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DISTRICT COURT

CLARK COUNTY, NEVADA

STEVEN C. JACOBS, Plaintiff, vs. LAS VEGAS SANDS CORP., a Nevada corporation; SANDS CHINA LTD., a Cayman Islands corporation; DOES I through X; and ROE CORPORATIONS I through X, Defendants.	CASE NO. A-10-627691-C DEPT. NO. XI **PLAINTIFF'S OPPOSITION TO LAS VEGAS SANDS CORP.'S MOTION TO DISMISS PURSUANT TO NRCP 12(B)(6) AND 19 FOR FAILURE TO JOIN AN INDISPENSABLE PARTY** Hearing Date: March 15, 2011 Hearing Time: 9:00 a.m.

Plaintiff Steven C. Jacobs ("Jacobs"), through his undersigned counsel, hereby files his Opposition to Las Vegas Sands Corp.'s Motion to Dismiss Pursuant to NRCP 12(b)(6) and 19 for Failure to Join an Indispensable Party. This Opposition is based on the papers and pleadings on file herein, the exhibits attached hereto, and the Points and Authorities that follow.

POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant Las Vegas Sands Corp. ("LVSC") seeks to dismiss the Complaint in this matter on the sole ground that Jacobs has failed to join an indispensable party, namely Venetian Macau

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Limited ("VML")—an entity that has been owned and controlled by LVSC through one vehicle or another at all times relevant to these proceedings. LVSC's Motion is premised on the notion that Jacobs was an employee of VML, not LVSC, and relies principally upon two documents to support this assertion: (i) an Agreement for Services that was entered into between VML and Jacobs effective May 1, 2009; and (ii) a Letter of Appointment for Executive (the "Appointment Letter") executed by Jacobs and VML on or about June 16, 2009. *See* Mot. at Exs. B and C. LVSC's reliance on these documents for the propositions advanced in its Motion is wholly misleading.

The Agreement for Services and the Appointment Letter upon which LVSC relies did not establish an employer-employee relationship between Jacobs and VML. To the contrary, VML executed a document on July 3, 2009 expressly acknowledging that Jacobs was still "discussing [his] employment contractual terms with the parent company Las Vegas Sands Corp.," that the Agreement for Services and Appointment Letter served "the sole and exclusive purpose of applying for a Macau work permit," and that, with the exception of paying Jacobs' salary and reimbursing his expenses, these "Interim Agreements" could not "be used for any other purpose." Given that VML's July 3 letter to Jacobs completely eviscerates the positions advanced by LVSC—including the sworn declaration of VML employee Cheong, Kuok Kuan Paulo—it is hardly surprising that the gaming behemoth not only failed to provide Her Honor with a copy, but also failed to mention the document's very existence.

The reality is that Jacobs' employment was governed by a term sheet executed on or about August 3, 2009 by Jacobs and Michael Leven, LVSC's President and Chief Operating Officer. The term sheet makes no mention of VML and clearly provides that Jacobs would be reporting to the "President and COO LVS" (*i.e.*, Leven) or "CEO/Chairman LVS" (*i.e.*, Sheldon G. Adelson). Indeed, it was the Compensation Committee for LVSC, not VML, which approved Jacobs' term sheet. LVSC's Vice-President and Deputy General Counsel, moreover, expressly advised Jacobs in

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writing on August 7, 2009 that he was becoming "an executive officer of LVS" and, as such, was subject to reporting requirements of the United States Securities and Exchange Commission ("SEC"). LVSC did, in fact, file documents with the SEC identifying Jacobs as an "Officer" of LVSC. Finally, when questioned about Jacobs' termination in an LVSC earnings call on July 28, 2010, Leven—in the presence of Adelson—made no mention of any purported employment contract between Jacobs and VML but instead acknowledged that Jacobs "had a signed term sheet."

Simply put, Jacobs' employment relationship was governed by the term sheet he executed with LVSC. That LVSC opted to route Jacobs' salary and benefits through VML in no way diminishes the control LVSC had over Jacobs' employment and certainly does not transform VML into a necessary, let alone, indispensable party under NRCP 19.

II. FACTUAL BACKGROUND

A. Parties/Players

1. Prior to his employment relationship with LVSC, which will be detailed below, Plaintiff Steven Jacobs served as the President and Chief Executive Officer of Vagus Group, Inc. ("VGI"), an international management services company specializing in travel and hospitality. Through VGI, Jacobs held a variety of senior executive roles at various companies, including Louvre Hotels, Hyatt, and Best Western International.[1]

2. LVSC is a corporation organized and existing under the laws of the State of Nevada with its principal place of business in Clark County, Nevada. LVSC is publicly traded on the New York Stock Exchange. From or about June 2002 through or about September 2009, LVSC (and/or its corporate predecessors) was the parent company of VML, the holder of a

[1] *See* Affidavit of Steven C. Jacobs ("Jacobs Afft.") at ¶ 3, attached hereto as Exhibit 1.

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subconcession granted by the Macau government that allows Defendants to conduct gaming operations in the Macau Special Administrative Region of China.[2]

3. In or about Fall 2009, LVSC spun off its Macau holdings into a new company, Defendant Sands China, Ltd. ("SCL"). SCL conducted an initial public offering on the Hong Kong Stock Exchange on November 30, 2009. As a result of this corporate reorganization, LVSC remained the owner of more than 70% of SCL's outstanding shares, and SCL became the 90% owner of VML. Pursuant to Macau law, 10% of VML's shares must be held by a Macau citizen. Nevertheless, SCL—like LVSC before it—still exercises 100% of the voting and economic rights associated with VML. SCL's public filings likewise acknowledge that SCL, and thus VML, is still subject to the control of LVSC.[3]

4. At all relevant times herein, Sheldon G. Adelson ("Adelson") has been the Chairman of the Board and Chief Executive Officer of LVSC. Adelson is likewise the Chairman of the Board of SCL.[4] Upon information and belief, Adelson did not hold an officer or director position with VML at any time during Jacobs' tenure with LVSC (*i.e.*, March 2009 through July 2010).[5]

5. Michael Leven ("Leven") has served on LVSC's Board of Directors since 2004 and became LVSC's President and Chief Operating Officer on March 11, 2009. After Jacobs was

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[2] *See* Declaration of J. Colby Williams ("Williams Decl.") authenticating various exhibits, attached hereto as Exhibit 2. *See also*, Prospectus of Sands China, Ltd. at pp. 76-79, true and correct excerpts of which were obtained at www.sandschinaltd.com and are attached hereto as Exhibit 3.

[3] *See* Exhibit 3 at pp. 48, 76-80.

[4] *See* LVSC Corporate Overview obtained at www.lasvegassands.com, a true and correct copy of which is attached hereto as Exhibit 4. *See also*, SCL Corporate Governance obtained at www.sandschinaltd.com, a true and correct copy of which is attached hereto as Exhibit 5.

[5] *See* Jacobs Afft. at ¶ 6.

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terminated, Leven became SCL's Chief Executive Officer on July 23, 2010. On July 27, 2010, Leven was appointed Executive Director of SCL's Board of Directors. Leven holds both of these positions with SCL today.[6] Upon information and belief, Leven did not hold an officer or director position with VML at any time during Jacobs' tenure with LVSC (*i.e.*, March 2009 through July 2010).[7]

B. Jacobs' Employment Relationship With LVSC

6. Leven and Jacobs have known each other for many years having worked together as executives at U.S. Franchise Systems in the 1990's and in subsequent business ventures thereafter. After Leven received an offer from LVSC's Board to become the company's President and COO in March 2009, Leven reached out to Jacobs to discuss the opportunity and the conditions under which he should accept the position. One of the conditions included a commitment from Jacobs to join Leven for a period of 90-120 days to "ensure my [Leven's] success."[8]

7. Jacobs travelled to Las Vegas in March 2009 where he met with Leven and Adelson for several days to review LVSC's Nevada operations. While in Las Vegas, the parties agreed to a consulting agreement between LVSC and Jacobs' company, VGI. Jacobs then began working for LVSC restructuring its Las Vegas operations.[9]

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[6] *See* Exhibits 4 and 5. *See also*, LVSC Form 8-K dated September 14, 2010 (incorporating SCL Interim Report 2010), true and correct excerpts of which are attached hereto as Exhibit 6. Prior to becoming an Officer and Director of SCL in July 2010, Leven had only been a special advisor to SCL's Board. *Id.*

[7] *See* Jacobs Afft. at ¶ 7.

[8] *See* Jacobs Afft. at ¶ 8.

[9] *See* Jacobs Afft. at ¶ 9. *See also*, E-mail chain regarding "Vagus Group-***LVSC***-Consulting Agreement" a true and correct copy of which is attached hereto as Exhibit 7 (emphasis added).

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8. Jacobs, Leven, and Adelson subsequently travelled to Macau to conduct a review of LVSC's operations in that location. While in Macau, Leven told Jacobs that he wanted to hire him to run LVSC's Macau operations. Jacobs and Leven returned to Las Vegas after spending approximately a week in Macau. Jacobs then spent the bulk of the next 2-3 weeks working on the Las Vegas restructuring program and also negotiating with Leven regarding the latter's desire to hire him as a full-time executive with the company and the terms upon which Jacobs would agree to do so.[10]

9. LVSC, through Leven, announced on May 6, 2009 that Jacobs would become the interim President of Macau Operations. In order to enable Jacobs to obtain a Macau work permit, Jacobs and VML executed two documents: (i) an Agreement for Services, and (ii) a Letter of Appointment for Executive.[11] The Agreement for Services, which reflects an effective date of May 1, 2009, memorialized Jacobs' initial status as an independent contractor of VML. The Appointment Letter, which is dated June 16, 2009, memorialized an offer of employment.[12] These are the two documents upon which LVSC relies to contend that Jacobs was a VML employee.

10. On July 3, 2009, Antonio Ferreira, VML's Managing Director and the same person who signed the aforementioned Agreement for Services and Appointment Letter, sent Jacobs a side-letter that utterly dispels the fiction that said documents rendered Jacobs a VML employee. The letter states in pertinent part:

- "Venetian Macau Limited ("the Company") understands that you are currently discussing your employment

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[10] *See* Jacobs Afft. at ¶ 10.

[11] *See* Mot. at Exs. B and C. For the convenience of the Court, true and correct copies of the Agreement for Services and the Appointment Letter are attached hereto respectively as Exhibits 8 and 9.

[12] *See* Exhibit 8 at ¶¶ 3-4; Exhibit 9.

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contractual terms with the parent company, ***Las Vegas Sands Corp.***" (emphasis added).

- ***The Company and You hereby acknowledge and accept that the Letter of Appointment for Executive and the Agreement for Services signed by the Company and You ("Interim Agreements") will serve the sole and exclusive purpose of applying for a Macau work permit and that with the exception of paying the salary and reimbursing all personal expenses, the terms and conditions therein are non-binding and non-enforceable, on any grounds and cannot be used for any purposes whatsoever.*** (emphasis added).

- The Company and you hereby agree that your employment relationship with the company ***will be ruled exclusively by the terms and conditions forming part of an employment agreement being currently negotiated*** and to be agreed upon and executed in due time, which agreement shall replace and supersede in its entirety the Interim Agreements. (emphasis added).[13]

11. Jacobs required the side-letter because he was familiar with the high turnover rate of executives who had worked for LVSC and its subsidiaries in the past coupled with Adelson's well-established reputation for dishonoring contractual obligations owed by his companies. In light of the foregoing, Jacobs (presciently) wanted his employment agreement to be with the U.S.-based LVSC so that he would be able to pursue any legal relief in the United States in the event he was to meet a similar fate. Jacobs specifically provided a copy of the side-letter to Leven for his approval before it was executed.[14]

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[13] A true and correct copy of the side-letter dated July 3, 2009 is attached hereto as Exhibit 10. The side-letter contains a confidentiality provision. *See id.* Jacobs is willing to treat the side-letter as confidential in this litigation provided the requirements set forth in Part VII of the Nevada Supreme Court Rules, titled *Rules Governing Sealing and Redacting Records*, are met. Because LVSC has, however, already made public various documents titled "Private & Confidential," *see, e.g.*, Mot. at Ex. C, as well as Jacobs' personal information such as his former pay stubs and home address, *see id.* at Ex. D, it is clear LVSC is not interested in any sort of protective order for these materials.

[14] *See* Jacobs Afft. at ¶ 13. *See also*, e-mail chain between Jacobs and Leven dated 7/1-2/09, a true and correct copy of which is attached hereto as Exhibit 11.

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12. Jacobs and Leven continued to negotiate the terms of Jacobs' employment through early-August 2009. On August 3, 2009, Jacobs sent Leven an e-mail containing a counterproposal of terms and advising that a final decision, one way or the other, was necessary within a matter of days. Leven responded as follows:

> ***This is ok***[.] I have forwarded to comp comm. They already know the details[.] [W]ill the letter and signature be good enough or do you want me to put it in another form[?] [I]f the lawyers get involved we will never get it done[.] ***I think the letter is good enough.*** I don't think I can go through two lawyers[.] ***[T]his should protect you*** but I can draft contract if you wish but if it goes to [H]oward[,] it will take forever. What do you think[?] (emphasis added).

Leven signed the e-mail as "President and Chief Operating Officer" of LVSC.[15]

13. Jacobs agreed with Leven that a long-form contract was not necessary to formalize his employment relationship with LVSC provided the parties signed off on the Offer Terms and Conditions (the "Term Sheet") that had been agreed upon. Leven and Jacobs signed the Term Sheet on or about August 3, 2009.[16] The Term Sheet makes clear that Jacobs would be reporting to "President and COO LVS" (*i.e.*, Leven) or "CEO/Chairman LVS" (*i.e.*, Adelson). The Term Sheet does not mention VML; nor does it contain any forum selection clause requiring litigation in Macau. It does, however, provide that Jacobs was to receive 500,000 stock options in LVSC "on the date of hire." These options were in addition to 75,000 LVSC options previously

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[15] A true and correct copy of the subject e-mail chain is attached hereto as Exhibit 12.

[16] A true and correct copy of the Term Sheet is attached hereto as Exhibit 13. The Term Sheet contains material differences from the Appointment Letter including, but not limited to, a 3-year term (as opposed to 2 years) and benefits flowing from a "Not For Cause" termination. *Compare id.* with Exhibit 9.

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awarded to Jacobs in June 2009 pursuant to a written agreement with LVSC that is expressly governed by Nevada law.[17]

14. On August 6, 2009, Leven forwarded an e-mail to Jacobs confirming that LVSC's Compensation Committee "***has approved the term sheet for Steve's contract.***"[18] (emphasis added). The next day, LVSC's then-VP and Deputy General Counsel, Gayle Hyman, sent Jacobs an e-mail stating that once he signed the employment agreement, he "***will become an executive officer of LVS***" (emphasis added) and, thus, would be subject to certain SEC reporting requirements regarding his LVSC stock ownership.[19]

15. Approximately one month later, Ms. Hyman again wrote to Jacobs and stated that "SGA and Mike decided to make the CEO's of the company's significant subsidiaries ***'executive officers' of LVSC*** for SEC reporting purposes." (emphasis added). She also provided Jacobs with a "Form 3" to complete for filing with the SEC.[20] The Form 3, which identified Jacobs as an "Officer" of LVSC was, in fact, subsequently filed with the SEC and reported the 575,000 stock options Jacobs held in LVSC.[21]

16. On or about November 2, 2009, LVSC filed a Form 8k with the SEC that included a number of documents regarding the planned initial public offering of SCL. When identifying the Directors and Senior Management of the soon to be listed company, Jacobs was described as

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[17] A true and correct copy of the Nonqualified Stock Option Agreement dated June 18, 2009 is attached hereto as Exhibit 14.

[18] A true and correct copy of the subject e-mail chain is attached hereto as Exhibit 15.

[19] A true and correct copy of the subject e-mail is attached hereto as Exhibit 16.

[20] True and correct copies of the subject e-mail and attachment are attached hereto as Exhibit 17.

[21] *See id. See also*, Form 3 publicly filed on September 14, 2009, a true and correct copy of which is attached hereto as Exhibit 18.

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"our [*i.e.*, SCL's] Chief Executive Officer, President-Macau and Executive Director. ***Mr. Jacobs has been President-Macau of LVS from May 2009 and has worked with LVS since March 2009.***" (emphasis added). LVS is defined in the documents as "Las Vegas Sands Corp., a company incorporated in Nevada, U.S.A. in 2004 and the common stock of which is listed on the New York Stock Exchange."[22]

17. While Jacobs spent the majority of his time in Macau focusing on LVSC's operations in that location, he was also required to perform duties in Las Vegas including, but not limited to, working with LVSC's Las Vegas staff on reducing costs within the company's Las Vegas operations, consulting on staffing and delayed opening issues related to the company's Marina Bay Sands project in Singapore, and participating in meetings of LVSC's Board of Directors.[23]

18. Notwithstanding that Jacobs was ostensibly the head of LVSC's Macau operations, both Leven and Adelson, in particular, exercised a high degree of control over Jacobs and his employment. The control ranged from the mundane such as selecting disposable hand towel holders for the men's bathroom to items of significance. For example, when Jacobs wanted to pursue a possible partnership with Caesars Palace for a project in Macau, a project he and Leven had discussed in some detail, Leven told him there would be "no chance" Jacobs could get it done unless the idea was made to appear to have originated with Adelson. Having by this time become well-acquainted with Adelson's ego-centric behavior, Leven sarcastically remarked, "*that's how billionaires think[.] [W]e are just executors[;] they are strategic genii in their own minds*[.]"

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[22] True and correct excerpts of the Form 8 filed by LVSC on November 2, 2009 are attached hereto as Exhibit 19.

[23] *See* Jacobs' Afft. at ¶ 19.

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(emphasis added).[24] SCL, moreover, has publicly acknowledged that LVSC has "the ability to exercise control over [SCL's] business policies and affairs," including "***the selection of [SCL's] senior management.***"[25] (emphasis added). Indeed, it was Adelson's obsessive compulsion to control every facet of Jacobs' employment that ultimately led to the latter's wrongful termination on July 23, 2010.[26]

19. Just five days after Jacobs' termination, Leven and Adelson participated in an earnings call to discuss LVSC's second quarter 2010 earnings. During the call, Leven was asked whether Jacobs had a "non-compete" and, if so, how long did it last. Contrary to the position now taken by LVSC before this Court that Jacobs had an employment contract with VML, Leven advised that Jacobs "does not have an actual employment contract. ***He had a signed term sheet.*** We never got to contract with it, and ***I don't believe he has a non-compete in that term sheet.***" (emphasis added). As we now know, that Term Sheet was executed with LVSC, ***not*** VML.[27]

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[24] A true and correct copy of the subject e-mail chain is attached hereto as Exhibit 20. These e-mail communications likewise undercut the allegation that Jacobs travelled to Toronto without authorization to negotiate a deal with the Four Seasons, *see* Mot. at Ex. G (VML Termination Letter), as Jacobs expressly advised Leven therein that he was heading to Toronto to "close the deal." *See* Ex. 20. Leven's lack of objection to this news speaks volumes about the trumped-up nature of the charges contained in the termination letter. Jacobs looks forward to disproving the remainder of LVSC's baseless allegations in due course.

[25] *See* Attached Exhibit 3 at p. 48.

[26] *See* Complaint at ¶¶ 26-29.

[27] True and correct excerpts of the transcript from LVSC's Q2 2010 earnings call, obtained from www.seekingalpha.com, are attached hereto as Exhibit 21. While Jacobs acknowledges that he never signed a long-form contract of employment with LVSC, this in no way undermines the Term Sheet's status as an enforceable agreement. *See, e.g., Local Union 813, Intern. Broth. Of Teamsters v. Waste Management of NY, LLC*, 469 F.Supp.2d 80, 86-87 (E.D.N.Y. 2007) ("The law generally enforces [letters of intent and term sheets] as contracts when they contain all material terms of the contemplated contract or when the remaining acts to arrive at a contract, *e.g.*, drafting and execution of formal contract documents, are merely ministerial."); *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005) ("[a] contract can be formed . . . when the parties have agreed to the material terms, even though the contract's exact language is not finalized until later."). After all, it was Leven who advised that he thought a letter agreement was

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III. LEGAL ARGUMENT

A. Applicable Standards Governing NRCP 12(b)(6) and NRCP 19.

LVSC seeks dismissal of Jacobs' Complaint pursuant to NRCP 12(b)(6). Under this Rule, the moving party bears the heavy burden of demonstrating that the non-moving party failed to join a necessary and indispensable party. *See Shermoen v. U.S.*, 982 F.2d 1312, 1317 (9th Cir. 1992) (analyzing the federal equivalent of NRCP 12(b)(6)); *Nevada Eighty-Eight, Inc. v. Title Ins. Co. of Minnesota*, 753 F.Supp. 1516, 1522 (D. Nev. 1990) ("the burden of proving that joinder is necessary rests with the party asserting it."). Indeed, "courts are reluctant to dismiss a complaint for failure to join a party unless it appears that serious prejudice or inefficiency will result." *Jordan v. Washington Mut. Bank*, 211 F.Supp.2d 670, 675 (D. Md. 2002); *World Omni Financial Corp. v. Ace Capital Re, Inc.*, 2002 WL 31016669 (S.D.N.Y. 2002) (same).

A Rule 12(b)(6) motion to dismiss requires the Court to engage in a two-step analysis under NRCP 19 to determine first whether the absent party is "necessary." If the party is deemed "necessary," only then does the Court proceed to the determination of whether it is "indispensable." Rule 19(a) governs whether a party is "necessary" to an action and reads in pertinent part:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if:
>
> (1) in the person's absence complete relief cannot be accorded among those already parties; or

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"good enough," that the lawyers would "take forever" to draft a long-form contract, and that a letter agreement "should protect [Jacobs]." *See* Exhibit 10. The parties, moreover, mutually performed under the Term Sheet for nearly one year. *Cf. Tropicana Hotel Corp. v. Speer*, 101 Nev. 40, 44, 692 P.2d 499, 502 (1985) ("performance by a party after agreement has been reached but before a writing has been prepared is regarded as some evidence that the writing was only a memorial of a binding agreement.").

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(2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect that interest or;

(ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

NRCP 19(a).

If the absent party is deemed "necessary" but cannot be joined to the action, then the Court must consider "whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed." NRCP 19(b). "The inquiry is a practical one and fact specific, and is designed to avoid the harsh results of rigid application." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). The Court considers the following four factors when determining whether an absent party is "indispensible":

(1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties;

(2) the extent to which, by protective provisions in the judgment, by shaping of relief, or other measures, the prejudice can be lessened or avoided;

(3) whether a judgment rendered in the person's absence will be adequate; and

(4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

NRCP 19(b). Joinder, however, "is not required where the absent parties' interests are adequately protected by those who are present." *In re Allustiarte*, 786 F.2d 910, 919 (9th Cir. 1986). As will be set forth below, VML is neither necessary nor indispensable to this action.

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B. VML Is Not A "Necessary" Party Under Rule 19(a).

1. VML is not a Party to Jacobs' Employment Agreement or the Nonqualified Stock Option Agreement.

"A nonparty to a commercial contract ordinarily is not a necessary party to an adjudication of rights under the contract." *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1044 (9th Cir. 1983) (government was not a necessary party under Fed.R.Civ.P. 19 where it was not a party to contract at issue even though it had prompted the parties to enter into the subject agreement). This principle controls the issue here as Jacobs' breach of contract claims against LVSC arise from the Term Sheet and the Nonqualified Stock Option Agreement. *See* Complaint at ¶¶ 34-47. VML is not a party to either of these agreements.

To review, VML expressly disavowed any legal effect of the Agreement for Services and Appointment Letter (other than paying Jacobs' salary and costs) and acknowledged that Jacobs was negotiating his employment contract with LVSC. *See supra* at 6-7. Those negotiations occurred between Jacobs and Leven in his capacity as President and COO of LVSC and resulted in a Term Sheet that contained material differences from the Appointment Letter and required Jacobs to report to LVSC's "President and COO" or its "CEO/Chairman." *Id.* at 8. LVSC's corporate counsel advised Jacobs that he would become an "executive officer" of LVSC and would be subject to SEC reporting requirements. *Id.* at 9. And LVSC thereafter affirmatively describe Jacobs as an "officer" of LVSC in public filings with the SEC. *Id.* at 9-10.[28] Finally, Leven publicly acknowledged that Jacobs' employment was governed by the "signed term sheet." *Id.* at 11.

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[28] Given its above-referenced representations to a regulatory agency, LVSC should be estopped from now taking a contrary position in this action. *Cf. American Manufacturers Mut. Ins. Co. v. Payton Lane Nursing Home, Inc.*, 704 F.Supp.2d 177, 192-93 (E.D.N.Y. 2010) ("courts have regularly found that quasi-estoppel bars a party from adopting a factual position in court that is contrary to a position taken on a tax return.").

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Because LVSC and Jacobs are the only parties to the Term Sheet and Stock Option Agreement, it is clear that complete relief can be accorded among them. *See* NRCP 19(a)(1). *Northrop Corp., supra.* Nor would VML have any genuine interest in this breach of contract action given its status as a non-party to the contracts at issue. *See* NRCP 19(a)(2). In light of the foregoing, VML is not a "necessary" party under NRCP 19(a), and LVSC's Motion may be denied on this basis alone.[29]

2. Even if LVSC and VML are Considered Co-Obligors Under Jacobs' Employment Agreement, VML is Still not a "Necessary" Party Under NRCP 19(a).

Jacobs has demonstrated above that the side-letter from VML completely undermines LVSC's position that Jacobs was a VML employee by virtue of the Agreement for Services and Appointment Letter. Jacobs has also provided overwhelming evidence establishing that his employment relationship was with LVSC, not VML. LVSC nonetheless maintains that VML is an indispensable party because it paid Jacobs' salary and benefits. *See* Mot. at 7:21-27. This is wrong for at least two reasons, both of which will be addressed in turn.

a. LVSC controlled Jacobs' employment

Payment of salary alone does not determine employment status. While the source of wages may be one factor in determining an employer-employee relationship, *see, e.g., Clark*

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[29] Jacobs acknowledges that actions seeking to set aside a contract or other equitable relief may require the joinder of all parties to a contract. *See Holland v. Fahnestock & Co., Inc.*, 210 F.R.D. 487, 502 n.16 (S.D.N.Y. 2002). Here, however, VML is not a party to the subject agreements and Jacobs is not seeking to set aside any contracts. He is instead seeking monetary damages for their breach. *See Sinotrans Container Lines, Co., Ltd. v. North China Cargo Svcs.*, Inc., 2008 WL 3048855 *3 (C.D.Cal. 2008) ("Review of the complaint fails to show why meaningful relief cannot be accorded the existing parties without King being present. For example, this case does not involve the rescission of a contract, claimants to a common fund or property, or conflicting claims to ownership or possession of property."). This distinguishes the present matter from the cases relied upon by LVSC where, for instance, the absent parties had issued the sanctions being challenged, *see University of Nevada v. Tarkanian*, 95 Nev. 389, 395-96, 594 P.2d 1159, 1163 (1979), or claimed an interest in the real property being forfeited. *See Glady's Baker Olsen Family Trust v. Eighth Jud. Dist. Ct.*, 110 Nev. 548, 874 P.2d 778 (1994).

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County v. SIIS, 102 Nev. 353, 354, 724 P.2d 201, 202 (1986) (recounting 5 factors), the key inquiry is who has the "right to control" the employee's activities.[30] As the Fourth Circuit Court of Appeals has aptly summarized:

> [W]here more than one possible employer is involved[,] [t]he question of pay is not conclusive. Neither is the power to employ and discharge the particular employee a conclusive test. Nor is it necessarily conclusive to determine for whose benefit the act was performed. The ultimate test is which employer had the right to control and direct the conduct of the employee in the performance of the act in question.

People's Supply, Inc. v. Vogel-Ritt of Penn-Mar-Va., Inc., 273 F.2d 933 (4th Cir. 1960). Similarly, in *Beegle v. Rest. Mgmt., Inc.*, the trial court was faced with the question of which of two possible entities employed a restaurant worker for purposes of determining whether a co-worker could pursue tort claims based on vicarious liability or was otherwise limited to workers compensation. 679 A.2d 480, 485 (D.C. Ct. App. 1996). In deciding that the plaintiff was limited to workers compensation, the decisive factor for the trial court was who paid the worker's salary. *Id.* The appellate court reversed, instructing "[t]his was not an adequate basis upon which to determine the relationships of the parties and the question of liability. The right to control the employee in the performance of work is the decisive test." *Id.*

Here, it cannot be genuinely disputed that LVSC controlled Jacobs' employment. The Term Sheet required Jacobs to report to the "President and COO LVS" or the "CEO/Chairman of LVS." *See supra* at 8. Jacobs has submitted a declaration attesting to the control exercised by LVSC over his employment decisions, and SCL—LVSC's majority-owned subsidiary and

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[30] *See, e.g., Clark County, supra*, 102 Nev. at 354, 724 P.2d at 202 ("The inability of the alleged employer to control the activities of the claimant is highly persuasive in determining whether an employer-employee relationship exists."); *Azad v. United States*, 388 F.2d 74, 76 (9th Cir. 1968) ("authorities seem to be in general agreement that an employer's right to control the manner in which the work is performed is an important ***if not the master test*** to be considered in determining the existence of an employer-employee relationship.") (emphasis added); *In re FedEx Ground Package Sys., Inc.*, --- F.Supp.2d ---, 2010 WL 5094230 (N.D. Ind. 2010) (summarizing the importance of "right to control" in determining whether an employer-employee relationship exists in various jurisdictions).

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VML's parent at the time of Jacobs' termination—has publicly acknowledged that its business policies and selection of senior management were subject to the control of LVSC. *Id.* at 10-11. It is worth noting that when Jacobs was wrongfully terminated, he was given a termination letter signed by Adelson under the SCL mark.[31] LVSC and SCL, moreover, were the entities that disclosed Jacobs' termination in public filings on July 23, 2010.[32] It was only after two weeks had nearly passed that Jacobs received the belatedly-manufactured termination letter from VML that LVSC now trumpets as proof of an employment relationship. *See* Mot. at 5:8-13. The VML termination letter and its reference to "the employment contract dated June 16, 2009 between Venetian Macau Limited and you" is, of course, directly at odds with the VML side-letter disclaiming any contractual relationship with Jacobs. As such, its evidentiary value for purposes of rendering Jacobs a VML employee is *nil*.

b. *Because VML was, at most, a joint obligor under Jacobs' employment agreement, it still does not qualify as a "necessary" party under NRCP 19(a).*

While LVSC may have routed payment of Jacobs' salary and health insurance through VML, LVSC was nonetheless directly responsible for satisfying other obligations under the Term Sheet. These obligations included, *inter alia*, the issuance of Jacobs' stock options in LVSC. Accordingly, VML was—at most—a joint obligor (or co-obligor) with LVSC under the employment agreement. An "obligor" is defined as "the person who has engaged to perform some obligation." *Brackin Tie, Lumber & Chip Co. v. McLarty Farms, Inc.*, 704 F.2d 585, 586 (11th Cir.1983) (citing *Black's Law Dictionary*). *See also, Trans Pac. Corp. v. South Seas Enter., Ltd.*, 291 F.2d 435, 436-437 (9th Cir. 1961) (noting that a case of "joint obligors" occurs when a contracting party "shares a duty with someone else"). On the other hand, an "obligee" is defined

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[31] A true and correct copy of this letter is attached hereto as Exhibit 22.

[32] *See* Form 8K filed by LVSC on July 23, 2010, a true and correct copy of which is attached hereto as Exhibit 23.

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as "the person in favor of whom some obligation is contracted, whether such obligation be to pay money or to do or not to do something." *Black's Law Dictionary* 1226 (4th ed. 1951).

It is well-settled that "[c]o-obligors to an agreement are not 'indispensable' parties to a litigation under Rule 19(b)." *Holland v. Fahnestock & Co., Inc.*, 210 F.R.D. 487, 501 (S.D.N.Y. 2002) (numerous citations omitted). *See also, Wolgin v. Atlas United Fin. Corp.*, 397 F.Supp. 1003, 1012 (E.D.Pa. 1975) ("[J]oint obligors (persons who owe a duty of performance), as opposed to joint obligees (persons to whom a duty is owed), have never been considered indispensable parties."). As one prominent legal commentator has explained, "the joinder of obligors is left to plaintiff's discretion by many courts and plaintiff may select defendants without being concerned about dismissal because of non-joinder. Joint obligors thus are treated as Rule 19(a) parties, but are not deemed indispensible under Rule 19(b)" *See* Wright, Miller & Kane *Federal Practice and Procedure*: Civil 3d § 1613 at 177 (2001).

The reasoning underlying the different treatment of obligors and obligees for purposes of a Rule 19 indispensability analysis is attributable to the principle of joint and several liability, which allows "a plaintiff to satisfy its whole judgment by execution against any one of the multiple defendants who are liable to him, thereby forcing the debtor who has paid the whole debt to protect itself by an action for contribution against the other joint obligors." *Holland*, 210 F.R.D. at 502 (quoting *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 412 (3d Cir. 1993)). In other words, forcing one of a number of potential defendants to bear an entire loss does not constitute "the risk of incurring double, multiple, or otherwise inconsistent obligations" that Rule 19 is designed to protect against.[33]

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[33] Conversely, when a potential plaintiff-obligee is not joined in an action, the defendant in such a proceeding faces the very real danger of "incurring double, multiple, or otherwise inconsistent obligations" because nothing prevents the absent plaintiff from bringing a separate action against the defendant on the same claim. *See Holland*, 210 F.R.D. at 502 n.16. *See also, Johnson v. Johnson*, 93 Nev. 655, 658, 572 P.2d 925, 927 (1977) (recognizing that "[a] non-

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Janney illustrates this principle nicely in the context of parent and subsidiary corporations. In that case, a consultant sued a subsidiary corporation (Shepard Niles) in a dispute arising out of a contract the consultant had with the parent company (Underwood). The plaintiff only named Shepard Niles as a party to the action even though Underwood was the only signatory to the agreement. Shepard Niles thus filed a motion to dismiss for failing to join Underwood as an indispensable party under Rule 19, which the district court granted. In reversing, the Third Circuit Court of Appeals began by addressing "whether a court can grant complete relief in a breach of contract action to the parties before it when only one of two co-obligors has been joined as a defendant." *Id.* at 405. Where "the agreement in question can be construed or interpreted as a contract imposing joint and several liability on its co-obligors...complete relief may be granted in a suit against only one of them." *Id.* at 406. Because the language of the subject agreement referred to both Underwood "and subsidiaries" and did not contain language precluding a construction that imposed joint and several liability, the court determined that Shepard Niles and Underwood were co-obligors and, therefore, Underwood was not a necessary party under Rule 19(a)(1). *Id.*[34]

The court subsequently conducted an analysis under rule 19(a)(2)(ii) to determine whether continuation of the action in the absence of Underwood would expose Shepard Niles to the "substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of

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joined transferee of property which has been ordered reconveyed could validly force relitigation of the issue of the propriety of the reconveyance before coming under any legal duty to reconvey the property.").

[34] Here, it is Jacobs' position that LVSC, as the only signatory to the Term Sheet, is the only obligor and, thus, the only necessary defendant on this breach of contract claim. Assuming, *arguendo*, that VML is a joint-obligor under the Term Sheet, nothing in this agreement—as in *Janney*—precludes a construction that liability thereunder is joint and several.

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the claimed interest." *Id.* at 411.[35] Specifically, Shepard Niles claimed that it would be subject to "double liability" because it could be responsible for the entire judgment without the presence of Underwood. *Id.* at 412. The court flatly rejected this contention:

> The possibility that Shepard Niles may bear the whole loss if it is found liable is not the equivalent of double liability. It is instead a common result of joint and several liability and should not be equated with prejudice. Inherent in the concept of joint and several liability is the right of a plaintiff to satisfy its whole judgment by execution against any one of the multiple defendants who are liable to him, thereby forcing the debtor who has paid the whole debt to protect itself by an action for contribution against the other joint obligors.

Id. To be sure, an "outcome adverse to Shepard Niles...does not have any legal effect on whatever right of contribution or indemnification Shepard Niles may have against Underwood." *Id.* "The possibility that the defendant may have a right of reimbursement, indemnity, or contribution against the absent party is not sufficient to make the absent party indispensible to the litigation." *Id.* (quotations and alterations omitted). In sum, the court held that Underwood was not a "necessary" party under Rule 19(a)(2)(ii) because continuation of the suit in its absence would not create double or inconsistent liabilities for Shepard Niles. *Id.* at 412-13.

Since Underwood was not a "necessary" party under Rule 19(a)(1) or (a)(2), the court was not required to reach the issue of whether it was an "indispensable" party under Rule 19(b). *See Janney*, 11 F.3d at 404. Even where courts have found co-obligors to be "necessary" parties

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[35] Before doing so the court examined whether a judgment entered against Shepard Niles would constitute binding precedent in a different action on the same facts against Underwood as contemplated by Rule 19(a)(2)(i). *Janney*, 11 F.3d at 406-11. LVSC did not raise this argument in its brief, but the *Janney* court was clear that such an occurrence would not be prejudicial to Underwood. *Id.* at 409 ("Underwood's absence will not create a precedent that might persuade another court to rule against Underwood on principles of *stare decisis*, or some other unidentified basis not encompassed by the rules of collateral estoppel or issue preclusion."). Likewise, if Jacobs prevails in this action, he cannot recover a second time against VML. *See Dernick v. Bralorne Resources, Ltd.*, 639 F.2d 196, 199 (5th Cir. 1981) (where recovery against parent company in federal court action would moot state court proceedings against subsidiary corporation, subsidiary was not an indispensable party to federal court action as plaintiff "[did] not seek and [could] not have 'two bites at the apple.'").

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under Rule 19(a), they universally hold that such parties are not "indispensable" under rule 19(b). We turn briefly to that issue now.

C. VML Is Not An "Indispensable" Party Under Rule 19(b).

In the unlikely event the Court was to find that VML is a necessary party under Rule 19(a) (and it should not given that VML is not a party to the Term Sheet or Stock Option Agreement), it must still determine whether VML is an indispensable party under Rule 19(b) whose absence requires dismissal. While some courts other than *Janney* have found that co-obligors are necessary parties under Rule 19(a), they have nonetheless determined that such parties are *not* indispensable under Rule 19(b). *See, e.g., Holland*, 210 F.R.D. at 501 and n.15 ("it is well-settled that "co-obligors to an agreement are not "indispensable parties to a litigation under Rule 19(b).") (citing 10 cases and 2 legal treatises); *Brackin, supra*, 704 F.2d at 586-87 ("A review of the case law in this area reveals that the majority of courts hold that while joint obligees are indispensable parties, joint obligors are not.") (surveying authorities). The same result is warranted here under the pertinent NRCP 19(b) factors.

1. A Judgment will not Prejudice VML or Existing Parties.

LVSC can avoid sole responsibility for its breach of the Term Sheet by impleading or independently suing VML for indemnity or contribution. *Id.* at 502 (explaining defendant's ability to pursue third parties under Rule 14). There is no danger that LVSC and VML will be subject to inconsistent obligations as Jacobs (i) seeks only money damages (as opposed to injunctive relief, rescission, or specific performance), and (ii) cannot recover a second time against VML. *Id.* at 502 and n.16 (explaining that, in contrast to actions for money damages, actions to set aside contracts or for injunctive relief may require the joinder of all parties to a contract because such actions could result in inconsistent obligations). *See also, Dernick, supra* (explaining that plaintiff can only recover once on a judgment); and *supra* at 15 n.29. To the

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extent VML may be subject to issue preclusion, LVSC and SCL more than adequately represent VML's interests as they are the majority shareholders in the company and will undoubtedly be advancing "virtually the same legal and factual positions." *Id.* at 503 n.18 (quoting *Southeastern Sheet Metal Joint Apprenticeship Training Fund v. Barsuli*, 950 F.Supp. 1406, 1414 (E.D.Wis. 1997)).[36]

2. Protective Measures to Lessen Claimed Prejudice.

In discussing this factor, the Advisory Committee Note to the 1966 amendments of Fed.R.Civ.P. 19 indicate that the absent parties as well as those presently before the court should take steps to avoid the possibility of prejudice. *See* 1966 Advisory Committee Note to Rule 19. This includes informally notifying the absent party of the pending suit so that it may consider what to do. "[Its] inaction with knowledge may be pertinent to the issue of maintaining the action or dismissing it." *Id.* Here, of course VML already knows about the suit and has provided documentation to LVSC for use in these proceedings. Nothing prevents VML from voluntarily appearing in this action or intervening as any personal jurisdiction and venue issues can be waived, and its presence would not deprive this Court of subject-matter jurisdiction. *See* Wright, Miller & Kane *Federal Practice and Procedure*: Civil 3d § 1608 at 112-14 (2001). Alternatively, and as touched on above, LVSC and SCL are perfectly free to bring VML into this action by way of third-party practice. *See id.* at 111-12.

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[36] LVSC's (and SCL's) ability to advance VML's positions is evidenced by the Motion itself where LVSC had no problem obtaining an extensive—albeit wholly inaccurate—declaration from VML's Associate Director for Human Resources as well as a variety of VML documents. *See* Mot. at Exs. A-D. *See also, Pujol v. Shearson/American Express*, 877 F.2d 132, 134-38 (5th Cir. 1989) (where the interests of the defendant parent company and its wholly-owned subsidiary were virtually identical, subsidiary was not an indispensable party to action filed by wife arising out of her husband's wrongful termination by subsidiary even though wife indicated intent to introduce evidence of wrongdoing by subsidiary); *Micro-Medical Industries, Inc. v. Hatton*, 607 F.Supp. 931, 934 (D.P.R. 1985) ("Being thus situated as parent and wholly-owned subsidiary, members of a single enterprise engaged in a common business venture, it appears to us that the interests of the parent in this suit encompass those of the subsidiary.").

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3. A Judgment Rendered in VML's Absence Will be Adequate.

Assuming *arguendo* that VML is a joint-obligor with LVSC, Jacobs can still obtain complete relief in this action because LVSC's and VML's liability is joint and several. *See Holland,* 210 F.R.D. at 501-02 (explaining that plaintiff can obtain the relief it is entitled to by obtaining a judgment against one of several joint debtors). *See also, supra* at 17-19 (examining ability to recover against one co-obligor).

4. Jacobs will not have an Adequate Remedy if the Action is Dismissed.

LVSC and SCL contend that Jacobs has an adequate remedy if this case is dismissed because he can bring suit in Macau. While this contention is dubious for a variety of reasons, it would not justify a dismissal of this action even if it was an accurate statement of fact. *See Rishell v. Jane Phillips Episcopal Mem. Med. Ctr.*, 94 F.3d 1407, 1413 (10th Cir. 1996) ("[C]ourts do not view the availability of an alternative remedy, standing alone, as a sufficient reason for deciding that the action should not proceed among the parties before the court.") (multiple citations omitted).

IV. CONCLUSION

VML is not a "necessary" party under Rule 19(a) for the simple reason that it is not a party to any of the contracts at issue. Assuming without conceding that VML could be considered a contracting party because it was the conduit for Jacobs' salary and health insurance, it would still be nothing more than a joint-obligor under Jacobs' employment agreement. An unbroken line of legal authorities firmly establishes that joint-obligors are not "indispensable" parties under Rule 19(b).

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In light of the foregoing, LVSC's Motion must be denied in its entirety.

DATED this 9th day of February, 2011.

CAMPBELL & WILLIAMS

By /s/ ***Donald J. Campbell***
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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of February, 2011 I served by U.S. Mail, first class postage pre-paid, a true and correct copy of the foregoing **Opposition to Las Vegas Sands Corp.'s Motion to Dismiss Pursuant to NRCP 12(b)(6) and 19 for Failure to Join an Indispensable Party** to the following counsel of record:

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/s/ Lucinda Martinez

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EXHIBIT B

EXHIBIT B

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CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

STEVEN JACOBS Plaintiff vs. LAS VEGAS SANDS CORP., et al.. Defendants	CASE NO. A-627691 DEPT. NO. XI **Transcript of Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON PLAINTIFF'S MOTION FOR PROTECTIVE ORDER

FRIDAY, NOVEMBER 6, 2015

APPEARANCES:

FOR THE PLAINTIFF:	TODD BICE, ESQ. JORDAN T. SMITH, ESQ.
FOR THE DEFENDANTS:	J. STEPHEN PEEK, ESQ. JON RANDALL JONES, ESQ. STEVE L. MORRIS, ESQ.
COURT RECORDER:	TRANSCRIPTION BY:
JILL HAWKINS District Court	FLORENCE HOYT Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

rehearing, even though I technically can't do it until I get the writs. So if Mr. Bice is telling me he thinks he may be moving for rehearing on the issue related to the deposition --

MR. BICE: I don't know. But --

THE COURT: You're thinking about it.

MR. BICE: Yeah. We're analyzing it.

THE COURT: Then I will wait until you tell me other stuff.

MR. BICE: Understood.

MR. RANDALL JONES: And we are, too.

THE COURT: Okay. So then I won't do anything until I actually get the formal documents.

Next step was we had previously suspended expert disclosures until after the first of the year. Is it time now to talk about when you want those expert disclosures to be, or do you need some time to figure that out?

MR. BICE: We would like to get those put back on, Your Honor.

MR. RANDALL JONES: And I understand why Mr. Bice would, and I don't blame him. If I was him, I would, as well. I think the problem with that is with the status of VML up in the air that is problematic.

THE COURT: I am assuming at this point those three initials are not involved in my case. That's my assumption. Until something happens and I get an order, I'm making the

assumption I'm moving forward with the parties currently sitting in this courtroom.

MR. RANDALL JONES: And I would only say, Your Honor, that, while we certainly believe that -- and I don't represent, as you know, VML -- we certainly believe they shouldn't be in the case for the reasons we've articulated before they got in the case, that's still an issue that's up in the air. And going ahead with the expert designations is problematic for that reason. Obviously you could do it, but in if we -- if VML is ultimately in this case, then that's going to be a problem for expert designations, it seems to me.

THE COURT: Well, here's my concern. And this is -- and I'll let Mr. Bice talk in a minute. The way the most recent order was issued from the Supreme Court related to Judge Denton's decision the case is stayed as to them only. And that means I have to move forward on you guys and I've got to do my part. And if something happens and they come back, then I, of course, will make accommodations. As I've already told Mr. Bice, that may impact his trial date, it may impact all your discovery dates.

MR. RANDALL JONES: Right.

THE COURT: But it's up there, and they'll do what they do and it'll take as long as it takes.

MR. RANDALL JONES: You know, and again I understand you're going to run the case as you think is most appropriate.

That was my only comment about that. That may or may not be a significant issue in the Court's mind with respect to those deadlines. So that was -- that's my only point on that issue.

THE COURT: Is that your only concern?

Mr. Peek.

MR. PEEK: Your Honor, I have additional concerns, and I don't say this to -- in any effort to throw fuel on a flame. But we certainly have a number of discovery issues that are still outstanding on both sides -- or all sides. So I'm concerned about being able to get all of the discovery necessary that our experts would need. So for that reason I think that -- I'm happy to set a date or a deadline, but I'd like to at least move it out as far as we can in order to meet everybody's obligations.

MR. RANDALL JONES: And in that regard Mr. Peek's point is that we have been unable to get -- and I understand Mr. Bice has a right to protect his client the way he thinks is appropriate, but this is -- this motion is an example of that. We've had a very great time -- difficult time, excuse me, getting information related to Mr. Jacobs, and I -- from a strategic standpoint, and I'm sure the Court can appreciate this from your own experience as a trial lawyer, I don't want to take Mr. Jacobs's deposition until I get the backup documentation. And I have had a difficult -- very difficult time getting that information. And so that's part of the

concern I have about setting expert deadlines.

THE COURT: So how about we do this. And, Mr. Bice, what I want you to do is I want you to come up with a schedule. Because in the order that I issued which I called Second Amended Order Setting Civil Trial I set the dates which are now suspended that start on November 20th.

MR. BICE: Correct.

THE COURT: I told you guys you would be good until at least after the first of the year. I need to make sure you have at least a month's advance notice, which is why I'm trying to have this discussion now, because I don't want to throw anybody under the bus by giving you too short a deadline. Which is why I thought we would discuss it today. And I'm not giving you a date today. I'm saying I need you to think about those dates today. And I understand your VML issue, but under the circumstances I've got to move forward.

MR. RANDALL JONES: Understood.

THE COURT: But I understand.

Mr. Bice.

MR. BICE: Yes. And, Your Honor, when VML comes back we will address that, and there may be other motions that deal with VML, since VML wants to claim to be separate. We can even address severance at that point in time of VML and its issues. So we'll address all of that when VML comes back down here.

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
Las Vegas, Nevada 89146

Florence M. Hoyt

FLORENCE M. HOYT, TRANSCRIBER

11/6/15

DATE

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EXHIBIT A

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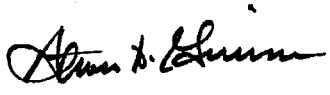

CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

STEVEN JACOBS Plaintiff vs. LAS VEGAS SANDS CORP., et al. Defendants	CASE NO. A-627691 DEPT. NO. XI **Transcript of Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON MOTIONS

THURSDAY, NOVEMBER 5, 2015

APPEARANCES:

FOR THE PLAINTIFF:	JAMES J. PISANELLI, ESQ. TODD BICE, ESQ. JORDAN T. SMITH, ESQ.
FOR THE DEFENDANTS:	J. STEPHEN PEEK, ESQ. JON RANDALL JONES, ESQ. RYAN M. LOWER, ESQ. STEVE L. MORRIS, ESQ.
COURT RECORDER:	TRANSCRIPTION BY:
JILL HAWKINS District Court	FLORENCE HOYT Las Vegas, Nevada 89146

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LAS VEGAS, NEVADA, THURSDAY, NOVEMBER 5, 2015, 8:41 A.M.

(Court was called to order)

THE COURT: Is Jacobs versus Sands ready now? I tried to call you before. Everybody got up here, and then we realized Mr. Peek and Mr. Morris were not here.

MR. PEEK: I'm so sorry for being a little tardy, Your Honor.

THE COURT: Well, you were actually on time. I was trying to start early so you guys could get where you're supposed to be.

MR. PEEK: I'm sure all the folks behind me are pleased that you called us first.

THE COURT: Because of the stay, I am not mentioning three initials today of another party who I assume is not here with us, and I will take no action related to that party.

So what motion would you gentlemen like to start with?

MR. LOWER: Your Honor, how about the motion to strike?

THE COURT: That's the easiest one. Let's start with easy. Thank you. Mr. Lower, I appreciate easy every once in a while.

MR. LOWER: I think this is very easy, Your Honor. You've dismissed the sixth cause of action twice because Mr. Jacobs has not alleged that Mr. Adelson was his employer.

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
Las Vegas, Nevada 89146

Florence M. Hoyt

FLORENCE M. HOYT, TRANSCRIBER

11/5/15

DATE

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: 69090

District Court Case Number A627691-B

REPLY IN SUPPORT OF 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

CARBAJAL & MCNUTT
Daniel R. McNutt, Bar No. 7815
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Attorneys for Petitioner

Real Party in Interest Steven Jacobs ("Jacobs") offers nothing more to this Court than excuses for not obeying this Court's order, and declaring VML's motion to strike moot. Despite contending that he has "granted VML the very relief it sought – dismissing it from the action," Opp'n at 1, he affirms he is "entitled to re-file his action and address his rights against VML if he so desires." Opp'n at 6. This is not the "relief" VML seeks or is entitled to.

Moreover, because Jacobs concedes that an answer to VML's pending petition is not needed, Opp'n at 5 - 6, it is ripe for consideration and should be submitted and decided on the merits.

A. JACOBS'S DISMISSAL OF VML IS NOT EFFECTIVE

As a threshold matter, VML has not conceded that it has been dismissed from the case; Jacobs's claim otherwise disregards the substance of VML's motion *and* the district court's recognition that it is barred from acting as to VML until further order of this Court. VML's motion, at page 6 says: "***the district court lacks jurisdiction to entertain any matter concerning VML, including Jacobs's purported voluntary dismissal***." VML's position on this issue could not have been clearer.

1. Jacobs Does Not Have A "Right" To A NRCP 41(a)(1) Dismissal

NRCP 41(a)(1) says "***an action*** may be dismissed by the plaintiff . . . " Jacobs does not seek to dismiss ***an action,*** he simply seeks to dismiss claims against VML. *Compare* NRCP 41(b) (a defendant may move for dismissal of ***an action or of any claim*** . . ." *with N*RCP 41(a)(1) ("***an action*** *m*ay be dismissed). Because the language in NRCP 41(a)(1) "is plain and unequivocal," it should be given "its ordinary meaning and not go beyond it." *City of Henderson v. Kilgore,* 122 Nev. 331, 333, 131 P.3d 11, 12 (2006) (citations and internal quotations omitted).

This Court has also recognized that the right to voluntary dismissal is not absolute. *In re Phillip A.C.*, 122 Nev. 1284, 1290-91, 149 P.3d 51, 55-56 (2006). Where, as here, a Rule 41(a)(1) dismissal is filed at an advanced stage of the proceedings, it is ineffectual. *Id.* This is consistent with the essential purpose of the rule, which "is to facilitate voluntary dismissals, but to limit them to an early stage of the proceedings before issue is joined." *Harvey Aluminum*, 203 F.2d at 107.

2. Both Jacobs and the District Court Recognized the Court's November 4 Order Stayed all Matters as to VML Until Further Order of the Court.

Jacobs also tortures the language in the Court's November 4 Order to excuse his defiance of it, in an effort to support his suggestion that dismissal is effective. The November 4 Order, however, says that "***the proceedings below*** against petitioner only ***are stayed*** pending further order of this court." The district court recognized this repeatedly during the November 5 and 6, 2015 hearings following issuance of the Order. *See* Ex. A, Excerpts of Nov. 5, 2015 Hr'g Tr. at 2:13-15); Ex. B, Excerpts of Nov. 6, 2015 Hr'g Tr. at 4 – 5. Thus, Jacobs's self-serving attempt to restore jurisdiction to the district court to dismiss VML *without prejudice* so as to avoid the writ petition that he did not answer as ordered should be rejected.

Jacobs's revisionist claim that he "never opposed" joining the action below (Opp'n at 2) is a distinction without a difference. Jacobs's position, which VML correctly presented on page 4 of its motion is a matter of record: Jacobs aggressively fought and defeated the motion to dismiss years ago by persuading Judge Gonzalez that VML was neither a necessary nor indispensable party. *See* Ex. 1 to Mot. at 23 – 36; *see also* Ex. C, Jacobs's Opp'n to Mot. to Dismiss at 23 (VML is not a "necessary" party under Rule

19(a) for the simple reason that it is not a party to any of the contracts at issue."). If Jacobs believed his own excuse that VML might be a joint obligor, rather than unavailable for lack of jurisdiction, he would have simply moved to amend to add VML in 2011.

3. The Mootness Doctrine Is Irrelevant.

The Court recently declared that "[u]nder the mootness doctrine, this court will only decide cases if a live controversy is present *or they 'involve[ ] a matter of widespread importance that is capable of repetition, yet evading review*.'" *Las Vegas Paving Corp. v. RBC Real Estate Fin., Inc.*, Nos. 60599, 60822, 2015 LEXIS 1124, at *3 (Nev. Sep. 21, 2015) (quoting the case cited by Jacobs: *Personhood Nevada v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010)). Unlike the direct appeal cases on which Jacobs mistakenly relies, this case involves a petition for extraordinary relief which the Court *has already determined* involves an issue worthy of writ consideration. "Consideration of extraordinary writ relief is often justified 'where an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction." *MountainView Hosp., Inc. v. Eighth Judicial Dist. Ct.*, 273 P.3d 861, 864 (Nev. 2012) (internal quotations and citations omitted). The issues presented by VML's petition are ones that deserve clarity for the benefit of the bench and bar. It would be inappropriate to permit Jacobs to defeat their consideration and clarification by declaring the petition moot.

B. JACOBS'S SUGGESTION THAT THIS COURT LACKS JURISDICTION IS ALSO WRONG.

Jacobs's bold suggestion that this Court lacks jurisdiction and would violate the Constitution by proceeding is foolish. The Court's November 4, 2015 Order staying the proceedings against VML divested the district court of jurisdiction over VML until this Court says otherwise.

Mack-Manley v. Manley, 122 Nev. 849, 855, 138 P.3d 525, 529 (2006) (citations omitted) ("a timely notice of appeal divests the district court of jurisdiction to act and vests jurisdiction in this court"); *see also Nken v. Holder*, 556 U.S. 418, 419, 129 S. Ct. 1749, 1752 (2009) (reiterating that "[a]n appellate court's power to hold an order in abeyance while it assesses the order's legality has been described as inherent, and part of a court's 'traditional equipment for the administration of justice.'" (quoting *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9-10, 62 S. Ct. 875 (1942)). Comparing an injunction to a stay, the United States Supreme Court in *Nken* said:

> A stay pending appeal certainly has some functional overlap with an injunction, particularly a preliminary one. Both can have the practical effect of preventing some action before the legality of that action has been conclusively determined. ***But a stay achieves this result by temporarily suspending the source of authority to act***.

Id. at 428-29, 129 S. Ct. at 1758 (internal citations omitted) (emphasis added). Jacobs filed his purported "voluntary dismissal" in the district court that lacks jurisdiction over VML. *See* Ex. B at 4 -5 (where the district court recognized that "[VML is] ***not involved in my case . . . [u]ntil something happens and I get an order***.").

Jacobs's reliance on the line of cases that provide, correctly, that an appellate court's stay permits actions not inconsistent with the terms of the stay is non-availing.[1] The Court in this case did not stay a discrete act

[1] None of the cases on which Jacobs rely are instructive. *Independent Union of Flight Attendants v. Pan Am World Airways, Inc.*, 966 F.2d 457, 459 (9th Cir. 1992), and *In re Davenport*, 40 F.3d 298, 299 (9th Cir. 1994) involved direct appeals in two party disputes and the automatic stay under the Bankruptcy Code. The purpose of that stay is two-fold: (1) to protect debtors by providing a respite to regroup; and (2) to protect creditors for a rush to judgment. *Indep. Union of Flight Attendants*, 966 F.2d at 459. In both cases, the dismissal of the underlying proceedings had no effect on debtors or creditors and thus was no inconsistent with the automatic stay. *Merit Ins. Co. v. Leatherby Ins. Co.*, 581 F.2d 137, (7th Cir. 1978), likewise a direct appeal in a two-party dispute, but involved a stay pending arbitration,

or event related to the litigation (such as a deposition), it expressly stayed "the proceedings below" which both Jacobs and the district court understood took VML out of the district court proceeding. Thus, the Court has jurisdiction to act on VML's petition that Jacobs did not answer.

C. THE PETITION IS RIPE FOR CONSIDERATION AND SHOULD BE SUBMITTED AND DECIDED.

VML did not "fault[]" Jacobs for not filing an answer to VML's writ petition because it feels an answer is necessary, (Opp'n at 5); it "fault[ed]" him not obeying the Court's order requiring him to file an answer,[2] despite having sought and obtained a two week extension to do precisely that. VML does not believe an answer from Jacobs is needed, as it said in its petition, but given Jacobs' election not to answer, VML asked that its petition be submitted for a decision on the merits (Mot. at 4).

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which the parties had begun before one opted to voluntarily dismiss the entire action. Jacobs also cites *Nguyen v. United States*, 792 F.2d 1500, 1503 (9th Cir. 1986) for the proposition that this Court agreed with him that "a party can take any action so long as it is not inconsistent with a stay's purpose" (Opp'n at 3), but the case does not stand for the proposition, it simply addresses the scope of the mandate.

[2] Under such circumstances, the Court has previously recognized that "it is the prerogative of this court to elect to treat [the real party in interest] failure to answer as a confession of error." *Orme v. Eighth Judicial Dist. Ct.*, 105 Nev. 712, 782 P.2d 1325, 1326 (1989). *Orme*, cited by Jacobs himself, confirms that his failure to answer could, but need not be the basis for granting the petition.

D. CONCLUSION

For these and the reasons set forth in its Motion, VML respectfully asks, again, that its mandamus petition be submitted for consideration on the merits and granted.

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Attorneys for Petitioners

CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. P. 25(b) and NEFR 9(f), I hereby certify that I am an employee of CARBAJAL & MCNUTT; that on this date I electronically filed the following document: **REPLY IN SUPPORT OF 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** 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:

James J. Pisanelli Todd L. Bice Debra Spinelli PISANELLI BICE PLLC 400 South 7th Street, #300 Las Vegas, NV 89101 **Attorneys for Steven C. Jacobs, Real Party in Interest**	**VIA HAND DELIVERY** Hon. Mark R. Denton Eighth Judicial District Court of Clark County, Nevada Regional Justice Center 200 Lewis Avenue Las Vegas, Nevada 89155 ***Respondent*** **COURTESY COPY – VIA HAND DELIVERY** Hon. Elizabeth Gonzalez Eighth Judicial District Court of Clark County, Nevada Regional Justice Center 200 Lewis Avenue Las Vegas, Nevada 89155

DATED this 1st day of February, 2016.

By: /s/ *Lisa Heller*