

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 *****

3 SANDS CHINA LTD., A Cayman
4 Islands corporation,

5 Petitioner,

6 v.

7 CLARK COUNTY DISTRICT
8 COURT, THE HONORABLE
9 ELIZABETH GONZALEZ,
10 DISTRICT JUDGE, DEPT. 11,

11 Respondents,

12 and

13 STEVEN C. JACOBS,

14 Real Party in Interest.

Case No.: 68265 Electronically Filed
Consolidated with Case Nos. 68275
68309 Nov 17 2015 09:57 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

**PETITION FOR REHEARING
EN BANC**

15 **I. INTRODUCTION**

16 Real Party in Interest Steven C. Jacobs ("Jacobs") petitions this Court under
17 NRAP 40 to rehear the deposition point addressed in the November 4, 2015
18 unpublished Order which (amongst other things) granted Sands China Ltd.'s
19 ("Sands China") Petition for Writ Relief in Docket No. 68275 (the "Order"). There,
20 this Court said that a district court "lacked the authority to order" a corporation's
21 Independent Director to attend a deposition in the United States because such
22 persons are the equivalent of non-parties, with this Court going so far as to note the
23 protections for "non-parties" under NRCP 45. (Order at 6.)

24 Respectfully, the Order conflicts with the plain terms of NRCP 30 and 32 as
25 well as placing Nevada on a corporate-litigation island in conflict with every
26 jurisdiction which has adopted rules analogous to the Federal Rules of Civil
27 Procedure. Indeed, since the Federal Rules' 1970 amendments it is the law that "the
28 corporation is responsible for producing its officers, managing agents, and directors
if notice is given; a subpoena for their attendance is unnecessary, and sanctions may

1 be imposed against a corporation if they fail to appear." WRIGHT, MILLER, CANE,
2 MARCUS & STEINMAN, 8A FED. PRAC. & PROC. CIV. § 2103 (3d Ed. 2015). This
3 settled rule follows from the fact that "[o]bviously it is not literally possible to take
4 the deposition of a corporation; instead, when a corporation is involved, the
5 information sought must be obtained from natural persons who can speak for the
6 corporation." *Id.* And, as NRCP 32(a)(2) expressly provides, the depositions of
7 those authorized to speak on the corporation's behalf – officers, directors, managing
8 agents or Rule 30(b)(6) designees – constitute the corporation's "representatives"
9 and thus "the deposition of the corporation is said to be 'taken through' [these]
10 particular individual[s]." *Id.*

11 Corporate directors – whether executive directors, non-executive directors or
12 so-called independent directors – are (under the express terms of NRCP 30 and 32)
13 the representatives of the corporation and their deposition may be taken upon
14 notice. They are not a "non-party." They are treated as parties – because a
15 corporation cannot literally speak – which is why the corporation is responsible for
16 producing them and subject to consequences for their noncompliance. NRCP 37(d).

17 This Court's Order ignores that long-established rule and places Nevada in
18 complete isolation relative to discovery from corporations, departing from the
19 expressed terms of the Nevada Rules of Civil Procedure and the precedent upon
20 which the Rules derive. If this Court will not recall the Order, then Jacobs asks that
21 it be published as a formal opinion. After all, this Court entertained the writ
22 because it proposed to provide guidance to the lower courts and all litigants. All
23 corporations and other legal entities should be afforded the same protections as
24 these Petitioners under Nevada law.

25 **II. DISCUSSION**

26 A petition to rehear an en banc decision of this Court is governed by
27 NRAP 40(b)(2). "A petition shall state briefly and with particularity the points of
28 law or fact that the petitioner believes the court has overlooked or misapprehended

1 and shall contain such argument in support of the petition as the petitioner desires to
2 present." *Id.* This Court will also entertain a petition for rehearing where doing so
3 will promote substantial justice. *Calloway v. City of Reno*, 114 Nev. 1157, 1158,
4 971 P.2d 1250, 1250 (1998).

5 Here, this Court overlooked or misapprehended that "[u]nder Rule 30(b)(1), it
6 is well recognized that if the corporation is a *party*, *the notice compels it to produce*
7 any 'officer, ***director*** or managing agent' named in the deposition notice. It is not
8 necessary to subpoena such individual." *Cadent Ltd. v. 3M Unitek Corp.*, 232
9 F.R.D. 625, 628 n.1 (C.D. Cal. 2005)¹ (quotations omitted, last emphasis added);²
10 accord *JSC Foreign Econ. Ass'n Technostroyexport v. Int'l Dev. & Trade*
11 *Servs., Inc.*, 220 F.R.D. 235, 237 (S.D.N.Y. 2004) ("Pursuant to Rule 30(b)(1) of
12 the Federal Rules of Civil Procedure, a specific officer, ***director***, or managing agent
13 of a corporate party may be compelled to testify pursuant to a notice of
14 deposition.") (emphasis added).³ Notice alone compels a director to attend the
15 deposition. In fact, "the 1970 Amendments to Rule 30 expressly removed the
16 previous distinction between directors, on the one hand, and managing agents and
17 officers, on the other; a corporation now is *deemed* to have legal control over its
18 directors, like its managing agents and officers for deposition purposes."

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21 ¹ This Court relied upon *Cadent Ltd.* in *Okada v. Eighth Judicial District Court*, 131 Nev. Adv. Op. 83 (2015).

22 ² Jacobs noted this point on pages 3 and 4 of his Opposition to Objection to
23 Notice of Deposition of David Turnbull and Motion for Protective Order which was
24 attached as Exhibit 1 to Jacobs' Opposition to Purported Emergency Motion to Stay
25 NRAP 27(e) – Immediate Relief Required. That Opposition was treated *sua sponte*
by this Court as Jacobs' Answer to Sands China's Writ Petition. (Order Granting
Stay at 1 n.1, Dkt. No. 68275, June 23, 2015 ("In the interest of judicial efficiency,
we deem the opposition [to the motion to stay] as the answer to the petition.").)

26 ³ See *Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005)
27 (recognizing "that federal decisions involving the Federal Rules of Civil Procedure
28 provide persuasive authority when this court examines its rules.").

Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co., 497 F.3d 1135, 1147 (10th Cir. 2007) (emphasis original).

The deposition of any director may be set upon notice because "[w]hen an employee named in a deposition notice 'is a *director*, officer, or managing agent of [a corporate party], such employee will be regarded as a representative of the corporation.'" *Cadent Ltd.*, 232 F.R.D. at 628 (quoting *Moore v. Pyrotech Corp.*, 137 F.R.D. 356, 357 (D. Kan. 1991)) (emphasis added). This is true even if the officer, director or managing agent is a foreign national. *Calderon v. Experian Information Solutions, Inc.*, 290 F.R.D. 508, 517 (D. Idaho 2013) (Only if the foreign national is "not an officer, director or managing agent of the corporate opponent" must a subpoena be obtained and enforced through the procedures of the Hague Convention or other applicable treaty). Nor does it matter if the director is denoted as an executive director, non-executive director or even a so-called independent director.⁴ See *Murata Mfg. Co. v. Bel Fuse Inc.*, No. 03 C 2934, 2004 WL 2211608, at *1 (N.D. Ill. Sept. 30, 2004) (there is no "distinction between executive and non-executive directors" in context of serving process upon corporation).

Respectfully, the predicate for this Court's Order – that as an "Independent Director," Turnbull is somehow analogous to a non-party witness – is contrary to both fact and law. As a director of Sands China, Turnbull is a corporate

⁴ A director's purported "independence" has nothing to do with their status as a corporate representative under Rules 30 and 32. "Independence" is a criteria defined by various stock exchanges for a corporation that seeks the privilege of trading shares upon their exchange, including on the Hong Kong Stock Exchange. The New York Stock Exchange has similar criteria for identifying which directors qualify as independent directors. See NYSE Listed Company Manual, §303A.02 Independence Test (explaining who qualifies as an "independent director."). nysemanual.nyse.com/lcm/help/mapContent.asp. Turnbull is a director, and whether he meets the criteria of "independence" for purposes of the Hong Kong Stock Exchange is of no moment for his testimony. By definition, a director – regardless of whether he or she meets the test of independence for any particular stock exchange – is a corporate representative who speaks for the company under Rules 30 and 32.

1 representative, speaks for the corporation, and his testimony is binding on the
2 corporation just as is the testimony of any other "party." NRCP 32(a)(2). And that
3 is why his deposition may be properly set upon notice without any need for a
4 subpoena.

5 The District Court necessarily has the discretion to set the location of
6 Turnbull's deposition – just like for any corporate officer, director, managing agent
7 or Rule 30(b)(6) designee – in conformity with the factors outlined in *Okada v.*
8 *Eighth Judicial District Court*, 131 Nev. Adv. Op. 83 (2015). Corporate officers,
9 directors, managing agents or Rule 30(b)(6) designees are not "non-parties" for
10 purposes of discovery or the rules of evidence.

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1 **III. CONCLUSION**

2 This Court's Order misapprehends the authorized means of discovery from
3 corporate officers, directors and managing agents. Persons who assume these roles
4 are not non-party witnesses. While the physical location of any corporate
5 representative may be a factor for the district courts to apply in determining where
6 the deposition should occur (considering all other factors), this Court did not
7 address that point, instead saying that the District Court lacked authority to make a
8 corporate director appear. Accordingly, Jacobs asks this Court to rehear that
9 portion of the Order. If this Court declines, then Jacobs asks that the Order be
10 reissued as a published decision. NRAP 36(f). The effect of the Order is too
11 far-reaching to be left for the benefit of just these Petitioners. If that is the law in
12 Nevada, then everyone is entitled to know it and rely upon it.

13 DATED this 17th day of November, 2015.

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULES 40 AND 40A

I hereby certify that this brief for rehearing/reconsideration complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2007 in size 14 font in Times New Roman.

I further certify that this brief complies with the page or type-volume limitations of NRAP 40 or 40A because it does not exceed 10 pages.

Finally, I hereby certify that I have read this appellate brief, 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 NRAP 28(e)(1), which requires that every assertion in this brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on 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

DATED this 17th day of November, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC and that, on this 17th day of November 2015, I electronically filed and served a true and correct copy of the above and foregoing **PETITION FOR REHEARING EN BANC** properly addressed to the following:

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