IN THE SUPREME COURT OF THE STATE OF NEVADA

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Tracie K. Lindeman
Clerk of Supreme Court

SANDS CHINA LTD., a Cayman Islands corporation,

Petitioner,

vs.

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

Respondents,

and

STEVEN C. JACOBS,

Real Party in Interest.

Case Number: 67576

District Court Case Number: A627691-B

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR MANDAMUS RE MARCH 6, 2015 SANCTIONS ORDER

MORRIS LAW GROUP
Steve Morris, Bar No. 1543
Rosa Solis-Rainey, Bar No. 7921
900 Bank of America Plaza
300 South Fourth Street
Las Vegas, Nevada 89101
Telephone No.: (702) 474-9400

HOLLAND & HART LLP
J. Stephen Peek, Bar No. 1758
Robert J. Cassity, Bar No. 9779
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
Telephone No.: (702) 669-4600

KEMP, JONES & COULTHARD, LLP
J. Randall Jones, Bar No. 1927
Mark M. Jones, Bar No. 267
3800 Howard Hughes Pkwy, 17th Fl.
Las Vegas, Nevada 89169
Telephone No.: (702) 385-6000

Attorneys for Petitioner

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I. INTRODUCTION

SCL seeks relief from a district court order ("Sanctions Order") barring SCL from presenting any evidence in a *jurisdictional* hearing, thus ensuring that SCL will be found through sanction to be subject to the jurisdiction of the district court. In its Petition, SCL advanced a series of arguments showing that the Sanctions Order cannot be sustained under either Nevada Rule of Civil Procedure 37 or the Due Process Clause. In his Answer, Plaintiff fails to present a credible challenge to the major factual predicates underlying each of these arguments.

First, Plaintiff provides *no explanation* of how the redacted personal data has any relevance to the jurisdictional issue before the district court. Nor does Plaintiff cite any facts—or provide any examples—showing that the redacted data has any jurisdictional importance. Indeed, in his Answer, Plaintiff cites *only two emails* (out of a total production of thousands of documents), and both emails are demonstrably irrelevant to any jurisdictional claim.

Second, Plaintiff makes *no attempt* to defend as "reasonable" the district court's extraordinarily overbroad and burdensome discovery orders which required SCL to create novel and expensive logs and produce thousands of documents having no jurisdictional relevance. In fact, in his Answer, Plaintiff does not dispute SCL's assertion that the scope, burdens and costs of the jurisdictional discovery in this case are *unprecedented* in Nevada or in any other jurisdiction.

Third, Plaintiff does not deny that SCL's home government *required* the company to redact the personal data from the discovery documents and that this requirement was a "contributing" factor in SCL's decision to

make the redactions. Under controlling law, this is a critical fact in assessing the "willfulness" of SCL's conduct.

Fourth, Plaintiff does not challenge or even address SCL's showing that the sanctions imposed in this case are wildly disproportionate to the underlying "violation," particularly when compared to the only two other cases involving sanctions of similar severity. In those cases, the non-complying party refused to produce entire categories of documents that were "critical" to the opposing party's case, whereas, here, SCL made only limited redactions having no litigation importance, and it did so only to comply with the laws of its home nation.

Fifth—and perhaps most important—Plaintiff does not dispute SCL's showing that the evidence of record does *not* support the district court's finding that SCL acted with an intent to "conceal evidence" or "abuse" discovery. In his Answer, Plaintiff makes no attempt to explain or justify this critical finding, much less defend it.

In light of these unchallenged facts, the sanctions imposed by the district court violate this Court's August 7, 2014 Order, NRCP 37 and the Due Process Clause, and, for these reasons, it must be vacated.

II. ARGUMENT

In his Answer, Plaintiff claims that writ review of the district court's Sanctions Order is improper and that, in any event, the district court did not err in balancing the five factors specified by this Court. Plaintiff further claims that the sanctions imposed by the district court are consistent with both NRCP 37 and the Due Process Clause. None of these claims have merit.

A. Writ Review of the District Court's Sanctions Order in this Case is Proper.

In this case, the district court imposed sanctions that are tantamount to a directed finding of jurisdiction because a foreign company made redactions in compliance with the laws of its home jurisdiction. These remarkable facts qualify this case for writ review under any standard, notwithstanding Plaintiff's claims to the contrary.

Indeed, in prior decisions in this litigation, this Court reached exactly this conclusion. When SCL sought writ relief from the district court's initial decision to hold a sanctions hearing, the Court elected to entertain the Petition. August 7, 2014 Order in Nevada Supreme Court Case No. 62944 ("August 7, 2014 Order"), on file herein, at 7. The Court noted that the "intersection between Nevada discovery rules and international privacy laws is an issue of first impression in Nevada." *Id.* The Court also stressed that the "question of whether a Nevada district court may effectively force a litigant to choose between violating a discovery order or a foreign privacy statute raises public policy concerns and presents an important issue of law that has relevance beyond the parties to the underlying litigation and cannot be adequately addressed on appeal." *Id.* at 6-7. Nevertheless, the Court denied the earlier Petition because the district court had not yet had an opportunity to conduct a sanctions hearing. *Id.* at 11-12.

The district court has now held that hearing, and SCL's Petition is ripe for writ review. The Petition not only presents the *identical* "important issue of law" identified by this Court in the earlier Petition, but it also raises important constitutional and other issues based on the district court's unprecedented sanctions.

Plaintiff makes no mention of this Court's decision to entertain the earlier Petition. Instead, Plaintiff asserts that writ review is inappropriate in this case under the Second Circuit's decision in *Linde v. Arab Bank, PLC*, 706 F.3d 92 (2d Cir. 2013). This argument is misplaced for several reasons.

First, *Linde* did not involve a *jurisdictional* proceeding in which the district court effectively stripped a foreign corporation of its jurisdictional defense before determining that it even had jurisdiction over the company. This result runs counter to the policy favoring adjudication on the merits, as well as this Court's August 26, 2011 Order directing the district court to issue "findings regarding general jurisdiction" after conducting an "*evidentiary hearing*." PA234-37 (emphasis added).

Second, as *Linde* make clear, the availability of writ review in cases involving international privacy laws depends on whether the district court clearly erred in balancing the same five factors identified by this Court. 706 F.3d at 107-12. In this case, unlike *Linde*, the district court clearly erred by making findings that are directly contrary to the evidence of record. Indeed, as shown below, Plaintiff makes no attempt to defend many of the critical findings underlying the district court's Sanctions Order.

Third, in *Linde*, the Second Circuit applied federal law, and it did not take into account the policy reasons underlying writ review by this Court. These reasons include the need to resolve issues of "first impression in Nevada" (such as the "intersection between Nevada discovery rules and international privacy laws") or other issues of "importance" that "cannot be adequately addressed on appeal." August 7, 2014 Order, at 6-7.

Finally, Plaintiff completely ignores the other elements of the Sanctions Order which impose other requirements on SCL. For example, the Order requires SCL to pay $250,000 to *third parties* before any appeal in

the underlying litigation can possibly take place. Once SCL pays this amount, it will not be able to recover the funds even if it prevailed on appeal. This fact alone would constitute an irreparable harm if not remedied by this Court through a Writ of Mandamus.

For all of these reasons, Plaintiff's claim that SCL's Petition is not properly subject to writ review is meritless.

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

In its Petition, SCL showed that the district court failed to provide any detailed factual analysis reflecting its *own* careful balancing of the five factors specified in the Court's Order. SCL also showed that, in applying the five factors, the district court reached conclusions that are directly contrary to the evidence of record. As discussed below, Plaintiff provides no credible response to either argument.

1. The District Court Failed to Engage in a "Particularized" Balancing of the Relevant Five Factors.

In its August 7, 2014 Order, this Court directed the district court to undertake a careful balancing of the five specified factors in deciding what sanctions if any should be imposed on SCL. August 7, 2014 Order, at 7-8, 10-11. Yet, notwithstanding this clear mandate, the district court did not engage in the "particularized analysis" required to balance the relevant factors. *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct.*, 482 U.S. 522, 543-44 n.29 (1987). Instead, the district court largely adopted Plaintiff's conclusory assertions with no detailed factual analysis of its own to show how it reached its conclusions.

In his Answer, Plaintiff makes no real attempt to refute this showing. Indeed, in his discussion of the "five factor" test, Plaintiff cites the district court's opinion only five times—and each of the citations are to conclusory

statements that the district court adopted directly from Plaintiff's own proposed findings.[1] Plaintiff then purports to buttress these findings by providing *his own factual analysis* based (allegedly) on the evidence of record. *See, e.g.*, Pl. Br., at 24-30, 31-32.

To take just one example, Plaintiff cites the district court's conclusory finding that "SCL destroyed the evidentiary value of the documents," PA43816 ¶ 102, and then attempts to support that finding with two exhibits that he reproduces in his brief—even though the district court nowhere described or even mentioned the two exhibits in its Sanctions Order. Pl. Br., at 26.

This *post hoc* analysis is no substitute for the careful *judicial* balancing that this Court contemplated in its August 7, 2014 Order. The district court's failure to engage in such an analysis undermines the reliability of its major findings, all of which (as shown below) are contrary to the evidence of record.

2. The District Court's Findings Are Contrary to the Evidence of Record.

a. The Evidence Showed that the Redacted Personal Data Has No Relevance to the Jurisdictional Issue.

In its Petition, SCL stressed that the district court never explained how redacted personal data such as names and addresses could have any "importance" to the only issue properly before the court—its jurisdiction

[1] The five district court "findings" cited by Plaintiff, (Pl. Br., at 26,31,35), and their source in Plaintiff's proposed findings are: (1) **PA43816, ¶ 102** (Plaintiff's Proposed Findings of Fact, ¶ 56); (2) **PA43820 ¶ 120** (Plaintiff's Proposed Conclusions of Law, ¶ 9); (3) **PA43830 ¶ 127** (Plaintiff's Proposed Conclusions of Law, ¶ 11); (4) **PA43822 ¶ 131** Plaintiff's Proposed Conclusions of Law, ¶ 16) and (5) **PA43822 ¶ 134** (Plaintiff's Proposed Conclusions of Law, ¶ 18).

over SCL. In so doing, SCL raised a very simple question: How can the redacted data have any relevance to the jurisdictional claims made by Plaintiff?

Nowhere in his Answer does Plaintiff answer this simple question. Nor does Plaintiff identify a single redacted document in which the identity of the redacted name would have any jurisdictional significance—or identify a single jurisdictional issue to which the redacted data would be relevant.

Instead, Plaintiff simply claims that the relevance of the data can be presumed because the Macau reviewers selected the documents for production. Pl. Br., at 24-25. This argument is a *non-sequitur*. The mere fact that the Macau reviewers—whom Plaintiff elsewhere derides for their lack of legal training and experience (Pl. Br., at 16)—selected the documents as *responsive* to Plaintiff's document requests does not establish the jurisdictional *relevance* of the redacted data. This is particularly true since the key issue is not the relevance of the *documents* (all of which SCL produced), but the relevance of the *redacted data*. Plaintiff cannot rely on the Macau reviewers to explain why the redacted data has any jurisdictional importance when he cannot provide a coherent explanation of his own.

Plaintiff next tries to explain his failure to present *any* evidence at the hearing showing the "importance" of the redacted data. To this end, Plaintiff asserts that he did not introduce a larger number of exhibits because the parties agreed to stipulate to the number of redacted documents. Pl. Br., at 25-6. This claim is baseless. Plaintiff agreed to the stipulation in lieu of a mass introduction of documents for the sole purpose of establishing the total number of redacted emails. *See* PA43206. Nothing

in this agreement prevented Plaintiff from introducing as many specific exhibits as he wanted to prove jurisdictional relevance. Yet, to support his claims, Plaintiff ended up relying on a grand total of *just 27 exhibits*, even though he bore the burden of proof on prejudice.

In its Petition, SCL demonstrated that none of the 27 documents have any jurisdictional significance. *See* SCL Br., at 23-24. In his Answer, Plaintiff does not challenge this showing, other than to cite just *two* emails (Exhibits 16 and 32), which now represent the *sum total* of his evidence on the "importance" of the redacted data. The two emails are reproduced in relevant part below (from SCL's Power Point presentation at the hearing):

RE: Board of Director Meeting Information Request

From:

"Personal @venetian.com.mo>

To:

"Personal @venetian.com.mo>

Date:

Tue, 07 Apr 2009 13:50:44 +0800 → Prior to SCL's existence

Personal

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

Personal Redaction

Please consider the environment before printing this email

Sent: 07 April 2009 13:50

→ Prior to SCL's existence

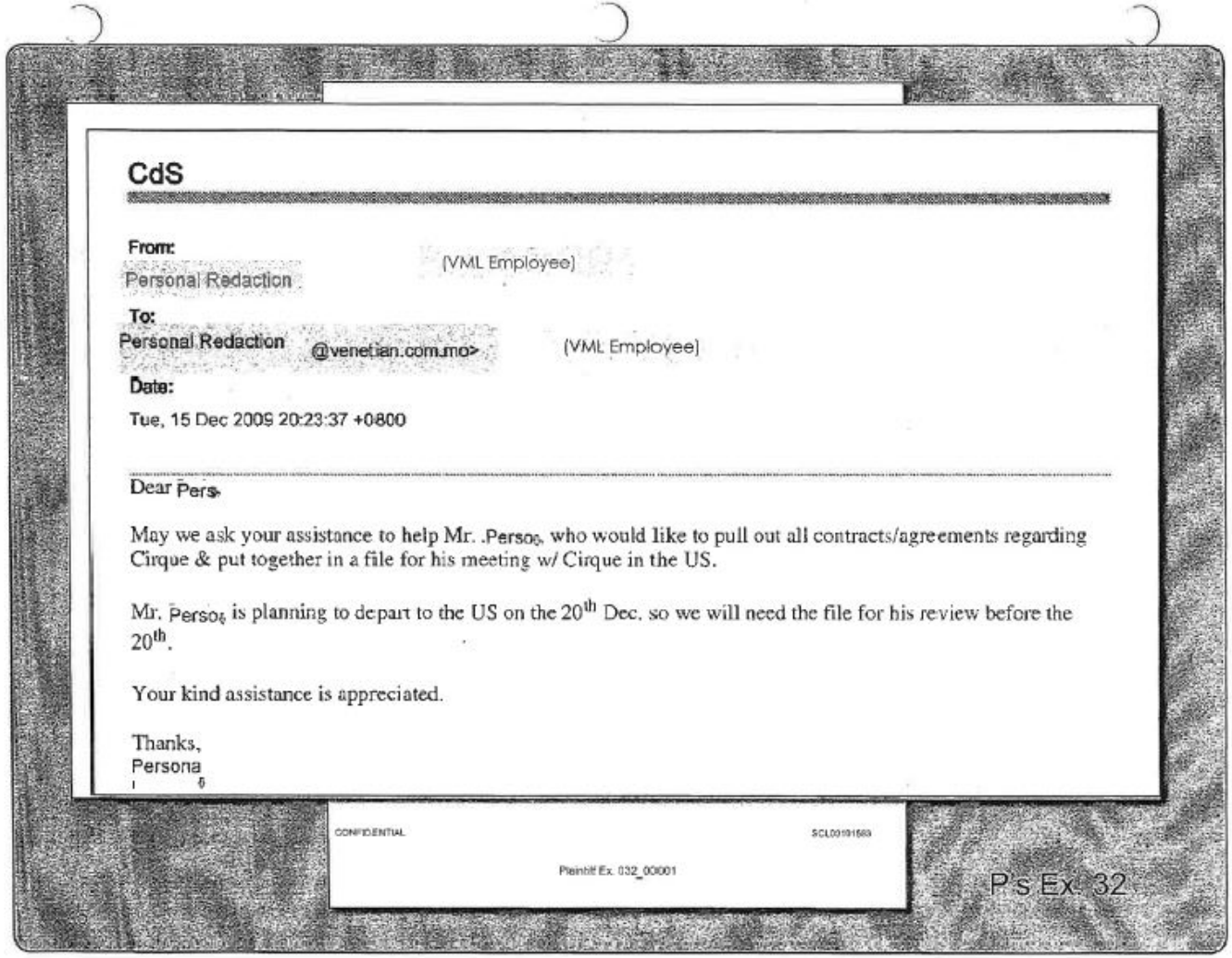
CONFIDENTIAL

SCL0016720

Plaintiff Ex. 016_000001

P's Ex. 16

PA43658



CdS

From:
Personal Redaction (VML Employee)

To:
Personal Redaction @venetian.com.mo> (VML Employee)

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

CONFIDENTIAL SCL00191589

Plaintiff Ex. 032_00001

P's Ex. 32

Even these exhibits provide no help to Plaintiff. In both exhibits, the actual content of the document is clear: Exhibit 16 describes LVSC Chairman Sheldon Adelson's review of certain HR decisions made by VML, while Exhibit 32 recites that a VML employee wants to gather contracts with Cirque de Soleil in anticipation of "his meeting with Cirque in the US." These exhibits have ***no*** jurisdictional relevance. Exhibit 16 is dated April 7, 2009, which is ***prior*** to SCL's existence, PA 43918 at 3 ¶B, and it therefore has no relevance to the question of whether the district court has jurisdiction over SCL. Exhibit 32 deals with an upcoming U.S. meeting with Cirque de Soleil. It is clear from the face of Exhibit 32 that, contrary to Plaintiff's claims (Pl. Br., at 28), it has nothing to do with the reasons for Plaintiff's termination or any other issue bearing on jurisdiction.

Furthermore, even if Exhibits 16 or 32 could be viewed as relevant, the "jurisdictional importance" would arise from the *content of the document*, not from the redacted names. Indeed, Plaintiff could substitute ***any name he wanted*** for the redacted names in either Exhibit 16 or 32 (or in any of the other exhibits he relied on to show prejudice), and the jurisdictional "importance" of the document would remain ***unchanged***. *See* PA43622-23, PA43638-39 and PA43641-46.

Thus, the two exhibits cited by Plaintiff provide compelling proof of the three major points made in SCL's Petition: (1) the redactions in the Macau documents generally do not obscure the content of the document; (2) the documents generally deal with mundane topics like schedules and events; and (3) in any event, the redacted personal data (generally the names of Macanese citizens) is not relevant to Plaintiff's jurisdictional claims.

Finally, like the district court, Plaintiff completely ignores the second and equally critical issue in determining the "importance" of the redacted data: Are the redactions "cumulative" to other evidence available to Plaintiff? *Richmark Corp. v. Timber Falling Consultants,* 959 F.2d 1468, 1475 (9th Cir. 1992). Plaintiff makes no attempt to show that the redacted data was non-cumulative to the depositions and thousands of documents produced by Defendants. This is true, moreover, even though (as Plaintiff's own exhibits show) the *content* of the redacted Macau documents is generally clear. As a result, if the redacted documents were truly non-cumulative to other evidence, Plaintiff would be able to prove the point.

Thus, like the district court, Plaintiff makes no showing that the redacted personal data is both "important" to the jurisdictional issue and non-cumulative to the other evidence in the case. For this reason alone, the Sanctions Order should be vacated.

b. The Jurisdictional Discovery Was Broad and Unreasonably Burdensome.

The sole basis for Plaintiff's claim that the discovery requests in this case were "specific" is that the court previously reviewed and approved the 11 broad categories of documents that Plaintiff could request. PA43819 ¶ 119. He provides no other facts or analysis to support a finding that the discovery was not overbroad or unduly burdensome. Indeed, he does not even describe the district court's discovery orders, or address the limits on the scope of jurisdictional discovery following this Court's decision in *Viega GmbH v. Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 40, 328 P.3d 1152 (2014 (Case No. 59976)), and the U.S. Supreme Court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 (2014).

As a result, Plaintiff makes no attempt to defend the district court's initial discovery order, which permitted Plaintiff to issue 24 Requests for Production and depose four of Defendants' senior executives as part of *jurisdictional* discovery. PA539-44. Nor does Plaintiff defend the district court's March 27, 2013 *sua sponte* decision directing SCL to (1) greatly increase its document production by searching the records of 13 additional *merits* custodians (with no finding that such a search was likely to yield any jurisdictional evidence); and (2) log *all documents* that SCL withheld on the grounds that they were irrelevant to jurisdiction (which ultimately required the creation of a costly 37,000 page log). PA2258:26-2259:1.

Likewise, Plaintiff provides no response to the striking contrast between the grossly overbroad and oppressive discovery orders in this case and the narrowly-tailored requests in other cases upholding sanctions. *See, e.g., Richmark*, 959 F.2d at 1475 (request for "assets" discovery to enforce a judgment); *Linde,* 269 F.R.D. at 193 (request for "bank account" discovery to prove a link with terrorist groups).

Finally, Plaintiff does not dispute SCL's assertion that the burdens, costs and scope of the district court's jurisdictional discovery orders in this case are *literally unprecedented*—not just in Nevada, but in every jurisdiction in the country. Standing alone, this undisputed fact proves that the discovery orders in this case were so overbroad and unreasonable as to weigh heavily against the imposition of sanctions. *Richmark*, 959 F.2d at 1475.

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

In its Petition, SCL showed that the district court ignored the third factor cited by this Court—the location of the requested documents—by

refusing to give any weight to the documents' location in Macau. PA43820 ¶ 120. The district court reached this result by simply announcing—with no analysis or explanation—that the location of the documents "does not militate against sanctions or their importance to jurisdictional issues." PA34820 ¶ 120.

In his Answer, Plaintiff adopts the same conclusory approach by announcing—again with no analysis or explanation—that the district court "acted well within its discretion" in reaching this conclusion. Pl. Br., at 31. This argument ignores the controlling body of law (not to mention this Court's directive) holding that the location of the requested documents in a foreign country is a relevant factor because the individuals required to produce the documents are "subject to the law of that country." *Richmark*, 959 F.2d at 1475. Consequently, on this ground as well, the district court erred in its balancing of the factors specified by this Court.

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

In response to SCL's showing that LVSC provided substantially the same information as the information sought from SCL, Plaintiff asserts—with no citation to authority—that "LVSC's production of *other documents* is not, by definition, a substantial equivalent of the documents that remain redacted." Pl. Br., at 32. Under Plaintiff's theory, SCL can satisfy this fourth factor only if it provides a "substantial equivalent" of the actual redacted documents. *Id.*

This theory is wrong as a matter of law. As SCL showed in its Petition, the correct legal test is whether the party requesting the documents can obtain a "substantial equivalent" of the "*information sought*"—as opposed to the actual documents—from another source.

Richmark, 959 F.2d at 1475. In this case, the "information sought" was set forth in the *identical* discovery requests that Plaintiff served on LVSC and SCL. In response to these requests, LVSC produced more than 24,000 documents (including unredacted copies of all responsive Macau documents found in the United States) and submitted four of its executives for deposition.

To be sure, Plaintiff claims that SCL's "generic reference" to LVSC's production of "thousands of other documents" does not establish "substantial equivalence." Pl. Br., at 32. But this claim misses the point. LVSC made its production in response to the *same* discovery requests that Plaintiff served on SCL, and Plaintiff never asserted that LVSC's production was inadequate to address his jurisdictional needs. Indeed, in his brief, Plaintiff *still* cannot identify *a single jurisdictional fact or issue* that the LVSC documents and depositions do not adequately address.

Nor is that all. SCL also (1) undertook "extensive efforts" to locate and produce unredacted copies of the Macau documents in the U.S. (PA43814 ¶ 93); (2) created a "Redaction Log" that identified the employer of each individual whose name had been redacted (PA4225-4387, 4750-4751, 5262); and (3) obtained "consents" from the four key LVSC executives to "unredact" their names from the Macau documents. PA43815 ¶ 95; PA3890-3893. Finally, SCL offered to conduct more searches for duplicate documents or seek specific consents for any documents Plaintiff identified as being important to his jurisdiction theories–but Plaintiff refused to respond.

Taken together, these steps provided Plaintiff with more than a "substantially equivalent" means of obtaining the jurisdictional "information sought" from SCL. This is particularly true in light of

Plaintiff's persistent refusal to make any effort to mitigate any possible claim of prejudice—not only by refusing Defendants' request to identify specific documents that he wanted unredacted, but also by refusing Defendants' request to consent to the "unredaction" of his own name from the redacted documents. PA4745-4749. In a footnote, Plaintiff tries to minimize the import of these refusals by claiming that he had "no obligation to provide an MPDPA consent" in light of the district court's September 2012 sanctions order. Pl. Br. 32, n.12.

This argument misses the point. The question is not whether Plaintiff was "obligated" to waive his rights under the MPDPA, but whether he had any good faith basis for refusing to do so—particularly in light of his professed commitment to discovering the "truth" of his jurisdictional claim. Pl. Br., at 34. In other cases, the party seeking discovery generally does "everything in its power" to obtain the necessary information from other sources. *Richmark*, 959 F.2d at 1476. But in this case, Plaintiff plainly had no interest in assisting SCL in obtaining alternative sources for the information. To the contrary, in an effort to secure a litigation advantage, Plaintiff *actively blocked* SCL's efforts to obtain such sources.

This refusal to cooperate underscores the hypocritical nature of Plaintiff's criticism of SCL for not obtaining "consents" from all other SCL employees. Pl. Br., at 14. Plaintiff is SCL's former CEO, and he was directly involved in (or knowledgeable about) any SCL activities having jurisdictional relevance. If the former CEO refused to provide consent, it made little sense for SCL to try to obtain consents from all the other SCL employees whose names had been redacted—unless, of course, Plaintiff agreed to identify specific documents having alleged jurisdictional importance, in which case SCL would try to seek the necessary consents.

PA1941:25-1942:2; PA43717. Plaintiff, however, refused to provide this information, just as he refused to consent to the "unredaction" of his name from the Macau documents.

Accordingly, this case presents the striking paradox of a Plaintiff who seeks the imposition of sanctions on SCL for its compliance with the MPDPA, while, at the same time, invoking his *own* rights under the MPDPA to block SCL's efforts to mitigate his claims of "prejudice." This Court should not countenance such transparent gamesmanship.

e. The District Court Failed to Properly Balance the National Interests.

Plaintiff defends the district court's decision to give no weight to Macau's interest in the MPDPA on the ground that SCL presented no evidence "beyond the MPDPA itself to demonstrate Macau's supposed interest." Pl. Br., at 34. This claim is incorrect. At the hearing, SCL showed that, among other things, on August 2, 2012, a senior Macau official announced that if the government found "any violation or suspected breach" of the MPDPA, it "will take appropriate action ***with no tolerance***." PA4636:18-25 (emphasis added). In the same announcement, the official stated that "[g]aming enterprises should pay close attention to and comply with relevant laws and regulations." *Id.*

This announcement reinforced the message that SCL received in a series of meetings with the OPDP in 2012. As the district court expressly found, in these meetings, the OPDP made clear to SCL that the failure to redact personal data from the discovery documents would violate the MPDPA and that any violation would be strictly enforced. PA43800 ¶¶ 42-44. Based on its own findings alone, the district court clearly erred in

refusing to give any weight to Macau's interest in enforcing its data privacy laws.

Equally unfounded is the district court's finding that the U.S. has an "*overwhelming* interest" in compelling the disclosure of the redacted data. Like the district court, Plaintiff tries to defend this statement by relying entirely on highly-generalized abstractions such as the right of every litigant to "receive full and fair discovery to uncover the truth of their judicial claims." (Pl. Br., at 34).

At no point does Plaintiff or the district court identify any specific U.S. interest implicated by the compelled disclosure of the redacted data *in this case. Compare Linde*, 706 F.3d at 99 (the withheld documents implicated "the substantial public interest in compensating victims of terrorism and combating terrorism"). This failure reflects the simple truth that the United States has *no national interest* in compelling SCL to violate the laws of Macau by disclosing personal data having no relevance to jurisdiction or any other issue in this case.

C. The District Court's Order Violates NRCP 37.

In its Petition, SCL demonstrated that the district court violated NRCP 37 by imposing sanctions without any factual basis to show either prejudice or a bad faith intent to withhold evidence. *See, e.g., City of Sparks v. Second Jud. Dist. Ct.,* 112 Nev. 952, 920 P.2d 1014, 1016 (1996). Plaintiff does not rebut SCL's showing on either point.

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

Plaintiff cites no credible evidence to support his claims of "severe prejudice." He first argues that prejudice should be "presumed" from the "unreasonable delay" that has allegedly resulted from the redactions issue.

(Pl. Br., at 38). But the district court expressly found that the delays in this case resulted from multiple causes, including various privilege and other issues that have been the subject of several writs and a lengthy *in camera* review. PA43826 ¶ 153. Plaintiff cites no evidence showing that the "redaction" issue alone has been the cause of any specific period of delay, much less an "unreasonable" delay.

Plaintiff also claims that he suffered prejudice because SCL used untrained Macau reviewers with "unidentified legal knowledge" to make "relevancy determinations" in Macau. Pl. Br., at 16. This argument, of course, is squarely at odds with Plaintiff's claim that the redacted documents can be deemed to be "relevant" because SCL's Macanese reviewers identified them as "responsive" documents. *Id.,* at 24-25. But even if this abstract and non-specific "process" claim could be credited, it does not violate any discovery order entered by the district court. As a result, Plaintiff's "process" criticisms cannot serve as the basis for his prejudice claim.

Plaintiff also makes vague references to the "permanent loss of evidence" and the "destruction" of evidence, but provides absolutely no specifics to support the claim. Pl. Br., at 38. Indeed, in his entire, two-paragraph discussion of prejudice, Plaintiff provides only *one* specific example of alleged prejudice—the deposition testimony of former LVSC executive Michael Leven, who stated that he did not have the "slightest idea" what topics were addressed in certain redacted documents. *Id.* Yet, in making this argument, Plaintiff fails to reveal that Defendants produced *unredacted* copies of the *same* exhibits shown to Mr. Leven after locating

them in the United States—*and none of the emails has any jurisdictional significance at all*.[2]

Thus Plaintiff's only specific example of prejudice turns out to have no prejudicial impact at all. This failure of proof again reflects the simple truth that the redacted personal data has no evidentiary value in this litigation.

2. No Facts Support the Finding that SCL Acted with an Intent to Conceal Discoverable Information.

Plaintiff argues that the district court correctly found SCL's violation of its order to be "willful" because "it is not factually impossible for SCL to comply." Pl. Br., at 37. Plaintiff further claims under the Ninth Circuit's decision in *Richmark* a finding that a party is "factually" capable of producing the requested information is all that is needed to assess "willfulness." *Id. citing Richmark*, 959 F.2d at 1481.

This claim is simply wrong. The courts (including the Ninth Circuit) have repeatedly recognized that in assessing willfulness, a judge must consider not only "factual impossibility," but also whether circumstances beyond the non-complying party's control "contributed to the non-compliance." *Societe Internationale Pour Participations Industrielles et Commericales, S.A. v. Rogers*, 357 U.S. 197, 211 (1958); *Richmark*, 959 F.2d at 1475, 1479; *LeGrande v. Adecco*, 233 F.R.D. 253, 257 (N.D.N.Y. 2005).

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[2] The emails deal with such inconsequential topics as expense folios (**PA42904-05**), management announcements (**PA42908**) and scheduling issues (**PA42909-10**). For a comparison of the deposition exhibits with the unredacted copies, *compare* **(1) PA4738-39** (Pl. Ex. 77 and ML Depo. Ex. 57) *with* **PA42904-06** (SCL Ex. 370); **(2) PA4737** (Pl. Ex. 76 and ML Depo. Ex. 58) *with* **PA42907** (SCL Ex. 371); **(3) PA4719** (Pl. Ex. 28 and ML Depo. Ex. 59) *with* **PA42908** (SCL Ex. 372); **(4) PA4721** (Pl. Ex. 38 and ML Depo. Ex. 60) *with* **PA42909** (SCL Ex. 373); and **(5) PA4735-36** (Plaintiff's Ex. 62 and ML Depo. Ex. 62) *with* **PA42911** (SCL Ex. 374).

Yet, in his discussion of "willfulness," Plaintiff does not address this issue at all. (Pl. Br., at 37). As a result, he does not challenge or otherwise address the evidence cited by SCL showing that (1) the OPDP issued directives *requiring* SCL to redact the personal data; and (2) the OPDP's directives—which were obviously a factor beyond SCL's control—therefore "contributed" to the company's decision to make the redactions. *See* PA4108:8-25; 4114:12-4115:18, 4117:6-4118:2, 4143:3-12; 4583:1-16; 4602:25-4603:3. Based on this unchallenged evidence alone, the district court's order violated NRCP 37.

One other point warrants special emphasis. In its Petition, SCL argued at length that the district court's finding that SCL—and in particular the client—acted with an intent to conceal "discoverable information" had no factual basis whatsoever. SCL Pet., at 40-44. In so doing, SCL stressed that the evidence of record documented SCL's many efforts to comply with the court's discovery orders, several of which the court expressly recognized and "applauded." PA43814-15 ¶¶ 93, 97 n.15. These efforts included (1) dispatching the company's U.S. lawyers to meet with the OPDP; (2) undertaking "extensive efforts" to search in the U.S. for unredacted copies of the Macau documents; (3) obtaining the consents of the LVSC executives to "unredact" their names in the Macau documents; and (4) asking Plaintiff to provide a similar consent and to identify specific documents that he claimed had jurisdictional importance. Finally, SCL stressed that it had absolutely no "litigation" motive to prevent Plaintiff from obtaining the redacted data because data has no litigation importance.

In his brief, Plaintiff does not challenge any of these arguments. Nor does he dispute SCL's conclusion that the evidence provides no support for

the district court's finding that SCL redacted the personal data with an intent to conceal "discoverable information."

As shown below, this implicit concession carries profound implications not only for the Rule 37 and Due Process analysis, but also for SCL's request for reassignment.

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

In attempting to defend the severity of the district court's sanctions, Plaintiff claims that both the preclusion of witnesses and the adverse inferences were necessary to "neutralize the advantage" that SCL purportedly gained by making redactions in the Macau documents. Pl. Br., at 40. But in so doing, Plaintiff nowhere explains exactly what evidentiary "advantage" SCL gained by making the redactions. The reason for this silence is simple: Plaintiff cannot show that SCL gained any litigation advantage by redacting the data because the data has no evidentiary value.

More broadly, Plaintiff does not address SCL's showing that the severity of the sanctions is grossly disproportionate to the nature of the underlying violation, particularly when compared to the only two cases involving sanctions of similar severity. In *Insurance Corp.* and *Linde,* the non-complying parties engaged in a wholesale refusal to produce "critical" documents that were "essential" to the opposing party's case. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 705 (1982); *Linde*, 703 F.3d at 107-112. By contrast, in this case, SCL, in compliance with Macanese law, made limited redactions of personal data having no evidentiary value and then made "extensive efforts" to find alternative sources for the redacted data.

Plaintiff's reliance on *General Atomic Co. v. Exxon Nuclear Co.*, 90 F.R.D. 290 (S.D. Cal. 1981) and *State of Ohio v. Arthur Andersen & Co.*, 570 F.2d 1370, 1371-72 (10th Cir. 1978) is similarly misplaced. In those cases, the courts upheld preclusion sanctions after finding that the non-compliant party had engaged in "flagrant, bad and callous disregard" of judicial orders, *State of Ohio*, 570 F.2d at 1376, or deliberately transferred documents to a foreign country to "make them unavailable for discovery in anticipated antitrust litigation." *General Atomic*, 90 F.R.D. at 307. In addition, in those cases, the withheld documents were directly relevant to claims and defenses in the litigation. *Id.* at 308. As shown above, this case does not involve any facts comparable to *State of Ohio* or *General Atomic.*

D. The District Court's Order Violates Due Process.

In its Petition, SCL showed that a sanctions order can violate the Due Process Clause in two circumstances: (1) if the failure to produce the documents does not support a presumption that the non-compliant party's claim lacks merit (because the withheld information is not material to any claim or defense), *see, e.g., Insurance Corp.*, 456 U.S. at 705; *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 351 (1909); or (2) if the non-compliant party's failure to produce the documents is "due to inability and not to willfulness, bad faith, or any fault of petitioner." *Hammond Packing*, 212 U.S. at 351. *See also Rogers*, 357 U.S. at 209, 212.

Both principles apply here, where the district court required SCL to produce redacted data having no litigation importance, and SCL made the redactions only because the OPDP required it to do so. Plaintiff, however, does not address either point. Instead, Plaintiff argues that the sanctions do not violate Due Process because the U.S. Supreme Court upheld a

sanction striking a foreign company's jurisdictional defense in *Insurance Co.*, 465 U.S. at 705-06.

This argument ignores the Supreme Court's rationale. In *Insurance Co.* (which did not involve an international privacy law), the defendants repeatedly refused to comply with an order requiring them to produce documents that were "critical" to the jurisdictional issue. *Id.* at 709. On these facts, the Supreme Court concluded that the dismissal of the jurisdictional defense did not offend Due Process because the defendants' bad faith failure to produce the documents supported the presumption that their defense had no merit. *Id.*

By contrast, in this case, as shown above, SCL did not act in bad faith in making the redactions, and, in any event, the redacted data had no relevance to any jurisdictional issue in the litigation. Consequently, SCL's decision to redact the data does not support a presumption that its jurisdictional defense lacks merit. For these reasons, the district court's order imposing preclusion, adverse inference and other sanctions on SCL violates Due Process and must be vacated.

E. The Case Should Be Reassigned.

SCL recognizes that this Court re-assigns cases only in the most exceptional of circumstances. Nevertheless, SCL respectfully submits that the tortuous history of this litigation provides just such exceptional circumstances on two alternative grounds: (1) the district court pre-judged the sanctions issue and reached critical conclusions about SCL that have no factual basis; and (2) the district court routinely imposes punitive and objectively unreasonable burdens on SCL that are unprecedented in Nevada law.

In his Answer, Plaintiff asserts that SCL failed to prove that the district court holds a "deep-seated favoritism or antagonism" that would make impartiality "impossible." Pl. Br., at 46, citing *Litecky v. United States,* 510 U.S. 540, 555 (1994). But as shown below, Plaintiff makes no attempt to defend or even address the critical facts cited by SCL that form the basis for its request.

1. The District Court Holds Unfounded Beliefs about SCL that Preclude Impartiality.

First, Plaintiff does not dispute that notwithstanding this Court's explicit directive, the district court decided to impose sanctions *before* it had ever conducted the hearing—and before, obviously, it had heard any evidence or made any attempt to balance the relevant factors specified by the Court. (8/14/2014 Tr., at 29:10-13) ("There's going to be a sanction because *I already had a hearing, and I made a determination that there is a sanction*") (emphasis added). This is an indisputable example of pre-judgment made in contravention of a superior court's specific directive. *See* PA43570:5-8 (announcing in the middle of closing arguments that "I'm trying to get information so that I can make a better decision [about sanctions], rather than a worse decision, because *none of them are going to be good*."); PA43983:7-12; PA44104 ¶ 5 (pre-judging SCL's motion to dismiss 7th Claim, which has yet to be heard); PA2942:9-19 (responding "This is bullshit" to SCL's inability to provide an earlier date on which she could set the evidentiary hearing on sanctions without risking their ability to prepare); *see also* SCR CJC Canon 2.2 (impartiality); *see also* SCR CJC Canon 2.3, Comment 2 (judge shall not exhibit bias by epithets, slurs, etc).

Second, Plaintiff does not dispute that the district court holds the unsupported belief that SCL acted with an intent to "conceal evidence" and "abuse" discovery. PA43825 ¶ 148; PA43793 ¶ 112; 43827 ¶ 154a. The mere fact that the court holds this unwarranted belief demonstrates that it cannot serve in this case as a "neutral, impartial administrator of justice." *United States v. Torkington*, 874 F.2d 1441, 1447 (11th Cir. 1989). Indeed, the district court could not possibly have made any findings about the *client's* intent without impermissibly drawing an adverse inference from SCL's invocation of the attorney-client privilege (which the district court disclaimed).[3]

These critical and undisputed facts provide an objectively reasonable basis for concluding that the district court has a "deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky,* 510 U.S. at 555; *see* SCR CJC Canon 2.3 (A) (A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice).

2. The District Court Has Not Been Able to Fairly and Efficiently Manage the Litigation.

Even if the apparent bias of the court could be set aside, the history of this case shows that the court is not able to fairly and effectively manage the litigation. To highlight some of the remarkable aspects of this litigation, consider the following:

Five Writ Petitions in the Jurisdictional Proceedings Alone. This is the fifth writ petition filed by Defendants in a five-year old case in which the district court has yet to determine whether it has jurisdiction over SCL.

[3] As SCL noted in its Petition, no adverse inferences can be drawn from a party's decision not to waive the privileges and work product protection afforded by Nevada law, under NRS 49.095 and NRCP 26(b)(3). *See*, *e.g.*, *Nabisco, Inc. v. PF Brands, Inc.*, 191 F.3d 208, 226 (2d Cir. 1999).

Plaintiff seeks to portray the Petitions as an example of SCL's "stalling" tactics, but this argument has a major problem: Defendants' Petitions have all been well-founded. This Court granted three of the first four Petitions, and it denied the fourth only so that the district court could conduct the sanctions hearing—which has now led to the fifth petition.

Nor is there any reason to believe that this sad history will not continue. Just last week, the district court granted Plaintiff's motion to take additional *jurisdictional* discovery on events occurring through 2014, even though the filing date for Plaintiff's complaint is 2010. PA44090:17-91:15; PA43992-94.

Unprecedented Discovery Burdens and Costs Imposed on SCL. Plaintiff does not dispute that the district court has imposed jurisdictional discovery burdens on SCL that are far greater than those imposed on a foreign company in any other reported case. Plaintiff makes no attempt to defend as "reasonable" the district court's *sua sponte* decisions to (1) double the number of jurisdictional custodians that SCL was required to search with no showing of jurisdictional relevance; or (2) require SCL to create a 37,000+ page "Relevancy Log" so that the court could determine if it should impose additional sanctions.

These decisions are so manifestly unreasonable—and so grossly disproportionate to the narrow jurisdictional issue before the district court—as to be indefensible.

Delay. Five years after Plaintiff filed his lawsuit—and nearly four years after this Court issued its August 26, 2011 mandate—the district court still has not held the jurisdictional hearing ordered by this Court. This delay has resulted not from SCL's alleged "stalling" tactics, but from (1) the magnitude of the jurisdictional discovery demanded by the district

court; and (2) the necessity for SCL to repeatedly file meritorious petitions to obtain relief from this Court.

Thus, the undisputed facts in this case demonstrate that the district court's decisions are so lacking in moderation and fundamental fairness as to require a new judge to preserve the appearance of a neutral forum. Contrary to Plaintiff's claims, this Court has previously reassigned cases on remand. *See, e.g., FCH1 LLC v. Rodriguez*, 335 P.3d 183, 190 (2014). SCL therefore requests to have this case reassigned if remanded.

III. CONCLUSION

Petitioner respectfully requests that this Court grant the Petition and enter an order vacating the district court's March 6, 2015 order. Petitioner further requests that this Court enter an order staying both the March 6, 2015 order and the jurisdictional hearing (currently scheduled to begin on April 20, 2015) pending resolution of this Petition.

MORRIS LAW GROUP

By: /s/ STEVE MORRIS
Steve Morris, Bar No. 1543
Rosa Solis-Rainey, Bar No. 7921
900 Bank of America Plaza
300 South Fourth Street
Las Vegas, Nevada 89101

KEMP JONES & COULTHARD, LLP
J. Randall Jones, Bar No. 1927
3800 Howard Hughes Pkwy., 17th Fl.
Las Vegas, NV 89169

HOLLAND & HART LLP
J. Stephen Peek, Esq., Bar No. 1758
Robert J. Cassity, Esq., Bar No. 9779
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

Attorneys for Petitioner

CERTIFICATE OF COMPLIANCE

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

I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 6,997 words, less than half the type-volume specified for an opening or answering brief.

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

MORRIS LAW GROUP

By: /s/ STEVE MORRIS
Steve Morris, Bar No. 1543
Rosa Solis-Rainey, Bar No. 7921
900 Bank of America Plaza
300 South Fourth Street
Las Vegas, Nevada 89101

CERTIFICATE OF SERVICE

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

James J. Pisanelli
Todd L. Bice
Debra Spinelli
Pisanelli Bice
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

Attorneys for Steven C. Jacobs, Real Party in Interest

SERVED BY HAND DELIVERY ON 4/1/2015

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

Respondent

DATED this 31st day of March, 2015.

By: /s/ PATRICIA FERRUGIA