IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 67576

LAS VEGAS SANDS CORP., A NEVADA CORPORATION, AND SANDS CHINA LTD., A CAYMAN ISLANDS CORPORATION,

Petitioners,

v.

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

Respondents,

and

STEVEN C. JACOBS,

Real Party in Interest.

CONSOLIDATED ANSWER TO PETITION FOR WRIT OF PROHIBITION OR MANDAMUS; AND OPPOSITION TO EMERGENCY MOTION TO STAY

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) that must be disclosed. These representations are made in order that Justices of this Court may evaluate possible disqualification or recusal.

PISANELLI BICE PLLC and CAMPBELL & WILLIAMS are the only law firms whose partners or associates have or are expected to appear for Real Party in Interest Steven C. Jacobs.

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I. INTRODUCTION

The law does not support writ review of interlocutory discovery sanctions a trial court imposes to level the evidentiary playing field. With what is now their sixth writ request, Petitioners Las Vegas Sands Corp. ("LVSC") and Sands China Limited ("SCL") attempt to revise history and cast themselves as victims rather than intransigent profiteers of deception as the district court found and the record shows. The Petition whitewashes the conduct that led to the imposition of sanctions in the first place and the resulting escalation of those sanctions for continued noncompliance. As the district court long ago found, LVSC and SCL acted to "deceive" it and Real Party in Interest, Steven C. Jacobs ("Jacobs") to obstruct jurisdictional discovery and delay this case. Because the Macau Personal Data Privacy Act ("MPDPA"), a foreign blocking statute, was the means of that deception, over two years ago the district court precluded its use to avoid document production and admission at the jurisdictional hearing.

This latest writ application seeks to reinstate gains of that deception and undo the key sanctions the district court found necessary to level the playing field for the jurisdictional hearing. Petitioners' wished-for interlocutory review of the district court's balancing is not a proper matter for extraordinary writ review, particularly one truncated under the guise of purported emergency.[1] By design, discovery sanctions seek to deprive wrongdoers of the benefits of noncompliance, including the delay that obstruction necessarily breeds. Permitting writ review of such interlocutory sanctions undercuts their very purpose by engendering further delay.

[1] The recklessness with which Petitioners are allowed to disrupt the district court proceedings is wrongful and offensive. They buy time to file a 50-page petition and 34-volume appendix to suggest there is inadequate time for this Court to consider the matter yet Jacobs has one week to respond because of the threat of yet another disruption in the path to the jurisdictional hearing and also has to address the specious suggestion of further delay due to unsubstantiated claims of bias against the district court.

Parties like SCL are incentivized not to comply because the opportunity for further delay through writ review. This Court's precedents and sound policy preclude such interference.

Besides the procedural impropriety, the Petition is brazenly disloyal to the record and the district court's findings. The district court did not write from a blank slate for the order Petitioners now challenge – the March 6, 2015 Sanctions Order (the "March 2015 Sanctions Order"). It is the product of two evidentiary hearings, the last spanning six days, a prior sanction where the district court sought to ameliorate some of the prejudice, and ultimately culminated in the district court's forty pages of findings. There, it detailed how SCL left redacted nearly 8,000 documents – which SCL's own reviewers determined relevant/responsive to jurisdictional discovery – hiding names of all participants in the documents. The documents are useless from an evidentiary standpoint and cannot be effectively searched by electronic means. Additionally, Petitioners admitted that they did not adhere to available processes to produce documents under Macau law, even assuming a continued entitlement to assert the MPDPA. SCL simply concluded the benefits of noncompliance outweighed the costs. Even if such decisions were subject to interlocutory review, the district court's balancing of the evidentiary playing field – when litigants commonly have their defense stricken for lesser misconduct – is well within its discretion.

Petitioners profited long enough from the delay and paralysis they procured. Approaching its fifth year anniversary, no merits discovery has yet occurred, no testimony has been preserved while memories fade, witnesses scatter, and at least one has died. Jacobs is entitled both to his day in court and the remedies the district court imposed to compensate for SCL's open and admitted withholding of relevant/responsive evidence in jurisdictional discovery.[2]

[2] Petitioners also criticize the district court for delaying its March 2015 Sanctions Order until a month and a half before the evidentiary hearing on personal

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II. FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED BY THE PETITION

A. The Jurisdictional Dispute Is Not As SCL Pretends.

Petitioners' recurring tactic is to revise history about SCL's Nevada contacts to accommodate arguments it wishes it could make. SCL repeats its long-tried and rejected mantra that no jurisdictional discovery should have occurred because, it says, the only issue is whether it is at "home" in Nevada. (Pet. at 30-31.) The point apparently is that SCL would never had to deceive had jurisdictional discovery not been permitted. Of course, Jacobs has lost count of the times this argument has been made and rejected, but its regurgitation here only confirms how far into the weeds SCL will go to try and hide.

The jurisdictional question and related discovery is not confined to determining where SCL is at home.[3] Jacobs served as the CEO of SCL pursuant to a contract with SCL's controlling parent, LVSC. That contract, known as the "Term Sheet," was negotiated, approved, and agreed to in August of 2009 in Nevada. (LVS 10-Q, *available at* http://www.sec.gov/Archives/edgar/data/1300514/000095012310046667/0000950123-10-046667-index.htm). LVSC filed it with the United States Securities and Exchange Commission ("SEC"), shortly before Jacobs' wrongful termination, confirming it is his employment contract. *Id*. It provides for various compensation,

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jurisdiction. But Petitioners sought to hold the sanctions hearing ***contemporaneously*** with the jurisdictional hearing or just shortly before. (SA262-63.) The district court determined to hold the sanctions hearing in advance to avoid the delay Petitioners seek to now secure. (SA431.)

[3] The upcoming evidentiary hearing will show that SCL is but a holding corporation and lacks operational assets. It does not do business in Macau; its wholly-owned subsidiaries do. SCL's attempts at claiming its home is where its subsidiaries operate is simply not the law. *See Johnson v. SmithKline Beecham Corp.*, 853 F. Supp. 2d 487 (E.D. Pa. 2012) *aff'd*, 724 F.3d 337 (3d Cir. 2013).

stock options, and benefits available to senior executives, including participation in additional future SCL stock options. *Id*. That Nevada-based agreement provided that if Jacobs were wrongfully terminated as SCL's CEO, he would receive immediate vesting of all stock options and one year's severance. At the forthcoming jurisdictional hearing, Jacobs will show that he received other stock option grants while at SCL governed by the terms of that Nevada employment agreement.

The discovery Jacobs fought to obtain unearthed how the scheme to terminate him was hatched and carried out from Las Vegas by persons claiming to be acting in their capacity as SCL representatives. (SA149-53, 223-31.) III Supp. App. 000470, 504-12.)[4] Specifically, SCL's special advisor to the Board, Mike Leven, revealed that he and Sheldon Adelson planned and executed Jacobs' termination from Las Vegas. (*Id.*) According to both, they were acting as SCL representatives when carrying out these deeds in Nevada, *see id,* including drafting the fraudulent termination letter. (SA151-52.) They had to actually manufacture fictitious "SCL" letterhead in Las Vegas to print the letter in Las Vegas.

Press releases – including those presenting false facts – were drafted in Las Vegas by executives purportedly acting as SCL's agents. (SA225-26.) The Las Vegas-based lawyers involved in executing the termination were supposedly acting for SCL. (SA228-30.) And, the subsequent justification letter – listing twelve fabricated reasons to rationalize Jacobs' termination and claim the right to dishonor the term sheet and stock options – was drafted in Las Vegas, even though it was purportedly sent on behalf of Venetian Macau Limited, an SCL subsidiary. (*See* SA150-152.)

These are just ***some*** of the facts that came to light because of the district court's ordered jurisdictional discovery. That Petitioners sought to avoid their

[4] These excepts were included in the appendix in Case No. 62944. NRAP 21(a)(4).

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disclosure reinforces why jurisdictional discovery was warranted, properly ordered and how continued noncompliance seeks to prejudice Jacobs, just as the district court found.[5]

B. Petitioners Deceive The District Court About The Location And Their Access To Jurisdictional Evidence.

The district court's latest sanction is the product of Petitioners' misrepresentations about their ability to comply. They repeatedly misrepresented the location, their secret review, and their supposed inability to access evidence because of the MPDPA. Their disgraceful conduct came to light because of the district court's first evidentiary hearing in September, 2012.

The evidence there established that the deception began before this Court directed the district court to stay the merits pending a more detailed factual finding for personal jurisdiction. Claiming unfairness to defend this case in Nevada, SCL trumpeted the purported cost of complying with merits discovery while it disputed jurisdiction, including the supposed catch-22 it would be placed in under the claimed MPDPA strictures. (SA118.) To bolster this story, SCL proffered a declaration from in-house Macau counsel, David Fleming, explaining how no data could be transported to the United States without complying with a burdensome protocol. (SA85-87.)

This Court granted SCL's petition, concluding a more comprehensive factual record was warranted. Needing to avoid development of the very factual record it claimed was lacking, SCL sought to obstruct access and conceal evidence. Even

[5] SCL tried to suppress these facts by claiming that they only go to the question of "specific jurisdiction" and that Jacobs had somehow waived any ability to claim specific jurisdiction. SCL has advanced that erroneous position to both the district court and this Court on numerous occasions all to no avail, and it has never been able to explain how Jacobs waived specific jurisdiction when the district court determined it did not need to reach that question, having previously determined that general jurisdiction existed.

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before Jacobs filed this action, LVSC's then-deputy general counsel, Michael Kostrinsky, directed Macau executives to ship data out of Macau to Las Vegas, including a supposed copy of Jacobs' computer drives. (PA1095-101, 1112-13.) In March of 2011, LVSC subsequently directed electronically stored information ("ESI") of several other key executives also be transferred from Macau to Las Vegas. (PA636-37.)

The ease of data flow from Macau to Las Vegas certainly was not consistent with the picture LVSC and SCL painted to this Court and the district court. But, ease of access is how LVSC had always managed its Macau operations. As Kostrinsky confirmed, he was not aware of any restrictions on data transmission from Macau related to any litigation; that is, until around the time the United States government issued subpoenas in response to the allegations in this case. (PA1077-78; PA1147.) As LVSC's Chief Information Officer, Manjit Singh, later acknowledged, LVSC had long maintained a data link between Las Vegas and Macau and there was a free flow of information. (PA1279, 1281, 1286-87.) Macau data was freely accessible from Las Vegas in the ordinary course of business.

Faced with the prospect of discovery concerning Jacobs' allegations, easy access to data no longer suited Petitioners. As Singh subsequently revealed, the company abruptly changed its policies regarding access in the spring of 2011. Singh confirmed he was summoned to a meeting where he and others were told the company was changing policy, discontinuing the unfettered access to data. (PA1274-75, 1277, 1283-84.) Records would remain offshore and, it would be argued, unreachable. The long-existing data link was disconnected and a "stone wall" erected against any further evidence leaving Macau. (PA1283.) None of these facts found their way into disclosures to this Court or the district court.

Nor did this convenient and self-serving policy change diminish the fact that significant data had already been transferred to the United States. (PA1306.) And Petitioners knew its significance. Not long after the transmittal, a vendor for

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LVSC's audit committee working with another of its outside counsel, O'Melveny and Myers, copied all of the drives and data brought from Macau. (PA1118.) Petitioners concealed this from Jacobs and the district court. Tthe magnitude of this deception was compounded by the subsequent revelation that this data processing had occurred in March of 2011 in connection with responding to the SEC's subpoena. (PA637-38.)

But that is not what Petitioners told the district court. To the contrary, trying to convince the district court of the seriousness of the MPDPA's prohibitions, SCL told the district court in July of 2011:

> [MS. GLASER:] The government investigations that are occurring, they have the same roadblock. The same stonewall that everyone else has. They are not – they are not even permitting the government to come in and look at documents. It is ***only Sands China lawyers*** who are being allowed to even start the process of reviewing documents. There are no documents that have been produced that have – from Sands China to the federal government in any way, shape, or form. And I need to be very clear about that, your honor.

(SA118 (emphasis added).) The magnitude of this deception became clearer during the recent evidentiary hearing when the district court learned O'Melveny was permitted to review documents in Macau, contrary to SCL's representations. (PA15595-98, 15609, 15797-803, 15829-30, 15853-54.) SCL's statements to the district court were patently false.

Similarly, as a result of the first sanctions hearing, the district court learned that counsel had been accessing and reviewing Macau data in Las Vegas as early as May of 2011. (PA891.) But, even before this Court's merits stay, SCL told the district court that all of its documents were in Macau and must be reviewed there: "They're in Macau. They are not allowed to leave Macau. We have to review them there . . . ." (SA52). These representations were false, but would be repeated hearing after hearing.

When seeking its original stay from the district court pending its first petition, SCL wanted to convince the Court about how serious the problem was,

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asserting it was "on the cusp of violating the [MPDPA] law, Your Honor." (SA112.) Petitioners outlandishly said:

> GLASER: We're not allowed to look at documents at a station here in --
>
> COURT: Mr. Jones is going to go. …
>
> GLASER: Actually, Mr. Jones can't go.
>
> COURT: I'm sorry to hear that, Mr. Jones.
>
> GLASER: The only people that can go are people that represent Sands China, and they to do it [sic] in Macau. …

(SA113).

This was not remotely forthright. Jones had sat at a station in Las Vegas months earlier and reviewed the very evidence Petitioners claimed they could not produce because it was in Macau. (PA1186-87.) And, LVSC's own counsel for the audit committee, O'Melveny, had been in Macau reviewing documents relating to the government's subpoenas that grew out of this litigation. (PA15595-98, 15609, 15797-803, 15829-30, 15853-54.)

This deception continued even after the district court ordered jurisdictional discovery. Once again, although they knew the truth, Petitioners continued to deceive the district court and Jacobs into believing that SCL's responsive documents were in Macau, and the MPDPA precluded SCL from complying with its discovery obligations.

Even as of May 24, 2012, nearly two years after volumes of data had been transferred to the United States and reviewed, Petitioners continued the ruse:

> With respect to Jacobs, Jacobs – I'll have to let Mr. Weisman deal with Mr. Jacobs, because those are issues that are of Sands China, because he was a Sands China executive, not a Las Vegas Sands executive. So we don't have documents on our server related to Mr. Jacobs. So when he says we haven't searched Mr. Jacobs, he is correct; ***because we don't have things to search for Mr. Jacobs.***

(SA129-30) (emphasis added). But, as LVSC's director of information technology, Singh, later admitted these statements were untrue. Volumes of data had been

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placed on LVSC's server in August of 2010 and was reviewed by executives and lawyers, including those making these false assertions.

C. The District Court's First Sanctions Order.

Petitioners successfully halted through their manipulative enlistment of the MPDPA. Accordingly, based on what it learned at the first evidentiary hearing, the district court entered an order (the "September 2012 Order"), and made explicit findings, including that the "lack of disclosure appears to the Court to be an attempt by Defendants to stall the discovery, and in particular, the jurisdictional discovery in these proceedings." (PA1365.) "[G]iven the number of occasions the [MPDPA] and the production of ESI by Defendants was discussed there can be no other conclusions than that the conduct was ***repetitive and abusive***." (*Id.* (emphasis added).) The district court expressly found that the Petitioners changed corporate policy regarding access to information "during the course of this ongoing litigation" to "prevent the disclosure of the transferred data as well as other data." (PA1364.) Because of the false representations over many months, the court found that LVSC, SCL and their respective agents acted with the "***intention to deceive the Court***." (PA1366) (emphasis added). Because the MPDPA served as the tool for this deception, the district court's principal sanction to mitigate the harm precluded Petitioners from "raising the [MPDPA] as an objection or as a defense to admission, disclosure or production of any documents" for purposes of jurisdictional discovery or the yet-to-be-held jurisdictional hearing. (PA1366.) SCL never challenged this Order.

D. SCL Continues To Violate the District Court's Discovery and Sanctions Orders.

As the district court would later conclude, the sanctions it first imposed to ameliorate the prejudice to Jacobs proved insufficient to deter SCL from ignoring court orders and violating Jacobs' rights. (PA43817.) Despite that Jacobs' discovery requests had been pending since December 23, 2011, not a single

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document had been reviewed in Macau let alone produced. (PA4644-45.)[6] SCL bought time by switching counsel, but their lack of compliance soon resurfaced.

At a December 18, 2012, hearing, the district court noted LVSC and SCL's approach of "avoid[ing] discovery obligations that I have had in place since before the stay" and how they had "violated numerous orders." (PA1669, 1690.) The district court announced it was setting a firm deadline in an express order to end the obstructionism, and gave Petitioners one final chance to comply, ordering the production of "all information within their possession that is relevant to the jurisdictional discovery" by January 4, 2013. (PA1768.)

By that date, SCL produced what it claimed were the responsive documents to jurisdictional discovery located in Macau. (PA1701-61.) However, it searched less than one-third of the custodians identified with knowledge of jurisdictional facts, conveniently omitting SCL's board members. (PA1757-61, 1776-77.) After searching only six of the identified custodians, plus two others of its choosing, SCL ran less than all of the search terms against the reduced custodian list. (*Id.*)

As if that were not enough circumvention, Petitioners reenlisted the barred MPDPA and deleted the identity of ***every*** author, recipient, or person identified in each document. (*See* PA15876, 4225-387, 4750, 4751-5262.) The ordered production was rendered unintelligible and of no discernible evidentiary value.

Faced with the year-long stall and sabotage of Jacobs' rights, the district court announced it would convene yet another evidentiary hearing, noting one of the things it would consider and balance in determining sanctions was the justification for the continued reliance upon the MPDPA:

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[6] SCL represents to this Court how it produced thousands of pages of documents, a representation that lacks support and is not true. What documents had been produced were those located in Las Vegas in the possession of LVSC, and even then they failed to properly search and produce documents that had been brought from Macau and were then residing on LVSC's servers. (PA4382.)

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> [A]s a sanction for the inappropriate conduct that has happened in this case, in this case you've lost the ability to use that [MPDPA] as a defense. I know that there may be some balancing that I do when I'm looking at the appropriate sanctions under Rule 37 standard as to why your clients may have chosen to use that method to violate my order. And I'll balance that and I'll look at it and I'll consider those issues. But they violated my order.

(PA2212, PA2194.)

Petitioners knew what the evidence would show at such a hearing occur, and they thus sought yet another writ from this Court (Case No. 62944), requesting the district court be precluded from conducting an evidentiary hearing to determine the consequences for defying the September 2012 Order.

Although this Court ultimately denied that petition, LVSC and SCL used it to procure another delay and made representations of which this Court should take note. For one, SCL claimed it was confused by the September 2012 Order because it did not understand it precluded redactions under the MPDPA. (PA1918.) Additionally, SCL represented it thought the September 2012 Order only applied to the documents located in the United States and did not apply to documents located in Macau. SCL made these representations to this Court in a "Notice of Filing in Related Case Re Correction of Record of March 3, 2014 Oral Argument" authorized by Fleming. (PA4196, 4586-8.) But as SCL's own executives admitted at the most recent evidentiary hearing, these and a host of other contentions were not forthright. (PA4121-25.)

E. The Recent Evidentiary Hearing and the District Court's Extensive Findings Again Expose SCL.

Once the district court convened the second sanctions hearing, the reasons that SCL and LVSC sought to avoid it became all the more apparent. As the district court would learn and conclude, Petitioners' attempted use of the MPDPA is even more contradictory and inconsistent than known at the time of the September 2012 Order. For instance, as previously noted, after Jacobs

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commenced this action in October 2010, the SEC issued at least one subpoena to LVSC seeking information, some of which was located in Macau. LVSC's general counsel, Ira Raphaelson, touted the seriousness with which LVSC and SCL undertook their obligations relative to that request. In response, the LVSC Board of Directors voted to vest the full power of the Board with LVSC's audit committee, (PA15852-53), which engaged O'Melveny as legal counsel. Raphaelson expressly recalled conferring with David Fleming, SCL's General Counsel, about compliance. As SCL is 70% owned by LVSC, Fleming reported to Raphaelson. Raphaelson claims he wanted to ensure that "maximum access" was given to information SCL possessed. (PA15853.)

As part of Raphaelson's "maximum access," O'Melveny lawyers from the United States travelled to Macau and given access to SCL's files and servers. (PA15595-96.) Raphaelson testified that "a number of consents" were obtained from employees under the MPDPA so that O'Melveny would have access to documents to interview Macau executives. (PA15854.)

One of those Macau executives was Ben Toh, SCL's Chief Financial Officer, and a member of SCL's Board of Directors. Toh recalled his interview by O'Melveny lawyers sometime in 2011, during which he was shown documents. (PA15597-98.) While he could not recall all of the specifics, he believed some documents were emails originated in Macau. (PA15598.) As the district court found, in contrast to what SCL and LVSC repeatedly represented, LVSC's United States lawyers were given access to SCL's Macau data, and allowed to review and use it for their purposes.

This stands in sharp contrast to SCL's attitude when it came to complying with its discovery obligations in this litigation. While Raphaelson recalled the "maximum access" discussion with Fleming about O'Melveny's review, he could not recall the more recent input he provided to Fleming concerning compliance with the district court's September 2012 Order. But as the district court found, the

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record is replete with evidence that SCL took a far different and dismissive approach to its obligations to comply with court orders.

Even after the district court's September 2012 Order which stemmed from Petitioners' efforts to deceive the court, Macau's Office of Personal Data Protection ("OPDP") – the governmental agency charged with administering the MPDPA –informed SCL that its request to transfer data concerning this litigation was incomplete, based upon wrong provisions of the MPDPA, and would not be considered absent corrections and additional information. (PA15943-44, 4581-83.)

SCL conceded it knew OPDP considered its requests to be incomplete yet took no action to remedy the deficiencies. (*Id.*) Fleming initially rationalized this inaction, claiming there was insufficient time. (*Id.*) But as the district court found, even though SCL was still producing documents as late as January 2015 in redacted form, Fleming conceded SCL took no action to address the inadequacies OPDP noted in 2012. (PA4583.) SCL did ***nothing*** for over two years toward addressing OPDP's instructions that its request was defective. The district court justifiably cited this knowing inaction as contradicting SCL's cries of good faith. (PA43802.)

SCL acted similarly when OPDP expressly referenced that SCL could pursue available remedies in Macau courts concerning the data transfer. (PA4172-76.) Fleming acknowledged he knew of available avenues, but did nothing. (PA4145.) SCL did nothing despite that the MPDPA expressly authorizes a transfer of data "for compliance with a legal obligation" "or for the . . . exercise of defence [sic] of legal claims." (PA15466-86.)

Underscoring SCL's intended non-compliance was its admission that it had not sought a single MPDPA consent from any Macau personnel. (PA4147-48.) One of the first things Macau officials told SCL about transferring data was they could get the consents of the persons involved. Yet, Fleming admits that SCL did

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not seek ***one single consent*** from any Macau executives related to this case. (*Id.*) Fleming's only explanation was to claim that it would be too cumbersome. And, as the district court noted, SCL previously sought to rationalize its failure by suggesting it faced potential liability if it sought consents because it could be accused of pressuring personnel to consent. (PA15920-21.)

Raphaelson's revelation that "a number of consents" were obtained to give O'Melveny access to address the SEC's investigation contradicts what SCL had told the district court. As Toh even acknowledged, he believed that he consented for LVSC to access his personal data pursuant to his employment arrangement. (PA15609.) And, even though Toh and other SCL executives were the custodians SCL had been ordered to search for jurisdictional discovery, ***not a single consent was sought***. As the district court recognized, SCL can and will obtain consents when in its economic interest, but consciously chose not to do so where it is a defendant facing potential liability in a U.S. Court. (PA43805, 43820.)

That consents were later obtained from four Nevada residents – Adelson, Goldstein, Leven and Kay – nearly two years after the ordered production is proof of how SCL selectively used the MPDPA to obstruct. These four executives are United States residents. Their emails are located in Nevada and not subject to the MPDPA, a fact that Petitioners concede. As the district court easily concluded, seeking consents from four United States residents while not seeking consents from Macau personnel – several of whom were actual custodians – is the epitome of not acting in good faith relative to court orders and discovery obligations. (PA43820.)

Fleming conceded that he received the September 2012 Order, and understood it prohibited SCL from using the MPDPA as a basis for not producing document, and as a basis for redacting documents. Fleming acknowledged that the order was sufficiently "clear" to him. (PA4121-25.)

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By the time this Court entered its September 2014 Order, Fleming acknowledged he knew what was required:

> Q. Okay. And when you saw it did you understand that it precluded you - - or, I'm sorry, it precluded the company from redacting any documents pursuant to the MPDPA?
>
> MR. RANDALL JONES: Mr. Fleming - -
>
> THE WITNESS: Yes, of course I did. I told Her Honor exactly that a few minutes ago.
>
> BY MR. BICE:
>
> Q. All right. So you were - - you did not misunderstand as to which documents it applied; correct?
>
> A. Of course not.
>
> Q. You know that it applied to all of the documents that were then located in Macau; correct?
>
> A. Correct.

(PA4122.)

Despite SCL's claimed significance surrounding compliance with the MPDPA, the SCL Board was never provided a copy of the September 2012 Order imposing the sanction that the MPDPA could no longer be used as a shield. (PA15582-86.) Nor was the SCL Board provided copies of this Court's subsequent order requiring production of jurisdictional documents. (PA15583.) According to Fleming, he did not involve the Board in the decision not to comply with this Court's September 2012 Order. At best, he may have informed a couple of board members about it. But, the Board was never informed of any potential consequences, despite SCL's current protest of how the September 2012 Order portends serious consequences for SCL under Macau law.

F. The Prejudice To Jacobs Is Unmistakable.

SCL proves its lack of serious substance when it audaciously claims that there is no evidence upon which the district court could conclude that its ongoing noncompliance prejudiced Jacobs, let alone sufficient to warrant sanctions. (Pet.

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at 23.) As the district court made in findings – with citations to the actual evidence – SCL's continued enlistment of the MPDPA compromised the jurisdictional discovery process for documents in Macau. It rendered thousands of documents that SCL's own reviewers identified as relevant to jurisdiction indecipherable and unusable. (PA43816.) The search, review and redaction process in Macau is beyond suspect, with no evidence that the "Macau Citizens" who determined relevancy/responsiveness had any training relative to this case. (PA4503-09, 4511, 4548-49, 4643.)

FTI's Jason Ray, SCL's ESI vendor, revealed that since SCL had not sought to hire reviewers until a week before Christmas, it could not find a sufficient number of "competent Macau lawyers" to conduct the review. (PA4643.) Thus, non-lawyer paralegals, legal secretaries, and "other people" with unidentified "legal knowledge" were used to make relevancy determinations in Macau. No lawyers involved in this litigation reviewed documents in Macau for relevancy or responsiveness. (PA4504.)

The district court rightly condemned the lack of transparency in SCL's procedures, the veracity of which was undermined by the redactions concealing the identity of any of the documents' participants. SCL presented no evidence of any training of the Macau reviewers or their qualifications to make relevancy/responsiveness determinations. Ray conceded FTI did not do any subject matter training for the Macanese reviewers and he did not know if anyone provided any subject matter training. FTI only provided training on the computerized review platform. (PA4503-08, 4511.)

Because the Macanese reviewers redacted documents at the same time they reviewed for relevancy and privilege, no one involved in this litigation saw what was being redacted and what documents were excluded from production. (PA4508-09.) As the district court fairly concluded, it could have no confidence

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in this process as a result of the redactions. (PA43811.) "And, no litigant should be required to accept it, particularly under the circumstances of this case." (*Id*.)

The redactions made to the documents – hiding all names and other identifying information – highlighted the lack of fairness in the search, vetting, and production process. Because many of the search terms were names, the veracity and completeness of the search cannot be tested against the documents flagged for production. Indeed, the search terms themselves were redacted if they were names. SCL made it impossible for Jacobs or the court to know the identity of any of the persons referenced in those documents. As the district court aptly said: "Such a process is ripe for abuse and fails to meet the standards of fairness for discovery in a Nevada court." (PA4121-25.)

As the district court concluded from the testimony of FTI's Ray, the jurisdictional search terms some 70,000 documents as potentially relevant/responsive. (PA4498.) The "Macau Citizens" determined 15,000 of those documents were relevant/responsive to jurisdictional discovery. Over 7,900 of those relevant/responsive documents – more than 50% – were redacted so Jacobs and the court cannot know the authors, recipients, or identity of any person involved. (PA15876.) As the district court found based upon the admissions of SCL's own witnesses, the redactions make the documents undecipherable and useless as evidence. (PA43812.)

For SCL to pretend that it does not recognize the prejudice and impropriety of such a production speaks volumes about its candor and credibility. SCL's redactions make a mockery of the discovery process to which all litigants are rightly expected to conform themselves in a Nevada court.

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III. REASONS WHY THE WRIT SHOULD NOT ISSUE AND THE STAY LIFTED[7]

A. Writ Relief Is Not Available To Review Interlocutory Sanctions Orders.

As discovery is a matter within the trial court's discretion, it is with good reason that "writ relief is ***rarely*** available with respect to discovery orders. . . ." *Valley Health Sys., LLC v. Dist. Ct.*, 127 Nev. Adv. Op. 15, 252 P.3d 676, 677 (2011) (emphasis added). Only when there is no adequate remedy at law will a writ of mandamus issue "to compel the performance of an act that the law requires. . . or to control an arbitrary or capricious exercise of discretion." *Aspen Fin. Servs. v. Dist. Ct.*, 128 Nev. Adv. Op. 5, 289 P.3d 201, 204 (2012) (quoting *Int'l Game Tech. v. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008)).

In keeping with these limitations, this Court has found writ intervention appropriate in discovery matters in two limited circumstances: (1) blanket discovery orders without regard to relevance; or (2) a privilege may be forever lost. *Clark Cnty. Liquor & Gaming Licensing Bd. v. Clark*, 102 Nev. 654, 659-60, 730 P.2d 443, 447 (1986). And even then "[m]andamus will not lie to control discretionary action, unless discretion is manifestly abused or is exercised arbitrarily or capriciously." *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 637 P.2d 534 (1981) (internal citation omitted).

"Writ relief is an extraordinary remedy, and this [C]ourt typically exercises its discretion to consider a writ petition only when there is no plain, speedy, and adequate remedy in the ordinary course of law." *Fulbright & Jaworski v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 5, 342 P.3d 997, 1001 (2015). An appeal is an adequate legal remedy that precludes writ relief. *Pan v. Eighth Judicial Dist.*

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[7] Although this Court refused Jacobs' request to dissolve the stay, he continues to dispute that such an injunction should be available even before a writ petition has been filed to invoke this Court's original jurisdiction. *See* NRAP 21(e)("The court ***shall not consider*** any application for an extraordinary writ ***until the petition has been filed***. . . .") (emphasis added).

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Court ex rel. Cnty. of Clark, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004).

For those reasons, writ review is not appropriate for sanctions orders against a litigant, since they may obtain review by way of appeal from an adverse judgment. *In re AIM Sports, Inc*., 447 F. App'x 213, 215 (Fed. Cir. 2011) (rejecting mandamus review of monetary and evidentiary sanction). This Court has repeatedly indicated that parties to a case can challenge a sanctions order on appeal, and thus writ review is unavailable. *See Emerson v. Eighth Judicial Dist. Court of State, ex rel. Cnty. of Clark*, 127 Nev. Adv. Op. 61, 263 P.3d 224, 227 (2011) (consideration of a writ petition challenging a sanctions order against a party's attorney was proper because attorney was not a party to the litigation, could not appeal, and had no other adequate legal remedy available at law); *Office of Washoe Cnty. Dist. Atty. v. Second Judicial Dist. Court ex rel. Cnty. of Washoe*, 116 Nev. 629, 5 P.3d 562 (2000) (writ relief was appropriate because district attorney was a non-party to the proceeding without a right to appeal NRCP 11 sanctions order); *see also Albany v. Arcata Associates, Inc*., 106 Nev. 688, 689, 799 P.2d 566, 567 (1990) (same). [8]

Where a party is sanctioned for refusing to produce documents based upon a foreign privacy statute, the sanctions order is generally not reviewable until a final judgment is rendered in the action. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442 (1987), *cited with approval in Las Vegas Sands v. Eighth Judicial Dist. Ct.*, 130 Nev. Adv. Op. 61, 331 P.3d 876 (2014). *Linde v. Arab*

[8] SCL's citation to *City of Sparks v. Second Judicial District Court In & For County of Washoe*, 112 Nev. 952, 953, 920 P.2d 1014, 1015 (1996), supports denial of its petition. In *City of Sparks*, the Court entertained a petition because two *non-parties*, the city attorneys' office and the city manager's office, were sanctioned. As non-parties, those governmental offices did not have the ability to appeal. *Pengilly v. Rancho Santa Fe Homeowners Association*, 116 Nev. 646, 5 P.3d 569 (2000), is distinguishable because it involved a contempt order. In this case, the evidentiary sanctions hearing was not a contempt proceeding and the district court's March 2015 Order did not include a finding of contempt.

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Bank, PLC, 706 F.3d 92 (2d Cir. 2013), is instructive as it is the subsequent appellate decision of one of the cases relied upon by this Court when SCL first sought writ review before the district court's sanctions hearing. *Las Vegas Sands*, 130 Nev. Adv. Op. 61, 331 P.3d at 879 (citing *Linde v. Arab Bank, PLC*, 269 F.R.D. 186, 193 (E.D.N.Y.2010)).

In *Linde*, the defendant bank sought writ review of a discovery sanction imposed for failure to produce documents on the grounds of a foreign blocking statute. 706 F.3d at 108-15. Similar to the sanctions imposed by the district court here, the sanction in *Linde* permitted the jury to infer adversely from the bank's failure to produce documents and prohibited the bank from introducing certain evidence at trial. *Id.* at 95. And like SCL, the bank sought writ review with the same arguments, asserting that it faced irreparable harm because the discovery sanction violated its Due Process rights and made it "essentially inevitable" that the trier of fact will rule against it. *Id*. at 116-17. The bank repeated the same mantra advanced by SCL — "[r]aising the specter of a 'show trial' and positing the inevitable determination of" the issue against it. *Id*. at 115.

The Second Circuit rejected the claim for writ review, explaining that the arguments were properly addressed by way of an appeal if the bank lost on the merits before the trial court. *Id*. at 117-19. The court reasoned that "the type of harm that is deemed irreparable for mandamus purposes typically involves an interest that is both important to and distinct from the resolution of the merits of the case . . . By contrast, in this case, the harm that [bank] would experience from an adverse judgment is in essence indistinguishable from the harm experienced by other litigants who lose a battle in a lower court and seek appellate review." *Id*. The existence of foreign blocking statute provides no special basis for extraordinary writ review. *Id*. at 118.

The same applies here. SCL is a party to this proceeding and will have the right to appeal any adverse result following a trial on the merits, if it is aggrieved.

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Review at this juncture is premature as the district court has made no finding as to Jacobs' success. Nor does the district court's March 2015 Order exercise personal jurisdiction "by sanction." (*Compare* Pet. at 3.) At the jurisdictional hearing, Jacobs must still meet his burden at the conclusion of his case-in-chief regardless of the sanction imposed. The anticipated harm to SCL is no different than that of any other litigant who is sanctioned for discovery misconduct.

The United States Supreme Court has recognized the mischief of entertaining interlocutory review of such orders and how it undermines the very purpose of Rule 37 sanctions. Such sanctions are "designed to protect courts and opposing parties from delaying or harassing tactics during the discovery process." *See Cunningham v. Hamilton Cnty., Ohio*, 527 U.S. 198, 208 (1999) (Rule 37(a) sanction was not a final decision or immediately appealable under 28 U.S.C. § 1291). Allowing writ review of discovery sanctions in the middle of litigation undermines the district court's discretion to fashion appropriate sanctions and — as SCL wishes — dis-incentivizes judges from imposing sanctions to avoid further delays in the proceedings. *Id*. at 209.

"Delays and abuses in discovery are the source of widespread injustice; and were [the Court] to hold sanctions orders" are immediately reviewable, it "would risk compounding the problem. . . ." *Id*. at 210 (Kennedy, J., concurring). "Not only would such an approach ignore the deference owed by appellate courts to trial judges charged with managing the discovery process, it also could forestall resolution of the case as each new sanction would give rise to a new," request for review. *Id*. (internal citation omitted).

SCL presents no basis for appellant interference with the district court's determination as to how to best level the evidentiary playing field. SCL was sanctioned because it intentionally deceived the court. As this Court has noted, such conduct is nothing but a "fraud" on the court and can never be countenanced. *See Sierra Glass & Mirror v. Viking Indus., Inc.*, 107 Nev. 119, 126, 808 P.2d

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512, 516 (1991) (What counsel "considers clever lawyering and proficient advocacy is nothing other than a fraud on the court" when facts are misrepresented to the court. And a "fraud remains a fraud even when the perpetrator does not get caught."). SCL provides no basis for interlocutory review and affording it would only stall the resolution of the jurisdictional question and exacerbate the prejudice to Jacobs.

B. The District Court Did Not Manifestly Abuse Its Discretion or Act Arbitrarily and Capriciously[9]

C.

There is another reason this Court should not entertain SCL's petition and further delay this case: it lacks substantive merit. As confirmed by the district court's 40 pages of findings and legal conclusions, it did not manifestly abuse its discretion or act in some arbitrary and capricious manner. *See Nev. Power Co. v. Fluor Illinois*, 108 Nev. 638, 644, 837 P.2d 1354, 1358 (1992) (discovery sanctions are reviewed for abuse of discretion); *see also Round Hill Gen. Imp. Dist.*, 97 Nev. at 603-04, 637 P.2d at 536 (mandamus only available where manifest abuse of discretion or exercises it arbitrarily or capriciously).

Instead, based upon its intimate knowledge of the facts and circumstances, it imposed lesser sanctions to level the playing field and deprive SCL of the benefits it hoped to achieve through noncompliance. "The question is not whether this court would as an original matter have entered [these particular sanctions]; it is whether the trial court abused its discretion in so doing." *Kelly Broad. Co. v. Sovereign Broad., Inc.*, 96 Nev. 188, 192, 606 P.2d 1089, 1092 (1980).[10]

Recall, this Court already found that SCL did not "challenge" the September 2012 Order which precluded it from further enlistment of the MPDPA.

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[9] The stay should be lifted for the same reasons set forth below as SCL is not "likely to prevail on the merits in [its] writ petition" and the "object of the . . .writ petition will [not] be defeated if the stay. . .is denied." NRAP 8(c)(1),(4).

[10] *Superseded by statute on other grounds as recognized in Canarelli v. Dist. Ct.*, 127 Nev. Adv. Op. 72, 265 P.3d 673, 678 (2011).

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Las Vegas Sands v. Eighth Jud. Dist. Ct., 130 Nev. Adv. Op. 61, 331, P.3d 876, 878 (2014). That sanction is the product of Petitioners' conscious and intentional decision to deceive the district court. That sanction is binding upon SCL. But even if the district court were crafting its sanctions from scratch, this Court also explained that "the mere presence of a foreign international privacy statute itself does not preclude Nevada courts from ordering foreign parties to comply with Nevada discovery rules. Rather, the existence of an international privacy statute is relevant to the district court's sanctions analysis in the event that its order is disobeyed." *Las Vegas Sands v. Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 61, 331 P.3d 876, 880 (2014). Citing *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522 (1987) and the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442(1)(c) (1987), this Court identified five factors to consider:

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

Id.

Contrary to Petitioners' empty rhetoric, the district court not only considered each of these factors, as outlined in its extensive findings, it further considered the overarching factors of NRCP 37 and *Young v. Johnny Ribeiro Building, Inc.*, 106 Nev. 808, 93, 787 P.2d 777, 780 (1980). Respectfully, if the district court's comprehensive findings and balancing here are subject to second-guessing on such a record, then no litigant will ever be discouraged from deceiving courts and sabotaging the discovery process.

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1. The redactions are relevant and important to jurisdictional discovery.

Ignoring the actual record and the district court's explicit findings, SCL says that none of the nearly 8,000 documents that remain redacted and effectively unproduced have any importance as to whether it is subject to jurisdiction in Nevada. SCL exaggerates the law's requirements. The law deems documents sufficiently "important" by the shear fact that they are "relevant" to the question at hand. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442. "A court need consider only the relevance of the requested documents to the case; it need not find that the documents are vital to a proper [cause of] action." *Chevron Corp. v. Donziger*, 296 F.R.D. 168, 204-05 (S.D.N.Y. 2013) (quotations omitted). After all, NRCP 26(b)(1) permits discovery on any matter "which is *relevant* to the subject matter. . . ." (emphasis added).

SCL attempts to impose a greater "importance" standard to avoid sanctions by stretching *Linde v. Arab Bank, PLC*, 269 F.R.D. 186, 193 (E.D.N.Y. 2010) too far. Contrary to SCL's mischaracterization, *Linde* does not indicate that documents must be "essential" before sanctions are appropriate for refusing to produce documents. (Pet. at 21.) Rather, *Linde* unequivocally states, "a 'prejudiced party' will be permitted sanctions-particularly, as discussed in *Kronisch*, the sanction of an inference in its favor—'so long as [it] has produced ***some evidence suggesting that a document or documents relevant*** to substantiating [its] claim would have been included among the [withheld or destroyed] files.'" 269 F.R.D. at 196 (quoting *Kronisch v. United States*, 150 F.3d 112, 128 (2d Cir. 1998)) (emphasis added). The court in *Linde* only found that the documents at issue were "essential" in that case, not that documents need be "essential" before sanctions should issue. *Id*. at 193, 196-97.

Here, Jacobs presented more than "some evidence" demonstrating that the redacted documents are "relevant" to establishing his personal jurisdictional

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theories. *See id*. at 196. As the district court itself found, the nearly 8,000 documents remaining redacted were identified as relevant/responsive by SCL's own reviewers in Macau. They were flagged by the search terms that SCL employed to locate jurisdictional evidence. (PA1757-61.) SCL cannot seriously be suggesting that such documents are irrelevant, unless it is willing to admit that its searches in Macau and the review process was so fundamentally flawed that all it located and deemed worthy of production was irrelevant garbage.

And once again SCL wrongly pretends that the only question bearing on personal jurisdiction is whether it is at "home" in Nevada and that nothing else matters. Hardly. Not only is Jacobs entitled to demonstrate that SCL is at home in Nevada because that is the location of this holding company's nerve center, he's entitled to demonstrate that the causes of action here arise out of contacts SCL has with Nevada. That is why, not coincidentally, many of the jurisdictional discovery search terms focus on names and events that were being directed out of Nevada. (PA1757-61.)

Petitioners simply embarrass themselves when they claim that Jacobs could muster "only 27 documents (out of a total SCL production of more than 7,900 redacted documents)" as the only prejudice suffered. (Pet. at 23 (emphasis omitted).) Jacobs introduced those particular 27 documents to demonstrate the point of how redactions rendered the documents useless. Jacobs proposed to introduce the more than 7,900 redacted documents so that the record would be complete. SCL objected to that, claiming that many of its documents were confidential and contained sensitive information. (*See* PA43206). Thus, it asked Jacobs' counsel to agree to a stipulation where the parties would simply confirm that documents produced and the number that remained redacted still today. (PA43206.) SCL's current attempt to now profit from its own objection to the introduction of all 7,900 of the redacted documents is transparent. Besides, if the remaining 7,900 and more redacted documents were truly irrelevant to jurisdiction

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– despite the fact that SCL's Macau reviewers identified them as relevant/responsive – then SCL would have assuredly wanted them introduced to the district court to demonstrate Jacobs' purported lack of harm.

The illustrative documents which Jacobs had admitted demonstrated, as the district court found, the extreme prejudice that the redactions imposed, including making the documents utterly undecipherable in many respects. (PA43816.) Just one such example was exhibit 16 discussing Adelson's overarching control and direction of minute details. Yet, no one can know the authors, recipients, or even the identity of the people being discussed:

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RE: Board of Director Meeting Information Request

From:
'Personal" <Personal @venetian.com.mo>
To:
"Personal" <Personal @venetian.com.mo>
Date:
Tue, 07 Apr 2009 13:50:44 +0800

Pers
Thanks. I think this is a little rich. I doubt if I can't get the completion bonus. SGA is now reviewing every single HR decision including retention bonuses. I am not going to put a case to SGA that this guy is a critical person and must go onto our retention plan. BTW his daughter is now running HR!!!!!
I have no problem compensating in line with the policy, if school, discretionary bonus, notice period, relocation, etc are in line with policy then agreed. I need to look at the salary against the others.
I think that puts him above the other managers. Is he better than them or are we paying a premium?
ThanksPersonal

From: Personal
Sent: Tuesday, April 07, 2009 1:40 PM
To: Personal
Subject: RE: Board of Director Meeting Information Request

Personal

I spoke to Pers last night and he has said he will come back to me tomorrow. He seems to be torn between the benefits of having a stable relatively comfortable family life but somewhat boring work life in Australia as opposed to the cut and thrust of work in Hong Kong and a transient lifestyle. Let's see if he comes back tomorrow as promised and what his decision and ask is.

As regards Personal the terms he would accept are :

Salary SG$27,500
School Fees SG$750 x 10 months (per policy)
Discretionary Bonus 20% (currently on 15%)
Completion Bonus TBC (Would we be prepared to agree to 3 months)
Notice Period – assume 3months (currently on 1 month)
Relocation – TBC (Would we be prepared to pay at cost – 3 quotations ?)

If the above is acceptable to you. Then on a pro-rata basis this would put Con up to ±SG$34,000 + 25% bonus which is still pretty close to Personal . Per is already on a terminal bonus which I assume would transfer to MBS ? I have attached the spreadsheet I worked out last week in case you don't have the hard copy with you.

Personal Redaction

Please consider the environment before printing this email

From: Personal
Sent: 07 April 2009 13:20
To: Personal Redaction

Similar is Exhibit 32 which concerns events that purportedly give rise to Jacobs' termination. Some of the manufactured reasons for Jacobs firing included "negotiating arrangments for Sites [Parcels] 5 & 6 without prior approval" and "[e]ntering into negotiations with Cirque du Soleil without obtaining prior approval. . . ." (PA4733-34.) There are hundreds of documents related to these issues, and the other false reasons for Jacobs' termination, that are relevant to jurisdiction – as it shows where the events giving rise to the dispute were actually occurring and being directed from (i.e. in the United States from Nevada). Yet, all of the participants in those events are hidden due to the improper redactions. (*See, e.g.,* PA4716-18 (Parcels 5 & 6 and Adelson's changes to contracts and plans).) Again, the following is but one illustration considered by the district court in recognizing the impropriety of the redactions and the prejudice that they cause:

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CdS

From:
Personal Redaction

To:
Personal Redaction @venetian.com.mo>

Date:
Tue, 15 Dec 2009 20:23:37 +0800

Dear Pers.

May we ask your assistance to help Mr. .Perso, who would like to pull out all contracts/agreements regarding Cirque & put together in a file for his meeting w/ Cirque in the US.

Mr. Perso is planning to depart to the US on the 20th Dec. so we will need the file for his review before the 20th.

Your kind assistance is appreciated.

Thanks,
Persona

It does not take a law degree to recognize how such redactions render the evidentiary value of all such documents – those triggered by the jurisdictional search terms – utterly useless. It is not the district court or Jacobs that lack prospective or understanding. SCL is simply disingenuous in pretending to not recognize the problems that its indefusible redactions created.

2. Jacobs' discovery requests were specific.

SCL's suggestion that Jacobs' discovery requests were not sufficiently specific to trigger sanctions is just more empty rhetoric. In this case, the district court had given advance approval and narrowed the scope of Jacobs' document request. Well before the first evidentiary hearing in 2012, the district court received briefs, considered arguments, and reviewed the scope of Jacobs' request. (PA539-44). The district court then issued an order expressly describing the documents to which Jacobs was entitled. And, as SCL knows full well, it is from that point forward that the jurisdictional search terms that SCL employed were developed. As the courts recognize, requirements for production are sufficiently specific where a court has previously approved the requests and imposed limitations on the scope of production. *Pershing Pac. W., LLC v. MarineMax, Inc.*, No. 10-CV-1345-L DHB, 2013 WL 941617, at *7 (S.D. Cal. Mar. 11, 2013).

3. The redacted documents remain in Macau and there are no substitutes.

SCL tries to make much of the fact that it located as many replacement images in the Unites States as possible. But as the district court found, that exercise did not mitigate the prejudice or justify the redactions, since over 50% of the documents flagged by the search terms in Macau and deemed to be relevant/responsive remain redacted to this very day. As court's recognized, "where the information cannot be easily obtained through alternative means, *the origin of the information can be counterbalanced with the inability to obtain the*

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information through an alternative means, thus favoring disclosure." *Chevron Corp.*, 296 F.R.D. at 206 (S.D.N.Y. 2013) (emphasis altered, internal quotations omitted).

As such, the district court acted well within its discretion in fact finding including that limiting redactions to only Macanese documents "does not militate against sanctions or their importance to jurisdictional issues" as a result of the difficulty of locating the information in the United States. (PA43820.) Again, SCL admits that *at least* 7,904 of these documents remain redacted to this day. (PA15876.)

4. Jacobs does not have substantially equivalent means to obtain the redacted Information.

In that same vein, the district court fairly concluded that there were no substantially equivalent means of obtaining the redacted information and what it would reveal about the documents. (PA43821.) After all, SCL claims that the only documents which remain redacted are those for which no alternate source is available.

To claim that an alternate source justifies nonproduction, the law mandates that the purported "alternative means must be 'substantially equivalent' to the requested discovery." *Richmark Corp.*, 959 F.2d at 1475. Even if some documents can be obtained from the United States, there is no legitimate alternative means of securing the information when there is difficulty in obtaining *all* documents and when some of the requests do not relate to communications with other third parties. *Pershing Pac. W., LLC*, 2013 WL 941617, at *8. SCL must show that its feigned alternatives are substantially equivalent to the requested information. *See In re Air Crash at Taipei, Taiwan on Oct. 31, 2000*, 211 F.R.D. 374, 378 (C.D. Cal. 2002) ("However, defendant has not shown that the ASC report is substantially equivalent to the requested documents.")

Again, the evidence confirms that Jacobs has no alternative means of obtaining a "substantial equivalent" of the redacted information. While some

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duplicative documents were located in the United States, and were eventually produced without MPDPA redactions, SCL admits that at least 7,904 documents will not be produced. (PA15876.)

LVSC's production of *other documents* is not, by definition, a substantial equivalent of the documents that still remain redacted. And, Petitioners' generic reference to having produced thousands of other documents – somehow establishing that the documents that were reviewed in Macau and determined to be responsive and relevant by SCL's own reviewers need not be actually produced in a usable form – is nonsensical on its face. If the documents were triggered by the jurisdictional search terms and SCL's own reviewers determined them to be relevant/responsive, SCL is obligated to produce them. SCL has established how it plays games where it cites a large volume of documents as supposed proof of its forthrightness only to have to retract from that at a later date.[11]

Moreover, if it was not practical for SCL to obtain consents from the participants in the documents, then it has no basis for claiming substantial equivalent alternatives exist. *See United States v. Vetco Inc.*, 691 F.2d 1281, 1290 (9th Cir. 1981) ("It is not substantially equivalent because of the cost in time and money of attempting to obtain those consents.").[12]

[11] When LVSC and SCL sought an additional writ for the claims of privilege in the documents which Jacobs still possesses, they told this Court how they had determined that Jacobs possessed as many as 11,000 privileged documents. But when this Court granted the petition and the district court thereafter announced that it would review each document to assess the legitimacy of its claims, SCL reversed course. The district court had reviewed the privileged log and determined that it was egregious and made claims of privilege where none could plausibly exist (SA283, 290). Thereafter, SCL withdrew its claims of privilege over more the vast majority of documents that were subject to the writ petition, and the District Court overruled many other claims of privilege. (SA290, 331-32.) Simply put, SCL has no qualms about making wild claims about vast volumes of documents only to have to retreat once someone peeks behind the curtain.

[12] SCL attempts to portray Jacobs' refusal to provide an MDPA consent as

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5. The United States' interest outweighs Macau's supposed interests.

The balance of national interests is the most important factor. *Richmark Corp.*, 959 F.2d at 1476. The United States has a "substantial" interest in "vindicating the rights of American plaintiffs" and a "vital" interest "in enforcing the judgments of its courts." *Id*. at 1477. "[T]he United States has a substantial interest in fully and fairly adjudicating matters before its courts, [and] [a]chieving that goal is only possible with complete discovery." *Chevron Corp.*, 296 F.R.D. at 206 (internal quotations omitted).

Even though the presence of a privacy statute is some indication of a country's national interest, courts must consider "'expressions of interest by the foreign state,' 'the significance of disclosure in the regulation . . . of the activity in question,' and 'indications of the foreign state's concern for confidentiality ***prior to the controversy***.'" *Richmark Corp.*, 959 F.2d at 1476 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442 cmt. c) (bold added). In the absence of earlier statements of interest, a foreign government can express its interests by formally intervening in an action or filing an amicus brief. *See Chevron Corp.*, 296 F.R.D. at 206-07 (government can intervene); *see also In re Rubber Chems. Antitrust Litig.*, 486 F. Supp. 2d 1078, 1082 & n.2 (N.D. Cal. 2007) (foreign government offering to submit amicus brief as it had done in other matters).

"invoking. . .his own rights under the MPDPA in a transparent effort to manufacture prejudice." (Pet. at 19, 35.) Such nonsense should not go unaddressed. As Jacobs explained to SCL, he had no obligation to provide an MPDPA consent because the District Court's September 2012 sanction deprived SCL of the ability to enlist the MPDPA. (PA4748-49 ("The issues raised by your email have already been litigated and decided by the Court's September 14, 2012 Decision and Order regarding sanctions and decided by the Court's March 27, 2013 Order. . . .The Court has repeatedly ruled that [SCL] is not permitted to rely upon the MPDPA. . . regardless of 'consent' from the parties to the documents.").) Jacobs was under no obligation to waive the one substantive sanction from SCL's deceit by taking the bait.

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SCL failed to present *any* evidence beyond the MPDPA itself to demonstrate Macau's supposed national interest. Nor did SCL present actual evidence that it faces serious consequences for producing unredacted documents. *See In re Air Crash at Taipei, Taiwan on Oct. 31, 2000,* 211 F.R.D. at 379. Mid-litigation letters to parties are not proof of a government's actual national interests. *Id.* ("This letter is not persuasive proof that defendant or its officers or managing agents will be criminally prosecuted for complying with an order of this Court. Nor has defendant presented any evidence regarding the manner and extent to which Singapore enforces its secrecy laws."). Naked fear of prosecution is not sufficient. *Linde*, 269 F.R.D. at 197 *cited with approval Las Vegas Sands*, 130 Nev. Adv. Op. 61, 331 P.3d at 880 .

The United States has an overwhelming interest in ensuring that Jacobs – and all of its citizens – receive full and fair discovery to uncover the truth of their judicial claims. Nevada's interest is equally strong. SCL did not introduce any official statement of the Macanese government ***outside of this litigation*** regarding its interests in preventing SCL's disclosure of information. To be sure, SCL presented letters purportedly from the OPDP but those letters did not express interest in the redaction of this information ***before the case***. *See Richmark Corp*, 959 F.2d at 1476 (letters from PRC's State Secrecy Bureau sent during litigation ***do not*** constitute statement of interest because they were sent in response to the litigation in question). And, despite being aware of this litigation and the grandiose claims of wide-reaching implications, the Macanese government has not moved to intervene or even file an *amicus* brief to state its actual interests (if any). *Chevron Corp*., 296 F.R.D. at 206-07; *In re Rubber Chems. Antitrust Litig*., 486 F. Supp. 2d at 1082 & n.2.

As the district court found, SCL presented no evidence that it will actually be subject to any serious consequence for complying with a court order. SCL purposefully neglected to provide the OPDP with all of the necessary information

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required by the law to make a satisfactory request. (PA15943.) SCL even failed to invoke the proper provision of the MPDPA when asking for permission to review and redact. (PA15943-44.) *See Linde*, 269 F.R.D. at 199 ("Defendant's letters requesting permission from foreign banking authorities to disclose information protected by bank secrecy laws are not reflective of an "extensive effort" to obtain waivers . . . . Instead, the letters were calculated to fail."). And, once the OPDP rejected SCL's feeble request, SCL did not re-submit the request with corrected information and did not otherwise challenge the OPDP's decision in court despite being aware of its ability to do so. (PA4145, 4581-83, 15943-44.)

The threat of reprisal from the Macanese Government was so remote that Fleming averred that he did not even bring the decision to redact in violation of the district court's September 2012 Order before SCL's Board of Directors for discussion. (PA4132-33.) The Board did not authorize the decision despite the allegedly "grievous" consequences that could occur. (PAA4140-41.) If the decision to redact was as "difficult" as SCL would have the Court believe, the topic would have been presented to SCL's Board of Directors.

The district court rightfully concluded that Macau does not have a serious interest in privacy because SCL discloses personal data daily without any repercussions. (PA43822-23.) SCL has no MPDPA problem disclosing personal data when it benefits its own business interests, but when it's time to comply with a Nevada court's discovery orders, the MPDPA suddenly becomes impenetrable. In truth, SCL has exaggerated Macau's interest as an excuse to shield evidence and delay this case.

On balance, the district court weighed each of the factors outlined in this Court's decision in *Las Vegas Sands v. Eighth Judicial District Court*, 130 Nev. Adv. Op. 61, 331 P.3d 876 (2014) and provided a detailed explanation of all of the facts and circumstances justifying the sanctions that it imposed. The district court did not manifestly abuse its discretion by imposing a lighter combination of

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sanctions that are less damaging than the default or striking of SCL's jurisdictional defense that SCL actually deserved. The District Court was correct that the sanctions order "was one that [Sands China was] lucky to get. . . ." (PA43908.)

D. The Sanctions are Justified By NRCP 37

Nevada Rule of Civil Procedure 37 authorizes sanctions for "willful noncompliance with a discovery order of the court." *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990). In addition to Rule 37, the Court has "inherent equitable powers" to impose sanctions for "abusive litigation practices." *Id*. (citing *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 916 (9th Cir. 1987)) (citations omitted); *see also GNLV Corp. v. Serv. Control Corp.*, 111 Nev. 866, 869, 900 P.2d 323, 325 (1995) (noting that courts have the inherent authority to impose discovery sanctions "where the adversary process has been halted by the actions of the unresponsive party."). As this Court has warned, "[l]itigants and attorneys alike should be aware that these [inherent] powers may permit sanctions for discovery and other litigation abuses not specifically proscribed by statute." *Young*, 106 Nev. at 92, 787 P.2d at 779.

The ***minimum*** sanction a court must impose is one that deprives the wrongdoer of the benefits of their violations. *See Burnet v. Spokane Ambulance*, 933 P.2d 1036, 1041 (Wash. 1997) (*en banc*) ("The purpose of sanctions generally are to deter, punish, to compensate, to educate, and ***to ensure that the wrongdoer does not profit from the wrongdoing***." (emphasis added)); *Woo v. Lien*, No. A094960, 2002 WL 31194374, at *6 (Cal. Ct. App., Oct. 2, 2002) (upholding trial court's imposition of sanctions because not doing so "would allow the abuser to benefit from its actions."); *see also Rodriguez v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, 120 Nev. 798, 805, 102 P.3d 41, 46 (2004) ("[C]ivil contempt is said to be remedial in nature, as the sanctions are intended to benefit a party by coercing or compelling the contemnor's future compliance. . . .").

This Court has announced a number of factors to consider when assessing

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the propriety of a sanction.

> The factors a court may properly consider include, but are not limited to, the degree of willfulness of the offending party, the extent to which the non-offending party would be prejudiced by a lesser sanction, the severity of the sanction of dismissal relative to the severity of the discovery abuse, whether any evidence has been irreparably lost, the feasibility and fairness of alternative, less severe sanctions, such as an order deeming facts relating to improperly withheld or destroyed evidence to be admitted by the offending party, the policy favoring adjudication on the merits, whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney, and the need to deter both the parties and future litigants from similar abuses.

Young, 106 Nev. at 93, 787 P.2d at 780. This district court's sanction is supported by each of these considerations.

1. Sands China's violation of the District Court's Order is Willful.

The district court correctly determined that SCL's disobedience is willful because it is not factually impossible for SCL to comply. (PA43823-24.) For example, in *Richmark Corporation*, the resisting party made the same argument that SCL advances here. It "contend[ed] that it has no 'present ability' to comply with the discovery order because doing so would violate PRC law." 959 F.2d at 1481. The Ninth Circuit soundly rejected this position. The court held "[t]o prevail here, [the resisting party] bears the burden of proving that it is '*factually impossible* ' to comply with the district court's order – for example, because the documents are not in [the party's] possession or no longer exist." *Id.* Like SCL, the resisting party never disputed that it had the ability to produce the documents, it only argued "that disclosing the information will result in negative consequences for it, in that it might be prosecuted by the PRC." *Id.* This was not enough to "make out a showing of present inability to comply." *Id.*

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2. Jacobs has been severely prejudiced.[13]

As the district court noted, prejudice is presumed from the failure to comply with discovery orders and the accompanying delay. *Foster v. Dingwall*, 126 Nev. Adv. Op. 6, 227 P.3d 1042, 1049 (2010) (citing *In re Phenylpropanolamine (PPA) Products*, 460 F.3d 1217, 1236 (9th Cir. 2006) (holding that, with respect to discovery abuses, "[p]rejudice from unreasonable delay is presumed" and failure to comply with court orders mandating discovery "is sufficient prejudice")).

Prejudice also stems for the destruction and inability to use relevant evidence. *GNLV Corp.*, 111 Nev. at 870, 900 P.2d at 325. The evidence presented established that the MPDPA redactions have led to the permanent loss of evidence. The MPDPA redactions destroy any evidentiary value of the documents because, with the redactions, witnesses do not have "the slightest idea" what the redacted documents pertain to. (PA15645-47.) Leven testified that he could not make heads or tails of the documents as a result of the MPDPA redactions. (PA15645.) Witnesses cannot tell or recall if they were even involved with the documents. (PA15565-67, 15569.) As a corollary, it is impossible for Jacobs to lay a foundation for the documents due to the MPDPA redactions. (PA15559-69.) Additionally, the MPDPA redaction of personal data and names precludes Jacobs and his attorneys from determining or testing whether SCL's document search terms yielded all relevant and responsive documents located in Macau because, most often, the Boolean search terms used to search for (and produce) responsive documents consist of the names of individuals. (PA4487, 4494-95, 4499.)

3. The District Court imposed lesser sanctions than warranted by Sands China's Conduct

The RESTATEMENT (THIRD) OF FOREIGN RELATIONS Law § 442(1)(b) states

[13] The stay should be lifted because it worsens the prejudiced described here. *See* NRAP 8(c)(3) (considering whether the real party in interest "will suffer irreparable or serious injury if the stay. . .is granted.").

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that the "[f]ailure to comply with an order to produce information may subject the person to whom the order is directed to sanctions, including . . . a determination that the facts to which the order was addressed are as asserted by the opposing party." "[A] court or agency may, in appropriate cases, make findings of fact adverse to a party that has failed to comply with the order for production, even if that party has made a good faith effort to secure permission from the foreign authorities to make the information available and that effort has been unsuccessful." *Id*. at (2)(c).

Moreover, this adverse inference is in accord with Nevada law. NRS 47.250(3) permits a rebuttable inference that evidence that is willfully suppressed would be adverse if produced. *See also Bass-Davis v. Davis*, 122 Nev. 442, 448, 134 P.3d 103, 106 (2006). NRCP 37(b)(2) imposes a similar sanction for disobeying a court's discovery order. It provides that the "designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order." NRCP 37(b)(2).

Courts recognize that the adverse inference which the district court imposed here against SCL "serves the remedial purpose of restoring the prejudiced party to the same position he would have been in absent the wrongful destruction of [or willful refusal to produce] evidence by the opposing party." *Chevron Corp*., 296 F.R.D. at 222. In other words, it restores the evidentiary balance. *Linde*, 269 F.R.D. at 203. Again, a showing of bad faith is not required. "The inference is adverse to the [nonproducing party] not because of any finding of moral culpability, but because the risk that the evidence would have been detrimental rather than favorable should fall on the party responsible for its [nonproduction]." *Id.* at 200 (quotations omitted).

The adverse inference imposed by the district court by itself does not even level the evidentiary playing field and deprive SCL of the benefit of not producing information it is obligated to provide. *Burnet*, 933 P.2d at 1041; *Rodriguez*, 120

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Nev. at 805, 102 P.3d at 46. Hence, the preclusion of witnesses and evidence was necessary to neutralize the advantage SCL gains not producing evidence that its own reviewers have acknowledged is relevant/responsive to jurisdictional discovery. NRCP 37(b)(2) authorizes the district court to preclude evidence "to support or oppose designated claims or defenses, or prohibit [a] party from introducing designated matters in evidence."

The district court's monetary fine is modest relative to SCL's repeated disobedience and incorrigible behavior. A much greater sanction would have been appropriate. In *Richmark Corporation v. Timber Falling Consultants*, a company resisted discovery, and refused to comply with court orders, based upon "State Secrecy Laws" of the People's Republic of China. 959 F.2d 1471-72. As a sanction, the district court awarded the discovery party its attorneys' fees and costs and $10,000 a day in contempt fines. *Id*. at 1472. The Ninth Circuit affirmed the sanction even though, by the time of the appeal, the sanction amount "surpassed the amount of the underlying [$2.2 million dollar] judgment . . . ." *Id*. at 1481.

Here, the district court ordered $250,000 in contributions to charitable organizations. Considering the ineffectual nature of the first $25,000 sanction, and this litigant's extreme wealth, a sanction equivalent to $10,000 a day (or more than $7 million) would have been appropriate. Even though SCL's action will be unaffected by the amount of the district court's sanction, this factor weighs in favor of *increasing* the amount, not eliminating the sanction. *Richmark Corp*., 959 F.2d at 1482 ("[W]ere we to conclude that $10,000 per day was insufficient to coerce compliance, the appropriate solution would seem to be to remand the case to the district court so that it can *increase* the sanction. Dismissing the contempt sanction in its entirety, the result Beijing seeks, certainly would not be warranted.").

In addition, the award of attorneys' fees and costs associated with Jacobs' Renewed Motion for NRCP 37 Sanctions and SCL's violations of the District

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Court's September 2012 Order is necessary to even the scales and remove the financial burden intentionally inflicted on Jacobs. SCL has demonstrated through its discovery abuses that it wants to stall and spend Jacobs into submission. This sanction is mandatory for any successful Rule 37 motions. NRCP 37(a)(4)(A) ("If the motion is granted. . .the court ***shall***. . .require the party. . .whose conduct necessitated the motion. . .to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees. . . .") (emphasis added).

Finally, requiring Petitioners to search and produce relevant documents within their possession, custody, and control and located *in the United States* can hardly be considered a sanction. They had a preexisting obligation to search and produce the responsive information from the transferred data surreptitiously brought to the United States long ago. (PA1768.) The district court's directive in its March 6, 2015 Order is simply a reaffirmation of a process that should have been completed years ago.

4. The remaining* Young *factors justify the Sanctions

The district court's combination of sanctions is the lowest possible penalty for SCL's abuses and disregard of the district court's September 2012 Order. As described previously, evidence has been irreparably damaged and lost. Any lesser sanction — or diluting the district court's Order — would allow SCL to profit from its improper redactions and deprive Jacobs of a fair evidentiary hearing. The district court's sanction does not run afoul of the policy of resolving issues on the merits because SCL's personal jurisdiction defense was not stricken and it can still participate in the jurisdictional hearing. (PA43828.) The sanctions do not punish the client for the misconduct of its attorney because Fleming represented that he alone made the ultimate decision to redact the documents. (PA4132.) Lastly, serious sanctions are necessary to deter this sort of misconduct in the future. *Young*, 106 Nev. at 93, 787 P.2d at 780.

E. The District Court's Sanctions Easily Comport With Due Process

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The district court's sanctions do not offend Due Process as Petitioners bluster. This Court has held that Due Process does not preclude the greater "sanction[] of dismissal and entry of default judgment based on discovery abuses. . . ." *Young*, 106 Nev. 88, 93-94 & n.1, 787 P.2d 777, 779-80 & n.1 (1990) (collecting cases).

In similar a case, the United States Supreme Court has approved the striking of a party's personal jurisdiction defense as a sanction for violating a discovery order. *See, e.g., Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982). The Supreme Court found that this sanction does not offend Due Process because the defense may be waived or lost by estoppel. *Id.* at 701-07. "The actions of the defendant may amount to a legal submission to the jurisdiction of the court, whether voluntary or not." *Id.* at 704-05 Other courts have acknowledged under like circumstances that the "sanction [of] striking their personal jurisdiction defense would be appropriate for failure to comply with the order to produce insofar as it required production of documents bearing on their personal jurisdiction defense in this action." *Chevron Corp.*, 296 F.R.D. at 220.

In this case, the district court's sanctions are far more lenient. SCL may still participate in the jurisdictional hearing by objecting, cross-examining witnesses, and making opening and closing arguments applying the law to the facts. (PA43828.) And Jacobs still must meet his burden of proof. But even if SCL was correct that "the sanctions are tantamount to a directed finding of personal jurisdiction," (Pet. at 47), such a "directed finding" would not violate Due Process. *Ins. Corp. of Ireland*, 456 U.S. at 701-07. There is no honest dispute that SCL willfully and intentionally violated the September 2012 Order. *Id*. at 706.

Prohibiting SCL from presenting evidence at the jurisdictional hearing also comports with Due Process. Other courts have imposed the same preclusionary sanction under like circumstances. For example, in *State of Ohio v. Arthur Andersen & Co.*, 570 F.2d 1371-72 (10th Cir. 1978), the defendant argued that it

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could not comply with a discovery order because it would violate the laws of Switzerland. After analyzing *Societe Internationale v. Rogers*, the lower court imposed monetary and preclusionary sanctions. *Id*. at 1371-72. It ordered that the defendant "'shall not oppose or introduce any evidence opposing" Ohio's claims . . . ." *Id.* at 1374. The defendant sought review, and the Tenth Circuit Court of Appeals affirmed. The reviewing court found that the defendant's conduct — like the conduct of SCL — was deliberate, willful, and simply a diversionary tactic. *Id*. The court held that "[i]n the circumstances presented, the preclusionary sanctions were just and authorized by the Rule [37]." *Id*. at 1375. The appellate court also affirmed the award of attorneys' fees and costs. *Id*.

General Atomic Co. v. Exxon Nuclear Co., 90 F.R.D. 290 (S.D. Cal. 1981) is in accord. There, Exxon brought a motion for sanctions against the plaintiff for failure to produce documents located in Canada. *Id*. at 291. The plaintiff argued that production would violate Canadian regulations. *Id*. at 294. Unlike SCL, the plaintiff made several good faith attempts to overcome the regulations and also petitioned the Canadian courts for relief. *Id*. at 294-95. Because of these efforts, the court did not dismiss the plaintiff's complaint. *Id*. at 308. Instead, the court designated certain facts as presumed and precluded the admission of evidence. *Id*. The court found that a preclusion order prohibiting the introduction of evidence supporting these affirmative defenses was proportional to the nature of the prejudice to Exxon. *Id*. at 308. "***Preclusionary orders ensure that a party will not be able to profit from its own failure to comply***." *Id*. at 308 (emphasis added).

E. Sands China's Request for Reassignment Must be Denied.

SCL confirms its continuing campaign for delay with its groundless assertion that the district court has demonstrated "animus" and "pre-judg[ing] every major issue against SCL," such that it is entitled to the removal of the trial judge. Contrary to Petitioners' wants, a court's adverse rulings because a litigant does not follow court orders and engages in deception is not evidence of bias. It is just

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evidence that Petitioners cheating is not succeeding.

1. SCL's request is procedurally improper.

SCL's eleventh-hour attack on the district court's impartiality does not come close to meeting Nevada's procedural requirements. Nevada law provides two mechanisms to seek disqualification of a district judge. First, NRS 1.235 provides that "[a]ny party … who seeks to disqualify a judge for actual or implied bias or prejudice must file an affidavit specifying the facts upon which the disqualification is sought."

The affidavit "must be accompanied by a certificate of the attorney of record that the affidavit is filed in good faith and not interposed for delay . . . [and] filed "(a) [n]ot less than 20 days before the date set for trial or hearing of the case; or [n]ot less than 3 days before the date set for the hearing of any pretrial matter." NRS 1.235(1). None of Petitioners' counsel submit such an affidavit.

Additionally, "if new grounds for a judge's disqualification are discovered after the time limits in NRS 1.235(1) have passed, then a party may file a motion to disqualify based on [Nevada Code of Judicial Conduct] Canon 3E as soon as possible after becoming aware of the new information." *Towbin Dodge, LLC v. Eighth Judicial District Court*, 121 Nev. 251, 260, 112 P.3d 1063, 1069 (2005). "The motion must set forth facts and reasons sufficient to cause a reasonable person to question the judge's impartiality, and the challenged judge may contradict the motion's allegations." *Id.* As this Court has ruled, a motion filed pursuant to Canon 3E must be referred to another district court judge for hearing. *Id.*

SCL filed neither an affidavit pursuant to NRS 1.235 nor a motion under Canon 3E, cognizant that the charge is groundless and simply an attempt to bully anyone who dares rule against it. SCL's reliance on this Court's decisions in *Echeverria v. State*, 119 Nev. 41, 62 P.3d 743 (2003), and *Boulder City v. Cinnamon Hills Associates*, 110 Nev. 238, 871 P.2d 320 (1994), in support of its request is misplaced. Neither case involved a request to disqualify or recuse.

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Rather, *Boulder City* centered on a developer's action against a city based upon its denial of an application for a building permit. Overturning the district court's decision to limit the evidence at trial to the record before the city, this Court reassigned on remand "[i]n fairness to the district court judge and the litigants." 110 Nev. at 250, 871 P.2d at 327. Additionally, reassignment in *Echeverria* was required as the Court overturned the district court's criminal sentence because the state breached a plea agreement. 119 Nev. at 44, 62 P.3d at 745-46.

2. Sands China Cannot Meet the Standard for Disqualification.

Beyond its obvious procedural impropriety, SCL's request fails on its substance as well. As this Court is aware, judges are "presumed not to be biased, and the burden is on the party asserting the challenge to establish sufficient factual grounds warranting disqualification." *In re Dunleavy*, 104 Nev. 784, 788, 769 P.2d 1271, 1274 (1989) (quotations omitted).

Despite bearing the burden to prove reassignment is necessary, SCL provides no evidence in support of its request. Instead, it complains that the court has ruled against it on two sanctions hearings, the product of its own deception. As the United States Supreme Court has held, "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a ***deep-seated favoritism or antagonism that would make fair judgment impossible***." *Liteky v. U.S.*, 114 S.Ct. 1147, 1157 (1994) (emphasis added). "[N]either bias nor prejudice refer[s] to the attitude that a judge may hold about the subject matter of a lawsuit." *Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1170 (1998)). Thus, "[t]hat a judge has a general opinion about a legal or social matter that relates to the case before him or her does not disqualify the judge from presiding over the case." *Id.*

Furthermore, "rulings and actions of a judge during the course of official judicial proceedings do not establish legally cognizable grounds for

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disqualification." *In re Dunleavy*, 104 Nev. at 789, 769 P.2d at 1275. Rather, "[t]he personal bias necessary to disqualify must 'stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *Id.* at 790, 769 P.2d at 1275; *Liteky*, 114 S.Ct. at 1157 ("[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion. … Almost invariably, they are proper grounds for appeal, not for recusal."); *Garity v. Donahoe*, No. 2:11-cv-01805-RFB-CWH, 2014 WL 4354115, (D. Nev. Sept. 3, 2014)).

Here, SCL fails to submit any proof that the district court holds a "***deep-seated favoritism or antagonism***" that would make impartiality "***impossible***." Moreover, SCL provides no extra-judicial source for the Court's alleged bias. As shown, the Court's comments about its evidentiary findings are insufficient as are SCL's complaints about the sanctions imposed for its misconduct. *See City of Sparks v. Second Judicial District Court*, 112 Nev. 952, 955, 920 P.2d 1014, 1016 (1996) ("[I]mplicit in the district judge's authority to sanction is that the district judge must design the sanction to fit the violation."). Its request for recusal must fail.

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IV. CONCLUSION

For all the reasons stated above, Petitioners' request for a writ of mandamus should be immediately rejected and the temporary stay dissolved.

DATED this 27th day of March, 2015.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 font in double-spaced Times New Roman.

I further certify that I have read this brief and that it complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and 13,918 words.

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

DATED this 27th day of March, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Pisanelli Bice, and that on this 27th day of March, 2015, I electronically filed and served a true and correct copy of the above and foregoing **CONSOLIDATED ANSWER TO PETITION FOR WRIT OF PROHIBITION OR MANDAMUS; AND OPPOSITION TO EMERGENCY MOTION TO STAY** properly addressed to the following:

J. Stephen Peek, Esq.
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SERVED VIA HAND-DELIERY ON 03/20/13
The Honorable Elizabeth Gonzalez
Eighth Judicial District court, Dept. XI
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155

An employee of Pisanelli Bice, PLLC