

IN THE SUPREME COURT OF THE STATE OF NEVADA

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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: 68265
Consolidated with Case Nos.
68275 and 68309

District Court Case Number:
A627691-B

**SANDS CHINA'S
ANSWER TO JACOBS'S
PETITION FOR
REHEARING EN BANC**

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I. SUMMARY OF RELIEF SOUGHT

Real Party in Interest, Steven C. Jacobs ("Jacobs") asks this Court to reconsider its November 4, 2015, Order to vacate the district court's order requiring that Sands China Ltd., a foreign corporation ("Sands China"), produce a Hong Kong resident who is one of its Independent non-Executive Directors for deposition in Hawaii. Sands China is a foreign holding company that is incorporated in the Cayman Islands and is listed on the Hong Kong Stock Exchange. Its affiliates do business exclusively in Asia.

The Independent Director, David Turnbull, is a British citizen who works and lives in Hong Kong. He has not had any contact with this forum, has never been in Nevada, and has never been required to travel outside of Asia at the request or invitation of Sands China. *See* Declaration of David Turnbull, APP0026-27.¹

Jacobs petitions for rehearing based on his mistaken contention that the Court's November 4 Order "conflicts with the plain terms of NRCP 30 and 32," Pet. at 1, and that the Order "overlooked or misapprehended that "[u]nder Rule 30(b)(1), it is well recognized that if the corporation is a party, the notice compels it to produce any 'officer director, or managing agent' named in the deposition notice." *Id.* at 3. Jacobs's petition, however, does not support this contention. Neither Rule 30 nor 32 converts a corporate party's foreign non-resident independent directors into parties for deposition by notice in the forum, nor do the rules address the appropriate location for the deposition of a party, as the Court recently

¹ Citations to "APP00__" are references to the appendix filed in support of Sands China's original petition for writ relief.

recognized in the *Okada* writ decision in Case No. 68439. Nor do the rules speak to the appropriate location for a foreign non-party witness, such as Mr. Turnbull.

The Court's Order was correct as written and filed. If Jacobs wishes to depose Sands China's Independent Hong Kong Director Turnbull, Jacobs can do so in Asia, where he worked and where Sands China is exclusively located and Mr. Turnbull resides.

II. STANDARD FOR REHEARING

NRAP 40 provides that rehearing may be appropriate "(i) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or (ii) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case." NRAP 40(c). Rehearing is not appropriate to reargue matters presented in the briefs. *Id.*

A petition for rehearing must "state briefly and with particularity the points of law or fact that the petitioner believes the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present." NRAP 40(a)(2). Claims "that the court has overlooked or misapprehended a material question of law or has overlooked, misapplied, or failed to consider controlling authority shall be supported by a reference to the page of the brief where petitioner has raised the issue." *Id.*

Jacobs's meritless claim of error is that the Court's November 4 Order vacating the district court's earlier order permitting him to depose Independent Director David Turnbull in Hawaii "conflicts with the plain terms of NRCP 30 and 32," Pet. at 1, and that the Court "overlooked or

misapprehended that "[u]nder Rule 30(b)(1), it is well recognized that if the corporation is a party, the notice compels it to produce any 'officer director, or managing agent' named in the deposition notice." *Id.* at 3. But Jacobs does not point to language in NRCP 30 and 32 that he claims the order conflicts with, and he has not cited any *controlling* authority that the Court overlooked. He merely rehashes arguments and some of the authorities he urged on the Court when he unsuccessfully opposed the Order he now wishes to "rehear" (read "reargue") and set aside.² For these reasons, Jacobs's petition for rehearing does not present a basis for the Court to overturn its November 4 Order, which it should affirm by denying rehearing.

III. THE COURT'S NOVEMBER 4 ORDER WAS ENTIRELY CORRECT AND SHOULD BE SUSTAINED.

A. The Court's Order Concluding that Mr. Turnbull is Not a Party Is Correct.

Following the erroneous conclusion that Sands China was subject to general jurisdiction, the district court ordered the deposition of Hong Kong resident David Turnbull in Hawaii on five days notice. As the Court is now well aware, Sands China is a foreign holding corporation that does not do business in the United States. It is headquartered and functions exclusively in Asia. This Court, however, in its November 4 Order overturned the district court's earlier order finding that it had general jurisdiction over Sands China, which was the primary basis for ordering Sands China to produce Mr. Turnbull in Hawaii for deposition.³

² Pursuant to NRAP 21(b)(1), the Court considered Jacobs' opposition to Petitioner's Emergency Motion to Stay as the answer to the writ petition. June 23, 2015 Order at 1.

³ Jacobs is not a forum resident. He worked in Asia. He did not identify specific Sands China contacts with Nevada that resulted in his alleged

Jacobs initially noticed the deposition of Mr. Turnbull in Las Vegas. Following Sands China's motion for a protective order to vacate that notice, 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."⁴ APP0058, at 2, ¶6; APP0049-52. The

wrongful termination in Macau. Thus, Sands China has asked this Court to reconsider its decision that the district court's "preliminary" finding of specific jurisdiction would be sustained because that finding runs counter to the law that caused the Court to overturn the district court's finding of general jurisdiction over Sands China. But to the point of Jacobs's petition for rehearing: Independent Director Turnbull had nothing to do with the alleged defamatory statement on which the district court found "preliminary" specific jurisdiction, so why should he be treated as a "party" on this theory of jurisdiction and subjected to deposition by notice 11,500 miles from his home and place of employment? Moreover, the Court is currently reexamining whether Sands China can be lawfully subjected to specific jurisdiction for a statement made in the forum that it did not make or authorize.

⁴ As addressed on page 4 of Sands China's petition, the district court's decision faulted the defendants for having "failed to establish good cause to hold Mr. Turnbull's deposition in Macau or Hong Kong, as they request." This finding turns the law upside down. *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 corporation is not required to produce a corporate officer in Florida unless it is seeking affirmative relief); 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice & Procedure* § 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 Malletier v. Dooney & Bourke*, No. 04 Civ. 5316, 2006 WL 3476735, at *16, 2006 Lexis 87096 (S.D.N.Y., Nov. 30, 2006) ("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"). The crux of the petition, which Jacobs's petition for rehearing ignores, was not whether Mr. Turnbull had to be subpoenaed; Sands China had already agreed to produce him in Hong Kong. The petition addressed whether or not he

district court failed to identify any "discovery dispute" that would be likely to arise during the deposition *or* explain how the court could "actively supervise" and resolve such a dispute in Hawaii from Las Vegas. APP0058, ¶6.

In the six plus years that Mr. Turnbull has served as an Independent non-Executive Director, he has not been required or invited by Sands China to travel outside of Asia. Mr. Turnbull has *never* been in Nevada. APP0026 ¶ 4 (emphasis added). He is a permanent resident of Hong Kong, where he has lived and worked for over 25 years. *Id.* ¶¶ 1-2.

Unlike the executive directors of Sands China, Mr. Turnbull is not an employee of the company, which he serves only on a part-time basis. Mr. Turnbull is employed by, and has significant professional obligations to, other companies in Hong Kong. APP0026 ¶ 1. Macau and Hong Kong are more than 11,500 miles from Las Vegas and in a time zone 16 hours ahead of local time, "more than two days travel from Las Vegas." APP0027, ¶ 7.

Jacobs contends that the Court's November 4 Order that Mr. Turnbull is "neither a party nor a corporate representative under NRCP 30(b)(6)" conflicts with the plain terms of NRCP 30 and 32, but he does not identify any language in the rules to support his "plain terms" argument. Instead, he offers only the empty argument that NRCP 30(b)(1) automatically requires a corporate party to produce its employees and directors in the forum chosen by non-Nevada resident Jacobs. Rule 30(b)(1), however, does not say that. NRCP 30(b)(1) permits "a party [to] take the testimony of any person, including a party by deposition." This

should be forced to leave home submit to deposition thousands of miles outside of the country where he resides and works.

plain language says absolutely nothing about turning a foreign citizen not named in the complaint into a "party" subject to deposition in the forum selected by the plaintiff merely because the foreign citizen may be affiliated with a party that has been sued in the forum.

The Court's November 4 Order in no manner conflicts with the plain language of NRCP 30 (b)(1) and 32. NRCP 32 simply describes how depositions may be used. Thus, maintaining the Court's November 4 Order would not place "Nevada on a corporate-litigation island in conflict with" the rest of the judicial world. Jacobs Pet. For Rhrgr., at 1.

Jacobs relies heavily on *Cadent Ltd. v. 3M Unitek Corp.*, 232 F.R.D. 625 (C.D. Cal. 2005), as a basis to criticize the Court's conclusion (Docket No. 68275) that the district court lacked authority to order Mr. Turnbull, an Independent non-Executive Director of Sands China, to present himself in Hawaii for deposition because he was neither a party nor a company representative under NRCP 30(b)(6). But *Cadent* does not in any way undermine the Court's decision: "**When 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*, 232 F.R.D. at 628 (emphasis added).⁵ Whether or not a subpoena was needed was not the subject of Sands China's petition. Sands China offered to present Mr. Turnbull in Hong Kong in person or by video, which Jacobs rejected. *Cadent* is also unavailing because

⁵ Notably, *Cadent* is also distinguishable because it involved the plaintiff corporation's motion for protection from having its officers and employees deposed in the forum it selected in which to file suit. *Cadent*, 232 F.R.D. at 630. The court found that the plaintiff failed to demonstrate good cause for obtaining protection against depositions in the forum it chose to sue, though it permitted some cost-splitting. Sands China did not initiate this lawsuit in Nevada (or Hawaii, for that matter).

Mr. Turnbull is an Independent non-Executive Director for Sands China. He is not its employee.

For similar reasons, the other authorities Jacobs's overblown petition relies on do not support his assault on the Court's November 4 Order. For example, in *Calderon v. Experian Information Solutions, Inc.*, 290 F.R.D. 508, 510 (D. Idaho 2013) the issue was whether dispute-resolution agents/employees of the defendant's sister company in Chile, who handled the plaintiff's dispute with the defendant, could be treated as a party for discovery purposes. The Chilean employees who handled plaintiff's dispute with the U.S. defendant were properly deemed its managing agents and thus made subject to deposition by notice under Fed. R. Civ. P. 30(b)(1) but *in Chile*, where they lived and worked, not in the United States.

Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Company, 497 F.3d 1135, 1147 (10th Cir. 2007), a Rule 30(b)(6) case also relied on by Jacobs, does not support rehearing. It involved review of the district court's Fed. R. Civ. P. 41(b) dismissal of plaintiff's claims for its willful efforts to delay the deposition of its Rule 30(b)(6) corporate designee who died during the delay, after many months of efforts by the defendants to depose him. Here, however, Sands China is not trying to avoid Mr. Turnbull being deposed; it asks only that he not be compelled to travel half-way around the world to be deposed about events that occurred near his home in Hong Kong, when Jacobs lived there and worked in Macau and was employed by Venetian Macau Ltd., an affiliate of Sands China.

Jacobs's attempts to distract the Court with his contention that Mr. Turnbull and other non-party directors must be considered "parties" under Rule 30 because corporations are unable to speak except through representatives. This argument fails to acknowledge that representatives

who speak for a corporation are designated not by Jacobs but by the corporation pursuant to NRCP 30 (b)(6). Moreover, there is no requirement that a 30(b)(6) deponent or a representative of a foreign corporation be deposed in the forum chosen by the plaintiff, as the Court recently recognized in the *Okada* writ decision, discussed below. Here, however, Jacobs sought testimony from Mr. Turnbull individually under Rule 30(b)(1), not as a corporate representative under NRCP 30(b)(6). The distinction was noted in this Court's November 4 Order and is dispositive. *See* APP0023-24; APP0049-50.⁶ The Court's November 4, 2015 Order was correct, and it should be sustained.

The spare authority offered by Jacobs to support his contention that no distinction exists between employees who are corporate directors and independent non-executive directors is an unpublished decision construing a New York statute on the subject which has no Nevada counterpart. Jacobs's Pet. for Rehearing at 4 (citing *Murata Mfg. Co. v. Bel Fuse Inc.*, No. 03 C 2934, 2004 WL 2211608, at *1, 2004 Lexis 19840, at *4 (N.D. Ill. Sept. 30, 2004)). *Murata* resolved a dispute about the adequacy of *service of process* on a Hong Kong corporation by service on a non-executive director residing in New York under a New York statute that expressly authorized service on "an officer, director, managing or general agent, cashier or assistant cashier or any other agent authorized by appointment

⁶ Jacobs cites to no authority for the nonsense proposition in footnote 4 of his Petition for Rehearing En Banc that an independent director, such as Turnbull, "is a corporate representative who speaks for the company under Rules 30 and 32." What Rule 32 says about a Rule 30 deponent is this: if at the time of deposition the deponent is an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a)," the deposition "may be used by an adverse party for any purpose." NRCP 32(a)(2) (emphasis added). That does not make Mr. Turnbull available in Nevada or Hawaii on mere notice by Jacobs.

or by law to receive service." Service of process is not an issue here. It should also be noted that *Murata* does not address the propriety of noticing the deposition of a foreign national-director—non-executive or executive—in the forum, as Jacobs attempted with Mr. Turnbull.

Mr. Turnbull is not a named party, as the Court properly concluded. If Jacobs wishes to depose him, he must do so in Hong Kong where Mr. Turnbull lives and works. *Louis Vuitton*, *supra* n. 4.

B. The Court's Recent Decision in the *Okada* Writ Proceeding Supports the Court's November 4 Order Regarding the Location of the Deposition of a Foreign Non-Party Witness.

In *Okada v. Wynn Resorts*, the Court expressly addressed the deposition of a *party* and held that NRCP 30 "does not set forth any restrictions as to where the deposition must take place." *Okada v. Eighth Judicial Dist. Ct.*, 131 Nev. Adv. Op. 83, at 8, 359 P.3d 1106, 1111 (2015). The source for the Court's discussion of this point was the treatise, *Federal Practice & Procedure* § 2112, where the authors went on to say about non-party corporate agents and officers that *their depositions should be taken at the corporation's "principal place of business."* 8A Wright, Miller & Marcus § 2112, at 533 (emphasis added).

The Court recognized that the general rule directs plaintiffs to depose foreign non-resident defendants where they reside, or at the corporation's principal place of business *for Rule 30(b)(6) witnesses*, 131 Nev. Adv. Op. 83, at 9, 359 P.3d at 1111, n. 5, (citing *Farquhar v. Sheldon*, 116 F.R.D. 70, 72 (E.D. Mich. 1987) (citing *Salter v. Upjohn Co.*, 593 F.2d 649, 671 (5th Cir. 1979)). Unlike plaintiffs who select the forum (as Jacobs did in this case), defendants usually have not chosen to place themselves in the forum. *Buzzeo v. Board of Educ.*, 178 F.R.D. 390, 391 (E.D. N.Y. 1998). Thus, "the

plaintiff is generally required to "bear any reasonable burdens of inconvenience that the action presents." *Id.*

Unlike Mr. Okada, who is himself a named party, Mr. Turnbull is neither a party nor an employee of Sands China. He resides and works in Hong Kong. He performs his duties as an Independent non-Executive Director on behalf of Sands China in Hong Kong or Macau. Turnbull Decl. ¶ 5. SCL offered to produce him in Hong Kong for a live or a video deposition, which Jacobs and the district court rejected for no good reason. APP0053-56. Compare this unreasoned decision with *Rehau, Inc. v. Colortech, Inc.*, 145 F.R.D. 444, 447 (N.D. Ohio 1992) (depositions of European witnesses ordered by telephone because, the court found, "there is no indication that the integrity of the discovery process will be compromised in any way by doing so," or that "telephonic depositions. . . will be inaccurate or untrustworthy") and *Hyam v. American Export Lines, Inc.*, 213 F.2d 221, 222 (2nd Cir. 1954) (party seeking an oral deposition at the situs of the forum is not entitled as a matter of right in every case to such a deposition. Burden to the opponent must be considered and deposition in a distant location (Bombay, India) may be ordered).

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 defendant's place of residence may be even stronger.

In re Outsidewall Tire Litigation, 267 F.R.D. 466, 471 (E.D. Va. 2010), citing *Farquhar*, 116 F.R.D. at 73; accord, *Tailift USA v. Tailiff Co. Ltd.*, No. 3:03-cv-0196-M, 2004 WL 722244, 2004 Lexis 28648 (N.D. Tex. Mar. 26, 2004) at *1, 4 (presumption not overcome that a 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").

C. Jacobs's Petition for Rehearing En Banc Does Not Demonstrate Any Reason Why Deposing Mr. Turnbull in Asia is Not Appropriate.

Jacobs says the Court should have considered *Okada*, but he makes no effort to demonstrate how considering deposing Mr. Okada, a *party*, in Las Vegas would justify deposing non-party Turnbull here, who, unlike Mr. Okada (a party) has no ties to this forum. Moreover, there was no showing by Jacobs that Mr. Turnbull could not be adequately and conveniently deposed in Hong Kong, in person or by video, as Sands China has offered in this transnational litigation. APP0045-46. The Court's November 4 Order is consistent with the law elsewhere 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*, 593 F.2d at 562 (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. Under such circumstances, a plaintiff "cannot complain if [he is] required to take discovery at great distances from the forum." *Farquahar*, 116 F.R.D. at 72. Sustaining the Court's November 4 Order is also consistent with 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).

IV. CONCLUSION.

For the foregoing reasons as well as those presented in Sands China's petition for rehearing the decision that this foreign holding company is subject to specific jurisdiction in Nevada, the Court should uphold its November 4, 2015 Order and confirm that if plaintiff wishes to depose non-party Independent Director Turnbull (or other non-party Sands China officers and directors residing in Asia), he must do so in Asia. Mr. Turnbull's deposition should therefore proceed either in Hong Kong, where he lives and works and where petitioner offered to make him available, or in Macau, where Sands China's affiliate/subsidiary that employed Jacobs (Venetian Macau Ltd.) does business.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that I have read this **SANDS CHINA'S ANSWER TO JACOBS'S PETITION FOR REHEARING EN BANC**, 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. I further certify that this brief complies with the page-or type-volume limitations of NRAP 40 or 40A because it is proportionately spaced, has a typeface of 14 points and contains 3,742 words.

4. 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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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: **SANDS CHINA'S ANSWER TO JACOBS'S PETITION FOR REHEARING EN BANC** 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, I certify that I am an employee of MORRIS LAW GROUP; that, in accordance therewith, I caused a copy of **SANDS CHINA'S ANSWER TO JACOBS'S PETITION FOR REHEARING EN BANC** to be delivered, in a sealed envelope, on the date and to the addressee(s) shown below **(as indicated below)**:

VIA HAND DELIVERY ON 1/22/2016

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

Respondent

DATED this 21st day of January, 2016.

By: /s/ PATRICIA FERRUGIA