

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:

District Court Case Number:
A627691-B

**PETITION FOR WRIT OF
PROHIBITION OR
MANDAMUS**

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RULE 26.1 DISCLOSURE

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

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

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I. THE RELIEF SOUGHT.

This emergency petition seeks a writ of prohibition or mandamus to overturn an arbitrary and capricious order of the district court entered on June 19, 2015. Order Overruling Objection to Notice of Deposition of David Turnbull and Denying Motion for Protective Order, 6/19/2015, App. 0057-59. The order compels petitioner, Sands China Ltd., a foreign corporation ("SCL") that is incorporated in the Cayman Islands and is listed on the Hong Kong Stock Exchange and whose primary operations are in Macau, to produce one of its independent non-executive directors, who is a resident of Hong Kong, in Hawaii for deposition on Thursday, June 25, 2015, two business days from today. The director is David Turnbull, a British citizen, who lives and works in Hong Kong. He has not had any contact with this forum, and he has never been in Nevada. Declaration of David Turnbull, ("Decl. Turnbull"), App. 0026-27.

II. ISSUES PRESENTED.

Whether the district court may compel a foreign corporation headquartered in Macau that does no business in Nevada, has had no contacts with the State, and which seeks no relief in the underlying lawsuit to produce a corporate representative residing in Hong Kong for deposition somewhere in this country on only five days notice merely because the court thinks the deposition should be taken on "American soil," without due regard for international comity and the uncontested hardship and inconvenience that several days and 11,000+ miles of travel will impose on the foreign resident/deponent.

III. THIS PETITION RAISES AN UNPRECEDENTED DISCOVERY ISSUE THAT SHOULD BE ADDRESSED BY WRIT.

The Court recently pointed out that "a writ of prohibition is a more appropriate remedy for the prevention of improper discovery, [although] writ relief is generally unavailable to review discovery orders." *Las Vegas Sands Corp. v. Eighth Jud. Dist. Ct.*, 130 Nev. ___, 331 P.3d 876, 878 (2014). This petition, however, raises, as did the petition in the cited case, "public policy concerns and presents an important issue of law that has relevance beyond the parties to the underlying appeal [] [that] cannot be adequately addressed on appeal." *Id.* at 878-79.

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

This writ petition, irrespective of how it is characterized, addresses an unprecedented decision of the district court that in turn raises an issue that has not been previously considered by this Court: Does the district court have discretion to order a foreign citizen and resident of Hong Kong, who has no ties to Nevada or the United States, to appear in the United States (Hawaii) on only five days notice for a discovery deposition in disregard of state and federal precedent that holds that such a deposition should be held in the foreign citizen's place of residence, absent a showing of good cause for the inconvenience and hardship imposed on the

deponent to appear in the United States? Because of the transnational character of this case, the court's order raises risks to international comity that the United States Supreme Court cautions courts to avoid. *Daimler AG v. Bauman*, 471 U.S. ___, 134 S. Ct. 746, 762-63 (2014). Here, the district court found it has general jurisdiction over Macau-based SCL that clothed it with the discretion to compel SCL to produce one of its Hong Kong directors in Hawaii for deposition on Thursday next.

This is, SCL submits, an "exorbitant exercise [] of all-purpose jurisdiction," *id.*, that the district court engaged in when it entered its order on June 19 and declined to stay the order while this Court addresses this important and far-reaching abuse of discretion. After-the-fact consideration of the issue by appeal will not alleviate or in any manner diminish the inconvenience and hardship imposed on the deponent by uprooting him from Hong Kong to appear for deposition in Hawaii. Thus, SCL has no plain, speedy, and adequate remedy in the ordinary course of law" to address the district court's clear abuse of discretion. *See Club Vista Fin. Servs. v. Dist. Ct.*, 128 Nev. ___, 276 P.3d 246, 249 (2012); *Int'l Game Tech v. Second Jud. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008).

IV. INTRODUCTION AND STATEMENT OF FACTS AND REASONS WHY THIS PETITION SHOULD BE GRANTED AND AN EMERGENCY STAY ENTERED UNTIL THE WRIT SOUGHT IS GRANTED OR DENIED.

This emergency petition and request for a stay of a foreign resident's deposition in Hawaii, where neither he nor the plaintiff resides or works, arises out of an unprecedented order that is not a reasonable exercise of judicial discretion. The district court has ordered SCL, a foreign corporation that does not do business in the United States and that is headquartered and has its principal place of business in Macau, to produce

one of its independent directors, David Turnbull, in Hawaii for deposition on June 25, 2015, *two days* from today. Mr. Turnbull resides and works in Hong Kong. His deposition was initially noticed for June 17 in Las Vegas, App. 23-25, but following denial of SCL's motion for a protective order regarding the place of the deposition on June 16, 2015, App.57-59, the district court ordered his deposition to be "conducted on U.S. soil and under circumstances where the Court can actively supervise a discovery dispute, if necessary." App. 0058, at 2, ¶6; Amended Notice of Deposition, App.49-52. The court did not find, however, that any "discovery dispute" is likely to arise during the deposition *or* how, if such were to occur, she could "actively supervise" the dispute in Hawaii from Las Vegas.¹

David Turnbull's declaration establishes that he is a British citizen permanently residing and working in Hong Kong on behalf of Hong Kong companies. He is also an independent non-executive Director of SCL ("INED") which is a publicly-traded company listed on the Hong Kong Stock Exchange. In the 5+ years he has been an INED he has not been in the United States. He has never been in Nevada or elsewhere in the United

¹ The court justified this remarkable decision on the ground that "Defendants have failed to establish good cause to hold Mr. Turnbull's deposition in Macau or Hong Kong, as they request." This turns the law on the subject of place of deposition on its head, whether the law be state or federal. *See, e.g., Kaufman v. Kaufman*, 63 So.2d 196 (Fla. 1952) (a defendant will not be required to travel a great distance and incur substantial expenses to be deposed by the plaintiff, unless the defendant is seeking affirmative relief. SCL is not seeking affirmative relief against plaintiff Steven Jacobs.); *Besco Equip. Co. v. Golden Loaf Bakery, Inc.*, 458 So.2d 330, 332 (Fla. App. 1984) (a nonresident corporate officer in Florida); 8A Wright, Miller & Marcus §2112, at 533 (2010) ("The deposition of a corporation by its agents and officers should ordinarily be taken at its principal place of business"); *Louis Vuitton v. Dooney & Bourke*, 2006 WL 3476735, at *16 (S.D.N.Y.) ("The ordinary rule is that the deposition of corporate employees is to be conducted where they work, particularly when the corporation is a defendant . . . , and accordingly we direct that any deposition of Mr. Nottoli be taken in Italy").

States on behalf of or at the invitation of SCL or its co-defendant, Las Vegas Sands Corp. He has no plans to come to the United States. In his words, "It would be a profoundly disruptive and unreasonable hardship for me to travel to Las Vegas for a deposition," which would mean a 14,000 mile, several-days journey. Decl. Turnbull, at 2; ¶¶ 7, 8; ¶¶ 1–6,² App. 0026-27.

A. The Source Of This Lawsuit Is In Macau Where SCL's Resident Directors And Representatives Are Available And Should Be Deposed.

This lawsuit arises out of the plaintiff's employment in Macau for several months in 2009–2010, where, he alleges, he was wrongfully terminated as the CEO of SCL.³ Fourth Amended Complaint, App. 60-80. *He chose* this Nevada forum; he was not constrained to file here. Jacobs

² Hawaii as the deposition location ordered by the district court would be an 11,000 mile roundtrip journey for Mr. Turnbull.

³ This is the seventh writ petition in this extraordinary case. Five of the preceding writs have been acted on. The sixth petition was filed on June 19 challenging the district court's finding that it has jurisdiction over SCL. Case No. 68265. This seventh petition is the product of the district court's order last Friday, June 19, the same day that SCL filed its writ petition on jurisdiction. This seventh petition asks the Court to vacate the subject notice of deposition in Hawaii, scheduled for June 25, and stay the deposition in any location other than Macau or Hong Kong until the petition is disposed of. There is another petition coming this week as a consequence of the district court's Trial Order on June 12, 2015, App.28-35, forcing the case to trial on the merits on October 14, 2015, without allowing SCL and its co-defendants, who have been stayed from initiating discovery and otherwise preparing for trial for 3 years and 8 months, reasonable time to prepare. The district court claimed it could not do otherwise because an unpublished decision of this Court involving NRCP 41(e) casts doubt on the explicit stay of all proceedings in this case, by this Court on August 26, 2011, except as necessary to decide jurisdiction, from August 26, 2011, to May 28, 2015. The district court invited the defendants to take up the tolling of Rule 41(e) by this Court's express order in August 2011 by writ petition, which the defendants are preparing to file together with a request to stay all proceedings until the disorder in this case and the question of jurisdiction over SCL can be resolved by this Court. Tr. 5/28/15, at 5-6; 19:10-15, 21:12-16.

could have brought this suit in Macau, where he was employed, or in Hong Kong, where Mr. Turnbull resides and works and SCL's stock is traded. Election of this forum by Jacobs to sue his former Macau employer, located half a world away, in Las Vegas has meaning in this petition. By filing here, he did not thereby establish "good cause" to notice and require Macau or Hong Kong-based directors of SCL to travel to Las Vegas for deposition on his mere notice.

Having elected this forum, Jacobs is required by the authorities—state and federal—to show good cause to overcome the presumption "that the defendant will be examined at his residence or place of business or employment." *Farquhar v. Shelden*, 116 F.R.D. 70, 72 (E.D. Mich. 1987); *Fortune Ins. Co. v. Santelli*, 621 So.2d 546, 547 (Fla. App. 1993) ("Under federal law, the deposition of a representative of a corporate defendant is ordinarily taken at the corporation's principal place of business unless justice requires otherwise. We find this consistent with the rules of discovery under Florida law and hold that the Petitioner should be required to produce the corporate representative in Dade County").

The presumption that Mr. Turnbull (and any other directors or officers who reside and work in Asia) should be, absent "special," "unusual," or "peculiar" circumstances not found here, deposed in Macau or nearby Hong Kong is supported by almost all courts that have addressed the subject. A leading exemplary case put it this way:

[I]nsofar as a foreign defendant may be more inconvenienced by having to travel to the U.S. than a defendant who merely resides in another state or in another judicial district, the presumption that the deposition should occur at a foreign defendants' place of residence may even stronger.

In re Outsidewall Tire Litigation, 267 F.R.D. 466, 471 (E.D. Va. 2010). *Accord*, *Tailift USA v. Tailiff Co. Ltd.*, 2004 WL 722244 (N.D. Tex. Mar. 26, 2004) at *1,

4 (presumption not overcome that foreign "defendant's corporate representative should be deposed at its principal place of business in Taiwan"); *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. S.D. Iowa*, 482 U.S. 522, 546 (1987) (presumption stronger for foreign defendants); see *Fausto v. Credigy Serv. Corp.*, 251 F.R.D. 427, 429 (N.D. Cal. 2008) (a natural-person defendant should be deposed in the district of his or her residence); *Louis Vuitton*, 2006 WL 3476735 at #16 ("no compelling reason to alter that presumption, and accordingly we direct that any deposition of Mr. Nottoli," a resident of Italy who was unlikely to be in the forum before discovery closed, "be taken in Italy").

This is not a run-of-the-mill discovery dispute. The plaintiff seeks to haul Mr. Turnbull out of Asia for deposition in Las Vegas or Hawaii for no reason other than the district court wants Mr. Turnbull deposed "on U.S. soil." This is not an exercise of the district court's sound discretion, as referred to in *Club Vista Financial Servs. v. District Court*, 128 Nev. ___, 276 P. 3d 246, 249 (2012); the order regarding Mr. Turnbull is arbitrary and unnecessary. SCL offered to produce him in Hong Kong for a live video deposition, which the court rejected. Tr. 06/19/15, App.53-56. In addition to disregarding the legion of cases calling for his deposition to be taken in Macau or Hong Kong, where he lives and works, the district court did not consider the deponent's convenience in requiring him to leave home to travel for four days for not more than seven hours of deposition testimony in Hawaii. If ordering a foreign witness to the United States just so he can touch American soil were the touchstone for decision, then no deposition of foreign witnesses would ever be taken in their place of residence or principal place of business. And cases such as *Six West Retail Acq. v. Sony Theater Mgmt. Corp.*, 203 F. R. D. 98, 108 (S.D.N.Y. 2001) would be

meaningless. There, the court recognized that "hardship to the witnesses" must be considered and ordered depositions of Japanese executives of one of the defendants be taken in Japan because "the convenience factors favor taking depositions in Japan." *Compare Devlin v. Trans. Comm. Int'l Union*, 2000 WL 28173, at *4 (S.D.N.Y. Jan. 14, 2000) ("the convenience of counsel is less compelling than any hardship to with witnesses").

There has been no showing by the plaintiff that David Turnbull could not be adequately and conveniently deposed in Hong Kong, in person or by video, as SCL has offered in this transnational litigation. Tr. 6/16/15, at 10-11, App. 45-46. The district court's unprecedented punitive and arbitrary order also runs counter to the United States Supreme Court's admonition about the "risks to international comity" that "exorbitant exercises of all-purpose jurisdiction" pose. *Daimler AG v. Bauman*, 571 U.S. ___, 134 S. Ct. 746, 762-63 (2014). The district court's order of June 19 is such an "exorbitant exercise" of discretion in light of the rule that absent "special circumstances," not shown here, "a party seeking discovery must go where the desired witnesses are normally located." *Farquhar*, 116 F.R.D. at 72; *see Salter v. Upjohn*, 593 F.2d 649, 562 (5th Cir. 1979) (the deposition of a corporation by its agents and officers should be taken at its principal place of business, especially when, as in this case, the corporation is the defendant"). When the plaintiff has selected the forum, as Jacobs did, the defendants "are not before the court by choice. Thus, courts have held that plaintiffs normally cannot complain if they are required to take discovery at great distances from the forum." *Farquahar*, 116 F.R.D. at 72.

V. CONCLUSION.

For all of the foregoing reasons, the district court's June 19, 2015, order compelling SCL to produce David Turnbull for deposition outside

the country of his residence was the product of a clear abuse of discretion which this court should reverse.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that I have read this **PETITION FOR PROHIBITION OR MANDAMUS**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. 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.

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

3. Finally, I 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.

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VERIFICATION

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

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

This declaration was executed on the 22nd day of June, 2015 in Las Vegas, Nevada.

A handwritten signature in black ink, appearing to read "Steve Morris", is written over a horizontal line.

Steve Morris

CERTIFICATE OF SERVICE

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

VIA HAND DELIVERY

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