

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

2                                   \*\*\*\*\*

3   VENETIAN MACAU, LTD., a Macau  
4   corporation,

5                                   Petitioner,

6   v.

7   CLARK COUNTY DISTRICT  
8   COURT, THE HONORABLE MARK  
9   R. DENTION, DEPT. 13,

10                               Respondents,

11   and

12   STEVEN C. JACOBS,

13                               Real Party in Interest.

Case No.: 69090 Electronically Filed  
Jan 25 2016 08:37 a.m.

**OPPOSITION TO PETITIONER'S  
MOTION TO STRIKE REAL  
PARTY IN INTEREST'S "NOTICE  
OF MOOTNESS" AND TO SUBMIT  
AND GRANT PENDING PETITION  
FOR WRIT OF PROHIBITION OR  
MANDAMUS RE ORDER  
STRIKING VML'S PEREMPTORY  
CHALLENGE OR, IN THE  
ALTERNATIVE, TO PERMIT  
DISMISSAL PROVIDED IT IS  
WITH PREJUDICE**

14   **I.       INTRODUCTION**

15       The only debate presented by Petitioner Venetian Macau, Ltd.'s ("VML")  
16   motion is who should be most offended by it: (1) Real Party in Interest Steven C.  
17   Jacobs ("Jacobs") for having to expend more resources in responding to something  
18   that is transparent and frivolous; or (2) the judiciary over the recurring refrain by  
19   yet another one of billionaire Sheldon Adelson's entities that no rule or law, even  
20   the Nevada Constitution, should be an obstacle to their foot-stomping. What is not  
21   open for debate is that VML's motion is an illegitimate one which wastes private  
22   and public resources.

23       According to VML, it should not be burdened with having to appear in a  
24   long-running dispute with Adelson and his other companies, LVSC and  
25   Sands China, by being joined in that litigation, particularly in front of the court  
26   where the action is assigned. As it became obvious that this latest round of  
27   maneuvering was threatening the trial date, Jacobs granted VML the very relief it  
28   sought – dismissing it from the action. VML concedes that it has been dismissed  
from the case, and that this Petition is necessarily moot. But VML simultaneously

1 begs the Court to ignore the rules, dispense with the Constitution, and magically  
2 accommodate the desired forum-shopping of Adelson, LVSC and Sands China. But  
3 if all that seems a bit too much, VML then proposes that the Court alternatively  
4 violate Jacobs' rights by ordering that his voluntary dismissal under Rule 41 be with  
5 prejudice, in express disregard of this Court's own rules and the law.

6 Respectfully, the attempt by Adelson and his companies to treat the legal  
7 process like just another inconvenient business deal – where they try to bully their  
8 way out of it – must be rejected.

## 9 **II. BACKGROUND**

10 The pertinent facts are addressed in Jacobs' Opposition to the Emergency  
11 Motion to Stay which he submitted to this Court on November 4, 2015. But there  
12 are a couple of points that bear additional mention. Contrary to VML's present  
13 hyperventilation, Jacobs at no point in time opposed VML joining the action below.  
14 He simply opposed, rightly, the erroneous assertions by LVSC and Sands China  
15 that VML was both a "necessary" and "indispensable" party which required the  
16 entire dismissal of Jacobs' claims, including those against all defendants. At no  
17 point in time has VML been precluded from asserting or protecting any of its  
18 purported rights. It has been free to intervene in the District Court proceedings  
19 since that case's inception if it thought appropriate.

20 Nor is Jacobs required to accommodate the incessant attempts by the  
21 defendants to delay the trial in this action, including their near-endless campaign of  
22 judge shopping because of their well-documented misconduct. When it became  
23 apparent that the addition of VML would become yet another in the long line of  
24 excuses for procedural gamesmanship, Jacobs elected (which is his right) to  
25 eliminate that pathway of delay and gave VML the very thing it claimed it wanted:  
26 Removal from the underlying action.

### III. ANALYSIS

#### A. The Petition Is Moot As There Is No Relief Available To VML.

"The question of mootness is one of justiciability. This court's duty is not to render advisory opinions but, rather, to resolve actual controversies by an enforceable judgment." *Personhood Nevada v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010). A controversy must be present throughout the entire proceeding and, even though a case presents a live controversy at the beginning, it may be mooted by subsequent events. *Id.* This requirement is not one of convenience, but one of constitutional limitation.

VML concedes that there is no relief that it can be provided because of the Rule 41(a) dismissal of it from the action. VML had filed no answer or motion for summary judgment. Thus, just as the Rule authorizes, Jacobs refunded VML's filing fee and dismissed it from the case without prejudice. NRCP 41(a)(1)(i). As there is no relief which VML seeks, or can even obtain, its Petition it is moot. *See Indep. Union of Flight Attendants v. Pan Am. World Airways, Inc.*, 966 F.2d 457, 459 (9th Cir. 1992) ("A party's decision to withdraw a claim renders it moot."); *see also In re Davenport*, 40 F.3d 298, 299 (9th Cir. 1994) (debtors voluntary dismissal of underlying bankruptcy case mooted appeal, deprived the court of jurisdiction, and required the court to vacate earlier decisions of the bankruptcy court).

That outcome is unaffected by this Court's stay pending disposition of the Petition. This Court has already agreed with Jacobs – during Sands China's jurisdictional writ – that a party can take any action so long as it is not inconsistent with a stay's purpose. (*See Order Granting in Part and Denying in Part Petition for Writ Relief* (Docket No. 68265) at 3 n.3, on file (citing *Nguyen v. United States*, 792 F.2d 1500, 1503 (9th Cir. 1986)).) In the jurisdictional writ proceeding, Sands China argued that the merits stay precluded Jacobs from amending his Complaint to plead additional claims. This Court rejected that contention, noting that the stay order did not expressly forbid amendments. *See id.*

1 Similarly, this Court's November 4, 2015 Order did not bar Jacobs from  
2 granting VML the relief that it sought – a dismissal. (Order Granting Stay and  
3 Directing Answer, Nov. 4, 2015, on file.) The Order specifically states that "the  
4 proceedings below *against petitioner only* are stayed pending further order of this  
5 court." (*Id.* (first bold and emphasis added).) Jacobs' voluntary dismissal of VML is  
6 not a proceeding "against" VML. On the contrary, the dismissal *benefits* VML by  
7 removing it from this action. A voluntary dismissal is not precluded by a stay or the  
8 purpose behind it. *See Merit Ins. Co. v. Leatherby Ins. Co.*, 581 F.2d 137, 142-43  
9 (7th Cir. 1978) (order granting stay and compelling arbitration implicates the court's  
10 jurisdiction but did not prevent the plaintiff from voluntarily dismissing defendant  
11 even though arbitration had already commenced); *see also Indep. Union of Flight*  
12 *Attendants*, 966 F.2d at 458 (automatic bankruptcy stay did not preclude appellate  
13 or district courts from dismissing a case on its docket because doing so does not  
14 contravene the purpose behind the automatic stay).

15 **B. The Advisory Ruling VML Seeks Is Not The Law.**

16 Apparently thinking that it can still aid its former co-defendants in their  
17 desire to delay the trial and replace the presiding judge, VML tells this Court that it  
18 should simply ignore the Constitution, its own lack of jurisdiction, and give the  
19 defendants what they really seek. But of course, VML not only bears the burden of  
20 demonstrating that this Court has jurisdiction over a live case and controversy, but  
21 that it is also entitled to the relief it seeks, something it does not remotely do. *Pan*  
22 *v. Eighth Jud. Dist. Ct.*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). The mere fact  
23 that the Court directed Jacobs to respond hardly establishes that VML's now-moot  
24 Petition had merit. *See Whitehead v. Nevada Comm'n On Judicial Discipline*,  
25 110 Nev. 128, 143-44, 906 P.2d 230, 240 *decision clarified on denial of reh'g*,  
26 110 Nev. 380, 873 P.2d 946 (1994)("We should hasten to mention that this court  
27 thus far has issued no writ . . . . By deciding to consider the petition, the judgment  
28

1 we made was simply that (based on the petition and supporting documents) 'the  
2 petitioner has set forth issues of *arguable* merit.'").

3 The Court's Order directing an answer does not even provide that VML had  
4 set forth issues of arguable merit. Rather, it only stated that an answer "will assist  
5 in resolving the matter." (Order Granting Stay and Directing Answer, Nov. 4, 2015,  
6 on file.) Indeed, it is ironic that VML faults Jacobs for not filing an answer when it  
7 previously argued that the Court should treat Jacobs' Opposition to Emergency  
8 Motion to Stay All Proceedings as his answer. (*Id.* at n.1.)

9 As the District Court found, and as Jacobs' Opposition to the Emergency  
10 Motion to Stay All Proceedings confirms, one side's peremptory challenge under  
11 SCR 48.1 is not "revived" by the subsequent adding of an additional defendant to  
12 the case, where the District Court has already made multiple rulings on contested  
13 matters. *See Gallen v. Eighth Jud. Dist. Ct.*, 112 Nev. 209, 211, 911 P.2d 858, 859  
14 (1996) (new party to the action had no ability to assert peremptory challenge which  
15 had been waived by failure to exercise by parties on the same side as the  
16 newly-added party); *see also Jeaness v. Second Jud. Dist. Ct.*, 97 Nev. 218, 219-20,  
17 626 P.2d 272, 273 (1981) (failure to file within the time structures of Rule 48.1  
18 results in the waiver of any right to make a peremptory challenge). The plain  
19 language of SCR 48.1 and this Court's own decisions confirm the propriety of the  
20 District Court's striking of the improper peremptory challenge. It was simple forum  
21 shopping by the defendants.

22 And, contrary to VML's wants, this Court does not treat the lack of a formal  
23 answer as a confession of the Petition's underlying merits, even when the matter is  
24 not moot. *See Orme v. Eighth Jud. Dist. Ct.*, 105 Nev. 712, 714, 782 P.2d 1325,  
25 1326 (1989) ("Therefore, an answer to the instant petition is not essential to our  
26 proper resolution of this matter. *See* NRAP 21(b). Consequently, we have elected to  
27 resolve the single legal issue before us on the merits, and none of the conclusions  
28 set forth below are premised upon Kahn's failure to answer the petition."); *State v.*

1 *O'Donnell*, 98 Nev. 305, 305, 646 P.2d 1217, 1218 n.1 (1982) ("We note that  
2 respondent did not file an answer against issuance of a writ as ordered by this court.  
3 Despite this dereliction, we review the merits of the petition . . .").

4 **C. Jacobs' Dismissal Of VML Is Without Prejudice As A Matter Of**  
5 **Law.**

6 VML confirms its lack of serious substance when it claims that this Court  
7 should disregard the law and strip Jacobs of his rights under NRCP 41(a).  
8 (Mot. at 10.) It cites no authority which would allow this Court to do so, of course.  
9 *See American Soccer Co. v. Score First Enterprises*, 187 F.3d 1108, 1110 (9th Cir.  
10 1999) ("This 'absolute right' for a plaintiff to voluntarily dismiss an action when a  
11 defendant has not yet served an answer or summary judgment motion leaves no role  
12 for the court to play") (emphasis in original); *Pedrina v. Chun*, 987 F.2d 608, 610  
13 (9th Cir. 1993) ("This is a matter of right running to the plaintiff and may not be  
14 extinguished or circumscribed by adversary or court.") (Citation omitted).

15 Instead, VML nonsensically claims that it is somehow prejudiced by the fact  
16 that it was not added to a case where it claims it cannot be added and should not be  
17 added. This Court would be hard-pressed to envision a more absurd argument than  
18 that advanced by VML. The victim of gamesmanship in this action is not VML.  
19 Jacobs has no obligation to accommodate the incessant maneuvering to engage in  
20 delay and forum shopping. VML insisted that it should not be joined to the  
21 underlying action, and Jacobs has accommodated VML. As Rule 41(a) expressly  
22 provides, Jacobs is entitled to re-file his action and address his rights against VML  
23 if he so desires.

**II. CONCLUSION**

The Petition is moot.

DATED this 22nd day of January, 2016.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC and that, on this 22nd day of January, 2016, I electronically filed and served a true and correct copy of the above and foregoing **OPPOSITION TO PETITIONER'S MOTION TO STRIKE REAL PARTY IN INTEREST'S "NOTICE OF MOOTNESS" AND TO SUBMIT AND GRANT PENDING PETITION FOR WRIT OF PROHIBITION OR MANDAMUS RE ORDER STRIKING VML'S PEREMPTORY CHALLENGE OR, IN THE ALTERNATIVE, TO PERMIS DISMISSAL PROVIDED IT IS WITH PREJUDICE** properly addressed to the following:

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