transfer documents
13 out of Macau to comply with discovery in this case. As reflected in the OPDP's August 8, 2012
14 letter, the OPDP rejected Defendants' arguments and advised that they could not even review
15 documents in Macau in connection with this case. In short, Defendants' conduct in this case was
16 far less egregious than the conduct that warranted a fine of \$10,000 in *Travel Sentry*.

17 Other courts have imposed monetary and non-monetary sanctions of equivalent severity
18 for conduct that was more culpable than Defendants in this case. In *Merkle v. Guardianship of*
19 *Jacoby*, 912 So.2d 595 (Fla. App. 2 Dist. 2005), appellant, an attorney, failed to inform the
20 appellate court that he had settled the case, rendering the appeal moot. *Id.* The attorney admitted
21 that the reason he failed to disclose the settlement "was to gain a perceived tactical advantage in
22 matters unrelated to the" case on appeal. *Id.* at 599. The court found that the attorney's "selfish
23 desire to pursue a purely personal agenda in disregard of his duty of candor to this court required
24 us to put aside our work on the cases of litigants with genuine controversies—many of whom are
25 serving lengthy prison sentences—and spend our limited time and resources to review, research
26 and prepare an opinion in a case that should have been dismissed." *Id.* at 601-2. The court
27 further emphasized that the attorney had "failed to make any expression of regret or to apologize
28 for his actions." *Id.* at 602 (noting that Merkle had chosen "to adopt a posture of defiance rather

1 than contrition"). As a sanction, the court imposed a \$500 fine, required the attorney to pay the
 2 costs of proceedings to determine whether the case was moot, and ordered the attorney to obtain
 3 "a minimum of fifteen continuing legal education hours in appellate practice and procedure in
 4 addition to the continuing legal education" he would otherwise be required to undertake.

5 As *Merkle* illustrates, in assessing an appropriate sanction, courts often take into account
 6 the response of a party or counsel after the issue of sanctions is raised. See, e.g., *Resolution*
 7 *Trust Corp. v. Williams*, 162 F.R.D. 654, 658-660 (D. Kan. 1995) (holding that reprimand was
 8 the "least severe sanction" the court could impose as deterrence where plaintiff and its counsel
 9 knowingly withheld documents and their response to sanctions motion was "inadequate,
 10 inappropriate and unprofessional"). Here, Defendants and their counsel have expressed their
 11 regret for failing to meet the Court's expectations. SRHS at 2-3. And after the Court expressed
 12 its concerns, Defendants immediately began investigating the circumstances surrounding the
 13 transfer of ESI for which Plaintiff was the custodian and other data transfers from Macau to the
 14 United States. Defendants filed a report of their initial findings, which they later supplemented.
 15 See Defendants' Joint Statement on Data Transfers; SRHS. If an oral admonishment or fine is a
 16 proportionate sanction for unrepentant litigants who deliberately mislead or conceal information
 17 from a court, any greater sanction here would be disproportionate for what amounts to an honest
 18 mistake driven by legitimate and reasonable concerns over the implications of Macau law.

19 **IV. THE COURT SHOULD NOT AWARD PLAINTIFF ATTORNEY'S FEES**

20 Plaintiff's Brief erroneously asserts that the Court should award attorney's fees "in
 21 addressing the production of his hard drive and related information (including all fees and costs
 22 charged by Advanced Discovery)" as well as fees "for filings, hearings and related advocacy
 23 about the fraudulently asserted Macau Privacy Data Protection Act [sic]." Brief at 7:7-10. This
 24 request should be denied.

25 First, Plaintiff does not demonstrate that the Court has the authority to award attorney's
 26 fees as a sanction in this situation. Plaintiff has not filed a motion for sanctions. Instead, this
 27 Court has made clear that it has set the sanctions hearing pursuant to EDCR 7.60—a provision
 28

1 that, as Defendants have explained, “must be construed as coextensive with Rule 11 because
 2 Nev. R. [Civ.] P. 83 permits district courts to adopt local rules only if such rules are ‘not
 3 inconsistent’ with the Nevada Rules of Civil Procedure.” DSHS at 8 (citing *Nevada Power Co.*
 4 *v. Fluor Illinois*, 108 Nev. 638, 837 P.3d 1354, 1359 n.4 (1992)).

5 Rule 11 provides, in relevant part, that a sanction may consist of “an order to pay a
 6 penalty into court, or, *if imposed on a motion* and warranted for effective deterrence, an order
 7 directing payment to the movant of some or all of the reasonable attorney’s fees and other
 8 expenses incurred as a direct result of the violation.” Nev. R. Civ. P. 11(c)(2) (emphasis added).
 9 The italicized language indicates that Rule 11 authorizes the award of attorney’s fees only where
 10 a party moves for sanctions, not where, as here, the Court has ordered a sanctions hearing *sua*
 11 *sponte*. Federal courts have uniformly adopted this reading of Rule 11 of the Federal Rules of
 12 Civil Procedure for this reason. *See Marlin v. Moody Nat. Bank, N.A.*, 533 F.3d 374, 379 (5th
 13 Cir. 2008) (noting that “[s]anctions imposed on the district court’s initiative, as in this instance,
 14 are limited to nonmonetary sanctions or a monetary penalty payable to the court”); *Northwest*
 15 *Bypass Group v. U.S. Army Corps of Engineers*, 2008 WL 2679630, at *2 (D. N.H. 2008)
 16 (agreeing with “the unanimity of circuit authority” in concluding that “absent a Rule 11(c)(2)
 17 motion,” an order awarding attorney’s fees as a sanction was “issued in error”). Thus, awarding
 18 attorney’s fees as a sanction would be inconsistent with the plain language of Rule 11.⁶

19 Second, if the Court were to construe Plaintiff’s Brief as tantamount to a motion for
 20 sanctions, Plaintiff has not met his burden of demonstrating an entitlement to fees. In *Fluor*, the
 21 Supreme Court made clear that attorney’s fees and costs imposed as a sanction must relate
 22 specifically to the misconduct. *See Fluor*, 837 P.3d at 1360-61 (holding that a district court erred
 23 in imposing as a sanction all attorney’s fees incurred by the other party rather than those fees and
 24 costs associated with the violation of the discovery order).

25
 26 ⁶ EDCR 7.60(b) states that the “court may, after notice and an opportunity to be heard,
 27 impose upon an attorney or a party any and all sanctions which may, under the facts of the case,
 28 be reasonable, including the imposition of fines, costs *or attorney’s fees...*” (emphasis added).
 Because EDCR 7.60(b) cannot go beyond Rule 11, EDCR 7.60(b) should be construed to permit
 the imposition of attorney’s fees only upon motion by the opposing party.

1 Plaintiff has not shown that either category of work for which he seeks fees was caused
2 by Defendants' conduct at issue. The fees associated with the appointment of Advanced
3 Discovery were caused by the Court's concerns with respect to the integrity of the data in
4 Plaintiff's possession. Plaintiff has an obligation to preserve data in his possession regardless of
5 what data Defendants possess. Even if Defendants had specifically identified the Subject
6 Transfers earlier, Plaintiff would still have been required to deliver the data in his control to
7 Advanced Discovery. Moreover, Plaintiff has not shown that the data in his possession is
8 entirely duplicative of the Subject Transfers, as he suggests. See Br. at 6:25-26. Based on the
9 volume of data Plaintiff deposited with Advanced Discovery, it appears that the data in his
10 possession is not limited to his own emails.

11 Nor has Plaintiff shown an entitlement to the fees incurred for advocacy related to the
12 PDPA. The PDPA is a real statute, and its application to documents in Macau was, is and will be
13 an issue that must be addressed in this case. Plaintiff certainly has not withdrawn his demands
14 that Defendants search the vast quantity of data that remains in Macau and produce any
15 responsive documents. The PDPA was not "fraudulently asserted," Br. at 7:10,⁷ and the time
16 spent by Plaintiff on this issue would have been incurred regardless of whether Defendants had
17 specifically identified the Subject Transfers earlier.

18 For these reasons, an award of attorney's fees or costs would be inappropriate.

19 **V. CONCLUSION**

20 Defendants respectfully submit that any sanction imposed against them in this case
21 should be in the nature of an oral reprimand and/or a monetary fine payable to the Court or to an
22 appropriate charity.
23
24
25

26
27 ⁷ Defendants question how Plaintiff's counsel can assert that the PDPA is fraudulent,
28 given that the same counsel represent Wynn Resorts, which has been investigated by OPDP for
violations of the PDPA, and which likely will face PDPA issues in connection with the Okada
litigation.

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DATE: September 11, 2012

LIONEL SAWYER & GOLLINS

By: 

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(limited appearance)

CERTIFICATE OF SERVICE

Pursuant to Nevada Rule of Civil Procedure 5(b), I hereby certify that I am an employee of LIONEL SAWYER & COLLINS and that on this 11th day of September, 2012, I caused documents entitled **DEFENDANTS LAS VEGAS SANDS CORP.'S AND SANDS CHINA LIMITED'S STATEMENT ON POTENTIAL SANCTIONS** to be served as follows:

☒ by depositing same for mailing in the United States Mail, in a sealed envelope addressed to:

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☒ pursuant to Nev. R. Civ. P. 5(b)(2)(D) to be sent to the facsimile numbers indicated above.

☐ to be hand delivered to:

and/or

☒ by the Court's ECF System through Wiznet.

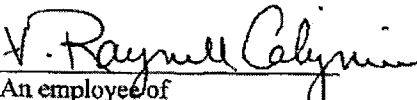

An employee of
LIONEL SAWYER & COLLINS

EXHIBIT 1

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THE WALL STREET JOURNAL
WSJ.com

September 5, 2012, 1:34 PM ET

Study Says Data Privacy #1 Obstacle in Multinational Probes

By C.M. Matthews

Data privacy is the biggest challenge for lawyers and accountants conducting multinational investigations or cross-border litigation, according to a study released Wednesday.

The study found that 54% of those questioned said that data privacy was the greatest obstacle when handling these types of investigations or engagements.

The study, published by business advisory firm FTI Consulting Inc., surveyed 114 legal and accounting professionals who have handled e-discovery matters for either multinational investigations or cross-border litigation.

The findings come amid an uptick in investigations under the U.S. Foreign Corrupt Practices Act and the U.K. Bribery Act, both of which prohibit bribery abroad to win business.

"Multinational investigations such as FCPA matters present complex challenges for legal teams, including data privacy laws, time pressures and language barriers," Craig Earnshaw, a managing director in the Technology practice at FTI Consulting in its London office, said in a news release.

Nearly half of the respondents said they had conducted investigations requiring data collection in China, which presents a litany of challenges because of its complicated data privacy laws.

Respondents also said that multinational investigations were costly enterprises with 48% reporting they had spent more than \$500,000 on such matters, and, most thought things would only get tougher with 76% predicting an increase in data privacy requirements in the coming years.

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