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 Electronically Filed Aug 04 2015 09:46 a.m. Tracie K. Lindeman Clerk of Supreme Court
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. THE EIGHTH JUDICIAL DISTRICT	Case No. 68309

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 IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR MANDAMUS RE TRIAL-SETTING ORDER

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INTRODUCTION

Setting aside Jacobs's proclivity, if not his practice, to personalize any and every position taken by SCL and its co-defendants in this litigation (*e.g.*, Jacobs's accusation that Defendants' clear acknowledgement of the effect of this Court's August 26, 2011 stay order was somehow "intentionally vague" and designed to put "Jacobs and the district court under the threat that . . . no tolling had occurred," Ans. Br. at 1 - 2), his "answer" to this writ petition presents no substantive reason against granting the writ. In point of fact, he opens his answer by acknowledging that "[m]uch of the relief Petitioners seek has been . . . granted" by the district court's amended scheduling order setting trial for June 27, 2016, following this Court's July 1, 2015, Order vacating the October 2015 trial date.

So, what's left? According to Jacobs, what is left is his wish for an "unequivocal ruling . . ." that confirms a point that is not in issue or contested by this writ petition: "that Jacobs's rights are preserved." Ans. Br. at 1. Defendants have been clear all along: under the tolling rule that the Court articulated years ago in *Boren v. City of North Las Vegas*, 98 Nev. 5, 638 P.2d 404 (1982), this Court's stay tolled Rule 41(e)'s five-year rule. Jacobs's attempt to defend his own inexplicable refusal to acknowledge that undeniable fact in the district court—and the district court's consequent imposition of an entirely unfair trial date —is wholly irrelevant in light of Jacobs's belated decision to embrace *Boren's* tolling rule in this Court, and the district court's order resetting the trial date.

Jacobs's desire to self-aggrandize is not an appropriate response to the writ petition; it should be disregarded by the Court. Nevertheless, district court's response to the Court's order of July 1 vacating the October

trial date confirms that her scheduling order setting trial in October 2015 was erroneous as a matter of law, and that Jacobs's answer should be disregarded as irrelevant to the issues framed by the defendants' writ petition: whether this Court's August 2011 stay order tolled the five-year period and whether forcing the defendants to trial without affording them a reasonable opportunity to develop through discovery the facts to defend themselves would be a denial of their right to due process.

A. The District Court's New Trial Setting In Response to This Court's July 1, 2015 Order Confirms that the Petition Should be Granted.

This Court's July 1, 2015 Order vacating the expedited October trial date effectively granted the relief called for in the Petition. The July 1, 2015 Order confirms that "the stays entered in these matters toll the five-year period set forth in NRCP 41(e)." Order at 2-3. In an effort to clothe himself in the garb of an aggrieved party, Jacobs's Answering Brief maintains that further "clarity" is needed to prevent him from becoming "a victim of potential future interpretations of NRCP 41(e)." Ans. Br. At 3. This is nonsense. This self-invitation to brief that which is not in issue does not turn the Court's July 1 Order into a request for the Court and the parties to endure false statements of his and the district court's rectitude for rejecting the Court's binding decision in *Boren v. City of North Las Vegas* in favor of "that silly [unpublished order in the] *Meduka* case." APP0180, 6/12/15 Supp. 16.1 Tr. at 2:22. Jacobs is implicitly asking the Court to grant the writ while at the same time presenting reasons why the writ should not issue.

B. Plaintiff's Unwarranted Attacks on Petitioners' "Silence" Conveniently Ignore His Own Silence and the Record.

Plaintiff's continued attacks on Petitioners' "silence" on Rule 41(e) predictably ignore or misrepresent record facts. The four "facts" Plaintiff

points to in his Answering Brief to support his attack on Petitioners "convenient silence" demonstrate nothing more than the district court at some point suggested briefing on the five-year issue, which neither side provided. *See* Ans. Br. at 2:2 citing 1 App 060 n.8 (the initial district court order setting an expedited trial date, because "the parties have not agreed" [when in fact it was only plaintiff that refused to stipulate] to tolling); 2SA0304 (Minute Order issued by the district court following status conference initially set to address "Briefing on Five-Year Rule" but instead used only to review an unrelated status report); 5SA1122 (Plaintiff's counsel stating "I'm not sure that briefing ultimately was ever submitted. I recall us having the discussion . . . but I don't know that the briefing ever actually occurred." Las Vegas Sands counsel concurred, saying that "I do not remember that there was actually a brief submitted to the Court on this issue. I do remember the Court inviting briefing . . . but I don't believe that any of us did."); 9SA1875 - 76 (Sands China's counsel stating that "If there is any evidence that any of the defendants' counsel ever said on the record that the Rule 41(e) had clearly not been tolled, . . . I've never heard that before" in response to the Court's statement that she "asked for briefing . . . the parties in this case consulted and decided they weren't even going to brief the issue").

It is disingenuous and reckless for Jacobs to now represent that Sands China "declined" or "would not agree to briefing any position" (Ans. Br. at 1) in view of this record and the fact Plaintiff himself never briefed the issue. The parties did argue the Rule 41(e) issue, which is not at all complicated: The Court's August 26, 2011 stay order stayed the application of Rule 41(e).

C. Plaintiff's Suggestion that an Expedited Trial Date was Proper Likewise Ignores the Record Facts.

Plaintiff's argument that trial setting issues do not warrant writ relief contradict his alleged need for "clarity." He also ignores the due process violations involved when, as here, he sought an expedited trial date that would deprive Defendants of a fair opportunity to gather facts from Jacobs and others to defend themselves.

Jacobs's defense of the district court's expedited trial setting because of alleged "apprehension" or "inconsistencies" is nothing more than an effort to defend his petulant insistence on an expedited trial setting to exploit the considerable advantage he gained from years of discovery, including extensive merits discovery under the guise of "intertwined" jurisdictional discovery, while the defendants, by edict of the district court, had none. *Boren* clearly says that the NRCP 41(e) setting was tolled during those years. Furthermore, this Court's prior decisions, including the unpublished order in the *Maduka* case that allegedly gave the district court pause, have recognized that the five-year period "may be extended" by stipulation. *Maduka v. Eighth Jud. Dist. Ct.*, No. 57299, 2011 WL 4378796, at *2 (Nev. 2011) (citing *Massey v. Sunrise Hospital*, 102 Nev. 367, 368, 724 P.2d 208, 209 (1986) (where the parties stipulated to "waive" or extend the NRCP 41(e) period for a specified duration); *Johann v. Aladdin Hotel Corp.*, 97 Nev. 80, 81, 624 P2d 493, 493-94 (1981) (acknowledging a limited written stipulation between the parties extended the NRCP 41(e) period); NRCP 41(e) (providing that five-year period "may be extended."). *Maduka* itself recognized that the "oral stipulation agreed to by the parties, and memorialized in the district court's . . . minutes, validly extended the NRCP 41(e) period until July 12, 2010," but as this Court recognized on appeal, the district court unfortunately erred in not bringing the matter to

trial within the stipulated timeframe -- not because of any ambiguity, but because of the case management process. *Id.* at *3.

Jacobs had adequate "protection," both under *Boren* and under Petitioners' unequivocal statements that the five-year period of NRCP 41(e) period had been tolled until July 22, 2019 (Petitioners provided the computation used to obtain that date), AND their stipulation on the record to be bound to that extended period. 1APP0124. Despite having no risk under NRCP 41(e), Plaintiff unreasonably insisted on an expedited trial setting, which the district court willingly gave him.

D. *Massey v. Sunrise Hospital* Does Not Change the Analysis in this Case.

Jacobs makes much ado about *Massey*, a case that is factually inapposite to this one. *Massey* involved a case in which the five-year rule had run during the pendency of proceedings against one party (the doctor) following appeal. *Massey*, 102 Nev. at 369, 724 P.2d at 209. Plaintiff there initially brought claims against the hospital only; over a year later, he added the doctor, who moved to dismiss on statute of limitation grounds. *Id.* The doctor's dismissal was granted and the plaintiff appealed. During the pendency of the appeal, the hospital and plaintiff agreed to "waive" the five-year rule, which would have run on July 28, 1983, for a discrete period of six months following remittitur. *Id.* Remittitur issued on December 28, 1983; under the stipulation, trial was required to begin by June 28, 1984. *Id.* This Court reversed the order granting the doctor's dismissal and remanded for a separate trial on the statute of limitations issue. *Id.* The doctor was thereafter dismissed, on April 11, 1984, and on December 6, 1984, the hospital moved for dismissal pursuant to NRCP 41(e).

Under those circumstances, not those now before the Court, the Court recognized that although the "spirit of the law contemplates trial on

the merits," this spirit must be balanced with "the desire to end litigation after a reasonable amount of time." *Id.* The Court recognized that the "three year" provision *extends* the "five-year" rule when an appeal is taken. In this case, Plaintiff attempts to turn this provision on its head by suggesting that the "five-year" period should be *shortened* because of the appeal by a Defendant (Adelson) whom he belatedly pulled into the action in 2011. App. Br. at 5.

Massey does not support *shortening* the five-year rule because of the provision permitting an extension to that rule by a 3-years-to-trial from remittitur clause. In fact, this Court in *Massey* recognized that the district court's 54(b) certification effectively delayed the trial because it was not unreasonable for the plaintiff to await trial against the hospital while the statute of limitation issue as to the doctor remained open. *Massey*, 102 Nev. at 370, 724 P.2d at 210. The Court therefore rejected the hospital's claim that it should not be bound by the "three-year" extension available due to its co-defendant's appeal, and remanded based on the district court's failure to exercise the discretion to permit plaintiff the additional time allowed to take the claims against the hospital to trial. *Id.* at 371, 724 P.2d at 210.

Here, the Court's prior stays toll the five-year period until July 22, 2019. It would be contrary to *Massey* and the spirit of the rule to permit Plaintiff to use the "three-year" rule to shorten rather than extend the time available for the parties to bring this matter to trial on the merits.

CONCLUSION

Plaintiff cannot reasonably maintain his contradictory position that "clarity" is needed (as alleged by him and the district court) and his position that writ relief is inappropriate. Petitioners thus respectfully

request that this Court grant the Petition and confirm that this case was prevented from going to trial by the Court's August 26, 2011 stay and the period of time that stay was in place tolled the five-year period set forth in Rule 41.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this **REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR MANDAMUS RE TRIAL-SETTING 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.

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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 IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR MANDAMUS RE TRIAL-SETTING ORDER** 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
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DATED this 3rd day of August, 2015.

By: /s/ PATRICIA FERRUGIA