IN THE SUPREME COURT OF THE STATE OF NEVADA

SANDS CHINA LTD., Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ELIZABETH GOFF GONZALEZ, DISTRICT JUDGE, Respondents, and STEVEN C. JACOBS, Real Party in Interest.	Case Number: 68265
SANDS CHINA LTD., A CAYMAN ISLANDS CORPORATION, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ELIZABETH GOFF GONZALEZ, DISTRICT JUDGE, Respondents, and STEVEN C. JACOBS, Real Party in Interest.	Case No. 68275
LAS VEGAS SANDS CORP., A NEVADA CORPORATION; SANDS CHINA LTD., A CAYMAN ISLANDS CORPORATION; AND SHELDON G. ADELSON, AN INDIVIDUAL, Petitioners, vs.	Case No. 68309

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ELIZABETH GOFF GONZALEZ, DISTRICT JUDGE,

Respondents,

and

STEVEN C. JACOBS,

Real Party in Interest.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR MANDAMUS

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TABLE OF CONTENTS

Page No.:

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

Plaintiff claims that the district court properly found general jurisdiction over Sands China Ltd. ("SCL") based on the "extraordinary control" exercised by SCL's parent, Las Vegas Sands Corp. ("LVSC"). Pl. Br. at 31-34. Plaintiff asserts that this control was so "pervasive and continual" as to make LVSC an "agent" of SCL. *Id.* at 33. This claim fails for two fundamental reasons.

First, Plaintiff nowhere explains how the district court's agency-based jurisdictional analysis can be reconciled with the U.S. Supreme Court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746, 759-60 (2014) or this Court's decision in *Viega GmbH v. Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 40, 328 P.3d 1152 (2014). While Plaintiff claims that an agency-based jurisdictional approach is still "relevant" after *Daimler*, he fails to show how the district court's analysis (which focused on the parent's "control" of the subsidiary) differs from the agency-based approach rejected in *Daimler* (which also focused on the parent's "control").

Second, Plaintiff makes *no attempt* to defend the district court's "inverted agency" rationale, which held that the parent corporation (LVSC) acted as the *agent* of its foreign subsidiary (SCL), even though the parent supposedly exercised "pervasive" control over the subsidiary. This theory turns upside down the most basic precepts of agency law which require the principal to have the legal right to control the agent, not vice versa.

The district court relied on this novel theory to justify an unprecedented expansion of general jurisdiction. Under the district court's rationale, the Nevada courts have *general jurisdiction* over the foreign subsidiaries of Nevada parent companies—even though the subsidiaries have no connection with Nevada—because the parents can be viewed as

"agents" of the subsidiaries. The sole requirement for this inverted agency relationship is that the parent must exercise "corporate control" over its own subsidiary. Like the district court, Plaintiff cites no case that purports to extend general jurisdiction to the foreign subsidiaries of in-state parent corporations.

Plaintiff's defense of the district court's transient jurisdiction ruling is not persuasive. As SCL showed in its opening brief, this holding is contrary to recent decisions from this Court and others holding that transient jurisdiction does *not* apply to corporations. *Freeman v. Second Jud. Dist. Ct.*, 116 Nev. 550, 558, 1 P.3d 963, 968 (2000) (en banc); s*ee also Martinez v. Aero Caribbean*, 764 F.3d 1062, 1067-69 (9th Cir. 2014). Plaintiff does not distinguish or even address the rationale of these decisions.

Plaintiff fares no better in his attempt to defend the district court's specific jurisdiction ruling. This Court has made clear that specific jurisdiction requires a showing that (1) the non-resident defendant "purposefully availed itself" of Nevada law; and (2) the plaintiff's cause of action arises from the defendant's "purposeful" conduct in Nevada. *Viega*, 328 P.3d at 1157.

Plaintiff fails to meet this burden for two basic reasons. First, Plaintiff relies on the same agency theory used by the district court, claiming that LVSC acted as SCL's "agent" because LVSC (the alleged agent) "controlled" SCL (the supposed principal). This claim is both legally and factually untenable.

Second, Plaintiff asserts that SCL engaged in "purposeful conduct" because the company "knew of," "assented to" or "accepted the benefits of" LVSC's alleged acts. Such passive activity is insufficient as a matter of law to satisfy the "purposeful conduct" requirement. Both the U.S. Supreme

Court and this Court have made clear that a foreign corporation can engage in "purposeful" conduct in a forum only by "*directing its agents or distributors to take action there*." *Daimler*, 134 S. Ct. at 759 n.14 (emphasis added); *Viega*, 328 P.3d at 1161. In this case, Plaintiff failed to present any facts showing that SCL *directed* its alleged in-state agent (LVSC) to engage in any of the acts relating to the separate causes of action alleged in the complaint.

Accordingly, Plaintiff failed to carry his burden of proof on each of the three jurisdictional theories advanced by the district court. *Trump v. Eighth Jud. Dist. Ct.*, 109 Nev. 687, 692, 857 P.2d 740, 743-44 (1993) (plaintiff bears burden of producing evidence of all facts necessary to establish personal jurisdiction). For these reasons, the district court's jurisdictional order should be reversed.

II. ARGUMENT

A. This Case is Appropriate for Writ Review.

Plaintiff claims that writ review of the district court's jurisdictional order is not appropriate because the court's findings were "preliminary" and "non-binding." Pl. Br. at 27-28. This argument ignores this Court's controlling decisions in *Viega* and *Trump*, not to mention its prior decisions in this case. In those cases, the district courts denied the foreign party's motions to dismiss for lack of jurisdiction after holding that the plaintiff had made a "prima facie showing of general and specific jurisdiction." *Viega*, 328 P.3d at 1155; *Trump*, 857 P.2d at 743. In both cases, the district court's jurisdictional findings were necessarily "preliminary" and subject to a final determination at trial. *Trump*, 857 P.2d at 744.

Nevertheless, in both cases, this Court found that writ review was appropriate. In the words of the *Viega* Court, "[a]s *no adequate and speedy*

legal remedy typically exists to correct an invalid exercise of personal jurisdiction, a writ of prohibition is an appropriate method for challenging district court orders when it is alleged that the district court has exceeded its jurisdiction." *Viega*, 328 P.3d at 1156 (emphasis added).

This rationale applies with special force here where this Court has already determined that SCL's jurisdictional objections are worthy of writ review. In August 2011, the Court granted SCL's first jurisdictional petition and ordered the full evidentiary hearing that has now led to SCL's second petition.

Thus, the preliminary nature of the district court's findings does not make those findings inappropriate for writ review. Nevertheless, it bears noting that, contrary to Plaintiff's assertion, SCL did *not* ask the district court to make "preliminary" jurisdictional findings. The district court announced that it intended to make all of its findings "preliminary" (15PA44166-67) because she mistakenly believed "there is a lower standard [of proof to sustain jurisdiction] at this stage than there is at trial." Later, however, in her decision on May 28, the court said its findings and conclusions "related to jurisdiction" would be made by a preponderance of the evidence, but only because this Court in its August 26, 2011 Writ ordered her to do so. 28PA47331. The court considered the Writ to have directed her to conduct an "evidentiary hearing [and allow] the jurisdictional discovery necessary prior to the hearing that have not been a wise use of judicial resources." 28PA47331 at n.12.

Plaintiff is also incorrect when he asserts that the jurisdictional issues in this case are "intertwined" with the merits of his substantive allegations. Pl. Br. at 28-29. The jurisdictional analysis in this case turns on the

following issues, none of which has anything to do with the merits of Plaintiff's claims:

1. Where is SCL's place of incorporation and principal place of business?

2. Is the district court's "inverted agency" theory legally tenable to render SCL "at home" in Nevada?

3. Did SCL direct LVSC to engage in any of the acts relating to Plaintiff's separate causes of action?

These issues are completely unrelated to Plaintiff's substantive claims of breach of contract, conspiracy and defamation.

Accordingly, Plaintiff's assertion that this case is not appropriate for writ review is without merit.

B. The District Court Erred in Holding that SCL is Subject to the General Jurisdiction of the Nevada Courts.

In its opening brief, SCL showed that the district court's decision finding general jurisdiction over SCL cannot be reconciled with the U.S. Supreme Court's decision in *Daimler* and this Court's decision in *Viega*.

In response, Plaintiff does not dispute *Daimler's* two key holdings that (1) a corporation is subject to general jurisdiction only if it is "at home" in the forum state; and (2) this requirement generally means that either the company's place of incorporation or its principal place of business must be located in the forum state. 134 S. Ct. at 761-62 and n.19; *Viega*, 328 P.3d at 1158. Nor does Plaintiff dispute that Nevada is not SCL's place of incorporation or principal place of business, and that SCL does not conduct any operations within the state.

Instead, Plaintiff suggests that this case qualifies as an "exception" to the *Daimler/Viega* rule because LVSC exercised such "pervasive and continual" control over SCL as to create an agency relationship between the

two companies. Pl. Br. at 33-34. To support the claim, Plaintiff relies on pre-*Daimler* cases such as *Sonora Diamond Corp. v. Superior Court*, 99 Cal.Rptr. 824 (Cal. Ct. App 2000), holding that a non-resident parent can be subject to general jurisdiction if its in-state subsidiary qualifies as an "agent" of the parent. *Id.* at 838.

In making this argument, Plaintiff does not explain exactly how the district court's version of agency-based jurisdiction (which focuses on the parent's "control" over the subsidiary) is any different from the discredited Ninth Circuit theory that *Daimler* rejected. Like the district court, the "Ninth Circuit's agency analysis also looked to whether the parent enjoys 'the right to substantially control' the subsidiary's activities." *Daimler*, 134 S. Ct. at 760 n.13. However, the Supreme Court rejected this analysis, finding that the "separate inquiry into control hardly curtails the overbreadth of the Ninth Circuit's agency holding." *Id.*

The same logic applies here, where the district court's "separate inquiry into control hardly curtails the overbreadth of [its] agency holding." *Id.* Indeed, under the district court's theory, Nevada courts would have general jurisdictional over *all of the global subsidiaries of Nevada corporations*—no matter where the subsidiaries are incorporated or conduct their operations—as long as the Nevada parents exercised "corporate control" (Pl. Br. at 31) over their own subsidiaries. Such a sweeping and overbroad application of general jurisdiction cannot be squared with *Daimler*.

Furthermore, even if the district court's rationale could be distinguished from the Ninth Circuit's analysis, Plaintiff provides no credible response to the other flaws in the court's reasoning. First—and perhaps most importantly—Plaintiff makes *no attempt* to defend the district

court's unique *inverted* agency theory, which purported to find that the alleged "agent" (LVSC) exercised an "extraordinary amount of control" over the supposed "principal" (SCL). 28PA47305 at ¶ 110. This theory is unique and without merit because it is contrary to two of the most basic precepts of agency and corporate law—namely, (1) in a principal-agent relationship, the principal "controls" the agent, not the other way around; and (2) in a parent-subsidiary relationship, the parent is the "principal" and the subsidiary is the "agent," not the other way around. *See Viega*, 328 P.3d 1158. Neither Plaintiff nor the district court cite any authority to support the court's finding that a purported "agent" (LVSC) can control its supposed principal (SCL).

Second, even if the district court's inverted agency theory had merit, Plaintiff fails to show how the facts in this case establish the kind of "control" necessary to establish an agency relationship. In *Viega*, this Court made clear that the mere existence of a parent-subsidiary relationship is not sufficient to establish agency. *Viega*, 328 P.3d at 1158-59. This rule reflects the principle that parent and subsidiary corporations are presumed to be separate legal entities, even though the parent owns and controls the subsidiary. *Id.* Consequently, an agency relationship can arise only if the parent controls the subsidiary to such an extent that the subsidiary has no separate existence of its own. *Id*.

In this case, the undisputed facts showed that SCL is a public company traded on the Hong Kong stock exchange with its own board of directors, its own executive team, its own books and records, its own business operations in Macau, and its own revenue of $4 billion. 28PA47289-90, ¶¶ 25-37, PA47291-92 ¶¶ 41-45. To be sure, the district court purported to find that LVSC exercised an "extraordinary amount of

control" over SCL, but it did so by relying on facts such as the two companies' interlocking officers and directorates, and LVSC's alleged role in "dictat[ing] large and small scale decisions." 28PA47292-93 ¶¶ 47-50. But these facts "merely show the amount of control typical in a parent-subsidiary relationship," and are thus insufficient to establish an agency relationship. *Viega*, 328 P.3d at 1158; *Sonora Diamond*, 99 Cal. Rptr. at 838. In his argument, Plaintiff cites no additional facts other than a cryptic reference (with no supporting citations) to "international market, gaming credit, FF&E." Pl. Br. at 35. These additional facts provide no basis for a finding of "extraordinary control," much less a basis for general jurisdiction.

Third, even if Plaintiff could establish the requisite "control" for an agency relationship, he makes no effort to address the final issue in the *Daimler* analysis—*i.e.*, whether LVSC's actions as SCL's purported Nevada agent, *when compared to SCL's activities as a whole*, were "so substantial and of such a nature" that SCL should be deemed to be "at home" in Nevada. *Daimler*, 134 S. Ct. at 761 n.19. This inquiry is critical under *Daimler* because a foreign corporation, such as SCL, cannot be deemed to be "at home" in a foreign jurisdiction (Nevada)—unless a "substantial" amount of its "worldwide" activities take place in that forum. *Id.* at 762 n.20. *See Gucci Am., Inc. v. Li*, 768 F.3d 122, 135 (2d Cir. 2014).[1]

Yet, in this case, Plaintiff, like the district court, completely ignores the striking contrast between SCL's business activities in Macau (which

[1] Plaintiff purports to distinguish *Gucci* on the ground that it involved a non-party's jurisdictional claim. Pl. Br. at 33. But this alleged distinction is not relevant to the jurisdictional analysis, which is why the *Gucci* court relied on *Daimler*. *Gucci*, 768 F.3d at 135.

generated more than *$4 billion* in revenue) and LVSC's activities as SCL's alleged agent in Nevada (which generated no revenue). Instead, like the district court, Plaintiff claims that SCL is "at home" in Nevada based *solely* on LVSC's purported activities as SCL's alleged "agent". 28PA47306, ¶ 114. This error provides yet another ground for vacating the district court's order.

One final point bears special emphasis: In *Daimler*, the Supreme Court stressed that a strict standard of general jurisdiction is particularly important in the "transnational context" where "exorbitant exercises of all-purpose jurisdiction" pose "risks to international comity." *Daimler*, 134 S. Ct. at 761-63.

This admonition applies with special force here, where the district court found general jurisdiction by applying the discredited pre-*Daimler* agency theory to a new and entirely different set of facts. In the pre-*Daimler* cases, the courts upheld general jurisdiction over *foreign parents* based on a finding that the parents' in-state subsidiaries could be deemed to be the *foreign parents' "agents*." *See*, *e.g.*, by contrast, in this case, the district court upheld general jurisdiction over a *foreign subsidiary* based on a finding that the subsidiary's in-state parent could be deemed to be the *subsidiary's "agent*."

This aberrational theory of jurisdiction not only ignores the most basic principles of agency law, but also represents an unprecedented expansion of general jurisdiction. *See Goodyear Dunlop Tires, S.A. v. Brown*, 131 S. Ct. 2846 (2011) (reversing a finding of general jurisdiction over the foreign subsidiaries of a U.S. parent). Plaintiff cites no case—not even a pre-*Daimler* case—holding that the foreign subsidiaries of an in-state parent can be subject to the general jurisdiction of the courts of that state merely

because the parent exercises "corporate control" over its subsidiaries. Such an "exorbitant"—and unprecedented—exercise of transnational jurisdiction is precisely what *Daimler* forbids.

C. The District Court Erred in Holding that It Has Transient Jurisdiction Over SCL.

In defending the district court's "transient" jurisdiction ruling, (28PA47317, ¶ 176), Plaintiff relies on decisions holding that personal jurisdiction can be asserted over an *individual* who is served with process while present in the forum state. *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 628 (1990); *Cariaga v. Eighth Jud. Dist. Ct.*, 104 Nev. 544, 546, 762 P.2d 886, 887-88 (1988).

But Plaintiff does not distinguish or meaningfully address the cases declining to apply this rule to *corporations*. These cases include decisions from this Court and others holding that in-state service on a corporation's registered agent does not create general jurisdiction. *Freeman*, 116 Nev. at 558, 1 P.3d at 968 (en banc).

The cases also include *Martinez*, where the Ninth Circuit set forth the rationale for limiting transient jurisdiction to only "natural" individuals. 764 F.3d at 1068. The court explained that while "natural persons are present in a single, ascertainable place," corporations can be in "many places simultaneously" because they act through their many agents. *Id.* at 1068. Consequently, as this Court has recognized, the jurisdictional inquiry as to corporations does not focus on the state's "physical power" over the company, but on the "minimum contacts" analysis of *International Shoe*. *Freeman*, 116 Nev. at 556, 1 P.3d at 967.

This rationale explains why a foreign corporation is not subject to general jurisdiction based solely on the presence of a subsidiary—or any

other "agent"—in the forum state. *Daimler*, 134 S. Ct. at 759-63; *Freeman*, 116 Nev. at 558, 1 P.3d at 967-68. For these reasons, the district court's assertion of transient jurisdiction over SCL must be reversed.

D. The District Court Erred in Holding that It has Specific Jurisdiction Over SCL.

1. The Mandate Rule Bars Plaintiff's Specific Jurisdiction Claims.

In arguing that the district court did not have the authority to address the specific jurisdiction claims, SCL relied on the well-established "principle that an inferior tribunal is bound to honor the mandate of a superior court within a single judicial system." Wright & Miller, Federal Practice and Procedure, § 4478.3 (2d ed. 2014).

Here, this Court's August 26, 2011 Order directed the district court to decide *only* the issues of "general and transient jurisdiction," while staying all other aspects of the litigation. 1PA236. Consequently, under the Mandate Rule, the district court did not have the authority to address any other issue in the litigation, including Plaintiff's newly-discovered claims of specific jurisdiction. *General Universal Sys. Inc. v. HAL, Inc.*, 500 F.3d 444, 453-54 (5th Cir. 2007).

Plaintiff now asserts that the Mandate Rule does not apply because this Court did not address the specific jurisdiction issue "either explicitly or by necessary implication." Pl. Br. at 36. But the only reason this Court did not address this issue is that Plaintiff elected to forego making this claim before either the district court or this Court in response to SCL's first jurisdictional writ. Plaintiff should have raised all of his jurisdictional arguments in a timely manner, but he chose not to do so, either for tactical reasons or otherwise.

Accordingly, by virtue of *Plaintiff's own decisions*, both the district court and this Court addressed only general and transient jurisdiction. The result was a mandate that was clear and unambiguous in its scope: It directed the district court to "revisit the issue of personal jurisdiction" over SCL "by holding an evidentiary hearing and issuing findings regarding *general and transient jurisdiction," while staying all other aspects of the litigation*. 1PA236 (emphasis added).

Under the Mandate Rule, the district court did not have the authority to exceed the scope of this mandate. For this reason alone, the district court's Order finding specific jurisdiction over SCL should be reversed.

2. Plaintiff's Breach of Contract Claim Does Not Support Specific Jurisdiction.

In its opening brief, SCL relied on this Court's recent decisions setting forth the requirements for specific jurisdiction over a non-resident corporation. *Arbella Mut. Ins. Co. v. Eighth Jud. Dist. Ct.*, 122 Nev. 509, 513, 134 P.3d 710, 712-13 (2006); *Viega*, 328 P.3d at 1157. Under these decisions, a plaintiff must prove *both* that (1) the defendant *purposefully availed itself* of the protections of Nevada laws or otherwise directed its conduct toward Nevada; and (2) the plaintiff's cause of action arose from the defendant's *purposeful conduct* in Nevada. *Id.*

In response, Plaintiff makes no credible effort to apply these controlling decisions to the district court's findings here. Instead, he relies on inapposite lower court decisions from Florida, Michigan, California and Minnesota to make claims that are either irrelevant or baseless.

With respect to the first requirement, Plaintiff asserts that a party "purposefully avails itself" of a forum's laws by making a contract in the forum state. Pl. Br. at 40. This principle has no application here. The issue

in this case is not whether the district court has jurisdiction over the breach of contract claim, but whether it has *specific jurisdiction over SCL* based on that claim. On this issue, Plaintiff does not dispute that SCL was *not even in existence at the time the alleged contract was formed*. 28PA47334-35 ¶¶ 18-21. Plaintiff therefore concedes that LVSC—and *not* SCL—"negotiated and made" the alleged agreement. Pl. Br. at 40.

Plaintiff nevertheless claims that SCL "purposefully availed itself" of Nevada's laws because SCL allegedly "assumed" the contract and subsequently "accepted its benefits." Pl. Br. at 41-42. This argument fails for several reasons.

First, Plaintiff did not allege[2] or prove that SCL was a party to the supposed contract, or that SCL later "assumed" the contract's obligations. The only support Plaintiff provides for this claim is the curious assertion that "*Sands China says* that 'Jacobs' employment pursuant to the Term Sheet was *transferred to [Sands China]* and assumed by it.'" Pl. Br. at 41 (emphasis added). This assertion mirrors the district court's finding that, notwithstanding the complete absence of any document reflecting the alleged assumption, SCL "understood" that Plaintiff was serving as CEO pursuant to an alleged contract that had been "negotiated and approved in Nevada *by the Nevada parent*. 28PA47291 at ¶ 39 (emphasis added).

These "facts" do not establish that SCL "purposefully availed itself" of Nevada's laws. *Viega*, 328 P.3d at 1157. Indeed, the extraordinarily passive conduct alleged in these statements (*e.g.*, the contract "*was transferred*" to SCL, and SCL "*understood*" the agreement to be "negotiated and approved"

[2] Plaintiff did not allege that SCL breached the employment agreement until he filed his Fourth Amended Counterclaim *after* the jurisdictional hearing.

by LVSC) stands in sharp contrast with the cases cited by Plaintiff. In those cases, the courts found that the foreign corporation undertook unambiguously *affirmative acts*—such as executing written agreements—to knowingly assume the obligations of a contract made in the forum state.[3] Here, Plaintiff (like the district court) cites *no evidence* showing that SCL undertook any affirmative act to "assume" the alleged contract in Nevada—not a single email, agreement, board resolution or other document reflecting a "purposeful" act.

Similarly, Plaintiff's claim that SCL "purposefully availed itself" of Nevada's laws by "accepting the benefits" of the alleged contract also fails. A passive act such as "accepting benefits" cannot satisfy the requirement that the non-resident must "*affirmatively direct [its] conduct*" to the forum state. *Viega*, 328 P.3d at 1157. This is particularly true where, as here, the non-resident company does not "accept the benefits" of the employee's services *in the forum state*.

To be sure, Plaintiff claims that two cases from other jurisdictions hold that "accepting the benefits of an employee's services pursuant to an employment agreement" subjects a party to personal jurisdiction. Pl. Br. at 41-42. But this claim is simply wrong. In *Woods v. Jorgensen*, 522 So.2d 935, 937 (Fla. Dist. Ct. App. 1988), a Florida court upheld personal jurisdiction over California trust based on evidence showing that the trust was the alter ego of a California corporation. In *Thornton v. Interstate Securities Co.*, 666 P.2d 370, 374 (Wash. App. 1983), a Washington court upheld personal

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[3] *See, e.g., Jet Wine & Spirits, Inc. v. Bacardi & Co., Ltd.*, 298 F.3d 1, 8 (1st Cir. 2002) (executed written agreement); *Jeffrey v. Rapid American Corp.* 529 N.W.2d 644, 655 (Mich. 1995) (same); *Bruns v. DeSoto Operating Co. Inc.*, 251 Cal. Rptr. 462 (Cal. App. 1989) (purchased assets that constituted the subject matter of the contract).

jurisdiction over a Kansas company based on evidence showing that company collected accounts receivable *in the forum state*. Thus, neither case supports Plaintiff's claim.

Furthermore, the "accepting the benefits" rationale is particularly unavailing here because SCL "accepted the benefits" of Plaintiff's services *in Macau*, not Nevada. Consequently, even under this novel theory, the contract claim provides no basis for a finding that SCL "purposefully availed itself" of Nevada law. SCL did not negotiate or make the contract in Nevada; SCL did not perform the contract in Nevada; and SCL did not "accept the benefits" of the contract in Nevada.

Finally, even if Plaintiff could prove that SCL "purposely availed itself" of Nevada's laws, he fails to establish this Court's second jurisdictional requirement—a showing that the actual breach of contract claim resulted from SCL's "*purposeful" conduct in Nevada*. *See Dogra v. Liles*, 129 Nev. Adv. Op. 100, 314 P.3d 952, 955 (2013).

Like the district court, Plaintiff asserts that this requirement is met because (1) LVSC executives made the termination decision in Nevada while acting as SCL's agents; and (2) "SCL knew of LVS's acts in the forum to complete Jacobs' termination and *assented to them*." 28PA47313, ¶ 152 (emphasis added); *see also* 28PA47298-99, ¶¶ 68-71; Pl. Br. at 45.

But this claim cannot stand for several reasons. First, it relies on the district court's inverted agency theory which asserts that the foreign subsidiary can be the principal and the in-state parent can be the agent, even though the parent controls the subsidiary. As noted earlier, this theory conflicts with basic precepts of both agency and corporate law.

Second, it relies on the assertion that the in-state parent exercised sufficient control over the foreign subsidiary to establish an agency

relationship. As shown above, the district court cited only facts showing the kind of control inherent in a parent-subsidiary relationship, which "is not sufficient to establish agency." *Viega*, 328 P.3d at 1158.

Finally—and perhaps most importantly—Plaintiff cites no evidence showing that SCL *directed* its purported agents in Nevada to undertake the termination strategy. Both this Court and the U.S. Supreme Court have made clear that a corporation can engage in "purposeful" conduct in a forum only "by *directing its agents or distributors to take action there*." *Daimler*, 134 S. Ct. at 759 n.14 (emphasis added); *Viega*, 328 P.3d at 1161 (specific jurisdiction can arise "when a corporate entity purposefully *directs its agent* to engage in activities in the forum").

Accordingly, for purposes of specific jurisdiction, it is not enough if the in-state agent (in this case, LVSC) engages in conduct *on its own* that can then be "attributed" to the non-resident principal (SCL). Rather, to establish specific jurisdiction, a plaintiff must show that the non-resident principal expressly *directed the agent* to undertake the relevant conduct within the forum. *Id.*

In this case, Plaintiff, like the district court, relies entirely on evidence supposedly showing that SCL "knew" of LVSC's termination plans and then "*assented to them*." 28PA47313, ¶ 152 (emphasis added). These alleged "facts" are insufficient as a matter of law to show that SCL "directed" its alleged agents to terminate Plaintiff or otherwise engaged in "purposeful" conduct relating to the alleged breach.

Thus, Plaintiff failed to carry his burden of showing that his breach-of-contract claim satisfied both of this Court's two requirements for specific jurisdiction: SCL did not purposefully avail itself of Nevada laws, and the alleged breach of contract did not arise from SCL's purposeful conduct in

Nevada. On either of these two grounds, the district court's Order should be vacated as to this claim.

3. Plaintiff's Conspiracy and Aiding and Abetting Claims Do Not Support Specific Jurisdiction.

Plaintiff invokes the "conspiracy theory of jurisdiction" to defend the district court's finding of specific jurisdiction based on the conspiracy and aiding and abetting claims. Pl. Br. at 44. But a plaintiff cannot rely on mere allegations to establish personal jurisdiction; rather, he has the burden of "introducing competent evidence of specific facts" to establish this claim. *Trump,* 857 P.2d at 743.

In this case, Plaintiff again relies on his agency theory to try to show specific jurisdiction based on the "conspiracy" and "aiding and abetting" claims. In particular, he again argues that LVSC, while allegedly acting as SCL's agent, made plans in Nevada to terminate Plaintiff, and SCL "*knew of and ratified this wrongful activity*." Pl. Br. at 45 (emphasis added).

But this theory is no more viable in the context of a conspiracy claim than it is in the context of a breach of contract claim. Indeed, it suffers from exactly the same infirmities. It relies on the legally untenable assertion that LVSC could have acted as SCL's "agent" even though LVSC controlled SCL; it cites no facts showing that LVSC exercised sufficient control over SCL to establish an agency relationship; and (3) it provides no evidence showing that SCL "directed" LVSC to undertake any acts in furtherance of the alleged conspiracy. *See* Section D. 2, *supra* pp. 12-16.

Indeed, as a matter of law, the mere "fact" that SCL purportedly "knew of and ratified" LVSC's plans does not show that SCL "directed" LVSC to undertake the alleged conspiracy or otherwise engaged in sufficiently "purposeful" conduct to establish specific jurisdiction over SCL.

Daimler, 134 S. Ct. at 759; *Viega*, 328 P.3d at 1163. For these reasons, the conspiracy and aiding and abetting claims provide no basis for specific jurisdiction.

4. Plaintiff's Defamation Claim Does Not Support Specific Jurisdiction Over SCL.

For the first time in this litigation, Plaintiff claims that SCL waived its jurisdictional objections by joining in a motion to dismiss the Third Amended Complaint under NRCP 12(b)(5). Pl. Br. at 45. But Plaintiff waived this argument by failing to present it to the district court. *Diamond Enterprises v. Lau,* 113 Nev. 1376, 1378, 961 P.2d 73, 74 (1997). In addition, the claim is factually and legally unfounded. SCL moved to dismiss the original complaint for lack of jurisdiction on December 20, 2011 (which ultimately led to this Court's August 26, 2011 mandate), and it moved to dismiss Plaintiff's Third Amended Complaint for lack of jurisdiction and failure to state a claim on January 12, 2015. *Id.* at 1378, 951 P.2d at 74. The mere fact that it joined its jurisdictional objections with other defenses did not waive the jurisdictional defense. *Hansen v. Eighth Jud. Dist. Ct.*, 116 Nev. 650, 656, 6 P.3d 982, 986 (2000).

Plaintiff fares no better with his argument that the defamation count can support specific jurisdiction over SCL. As with his other claims, Plaintiff fails to present any evidence showing that SCL "directed" Mr. Adelson to make the allegedly defamatory statement. Instead, Plaintiff relies on a district court case holding that a company can be liable for the defamatory statements made by its president while acting within the scope of his authority. Pl. Br. at 46.

But this argument confuses the test for liability with the test for specific jurisdiction over non-resident corporations. As shown above,

under both *Daimler* and *Viega*, a non-resident corporation engages in "purposeful" conduct in the jurisdictional sense only if it "directs" its in-state agent to undertake a specific course of conduct. *Daimler*, 134 S. Ct. at 759; *Viega*, 328 P.3d at 1163. This test is not met if the in-state agent—whether a subsidiary or an individual—acts on its own initiative with no direction from the foreign parent.

Furthermore, Plaintiff presented no evidence showing that Mr. Adelson was even acting within the scope of his authority as an SCL agent when he made the alleged statement. Plaintiff's theory is that Mr. Adelson was simultaneously acting in both his individual capacity and as an "agent" for SCL. But as SCL showed in its opening brief, if an agent commits an act in his personal capacity—while acting on behalf of his own interests—he necessarily cannot be acting on behalf of his principal's interests. Plaintiff makes no showing to the contrary.

Thus, like his other claims, Plaintiff's defamation claim provides no basis for specific jurisdiction against SCL.

E. The District Court Erred in Finding its Exercise of General and Specific Jurisdiction To Be Reasonable.

Plaintiff attempts to defend the district court's "reasonableness" finding[4] by claiming, as the district court did, that "SCL will *not suffer any burden* defending this action in Nevada." 28PA47315-16, ¶ 167 (emphasis

[4] To determine whether the exercise of personal jurisdiction is reasonable, the courts consider a range of factors, including (1) the burden on the defendant; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; and (4) the judicial system's interest in obtaining the most efficient resolution of controversies. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *Emeterio v. Clint Hurt & Assocs., Inc.*, 114 Nev. 1031, 1036-37, 967 P.2d 432, 436 (1998).

added); Pl. Br. at 48. Like the district court, Plaintiff cites *no facts* in the record—not a single piece of evidence—to support this extraordinary assertion. As SCL stressed in its opening brief, this litigation has already been extraordinarily burdensome, costing SCL more than $2.4 million in the jurisdictional phase alone (8PA4438:11-13), in large part because of the acknowledged conflicts between the district court's discovery rulings and SCL's obligations under the MPDPA. 28PA47316, ¶ 171.

Plaintiff attempts to dismiss the hardships imposed by the MPDPA by making the remarkable assertion that "any hardship [is] of [SCL's] own making"—as if SCL invented the MPDPA and then spent extraordinary sums of money to comply with fictitious obligations under Macanese law. Even the district court acknowledged that the MPDPA imposes a legal duty on SCL that directly conflicts with its discovery obligations in this case. 14PA43797, ¶ 25. This conflict warrants special weight in light of the Supreme Court's caution that in assessing the reasonableness of the exercise of jurisdiction over a foreign corporation, a court must take into account the "transnational context" of the jurisdictional dispute. *Daimler*, 134 S. Ct. at 762-63.

Finally, Plaintiff provides no cogent answer to what is perhaps the most important question in this appeal: What interest does the Nevada judicial system have in resolving a dispute between a Florida/Georgia resident and a Cayman Islands corporation that is based in Macau and does no business in Nevada?

Plaintiff's only response is that Nevada has an interest in "resolving disputes associated with Nevada contracts." Pl. Br. at 48. But this claim ignores the obvious fact that the litigation of Plaintiff's substantive claims

against the primary defendants—LVSC and Mr. Adelson—will proceed in Nevada whatever the outcome of SCL's jurisdictional challenge.

Nevada has no real interest in adjudicating a dispute between two non-residents of the state, and a finding of jurisdiction will impose exorbitant costs on a foreign company. These two undeniable facts, together with the transnational context of the dispute, make the exercise of jurisdiction over SCL unreasonable.

F. The Sanctions Order.

Plaintiff claims that the Sanctions Order is "moot" because it had "no bearing" on the district court's jurisdictional ruling. Pl. Br. at 51. This argument ignores the full scope of the order which not only authorized the district court to draw adverse inferences, but also barred SCL from presenting any witnesses or other evidence. 14PA43828 at IV(e).

With respect to the adverse inferences, the district court stated that it found the evidence sufficient to establish jurisdiction without the adverse inferences, but specifically noted that the inferences provided "additional evidentiary support" for its conclusions. 28PA47308, ¶¶ 123, 125. If this Court finds that the district court did not rely on the adverse inferences, and further finds that the district court's jurisdictional order must be vacated, SCL agrees that the propriety of the *evidentiary* sanctions order does not have to be decided in this appeal.

On the other hand, if the Court were to conclude that Plaintiff's evidence raised a colorable claim of jurisdiction, a very different situation would arise. In such a case, the Court would then have to address the sanctions order which barred SCL from presenting *any* of its extensive evidence rebutting Plaintiff's claims on such critical jurisdictional issues as the nature of its relationship with LVSC—all of which SCL detailed in its

Offer of Proof. 23PA46200-22; *see also* 23PA46223-80 (appendix supporting Offer of Proof).

Apart from the evidentiary sanctions, the district court's March 6, 2015 sanctions order also imposed various monetary sanctions (14PA43828 at IV(e)), which this Court has now stayed. Nev. Sup. Ct. Order dated April 2, 2015 (Case No. 67576). The monetary sanctions provide an alternative reason why the sanctions order should be vacated.

To the extent the Court addresses the sanctions order in this appeal, Plaintiff provides no challenge to the major factual predicates of SCL's argument, including the following:

1. The Macanese government *required* SCL to redact all personal data from documents produced in jurisdictional discovery;

2. SCL undertook extensive good faith efforts to provide alternative sources for the redacted data; and

3. The redacted personal data information had absolutely *no jurisdictional relevance or importance*.

In light of these unchallenged predicates, the sanctions order should be vacated for the reasons set forth in SCL's opening brief.

G. This 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.

With respect to the apparent bias of the district judge, Plaintiff makes no attempt to defend the district court's declared intention 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. 2PA2669 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 this Court's specific directive.

Plaintiff also does not deny that the district court holds the unsupported belief that SCL acted with an intent to "conceal evidence" and "abuse" discovery. 14PA43825, ¶ 148; 14PA43818, ¶ 112; 14PA43827, ¶ 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).[5]

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. Among other things, Defendants have been forced to file ***eight writ petitions*** in a five-year old case that only recently began merits

[5] 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).

discovery. Plaintiff seeks to portray the Petitions as an example of "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 then led to the fifth petition.

Nor is there any reason to believe this pattern will end, as three additional petitions are currently pending before this Court. On June 19, 2015, SCL filed its petition in this matter after the district court issued its jurisdictional decision. On June 23, 2015 this Court *sua sponte* issued an order staying the district court's jurisdictional order. Nev. Sup. Ct. Order dated June 23, 2015 (Case No. 68265).

On June 23, 2015, SCL filed an emergency petition and request for stay after the district court ordered SCL to produce for deposition *in Hawaii on five days notice* one of SCL's Hong Kong-based independent directors. This Court subsequently issued an order staying the deposition. Nev. Sup. Ct. Order dated June 23, 2015 (Case No. 68275).

Finally, on June 26, 2015, SCL and the other defendants filed a petition seeking writ relief after the district court ordered the case to be tried on the merits in less than four months, even though all merits discovery had been stayed for nearly four years as a result of this Court's mandate. This Court subsequently issued an order vacating the trial date. Nev. Sup. Ct. Order dated July 1, 2015 (Case No. 68265).

In addition to this pattern of repeated—and meritorious—petitions for writ relief, 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 decisions to (1) double the number of

jurisdictional custodians that SCL was required to search with no showing of jurisdictional relevance; (2) require SCL to create a 37,000 page "Relevance Log" so that the court could determine if it should impose additional sanctions; or (3) require SCL to produce a Hong Kong-based member of its Board of Directors in Hawaii for a deposition on only five days notice.

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

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*, 130 Nev. Adv. Op. 46, 335 P.3d 183, 190 (2014). SCL therefore requests to have this case reassigned if remanded.

III. CONCLUSION

Petitioners respectfully request that this Court grant the Petition and enter an order vacating the district court's sanctions and jurisdictional orders and directing the district court to dismiss Plaintiff's complaint against SCL.

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CERTIFICATE OF COMPLIANCE

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

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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 following document: **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:

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Pursuant to Nev. R. App. P. 25(b), I further certify that I caused the same document to be hand delivered in a sealed envelope, on the date and to the addressee(s) shown below:

VIA HAND DELIVERY ON 8/4/2015
Judge Elizabeth Gonzalez
Eighth Judicial District Court of
Clark County, Nevada
Regional Justice Center
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Las Vegas, Nevada 89155
Respondent

DATED this 3rd of August, 2015.

By: /s/ PATRICIA FERRUGIA