IN THE SUPREME COURT OF THE STATE OF NEVADA

VENETIAN MACAU LTD., a Macau corporation,

Petitioner,

vs.

CLARK COUNTY DISTRICT COURT, THE HONORABLE MARK R. DENTON, DISTRICT JUDGE, DEPT. 13,

Respondents,

and

STEVEN C. JACOBS,

Real Party in Interest.

Case Number:

District Court Case Number A627691-B

PETITION FOR WRIT OF PROHIBITION OR MANDAMUS RE ORDER STRIKING VENETIAN MACAU LTD'S PEREMPTORY CHALLENGE

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RULE 26.1 DISCLOSURE

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

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

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By: /s/ DAN MCNUTT
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I. INTRODUCTION

After adding Venetian Macau Ltd. ("VML"), a Macanese company, resident in Macau, SAR, that does business only in Macau, as a defendant under an amended complaint approved by the challenged judge on September 18, 2015, *four years* and five months after persuading that same district court judge that VML is neither a necessary nor an indispensable party, Plaintiff Steven C. Jacobs ("Jacobs") moved to deprive VML of its right to timely challenge that judge under Nevada Supreme Court Rule 48.1. VML had timely and properly filed the peremptory challenge at issue in this writ petition after having been involuntarily hauled into this case. VML did so prior to the judge ruling on any contested matters concerning VML.

Jacobs should not be permitted to walk both sides of the street under Rule 48.1. Having vehemently (and successfully) fronted the position to the district court in 2011 that VML should not be a defendant "for the simple reason that it is not a party to any of the contracts at issue," PA 593. He should not now be permitted to deprive VML of its right to "one change of judge by a peremptory challenge" under Nevada Supreme Court Rule 48.1 on the basis that Judge Elizabeth Gonzalez has ruled on contested matters that, according to him, had nothing to do with VML *and* were made when VML was not a party defendant.

Judge Mark Denton therefore erred when he granted Plaintiff's motion to strike VML's Rule 48.1 peremptory challenge based on the single singular dicta in this Court's decision in *Gallen v. Eighth Judicial District Court*, 112 Nev.209, 213, 911 P.2d 858, 860 (1996). The language in *Gallen* relied upon by Judge Denton, was not necessary to the Court's decision in that case because the party who asserted the peremptory challenge *had been dismissed* from the case under Nev. R. Civ. P. 41(a). The Court's affirmance

of Joseph Gallen's dismissal was fully dispositive of his status, thus rendering it unnecessary for the Court to reach the issue of whether a new party added to ongoing litigation is entitled to the same right to a peremptory challenge under SCR 48.1 as the original parties.

The Court's post-*Gallen* decisions confirm that this issue—a newly added party's right to invoke Rule 48.1 when no party has previously done so—has not been adjudicated by this Court. Clear guidance on this issue from the Court today would assist not only the parties in this case, but the parties and courts in other cases in which a plaintiff might have an interest in gaming the judicial system by waiting to add parties until the district court has decided a contested matter so the plaintiff can say, as Jacobs has here, that the unsuspecting added party's Rule 48.1 rights have been extinguished.

This petition addresses the order entered by Judge Denton on October 27, 2015 granting Plaintiff's "Emergency Motion to Strike VML's Unlawful Peremptory Challenge of Judge," PA1157-58, and his refusal to address a stay of proceedings to permit this writ petition to be filed and acted on by this Court before this case is returned to the district judge that VML has preempted under SCR 48.1.

II. ISSUE PRESENTED BY THIS WRIT PETITION

Whether Nevada Supreme Court Rule 48.1 limits a newly-added party's right to file a peremptory challenge when no other party on that side has exercised the right, and the district court has not ruled on any contested matter concerning the new party (which in this case the Plaintiff successfully fought adding at the outset of this case).

III. STATEMENT OF FACTS

Jacobs filed this action on October 20, 2010. Sands China Ltd. ("SCL") immediately challenged jurisdiction, PA46, and Las Vegas Sands Corp. ("LVSC") moved to dismiss for failure to join an indispensable party, VML. PA1. Jacobs opposed LVSC's motion, declaring that VML – the entity that employed him, paid his salary, and provided his employee benefits in Macau that he now wishes to sue – had nothing to do with this action. PA593.

The district court was persuaded by Jacobs' argument, and then made her decision influenced by her lack of jurisdiction over VML, as the following exchange on March 15, 2011 demonstrates:

> THE COURT: So can I ask you the question **that controls** sort of this.
>
> MR. PEEK: Certainly.
>
> THE COURT: Is VML subject to service of process and whose joinder will not deprive the Court of jurisdiction over the subject matter of the action?
>
> . . . .
>
> THE COURT: Mr. Peek, can you tell me what court in whatever jurisdiction in the world would have jurisdiction over all of the parties in this case –
>
> MR. PEEK: Venetian Macau –
>
> THE COURT: – including VML.
>
> MR. PEEK: Macau would, Your Honor.
>
> THE COURT: Macau's not going to have jurisdiction over all the parties in this case.
>
> MR. PEEK: They're going to have jurisdiction over Mr. Jacobs, they're going to have jurisdiction over Sands China Limited, they're going to have jurisdiction over VML.
>
> THE COURT: And LVSI?

> MR. PEEK: LVSI, Your Honor, in the way it does business there through it subconcessions I think is going to be -- have jurisdiction over LVSI.
>
> THE COURT: Okay. Thank you.

PA725-30 (emphasis added). The Court then denied LVSC's motion to dismiss for failure to join an indispensable party because of her concern over jurisdiction:

> THE COURT: Thank you, Mr. Peek.
>
> Despite the extensive briefing and arguments that have been presented here today, the Court is only hearing a joinder motion at this time, not a summary judgment motion.
>
> While it would certainly be easier for all of us if VML was a party to this litigation, the motion is denied **because of the** Court's concerns regarding jurisdiction over VML.

PA731-32 (emphasis added).

A short time later, Judge Gonzalez asserted jurisdiction over SCL, VML's parent, based on its "extensive contacts" with Nevada, without describing any contacts. SCL immediately sought an extraordinary writ to review this flawed ruling. On August 26, 2011, this Court issued an Order Granting [SCL's] Petition for Writ Mandamus and ordered the district court to conduct an "evidentiary hearing and issu[e] findings regarding general and transient jurisdiction." Nearly four years later (in 2015), Judge Gonzalez finally conducted the evidentiary hearing—albeit a one-sided hearing under an incorrect legal standard—and again found jurisdiction over SCL, this time based on a novel reverse agency theory she crafted to avoid the United States Supreme Court's intervening decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). This erroneous decision is the subject of a pending writ petition in Case No. 68265.

Following her jurisdictional ruling, Judge Gonzalez entered two separate orders setting this case to be tried on the merits beginning only four months later (on October 14, 2015). PA734-40; PA769-76. On June 2, 2015, *after* the expedited trial setting he demanded was in place, Jacobs sought to add VML as a party. PA741-68. The district court denied leave to add VML given the scheduled trial date in October 2015. PA777-78;[1] PA788. The court did, however, allow Jacobs to file a Fourth Amended Complaint expanding his claims against SCL yet again. *Id.*

Having failed in his effort to force defendants to trial on the merits without substantive discovery,[2] Jacobs sought to prejudice them in other ways. On July 27, 2015, following a writ petition challenging the expedited trial setting, the district court reset the trial for June 27, 2016. PA824-32. Instead of renewing his motion to add VML as a party before merits discovery got underway, Jacobs, who had obtained far-reaching discovery over the almost four years it took to have the jurisdictional hearing, immediately demanded virtually limitless additional company depositions under NRCP 30(b)(6). PA812-23. Jacobs's extensive demands wholly ignored the fact that discovery had essentially been a one-way street for him during the past four years, with defendants receiving little from him beyond a document dump ordered by the Court on the eve of the jurisdictional hearing.

On September 15, 2015, months after the new trial date had been set, and in the middle of the highly contested 30(b)(6) depositions commenced

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[1] A written order on this decision had not yet been entered.

[2] The challenged judge has in fact ruled that SCL need not answer the Fourth (and now Fifth) Amended Complaint pending disposition of the jurisdictional writ in Case No. 68265, yet has forced SCL to participate in discovery. PA950A-D.

without VML's participation, Jacobs moved to file a Fifth Amended Complaint adding VML as a party. PA833. Over defendants' oppositions, PA862, Judge Gonzalez granted Jacobs' motion and permitted VML to be added. PA925-26; PA928-29.[3]

On October 16, 2015, shortly after it purportedly was served in Las Vegas, VML filed a peremptory challenge of Judge Gonzalez. PA951-53. The case was reassigned to the Honorable Mark R. Denton. PA954-55. VML thereafter moved to quash service of process, PA1074, and also moved to dismiss for lack of jurisdiction. PA1087.

Jacobs responded by filing "Plaintiff's Emergency Motion to Strike Unlawful Peremptory Challenge of Judge, on shortened time. PA956. VML filed its lawful opposition on October 23, 2015, the same day on which Jacobs replied. PA1127; PA1135. Judge Denton heard the motion on October 26, 2015, and granted Plaintiff's request to strike the peremptory challenge based on a single sentence in *Gallen*. PA1155; PA1157-58.

Judge Denton declined to consider VML's request that he stay his order striking the peremptory challenge to permit this new defendant an opportunity to seek this Court's review under this petition. PA1155-56. He stated that VML would need to make this request to Judge Gonzalez who, of course, at that point had no jurisdiction over the case because of its reassignment to Judge Denton. *Id.* Judge Denton entered a written order on October 27, 2015, reiterating that VML's request to stay his order would have to "be presented to Judge Gonzalez, as she had jurisdiction over this case." PA1158.

[3] A written order on this decision had not yet been entered.

This Court's intervention at this point is needed to protect VML from being stripped of the same SCR 48.1 rights as other parties enjoy by Jacobs's manipulative pleading and litigation tactics. The object of this petition will be defeated if it is not considered before VML is required to litigate a contested matter before Judge Gonzalez. Contested matters include VML's pending motions to quash and to dismiss, now scheduled for December 3, 2015 and November 24, 2015, respectively, and a contested hearing of a motion to compel that the district court set for November 5 on an order shortening time requested by Jacobs.

IV. STATEMENT OF REASONS THE WRIT SHOULD ISSUE

"This court has original jurisdiction to issue writs of prohibition and mandamus" and "also all writs necessary or proper to the complete exercise of its appellate jurisdiction." Nev. Const. Art. 6, § 4. Extraordinary relief may be awarded where there is no plain, speedy, and adequate legal remedy. NRS 34.170; NRS 34.330; *Smith v. Eighth Judicial Dist. Ct.*, 107 Nev. 674, 677, 679, 818 P.2d 849, 851, 853 (1991).

This Court has previously held that "[e]xtraordinary writ petitions are the appropriate means to challenge district court decisions concerning peremptory challenges." *Morrow v. Eighth Judicial Dist. Court of Nev.*, 129 Nev. Adv. Op. 10, 294 P.3d 411, 413 (Nev. 2013) (citing *State Engineer v. Truckee-Carson Irrig.*, 116 Nev. 1024, 1029, 13 P.3d 395, 398 (2000)). Mandamus is the only avenue available to VML to challenge the order striking its timely peremptory challenge of Judge Gonzalez.

A. The District Court's Order Striking VML's Peremptory Challenge Based on Dicta in the Inapposite *Gallen* Case Was Error.

In *Gallen*, this Court considered a writ petition challenging the district court's refusal to give effect to a peremptory challenge made by a newly-

added third-party defendant, Joseph Gallen, who was voluntarily dismissed by the plaintiff under NRCP 41(a), after Mr. Gallen filed a peremptory challenge under Nevada Supreme Court Rule 48.1. The Court upheld the Nev. R. Civ. P 41(a) dismissal of him, the third-party defendant, but then added, without analysis or further explanation that "because Gallen [the late-added third-party defendant] [wa]s on the same side of the action as David Allen [the original defendant and apparent employer of attorney Gallen], he had no right to exercise a peremptory challenge." *Id.* Because the Court upheld the dismissal of defendant Gallen, it had no need to reach the issue of whether or not he was entitled to a peremptory challenge under SCR 48.1.

This Court enacted SCR 48.1 on July 20, 1979. The present version of the rules states:

> 1. In any civil action pending in a district court, which has not been appealed from a lower court, each side is entitled, ***as a matter of right***, to one change of judge by peremptory challenge. Each action or proceeding, whether single or consolidated, shall be treated as having only two sides. ***A party wishing to exercise the right*** to change of judge shall file a pleading entitled "Peremptory Challenge of Judge." The notice may be signed by a party or by an attorney, it shall state the name of the judge to be changed, and it shall neither specify grounds, nor be accompanied by an affidavit. If one of two or more parties on one side of an action files a peremptory challenge, no other party on that side may file a separate challenge.
>
> . . . .
>
> 3. Except as provided in subsection 4, the peremptory challenge shall be filed:
>
> (a) Within 10 days after notification to the parties of a trial or hearing date; or

> (b) Not less than 3 days before the date set for the hearing of any contested pretrial matter, whichever occurs first.
>
> . . . .
>
> 5. A notice of peremptory challenge may not be filed against any judge who has made any ruling on a contested matter or commenced hearing any contested matter in the action. Except as otherwise provided in subsection 8, a peremptory challenge may not be filed against any judge who is assigned to or accepts a case from the overflow calendar or against a senior or pro tempore judge assigned by the supreme court to hear any civil matter.
>
> . . . .
>
> 9. Notwithstanding the prior exercise of a peremptory challenge, in the event that the action is reassigned for any reason other than the exercise of a peremptory challenge, each side shall be entitled, as a matter of right, to an additional peremptory challenge.

Despite the language of the dicta in *Gallen*, the Court's earlier decisions, as well as decisions during the past 19 years since *Gallen* was decided, show *Gallen's* dicta regarding SCR 48.1 has not been followed by this or any other Court. In an earlier decision, *Smith*, 107 Nev. at 677, 818 P.2d at 852, for example, the Court recognized that "a right to a peremptory challenge promotes judicial fairness by allowing a party to disqualify a judge that it believes is unfair or biased." VML timely and properly filed its challenge within days of the flawed service on it.[4] VML's rights, or the rights of any new party belatedly brought into existing litigation by a manipulative plaintiff, should not be defined by Jacobs's capricious change of position regarding VML's role in this case. *That would be an abuse of the judicial process.*

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[4] VML has filed motions challenging service and jurisdiction, and does not waive these motions by seeking to also enforce its right to a peremptory challenge.

B. This Court's Intervention Is VML's Only Available Remedy to Enforce its Right to a Peremptory Challenge.

Nevada Supreme Court Rule 48.1 sets out the procedure for a peremptory challenge. It provides each party or side, ***as a matter of right***, one change of judge by peremptory challenge. The rule requires that the party file its peremptory challenge either (1) "[w]ithin 10 days after notification to the parties of a trial or hearing date;" or (2) "[n]ot less than 3 days before the date set for the hearing of any contested pretrial matter, whichever occurs first." SCR 48.1. These rules impose deadlines on existing parties for exercising peremptory challenges and reasonably tie those deadlines to events for which the existing parties will receive notice. *See Morrow*, 129 Nev. Adv. Op. 10, 294 P.3d at 413 (time to file peremptory challenge ran from notice to that party, which could pre-date first appearance).

Here, VML timely filed its peremptory challenge on October 16, 2015 under SCR 48.1, which VML is "entitled [to], as a matter of right." VML did not previously receive any notification of a trial or hearing date, because it had not been a party to the action. The district court recognized that the trial date and scheduling deadlines it set before adding VML as a defendant will now be impossible to achieve and will have to be reset. PA925-26; 929. Nor has any hearing been scheduled for any contested pretrial matter involving VML, other than this peremptory challenge and the two motions—to quash and to dismiss—previously described, and, most recently, a motion to compel set ex parte on an order shortening for this Thursday, November 5. Thus, VML has satisfied the time constraints imposed by Rule 48.1, and did not waive its right to exercise a peremptory challenge.

Judge Denton erred by failing to consider the materially different circumstances of this case and *Gallen* and the Court's post-*Gallen* decisions applying Rule 48.1. Unlike this case, where VML promptly asserted its right to a peremptory challenge, the added party in *Gallen* joined a pending motion to dismiss by his employer at the same time as he filed his peremptory challenge. 112 Nev. at 211, 911 P.2d at 859. The defendant (King) responded by voluntarily dismissing his third-party complaint against newly-added Gallen and then moved to strike his peremptory challenge. S*ee id.* The district court granted the dismissal and by doing so returned the case to the original judge.

This Court upheld the dismissal of Mr. Gallen, which rendered moot the propriety of his Rule 48.1 challenge. Thus the Court had no reason to rule on the motion to strike his peremptory challenge because he was no longer a party. The ruling did not force Gallen to defend himself in front of a judge Gallen had challenged under SCR 48.1, as would be the case here if VML's peremptory challenge is not upheld. More importantly, *Gallen's* dicta does not disturb the rule in *State ex rel Moore v. Fourth Judicial District Court*, 77 Nev. 357, 363-64, 364 P.2d 1073, 1077 (1961), or the cases relying upon *Moore*, which are binding precedent that Judge Denton declined to consider.

Tellingly, the dicta from *Gallen* discussed here has not been cited by *any* court, whereas *Moore's* holding has been cited in at least five other cases, including three decided after *Gallen*. *See Tradewinds Bldg. & Devel., Inc. v. Eighth Jud. Dist. Ct.*, 2013 WL 3896543 at *1 (Nev. July 23, 2013) (17 years after *Gallen* and citing *Moore* for the "holding that intervenors [i.e., newly-added parties] could file a peremptory challenge even though a contested hearing had occurred because they had lacked standing to

challenge a judge under the statutory predecessor to SCR 48.1 [former subsection 5 of NRS 1.230] until they formally joined the action"); *Turnipseed v. Truckee-Carson Irrigation Dist.*, 116 Nev. 1024, 1031, 13 P.3d 395, 399 (2000) (same); *Smith, 107* Nev. at 678, 818 P.2d at 852 (same); *Carr-Bricken v. First Interstate Bank,* 105 Nev. 570, 573,779 P.2d, 957, 969 (1989) (noting *Moore* "authorized a peremptory challenge to a judge by an intervening party, who, unlike appellant, was new to the action"); *Mundt* v. *Nw. Explorations, Inc.,* 963 P.2d 265, 269 (Alaska 1998) (citing *Moore* for its holding "that an intervenor has the same right to disqualify a judge as any other party").

Moreover, as indicated above, the present case is substantively distinguishable because third-party defendant Gallen, after being added to the pending action, *voluntarily joined* the plaintiffs motion to dismiss King's counterclaim against his employer, plaintiff David Allen, thus waiving his right to a Rule 48.1 challenge. *See Gallen,* 112 Nev. at 211, 911 P.2d at 859.

C. The Court's Intervention is Required to Confirm that New Parties Have the Same SCR 48.1 Rights as Original Parties.

If *Gallen's* Rule 48.1 dicta is the law, as Jacobs contends, it would convert later-added parties into second-class citizens, which would go against basic due process rights, as well as this Court's later decisions, discussed in the preceding pages. Nevertheless. Jacobs maintains that *Gallen* stands for the proposition that "if one side does not exercise its peremptory challenge, it is forever waived by all parties on the same side, even those that are later added to the case." PA962. The notion that one party's rights can be impaired and waived by the actions, or inactions, of others selected by the opposing party *before* the later-added party has notice or standing to speak up to protect its rights goes against basic due process.

VML could not have asserted its right to a peremptory challenge under Rule 48.1 any sooner than it did because it was not a party in this case. It had no standing or any other basis to invoke Rule 48.1. It would be fundamentally unfair to now punish VML by depriving it of its *right* to file a peremptory challenge of Judge Gonzalez in light of the fact that Jacobs convinced her years ago that VML is not needed or wanted as a party to this suit that he commenced in 2010.

The issue of judicial challenges is not new to Nevada. Under the statutory framework then in place, the Court addressed a nearly identical situation in *Moore*, 77 Nev. at 363-64, 364 P.2d at 1077. The Court in *Moore* endorsed allowing an intervenor to file a peremptory challenge, even after the judge had considered contested matters between the other parties because the intervenor did not have standing to challenge the judge until it became a party. *Id.* Like the party in *Moore*, VML could not have filed its peremptory challenge any earlier because it was not a party. Although *Moore* was decided under the statute that is the basis for Rule 48.1—NRS 1.230.5—rather than the later added Supreme Court Rule, the policy reasons underlying the Rule remain the same. Moreover, *Moore* has been cited favorably by this Court for the same proposition long after SCR 48.1 became effective, and long after the dicta in *Gallen* that is discussed above.

Furthermore, VML's situation is much more compelling than the situation in *Moore* because *VML did not voluntarily enter this case* as an "intervenor." VML was involuntarily made a party to the litigation by Jacobs years after he trumpeted to the district court that VML was neither an indispensable nor a necessary party. It would be profoundly unjust to permit Jacobs to deprive VML of its peremptory right under Rule 48.1 based on a situation of his own making.

D. The Court Should Also Grant This Petition Based on the Policy Considerations of SCR 48.1.

The policy underlying Rule 48.1 supports *Moore* and its progeny: "Peremptory challenges are mechanisms designed to insure a fair tribunal by allowing a party to disqualify a judge thought to be unfair or biased." *Smith*, 107 Nev. at 677, 818 P.2d at 852 (internal quotation and citation omitted). Parties added to a case after it is underway have the same reason for concern about fairness and bias of judicial officers as do parties who are present at the inception of the case. There is no good reason to permit a plaintiff to deny defendants their SCR 48.1 right – which is designed to address these concerns – by adding parties known at the outset to a case years later, particularly when, as here, Jacobs successfully argued in 2011 that VML did not belong in this case.[5]

The rule of *Moore* has been repeatedly recognized by this Court and others. In *Turnipseed*, *supra*, the Court found that a party that intervened several years after the initial action was filed was entitled to exercise a peremptory challenge. The Court cited *Moore* for the proposition that "an intervening party was not precluded from filing an affidavit to disqualify the judge despite the fact that there had been an earlier motion to set the cause for trial because *the intervenors did not become 'parties' to the action until*

[5] SCR 48.1 operates independent of the rules governing disqualification of a judge for actual bias. As *Smith* points out, Rule 48.1 alllows "a party to disqualify a judge *thought to be* unfair or biased" for any reason or no reason. 107 Nev. at 677, 818 P.2d at 852 (emphasis added). Here, however, VML would have reason to *think* the challenged judge could be biased against the defendants – all of them on the right side of the "*v.*" – because of the presence of Sheldon Adelson who the media alleged was displeased with the challenged judge during the most recent election cycle. *See* http://www.reviewjournal.com/news/las-vegas-candidate-s-allegations-reveal-another-side-judiciary-races.

their motion for intervention was granted." 116 Nev. at 1031, 13 P.3d at 399. (citing *Moore*, 77 Nev. at 363, 364 P.2d at 1077).

Similarly, in *Carr-Bricken*, 105 Nev. at 573, 779 P.2d at 969, although the Court rejected the notion that a counter-claim revives the right to a peremptory challenge, it distinguished that circumstance from one in which a *new party* is involved. The Court cited *Moore's* holding which it described as having "authorized a peremptory challenge" by a party who "was new to the action," *id.,* but distinguished it from the situation being considered, which involved an attempt to exercise a peremptory challenge after a counterclaim was asserted. Other jurisdictions since *Gallen* was decided also recognize *Moore* as standing for the proposition that "Nevada's Supreme Court expressly . . . adopt[ed] a rule that an intervenor has the same right to disqualify a judge as any other party." *Mundt* , 963 P.2d at 267 n.7.

This Court has previously enforced Rule 48.1 in harmony with these policy considerations, rather than strictly applying the Rules literal language. For example, in a recent unpublished opinion, the Court recognized that although the language in SCR 48.1 requires a peremptory challenge to be filed "[n]ot later than 3 days before the date set for the hearing of any contested pretrial matter," this requirement had to give way to the *practicalities of litigation* when the case had been reassigned less than three days before a contested hearing. *Tradewinds Bldg. & Dev. Inc. v Eighth Judicial Dist. Ct.*, No. 61796, 2013 Lexis 1097, 2013 WL 3896543 (2013) (emphasis added). Because the new party filed its challenge at the "first opportunity it had to file a challenge," *id.* at *3, the Court reversed the district court's order striking the peremptory challenge. *Id.* The Court should do the same here.

Smith is another example of a case that did not fall within the literal language of Rule 48.1. 107 Nev. at 677, 818 P.2d at 852. There, the party filing a motion for a new trial exercised a peremptory challenge to the successor judge in the department in which the case had been tried. Although this was not an issue addressed by the plain language of Rule 48.1, the Court nonetheless relied on policy considerations underlying the Rule and the holding in *Moore* to uphold the order denying the motion to strike the peremptory challenge.

The Court in *Turnipseed* again looked beyond Rule 48.1's literal language and held that a party who intervened several years after the initial action was filed was permitted to exercise a peremptory challenge. The Court cited *Moore* for the proposition that "an intervening party was not precluded from filing an affidavit to disqualify the judge despite the fact that there had been an earlier motion to set the cause for trial because the intervenors did not become 'parties' to the action until their motion for intervention was granted," and considered the way in which the claims had evolved in determining that the late-arriving intervenor could exercise a peremptory challenge under Rule 48.1. *Turnipseed,* 116 Nev. at 1031, 13 P.3d at 399.

Guidance from the Court is therefore required on the facts presented by this Petition to preserve a late-, involuntarily-added party's right to the same peremptory challenge enjoyed by the original parties under SCR 48.1. This is especially of concern in circumstances, such as here, where the plaintiff controls the pleadings and has prevented the later-added party from being named as a party at the outset of the case. Clarification is also needed on whether the existing parties to the litigation can, by not exercising a Rule 48.1 challenge, thereby "waive" the rights of non-parties

who do not have notice or standing sufficient to assert their own rights under Rule 48.1 when they are later and involuntarily added to the case.

V. CONCLUSION

Petitioners respectfully request the Court to enter a stay of proceedings until the Court can grant this Petition and enter an order vacating the district court's October 27, 2015 Order Striking VML's Peremptory Challenge of Judge Elizabeth Gonzalez.

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Attorneys for Petitioner, Venetian Macau Ltd.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that I have read this **PETITION FOR WRIT OF PROHIBITION OR MANDAMUS RE ORDER STRIKING VENETIAN MACAU LTD.'S PEREMPTORY CHALLENGE**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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

3. Finally, I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R. App. P. 28(e), which requires every section of the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied is to be found.

CARBAJAL & MCNUTT

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Attorneys for Petitioner, Venetian Macau Ltd.

VERIFICATION

1. I, Dan McNutt, declare:

2. I am one of the attorneys, one of the Petitioners herein;

3. I verify that I have read the foregoing **PETITION FOR WRIT OF PROHIBITION OR MANDAMUS RE ORDER STRIKING VENETIAN MACAU LTD.'S PEREMPTORY CHALLENGE** that the same is true my own knowledge, except for those matters therein stated on information and belief, and as to those matters, I believe them to be true.

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

/s/ Dan McNutt
Daniel R. McNutt

CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. P. 25, I certify that I am an employee of CARBAJAL & MCNUTT; that, in accordance therewith, I caused a copy of the **PETITION FOR WRIT OF PROHIBITION OR MANDAMUS RE ORDER STRIKING VENETIAN MACAU LTD.'S PEREMPTORY CHALLENGE** to be hand delivered, in a sealed envelope, on the date and to the addressee(s) shown below:

Judge Mark R. Denton
Eighth Judicial District Court of
Clark County, Nevada
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155

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

Respondent

James J. Pisanelli
Todd L. Bice
Debra Spinelli
Pisanelli Bice
PISANELLI BICE PLLC
400 South 7th Street
Las Vegas, NV 89101

Attorneys for Steven C. Jacobs, Real Party in Interest

DATED this 2nd day of November, 2015.

By: /s/ Lisa Heller